Alliant Foodservice, Inc. *and* Teamsters Local 628, International Brotherhood of Teamsters, AFL–CIO

United Service Employees Union, Local 1222 *and* Teamsters Local 628, International Brotherhood of Teamsters, AFL–CIO. Cases 4–CA–27669, 4–CA–27913, and 4–CB–8242

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On December 3, 1999, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The General Counsel and Respondents filed exceptions and supporting briefs, the Charging Party and Respondent Alliant Foodservice, Inc. filed answering briefs, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions as modified herein and to adopt the recommended Order as modified and set forth in full below.

1. The judge found that Respondent Alliant Foodservice, Inc. violated Section 8(a)(2) and (1) by recognizing Respondent United Service Employees Union, Local 1222 as the representative of its drivers and warehouse employees at a time when Local 1222 did not represent a majority of the employees in the bargaining unit, and that Local 1222 violated Section 8(b)(1)(A) by accepting recognition. The judge also found that the Respondents violated Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2), respectively, by entering into a collective-bargaining agreement containing a union-security clause.

The judge based his findings on the fact that, although, at the time Alliant extended recognition, a majority of the employees in the bargaining unit had signed cards authorizing Local 1222 to act as their bargaining agent, 16 of those employees had also signed cards designating the Charging Party, Teamsters Local 628, as their representative. As the judge correctly noted, the Board has long held that, when an employee has signed cards for two unions, the card of neither union will be considered a valid designation that can be used to support a finding of majority support of that union, unless the record establishes that "at the time material to the determination of the issue of majority status, the dual card signer intended only one of his dual cards—and which of them—to evidence his designation of a bargaining agent."[3] Accordingly, the judge found that the cards signed by the 16 dual card signers could not be relied on to establish Local 1222's majority status. And, as he further found, without those cards, Local 1222 lacked a showing of majority support.

We agree with the judge's findings and conclusions, for the reasons set forth in his decision, with one exception. One of the dual card signers, Daniel Carboni, testified that when he signed his authorization card for Teamsters Local 628, the Teamsters business agent who gave him the card told him that the "whole purpose" of signing the card was to have an election.[4] When an employee signs a card that, like the cards for Teamsters Lo-

[1] We find no merit in Respondent Alliant Foodservice's contention that it was denied due process at the hearing. Contrary to Alliant, we find the judge did not preclude it from effectively examining and cross-examining witnesses. We also find that Alliant was not prejudiced by the judge's refusal to order the Charging Party, Teamsters Local 628, to comply with a subpoena requesting, inter alia, all authorization cards showing support for Local 628. Local 628 failed to produce duplicate cards signed by employees Foth and McQuilken in response to the subpoena because they were not used to support Local 628's representation petitions. The judge, however, ordered both cards to be produced at the hearing, and they were produced. It is thus immaterial that the judge did not base his ruling on the subpoena. Finally, we agree with the judge, for the reasons discussed in his decision, that Alliant was not prejudiced by the judge's refusal to extend the hearing in order to receive testimony from employees Mendez and Groves.

[2] Respondent Alliant Foodservice has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We reject Alliant's contention that the judge should have drawn an adverse inference from the General Counsel's failure to call employees Foy, Groves, and Gatti to authenticate their authorization cards for Teamsters Local 628. None of those individuals were shown to be favorably disposed to the General Counsel or to Local 628 (all three signed cards for Respondent Local 1222 as well as for Local 628). We therefore cannot assume that the employees would have testified adversely to the General Counsel and to Local 628 had they been called as witnesses. *International Automated Machines*, 285 NLRB 1122, 1122–1123 (1987).

In the remedy section of his decision, the judge inadvertently stated that Respondent Alliant violated Sec. 8(a)(5). No such violation was alleged or found. We correct the error.

[3] *Crest Containers Corp.*, 223 NLRB 739, 741 (1976), quoted in *Katz's Deli*, 316 NLRB 318, 329–330 (1995), enfd. 80 F.3d 755 (2d Cir. 1996). See also, e.g., *Human Development Assn.*, 293 NLRB 1228 (1989), enfd. 937 F.2d 657 (D.C. Cir. 1991); *Flatbush Manor Care Center*, 287 NLRB 457, 458, 471–472 (1987); *Allied Supermarkets, Inc.*, 169 NLRB 927 (1968); and *Ace Sample Card Co.*, 46 NLRB 129, 130–131 (1942).

[4] Contrary to Alliant, there is no evidence that organizers for Local 628 made such statements to any other employee.

cal 628, clearly states that the employee is designating the union as his bargaining representative, the card will be found to establish the employee's support for the union as his bargaining agent even if he is also told that *one* purpose of the card is to make an election possible. By contrast, if the union organizer solicits cards by representing that the *only* purpose of signing cards is to obtain an election, any cards signed as a result of such representations cannot be used to establish the majority status of the union.[5] In these circumstances, we shall not rely on Carboni's card as supporting Teamsters Local 628; accordingly, the card he signed for Local 1222 is valid evidence of his support for that union. Even counting Carboni's support, however, Local 1222 lacked the support of a majority of the employees in the bargaining unit, and we affirm the judge's finding to that effect.[6]

Our dissenting colleague would overrule the "dual card" cases, and would count all cards signed by employees for Local 1222 and Local 628 as demonstrating support for those unions, even those signed by the "dual card" signers. She would infer that the employees who signed cards for both unions meant, by doing so, to indicate that they desired union representation and that either union would be an acceptable representative.

