Dairyland USA Corporation *and* Local 348-S, United Food and Commercial Workers[1] **and Miguel Pierre**

Dairyland USA Corporation *and* Local 348-S, United Food and Commercial Workers and William Urizar. Cases 2–CA–35632, 2–CB–19388, 2–CA–35633, and 2–CB–19389

MAY 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 19, 2005, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondents and the General Counsel each filed exceptions and supporting briefs, answering briefs, and reply briefs.

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, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

We adopt the judge's findings that Respondent Dairyland USA Corporation (Dairyland) violated Section 8(a)(1) of the Act by interrogating employees about their activities on behalf of Teamsters Local 202, engaging in surveillance of those activities, and threatening them with loss of work if the Teamsters came into Dairyland's facility. We also adopt the judge's findings that Dairyland violated Section 8(a)(1) by promising increased medical benefits to employees if they supported the Respondent Local 348-S, United Food and Commercial Workers (the Union), threatened an employee with discharge if he did not sign a Union card, and created the impression of surveillance of their protected activities. We also agree with the judge that Dairyland violated Section 8(a)(2) of the Act by directing employees to sign the Union's authorization cards.

The judge also found, however, that Dairyland did not violate Section 8(a)(2) by recognizing the Union as the employees' collective-bargaining representative at a time when the Union did not have the support of an uncoerced majority of employees. The General Counsel excepts to this finding and to the judge's failure to find that the subsequent collective-bargaining agreement between the Respondents also violated the Act.[3] As explained below, we find that Dairyland and the Union violated the Act as alleged in this regard, and we reverse the judge accordingly.[4]

I. BACKGROUND

Dairyland is a wholesale food distributor in the greater New York metropolitan area. Dairyland employs approximately 150 employees as warehousemen and drivers at its facility in the Bronx and at a small facility in Columbia, Maryland.[5] In addition to these facilities, Dairyland also uses a parking lot a few blocks away from the Bronx facility for its delivery trucks.

On January 23, 2003,[6] the Union and Dairyland signed a neutrality agreement. The terms of that agreement allowed the Union to come to the Bronx facility to meet with Dairyland's employees. On January 27, representatives of the Union went to Dairyland's Bronx facility and were provided space in the Dispatch Office to meet the employees and solicit authorization cards. On that day, Warehouse Supervisor Kevin Kelly told 18 warehouse employees that they "ha[d] to go" to the dispatch office to meet with the Union "to sign" a card. Operations Manager Mineo Maldonado was present when warehouse employee Bobby Richardson was signing a card, and at various times Maldonado went "in and out" of the card-signing meetings. Maldonado also threatened delivery driver Santana[7] by saying to him, "[I]f you don't sign the card, you won't be working here."[8] Maldonado

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

[2] The Respondents have 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.

[3] The General Counsel alleges that Dairyland's grant of recognition violated Sec. 8(a)(2); that the Union's acceptance of recognition violated Sec. 8(b)(1)(A); that Dairyland, by entering into, maintaining, and enforcing a collective-bargaining agreement containing a union-security clause when the Union did not represent an uncoerced majority of employees, violated Sec. 8(a)(3); and that the Union's entering into, maintaining, and enforcing such agreement violated Sec. 8(b)(2).

[4] Dairyland argues that the General Counsel's exceptions should be denied because they lack sufficient specificity under Sec. 102.46(b)(1) of the Board's Rules. Contrary to Dairyland's contention, we find that the General Counsel's exceptions substantially comport with the requirements of Sec. 102.46(b)(1), and accordingly are accepted.

We find it unnecessary to pass on the General Counsel's exceptions to the judge's failure to find that Dairyland created the impression of surveillance in January 2003; by Supervisor Maldonado, threatened employees with discharge in May 2003; engaged in surveillance of employees' union activities in June 2003; and interrogated employees concerning their protected activity. Any violations found in this regard would be cumulative of other violations found and accordingly would not affect the remedy.

[5] Approximately eight employees work at the facility in Maryland.

[6] All dates are in 2003, unless otherwise stated.

[7] Santana's first name is not in the record.

[8] We find no merit to the Union's argument that statements made on January 27 by Kelly and Maldonado consisted of lawful opinions.

also told delivery driver Miguel Pierre that the Union was "there for us" and would "supply medical benefits."

On January 31, pursuant to the neutrality agreement, an arbitrator conducted a card check. The arbitrator found that the Union had received 111 signed authorization cards out of a proposed unit of 150, and he certified the Union as the collective-bargaining representative of the unit employees. The following day, February 1, the Union and Dairyland signed a collective-bargaining agreement, in which Dairyland recognized the Union. The agreement contains a union security clause and a check-off clause. Since February 1, Dairyland has deducted $25 from each employee paycheck for union dues.

In May, after the foregoing events, employee Efrain Rodriguez raised a complaint about timecards in a union meeting. Several days later, Supervisor Kevin Kelly told Rodriguez that "he's hearing things about me that he's not liking and that I should put a stop to it."[9] Thereafter, in June, several employees met at a parking lot used by Dairyland a few blocks away from the facility to discuss representation by Teamsters, Local 202. Two days later, John Pappas, vice-president of Dairyland, called employee William Urizar into his office. At that meeting, Pappas stated to Urizar, "Willie, what were you doing in that meeting. . . . We know you were there," and "if those Teamsters come into the company, we're going to cut 30 routes."[10]

With this background, we turn to the allegation that Dairyland unlawfully recognized the Union.

II. UNLAWFUL RECOGNITION ALLEGATION

A. Judge's Analysis

The judge found that Dairyland did not violate Section 8(a)(2) of the Act by recognizing the Union at a time when the Union did not represent an uncoerced majority of employees. In doing so, the judge applied a purely mathematical analysis. He counted the 18 warehouse employees who were told to meet with the Union to sign a card. He also added Richardson, who signed his card in Maldonado's presence, and determined that a total of 19 employees were coerced and their authorization cards were thus tainted.[11] The judge then subtracted the 19 tainted cards from the total of 111 signed authorization cards and concluded that the Union had the support of 92 uncoerced employees, a majority of the proposed unit of 150. Consequently, the judge found that Dairyland's grant of recognition did not violate Section 8(a)(2) of the Act, that the Union's acceptance of recognition did not violate Section 8(b)(1)(A), that Dairyland did not violate Section 8(a)(3) by entering into, maintaining, and enforcing a collective-bargaining agreement containing a union- security clause, and that the Union did not violate Section 8(b)(2) by entering into, maintaining, and enforcing such agreement.

