

Tajon, Inc. and Fraternal Association of Special Haulers. Case 3-CA-10479

22 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 30 June 1982 Administrative Law Judge Russell M. King issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² only to the extent consistent with this Decision and Order.

The relevant facts, set out in more detail in the judge's decision, are not in dispute. The Respondent is a trucking company which employs many truckdrivers and approximately a half-dozen mechanics at its Niagara Falls, New York terminal. The truckdrivers are represented by the Union, and have a 3-year contract with the Respondent which expires 30 September 1982. By 20 February 1981,³ five of the six mechanics working for the Respondent at that time had signed union authorization cards. On 1 March the Respondent voluntarily recognized the Union as the exclusive bargaining representative of the mechanics. Two bargaining sessions were held after recognition was granted: one on 23 March and one on 13 April. At these meetings, the Union and the Respondent agreed on certain proposals but failed to reach agreement on others. At the end of the 13 April meeting no final agreement had been reached; outstanding issues included a pension plan, contract duration, a no-strike clause, work rules, and others. As that meeting ended, the Union requested that a date be set for another bargaining session, but the Respondent stated it wanted to delay setting a definite date due to its planned upcoming sale of approximately 50 trucks on 21 May. In late April, the Respondent laid off certain workers for economic reasons, including one bargaining unit mechanic. On 8 May a decertification petition was filed by Gerry Eakin,

who was the unit employee who had not originally signed an authorization card and who was one of the five remaining mechanics. That petition was dismissed by the Regional Director on 19 May. Prior to 22 May the Union's representative received letters dated 18 May from two mechanics—Richard Santiago and Robert Hopfer—of the remaining five, renouncing the Union and withdrawing their designation of the Union as their bargaining representative. The Respondent's president testified that prior to 22 May he learned that the mechanics no longer wanted to be represented by the Union and had filed a decertification petition with the Board. On 22 May the Union's representative came to the Company president's office and asked if the Respondent's president was ready to sign a contract. The Respondent's president replied in the negative, stating as his reasons that the mechanics had "withdrawn from the unit" and filed a petition with the Board and the Company would be in an "awful sticky spot to agree to a contract or sign a contract that the men didn't want." He noted in his testimony that to reach a full agreement they would have "needed at least one more day at the table."

The sole issue in this case, correctly identified by the judge, is also not in dispute: whether Respondent on 22 May lawfully withdrew recognition of the Union which it had voluntarily recognized on 1 March. The main legal principles for determining whether such a withdrawal is legal are settled. One, the Board has consistently held that a union which is recognized by the employer but not certified by the Board is, absent special circumstances not present here, irrebuttably presumed to have majority status for a reasonable period of time from the date of recognition. *Rockwell International Corp.*, 220 NLRB 1262, 1263 (1975); *Keller Plastics Eastern*, 157 NLRB 583, 587 (1966). After that reasonable period of time expires, the union enjoys a rebuttable presumption of majority status, which can be overcome by the employer demonstrating that the union in fact does not have majority representative status or that the employer has a good-faith doubt based on objective considerations of the union's majority representative status. *Brennan's Cadillac*, 231 NLRB 225, 227 fn. 8 (1977). Two, it is settled that in such cases, the Board first evaluates whether a reasonable period of time for bargaining had elapsed at the time the employer withdrew recognition, and only upon an affirmative finding as to that question does the Board consider the employer's proffered justification for withdrawal. "Absent a reasonable period of time for bargaining following recognition, the actual majority status of a union is immaterial." *Brennan's Cadillac*,

¹ We note that the judge mistakenly characterized the RM petition filed by the Respondent on 25 February 1981 (Case 3-RM-642) as a "Decertification Petition."

² Chairman Dotson and Member Hunter find it unnecessary to decide whether any presumption of majority status accrues to a voluntarily recognized union for the purposes of deciding this case, since they agree in any event that a reasonable time for bargaining had elapsed.

³ All dates hereinafter are 1981, unless otherwise specified.