We reject our colleague's position, for several reasons. First, the inference she would draw is inconsistent with the language of the authorization cards which the employees signed. Those cards do not indicate that the signer harbors a generalized desire for union representation and that either union would be acceptable as a bargaining agent. They state unequivocally that the union identified on the card is designated or authorized to act as the employee's representative. Indeed, some of the cards for Local 1222 also state that the signer is revoking any contrary designation. Thus, the plain language of the cards indicates that the employee has chosen the union whose name appears on the card—and only that union—as his exclusive representative.

Second, contrary to our colleague, it does not follow that an employee who has signed dual cards would be satisfied with representation by either union. It is at least as logical to infer that when an employee who signs a card for one union later signs a card for a second union, the employee has changed his mind and now wishes to be represented by the second union. Here, all but one of the dual card signers signed cards for Teamsters Local 628 after they signed cards for Local 1222. If anything, then, it would be more logical to conclude that those employees abandoned their support of Local 1222 in favor of Local 628 than to conclude that either union would be acceptable as their representative.

Third, the fundamental problem with our colleague's approach is that it is inconsistent with the Board's longstanding (if tacit) policy requiring employees to make an explicit choice of which, if any, union is to be their exclusive bargaining representative. That policy is most evident in Board-conducted elections. In a multiunion election, employees who desire union representation must vote for one, and only one, union regardless of whether they would find more than one acceptable. If an employee votes for more than one of the contending unions, his ballot will not be counted. The Board has uniformly, and wisely, followed the same policy in determining whether a union has established its majority status on the basis of a card count instead of an election. In that context, the Board also requires employees to make an unambiguous choice between competing unions. Those who do not, including those who sign cards for more than one union, are not counted as supporting either union. Unlike our colleague, we can discern no persuasive reason for abandoning that policy.

Our colleague asserts that our position is "flatly inconsistent with the language typically contained on union authorization cards." We disagree. The card-signer typically designates the union as his/her exclusive representative. And, even without that express language, that is the purpose for which our colleague would use the card. However, by definition, there cannot be two exclusive representatives. Further, there is nothing on the card which supports the "either union" construction of our colleague. That is, the card does not say that the employee wants union A if he/she cannot have union B.

Thus, one cannot definitively infer any clear choice by the dual-card signers. Accordingly, it is far better to resolve these matters by an election.

Our dissenting colleague argues that the recognition of, and contract with, Local 1222 would not impede the processing of an RC petition by Local 628 (assuming that Local 628 had a 30-percent showing of interest). The flaw in this reasoning is that, under her view, the election would be between a union with recognition and a contract and a union that is out in the cold. Under our approach, there would be a level playing field, i.e., the election would be held only after Local 1222 is shorn of its recognition and contract.[7]

[5] *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968), enfd. 441 F.2d 1027 (D.C. Cir. 1970).

[6] Only 51 employees out of a unit of 115 signed cards for Local 1222 alone. Thus, even counting Carboni, Local 1222 lacked majority support.

[7] Under *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), an employer's *lawful recognition* of union A (based on majority cards signed solely for Union A) will not preclude a petition by union B, if union B had a 30-percent showing before the election. However, in the

Finally, contrary to our colleague, we do not believe that the Board's treatment of dual cards unnecessarily dissuades employers from voluntarily recognizing unions that claim majority support. We acknowledge that an employer, like Alliant, could recognize a union in good faith and unwittingly violate Section 8(a)(2) if, it turns out, majority support does not, in fact, exist. Most such cases, however, can be settled promptly (without the formal finding of a violation) by the employer's withdrawing recognition and by testing the actual support of the competing unions through an election. Such an approach is normally expeditious and inexpensive and imputes no blameworthiness to the employer. Accordingly, we doubt that the dual card doctrine poses a significant impediment to voluntary recognition.

2. As part of the remedy for the violations, the judge recommended that Teamsters Local 628 be afforded access to Alliant's premises and that notices be read to the assembled employees by a Board agent.[8] Alliant has excepted to the imposition of those extraordinary remedies, and we find merit in the exception. Although Alliant unlawfully recognized Local 1222, there is no evidence that it did so in anything other than good faith, and it did not engage in other repeated, serious, and pervasive misconduct.[9] Accordingly, we shall impose only the Board's normal remedies for such violations.[10]

ORDER

A. The National Labor Relations Board orders that the Respondent, Alliant Foodservice, Inc., Swedesboro, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing or dealing with United Service Employees Union, Local 1222 as the exclusive bargaining representative of its employees at a time when that labor organization does not represent a majority of such employees in an appropriate bargaining unit.

(b) Giving effect to or enforcing the collective-bargaining agreement executed with Local 1222 or to any extension, renewal, or modification of it; provided, however, that nothing in this Order shall require the withdrawal or elimination of any wage increase or other benefits or terms and conditions of employment that may have been established pursuant to the performance of the contract.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 1222 as the collective-bargaining representative of its employees unless and until Local 1222 has been certified by the National Labor Relations Board as the exclusive representative of such employees.