B. Exceptions

The General Counsel excepts to the judge's failure to find that Dairyland unlawfully granted recognition, arguing that the judge applied the incorrect standard. The General Counsel contends that the judge erroneously applied a strict mathematical calculation and that the recognition was unlawful because Dairyland engaged in a pattern of unlawful assistance that tainted the Union's card majority. For the reasons stated below, we find merit to the General Counsel's exceptions, reverse the judge, and find that the recognition and resulting collective-bargaining agreement violated the Act as alleged.

C. Legal Standard

An employer violates Section 8(a)(2) of the Act when it extends recognition to a union that does not represent an uncoerced majority of employees. *Ladies Garment Workers*, 366 U.S. 731 (1961). The General Counsel does not need to show, with mathematical precision, that the union lacks the support of an uncoerced majority of employees. *SMI of Worcester*, *Inc.*, 271 NLRB 1508, 1520 (1984); *Clement Bros. Co.*, 165 NLRB 698, 699 (1967) (holding that coercion of 7 employees out of 129 who signed authorization cards in a unit of approximately the same size was sufficient to infer a larger pattern of coercion amid other violations), enfd. 407 F.2d 1027 (5th Cir. 1969). Rather, "'[a] pattern of company assistance can be sufficient to invalidate all cards.'" *Famous Castings Corp.*, 301 NLRB 404, 408 (1991) (quoting *Amalgamated Local 355 v. NLRB*, 481 F.2d 996, 1002 fn. 8 (2d Cir. 1973)). In determining whether a pattern of unlawful assistance exists, the Board examines the totality of the circumstances, including conduct oc-

Kelly did not express an opinion but rather directed employees to meet with the Union in order to sign a card. Further, Maldonado did not express his opinion to Santana but rather told Santana he "would not" have a job if he did not sign a card. See *Fountainview Care Center*, 317 NLRB 1286, 1290 (1995), enfd. mem. 88 F.3d 1278 (D.C. Cir. 1996) (finding unlawful employer's directive to sign authorization card in order to receive employment).

[9] In adopting the judge's finding that Kelly created the impression of surveillance when he told Rodriguez that "he's hearing things about me that he's not liking," we note that Dairyland excepted to the judge's decision to credit Rodriguez' testimony that Kelly so stated, not to the judge's legal determination that Kelly's statement created an impression of surveillance.

[10] We adopt the judge's findings that these acts in May and June violated Sec. 8(a)(1) of the Act, for the reasons stated in the judge's decision and in fn. 9, above.

[11] The judge inadvertently counted Richardson twice because he was also a warehouse employee; the correct number would actually be 18.

curring both before and after recognition of the union. *Farmers Energy Corp.*, 266 NLRB 722, 722–723 (1983) (determination of whether employer's pre- and post-recognition unlawful acts tainted majority status depends on the entire "'general contemporaneous current of which they were integral parts'") (quoting *Machinists, Lodge No. 35 v. NLRB*, 110 F.2d 29, 35 (D.C. Cir. 1939), affd. 311 U.S. 72 (1940)), enfd. 730 F.2d 1098 (7th Cir. 1984); *Windsor Castle Health Care Facilities*, 310 NLRB 579, 592 (1993) (finding that "circumstances occurring after the execution of the collective-bargaining agreement further manifest[ed] a pattern of assistance," enfd. in relevant part 13 F.3d 619 (2d Cir. 1994).

Thus, an employer unlawfully grants recognition to a union if it has engaged in a pattern of unlawful assistance. E.g., *Windsor Castle*, supra at 590. Some examples of conduct constituting unlawful assistance include directing employees to meet with a union representative to sign an authorization card and having a supervisor or company official present when cards are signed. *Duane Reade, Inc.*, 338 NLRB 943 (2003), enfd. 99 Fed. Appx. 240 (D.C. Cir. 2004). When such conduct is accompanied by other coercive activity that interferes with employees' Section 7 rights, that additional coercive conduct becomes part of the overall pattern of unlawful assistance. See, e.g., *Famous Castings Corp.*, 301 NLRB at 407–408 (employer's direction of employees to sign cards, interrogation of employees, and issuance of threats constituted pattern of assistance sufficient to taint majority).

Rather than considering whether the totality of the circumstances demonstrated a pattern of unlawful assistance, the judge simply subtracted 19 tainted authorization cards from the 111-card total and found that a majority of uncoerced employees still supported the Union. As set forth above, the judge did not apply the appropriate standard. E.g., *Famous Castings Corp.*, 301 NLRB at 408 ("'[T]he General Counsel need not prove with mathematical certainty that the union lacked majority support'" (quoting *Siro Security Service*, 247 NLRB 1266, 1271 (1980))). Applying the appropriate standard, we find, as explained below, that the totality of the circumstances demonstrates that Dairyland's conduct constituted a pattern of unlawful assistance sufficient to taint the Union's card majority.

D. Analysis

As found by the judge, Dairyland engaged in several instances of unlawful assistance to the Union and other coercive conduct. On the day that the Union came to the facility, Supervisor Kelly directed 18 employees to meet with the Union to sign a card, and Supervisor Maldonado was present when warehouse employee Bobby Richardson signed a card and was in and out of other card-signing meetings. That same day, Maldonado also threatened an employee with discharge if he did not sign a card and promised increased medical benefits to another employee if he supported the Union. Dairyland's pattern of unlawful assistance continued into June, when Vice President Pappas engaged in interrogation and surveillance and threatened an employee that the employees would lose work if the Teamsters came into Dairyland's facility.