231 NLRB at 226. Three, "There are no rules as to what constitutes a reasonable period of time, as each case must rest upon its own individual facts. . . . [R]easonable time does not depend upon either the passage of time or the number of calendar days on which the parties met. Rather, the issue turns on what transpired during those meetings and what was accomplished therein." *Brennan's Cadillac*, 231 NLRB at 226. Applying these principles, we find the instant case to be indistinguishable from *Brennan's Cadillac*, 231 NLRB 225, and hold, as there, that a reasonable period of time had elapsed when the Respondent withdrew recognition.

The Respondent here voluntarily recognized the Union, agreed to hold meetings to negotiate a first contract, met in negotiating sessions with the Union, reached substantial agreement with the Union on a number of issues, and then refused further bargaining and withdrew recognition of the Union at a point in time when no impasse had been reached and when a complete agreement might have taken only one more meeting. All of these facts were present in *Brennan's Cadillac*. The judge here, conceding the striking similarity between the two cases, nonetheless found *Brennan's Cadillac* inapposite because, in his words, "no substantial period of time had elapsed over the bargaining period." Yet that conclusion flies in the face of the teaching of *Brennan's Cadillac*. As noted above, the Board held there that a reasonable period of time does not depend on the number of days or months spent in bargaining. Rather, the test is what was accomplished at the meetings that were held. Here, the two negotiating meetings accomplished essentially what the eight meetings in *Brennan's Cadillac* accomplished: substantial agreement on many issues, with some important differences remaining and no impasse. Therefore, after the second meeting, a reasonable period of time for bargaining had passed and the Union no longer enjoyed an irrebuttable presumption of majority status. Five weeks after that second meeting, the Respondent refused further bargaining. As it is undisputed here that, at the time the Respondent refused to bargain, the Union in fact had lost its majority status,⁴ we find

that the Respondent has overcome the rebuttable presumption that the Union enjoyed majority support at that time. The Respondent thus did not violate Section 8(a)(5) by refusing on 22 May to bargain further with the Union and withdrawing recognition of the Union, and we will dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I find that the Respondent unlawfully withdrew its recognition of the Union. More specifically, I agree with the judge's analysis that the nascent bargaining relationship between the Respondent and the Union was not given a reasonable time, and thus not a fair chance, to bear fruit before the Respondent withdrew its recognition of the Union. My colleagues' reliance on *Brennan's Cadillac*, 231 NLRB 225 (1977), in reaching their result is clearly misplaced.

In *Brennan's Cadillac*, there were eight bargaining sessions over a 3-month period before the Respondent withdrew recognition; and while substantial movement toward an agreement had been made at those sessions, the union called a strike to force acceptance of its outstanding demands, rather than proceeding to a meeting which possibly could have led to a contract. Four days after the strike began, three of the five unit employees returned to work and withdrew from the union, after which the employer ceased to recognize the union. In these circumstances, the Board majority in essence found that the union's conduct of striking extended the bargaining beyond a reasonable time. Further, it is clear that the union's action in calling a strike precipitated a test of its strength among the unit employees.

In the instant case, on the other hand, at the time the Respondent withdrew its recognition of the Union, less than 4 weeks had elapsed between the beginning and the cessation of bargaining, and only two bargaining sessions had actually been held. Moreover, the Respondent's president conceded that after only the second bargaining session there was tentative agreement on "a good many" of the issues and that total agreement could possibly have been achieved with only one more bargaining session. Although the Union consented to the Respondent's expressed need for a hiatus in bargaining following the second session, the Union was clearly not a moving force behind the postponement of bargaining, and should not now be penalized for that concession.

⁴ At the time the Respondent granted recognition, five of the six mechanics had signed union authorization cards. At the time the Respondent refused to bargain further and withdrew recognition, at least three of the mechanics had unequivocally notified the Union that they did not want the Union to be their collective-bargaining representative (Gerry Eakin, Richard Santiago, and Robert Hopfer). Though the record is not specific as to the sentiments at that time of the other three mechanics (Craig Wentz, Gary Sattelberg, and Doug Collins, who had been laid off in April), it is clear that by 22 May the Union in fact did not have majority support of the unit employees.

Accordingly, I find that a reasonable period of time to bargain had not elapsed when the Respondent withdrew recognition from the Union, and thus the latter continued to enjoy an irrebuttable presumption of majority status which could not yet be challenged lawfully.

