Baby Watson Cheesecake, Inc. ***and*** **Local 810, International Brotherhood of Teamsters, AFL–CIO**

Retail, Wholesale, Warehouse & Production Employees InternationaL Union ***and*** **Local 810, International Brotherhood of Teamsters, AFL–CIO and Baby Watson Cheesecake, Inc., Party in Interest.** Cases 2–CA–25409, 2–CA–25411, and 2–CB–14035

November 9, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On June 4, 1992, Administrative Law Judge Steven Davis issued the attached decision. Respondent Employer filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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,[1] and conclusions[2] as modified and to adopt the recommended Order.

CONCLUSIONS OF LAW

1. Respondent Employer Baby Watson Cheesecake, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 810, International Brotherhood of Teamsters, AFL–CIO (Local 810) and Retail, Wholesale, Warehouse and Production Employees International Union (RWWPE) are labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening employees with discharge if they did not sign an authorization card for RWWPE, Respondent Employer violated Section 8(a)(1) and (2) of the Act.

4. By threatening to close its factory rather than recognize Local 810, and by threatening to close its factory if its employees selected Local 810 as their collective-bargaining representative, Respondent Employer violated Section 8(a)(1) of the Act.

5. By threatening to withhold and withholding employee paychecks when employees refused to sign authorization cards for RWWPE, Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act.

6. By promising to pay employees' dues owed to RWWPE, Respondent Employer violated Section 8(a)(1) and (2) of the Act.

7. By threatening to terminate and permanently replace unfair labor practice strikers, Respondent Employer violated Section 8(a)(1) of the Act.

8. By granting recognition to RWWPE and entering into a collective-bargaining agreement with it containing a union-security clause, and implementing the clause, Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act.

9. By deducting dues for RWWPE from the paychecks of its employees without uncoerced majority support for RWWPE, Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act.

10. The following unit is appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees and shipping employees of the Employer employed at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

11. Since October 28, 1991, Local 810 has been the exclusive collective-bargaining representative of the employees set forth in the appropriate collective-bargaining unit.

12. By the conduct set forth in paragraphs 3 through 9, above, the Respondent Employer has undermined the majority status of Local 810, and has precluded any likelihood that a fair election could be held.

13. By refusing to recognize and bargain with Local 810 in the above-defined collective-bargaining unit since October 28, 1991, Respondent Employer has violated Section 8(a)(5) and (1) of the Act.

14. By accepting recognition as exclusive collective-bargaining representative from Respondent Employer on November 1, 1991, and by executing a collective-bargaining agreement on that date which contained a union-security clause, which was implemented, RWWPE violated Section 8(b)(1)(A) and (2) of the Act.

15. By its letter to employees dated December 12, 1991, advising them that they must pay their financial obligations to RWWPE or face discharge, RWWPE violated Section 8(b)(1)(A) and (2) of the Act.

16. By accepting dues deductions from employees remitted by the Respondent Employer, RWWPE violated Section 8(b)(1)(A) and (2) of the Act.

[1] Respondent Employer 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.

[2] The judge's decision contained certain discrepancies between his findings and his conclusions of law. The Conclusions of Law have been amended, where necessary, to conform to his findings.

Member Oviatt finds it unnecessary to rely on the judge's citation to *Somerset Welding*, 304 NLRB 32 (1991), in which he dissented in part.

17. RWWPE did not engage in unfair labor practices, as alleged in the complaint, by receiving assistance and support from the Respondent Employer when the Respondent Employer (a) threatened its employees with discharge if they did not sign a card for RWWPE, (b) threatened to and withheld employees' paychecks when they refused to sign a card for RWWPE, or (c) promised to pay employees' membership dues owed to RWWPE.

18. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that Respondent Employer Baby Watson Cheesecake, Inc., New York, New York, its officers, agents, successors, and assigns, and Respondent Union Retail, Wholesale, Warehouse & Production Employees International Union, its officers, agents, and representatives, shall take the action set forth in the Order.

Larry Singer and *Belinda Lerner, Esqs.*, for the General Counsel.

Stuart Bochner, Esq. (Horowitz & Pollack, P.C.), of South Orange, New Jersey, for the Respondent Employer.

Larry Cole, Esq. (Cole & Cole, Esqs.), of Jersey City, New Jersey, for the Respondent Union.

Joel Roth, Esq., of New York, New York, for Local 810.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to charges filed in Cases 2–CA–25409 and 2–CA–25411 on November 4 and 5, 1991, respectively, by Local 810, International Brotherhood of Teamsters, AFL–CIO (Local 810) a consolidated complaint was issued against Baby Watson Cheesecake, Inc. (Respondent Employer or Employer) on January 7, 1992. Pursuant to a charge filed in Case 2–CB–14035 on January 14, 1991, by Local 810, a complaint was issued against Retail, Wholesale, Warehouse & Production Employees International Union (Respondent Union or RWWPE) on January 24, 1992.

The complaint against Respondent Employer alleges essentially that in early October 1991, Local 810 began an organizational campaign among Respondent Employer's employees and, thereafter, following a demand for recognition, Respondent Employer threatened employees with discharge if they did not sign a card for Respondent Union; threatened to close before it would recognize Local 810 and, if the employees selected Local 810 as their representative; threatened to and withheld employee paychecks when they refused to sign a card for Respondent Union; promised to pay employees' dues owed to Respondent Union; and threatened to terminate and permanently replace unfair labor practice strikers if they did not return to work by a certain date. The complaint also alleges that Respondent Employer assisted Respondent Union by coercing employees to sign cards for it, and granted recognition to Respondent Union and entered into a collective-bargaining agreement with it containing a union-security clause, notwithstanding that Respondent Union did not represent an uncoerced majority of the unit, and even though a valid petition had been filed by Local 810.

Finally, the complaint alleges that Respondent Employer unlawfully refused to bargain with Local 810, and requests that a bargaining order be issued to remedy the unfair labor practices.

The complaint against Respondent Union alleges essentially that Respondent Union received assistance and support from Respondent Employer through certain actions of Respondent Employer, set forth above, and also alleges that Respondent Union threatened employees that it would seek their discharge if they failed to meet their financial obligations to Respondent Union.

The complaint also alleged that Respondent Union, by its shop steward, threatened that it would seek the discharges of employees if they did not sign an authorization card for it. No evidence was presented as to this allegation. In his posthearing brief, The General Counsel requested permission to withdraw that allegation of the complaint. No opposition to that request has been received, and the General Counsel's request is accordingly granted.

The complaints allege violations of Section 8(a)(1), (2), (3), and (5) and Section 8(b)(1)(A) and (2) of the Act as to the above activities.

Respondents filed answers which denied the material allegations of the complaints, and on February 26, 1992, an order further consolidating cases was issued, consolidating the above cases for hearing.

On March 16, 1992, a hearing was held before me in New York City.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the brief filed by the General Counsel, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer, a domestic corporation having an office and place of business at 601 West 26 Street, New York City, has been engaged in the retail and nonretail business of baking and distributing Baby Watson Cheesecakes. Annually, Respondent Employer purchases and receives products, goods, and materials at its facility valued in excess of $50,000 directly from enterprises located outside New York State. Respondent Employer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Employer also admits, and I find, that Local 810 and Respondent Union are labor organizations within the meaning of Section 2(5) of the Act.

