

County Waste of Ulster, LLC and Laborers International Union of North America, Laborers Local 108, AFL-CIO and Local 124, R.A.I.S.E., IUJAT, Party in Interest.

County Waste of Ulster, LLC and Laborers International Union of North America, Laborers Local 108, AFL-CIO, Petitioner, and Local 124, R.A.I.S.E., IUJAT, Intervenor. Cases 2-CA-37437 and 2-RC-22858

February 11, 2009

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On May 9, 2007, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent and the Party-in-Interest (Local 124, R.A.I.S.E., IUJAT) filed exceptions and supporting briefs; the General Counsel and Charging Party Laborers International Union of North America, Laborers Local 108, AFL-CIO filed answering briefs; and the Respondent and the Party-in-Interest filed reply briefs.

The National Labor Relations Board¹ 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, Order, and Direction of Second Election.

The judge found that the Respondent engaged in objectionable conduct by granting a Christmas bonus to its employees, and that it violated Section 8(a)(2) of the Act by allowing Local 124 to distribute the bonus to employees. We adopt these findings for the reasons set forth in the judge's decision.

The judge also found that the Respondent's grant of the bonus violated Section 8(a)(1) of the Act. However, unlike the 8(a)(2) distribution violation, the grant of bonus was not alleged as a 8(a)(1) violation in the com-

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

² The Respondent 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.

plaint; it was alleged only as an election objection. In finding the Section 8(a)(1) violation, the judge did not mention the absence of a complaint allegation and consequently did not make the determination critical to finding an unalleged violation—whether the issue was “closely connected to the subject matter of the complaint and [was] fully litigated [at the hearing].” *Pergament United Sales*, 296 NLRB 333, 334 (1989).

Because of these omissions, we shall remand this issue to the judge to clarify whether he intended to find an unalleged violation and, if so, whether the finding is warranted under *Pergament*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, County Waste of Ulster, LLC, Montgomery, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assisting Local 124, R.A.I.S.E., IUJAT (Local 124), by allowing Local 124 to distribute bonuses to employees on company time and premises in order to influence them to vote for Local 124 instead of Laborers International Union of North America, Laborers Local 108, AFL-CIO.

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

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

(a) Within 14 days after service by the Region, post at its facilities in Montgomery and Kingston, New York, copies of the attached notice marked “Appendix.”³ 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 insure 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 facilities involved in these proceedings, it 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 December 1, 2005.

³ 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.”

(b) 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.

IT IS FURTHER ORDERED that the finding in Case 2-CA-37437 that the Respondent's grant of a bonus violated Section 8(a)(1) of the Act is severed and remanded to Administrative Law Judge Raymond P. Green for the purposes described above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the applicable decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the election held in Case 2-RC-22858 is set aside and that Case 2-RC-22858 is severed from Case 2-CA-37437 and remanded to the Regional Director for Region 2 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

APPENDIX

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 assist Local 124, R.A.I.S.E., IUJAT (Local 124), by allowing Local 124 to distribute bonuses to you on company time and premises in order to influence you to vote for Local 124 instead of Laborers International Union of North America, Laborers Local 108, AFL-CIO.

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

COUNTY WASTE OF ULSTER, LLC

Allen M. Rose, Esq., for the General Counsel.
Stuart Weinberger, Esq., for the Respondent.
Haluk Savci, Esq., for Local 108.
Stephen Goldblatt, Esq., for Local 124.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on October 31, November 21 and 22, and December 18, 2006, and March 13, 2007. The charge was filed on January 17 and amended on February 16, 2006. The complaint, which issued on July 31, 2006, alleged as follows:

1. That in December 2005, the Respondent by Ernie Palmer, its Operations Manager (a) created an impression that its employees' union activities were being surveilled and (b) told employees that it would be futile to select Local 108 as their collective-bargaining representation.
2. That during the period from November 2005 through January 2006, the Respondent rendered assistance to Local 124 by (a) allowing agents of Local 124 to distribute employee bonuses, holiday turkeys, and other gifts to employees, and (b) instructing employees to vote for Local 124.
3. That on or about January 12, 2006, the Respondent, for discriminatory reasons, discharged Michael Schiavone.

The unfair labor practice case is consolidated with a representation case in 2-RC-22858. The petition in that case was filed in May 2004. A Stipulated Election Agreement was approved on November 23, 2005, and an election was held on January 6, 2006. The unit consisted of:

All full-time and regular part-time drivers, helpers, mechanics and mechanic helpers employed by the Employer at its Montgomery and Kingston, New York facilities, excluding all other employees, guards, professional employees and supervisors as defined in the Act.

The tally of ballots showed that there were about 35 eligible voters and that of the votes cast, 7 were for Local 108, 21 votes for Local 124, and 1 for no union.