(b) Jointly and severally with Local 1222, reimburse its employees for any money required to be paid pursuant to the collective-bargaining agreement between Alliant and Local 1222, including money paid for initiation fees, dues, or other obligations of membership in Local 1222, plus interest.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts owed to employees under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Swedesboro, New Jersey facility copies of the attached notice marked "Appendix A."[11] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken

instant case, there is no lawful recognition of union A (Local 1222). Employees signed cards for both unions, and they did so in sufficient numbers to destroy the majority status of Local 1222. Thus, there is no valid basis for giving Local 1222 the advantage of incumbency in any election.

[8] See *Wallace International of Puerto Rico*, 328 NLRB 29, 30 (1999).

[9] This case is thus plainly distinguishable from *Wallace*.

[10] We agree with the General Counsel that the employees who must be reimbursed for dues and fees paid pursuant to the union-security clause of the collective-bargaining agreement between Alliant and Local 1222 are all those who did not join Local 1222 voluntarily before the contract became effective. See, e.g., *Cascade General*, 303 NLRB 656, 657 fn. 14 (1991), enfd. 9 F.3d 731 (9th Cir. 1993), cert. denied 511 U.S. 1052 (1994); *Human Development Assn.*, 293 NLRB at 1229. Interest on refunded dues and fees shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall delete from the recommended Order the provision that Alliant is not *authorized* to withdraw or eliminate any improvements in wages, benefits, or other terms and conditions of employment that may have been established pursuant to the contract. *Cascade General*, 303 NLRB at 657 fn. 14. We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co*, 335 NLRB 142 (2001). Finally, we shall substitute the Board's standard remedial language for certain portions of the judge's recommended Order.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time November 6, 1998.

(e) Post at the same places and under the same conditions copies of Appendix B as soon as it is forwarded by the Regional Director.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent, United Service Employees Union, Local 1222, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acting as the exclusive collective-bargaining representative of employees of Alliant Foodservice, Inc. at a time when it does not represent a majority of those employees in an appropriate bargaining unit.

(b) Giving effect to or attempting to enforce the collective-bargaining agreement between it and Alliant Foodservice, Inc. or to any extension, renewal, or modification thereof.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Jointly and severally with Alliant Foodservice, Inc., reimburse employees for any money required to be paid pursuant to the collective-bargaining agreement between Alliant and Local 1222, including money paid for initiation fees, dues, or other obligations of membership in Local 1222, plus interest.

(b) Within 14 days after service by the Region, post at its business office, meeting halls, and places where notices to its members are customarily posted, copies of the attached notice marked "Appendix B."[12] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Furnish to the Regional Director signed copies of the notice for posting by Alliant Foodservice, Inc. Copies of the notice to be furnished by the Regional Director shall, after being signed by Respondent Local 1222, be returned forthwith to the Regional Director.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, dissenting.

Board precedent holds that when an employee signs authorization cards for two unions, the cards cannot be considered reliable evidence of the employee's selection of either union as his bargaining representative.[1] Here, Respondent Alliant Foodservice, Inc. extended recognition to Respondent United Service Employees Union, Local 1222 on the basis of a card check which revealed that a clear majority of the employees in the drivers and warehouse employees unit had signed cards designating Local 1222 as their bargaining agent. Unbeknownst to either Respondent, however, by the time Alliant recognized Local 1222, Teamsters Local 628 had also obtained authorization cards from a number of employees, including 16 who had signed cards for Local 1222. Accordingly, my colleagues agree with the judge that the cards signed by 15 of the dual card signers cannot be used to show support for Local 1222, and that without those cards, Local 1222 lacked the support of a majority of the unit employees. They therefore affirm the judge's finding that Alliant and Local 1222 violated Section 8(a)(2) and 8(b)(1)(A), respectively, by extending and accepting recognition and violated Section 8(a)(3) and 8(b)(2), respectively, by entering into a collective-bargaining agreement containing a union-security clause.

I disagree. In my view, the Board's "dual card" doctrine is based on dubious reasoning and frustrates the policies of the Act. When an employee signs authorization cards for two unions, the Board refuses to infer that the employee supports *either* union. That refusal, however, is flatly inconsistent with the language typically contained on union authorization cards. The cards signed for both Local 1222 and Local 628 expressly state that the signer authorizes the union in question to act as his collective-bargaining representative. It is reasonable to infer that an employee who signs dual cards with that

[12] See fn. 12, infra.

[1] See, e.g., *Crest Containers Corp.*, 223 NLRB 739, 741–742 (1976).

language is implicitly stating that he wants union representation and would be prepared to be represented by *either* union for which he signed a card.

Accordingly, I would overrule the "dual card" cases and find that, when an employee signs authorization cards for more than one union, each card is evidence of support for that union as the employee's bargaining agent and should be counted when the Board is seeking to determine whether that union has majority support. (Where a subsequently signed card states that the signer is revoking a prior, contrary designation, I would honor the revocation, however.)