[1] Briefs were due on May 8, 1992. Respondent Employer sent a letter dated May 7 to the associate chief administrative law judge, requesting an extension of time to file a brief. The letter was received on May 10, after the time for filing briefs had expired. The request was denied as untimely. I have considered all the arguments made by Respondent Employer in the evidence received, including the arguments made at the district court proceeding.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Background

The General Counsel filed a petition with the United States District Court for the Southern District of New York, seeking relief pursuant to Section 10(j) of the Act. On March 9 and 10, 1992, a hearing was held before United States District Judge Leonard B. Sand. At the Board hearing, the parties stipulated that the evidence received at the district court hearing be received at the Board hearing. The parties further stipulated that the testimony adduced at the court hearing would be accepted for the truth of the matters asserted and would not be objectionable as hearsay evidence. In addition, at the Board hearing, certain stipulations were received.

Mario D'Aiuto, the owner and founder of Respondent Employer, was first contacted by RWWPE in about 1985, when he first opened his factory. At that time he employed six or seven employees. The RWWPE representative introduced himself, and D'Aiuto agreed to sign a contract with the RWWPE. The representative then signed up six employees: George Elias, Leo Fernandez, Eugene Finnegan, Frank Gerado, Fanny Gomez, and George Scavalopos.

The parties stipulated that at the time of the instant hearing, George Elias, Leo Fernandez, and Eugene Finnegan were statutory supervisors and not part of the collective-bargaining unit. They also stipulated that Frank Gerado was Mario D'Aituo's brother-in-law, who was deceased at the time of the hearing, and that Fanny Gomez was no longer employed at the Employer. George Scavalopos was still employed at the time of the hearing, but not in the collective-bargaining unit.

Those six employees were the only ones for whom dues were paid to RWWPE by the Employer. As to the source of the funds, D'Aiuto stated that dues were deducted from the paychecks of the six employees. Reporting forms were received in evidence which indicate that dues-deduction payments were made for the six employees in 8 months of 1988, each month in 1989 and 1990, and 8 months in 1991. It should be noted that Raphael Griffin, a delegate for RWWPE, stated that the Employer always sent payments owed (apparently the dues money as set forth in the reporting forms) but did not always send the reporting forms.

D'Aiuto stated that a representative from RWWPE appeared every 3 years or sent a new collective-bargaining agreement. A contract was received in evidence which stated that its effective dates were from November 4, 1988, to November 4, 1991. That agreement was negotiated in D'Aiuto's office, during which time a representative from RWWPE told him that the new contract would be similar to the prior agreement, and D'Aiuto agreed to that.

D'Aiuto admitted that it was his responsibility to properly report the names of those employees who left the Employer's employ, and those who were hired, and to remit union dues payments for those employees. However, he conceded not doing so, stating that although his business grew to 50 employees at the time of the incidents here, he continued to report only the six original employees. His reasons for ''hiding'' the increased complement of employees were that his business was suffering financially, had a huge debt, and he wished to limit his expenses. D'Aiuto stated that the Employer began making a profit only since about March 1991, but even then did not report the proper number of employees on its payroll.

D'Aiuto testified that he complied with the wage and hour provisions of the 1988 contract and the vacation clause. However, he also testified that when a decision was made concerning a starting salary or raises, he based such decisions on the economic interests of the Employer and on the merits of the employee. He used the contract as a ''parameter'' but did not adhere to it ''religiously.'' No grievances were filed pursuant to the contract. The Union never discussed a disciplinary warning with D'Aiuto or filed a grievance. The layoff-seniority provision was never utilized.

In this respect, D'Aiuto conceded that as of October 1991, his employees were not aware that the Employer had a relationship with any union, and that he did not tell newly hired workers of the existence of RWWPE. Indeed, employees Salvador Into and Jose Colon stated that during their 4-year and 1-1/2 year tenure with the Employer, respectively, they never knew of the existence of a union, and were never told that any union represented the employees.

2. The organizing drive

Jose Cuevas, a Local 810 organizer, was contacted by employee Leon Garcia, who sought representation by that Union for the Employer's employees. On October 5, 1991, a meeting was held at the office of Local 810, at which the following employees were present: Jose Colon, Leon Garcia, Oscar Guzman, Santiago Miranda, Juan Ramos, Alberto Salas, and Marcelino Sierra. Also in attendance were Union Agents Cuevas, Jay Silverman, and Gary Stevenson.

At the meeting, benefits of union membership were explained, as was the procedure for obtaining such membership, and the seven employees signed cards authorizing Local 810 to represent them.[2] Union Agents Silverman and Stevenson saw the employees sign the cards. Additional, blank cards were given to Leon Garcia, who was instructed to solicit his coworkers. Garcia gave cards to employee Salvador Into. They both obtained signed cards from their fellow employees.

Garcia stated that he solicited the following employees and saw them sign cards for the Union:[3] Marco Andrade, Salvador Into, Louis Chaca, Jose Colon, Jose Romero, Carla Santos,[4] Juan Santos, Angel Valentin, Samuel Valentin, Marco Vargas, and Gerardo Vasquez.

[2] The payroll lists Donato A. Salas, who was paid $6.50 per hour. There is no listing for Alberto Salas. The card of Alberto Salas was received in evidence, which states that he is paid $6.50 per hour. Apparently, Donato Salas is known as Alberto, and I will count the card of that individual.

[3] Some of the spellings of the employees' names differ between the transcript, and the authorization cards and the payroll. I have used the names as spelled in the payroll and the authorization cards as being the most accurate.

[4] There is no Carla Santos on the payroll, and no authorization card bearing that name has been received in evidence. However, Jamie Santos is on the payroll and that person's card, signed on October 7, 1991, is in evidence. Jamie Santos' home address, starting date and wage, set forth on the payroll and on the authorization card compare favorably. However, since her card has not been authenticated, I will not count it.

Barrera stated that he solicited the following employees and saw them sign cards for the Union: Magdalupe Aquilar,[5] Argentina Batista, Livio Castro, Donnell Cody, Norma Cruz, Geovanny Fernandez, Fred Frimpong, Ana Gonzalez, Michael Kwadwo, Dorotea Manrique, Juan Batista Morel,[6] Rosa Reynoso,[7] Maria Rivera, James Robinson, Santiago Torres, Mayra Vizcaino, and Collins Picket Yankey. In addition, Barrera stated that Chateram Ramdeo took a card for himself and his wife, and returned them the following day, signed. The cards of Chateram and Daywantie Ramdeo have been received in evidence, and will be counted.[8] Also received in evidence is the card of Manuel Jesus Mota. Mota's card has not been separately authenticated by any means. Although I would ordinarily receive it since the union agents testified that they received all these cards from the employees, nevertheless Mota's card cannot be given the same treatment because it bears a date of October 3, which is 2 days before the first meeting which he did not attend. Thus, I will not count Mota's card because it does not appear regular on its face, and has not been separately authenticated. Barrera gave all the signed cards in his possession to Garcia.

Two more meetings were held at Local 810 with employees of the Employer. At those meetings, Garcia gave Union Agent Cuevas the cards that he and Barrera collected from their coworkers. The employees elected an organizing committee to accompany the union agents when they requested recognition of Respondent Employer.

3. The appropriate bargaining unit

The parties stipulated that the appropriate bargaining unit includes all production and maintenance employees and shipping employees of the Respondent Employer employed at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

On October 28, 1991, Local 810 had signed authorization cards from 35 employees who were members of the unit. Respondent Employer's payroll for the period ending October 31, 1991, establishes that there were 46 employees employed in the appropriate bargaining unit.[9]

On October 28, 1991, three Local 810 agents visited Respondent Employer's facility. They met with a committee of about eight employees of Respondent Employer, and together spoke with Owner Mario D'Aiuto. The union agents introduced themselves, told D'Aiuto that Local 810 represented a majority of the employees, presented D'Aiuto with a recognition agreement, and requested that he bargain with the Union. D'Aiuto responded that he had his own union which he was ''bringing in.'' The union agents asked that D'Aiuto contact Local 810 quickly. Respondent Employer's answer admits that Local 810 made a demand for recognition that day.