Objections to the Election were timely filed by the Petitioner, Laborers International Union of North America, Laborers Local 108, AFL-CIO. The Objections referred for hearing are mostly the same allegations that are contained in the unfair labor practice complaint. In substance, the objections that were sent to hearing¹ are as follows:

That the Employer engaged in the following conduct:

1. Assisted Local 124 by providing Christmas bonuses at the end of November 2005 and allowing agents of Local 124 to distribute those checks at the facility, accompanied by a letter urging the employees to vote for Local 124;
2. Assisted Local 124 by allowing its representatives to dis-

¹ Local 108 withdrew Objections 5, 7; and 8(a) through (c).

tribute free turkeys, T-shirts and sweatshirts that contained stickers urging employees to vote for Local 124;

3. Assisted Local 124 by allowing its observer to distribute free coffee and donuts at the election;

4. Assisted Local 124 by allowing its representatives to distribute health insurance cards on its premises;

5. Assisted Local 124 by continuing to deduct union dues for Local 124 from employees' paychecks during the month of December 2005;

6. Assisted Local 124 by (a) failing to notify employees that it had withdrawn recognition from Local 124 as called for in a settlement agreement; (b) by informing employees that Local 124 was the incumbent union; by maintaining notices that employees should consult with the Local 124 shop steward regarding work place issues; and (c) by continuing to maintain health insurance for employees through the Local 124 health plan and not providing notice to the employees that they had the option of choosing alternatives as detailed in the settlement agreement;²

7. Interrogated employees about their union preferences;

8. That the Employer and Local 124 agents coerced and intimidated employees by creating a gauntlet for employees to pass through on the way to the polling area;

That Local 124 by its agents engaged in the following objectionable conduct:

1. Mailing to each employee's home a gift food basket with accompanying correspondence thanking employees for "their support;"

2. Distributing free sweatshirts and turkeys to employees at the employer's facility;

3. Inviting employees to a meeting where free food, alcohol, and entertainment were provided;

4. Distributing health insurance cards to the employees;

5. Distributing free coffee and donuts at the election;

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following findings and conclusions.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

a. Background

County Waste is a company that is engaged in removing waste from residences. The Company maintains its main office

in Clifton Park, New York, and operates one facility in Montgomery, New York, and another facility in Kingston, New York.

At the Montgomery facility, the Company employs about 20 to 30 drivers and helpers. At the Kingston facility, the Company employs about 10 drivers and helpers. At Clifton Park, the Company employs about another 100 employees, but those employees are not part of the unit involved in the present case.

The president of the Company is Scott Earl and he has a partner named David Fusca. The Company's manager is Ernest Palmer Jr. At the time of many of the events in this case, Carson Lyons was the assistant manager who directly supervised the employees at the Montgomery facility.

It should be noted that Carson Lyons, who was called as a witness by the General Counsel and who was hired as a driver in 2003 had been promoted to assistant manager in or about January or February 2005. He remained in that position until he quit in December 2005. In January 2006, and after the election, he returned to work as an ordinary driver. He therefore was not present during most of the election campaign and missed some of the events that are discussed here. I should also note that I thought that Mr. Lyons was a credible witness whose testimony was impartial.

The Montgomery facility opens at about 3 a.m. and the drivers, including Lyons who also takes a route, are out on the road throughout the day. The only person who remains in the facility is the woman who acts as a dispatcher and who is the conduit between customers, drivers, and the supervisor of the facility. For most of the day, there is no supervisory person present at the facility.

According to Michael Hellstrom, the business manager of Local 108, his union began organizing in the winter or early spring of 2004. In this effort, he testified that union representatives spoke to employees at the Company's parking lot.

After filing a representation petition on June 4, 2004, Local 108 was notified that the Company had extended recognition to Local 124 and that a contract executed between the Company and Local 124 was being raised as a bar to an election. Consequently, on June 17, 2004, Local 108 filed an unfair labor practice charge in Case 2-CA-36340 alleging that the recognition of Local 124 was a violation of Section 8(a)(2) of the Act. The Region issued a complaint based on that charge on June 28, 2005.

In the latter respect, the evidence shows that in 2004 the Company recognized and entered into a collective-bargaining agreement with Local 124 covering its drivers and helpers at two of its facilities. That contract ran from June 1, 2004, to May 31, 2007.

According to Hellstrom, Local 108 resumed organizing activity in the spring of 2005. He testified that they went out to transfer stations where the drivers of the Company went to dump their loads.

Hellstrom testified that between July and September 2005, Local 108 conducted demonstrations in front of the Company's facility in Montgomery, New York. However, these demonstrations were not, as far as I know, participated in by the Company's employees. They were carried out by union members

² As to item f, the General Counsel amended the complaint at the hearing on December 18, 2006. As I understand it, the GC is not alleging anymore that the Company violated Sec. 8(a)(2) of the Act by continuing to maintain health insurance for its employees through the Local 124 Health plan and by not providing notice to the employees that they had the option of choosing alternatives.

employed at other companies.³

The allegations of the aforesaid complaint were settled and as part of the settlement, a Stipulated Election Agreement was agreed to in the representation case. The terms of a settlement were agreed to on or about November 21, 2005, and the settlement documents were signed on November 23.