DECISION

RUSSELL M. KING, JR., Administrative Law Judge. This case¹ was heard by me in Buffalo, New York, on April 12, 1982. The initial charge was filed by the Fraternal Association of Special Haulers (the Union) on June 2, 1981, and an amended charge was filed on June 24, 1981,² on which date the complaint was also issued by the Regional Director for Region 3 of the National Labor Relations Board (the Board) on behalf of the Board's General Counsel.³ The complaint alleges that on March 1 the Company recognized the Union as the exclusive collective-bargaining representative of a unit of some five or six mechanics at the Company's Niagara Falls, New York terminal, the only one of Company's facilities immediately involved in this case. The complaint further alleges that on April 13 the Union and the Company came to a "complete" agreement with respect to the terms and conditions of employment of the unit of employees involved (mechanics) but, on May 22 and thereafter, the Company refused to execute a written contract embodying the agreement and refused to further recognize the Union as the exclusive collective-bargaining representative of the mechanics involved, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).⁴ The Company contends that in late April the employees involved renounced the Union, filed a decertification petition with the Board, and thus it rightfully refused to thereafter negotiate or enter into any contract with the Union, having a good-faith belief that the Union had lost its majority status after a reasonable period of time in which collective bargaining had occurred.

¹ Up until June 1, 1981, the employees involved in this case were actually employed by Tajon Warehousing Corporation, a "sister" corporation of Tajon, Inc. The two corporations were and are owned by the same stockholders and under the same management and control. The employees were mechanics who performed maintenance on trucks owned by Tajon, Inc. After June 1, 1981, the mechanics became employed by Tajon, Inc. where they continued the same work under the same management. Thus, and for the purpose of this case, both corporations were and are one and the same. Where the term "Company" or "Tajon, Inc." appears in this case, it shall apply to both corporations.

² All dates hereafter are in 1981 unless otherwise indicated.

³ The term "General Counsel," when used hereafter, will normally refer to the attorney in this case, acting on behalf of the General Counsel of the Board, through the Regional Director.

⁴ The pertinent parts of the Act provide as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 . . . (3) to refuse to bargain collectively with the representatives of his employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel and counsel for the Company, I make the following

FINDINGS OF FACT⁵

I. JURISDICTION

The pleadings, admissions, and evidence herein established the following jurisdictional facts.

The Company is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware. At all times material herein, the Company has maintained its principal office and place of business at R.D. #5, Mercer, Pennsylvania, and various other terminals, warehouses, and other facilities in various States of the United States including a terminal and warehouse at Niagara Falls, New York, and is, and has been at all times material herein, continuously engaged at said places of business and facilities in the interstate transportation of goods and materials and related services. During the year prior to the issuance of the complaint, the Company has received revenues in excess of \$4 million for the interstate transportation of goods and materials. Thus, and as admitted, I find and conclude that the Company is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

I further find and conclude that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Summary of the Testimony and Evidence⁶

1. Testimony of Union Representative Joseph C. O'Donnell

Joseph C. O'Donnell testified as a special representative of the Union. As special representative, he was on leave of absence from the Company where he had worked previously as a truckdriver. The Union represents the truckdrivers at the Company and there was presently a 3-year union contract that expired September 30, 1982.

⁵ The facts found herein are based on the record as a whole and upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the two witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to testimony in contradiction of findings herein, that testimony has been discredited either as having been in conflict with the testimony of the other witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

⁶ The following includes a summary of the testimony of the two witnesses appearing in the case. The testimony will appear normally in narrative form, although on occasion some testimony will appear as actual quotes from the transcript. The narrative only and merely represents a summary of what the witnesses themselves stated or related, without credibility determinations unless indicated, and does not reflect my ultimate findings and conclusions in this case.

Regarding the Union's mechanics at the terminal, O'Donnell testified that on January 23 he was contacted by mechanic Doug Collins regarding representation by the Union. O'Donnell related that he had obtained five signed union authorization cards, all signed at several meetings thereafter at a local restaurant. According to O'Donnell, at this time there were six mechanics employed at the terminal.