On the same day, October 28, Local 810 filed a petition for representation in Case 2–RC–21098 with the Board.

4. The strike

The following day, October 29, employee Leon Garcia phoned Local 810 Agent Cuevas, and told him that D'Aiuto was distributing to employees authorization cards for another union. Local 810 agents were also told that employees were threatened with discharge if they did not sign such cards. Garcia requested that Local 810 agents visit the shop. Mario D'Aiuto testified that at about this time, he told Respondent Employer's employees that he had the RWWPE union for many years, and that employees must sign cards for that union.[10] He directed Jose Soto, who speaks Spanish and English, to have the employees sign the cards.[11] Employees were told that if they did not sign a card for RWWPE, Respondent Employer could not ''guarantee them employment.''

Fourteen unit employees signed RWWPE authorization cards, dated October 29.[12] Raphael Griffin, a delegate for RWWPE, stated that he did not arrive at the shop until the following day, October 30. Accordingly, the cards were solicited by Mario D'Aiuto and Jose Soto. In this respect, employee Jose Colon stated that Mario D'Aiuto asked him to sign a card for RWWPE.

At about noon that day, October 29, the 3 Local 810 agents again visited the shop, and met with about 30 employees. The agents were told by certain employees that they were being asked to sign cards for a different union, were being forced to join a union which they did not select, and were being threatened with discharge. Employee Leon Garcia testified that the employees then decided to engage in a strike due to D'Aiuto's (a) refusal to accept Local 810; (b) pressure received on the job; (c) the long hours of work; and (d) lack of job security.[13] Employee Salvador Barrera testified that the employees suggested that they strike because Mario D'Aiuto did not want to talk to them. They told the agents that they wanted to take action by staging a protest in the street. The union agents agreed, obtained some blank picket signs from their cars, and 23 employees left the shop

[5] There is no Magdalupe Aquilar on the payroll. Her authorization card was difficult for Barrera to read. I have not counted that card.

[6] Barrera identified this person as Juan Moralez, but it is clear from the card, and the order of the cards as presented to the witness and received in evidence, that the card signer was Morel.

[7] Barrera identified this card signer as Rosalie Noto. However it is clear from the order of the cards presented to him, as received in evidence, and the pronunciation of ''Rosalie Noto,'' as transcribed by the court reporter, that the employee whose card he was identifying was Rosa Reynoso.

[8] Although there is no direct evidence that Daywantie Ramdeo is the wife of Chateram, there is no other Ramdeo on the payroll, and the authorization cards of the Ramdeos indicate that they live at the same address. Accordingly, I shall draw an inference that Daywantie is the wife of Chateram Ramdeo, and that Barrera received Daywantie's card at the same time that he received Chateram's.

[9] I have excluded from this computation Jose Soto, as to whom the parties were in dispute.

[10] Although D'Aiuto also stated that he urged those employees to sign cards for RWWPE who ''wished to sign,'' it appears that such workers were given little choice, since D'Aiuto also told them that they needed to sign such a card to remain employed by the Employer.

[11] Soto's supervisory and agency status, which is in issue, will be discussed, infra.

[12] Those employees are James Chen, Jose Fernandez, Clara Hernandez Garcia, Elsa Guzman, Sabino Hernandez, Thomas Kofi, Michael Kwadwo, Dorotea Manrique, Matilde Marte, Chicel Peguero, Rosa Reynosa, Maria Rivera, Joseph Watson, and Collins Yankey.

[13] Garcia also testified that at the meeting with Local 810, Mario D'Aiuto threatened to close the factory rather than accept that union. Inasmuch as this statement was not corroborated by others, particularly the union agents who were present, I do not credit this statement.

and began to picket.[14] The picket signs stated that the Employer was unfair to its workers.

I reject Mario D'Aiuto's testimony that the Local 810 agents approached him for the first time after the strike had begun. D'Aiuto testified that the strike occurred on October 28. In fact, it began on October 29, 1 day after Respondent Employer admittedly received a demand for recognition from Local 810.

The first day of the strike, October 29, was a payday. Local 810 Agent Jose Cuevas went with three employees, including Jose Colon, to Mario D'Aiuto's office. Cuevas told D'Aiuto that the employees wanted their paychecks. D'Aiuto replied that if they wanted their check, they should return to work. D'Aiuto spoke privately to Colon, and asked him to sign a card for RWWPE in order to receive his check. Colon refused. Cuevas and the employees then left. About 30 minutes later, the employees received their paychecks on the picket line.

Local 810 Agent Jay Silverman testified that on October 29, while on the picket line, he heard Luca D'Aiuto, the assistant to the president, admitted supervisor and son of Owner Mario D'Aiuto, tell employees that Respondent Employer would never sign with the Teamsters, and would close the factory if it had to sign with the Teamsters. Local 810 Agent Gary Stevenson essentially corroborated Silverman's testimony, adding that Luca made those comments about 12 times during the 2-week strike. Luca visited the picket line each day.

Local 810 Agent Gary Stevenson testified that that day he heard Luca and Soto say that no one would be allowed to work unless they signed a card for RWWPE.

Silverman and Stevenson stated that during the strike, they saw Luca and Jose Soto hand out cards for RWWPE on the picket line, telling the striking employees that if they signed the card they could return to work. Silverman also testified that while on the picket line, Luca told employees that RWWPE offered a medical plan. Silverman asked how much the dues were for RWWPE. Luca replied that the dues were $17, but that the employees did not have to pay dues since the Employer would pay union dues for the workers.

During Silverman's duty on the picket line thereafter he heard Luca or Soto telling employees that if they did not return to work they would be discharged. Employee Salvador Barrera also testified that he heard Soto telling the strikers that if they did not want to sign a card for RWWPE they would be discharged. Barrera also heard Soto tell an agent of Local 810 that Mario D'Aiuto did not want Local 810, and that he would prefer to close the plant than accept that union.

On October 29, the following letter, dated October 30 and signed by Mario D'Aiuto, was given to each striking employee with his paycheck:

> As an employee of Baby Watson Cheesecake, Inc., you are required to maintain membership in the Retail, Wholesale, Warehouse and Production Employees International Union. Under the agreement between the company and the union, you have access to the grievance and arbitration procedure to remedy any perceived wrongs done you. You are hereby notified that unless you return to your job by 10–31–91, your employment will be terminated.

A mailgram was sent on October 30 which was identical to the letter set forth above, except that the last paragraph reads as follows:

> You are hereby notified that unless you return to your job by November 1st, 1991, your employment will be permanently replaced.

5. The recognition of RWWPE

Mario D'Aiuto testified that when the Local 810 representatives requested recognition, he made them and his employees aware that Respondent Employer had a contract with another union. He stated that he did so, not only to keep Local 810 out because he had heard ''stories'' about the reputation of the Teamsters, but also because he preferred the less aggressive and less antagonistic RWWPE, a union that he had a relationship with for some time.

Raphael Griffin, a delegate with RWWPE, stated that he arrived at the Respondent Employer's premises for the first time on October 30, 1991, where he met with one or two employees. Prior to that he was not responsible for servicing that facility. The following day, October 31, he attended a meeting at the Respondent Employer's premises with about 30 employees. Griffin explained to the workers that RWWPE had a contract with Respondent Employer, which was due to expire on November 1,[15] and that he was there to negotiate a renewal agreement. An employee negotiating committee then developed contract demands.