Hellstrom testified that once the settlement was reached, he went out to the Montgomery facility on the following Monday at 3 a.m. to hand out leaflets to drivers as they were coming to work. He states that after that, he went to the Company facility about five times after the settlement and before the election.

According to Hellstrom, he and another organizer, Manuel Escobar, visited many of the employees' homes during the period before the election, but did not hold any group meetings with employees. During these one-on-one visits, they were told that one of the employees' major concerns was health insurance and that he (Hellstrom), talked about the advantages of the Local 108 health plan. Escobar talked to the Spanish-speaking employees.

Based on the testimony of Hellstrom, it appears that the employees of County Waste although solicited to join or vote for Local 108, played virtually no role as active participants in Local 108's campaign. In this regard, Hellstrom and Escobar tried to talk fleetingly to employees as they came into work in the early hours of the morning or when they arrived at transfer stations. They mailed out literature to employees and also visited employees individually at their homes.⁴

b. Alleged preelection assistance in favor of Local 124

The General Counsel alleges that the Respondent gave illegal assistance to Local 124 shortly after the parties had settled the previous unfair labor practice case and had set up the election for January 2006. In particular, the General Counsel alleges that the Respondent violated Section 8(a)(1) and (2) by allowing Local 124 to distribute turkeys, bonuses, and insurance cards on its premises.

In prior years, the Company had given out turkeys at Thanksgiving and Christmas bonuses at the end of the year. However, when it entered into a collective-bargaining agreement with Local 124, it did not pay the bonus in 2004. Nor did it distribute turkeys in 2004.

The evidence shows that in late November 2005, representatives of Local 124 came to the Montgomery facility and distributed turkeys. (Thanksgiving was on November 24, 2005, and it appears that the turkeys were paid for by Local 124.) The evidence shows that there were no supervisory people at the premises when this was done. When Palmer arrived later in the day, he told the Local 124 representatives to leave.⁵

³ I suspect that these activities prompted the Company and Local 124 to seriously consider settling.

⁴ Because the employees take their trucks out soon after arriving at the facility at around 3 a.m. and return from their routes on a staggered basis during the course of the day, they do not get much of a chance to see each other.

⁵ The Respondent points out that in accordance with the collective-bargaining agreement that was still in effect at the time, Local 124 had the right to visit the shop. Under the terms of the previous unfair labor

Company President Scott Earl testified that in December 2004, he received a phone call from Ernie Palmer who said that the men were up in arms because they hadn't received a Christmas bonus. Earl states that he told Palmer to tell the employees that they should take the matter up with Local 124 because they had chosen to be represented by that Union and Christmas bonuses were not included in the contract.

Earl testified that in April, May, and June, he sat down with Local 124 to talk about that Union's request that the Company join the Union's Health Insurance Plan. (At that time, the employees were covered by a Blue Cross/Blue Shield plan.) Earl also testified that during these mid-term contract negotiations, the Union also pressed him to restore the Christmas bonuses.

According to Earl, the result of these negotiations was that he agreed to substitute the Union's health insurance plan *and* he also agreed to pay a Christmas bonus in 2005 in the amount of 1 week's pay. The agreement regarding the health insurance is evidenced by a written modification to the collective-bargaining agreement. The purported agreement regarding the bonuses is not. Nor were the employees notified, at the time that this alleged agreement was made, that they were going to receive the bonuses. It was not until the bonuses were distributed in late November 2005 that the employees realized that they were going to receive a Christmas bonus.

I strongly suspect and would conclude based on the circumstances, that the Company and Local 124 made an agreement to pay the Christmas bonuses at or after they had decided to settle the pending 8(a)(2) allegations, which thereby resulted in the withdrawal of recognition of Local 124. The concomitant consequence of that withdrawal of recognition was that Local 124 would, pending the outcome of the election, no longer have the status of an incumbent union. Moreover, I would also conclude that the agreement to pay the bonuses that were equivalent to a pay raise of about 2 percent for the year was motivated by the desire to influence the outcome of the election in favor of Local 124.

Some of the employees may have received these bonuses by direct deposit. But others received them in envelopes distributed at the Company's facility by Local 124 agents. Enclosed with the checks was a written notice dated November 30, 2005, stating:

Enclosed please find your 2005 Holiday Bonus Check
As some of you know, Local 124 IUJAT had been negotiating for a bonus with the Employer for several months and finally obtained this benefit for you and your families. Several of you expressed concern that the bonus would be cancelled due to the coming election with Local 108; however, we have convinced the Company to honor the commitments it made to our members prior to Local 108's interference. We hope the coming campaign and election will not be too disruptive and we wish you all a happy and health holiday.