We find that this conduct demonstrates a pattern of unlawful assistance to the Union sufficient to taint the Union's majority support. Less interference than occurred here has been found sufficient to taint a union's majority status. See *Clement Bros.*, supra (coercion in connection with 7 authorization cards sufficient to taint union's majority status where all 129 unit employees signed authorization cards). Dairyland's conduct on January 27 was in itself a substantial indication of a pattern of unlawful assistance to taint the Union's showing of majority support, and its subsequent coercive behavior demonstrates that the events of January 27 were not isolated but part of a larger course of conduct. As found by the judge, whose findings in this regard we have adopted, Dairyland continued to interfere with employees' Section 7 rights in a manner demonstrating unlawful support for the Union by additional threats, unlawful interrogation, surveillance, and creating the impression of surveillance. Thus, the totality of the circumstances establishes that Dairyland engaged in a pattern of unlawful assistance to the Union over a period of several months.

For the foregoing reasons, we find that the record does not show that the Union represented an uncoerced majority of employees when Dairyland granted recognition. Accordingly, Dairyland's grant of recognition to the Union violated Section 8(a)(2). *Ladies Garment Workers,* supra.[12] Further, by entering into, maintaining, and enforcing a collective-bargaining agreement containing a union security clause at a time when the Union did not represent an uncoerced majority of employees, Dairyland violated Section 8(a)(3) of the Act. *Duane Reade*, 338 NLRB at 944. Similarly, the Union, by accepting unlawful assistance from Dairyland, violated Section 8(b)(1)(A) of the Act, *Ladies Garment Workers*, supra, and, by entering into, maintaining, and enforcing a collective-bargaining agreement with a union-security clause at a time when it did not represent an uncoerced

[12] Because we find, for the reasons set forth above, that Dairyland unlawfully recognized the Union, we find it unnecessary to pass on the General Counsel's alternative theory of a violation, i.e., that Dairyland violated Sec. 8(a)(2) by seeking to negotiate a collective-bargaining agreement with the Union before its formal grant of recognition.

majority of employees, violated Section 8(b)(2) of the Act as well, *Duane Reade*, supra.

Our analysis in this case is not, as our concurring colleague contends, at odds with the Board's treatment of *Gissel* bargaining orders and election objections.

First, we note that no party in this proceeding has advanced the argument endorsed by our colleague. Since the argument was not addressed in the pleadings, raised before the judge or briefed to the Board, it is not properly before us. Cf. *Transport Workers Local 525*, 329 NLRB 543, 543–544 fn. 1 (1999) (argument advanced for the first time in an exceptions brief not properly before the Board); see also *Group Health Inc.*, 325 NLRB 342, 345 fn. 15 (1998). However, because our colleague has questioned, sua sponte, the precedent she joins in applying, we briefly address her arguments. We show below that there is no inconsistency in the relevant law.

In the instant case, there was a purported card majority for the Union. However, there was also extensive unlawful conduct involved in the solicitation of the cards, including threats, interrogations, surveillance, and promises of benefits in exchange for support of the employer-preferred union. That pattern of coercive conduct and unlawful assistance of a favored union supports a reasonable inference that the claimed card majority was tainted. Thus, the recognition was unlawful under Section 8(a)(2).

Our colleague does not appear to disagree with this inference, and, indeed, finds the 8(a)(2) violation. However, she argues that this analysis, which the Board has consistently applied for many years with circuit court approval, is inconsistent with the analysis applied by the Board in *Gissel*[13] cases. In *Gissel* cases, the Board imposes the extraordinary remedy of a bargaining order where the Union possesses a valid card majority, and the employer's unfair labor practices are so severe and pervasive that a fair re-run election is unlikely. If the union does not have a valid card majority, there will be no bargaining order, even though the employer has engaged in substantial unfair labor practices.[14]

Our colleague suggests that our decision today warrants a different approach in the latter situation. In her view, the Board should *infer* that, but for the employer's unlawful conduct, the union would have achieved majority status, and thus a *Gissel* order should be entered.

The Board properly does not draw this inference, and the difference between the *Gissel* context and the instant case is clear. Indeed, the difference is grounded in the statute itself. Sections 8(a)(5) and 9(a) explicitly provide that the duty to bargain does not exist unless a majority of the employees have "designated or selected" the union.[15] It is not sufficient to infer that a majority would have done so if there had been no unlawful conduct. By contrast in the instant case, there is no statutory impediment to the Board's drawing a reasonable inference that unfair labor practices have tainted a union's card majority.

The objections cases are also different from the instant case. The issue in objections cases in not whether cards are tainted, but rather whether, notwithstanding the protections afforded by a secret ballot election conducted under the aegis of the Board, the objectionable conduct so interfered with the necessary "laboratory conditions" as to prevent the employees' expression of a free choice in the election. See, e.g., *Caron International, Inc.*, 246 NLRB 1120 (1979). Although, the relative margin in the election results can be a factor in making this judgment, it is simply one of the relevant factors in determining whether the election should be set aside. Id.

An additional factor in objection cases is the extent to which the improper conduct was disseminated in the unit. The Board places the burden of proof on the objecting party, and thus does not presume dissemination. *Crown Bolt Inc.*, 343 NLRB 776, 777 (2004). Because "there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees . . . the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one," and an election will not lightly be set aside. Id. (internal quotations and citations omitted). Accordingly, for example, if a union has won an election, 9(a) status will not be denied even if there is misconduct, provided that misconduct has not been widely disseminated. By contrast, the instant case involves authorization cards, not secret ballots cast under the Board's supervision, and a pattern of unlawful conduct in obtaining those very cards. In order to find 9(a) status, the Board must be satisfied that the cards are valid—i.e., that a majority has designated or selected the union. Thus, absent a showing that unlawful conduct was de minimus, the Board will not find 9(a) status.

ORDER

The National Labor Relations Board orders that

A. The Respondent, Dairyland USA Corporation, the Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing Local 348-S, United Food and Commercial Workers, as the collective-bargaining representative of

[13] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[14] *Gourmet Foods*, 270 NLRB 578 (1984).