On November 1, Griffin, RWWPE Official John Mongello, and the employee committee met with Mario D'Aiuto and presented their demands, which included 5 weeks of vacation after 11 years of employment, and a dental plan. Respondent Employer rejected those two demands, but following a negotiation session that day, executed an agreement, which purported to extend the expiring agreement, and which provided for certain benefits. It should be noted that as of November 1, no additional unit employees had signed cards for RWWPE, apart from the 14 who had signed cards dated October 29, 1991.

Subsequently, a typed agreement was executed, which provided that the new contract was effective from November 4, 1991, to November 4, 1994. The expiring agreement and the new contract contained a union-security clause, requiring membership in RWWPE as a condition of employment.

The strikers returned to work in two groups, the first on November 4, and the second group on November 18.

Beginning in the month of November 1991, Respondent Employer deducted dues of $15 per month from the wages of each unit employee, and remitted those amounts to RWWPE.

By letter dated December 12, 1991, RWWPE sent letters to employees of Respondent Employer advising them that pursuant to its contract with Respondent Employer, they were required to pay an initiation fee and dues, beginning

[14] Union Agents Cuevas and Stevenson testified that it was the employees' idea to take concerted action. Union Agent Silverman stated that the Union proposed it. The difference is immaterial. The important question is the reason for the strike, not who suggested it.

[15] The contract was actually due to expire on November 4.

November 1, 1991. The letter informed them that unless their obligation of $17 was paid within 15 days, RWWPE would request that Respondent Employer discharge them.

B. *Analysis and Discussion*

1. The supervisory and agency status of Jose Soto

The complaint alleges that Soto is a supervisor within the meaning of the Act, and an agent of the Respondent Employer. The Employer denies this. Soto did not testify.

The evidence establishes that Jose Soto is employed in Respondent Employer's office. Also employed in the office are Jenny Erato, the assistant to the president of the Employer who is also Mario D'Aiuto's sister, and Carolyn Carlson, the office manager. The parties stipulated that Erato and Carlson are not members of the appropriate bargaining unit herein.

Soto works in the accounts receivable department and performs general office work, using an adding machine. No one contends that he is a unit employee, and the General Counsel concedes that he is an office clerical employee.

There is no evidence that Soto possesses any supervisory authority, or that he has exercised any.

However, I find that there is sufficient evidence to find that Soto was an agent of Respondent Employer from the beginning of these incidents. Thus, Mario D'Aiuto testified that when confronted with the demand for recognition by Local 810, he determined to inform the employees of the Employer's relationship with RWWPE. He further decided that it was necessary that all the workers be made aware that they were required to sign cards for that union. In furtherance of that, D'Aiuto stated that he told Soto to solicit the employees to sign cards for RWWPE. He utilized Soto because he was bilingual, and most employees were Hispanic. He directed Soto to tell the workers that the Employer has a union, that union dues would be deducted from their wages, and that they had to sign a card for that union in order to remain employed.

In addition to these instructions from D'Aiuto, Soto was present with admitted Supervisor Eugene Finnegan on the picket line and told the strikers that if they did not sign cards for RWWPE, which he proffered, the Employer would fire them.

In order to determine whether an individual has apparent authority to act for an employer, the Board considers whether, ''under all the circumstances, the employees would reasonably believe that [the individual's] conduct reflected company policy and thus that [he] spoke and acted for management'' or on its behalf. *Futuramik Industries*, 279 NLRB 185 (1986); *EDP Medical Computer Systems*, 284 NLRB 1232, 1263 (1987).

Applying this principle to the facts, as Soto was used by the Employer as a conduit for information to the Spanish-speaking employees because of his understanding of that language, Soto relayed information from D'Aiuto to the workers. In addition, he engaged in the same conduct, soliciting employees to sign cards for RWWPE, and had discussions concerning the need for them to sign for that union, that D'Aiuto did. In addition, Soto appeared with supervisor Finnegan on the picket line, during which times they both spoke to employees with the same message—sign a card for RWWPE.

Accordingly, employees could reasonably believe that Soto's conduct reflected company policy, and that Soto spoke and acted for management. *Futuramik*, supra.

Therefore, I find and conclude that Soto was an agent of Respondent Employer at all times material herein.

2. Interference with the rights of employees

Mario D'Aiuto conceded that on October 29, he directed Jose Soto to have the employees sign cards for RWWPE and such employees were told that Respondent Employer could not guarantee them employment unless they signed such cards. There was other evidence that employees were told on the picket line that no one would be allowed to work unless he signed a card for RWWPE, and also if they did not want to sign such a card they would be discharged. Also, an employee heard Employer Agent Soto say that Mario D'Aiuto did not want Local 810, and would ''prefer to close the plan[t]'' if that union came in. Also, Luca D'Aiuto told the strikers that the employer would close the factory if it had to sign with Local 810.

Accordingly, these threats that employees would not be permitted to work unless they signed a card for RWWPE, and that they would be discharged unless they signed such a card violate Section 8(a)(1) and (2) of the Act. *Jayar Metal Finishing Corp.*, 297 NLRB 603, 605 (1990).

Respondent Employer's threat that it would close its factory constitutes unlawful interference with employee rights and violates Section 8(a)(1) of the Act. *Brown Transport Corp.*, 296 NLRB 552 (1989).

I reject Respondents' argument that the union-security clause in the expiring collective-bargaining agreement permitted them to insist that employees sign cards for RWWPE, as a condition of employment, pursuant to that clause. As will be discussed, infra, RWWPE had lost its majority status as of the time that the employees were required to sign cards for RWWPE, and Respondents had notice of that fact. Accordingly, RWWPE was not entitled to a presumption of continuing majority status. *S.M.S. Automotive Products*, 282 NLRB 36, 45 (1986).

A letter dated October 30 given to the strikers, advised them that unless they returned to work by October 31, their ''employment will be terminated.'' A confirming mailgram advised that unless they returned to work by November 1, they would be permanently replaced. Inasmuch as I find, as discussed below, that the strike engaged in by the employees was an unfair labor practice strike from its inception, I find that the strikers had the status of unfair labor practice strikers and, as such, could not be discharged or permanently replaced, as threatened by Respondent Employer. The letter clearly interfered with the employees' right to strike.

The Board considered an identical situation in *Dayton Auto Electric*, 278 NLRB 551 fn. 2 (1986), in which two mailgrams were sent to the strikers. The first warned that unless they reported to work by a certain date, they would be terminated. The second advised them to disregard the earlier mailgram, and stated that unless they reported to work by a certain date, they would be ''replaced not terminated.'' The Board found a violation as to the first mailgram, and also that the second failed to satisfy the standards for an effective repudiation as set forth in *Passavant Memorial Hospital*, 237 NLRB 138 (1978). The facts here are stronger since Respondent Employer did not tell the strikers to disregard the

letter, and in addition, the *Passavant* criteria have not been satisfied. Accordingly, I find that the letter and mailgram violate Section 8(a)(1) of the Act.

Respondents also argue that the strike was unprotected because of the no-strike clause in the expiring collective-bargaining agreement. Inasmuch as found infra, that the strike was an unfair labor practice strike, the employees' strike action was protected despite this provision. *Vanguard Tours*, 300 NLRB 250 (1990). Of course, the employees were not aware of the existence of the collective-bargaining agreement, much less its no-strike clause, at the time of the strike.