In addition to the turkey and bonus issues, the General Counsel also contends that the Respondent gave unlawful assistance to Local 124 when in December 2005, it allowed representa-

practice settlement that contract was not nullified until December 2, 2005.

tives of that union to come into its premises to distribute insurance cards.

Unlike the Christmas bonuses, no one disputes that the Company and Local 124 had entered into a mid-term modification of the contract some time in the spring of 2005, whereby the employees would be covered by that Union's insurance program.⁶ Moreover, under the terms of the previous settlement, although Local 124's contract was required to end on December 2, 2005, the employees were covered by that Union's health plan until January 1, 2006. As such, I cannot see how there can be anything unlawful in allowing Local 124 representatives to come to the facility to distribute insurance cards. I also see nothing particularly troublesome about the assertion that they handed out union T-shirts or sweatshirts at the same time.

c. Other preelection conduct

Schiavone testified that about 2 or 3 weeks before the election, Ernie Palmer told him that he heard that Schiavone was leaning towards Local 108 and asked if he was "steering towards Local 108." He asserts that Palmer stated that Local 108 would not get a contract through County Waste and that "they" would kill us on dues and initiations. According to Schiavone, Palmer said that they should keep this conversation between themselves and that he asserted that they, (presumably Local 108), would make promises but give you nothing. Finally, Schiavone states that Palmer told him "to go the right way; that 124 is a better union."

This alleged conversation between Palmer and Schiavone was not corroborated by anyone else as there was no-one else present. But additionally, there is no evidence that any other employees had any similar conversations with Palmer or any other supervisors of the Respondent. Given the lack of evidence showing at least one other similar transaction with other employees and given the fact that Schiavone did not, in fact, engage in any union activities that might have been noticed by or reported to management, this entire alleged transaction seems to me to be highly improbable and is not credited. Thus, although it would make sense for Palmer to talk to the employees and make a legally permitted expression of preference for one union over another, it seems to me that it is completely implausible that Palmer would have said that he heard that Schiavone was steering towards Local 108 when there was no way that he could have known this.⁷

d. The discharge of Schiavone

Michael Schiavone was hired by Carson Lyons on March 25,

⁶ Previously, the employees had gotten individual coverage, at company expense, under the Company's Blue Cross/Blue Shield plan but had to pay \$300 of their own money if they chose to have family coverage. Under the terms of the contract modification, the Company agreed to contribute to the Union's Health Care Plan which provided certain health benefits to the employees completely at company cost.

⁷ Carson Lyons testified that in the early autumn of 2005, Ernie Palmer told him that if Local 108 got in, he was going to shut the doors or going to change the name of the Company. Assuming this to be true, it would not constitute a violation of Sec. 8(a)(1) because at the time, Lyons was a 2(11) supervisor and there is no evidence that Lyons transmitted this statement to any of the employees.

2005. The evidence shows that Schiavone did *not* engage in any kind of solicitation on behalf of Local 108. Nor is there any evidence that he engaged in any other type of union activity other than stopping by the gate for a few minutes on the few occasions when union representatives were stationed there in the predawn hours of the morning. There is no evidence that he solicited other employees to support Local 108 or that even talked to other employees about Local 108. I don't even know if he signed a Local 108 authorization card.

During the course of his employment, Schiavone had difficulty arriving to work on time. (His starting time was 3 a.m.) According to Carson Lyons, he gave a verbal warning to Schiavone at which time Schiavone asserted that he had difficulty sleeping at night because of a medication that he was taking. Lyons testified that he told Schiavone that if that was the problem, then he would have to get a doctor's note. Schiavone never did provide a doctor's note and continued to come in anywhere from 45 minutes to an hour late.

During the same period of time there were other drivers who also were coming in late including Bob Pesce, Anthony Hingul, and Kevin Zenninger. According to Lyons, during the course of 2005 when he complained to Palmer about these people not coming in on time, Palmer failed to approve any disciplinary action against them. (Hingul was Local 124's shop steward and acted as that Union's observer at the election).

Also during his employment, Schiavone was involved in a couple of minor accidents. On one occasion, he hit some mailboxes and on another occasion, he scraped the side of a car and caused some minor damage to the car's fender. On a third occasion, Schiavone pulled out in front of a car that ran into him. With respect to accidents, Schiavone was not unique and there were some other drivers who had worse accidents and who continued to be employed. One example was Jack Gady, who according to Lyons, had five accidents and did a lot of damage.

In September or October 2005, Lyons transferred Schiavone to an automated truck that had an arm used to pick up garbage pails. The Company contends that in doing his route, Schiavone, as a general rule, took longer than what the route required.