Applying that reasoning to the facts of this case, I would find that Alliant did not extend recognition to a minority union by recognizing Local 1222, and that Local 1222 did not act unlawfully by accepting recognition.[2]

Under my approach, there would be no impediment to holding a Board election to determine whether the employees preferred Local 1222 or Local 628 as their representative. The Board has held that where rival unions are attempting to organize a group of employees, the employer's lawful recognition of one union will not bar a petition by the competing union if the petitioner demonstrates a 30 percent showing of interest that predates the recognition.[3] Thus, Local 628's attempts to organize and represent Alliant's employees could go forward. If Local 628 could show that it had the support of at least 30 percent of the unit employees when Alliant recognized Local 1222, it could obtain a Board election; if it won, it would replace Local 1222 as the employees' representative. Consequently, the protection afforded by the Board's election machinery is ample to safeguard Local 628's legitimate interests and employee free choice.[4]

Employers, meanwhile, should be encouraged to recognize unions voluntarily when they can demonstrate majority support.[5] The Board's "dual card" policy, in contrast, discourages employers from granting recognition to unions that apparently command the support of a majority of employees. Employers will predictably be reluctant to extend recognition, knowing that their actions can be found unlawful if, it turns out, the employees have also signed cards for a rival union.

Because I would find that Alliant lawfully recognized Local 1222, I would also find that the parties did not act unlawfully by entering into a contract containing a union-security clause. When recognition has been lawfully extended, the parties are entitled to engage in bargaining and to conclude and enforce a collective-bargaining agreement, even if another union appears on the scene and petitions for recognition. If the challenging union wins the election, the incumbent union is unseated and the contract becomes null and void.[6]

For all of the foregoing reasons, I would find that the Respondents did not act unlawfully in this case. I therefore respectfully dissent.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT recognize or deal with United Service Employees Union, Local 1222 as the exclusive collective-bargaining representative of our employees at a time when it is not the representative of a majority of such employees in an appropriate bargaining unit.

WE WILL NOT give effect to or enforce our collective-bargaining agreement with Local 1222 or to any extension, renewal, or modification of it; provided, however, that nothing in the Board's Order requires the with-

[2] Teamsters Local 628 did not file its representation petitions until after Alliant recognized Local 1222. Accordingly, there was no impediment to the extension of recognition on a showing that Local 1222 had the support of a majority of the unit employees. *Bruckner Nursing Home*, 262 NLRB 955, 957 (1982).

[3] *Smith's Food & Drug Centers*, 320 NLRB 844, 846 (1996).

[4] Moreover, the election process will be, in most cases, much more expeditious than attempting to oust an incumbent union through the filing and processing of unfair labor practice charges.

My colleagues object that an election held in these circumstances would be between a recognized union with a contract (Local 1222) and a union that is "out in the cold" (Local 628). They insist that, in order to have a "level playing field," the election should be held "only after Local 1222 is shorn of its recognition and contract." However, *Smith Food*, envisions an election being held between a recognized union and a union that is "out in the cold."

[5] "Voluntary recognition is a favored element of national labor policy." *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).

[6] *Air La Carte*, 284 NLRB 471, 472–473 (1987).

drawal or elimination of any wage increase or other benefits or terms and conditions of employment that may have been established pursuant to the performance of the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Local 1222 as the collective-bargaining representative of our employees unless and until it has been certified by the National Labor Relations Board as the exclusive representative of such employees.

WE WILL, jointly and severally with Local 1222, reimburse our employees for any money required to be paid pursuant to our collective-bargaining agreement with Local 1222, including money paid for initiation fees, dues, or other obligations of membership in Local 1222, plus interest.

ALLIANT FOODSERVICE, INC.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT act as the exclusive collective-bargaining representative of any of Alliant Foodservice's employees unless and until we are certified by the National Labor Relations Board as the exclusive collective-bargaining representative of such employees.

WE WILL NOT give effect or attempt to enforce our collective-bargaining agreement with Alliant Foodservice or to any extension renewal or modification thereof.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, jointly and severally with Alliant Foodservice, reimburse employees for any money required to be paid pursuant to our collective-bargaining agreement with Alliant, including money paid for initiation fees, dues, or other obligations of union membership, plus interest.

UNITED SERVICE EMPLOYEES UNION, LOCAL 1222

Henry R. Protas, Esq., for the General Counsel.

Jedd Mendelson, Esq., of Roseland, New Jersey, for the Respondent Employer.

Gary P. Rothman, Esq., of Elmsford, New York, for the Respondent Union.

David A. Gaudioso, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This case was heard in Philadelphia, Pennsylvania, on May 19 through 21, 1999. Subsequent to an extension in the filing date, briefs were filed by all parties.[1] The proceeding is based upon a charge filed November 18, 1998.[2] by Teamsters Local 628, International Brotherhood of Teamsters, AFL–CIO. The Regional Director's consolidated complaint dated April 29, 1999, alleges that Respondent Alliant Food Service, Inc., of Swedelsboro, New Jersey, violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act by voluntarily recognizing United Service Employees Union Local 1222 (Local 1222) at a time that it did not represent a majority of the bargaining unit; and by entering into, maintaining and giving effect to a collective-bargaining agreement with Local 1222 that contained a union-security agreement; and that Respondent Local 1222 engaged in correlative violations of Sections 8(b)(1)(A) and 8(b)(2) of the Act.[3]

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a wholesale distributor of food products. It annually ships goods valued in excess of $50,000 from its New Jersey location to points outside New Jersey and it admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (5), and (7) of the Act. Respondent Local 1222 is a labor organization within the meaning of Section 2(5) of the Act and it also is admitted that Union Local 628 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Employer's Swedesboro warehouse and truck terminal is operated by 115 employees. Prior to November 6, Local 1222 had solicited and obtained signed authorization cards from these employees and demanded that it be recognized as the representative of the employees in the following bargaining unit:

> All full time and regular part time drivers and warehouse employees employed by the Employer at the Warehouse, excluding office personnel, clericals and supervisors as defined in the Act.