[15] *Gourmet Foods*, supra.

its employees, unless and until it is certified by the Board as the collective-bargaining representative of such employees pursuant to Section 9(c) of the Act.

(b) Maintaining or giving any effect to the collective-bargaining agreement between Dairyland USA Corporation and Local 348-S entered into on or about February 1, 2003, or any renewal, extension, or modification thereof, unless and until Local 348-S is certified by the Board as the collective-bargaining representative of such employees; however, nothing in this Order shall require any changes in wages or other terms and conditions of employment that may have been established pursuant to the collective-bargaining agreement.

(c) Threatening employees with discharge if they do not sign a union authorization card.

(d) Creating the impression of surveillance of employees' union activities.

(e) Engaging in surveillance of employees' union activities.

(f) Interrogating any employee about protected activities.

(g) Threatening employees with loss of work because of their union activity.

(h) Promising increased medical benefits to employees if they support the Union.

(i) Directing employees to sign a union authorization card.

(j) 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 348-S as the exclusive collective-bargaining representative of its employees unless and until it has been duly certified by the Board as the exclusive representative of such employees.

(b) Jointly and severally with Local 348-S reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues check-off and union-security clauses of the February 1, 2003 collective-bargaining agreement. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 348-S prior to January 27, 2003.

(c) Within 14 days after service by the Region, post at its facilities in English and Spanish copies of the attached notice marked "Appendix A."[16] Copies of the notice, on forms provided by the Regional Director for Region 2, 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 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 since January 27, 2003.

(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.

B. The Respondent, Local 348-S, United Food and Commercial Workers, Forest Hills, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting recognition from and executing a collective-bargaining agreement with Dairyland USA Corporation, unless and until Local 348-S is certified by the Board as the collective-bargaining representative of a unit of Dairyland's employees pursuant to Section 9(c) of the Act.

(b) Giving effect to the February 1, 2003 collective-bargaining agreement between the Respondent Dairyland USA Corporation and the Respondent Local 348-S, 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 policies of the Act.

(a) Jointly and severally with Dairyland USA Corporation, reimburse with interest all present and former Dairyland employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues checkoff and union-security clauses of the February 1, 2003 collective-bargaining agreement. However, reimbursement does not extend to those Dairyland employees who voluntarily joined and became members of Local 348-S prior to January 27, 2003.

(b) Within 14 days after service by the Region, post at its union office in Forest Hills, New York, in English and Spanish, copies of the attached notice marked "Appendix B."[17] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the

[16] 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."

[17] See fn. 16, supra.

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 members 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) 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, concurring.

Under the Board's precedent applying Section 8(a)(2) of the Act, a pattern of employer assistance or coercion precludes a union from establishing majority support among employees by signed authorization cards, even without a showing that the employer's conduct affected a sufficient number of card signers to deprive the union of an actual majority.[1] That precedent dictates the result in this case, and so I concur.

I write separately to point out that the Board's approach in this area—which has never been carefully explained—seems to be at odds with its approach to analogous legal issues. In the context of bargaining orders issued to remedy employer unfair labor practices during union organizing campaigns, the Board requires a union to demonstrate an actual card majority. And in the election context, the Board requires specific proof that objectionable conduct potentially affected enough employees to change the result of the election. But where, as here, the issue is employer conduct that aids a union, no analogous showing is demanded. At some point, the Board should reconcile its precedents.

I agree with the judge's finding that Respondent Dairyland violated Section 8(a)(2) by directing 18 warehouse employees to sign Local 348-S authorization cards, and that Dairyland's coercive conduct immediately before or several months after its recognition of Local 348-S violated Section 8(a)(1). My doubt here involves the conclusion that Dairyland violated Section 8(a)(2) by recognizing Local 348-S, despite the fact that even excluding up to 20 cards of employees shown to be potentially coerced, Local 348-S could still demonstrate 60 percent majority support within the bargaining unit.

While the rule applied to reach this result is well established, the rationale for setting aside the majority showing of cards as objective indicators of employee free choice has not been articulated and is not clear. There seem to me three potential rationales for this rule. First, we could conclude that once the colluding parties' misconduct passes a certain threshold, there is an irrebuttable presumption that a majority of the employees do not support the union, no matter how many signed cards. Second, we could presume that the misconduct, because it is more than isolated, has necessarily been disseminated throughout the bargaining unit. Third, we could, as is suggested in cases cited in the majority opinion, simply infer that if the undefined threshold of illegal conduct is breached, many more unlawful acts beyond those shown to constitute the pattern must have occurred.[2] Any of these explanations, however, would seem to contravene the Board's approach to analogous legal issues.

Whatever the rationale, our conclusion here raises an apparent inconsistency with the Board's practice concerning remedial bargaining orders. In that context, the Board, under *NLRB v. Gissel Packing Co.*,[3] orders an employer to bargain with a union as a remedy for its serious unfair labor practices during an organizing campaign that would tend to dissipate the union's majority status and make a fair election unlikely. Before the Board will grant a *Gissel* bargaining order, however, the union must be able to demonstrate (most often through cards) that "at one time, in some form" it enjoyed the support of a majority of the bargaining unit's members.[4]

The Board embraces none of the potential rationales for today's rule in the *Gissel* context. Regardless of how oppressively a company responds to its employees' attempts to organize, the Board has declined to issue *nonmajority* bargaining orders under any circumstances for more than two decades. That is, no matter how egregious the employer's misconduct, there is no irrebuttable presumption that a majority of employees actually supported the union, even though only a minority signed cards. Furthermore, the Board will not infer that if a pattern of coercive conduct existed, enough other acts must have taken place to have affected a majority of the employees. Indeed, the Board has criticized any potential reliance on "reasonable" inferences to support nonmajority orders as involving "the substitution of guesswork and speculation for objective evidence, thereby eroding the majority rule principle."[5]

[1] See, e.g., *Famous Castings Corp*., 301 NLRB 404, 408 (1991) (holding that a pattern of company assistance was sufficient to invalidate all of a union's signed authorization cards without showing with mathematical precision that a sufficient number of employees were coerced in signing their cards to affect the union's majority).