According to Lyons, he decided to quit in December 2005 because his job as the manager of the Montgomery facility had become too stressful. He testified that he quit because the drivers were not coming to work on time and because he had to stay too late waiting for them to return. (In addition to being the facility's supervisor, Lyons also drove a route). According to Lyons, it was not just Schiavone, "it was everyone." From his testimony, the implication is that many of the drivers, including Schiavone, were not performing their jobs well and that he was not getting any significant support from Ernie Palmer who was unwilling to impose discipline. (Respondent's Counsel suggests that a reason for this was that the contract with Local 124 had a grievance and arbitration procedure and this would likely make the Company overly cautious in terms of imposing discipline).

In any event, when Lyons quit, Palmer took over the day-to-day supervision of the Montgomery facility. This meant, among other things, that he had to be there until the last truck arrived back at night. On several Fridays in December 2005,

Schiavone arrived back from his route well after 5 p.m. This meant that Palmer, with increasing aggravation, remained at the facility until after Schiavone returned. My impression is that Palmer was not so tolerant of the drivers when he had to remain at the facility for them to return.

With respect to the route driven by Schiavone (Route 66), the Respondent offered evidence showing that Lyons took over this route in January 2006 and took far less time than Schiavone to do the route.

Schiavone testified that on the day before he was fired, Palmer asked him if he could be on time. Schiavone states that he responded that he would do the best he could. On the next day, according to Schiavone, Palmer told him that although he didn't know why, he, (Schiavone), had pissed off Scott Earl and that he wanted Palmer to let him go. According to Schiavone, when he asked why, Palmer said that it was because of Schiavone's accident history and lateness's and that Scott "just got a hard-on for you."

Palmer testified that he was fed up with Schiavone's lateness's and lack of productivity and found out in early January 2006, that Carson Lyons was interested in coming back as a driver and not as a supervisor. Palmer testified that with this in mind, he decided to let Schiavone go and replace him with Lyons.

So what happened to some of the other drivers?

Anthony Hingul, who was the shop steward for Local 124, was discharged in January or February 2006 when he failed to pass a drug test. According to Lyons he made several recommendations to Palmer in 2005 that Hingul be fired. He also testified that on one occasion after recommending that Hingul be discharged, Palmer agreed to suspend him for 3 days.

Bob Pesce was described by Lyons as having the worst tardiness record. He testified that on one occasion while driving his route, Pesce refused to complete it and quit on the spot. Lyons testified that when Pesce asked for his job back, he was refused. I should note that Lyons testified that he had recommended to Palmer that Pesce be fired before this incident but that Palmer didn't go along. He testified that Pesce would improve after Palmer talked to him, but then revert to his practice of coming in late. Lyons also testified that Palmer was a friend of Pesce.

Kevin Zenniger was described by Lyons as having a bad attitude, although being a good worker when he came to work. Lyons testified that Zenniger was fired in the summer of 2005 after hitting a car in a culdesac.

Ed Hennee, a recycling driver, had an accident where he ran off the road after which he was discovered to have sleep apnea. As a result, Hennee was transferred to the Kingston facility where he was made a helper instead of a driver. According to Lyons, the Company wanted to make sure that he was a competent driver before he killed someone.⁸

Keith Cummings was, according to Lyons, a driver who did route 66 before Schiavone. According to Lyons, Cummings

would start his route late and return late. Lyons testified that he decided to go out to the route and discovered that Cummings was sleeping in the truck. He fired him on the spot. This took place in the summer of 2004.

Jack Gady, according to Lyons, had at least five accidents and has remained on the job. According to Lyons, the Company wanted to keep him and they needed the manpower.

e. Objections to the election

To an extent, Local 108's objections overlap with the General Counsel's unfair labor practice allegations. These would include an allegation of interrogation that would be encompassed by the testimony given by Schiavone regarding his alleged conversation with Palmer in December 2005. Other overlapping allegations are that the Employer unlawfully assisted Local 124 by (a) allowing representatives to hand out turkeys on its premises, (b) allowing them to distribute insurance cards on its premises, and (c) allowing them to distribute bonus checks.

Local 108 made additional allegations that are noted at the outset of this Decision. In support of those allegations I note the following:

The evidence demonstrated that in December 2005, Local 124 sent gift baskets of food to the employees at their homes. The value was not determined.

The evidence shows that prior to the election, Local 124 representatives appeared at the Montgomery facility and distributed Local 124 T-shirts or sweatshirts.

The evidence shows that prior to the election, Local 124 invited employees to a restaurant after working hours and paid for food and drinks.

The evidence shows that at the election, Hingul, Local 124's observer, offered employees free coffee and donuts.

The evidence shows that at the beginning of December 2005, the Employer deducted union dues for that month notwithstanding that pursuant to the settlement agreement, the Employer and Local 124 had agreed that their contract would be nullified as of December 2, 2005. However, the evidence also indicates that this was a bookkeeping error and the parties agree that the money was refunded to the employees.