3. Respondent Employer's withholding of paychecks

The first day of the strike, October 29, was a payday. While the employees were picketing that day, Local 810 Agent Cuevas requested that the employees receive their checks. Mario D'Aiuto told him that the employees should return to work if they wanted to be paid, and also told employee Colon that he should sign a card for RWWPE in order to receive his check.

In *Indiana & Michigan Electric Co.*, 236 NLRB 986 (1978), the Board held that the respondent's withholding of accumulated leave, constituting pay which had already been earned, violated Section 8(a)(3) and (1) of the Act. Pursuant to the employer's policy, adopted after a strike began, employees would receive such pay when they returned to work. the Board found that the employer's leave policy was designed to force employees to abandon the strike, and therefore was a retaliation for their exercise of their Section 7 rights.

Similarly, Respondent Employer told its striking employees that they should return to work if they wanted to be paid. Thus its action, like that of the employer in *Indiana & Michigan*, was ''calculated to force employees to abandon the strike.'' 236 NLRB at 987. Such conduct violated Section 8(a)(3) and (1) of the Act. I am aware that the withholding of the employees' paychecks was temporary, in that only about 30 minutes elapsed before the paychecks were delivered on the picket line. However, the initial refusal to tender the paychecks was coercive, regardless ot the brief period of time that the paychecks were actually withheld.

4. The offer to pay dues

As set forth above, Respondent Employer's supervisor Luca D'Aiuto told employees on the picket line that the employer would pay the employees' dues payments to RWWPE. Such an offer violates Section 8(a)(2) and (1) of the Act. *Christopher Street Corp.*, 286 NLRB 253, 256 (1987).

5. The complaint against RWWPE

The complaint against RWWPE alleges, in part, that RWWPE violated Section 8(b)(1)(A) and (2) by receiving assistance and support from Respondent Employer, by virtue of the Employer's actions, set forth above.

Specifically, the complaint alleges that RWWPE received assistance and support from the Employer when the Employer (a) threatened its employees with discharge if they did not sign a card for RWWPE; (b) threatened to and withheld employees' paychecks when they refused to sign a card for RWWPE; and (c) promised to pay employees' membership dues owed to RWWPE.

The General Counsel cites no authority, and I have found none, in which a union may be charged with the above violations, although committed by an employer. The acts above were committed by the Respondent Employer. No union action has been shown or proven. In order to establish a violation against RWWPE in these circumstances, there must be some union action undertaken. The sections of the Act relied upon by the General Counsel require, for Section 8(b)(1)(A) that the union ''restrain or coerce employees'' and, for Section 8(b)(2) that the union ''cause or attempt to cause an employer to discriminate against an employee.''

The General Counsel does not argue that RWWPE did anything affirmative as to the above actions. He argues that Respondent Employer's actions were designed to ensure that RWWPE benefitted from the Employer's actions, and therefore RWWPE, having received the fruits of such conduct, is liable therefor. However, unlike the situation, discussed infra, where RWWPE affirmatively accepted recognition and dues payments, it cannot be said that RWWPE engaged in any proscribed conduct by virtue of the Employer's activities.

A Section 8(b)(2) finding may only be made where a ''requisite causal nexus'' between the union and the employer's action is established. *Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100 (1986). The General Counsel has not proven such a nexus. *D.C. Construction Co.*, 276 NLRB 930, 933 (1985).

Accordingly, I cannot find that RWWPE violated Section 8(b)(1)(A) or (2) of the Act by the Employer's actions, set forth above. I will therefore recommend dismissal of those allegations of the complaint against RWWPE.

6. The nature of the strike

The complaint alleges that the strike was an unfair labor practice strike from its inception. Respondent Employer denies this allegation.

> A strike will be considered an unfair labor practice strike if the record establishes that an unfair labor practice was a contributing cause of the strike. [*Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989).]

The reasons for the strike must therefore be examined in order to determine this issue. On October 29, Local 810 agents were told that employees were being threatened with discharge if they did not sign cards for RWWPE. This was corroborated by Mario D'Aiuto who testified that he told Employer agent Soto to tell employees that if they did not sign a card for RWWPE, Respondent Employer could not guarantee them employment. In fact, 14 unit employees signed cards dated that day. Although it is not clear whether those cards were signed before or after the strike began, a proper inference may be drawn, based on the testimony that cards were solicited before Local 810 was called that day, that the unlawful statements were made prior to the strike. Immediately prior to the decision to strike, Local 810 agents were told by employees that they were being forced to join a union not of their choosing, and were being threatened with discharge. The Local 810 agents were told that employees wanted to take action by protesting in the street. Imme-

diately after the Local 810 agents were told of the Employer's actions, the employees struck.

The evidence therefore supports a finding that the employees engaged in the strike in order to protest Respondent Employer's requirement that they sign a card for RWWPE in order to remain employed by the Employer and, if they did not, face discharge. I have found that these threats are unfair labor practices.

Respondent argues that the strike was an economic strike, apparently relying upon the testimony of employee Garcia, who stated that the workers struck because D'Aiuto would not accept Local 810, and because of pressure received on the job, the long hours of work, and lack of job security. Respondent Employer also apparently relies upon the testimony of employee Barrera, who stated that the strike was agreed upon because D'Aiuto did not want to talk to them.

There was no obligation upon Respondent Employer to ''accept'' Local 810, or even to talk to it, inasmuch as the Employer could, at the time of Local 810's request for recognition, rely upon its right to have a question of representation decided by the Board's election processes. However, even Garcia's testimony supports a finding that the strike was to protest the unfair labor practices of Respondent Employer. Thus, Garcia stated that the employees struck in order to protest the pressure received on the job and the lack of job security. Surely, this relates to the pressure of being required to sign a card for RWWPE or face dismissal, and the lack of job security relates to the ease with which one could be discharged for not signing a card for a union one did not choose.

Accordingly, inasmuch as the strike took place, at least in part, in order to protest the unfair labor practice, which I have found, that Respondent Employer was threatening employees with discharge if they did not sign a card for RWWPE, I find that the strike was an unfair labor practice strike from its inception.

Even assuming that the strike began as an economic strike, it is clear that the subsequent unfair labor practices, including the threats to discharge the strikers, on the first day of the strike, if they did not return to work, and other unfair labor practices committed during the strike converted such an economic strike to an unfair labor practice strike.

7. The execution of a renewal collective-bargaining agreement

The complaint alleges that Respondent Employer granted, and RWWPE accepted recognition for the unit employees on November 1, 1991, and that a collective-bargaining agreement was unlawfully executed on that date notwithstanding that RWWPE did not represent an uncoerced majority of the employees in the unit, and notwithstanding that a valid petition had been filed on October 28, seeking an election among that unit.

On November 1, 1991, Respondents entered into a memorandum collective-bargaining agreement, which purported to extend the expiring agreement for 3 years, and which provided for certain additional benefits.

The fact that a petition had been filed prior to the execution of the renewal agreement has no legal effect upon the issues herein. ''The mere filing of a representation petition by an outside, challenging union will no longer require . . . an employer to withdraw from bargaining or executing a contract with an incumbent union.'' *RCA Del Caribe, Inc.*, 262 NLRB 963, 964 (1982).

However, the evidence does establish that RWWPE did not represent an uncoerced majority of the Employer's unit employees when it executed the collective-bargaining agreement on November 1, 1991.

On November 1, 1991, of the 46 employees in the appropriate bargaining unit, RWWPE had signed authorization cards from 14 such employees. All of those cards are dated October 29, 1991. Accordingly, as of the date the memorandum agreement was signed, a majority of respondent employer's employees had not signed authorization cards giving RWWPE the right to represent them.