O'Donnell testified that on February 20 he met with the Company's president, William Eshenbaugh, requested recognition on behalf of the mechanics, and displayed the five union authorization cards. Eshenbaugh replied by asking how much time he had, and O'Donnell related that he told Eshenbaugh that he had a reasonable length of time to make the decision regarding recognition.

O'Donnell testified that on February 24, not having heard from Eshenbaugh, he again went to Eshenbaugh's office and discovered that Eshenbaugh was in Florida. He then talked to Vice President Marion Martin and asked if the Company had come to a decision regarding recognition, and Martin replied that the Company had "filed a petition with the Labor Board."⁷

O'Donnell testified that, on Sunday March 1, he met with the five mechanics who had signed authorization cards and they all voted to go on strike "for recognition." O'Donnell and the mechanics then left the meeting and proceeded directly to the terminal where O'Donnell and four of the mechanics formed a picket line about 6 p.m. Although the mechanics did not work on Sundays, drivers were scheduled to go out on the road that evening. O'Donnell indicated that after the picket line was formed he telephoned terminal manager Timothy Chutz and told him about the pickets. Chutz appeared at the terminal 30 to 45 minutes later, and O'Donnell presented him with a letter from the Union for him to sign, acknowledging representation. Chutz took the letter and went inside the terminal and emerged about 30 minutes later and asked O'Donnell if he signed the recognition letter would the picket be called off. O'Donnell replied that they would, whereupon both O'Donnell and Chutz went back into the terminal where Chutz signed the recognition letter.⁸

O'Donnell testified that there were two bargaining sessions after the recognition letter was signed, one on March 23 and one on April 13. At the first bargaining session, he and mechanic Hopfer represented the Union. The Company was represented by President Eshenbaugh and his wife, Terminal Manager Chutz, and Vice President Martin. O'Donnell testified that the Union orally presented its demands and the two sides agreed on certain proposals, and apparently failed to come to an agreement on others. At the second session on April 13, other proposals were made by both sides and approximately a week later they were all reduced to writing by the Company and furnished to O'Donnell personally. On cross-examination, O'Donnell conceded that the Union had presented certain demands prior to the initial March 23 session and the Company had prepared a 7-page type-

written response to these demands prior to the March 23 session. O'Donnell testified that after the April 13 bargaining session both sides had "reached an agreement we were going back to the mechanics with . . . [they] hadn't got everything they wanted and we were going back to them and talk to them before we signed the agreement." O'Donnell conceded that it had always been his policy with the truckdrivers to get their approval before signing any contract. O'Donnell further conceded that at this point in the negotiations, no pension plan had been settled on, the term of the contract had not been settled, certain work rules had not been formulated, and other matters were still pending.

O'Donnell testified that about April 25 he was informed by the union steward of the truckdrivers that mechanic Doug Collins had been "laid . . . off." O'Donnell conceded that in early May the Company sold some 50 trucks and trailers, thus cutting down on the Company's entire work force. O'Donnell indicated that he then talked to mechanic Hopfer who informed him that the Company and the mechanics no longer wanted any part of the Union or the raises and benefits that had been negotiated. O'Donnell also related that Hopfer added that the mechanics were going to file a decertification petition with the Board.⁹ O'Donnell further conceded that he had also received letters from both mechanic Hopfer and mechanic Santiago, dated May 18, renouncing the Union and withdrawing their designation of the Union as their bargaining representative. O'Donnell went on to testify that with the above knowledge at hand, he nonetheless went to Eshenbaugh on May 22, proclaimed that the Union was ready to sign the "agreement" or "contract," which he had with him.¹⁰ O'Donnell indicated that Eshenbaugh replied he no longer felt the Union represented the mechanics and he no longer "wanted to sign." O'Donnell again conceded that he had never signed any contract without employee ratification. Soon after Eshenbaugh's refusal and on June 2, O'Donnell filed the initial charge in the case.