[2] *SMI of Worcester, Inc*., 271 NLRB 1508, 1520 (1984); and *Clement Bros. Co*., 165 NLRB 698, 699 (1967), enfd. 407 F.2d 1027 (5th Cir. 1969).

[3] 395 U.S. 575, 610, 613–614 (1969).

[4] *Gourmet Foods*, 270 NLRB 578, 586 (1984). I have dissented from this approach. See *First Legal Support Services,* 342 NLRB 350, 354 (2004).

[5] Id.

In other words, the Board's respect for employee free choice is so great that it is unwilling to grant a *Gissel* bargaining order that might infringe on that choice, even when an employer's campaign of antiunion coercion during a union's organizing drive makes it arguably reasonable to infer that the union might have garnered authorization cards from a majority of the employees if not for the employer's illegal conduct. If the principle of employee free choice is so important in the *Gissel* context that the Board will not order bargaining with a union prevented from attaining majority status through cards by an employer's "pervasive and outrageous unfair labor practices,"[6] then it makes little sense for us to brush aside a demonstrated majority on the current facts when no party has shown that majority to have been affected by unlawful acts.

Our result today also appears to be in tension with our treatment of election objections. In determining whether objectionable conduct could have affected the results of an election, the Board considers the number and severity of violations, the extent of their dissemination, and the size of the bargaining unit, among other things.[7]

In making that determination, the Board does not attempt to supply evidence of wider effect than the record supports. Specifically, in contrast with the cases cited by the majority, the Board will not infer greater illegal activity than has been affirmatively proven by the evidence.[8] Nor will the Board presume that unlawful conduct has been disseminated. Thus, in the recent *Crown Bolt*[9] decision, a majority of the Board (Member Walsh and I dissenting) refused to continue to presume that threats of plant closure,[10] will be disseminated throughout the bargaining unit.

When an employer maintains an unlawful rule during the preelection period, the Board has refused, over my dissent, to presume that employees were affected by it, despite the rule's inclusion the policy manual distributed to each employee.[11] Moreover, where third-party misconduct has taken place, my colleagues have expressed a preference for counting heads of those potentially coerced and comparing that total to the margin of victory.[12] In the face of these authorities, all of which ostensibly give primacy to employee free choice, it is anomalous to rely on inference over evidence in the Section 8(a)(2) context.

In sum, the line of authority relied upon today appears, at best, to reveal a discrepancy in the Board's law. The Board could explain the varying approaches. Or, it could adopt a unitary standard covering all of these situations. Under one possible standard, employees' expressions of free choice, through cards or ballots, would not be overturned without a clear showing that coercive conduct reached a sufficient number of employees to affect the majority. Under a different standard, a pattern of coercive conduct would be sufficient to infer that any supposed expression of employee choice, through either cards or ballots, would be found inherently unreliable if closely related in time to the repeated coercion. Today I do not decide whether one of these approaches or some other approach is preferable. Hopefully, however, in the interests of consistency, my colleagues will consider reconciling the Board's law at some time.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT recognize Local 348-S, United Food and Commercial Workers, as your collective-bargaining representative, unless and until it is certified by the Board as such.

WE WILL NOT maintain or give any effect to the collective-bargaining agreement between Dairyland USA Corporation and Local 348-S entered into on or about Febru-

[6] Id. at 583.

[7] *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

[8] See *Werthan Packaging, Inc.*, 345 NLRB 343 (2005). But see *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 and 915 (2004) (prounion supervisory misconduct inferred).

[9] *Crown Bolt, Inc.*, 343 NLRB 776 (2004).

[10] See *Indiana Cal Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301–1302 (6th Cir. 1988) (collecting cases regarding the severity that courts ascribe to threats of plant closure made during organizing campaigns); *Long Airdox Co.*, 277 NLRB 1157, 1160 (1985) (describing threats of plant closure as "one of the most coercive actions which a company can take in seeking to influence an election").

[11] *Delta Brands, Inc.*, 344 NLRB 252 (2005).

[12] See, e.g., *Accubilt, Inc.*, 340 NLRB 1337, 1339 fn. 6 (2003) (Chairman Battista and Member Schaumber concurring in disagreement with the "general atmosphere of fear and reprisal" standard which governs whether third party misconduct is sufficient to set aside election).

ary 1, 2003, or any renewal, extension, or modification thereof, unless and until Local 348-S is certified by the Board as your collective-bargaining representative.

WE WILL NOT threaten employees with discharge if they do not sign a union authorization card.

WE WILL NOT create the impression of surveillance of employees' union activities.

WE WILL NOT engage in surveillance of employees' union activities.

WE WILL NOT interrogate any employee about protected activities.

WE WILL NOT threaten employees with loss of work because of their union activity.

WE WILL NOT promise increased medical benefits to employees if they support the Union.

WE WILL NOT direct employees to sign a union authorization card.

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

WE WILL withdraw and withhold all recognition from Local 348-S as the exclusive collective-bargaining representative of our employees unless and until it has been duly certified by the Board as your exclusive representative.

WE WILL, jointly and severally with Local 348-S, reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues checkoff and union-security clauses of the February 1, 2003 collective-bargaining agreement. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 348-S prior to January 27, 2003.

DAIRYLAND USA CORPORATION

APPENDIX B

NOTICE TO 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT accept recognition from and execute a collective-bargaining agreement with Dairyland USA Corporation unless and until Local 348-S is certified by the Board as the collective-bargaining representative of a unit of Dairyland's employees.

WE WILL NOT give effect to the February 1, 2003 collective-bargaining agreement between Dairyland USA Corporation and Local 348-S, or to any extension, renewal, or modification of the agreement.

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

WE WILL, jointly and severally with Dairyland USA Corporation, reimburse with interest all present and former Dairyland employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues checkoff and union-security clauses of the February 1, 2003 collective-bargaining agreement. However, reimbursement does not extend to those Dairyland employees who voluntarily joined and became members of Local 348-S prior to January 27, 2003.