Even as to those 14 individuals who did sign cards for RWWPE, as set forth above, I have found that on October 29, Owner Mario D'Aiuto and Jose Soto, the Employer's agent, threatened employees with discharge if they refused to sign a card for RWWPE. Under such circumstances, it cannot be found that the authorization cards which RWWPE obtained, which were dated October 29, were uncoerced. Accordingly, they may not be counted toward its majority representation.

Respondents, however, argue that the prior collective-bargaining agreement, effective from 1988 to November 4, 1991, was valid and that RWWPE was entitled to a presumption of majority status, and accordingly, Respondents lawfully required the employees to sign cards for RWWPE as a condition of employment, as set forth in the expiring collective-bargaining agreement.

> Although an incumbent union is presumed to represent a majority of the employees for the purpose of negotiating a new collective-bargaining agreement, this presumption is not irrebuttable. . . . the negotiation and execution of a contract during the 60-day period prior to the termination of the preexisting contract is unlawful if during that time the incumbent union has suffered the loss of its majority status and the union and the employer are aware of this fact. *Clark Equipment Co.*, 234 NLRB 935, 937 (1978).

First, there was no evidence that RWWPE ever represented a majority of Respondent Employer's employees. No findings are here being made concerning the lawfulness or unlawfulness of the Respondent Employer's initial recognition of RWWPE sometime prior to 1988, or its execution of the collective-bargaining agreement with that union in that year, as Section 10(b) of the Act precludes any findings of violation. However, such activities may be examined in order to shed light on the events which occurred thereafter. *Metropolitan Alloys Corp.*, 233 NLRB 966, 969 fn. 6 (1977). Inasmuch as the circumstances here are related to the expiration of the 1988 contract and Respondent's claim that that contract permitted certain of its actions herein, such as the requirement that employees execute cards for RWWPE or face discharge, it is appropriate that the initial recognition of RWWPE and the manner in which the 1988 contract was given effect, be looked into.

As set forth above, sometime before 1988, RWWPE requested and received recognition from Respondent Employer. Then, the RWWPE agent obtained signed cards from six individuals. Such recognition prior to RWWPE representing a

majority of the unit employees would be unlawful. *Ladies Garment Workers (Bernhard-Altman) v. NLRB*, 366 U.S. 731 (1961),

At the time of the initial recognition, the six employees consisted of Gerado, who was D'Aiuto's brother-in-law, and who was deceased at the time of the hearing, Elias, Finnegan, Fernandez, all of whom were supervisors at the time of the hearing, Fanny Gomez, who was no longer employed at the time of the hearing, and Scavalopos, who was not a member of the bargaining unit at the time of the hearing. Those six were the only persons who Respondent Employer reported to RWWPE as being employed by it, and remitted dues for thereafter, notwithstanding that it employed 46 unit members at the time of the incidents at issue.

In addition, Respondent Employer ''hid'' the increasing numbers of employees from RWWPE, and also concealed the existence of the RWWPE and the contract from its employees. Regarding compliance with the contract, Respondent Employer obviously did not comply with the reporting requirement which obligated it to properly report to RWWPE the number of employees on its payroll. Although D'Aiuto testified that he adhered to a number of contractual provisions, it appears that as to those which may not have been complied with, there was no way for the employees to know that their conditions of employment were the subject of a contractual agreement, or that any union represented them, so that if any violations of the contract occurred, the employees were not aware thereof, and the contractual grievance provisions could therefore not be invoked.

D'Aiuto testified that the first time he notified employees of the existence of the contract with RWWPE was when he was ''barraged'' by Local 810, and he had ''no choice'' but to follow his ''moral duty'' and advise the employees that they were represented by a union which they must join.

Accordingly, the Employer was well aware, at the time that it executed the memorandum agreement on November 1, 1991, that RWWPE did not represent a majority of its employees. Thus, of the six persons who had signed cards for RWWPE in 1988, one was deceased, one was no longer employed, three were supervisors, and one was no longer in the unit. In addition, the Employer knew that inasmuch as it had concealed the existence of RWWPE from its employees, and that it had paid dues for only six employees until November 1, 1991, and remitted such dues pursuant to a union-security clause, that none of the other employees had designated RWWPE as his collective-bargaining representative.

Regarding knowledge of RWWPE that it no longer represented a majority of the Employer's employees, RWWPE argues that it satisfied its minimal obligation to police and enforce the collective-bargaining agreement. RWWPE contends that it was entitled to rely upon the Employer's report that only six employees were employed by it, and was not required to undertake any investigation as to the employee complement. RWWPE further states that it believed that the contract was being honored, and should not be penalized for the Employer's admitted concealment of a much larger unit.

The General Counsel argues, however, that RWWPE must have known that it had lost its majority status in late October 1991. RWWPE agent Griffin saw the striking employees on the picket line, and then sought to secure signed authorization cards from the Employer's employees. At that point it had no valid authorization cards from any of the Employer's employees. The General Counsel argues that RWWPE must have known that it lost its majority status because its representative made annual visits to the Employer's premises to obtain its signature on a renewal agreement, and should have, with any diligence, realized that the numbers of employees employed far exceeded the number reported by the Employer. RWWPE, on the other hand, argues that it was entitled to rely upon the Employer's report of six employees, and that it in good-faith believed that the Employer employed only six workers.

I believe that the evidence supports a finding that RWWPE was aware that it had lost its majority status when it executed the renewal memorandum agreement on November 1, 1991. Thus, there was a complete lack of interest in behalf of the Respondent Employer's employees by RWWPE during the term of the 1988–1991 collective-bargaining agreement. No efforts were made to ensure that the contract was being enforced. RWWPE simply relied upon the fact that it believed that the contract was being honored, and that it believed that only six employees were employed by Respondent Employer. RWWPE argues that no greater involvement was required than this. That may be true. However, the inquiry being made here is whether it was aware that it had lost its majority status when it executed the renewal agreement on November 1, 1991. At that time, RWWPE became aware, even if it did not possess such knowledge prior thereto, that (a) only 6 individuals had signed cards for RWWPE; (b) there were 46 employees in the unit; (c) dues were being remitted for only 6 individuals; (d) if it sought to speak with its 6 members it would have found that they were either not employed or not in the unit; and (e) a majority of the employees were on a picket line supporting another union.

I accordingly find and conclude that Respondent Employer and RWWPE were aware that RWWPE had lost its majority status when they negotiated and executed a renewal memorandum agreement on November 1, 1991. *Clark Equipment Co.*, supra.

Therefore, Respondent Employer's recognition of RWWPE at a time when RWWPE did not represent an uncoerced majority of the unit employees, and Respondent Union's acceptance of such recognition at that time violated the Act. Moreover, the negotiation and execution of the memorandum agreement of November 1, 1991, and the collective-bargaining agreement of November 4, 1991, which contained a union-security clause violated Sections 8(a)(1)(2) and (3) and 8(b)(1)(A) and (2) of the Act. *S.M.S. Automotive Products*, 282 NLRB 36 (1986).

In addition, since November 1, 1991, dues deductions have been made from the paychecks of the Employer's employees, and remitted to RWWPE. Such deductions and remittances, in the absence of uncoerced employee authorizations therefore violate Sections 8(a)(1),(2), and (3) and 8(b)(1)(A) and (2) of the Act. *Jayar Metal Finishing Corp.*, 297 NLRB 603.