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[1] The brief of the Charging Party seeks the admission of a late filed exhibit, a letter dated July 7, 1999, from Local 1222 to the employer. Both Local 1222 and the Employee oppose its admission. Under the circumstances, including my conclusions and recommended remedy, I am not persuaded that good cause is shown that would warrant a granting of the relief request and, accordingly, the request is denied.

[2] All following dates will be in 1998 unless otherwise indicated.

[3] Prior to the commencement of the hearing, the parties entered into a Board settlement (GC Exh. 25). The following consolidated complaint allegations were settled: Pars. 5, 7(a), 7(b), 8, 9(a), 9(c) and 10 and those portions of pars. 11–14 which refer to these paragraphs.

On November 6, the Employer and Local 1222 entered into an agreement whereby they designated an arbitrator to compare signatures on union authorization cards alleged by Local 1222 to have been signed by employees and to determine whether there were cards appearing to bear authentic signatures from more than 50 percent of the employees in the bargaining unit. The card check took place at a motel in Bridgeport, New Jersey, starting at 7 a.m. Local 1222 presented 67 signed cards and the company provided executed W-4 forms for the employees that were employed in the job classifications Local 1222 sought to represent. After comparing the signatures on the 67 authorization cards and the W-4 forms, the arbitrator determined that 65 authorization cards were authentic and bore the signatures of Alliant employees. As a result, he concluded that a majority of Alliant's employees had signed authorization cards for Local 1222 and immediately thereafter the company and Local 1222 signed a recognition agreement.

At the end of February the employer and Local 1222 began negotiating a labor agreement and on April 1, they concluded negotiations and, following ratification, executed a collective-bargaining agreement covering the drivers, warehouse employees and mechanics effective March 12, 1999, through March 13, 2002.

At about the same time that Local 1222 procured its authorization cards from bargaining unit employees, Teamsters Local 628 attempted to organize the same unit employees. Teamsters' secretary-treasurer, Jack Quigley, had received inquiries from some of the employees as early as the summer of 1998. However, it was not until he received a phone call on October 25, about the activities of Local 1222 that the Teamsters actively initiated a campaign. Teamster's vice president and business agent, John Dagle, then held two formal employee meetings at its union hall located in Philadelphia. The first was on October 31 and on November 4, Dagle gave blank Teamsters authorization cards to employee Francis Crane who immediately began to solicit signatures.

The first of the 16 employees to sign a card for the Teamsters was driver Vincent Cordua who described how he was driving from work on Wednesday (November 4), when he received a message on his beeper to stop by employee Don Malak's house. Cordua telephoned Malak, who told him that Francis Crane would be there with authorization cards. Cordua waited for Crane at Malak's house and then was given a Teamster's card, which he read, signed, and dated.

On November 5 other drivers were solicited to sign cards between 5 and 6 a.m., at work before they left the warehouse in their trucks. Drivers David Lex and Francis Kinsella received authorization card from Crane in the drivers' locker room. Crane watched as Lex signed and dated it. Kinsella filled out the card, signed, and dated it and returned it immediately to Crane (Kinsella recalls that that it was daylight when he signed the card and he thinks he signed it in the morning). Drivers Donald Pancoast and Antonio Mendez were given union authorization cards by Crane first thing in the morning, November 5. Pancoast sat in the drivers' room, read the top of the card, filled it out, signed, and dated it, and returned it to Crane. Mendez took the card to the locker room and turned his back to Crane, then turned and gave him a filled in, signed, and dated card (no one else was present). Driver Kevin Merk recalled that he was given his authorization card by either Crane or Don Malak between 5 and 5:30 a.m. on November 5 while at a desk in the drivers' room where he signed and dated the card. Driver Gilbert Melilli also got an authorization card from Crane in the drivers' locker room and signed and dated the card between 5:15 and 6a.m. on November 5 and returned the executed card to Don Malak. Driver Raymond McQuilken was given a Teamster's authorization card by driver Michael McKeown in the drivers' room on November 5, and he filled out the entire card but he could not recall whether he did so in the morning or the afternoon.

Drivers Daniel Carboni and Timothy Ciccimaro, who were not scheduled to work on November 5, went to the Teamsters' hall at about 3 p.m. where they were met by Teamsters Business Agent Dagle who gave both of them authorization cards. Carboni signed and dated his card and immediately returned it to Dagle. At the end of the workday on November 5, Malak gave driver John Harley a card out by the loading dock and he signed the card on the hood of his truck and returned it to Malak. Drivers Harry Ladner, Jr. and Brian McCarthy were also solicited in the parking lot as they were leaving work and Crane gave each a card. Ladner immediately filled it out and returned it to Crane. McCarthy recalled that he returned it to Crane the next day. Driver John Foth could not remember who gave him his card but recalled that he signed it at home on November 5 when he received it, and he returning the card to Crane the next day.