LOCAL 348-S, UNITED FOOD AND COMMERCIAL WORKERS

Ruth Weinreb, Esq., for the General Counsel.
Harold Weinrich, Esq., Steven Goodman, Esq., and *Christopher Valentino, Esq.,* for Dairyland.
J. Warren Mangan, Esq., for Local 348.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City, New York, during 16 days of hearing commencing March 29, 2004. The record was closed on January 11, 2005. Upon a charge filed on July 14, 2003, a consolidated complaint was issued on March 9, 2004, alleging that Dairyland USA Corporation (Dairyland) violated Section 8(a)(1), (2), (3), and (4) of the National Labor Relations Act (the Act). The complaint further alleged that Local 348-S, UFCW, AFL–CIO (Local 348 or the Union) violated Section 8(b)(1) and (2) of the Act. Respondents filed answers denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses and file briefs. Briefs were filed by the parties on April 25, 2005. Upon the entire record of the case, including my observation of the demeanor of the witnesses,[1] I make the following

[1] Credibility resolutions have been based on the witnesses' demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and inferences drawn from the record as a whole.

FINDINGS OF FACT

I. JURISDICTION

Dairyland, a New York corporation, with its principal office and place of business in Bronx, New York, has been engaged in the business of wholesale food distribution. It has been admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Local 348 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

On December 13, 2002, John Fazio, vice president of Local 348, met with Dean Facatsellis, vice president of Dairyland. Fazio provided Facatsellis with information concerning Local 348 and the two discussed the Union's medical plan. In early January 2003,[2] Facatsellis contacted Fazio to further discuss Local 348's medical plan. They also discussed the possibility of entering into a neutrality agreement.

On January 7, Fazio prepared a proposed contract which was subsequently sent to Dairyland. On January 23, representatives of the Union and Dairyland met to discuss the medical plan and executed a neutrality agreement. On January 27, Local 348's representatives went to Dairyland's facility to speak with the company's drivers and warehouse employees about joining their union and to obtain executed authorization cards. Pursuant to the terms of the neutrality agreement, on January 31, an arbitrator conducted a card check. The arbitrator determined that Local 348 had obtained 111 valid authorization card signatures from the bargaining unit of 150 employees. The arbitrator certified Local 348 as the bargaining representative of Dairyland's drivers and warehouse employees. On February 1, the parties entered into a 4-year collective-bargaining agreement.

2. Testimony of Miguel Pierre

Pierre, a Dairyland driver, testified that on January 27, he met with several representatives of Local 348 in the dispatch office. He testified that the meeting took place between 1 and 2 p.m. and that he was introduced to the union representatives by Mineo Maldonado, Dairyland's operations manager. He testified that Maldonado said that the "union was there for us" and would "supply medical benefits."

Pierre further testified that a meeting was held between the drivers and Local 348 representatives on June 5. The drivers asked questions about their medical benefits and work conditions. Pierre also testified that later in June the drivers had a meeting with a Local 202, IBT representative in the company parking lot. He testified that the dispatcher, Eddie Mercano, was close by, holding a telephone. Soon thereafter Facatsellis appeared and began talking to Mercano. The drivers then left the parking lot.

[2] All dates refer to 2003, unless otherwise specified.

3. Testimony of Juan Flores

Flores is a driver employed by Dairyland. He testified that at the meeting of Local 348 representatives in January, Maldonado was also there and told him, "Juan, you should be a member of the union because they give benefits for doctors and eyesight." Flores also testified that Maldonado was present when he signed the authorization card.

Flores further testified that a meeting of drivers was held in June at which time a Local 202 representative was present. He testified that the meeting was held in the parking lot and that Mercano came by and was talking on the telephone. Facatsellis came by, shook hands with Mercano and the drivers left. Flores testified that several days later he saw Maldonado who told him that "I know you were at the meeting."

On cross-examination, Flores was asked if he discussed his testimony with anyone. He answered that he had not. He was then asked if he had ever discussed his testimony with Weinreb (Weinreb), counsel for the General Counsel. He testified that he never discussed his testimony with Weinreb. He conceded that he signed a petition to decertify Local 348. He also conceded that Maldonado's office is separate from the dispatch office.

4. Testimony of Efrain Rodriguez

Rodriguez, a warehouse employee, testified that he was told by his supervisor, Kevin Kelly, to go to the January meeting. He testified that the meeting took place in the dispatch office and that three Local 348 representatives were there. He also stated that Maldonado was at the meeting.

Rodriguez testified that before he signed the authorization card, "I looked at the green card. At that time I heard Mineo [Maldonado] make a statement to Santana who left the office. And Mineo stated to him that if he didn't sign at the time, he wasn't going to be working there." On cross-examination, Rodriguez testified, "Santana just walked out of the office. Mineo, as he followed him out, said to him if you don't sign the card, you won't be working here."

On May 24, a meeting of warehouse employees was held in the "chocolate" room together with Local 348 representatives. Rodriguez testified that he complained about timecards. Rodriguez stated that several days later Kelly told him that "he's hearing things about me he's not liking and that I should put a stop to it. That if I'm unhappy or miserable why I just don't quit."

5. Testimony of Carlos Charriez

Charriez is a Dairyland warehouse employee. His supervisor is Kevin Kelly. He testified that in January several of the warehouse employees met with Kelly in the chocolate room. He testified that Kelly told them that they "always wanted a union. We finally got you one, and we'd like you to go to Brian [Adair's] office to sign some cards." Charriez testified that Fazio, the union representative, handed him some cards to sign. Charriez asked Fazio what would happen if he didn't sign. Fazio replied, "[Y]ou will have to get another job because this is going to be a union shop." Charriez further testified that in May he asked Maldonado what would have happened had he not signed the union authorization card. Charriez stated that

Maldonado replied, "[M]ajority rules. You had to sign the cards." Charriez also testified that at the meeting in January, Maldonado was "going in and out of the room" and that he didn't remember whether Maldonado was present when Fazio made the statement about signing the card.