Moreover, the RWWPE letters to employees dated December 12, 1991, advising them that they must pay their financial obligations to the RWWPE or face discharge, constitute the enforcement of a union-security clause in an unlawful collective-bargaining agreement, and accordingly violated Section 8(b)(1)(A) and (2) of the Act. *A.M.A. Leasing*, 283 NLRB 1017, 1024 (1987).

8. The propriety of a bargaining order

On October 28, 1991, Local 810 possessed signed authorization cards from 35 of the 46 employees employed in the appropriate collective-bargaining unit.

I have found that immediately upon learning of its employees' interest in Local 810, Respondent Employer embarked upon an aggressive campaign to undermine their support for that union, and attempt to coerce them into supporting RWWPE.

Specifically, I have found that Respondent Employer threatened its employees with discharge if they did not sign cards for RWWPE; threatened its employees that it would close its factory rather than recognize Local 810; promised to pay employees' membership dues in RWWPE; threatened striking employees with discharge; and withheld employees' paychecks and conditioned the issuance of such paychecks on their signing cards for RWWPE.

I have also found that Respondent Employer unlawfully recognized RWWPE when RWWPE did not represent an uncoerced majority of Respondent Employer's employees, and enforced a union-security clause affecting those employees.

The Supreme Court held in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 614–615 (1969), that where

> The possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

Here, the threats of plant closure and discharge ''not only are 'hallmark' violations but are 'among the most flagrant' of unfair labor practices.'' *Somerset Welding & Steel*, 304 NLRB 32 (1991)

These threats were conveyed by senior management officials, Mario D'Aiuto, the owner, and his son Luca, and also by Jose Soto, the Employer's agent. The timing of the antiunion campaign, occurring immediately after Local 810 made its demand for recognition, heightened its impact on the employees. *Astro Printing Services*, 300 NLRB 1028 (1990).

In addition, the unfair labor practices were disseminated to all of the relatively small number of employees in the unit. See *Gupta Permold Corp*., 289 NLRB 1234, 1259 (1988) (42 employees). The Employer attempted to have all its employees sign cards for RWWPE, and those who supported Local 810 went on strike immediately after the onset of the Employer's unfair labor practices. The Employer then attempted to persuade them on the picket line to abandon their support for Local 810, and support RWWPE.

Moreover, while on the picket line, Respondent Employer sought to induce its employees to abandon Local 810 by advising them that if they signed a card for RWWPE they could return to work, and then threatened them with discharge when they did not return. Furthermore, the impact on the employees was increased because the employees, interested in returning to work and being paid, were faced with the dilemma of abandoning the union they chose if they wished to return to work. Indeed, the evidence establishes that they did return to work and signed cards for RWWPE.

Respondents argue that the nature of the unfair labor practices found here are not so substantial that a fair election could not be held. I do not agree. The Respondent Employer's actions not only caused a complete repudiation of Local 810 by the employees who had once supported it, but its actions in recognizing and signing a collective-bargaining agreement with RWWPE served to substitute a labor organization which had not been chosen by any of them. This supplanting of validly and freely chosen Local 810 by an unlawfully supported RWWPE caused an entrenchment of RWWPE in the shop. This conduct has a strong coercive effect on the employees' freedom of choice, serving to remove from the employees their selection of a labor organization to represent them. *Yolo Transport*, 286 NLRB 1087, 1094 (1987); *Cas Walker's Cash Stores*, 249 NLRB 316, 326 (1980).

The events which occurred were tumultuous when viewed from the employees' standpoint. On that day Local 810 made its demand for recognition. The following day, Respondent Employer threatened its employees with discharge if they did not sign cards for RWWPE. Shortly thereafter, they were on the street, striking against the unfair labor practices of the Employer, where they were subjected to further unfair labor practices, including threats of plant closure and discharge. These events and violations ''which threaten the very livelihood of employees, are likely to have a lasting impact which is not easily erased by the mere passage of time or the Board's usual remedies.'' *Somerset Welding*, supra.

Accordingly, the possibility of erasing the effects of the Employer's unfair labor practices and conducting a fair election by the use of traditional remedies is slight. Reguiring Respondent Employer to refrain from such conduct will not eradicate the lingering effects of the violations. Consequently, an election would not reliably reflect genuine uncoerced employee sentiment. Accordingly, the employees' representational desires expressed through authorization cards would be better protected by the issuance of a bargaining order than by traditional remedies. *Salvation Army Residence*, 293 NLRB 944, 946 (1989).

Accordingly, a bargaining order is necessary to remedy the unfair labor practices which I have found and to effectuate the employees' sentiment, as expressed in the valid card majority obtained in favor of Local 810.

CONCLUSIONS OF LAW

1. The Respondent Employer, Baby Watson Cheesecake, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 810, International Brotherhood of Teamsters, AFL–CIO (Local 810), and Retail, Wholesale, Warehouse and Production Employees International Union (RWWPE), are labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening employees with discharge if they did not sign an authorization card for RWWPE, Respondent Employer violated Section 8(a)(1) of the Act.

4. By threatening to close its factory rather than recognize Local 810, and by threatening to close its factory if its employees selected Local 810 as their collective-bargaining representative, Respondent Employer Section 8(a)(1) of the Act.

5. By threatening to and withholding employee paychecks when employees refused to sign a card for RWWPE, Re-

spondent Employer violated Section 8(a)(1), (2), and (3) of the Act.

6. By promising to pay employees' dues owed to RWWPE, Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act.

7. By threatening to terminate and permanently replace unfair labor practice strikers, Respondent Employer violated Section 8(a)(1) and (3) of the Act.

8. By granting recognition to RWWPE and entering into a collective-bargaining agreement with it containing a union-security clause, and implementing such clause, Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act.

9. By deducting dues in RWWPE from the paychecks of its employees without having an uncoerced employee authorization therefor, Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act.

10. The following unit is appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees and shipping employees of the Employer employed at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

11. Since October 28, 1991, Local 810 has been the exclusive collective-bargaining representative of the employees set forth in the appropriate collective-bargaining unit, above.

12. By the conduct set forth in paragraphs 4–9, above, the Respondent Employer has undermined the majority status of Local 810, and has precluded any likelihood that a fair election could be held.

13. Respondent Employer has violated Section 8(a)(5) and (1) of the Act since October 28, 1991, by refusing to recognize and bargain with Local 810 in the above-defined collective-bargaining unit.

14. By accepting recognition as exclusive collective-bargaining representative from the Respondent Employer on November 1, 1991, and by executing a collective-bargaining agreement on that date which contained a union-security clause, which was implemented, RWWPE violated Section 8(b)(1)(A) and (2) of the Act.

15. By its letters to employees dated December 12, 1991, advising them that they must pay their financial obligations to the RWWPE or face discharge, RWWPE violated Section 8(b)(1)(A) and (2) of the Act.

16. By receiving dues deductions from employees remitted by the Employer, RWWPE violated Section 8(b)(1)(A) and (2) of the Act.

17. Respondent Union did not engage in unfair labor practices, as alleged in the complaint, by receiving assistance and support from the Employer when the Employer (a) threatened its employees with discharge if they did not sign a card for RWWPE; (b) threatened to and withheld employees' paychecks when they refused to sign a card for RWWPE; or (c) promised to pay employees' membership dues owed to RWWPE.

18. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Employer and Respondent RWWPE have engaged in unlawful conduct under the Act, I will recommend that they cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effects of their unfair labor practices.

The Order will require Respondent Employer to withdraw all recognition from RWWPE as the collective-bargaining representative of the unit employees, and that RWWPE be ordered to cease and desist from acting as such representative.