2. Testimony of Company President William Eshenbaugh

William Eshenbaugh testified as president of the Company and related that on February 24, when Union Representative O'Donnell informed him he had cards from the mechanics at the Niagara Falls terminal, he was "stunned." Eshenbaugh testified that when he told O'Donnell he would get back to him, he did not intend to do so. The following day he had a board meeting and later on that day he planned to leave on a Florida vacation. Eshenbaugh added that the Company's position was to file a petition with the Board and request an election, and this petition was filed on February 25, the day of the

⁹ Such a petition was filed on May 8 by mechanic Eakin, the only mechanic who refused to sign a union authorization card (Case 3-RD-687). The petition was dismissed by the Regional Director on May 19 for the stated reason that no reasonable period of time had elapsed since recognition was granted the Union.

¹⁰ The "agreement" or "contract" was a compilation of "summaries" or typed notes from the March 23 and April 13 bargaining sessions, which had been prepared by the Company's president, William Eshenbaugh.

⁷ Case 3-RM-642, decertification petition filed February 25 with the Board. The petition was withdrawn March 4.

⁸ The letter was admitted into evidence.

Company's board meeting and his departure to Florida.¹¹

Eshenbaugh then testified that on March 1 about 4 or 4:30 a.m. and while in Florida,¹² he received a call from Terminal Manager Chutz informing him of the picket line, and the fact that the truckdrivers were refusing to cross the picket line. According to Eshenbaugh, after a series of phone calls it was finally decided that Chutz would sign the recognition letter, thus ending the picket line, and that the Company "would pursue negotiations when [he] returned back from Florida." Eshenbaugh returned to his office on March 9 and indicated that shortly thereafter O'Donnell presented him a list of some 20 demands. Eshenbaugh prepared a typewritten response to these demands, adding certain proposals of his own, and this response was presented to O'Donnell at the first negotiation session on March 23.¹³ Eshenbaugh testified that at the March 23 negotiation session, some proposals were agreed to and some were not. The next session was set for April 13, but Eshenbaugh related that on April 4 or 5 the Company started "parking" 50 tractors and trailers, and replacing these units with outside owner-operators. Also in the interim the Company had drafted a typed "summary of . . . the language that came out of the March 23rd meeting," and this summary was thereafter presented to the Union at the forthcoming April 13 negotiating session.¹⁴

At the April 13 session, Eshenbaugh related that certain economic issues were discussed, together with many other topics and at the end of the session he again volunteered to "get something together in writing, summarizing where [they] were . . ." Eshenbaugh thereafter drafted such a typed summary of the "negotiations for both sessions, itemizing those items in agreement," listing "some items being dropped, and reflecting some things open."¹⁵ Eshenbaugh testified that the company summary made after the April 13 negotiating session was to be taken back to the mechanics to see if they "were now on track . . . and if the economics were 'going to fly' or if we were too far apart from what their demands were." Eshenbaugh indicated that, at the end of the April 13 session, O'Donnell requested a day to be set for another bargaining session, but that he wanted to delay setting a definite date because of the Company's upcoming truck-trailer sale on May 21. Eshenbaugh added that he also wanted to look into the "portability" of the Company's pension plan, apparently regarding the possible loss of shift of the mechanics into a representative unit or, in the alternative, to a union pension plan. Eshenbaugh also testified that at that point there was no agreement about the

term of the contract, and O'Donnell was hesitant at agreeing to a termination date with the drivers' contract a little more than a year away. Eshenbaugh added that he, on the other hand, was not satisfied with an "off-cycle" contract with the mechanics. Eshenbaugh further related that other things yet to be decided as of the end of the April 13 session included disciplinary actions, a no-strike clause, and supervisory personnel performing some bargaining unit work.

Eshenbaugh testified that, after the April 13 bargaining session, and before the March 22 confrontation with O'Donnell, he learned that the mechanics no longer wanted to be represented by the Union and had filed a decertification petition with the Board. Eshenbaugh related that, on May 22, O'Donnell came to his office and asked if he was ready to sign a contract, and he replied, "No" and asked, "What contract?" Eshenbaugh also told O'Donnell that the Company was not ready to sign any contract because the mechanics had "withdrawn from the unit" and filed a petition with the Board, and that the Company would be in an "awful sticky spot to agree to a contract or sign a contract that the men didn't want." Eshenbaugh indicated that at this point the Company and the Union had come to a "tentative agreement on a good many of the issues . . . [but would have] needed one more day at the table."