6. Testimony of Richardson

Bobby Richardson is a warehouse employee of Dairyland. His supervisor is Kevin Kelly. He testified that in January the day crew was assembled in the chocolate room. Kelly told the employees that "we have a union coming in." The next day Kelly told Richardson "the union's here. Go talk to the union." Kelly went to the dispatch office where the Local 348 representatives were present. They handed Richardson a union authorization card and the "highlight" sheet, which listed the benefits the employees would receive. Richardson signed both documents. He testified that Maldonado was present when he signed the card. Richardson also testified that in May he asked Maldonado whether he would still have a job if he hadn't signed the authorization card. Maldonado replied, "The majority rules. If you don't sign in, you don't have a job."

7. Testimony of Marvin Benjamin

Benjamin is another warehouse employee. His supervisor is Kevin Kelly. He testified that in January Kelly told the warehouse employees, "good news, guys, we've got a meeting." Kelly then said that the employees "have to sign a union card or we won't be in the union." At the end of the meeting Kelly told the employees that "we have to go to Brian's office in groups to sign the union card." Benjamin testified that it was Fazio who told him to sign the card and that Brian Adair was at his desk when he signed the card. Benjamin also testified that Maldonado briefly spoke at the meeting and that he was in the room "just a few moments."

8. Testimony of William Urizar

Urizar is a Dairyland driver. He testified that at 2:30 p.m. on January 27 he dropped off his keys in Maldonado's office and met several representatives from Local 348. He testified that he stayed in the office for 15 minutes and that Maldonado told him, "That's the union you guys want and sign the card." Urizar further testified that Maldonado told him, "Before you guys paid medical benefits, now it's going to be free, so sign the card." Urizar testified that Maldonado was present when he signed the authorization card.

Urizar testified that in June the drivers had a meeting in the parking lot. They discussed "how to try to get the Teamsters, Local 202." Eddie Mercano was standing near them with a "walkie-talkie." After 10 minutes Dean Facatsellis appeared at which time the drivers left. Urizar testified that 2 days later John Pappas, vice president of Dairyland, called him into his office. Pappas said, "Willie, what were you doing in that meeting? . . . We know you were there." Urizar testified that Pappas also said, "[T]hose Teamsters are a mafia . . . if those Teamsters come into the company, we're going to cut 30 routes."

Urizar filed a charge in this proceeding on July 14. He testified that his normal route was Route 9, covering the east side of Manhattan and that he normally made between 19 and 20 deliveries each day. He testified that beginning October, and lasting for 2–3 months, his deliveries were increased to 37, at which time he was being sent to Connecticut and Westchester. He testified that prior to October he had never been sent to Connecticut or Westchester.

9. Testimony of Torres and Maldonado

Carmen Torres is Maldonado's wife. She testified that she had a 1:30 p.m. doctor's appointment on January 27, and that her husband picked her up from home at 1 p.m. She further testified that she came back home at 3:30 p.m. and that her husband left for the office at 4 p.m. Maldonado corroborated his wife's testimony and testified that he left Dairyland at 12:30 that afternoon and did not return until 4:45 p.m. Maldonado also testified that his office is separate from the dispatch office. He shares his office with Brian Adair and there is a door which leads from his office to the dispatch office.

10. Testimony of John Fazio

Fazio testified that on January 27 he and the other Local 348 representatives did not meet with employees in Brian Adair's office. He also testified that he did not obtain any authorization cards in Adair's office and that Adair was not present when the authorization cards were signed or when the "highlight" sheet was signed.

B. Discussion and Conclusions

1. January 27 meeting

Charriez, Richardson, and Benjamin appeared to me to be credible witnesses. They testified forthrightly and consistently. To a large extent their testimony corroborated each other. Based on their testimony and the record as a whole I find that a meeting was held on January 27 between Local 348 representatives and the warehouse employees and drivers. The meeting was held in the dispatch office. Kelly met with the day crew of the warehouse employees. He told the day crew, which numbered 18 warehouse employees, that they "have to go" to the dispatch office "to sign" the union authorization cards.

I credit Torres' testimony that she had a doctor's appointment on the afternoon of January 27, and that her husband, Mineo Maldonado, took her there. I credit his testimony that he left the company at 12:30 p.m. and did not return until 4:45 p.m.

I credit Rodriguez' testimony that Maldonado was there for part of the meeting. I also credit Charriez' testimony that Maldonado "was going in and out of the room." I further credit Fazio's testimony that Adair was not present when the highlight sheet was signed or when the union authorization cards were signed. There seemed to have been some confusion in the testimony as to the nature of the dispatch office and Maldonado's and Adair's office. Based on the record as a whole I find that the dispatch office was separate from Maldonado's and Adair's office. The dispatch office was where the employees received their assignments and where they returned their keys. Next to the dispatch office, separated by a door, was an office which Maldonado and Adair shared. The January 27 meeting was held in the dispatch office.

Urizar testified that he came to the office at 2:30 p.m. and stayed for 15 minutes. He testified that Maldonado was there

and told him, "[T]hat's the union you guys want and sign the card." I do not credit Urizar's testimony in this regard. I have found that Maldonado was not present at the company from 12:30 until 4:45 p.m.

Flores testified that at the January 27 meeting, Maldonado told him, "Juan, you should be a member of the Union because they give benefits for doctors and eyesight." Flores also testified that Maldonado was present when he signed the union authorization card. I do not credit Flores' testimony. On cross-examination, Flores conceded that he did not arrive at the meeting until 1:30 p.m. As I have found earlier, Maldonado was not there at that time. In addition, also on cross-examination, Flores was asked whether he discussed his testimony with anyone. He answered that he had not. He was then asked, several times, whether he discussed his testimony with Weinreb, counsel for the General Counsel. He testified that he never discussed his testimony with Weinreb. I find that testimony to be incredible and am not crediting his testimony in this proceeding.