Crane solicited more cards from employees the next morning before work between 5 and 5:30 a.m. The cards he received were signed before at the latest 6 a.m., because at that point all the drivers would have been on the road. Crane gave a card to driver Alfred Gatti in the drivers' room and watched as Gatti read, signed, and returned the card. Crane gave a card to driver John Groves either in the drivers' room or in the locker room. He did not watch Groves fill out the card but he recalled that they were the only ones in the room and Groves returned it to him completely filled out. That same morning driver Tim Ciscenaro gave Joe Foy a card and he immediately filled it out and returned it.

The Teamsters subsequently filed petitions with the Board to represent separate units of the Employer's drivers and warehousemen. The showing of interest in support of the petition for the drivers' unit included the union authorization cards described above. The date stamps placed on the cards by the Region establish that as of November 10, 1998, the cards were in the custody of the Board. Subsequently, on November 14, a second meeting with employees was held at the union hall but no meeting occurred on November 7.

On April 1, 1999, the Employer and Local 1222 executed a collective-bargaining agreement (effective March 13, 1999, to March 13, 2002), which includes a union-security clause and dues have been tendered to Local 1222 pursuant to that clause.

III. DISCUSSION

The General Counsel contends that when, as here, an employee signs authorization cards for two unions, the employee fails to indicate which union he desires as his bargaining representative, and that as a general rule in these circumstances the Board will count neither card toward establishing majority status. Any evidence needed to overcome the application of this rule must be of sufficient reliability to leave no doubt that at the time material to the determination of majority status the employee intended to designate only one of the unions as his representative and the identity of the union that the employee intended to designate, see *Katz's Delicatessen of Houston Street,* 316 NLRB 318, 329 (1995).

The employer contends that on the November 6 recognition date, Local 1222 had signed cards from 68 of the 116 employees in the bargaining unit, or 58 percent. However, if at least 10 of these 68 employees had signed dual cards for Local 628, Local 1222 would not have reliably established a majority. Although, the General Counsel produced 16 Local 628 authorization cards from purported dual card signers, the Respondent contends that most of their cards must be disregarded or discounted because most were not properly authenticated. Otherwise, the General Counsel points out that Local 1222 actually submitted 67 authorization cards to the arbitrator and it argues that there is proof of 16 valid dual authorization card and therefore the Employer recognized Local 1222 when only 51 of 115 employees had given it unequivocal support.

A. *Due Process, Credibility, and the Validity of the Charging Party's Dual Authorization Cards*

On brief the Respondent employer alleges that its due-process rights were violated because prior to the hearing, the General Counsel refused to identify the alleged dual card signers or the number of dual cards and because this court then refused its request to adjourn the hearing so that it could call two rebuttal witnesses. The General Counsel introduced Local 628 authorization cards signed by John Groves and Antonio Mendez on Thursday, May 20. At the hearing on Friday, May 21, the Employer asserted that it was unsuccessful in serving a subpoena on them because of time factors and the fact that both drivers were on their usual Friday runs. First, it is noted that the General Counsel attempted to serve Mendez with a subpoena on Monday, May 17, and he refused both personal services (telling the server that he didn't want to get involved), and service by certified mail. Accordingly, I found that there was no reasonable basis to believe that he would now appear in response to a new subpoena. The record otherwise shows that the issue to which any testimony would be relevant is the authenticity of their authorization cards and that the cards have presumptively valid signatures (see the discussion herein) and were the subject of testimony about the circumstances of their execution from the person who solicited the cards. The record otherwise shows that the Respondent employer extensively investigated and obtain statements from other of its employees. The Employer admits that it spoke to Mendez on February 14, heard his verbal statement on when he signed the card, but did not obtain a written statement (as it apparently had done for other employees)

because it was aware of and assumed that Mendez would appear in response to the General Counsel's subpoena.

I then ruled that it would be too burdensome to keep the record open for the speculative testimony of these two witnesses and I concluded that good cause had not been shown to pursue the matter. An offer of proof was made that each would have testified that they completed the card for Local 628 on or after November 7, 1998 (it was not alleged that either had signed more than one card for Local 628). No offer was made regarding any comparison of the signatures of these two drivers on the cards with their W-4 forms (forms in the custody of the employer) the method used to authenticate the Local 1222 cards.

The Board's procedures do not allow for pretrial discovery and, otherwise, I find that the Respondent's had a reasonable opportunity to partake in relevant cross examination of all witnesses presented by the General Counsel. I also find that the witnesses it wished to question were it own current employees, under its control and that it has not shown how it has been prejudiced by the court's ruling. I also find that the relevation during the trial that at the second union meeting on November 14 two employees each had signed two separate second authorization cards for Local 628 does not vitiate the validity of their first signed and most relevant card and it does not show "foul play" and the failure of Local 628 to initially produce these documents is not shown to be prejudicial.

As noted below, I find that the witnesses' testimony regarding the cards and the circumstance under while they were solicited and signed is highly credible and it does not appear likely that testimony by Mendez and Groves, if contradictory, would be considered to be more reliable. This would be especially true of Mendez whose testimony would be suspect based on his previous refusal to honor a subpoena for the reason that he "didn't want to get involved." I also conclude that Grove's Local 628 authorization card clearly dated November 6, 1998 and signed is a valid card as is that signed by Mendez on November 5, 1998, and I find that each card should be credited and found to be trustworthy.