There is some evidence that the Employer did not affirmatively notify its employees that it had withdrawn recognition from Local 124 or that the employees had a number of options regarding health insurance coverage. The Settlement Agreement required the Company to send a letter to the employees notifying them of certain matters contained in Appendix B to the Settlement and did not require it to make any other specific notifications.⁹ As far as I know, the Respondent complied with the requirement that it mail copies of Appendix B to its em-

⁸ I note that if Schiavone was taking medication that made it difficult for him to get an adequate amount of sleep, I don't think that it would be all that advisable for him to be operating a large truck on country roads.

⁹ Appendix B states in pertinent part: "On January 6, 2006, an election shall be conducted by the . . . NLRB. . . . In this election, employees will have the right to vote for either Local 124, Local 108, or neither labor organization As of December 2, 2005, the Employer has withdrawn recognition from Local 124. This action has been taken by the Employer in order to resolve a Complaint issued by the Board in Case 2-CA-36340. In agreeing to have an election to resolve the NLRB Complaint, the Employer denies that it has engaged in any wrong doing or unlawful conduct."

ployees. Additionally, there was nothing to prevent Local 108 from notifying the employees of the basic terms of the settlement including that portion of the agreement whereby the employees could have a choice of options regarding health insurance. I also presume that in accordance with normal election practices, all parties were given an “*Excelsior* List” containing the names and addresses of the eligible voters.

There was insufficient evidence to establish that Local 124 or company representatives formed a gauntlet or otherwise impeded employees from going into the facility to cast their ballots.

Analysis

As discussed above, I have decided that I would not credit Schiavone’s testimony regarding his alleged conversation with Palmer in December 2005. Therefore I shall dismiss those aspects of the complaint that allege that the Respondent (a) created an impression that its employees’ union activities were under surveillance and (b) that Palmer told employees that it would be futile to select Local 108 as their collective-bargaining representation.

In my opinion, the General Counsel has failed to make out a prima facie case that Schiavone was discharged because of any union activities on his part or because the Respondent perceived that he was engaged in union activity. The fact is that Schiavone did not engage in union activities. That he, like other drivers, may have stopped on his way in to work to talk to Local 108 representatives, is not significant. This type of activity is hardly unusual and it is unlikely that it would have been much noticed as it would have taken place before dawn.

The bottom line is that Schiavone did not engage in any union activity and there is no credible evidence that the Company’s supervisors or managers were aware of his nonexistent activity or that they believed that he was engaged in such activity.

On the other hand, the Respondent presented evidence that Schiavone was constantly late to work, that he had some accidents and that he took an inordinate amount of time to complete his route. In particular, the evidence shows that in December 2005, he often returned late to the facility and that this resulted in Earl Palmer (who took over supervision from Lyons), having to stay late.

The General Counsel claims that Schiavone was treated disparately from other employees. But for this argument to have weight it has to be buttressed by at least some evidence, either direct or circumstantial, that could reasonably lead me to infer that the Respondent’s motivation was discriminatory within the meaning of Section 8(a)(1) and/or (3) of the Act. As I have concluded that Schiavone did not engage in union activity and that there is insufficient evidence to show that the Respondent entertained a belief that he was engaged in union activity, the question of disparate treatment has little impact.¹⁰

¹⁰ Moreover, I do not think that the evidence is particularly persuasive in showing disparate treatment. At various times the Respondent was either strict or lenient. In December 2005 and January 2006, it seems that the Respondent was a bit more fed up with its employees and decided to crack the whip. Thus, in addition to Schiavone, Hingul who was the shop steward for Local 124, was also discharged.

Based on the evidence I therefore conclude that the General Counsel has not sustained his burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

I would not conclude, based on this record, that the Respondent violated Section 8(a)(2) of the Act merely by evidence showing that in late November 2005, Local 124 representatives, apparently on their own initiative, showed up at the Montgomery facility and handed out frozen turkeys. Nor would I find a violation based on the evidence that in December 2005, Local 124 representatives arrived at the facility to hand out insurance cards and T-shirts. These action are, in my opinion, trivial and in the case of the insurance cards, the General Counsel essentially concedes that the Respondent did not violate the Act by continuing to pay into Local 124’s health plan at least for the month of December 2005. Nor does he challenge the evidence that the Company and Local 124 lawfully modified the existing collective-bargaining agreement so that the employees in the bargaining unit would be transferred from the Company’s health insurance to Local 124’s health plan.

The Christmas bonuses are an altogether different story.

At the outset it should be noted that the Christmas bonuses were worth the equivalent of a little less than a 2-percent pay increase for 2005. This cannot be construed as a trivial or insubstantial benefit.