Also the Order will require the Respondent Employer and RWWPE to cease giving force and effect to, and in any way implementing, the terms of their November 1, 1991 memorandum agreement, or the collective-bargaining agreement dated November 4, 1991. However, nothing contained herein will be construed as requiring the Respondent Employer to vary the wage, hour, seniority, or other substantive terms of employment that the Respondent Employer may have established in performance of the contract, or to prejudice the assertion by its employees of any right they may have under the contract.

In addition, inasmuch as the union-security and checkoff provisions have been implemented, the Order will require both the Respondent Employer and RWWPE, jointly and severally, to reimburse all employees for moneys paid by them, if any, or deducted from their earnings, if any, for initiation fees, dues, assessments, or other financial obligations of membership in RWWPE. Interest on such reimbursement will be computed as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As set forth above, I shall recommend that Respondent Employer be ordered to bargain with Local 810.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

A. The Respondent Employer, Baby Watson Cheesecake, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they do not sign an authorization card for Retail, Wholesale, Warehouse and Production Employees International Union.

(b) Threatening to close its factory rather than recognize Local 810, International Brotherhood of Teamsters, AFL–CIO.

(c) Threatening to close its factory if its employees selected Local 810 as their collective-bargaining representative.

(d) Threatening to withhold and withholding employee paychecks when employees refused to sign a card for RWWPE.

(e) Promising to pay employees' dues owed to RWWPE.

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[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Threatening to terminate and permanently replace unfair labor practice strikers.

(g) Recognizing RWWPE as the exclusive representative of its employees in an appropriate collective-bargaining unit, for purposes of collective-bargaining.

(h) Giving effect to its November 1, 1991 memorandum collective-bargaining agreement, or its collective-bargaining agreement effective from November 4, 1991, to November 4, 1994, with RWWPE, or to any extension, renewal, or modification thereof, however nothing in this Order shall authorize, allow, or require it to withdraw or eliminate any wage increase or other monetary benefit which may have been established pursuant to such collective-bargaining agreement.

(i) Discriminating against its employees by implementing the terms of the union-security clause in its November 1, 1991, and November 4, 1991 collective-bargaining agreements with RWWPE.

(j) In any other 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 RWWPE as the exclusive collective-bargaining representative of its employees in an appropriate collective-bargaining unit.

(b) Jointly and severally with RWWPE, reimburse all unit employees for any moneys required to be paid pursuant to the November 1, 1991 memorandum agreement, and the November 4, 1991 collective-bargaining agreement between it and RWWPE, together with interest computed as set forth in the remedy section of this decision.

(c) Recognize and on request, bargain in good faith with Local 810, International Brotherhood of Teamsters, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate collective-bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees and shipping employees of the Employer employed at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

(d) Post at its New York City copies of the attached notice marked ‘‘Appendix A.’’[17] 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 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.

(e) Post at its New York City facility and under the same conditions as set forth in (d) above, as soon as they are forwarded by the Regional Director, copies of the attached notice marked ‘‘Appendix B.’’

(f) Notify the Regional Director for Region 2 in writing within 20 days from the date of this Order what steps the Employer has taken to comply.

B. The Respondent, Retail, Wholesale, Warehouse and Production Employees International Union, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting recognition as, and acting as the exclusive collective-bargaining representative of the employees of Baby Watson Cheesecake, Inc., in an appropriate collective-bargaining unit.

(b) Giving effect to its November 1, 1991 memorandum agreement or its collective-bargaining agreement of November 4, 1991, with the Employer, or to any extension, renewal, or modification thereof.

(c) Discriminating or causing or attempting to cause the Employer to discriminate against employees in violation of Section 8(a)(3) of the Act by maintaining or implementing the terms of the union-security provision contained in its November 1, 1991 and November 4, 1991 collective-bargaining agreements with the Employer.

(d) Threatening employees that it would seek their discharge if they failed to meet their financial obligations to RWWPE.

(e) In any other 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) Jointly and severally with the Employer, reimburse all unit employees for any moneys required to be paid pursuant to the November 1, 1991 memorandum agreement, and the November 4, 1991 collective-bargaining agreement with the Employer, together with interest computed as set forth in the remedy section of this decision.

(b) Post at its offices and meeting places, copies of the attached notice marked ‘‘Appendix B.’’[18] Copies of the notice, on forms provided by the Regional Director for Region 2, after being singed by the Respondent Union’s authorized representative, shall be posted by Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to its members are customarily posted. reasonable steps shall be taken by Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 2 signed copies of ‘‘Appendix B’’ for posting by the Employer at its New York City facility, as provided above. Copies of the notice to be furnished by the Regional Director, after being signed by a representative of RWWPE, will be returned to the Regional Director for disposition by him.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

[17] 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.’’

[18] See fn. 17, above.

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.

WE WILL NOT threaten employees with discharge if they do not sign an authorization card for Retail, Wholesale, Warehouse and Production Employees International Union.

WE WILL NOT threaten to close our factory rather than recognize Local 810, International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT threaten to close our factory if our employees select Local 810 as their collective-bargaining representative.

WE WILL NOT threaten to withhold and withhold employee paychecks when employees refuse to sign a card for RWWPE.

WE WILL NOT promise to pay employees' dues owed to RWWPE.

WE WILL NOT threaten to terminate and permanently replace unfair labor practice strikers.

WE WILL NOT recognize RWWPE as the exclusive representative of our employees in an appropriate collective-bargaining unit, for purposes of collective-bargaining.

WE WILL NOT give effect to our November 1, 1991 memorandum collective-bargaining agreement, or our collective-bargaining agreement effective from November 4, 1991, to November 4, 1994, with RWWPE, or to any extension, renewal, or modification thereof, however nothing herein shall authorize, allow or require us to withdraw or eliminate any wage increase or other monetary benefit which may have been established pursuant to such collective-bargaining agreement.

WE WILL NOT discriminate against our employees by implementing the terms of the union-security clause in our November 1, 1991, and November 4, 1991 collective-bargaining agreements with RWWPE.

WE WILL NOT in any other 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 RWWPE as the exclusive collective-bargaining representative of our employees in an appropriate collective-bargaining unit.

WE WILL jointly and severally with RWWPE, reimburse all unit employees for any moneys required to be paid pursuant to the November 1, 1991 memorandum agreement, and the November 4, 1991 collective-bargaining agreement between us and RWWPE, together with interest.

WE WILL recognize and on request, bargain in good faith with Local 810, International Brotherhood of Teamsters, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate collective-bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All our production and maintenance employees and shipping employees employed at our facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

BABY WATSON CHEESECAKE, INC.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT accept recognition as, and act as the exclusive collective-bargaining representative of the employees of Baby Watson Cheesecake, Inc., in an appropriate collective-bargaining unit.

WE WILL NOT give effect to our November 1, 1991 memorandum agreement or our collective-bargaining agreement of November 4, 1991 with the Employer, or to any extension, renewal, or modification thereof.

WE WILL NOT discriminate or cause or attempt to cause the Employer to discriminate against employees in violation of Section 8(a)(3) of the Act by maintaining or implementing the terms of the union-security provision contained in our November 1, 1991, and November 4, 1991, collective-bargaining agreements with the Employer.

WE WILL NOT threaten employees that we would seek their discharge if they failed to meet their financial obligations to us.

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

WE WILL jointly and severally with the Employer, reimburse all unit employees for any moneys required to be paid pursuant to our November 1, 1991 memorandum agreement, and our November 4, 1991 collective-bargaining agreement with the Employer, together with interest.

RETAIL, WHOLESALE, WAREHOUSE AND PRODUCTION EMPLOYEES INTERNATIONAL UNION