2. Threat of discharge and impression of surveillance

Rodriguez testified that Maldonado followed Santana, a driver, out of the dispatch office and told Santana, "[I]f you don't sign the card, you won't be working here." I credit Rodriguez' testimony and find that this constituted a violation of Section 8(a)(1) of the Act. In addition, Rodriguez testified that at a meeting of warehouse employees in the chocolate room, he complained about timecards. Several days later Kelly told him, "[H]e's hearing things about me he's not liking." I credit Rodriguez' testimony and find that this violated Section 8(a)(1) of the Act.

3. Interrogation, surveillance, and loss of work

Urizar testified that 2 days after the June meeting in the parking lot, Pappas called him into his office and said, "Willie, what were you doing at that meeting? . . . We know you were there." Pappas also told Urizar, "[I]f those Teamsters come into the company, we're going to cut 30 routes." I credit Urizar's testimony and find that these statements violated Section 8(a)(1) of the Act.

4. Local 348's majority status

In cases alleging unlawful 8(a)(2) recognition, "it is the burden of proof of General Counsel to establish that the union accorded exclusive recognition was not the majority representative." *Rainey Security Agency,* 274 NLRB 269, 279 (1985). I credit Richardson's testimony that Maldonado was present when he signed the union authorization card. I have also found that Kelly told the 18 warehouse employees in the day crew that they have to sign the cards. Accordingly, I find that General Counsel has sustained her burden of showing that 19 of the employees were not "uncoerced."

The unit consists of 150 employees, 111 signed authorization cards. Subtracting the above-mentioned 19 cards results in 92 validly signed cards. This constitutes a majority of unit employees. I find that General Counsel has not sustained her burden and the allegation is dismissed.

5. Alleged onerous conditions imposed on Urizar

Urizar filed a charge on July 14, and an amended charge on September 24. The complaint alleges that beginning October 3, Dairyland imposed more onerous work conditions on Urizar.

Urizar testified that his normal route was Route 9, covering the upper east side of Manhattan. He further testified that beginning October, for 2 to 3 months, his deliveries were increased from an average of 19–20 per day to 37 deliveries. He also testified that prior to October he was never sent to Connecticut or Westchester to make deliveries. After October, however, he testified that he was required to make deliveries to both Connecticut and Westchester.

While Urizar testified that his normal route was Route 9, the record shows otherwise. In fact, from January 1 through September 30, out of 133 deliveries, Urizar was assigned Route 9 only 38 times. Whereas Urizar testified that prior to October he never was assigned deliveries in Connecticut or Westchester, the record shows that during the period January 1 through September 30, Urizar was assigned deliveries in Westchester and Connecticut 13 times. Finally, Urizar testified that beginning October deliveries increased from an average of 19–20 to 37. In fact, however, the record shows that for the period from June 2 through 30, Urizar's average daily deliveries were 21.5. This actually *decreased* to 19.75 for the period July 15 through December 30. The decrease took place even though Urizar filed his initial charge on July 14. For the period October 1 through December 30 Urizar's average daily deliveries were 20.8. During this period Urizar was assigned a helper for each delivery. The helper was not removed. I find that General Counsel has not shown that more onerous working conditions were imposed on Urizar. Accordingly, the allegation is dismissed.

6. Other allegations

The complaint alleges that Maldonado promised increased medical benefits if the employees signed the union authorization cards. I credit Pierre's testimony that Maldonado introduced the Local 348 representatives on January 27, and said that the Union was "there for us" and would "supply medical benefits." A promise of increased benefits interferes with protected rights and violates Section 8(a)(1) of the Act. See *Gerig's Dump Trucking,* 320 NLRB 1017, 1022 (1996), enfd. 137 F.3d 936 (7th Cir. 1998).

The complaint also alleges that Dairyland directed employees to sign union authorization cards, in violation of Section 8(a)(2). I have found that Kelly directed the day crew to sign cards on behalf of Local 348. I find this to be a violation of Section 8(a)(2) of the Act. See *Duane Reade, Inc.,* 338 NLRB 943, 944 (2003).

The General Counsel maintains that Maldonado engaged in an unlawful act of surveillance in June when he stood outside the drivers' locker room as they met with Local 348 representatives. Urizar, Flores, and Pierre testified that they did not see Maldonado at the door. Pantaleon, however, testified that he saw Maldonado at the door for approximately 1 minute. I do not credit Pantaleon. During re-cross-examination, he continually answered questions by saying "I don't remember." I believe that he did remember the answers to many of the questions, but in effect refused to answer the questions posed by counsel for Dairyland. Under such circumstances I believe that his testimony should not be credited. See *Bestway Trucking,*

310 NLRB 651, 661 (1993), enfd. 22 F.3d 177 (7th Cir. 1994).

The General Counsel also maintains that Dairyland engaged in surveillance at the parking lot meeting of employees in June. The employees were gathered in a parking lot which was used by several companies, by the employees and where Dairyland's trucks were parked. Mercano appeared not far from where the employees were standing, talking into a cell phone. After about 10 minutes Facatsellis appeared and the drivers left the parking lot. It has not been shown that talking into a cell phone constitutes surveillance. In addition, it has not been shown that Mercano was a supervisor within the meaning of the Act. In any event, I have already found that Dairyland engaged in surveillance on another occasion and therefore the violation will be remedied.

Concerning any allegation not specifically found to be an unfair labor practice, I have carefully reviewed all of the allegations and find that the General Counsel has not sustained her burden of showing that Respondent has violated the Act with respect to any other allegation.[3]

[3] The General Counsel has moved to withdraw par. 9(c) of the complaint and that portion of par. 8(a) which refers to Adair. The motion is granted.

CONCLUSIONS OF LAW

1. Dairyland is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union activities, by engaging in surveillance and creating the impression of surveillance of protected activities, by threatening discharge and by threatening loss of work for protected activities, and by promising increased medical benefits, Dairyland has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By directing its employees to sign union authorization cards, Dairyland has committed an unfair labor practice within the meaning of Section 8(a)(1) and (2) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondents did not violate the Act in any other manner alleged in the complaint.

REMEDY

Having found that Dairyland has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]