Scott Earl testified that at some point in 2005, Local 124 representatives asked to modify the collective-bargaining agreement made in 2004. He states that negotiations took place around April or May 2005 and that the main issue was health insurance. (As noted above, Local 124 wanted the Company to provide health insurance through Local 124’s plan). Earl testified that in addition to the health insurance issue, Local 124 insisted that the Company restore the Christmas bonuses that it had normally given prior to the 2004 contract. According to Earl, he entered into an agreement with Local 124 on both issues and agreed that the employees would get a Christmas bonus at the end of the year.

Unlike the insurance substitution, which was memorialized as a written addendum to the collective-bargaining agreement, the agreement on the bonuses was not reduced to writing. Moreover, the evidence shows that at the time of the alleged agreement, the employees were not notified that their Christmas bonuses were being restored. Indeed they received no notice of this until November 30, 2005, about 1 week after the parties agreed to hold an election on January 6, 2006. Moreover, the letter that was given out by Local 124 regarding the bonus was clearly related to the upcoming election as it asserted that this was a benefit obtained through Local 124’s efforts and prior to Local 108’s “interference.”

Benefits granted upon the advent of a union organizing campaign (assuming the Employer is aware of it), creates a presumption that they are granted to influence employees to withhold their support for unionization. *Yoshi’s Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1344 (2000); *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp.*, 298 NLRB 439, 443 (1990). To rebut this presumption, an Employer must establish a legitimate explanation for the timing of the grant of benefits and this usually consists of evidence that they were part of an

existing practice or that they were planned beforehand. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *Baltimore Catering Co.*, 148 NLRB 970 (1964). An employer cannot grant benefits when an election is pending without facing the presumption that it has violated the Act.

Moreover, even where benefits have been previously planned, an employer may violate the Act, if the timing of the announcement is designed to influence an election. *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002).

Another general rule is that in the absence of unlawful interference, an employer can express a preference for one union over another. *Alley Construction Co.*, 210 NLRB 999 (1974); *Plymouth Shoe Co.*, 182 NLRB 1 (1970). However, the case law is that where there are two unions competing, an employer may not assist one by means which are coercive or discriminatory. For example, an employer will violate the Act if it discriminatorily applies a no-solicitation rule against supporters of one union as opposed to the supporters of the other. *Davis Supermarkets*, 306 NLRB 426 (1992), affd. 2 F.3d 1162 (1993) cert. denied 511 U.S. 1003 (1994), and *M.K. Morse Co.*, 302 NLRB 924 (1991). In *Windsor Castle Health Care Facilities*, 310 NLRB 579 (1993), enf'd. as modified 13 F.3d 619 (2d Cir. 1994), the Board held that the employer violated Section 8(a)(1) and (2) when it hired an organizer from one union to do "sham" work in order to facilitate that Union's organizing campaign. And in *Duane Reade Inc.*, 338 NLRB 943 (2003), the Board held that the employer provided unlawful assistance when it provided meeting space on company time to representatives of a preferred union contrary to its own no-solicitation policy and required employees to attend that union's meetings on company time and denied equal access to a rival union.¹¹

On the other hand, where there is a legitimate incumbent union, an employer is free to negotiate with it for a new collective-bargaining agreement even after a rival union has filed a representation petition and when an election is pending. The Board adopted this rule even though the effect may likely favor the incumbent union.¹² Thus in *RCA del Caribe*, 262 NLRB 963 (1982), the Board overruled *Midwest Piping*, 63 NLRB 1060 (1945), and held that the mere filing of a representation petition by an outside union does not require an employer to withdraw from bargaining with an incumbent union. The majority stated that to prohibit negotiations until the Board ruled on the results of an election could work an undue hardship on employer, unions, and employees. They concluded that the *Midwest Piping* doctrine did not give adequate weight to the

¹¹ However, in *Tecumseh Corrugated Box Co.*, 333 NLRB 1 (2001), the Board held that the employer did not violate the Act even though it permitted union agents to address employees on company time and premises when it advised the employees that they were free to choose. In *Detroit Medical Center Corp.*, 331 NLRB 878 (2000), the Board held, in the context of an Objections case, that an employer does not have the affirmative duty to notify a rival union that it has granted access to the other where one union has requested access and the other has not.

¹² Assuming that an employer wanted to keep its relationship with an incumbent union, there would be a strong incentive to offer contract terms that were more favorable to the voters than might otherwise be the case if there was no rival union waiting in the wings.

Act's concern for the stability of existing collective-bargaining relationships. The Board majority also noted that in these types of circumstances, the employer cannot maintain strict neutrality and that a withdrawal from negotiations with an incumbent union would signal repudiation of the incumbent and favoritism towards the rival union. Finally, the majority asserted that changing economic circumstances might require immediate changes in working conditions that would be barred by precluding negotiations pending the ultimate outcome of an election.¹³

Under *RCA del Caribe*, the employer and a legitimately recognized incumbent union can enter into collective bargaining even though a petition has been filed by a rival labor organization, unless as described in *The Maramont Corp.*, the employer has actual knowledge that the incumbent no longer represents a majority of his employees.