The authenticity of the Local 628 authorization card also was established by the testimony of driver Crane who distributed and observed the circumstance until the cards he gave out were returned. He did this with the cards for Groves and Mendez (discussed above) and Alfred Gatti, each of whom did not testify in person, as well as with seven or more other card signers who did testify and described the similar circumstances under which they had obtained cards from Crane (or Malak, or Dagle) and had dated and returned these authorization cards. Accordingly, I reaffirm my evidentiary ruling made at the trial.

The back of the authorization cards have no preprinted matter and they contain only a November 10, 1998 date stamp by the Board's Regional Office. The front of the card is headed:

TEAMSTERS LOCAL 628

> I, the undersigned, of my own free will, desire to become a member of Local 628, affiliated with the International Brotherhood of Teamsters, and by doing, designate said union as my chosen representative in all matters pertaining to wages, hours and working conditions.

The card then provides for the insertion of the date, name, address, phone, years of service, and name of employer, job classification, shift, department and rate of pay, and signature. Each employee witness called by the General Counsel inspected his Local 628 authorization card authenticated the card and attested to the fact that the card bore his signature. Each also indicated that he was not coerced or promised any benefit prior to signing the card and each endured extensive voir dire and cross examination.

I carefully noted the demeanor of each witness and I find that the testimony of each dual card signer was trustworthy and credible in all significant respects, especially the date and the circumstance when the card was signed. As noted, 12 of the cards were authenticated by the card signers and 4 were authenticated by the solicitor. It is well established that the date entered on a card by the card signer raises an inference that the card was signed on the inscribed date. See *Tall Pines Inn,* 268 NLRB 1392 fn. 30, (1984); *Palby Lingerie,* 252 NLRB 176 (1980); and *Cato Show Printing Co.,* 219 NLRB 739, 756 (1975). Here, I find that there is no showing that any of the cards were not authentic or were obtained by any misrepresentation or coercion and, as stated in *DTR Industries,* 311 NLRB 833, 840 (1993);

> [W]here as here, the purpose of the card is set forth on its face in unambiguous language, the Board may not, in the absence of misrepresentations, inquire into the subjective motives or understanding of the card signer to determine what the signer intended to do by signing the card.

Although the Respondents' question the reliability of this testimony in general, Respondent Local 1222 in effect concede that 10 of the 16 cards proffered by the General Counsel are valid but specifically challenge the card signed by drivers Harley, Ladner, Pancoast, McCarthy, and McDulkin dated on November 5 and Cordua's card dated on November 4. Of the 16 "Duel" cards, 1 card is dated November 4, 12 were dated on November 5, including that of John Foth (who testified that his card was filled out at home that day but did not return it until November 6), and 3 were dated November 6.

The Respondent Union points out that Cordua's affidavit to the Board incorrectly states that he never signed a card for Local 1222 and that he put an incorrect phone number on his Local 628 card. It also argues that Harley did not recall which route he drove on November 5, he did not insert his correct length of service on his card, and he did not recall, until cross-examination and confrontation with a revocative form, that he had seen such a form. The Union points out that Kinsella recalled that he signed a revocation form prior to his Local 628 authorization card (dated November 5) but that revocation was dated November 14 and it shows that Ladner gave the Employer's counsel or statement agreeing that he was handed a Local 628 card the week of November 9 after an asserted November 7 union meeting. He also initially did not recognize a blank revocation form but immediately recalled and recognized signing one after being shown one with his signature. Ladner, however, testified that when he gave the Employer's counsel a statement he wasn't sure of the dates and had not personally attended the union meeting. He also testified he was sure that his Local 628 card was properly dated on the November 5 because he had been at work where he was writing that day's date on paperwork all day long and the date was there on his clipboard.

Pancoast gave the employer's counsel a statement that he signed his Local 628 card at a Saturday (November. 7) union meeting and he testified that he signed his revocation form the same day, however the actual documents reflect the dates of November 5 and 14, respectively, and he testified that he "thought" he signed them together at work, but apparently did not. Prior to the hearing, McCarthy signed a statement for the employer's counsel that stated he signed a Local 628 card on November 7. The card was dated November 5, however and he testified that all the handwriting on the card was his and that he dates documents with the date he signs them and did not backdate the authorization card.

Although there are some inconsistencies or ambiguities in the record regarding some of the drivers' testimony, the authorization card itself is the primary item of evidence and the date and circumstances of its execution was affirmed in each instance in direct testimony under my direct observation. I find that the failure of witnesses to sometime remember dates and exact circumstance or to remember events in precisely the same as other witnesses does not make a witnesses' testimony any less honest. I find that the testimony I observed an demonstrated attempt by each witness to give truthful answers to the best of their ability and I find that this testimony under my observation is more credible that the answers given under the unknown circumstance in which the drivers were privately questioned by the employer's counsel or the Board's investigating agent. Accordingly, I conclude that the 16 Local 628 authorization cards presented by the General Counsel are authentic and I find they were signed and dated as shown on the cards themselves. This conclusion is reinforced by the fact that only 4 days passed (including a Saturday and Sunday), between November 6 when the last three cards were signed and November 10, when the cards were transferred to the custody of the Board and thus there was little opportunity to generate or execute some speculative plot to predate or generate false documentation.