The Company argues, but Local 124 failed to corroborate, that an agreement was made in the Spring of 2005 to restore the Christmas bonuses in 2005. But that "agreement" was not reduced to writing and was not announced to the employees until after the parties to this case had agreed to hold an election in January 2006. Thus, the employees first became aware of this "agreement" on or about November 30, 2005, when representatives from Local 124 were allowed to pass these bonuses out to employees in envelopes that also contained the message that Local 124 was able to get these bonuses for the employees and that they should therefore vote for Local 124 and against outside interference.

Even assuming that the Employer and Local 124 entered into an agreement some months before November 2005, and even assuming that such an agreement would have been within their lawful authority because of the incumbent status of Local 124, the first announcement of the bonus was made only after the execution of an election agreement and was distributed during the period between the signing of election agreement and the election itself. I have no doubt that the timing of this announcement was designed to influence the employees to vote for Local 124 and not for Local 108. If, as contended, the agreement was made in the Spring of 2005, why weren't the employees notified of it at that time? And if not, why couldn't the bonus be paid after the election?

Nevertheless, I don't even believe that the agreement to pay these bonuses was made in the Spring of 2005. I think it is highly probable that such an agreement was made when it was becoming more and more obvious that the Employer was going to be forced to withdraw recognition from Local 124 and go to an election. An unfair labor practice had already been issued alleging that the Employer's recognition of Local 124 was unlawful. Local 108 was putting pressure on the Employer by engaging in demonstrations at its facilities. And by November 21, the Employer and Local 124 finally agreed to revoke Local 124's contract and recognition in consideration for settling the

¹³ However in *The Maramont Corp.*, 317 NLRB 1035 (1995), the Board held that the Employer was required to withdraw recognition after it receives knowledge that the incumbent union no longer represents a majority. In that case, the outside union sent a petition signed by a majority of the employees stating that they no longer wished to be represented by the incumbent union and demanded that the employer cease negotiations.

pending unfair labor practice complaint. Therefore, as of November 21, and no doubt for some time before that date, both the Employer and Local 124 must have concluded that they would not continue their collective-bargaining relationship. As such, Local 124 ceased being the “incumbent” union and therefore no longer had the legal advantage of non-neutrality that is permitted by *RCA del Caribe*. The reasons for giving Local 124 that legally recognized advantage no longer existed and there was no legitimate public policy reason why the Employer should be able to favor Local 124 by making a deal with it whereby the eligible voters would receive a wage increase shortly before the election.

I therefore conclude that by granting a bonus to the employees while the election was pending, the Respondent violated Section 8(a)(1) of the Act because the granting of that benefit was designed to influence the outcome of the election. Moreover, as I conclude that this bonus was the result of an agreement with Local 124 and was designed to influence the employees to vote for Local 124 and against Local 108, I conclude that the bonus and the announcement of the bonus constituted a violation of Section 8(a)(2) of the Act.

Finally, I conclude that the granting and announcement of this bonus constituted substantial interference with the election and therefore I sustain Objection 1 and recommend that the election be set aside and a new election be conducted.¹⁴

¹⁴ Having sustained Objection 1, it is not necessary to reach conclusions on the other Objections. However, I note the following: In *RL White Co.*, 262 NLRB 575 (1982), the Board held that the distribution of T-shirts by a party to an election as part of its campaign propaganda is not objectionable or coercive. See also *NLRB v. Coca-Cola Bottling Co.*, 132 F.3d 1001, 1005 (4th Cir. 1997). In *Jacqueline Cochrane Inc.*, 177 NLRB 837 (1969), the Board held that it was not objectionable for a union to distribute turkeys to employees before an election. In *Chi-*

CONCLUSIONS OF LAW

1. By granting bonuses to its employees while an election was pending and by allowing Local 124 to distribute these bonuses to employees on company time and premises, the Respondent violated Section 8(a)(1) and (2) of the Act.

2. The conduct found to be objectionable is sufficiently serious to set aside the election and to hold a new one.¹⁵

3. The Respondent has not violated the Act in any other manner encompassed by the complaint.

4. The aforesaid conduct interferes with commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent 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.]

cago Television News, Inc., 328 NLRB 367 (1999), the Board overruled an objection based on the contention that the employer held a party with food and drink before the election. The Board stated that “the Board did not purport to overrule its long line of cases holding that it will not set aside an election simply because the union or employer provided free food and drink to the employees.” That case was distinguishable from *Chicago Tribune*, 326 NLRB 1057 (1998), where the employer’s far more elaborate and costly party was held to have interfered with an election.

¹⁵ See *Playskool Mfg. Co.*, 140 NLRB 1417, 1419 (1963); *Dal-Tex Optical Co. Inc.*, 137 NLRB 1782, 1786–1787 (1962).