B. Majority Status

On November 6, when the employer granted Local 1222 recognition, it relied upon the recognition of 67 authorization card of 115 bargaining unit employees who had designated Local 1222 as their collective-bargaining representative. The General Counsel, however, has presented evidence that 16 of these same 67 employees also had signed union authorization cards for the Teamsters prior to the time recognition was granted. Specifically, I find that the General Counsel has established that John Harley, David Lex, Francis X. Kinsella Jr., Harry Ladner Jr., Donald Pancoast, John Foth, Alfred Gatti, John Groves, Antonio Mendez, Joseph Foy, Kevin Merk, Vincent Cordua, Brian McCarthy, Raymond McQuilken, Gilbert Melilli, and Daniel Carboni were dual card signers and, under these circumstances, none of their cards can be counted towards establishing either union's majority status, see the *Katz's Delicatessen* card, supra. Thus, the employer recognized Local 1222 at a time when there was evidence that only 51 out of 115 unit employees supported Local 1222.

C. Violations of the Act

An asserted good-faith belief that a union is the majority representative is no defense to the allegation that recognition was unlawfully extended to a minority union. *Ladies Garment Workers (Berhard-Altmann Corp.) v. NLRB,* 366 U.S. 731 (1961), and an employer violates Section 8(a)(1) and (2) of the Act by granting recognition and/or entering into a collective-bargaining agreement with a labor organization which does not enjoy the support of a majority of the employees in the bargaining unit. By the same token, a labor organization in this circumstance violates Section 8(b)(1)(A) of the Act by accepting recognition and/or entering into a collective-bargaining agreement. See the *Ladies Garment Workers* case, supra.

Here, the record clearly shows that on November 6, 1998, the Employer and Local 1222 entered into a recognition agreement whereby the Employer recognized this Union as the exclusive collective-bargaining representative of all full-time and regular part-time drivers and warehouse employees employed by the Employer at the warehouse. Furthermore, and despite the pendency of the charges in this proceeding, on April 1, 1999, the Employer and Local 1222 executed a collective-bargaining agreement. I find that by engaging in this conduct the Employer violated Section 8(a)(1) and (2) of the Act and Local 1222 violated Section 8(b)(1)(A) of the Act, as alleged, see *Katz's Delicatessen,* supra, and *Human Development Assn.,* 293 NLRB 1228 (1989).

It also is shown that the collective-bargaining agreement enter into and maintained by the Employer and Local 1222 contains a union-security clause and that dues have been tendered under this provision. It is a separate violation of Section 8(a)(1), (2), and (3) of the Act when an employer enters into and maintains a collective-bargaining agreement containing a union-security clause when the labor organization does not enjoy the support of a majority of the employees in the bargaining unit, and the labor organization in this circumstance violates Section 8(b)(1)(A) and (2) of the Act by entering into and maintaining an agreement with such a clause, see *St. Helens Shop N'Kart*, 311 NLRB 1281, 1285 (1993); *Famous Castings Corp.*, 301 NLRB 404, 408 (1991). Accordingly, I also find that by engaging in this conduct, the employer violated Section 8(a)(1), (2), and (3) of the Act and Local 1222 violated Section 8(b)(1)(A) and (2) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent Alliant Foodservice, Inc. is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union United Service Employees Union Local 1222 and Charging Party Union Teamsters Local 628, International Brotherhood of Teamsters, AFL–CIO are each a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Alliant has violated Section 8(a)(1), (2), and (3) of the Act by recognizing Local 1222 and signing a collective-bargaining agreement with Local 1222 containing a union-security clause.

4. Respondent Local 1222 has violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition from, and signing a contract with, Respondent Alliant, which contained a union-security clause.

THE REMEDY

Having found that the Respondents have violated Section 8(a)(1), (2), (3), and (5) and Section 8(b)(1)(A) and (2) of the Act, respectively, I shall ordered that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

While it is found that a disestablishment order is necessary and appropriate, nothing here shall authorize or require the withdrawal or elimination of any wage increase or other benefits, or terms and conditions of employment that may have been established pursuant to the performance of the collective-bargaining agreement between Local 1222 and the employer, see *Katz's Deli,* supra, at 334. Also, to the extent that the Respondent's union-security provision has resulted in the expenditure of initiation fees, dues, or other obligations of membership to dual card signers, as well as any employees hired after execution of the collective-bargaining agreement, such payments were derived from an unlawful agreement with a union that did not have clear majority status, and they are inherently coercive and should be reimbursed, with interest, see the discussion in *NLRB v. Katz's Delicatessen*, 80 F.3d 755, 770 (2d Cir. 1996)

While the Charging Party contends that because of a claimed inability to obtain a fair election in the future, it is entitled to a remedial bargaining order or an order that would exclude Local 1222 from the ballot in the event that a representation election be ordered, I find that adequate safeguards can be imposed through the imposition of special remedies that should dissipate as much as possible any lingering effect of each Respondent's unfair labor practices. Accordingly, it is recommended that the employees be given a fair opportunity to choose in an election which union, if any, they desire as their collective-bargaining representative. Although the pending representation petitions filed by the Charging Party are not a direct part of this proceeding, it is further recommended that if the Regional Director shall direct an election in those matters that he impose conditions which provide appropriate access for Teamsters Local 628 and which further provide for the reading and posting of appropriate noncoercive assurances by both of the Respondents' in a format consistent with, but not limited too, the directions of the Board in *Wallace International of Puerto Rico*, 328 NLRB 29 (1999).

[Recommended Order omitted from publication.]