Regarding the layoff of mechanic Collins in late April, Eshenbaugh testified that by the end of April the 50 truck units had been moved to another terminal for cleaning, painting, and sale preparation. The Niagara Falls terminal was reduced from 21 or 22 tractors to 14. According to Eshenbaugh, this necessitated the layoff of one of the four remaining mechanics. Collins was apparently next to the lowest on the seniority list, and Hopfer was the lowest, but he was also a foreman and was to be the new union steward under the current negotiations with the Union. Eshenbaugh thus concluded that in any event, Hopfer would have remained, either as a foreman, or under the Union's proposed superseniority clause. Eshenbaugh added that Hopfer also had supervisory skills that Collins lacked, and further had higher mechanical skills than Collins.

B. Evaluation of Testimony and Evidence; Initial Conclusions

1. Was there complete agreement?

I address this subject only because the complaint alleges such.¹⁶ I find that there was no complete agreement. Union Representative O'Donnell himself conceded that such things as the pension plan, the term of the contract, and certain work rules had not been decided after the April 13 bargaining session. The Company's president, William Eshenbaugh, whom I credit completely in this case, added that additional matters yet undecided included disciplinary actions or the grievance procedure, a

¹¹ As indicated earlier, this petition was Case 3-RM-642 and the petition was withdrawn on March 4.

¹² The "a.m." time was Eshenbaugh's actual testimony as reflected in the record. Common sense and other evidence in the case would indicate that in fact the time was in late afternoon on March 1, the undisputed time when the picket line emerged at the terminal.

¹³ Both the list of the Union's demands and the Company's response were admitted into evidence.

¹⁴ This summary was also introduced into evidence.

¹⁵ This summary was admitted into evidence. It is this summary, together with the company-prepared summary from the March 13 session, that O'Donnell indicated that he presented to Eshenbaugh on May 22 as the "contract" or "agreement."

¹⁶ If a complete agreement were found herein, and the General Counsel prevailed otherwise in the case, a proper remedy would include an order directing the Company to execute the contract. In his brief, the General Counsel abandons the issue and asks only the remedy that the Company be ordered to recognize and bargain with the Union.

no-strike clause, and the performance of some unit work by supervisory personnel. Other matters were also open or tentative.

2. The refusal to further recognize the Union

The dates and significant events in this case are virtually uncontested. On March 1 the Company recognized the Union as the exclusive bargaining representative of the mechanics at the Niagara Falls terminal. Bargaining sessions were held March 23 and April 13, resulting in significant progress towards a complete agreement. At the close of the April 13 session, it was understood that an additional session would be set after May 21 and in the interim, O'Donnell would consult with the mechanics on various proposals then pending, and on tentative agreements reached. Sometime between April 13 and May 18, the Union lost its majority support. During this period mechanic Doug Collins was laid off (on approximately April 25), mechanic Gary Eakin filed a decertification petition with the Board on May 8, and on May 18 mechanics Hopfer and Santiago wrote O'Donnell withdrawing their support and designation of the Union as their exclusive bargaining agent. The employee decertification petition (of May 8) was dismissed by the Regional Director on May 19, and on May 22 O'Donnell, yet to consult with the mechanics regarding the results of the earlier two bargaining sessions, approached President Eshenbaugh and requested him to sign "a contract." At this time, Eshenbaugh made it clear that the Company would sign no contract, and that it no longer recognized the Union as the bargaining agent for the mechanics.¹⁷

Under current Board precedent, which I am bound to follow, before an employer can properly and lawfully withdraw recognition of an employee bargaining representative, even with full and valid knowledge of the loss of the bargaining representative's majority status, there must have elapsed a reasonable period of time for bargaining. *Keller Plastics Eastern*, 157 NLRB 583 (1966); *San Clemente Publishing Corp.*, 167 NLRB 6 (1967); *Brennan's Cadillac*, 231 NLRB 225 (1977). Thus, not only the threshold but the sole issue in this case is whether or not such a reasonable period of time for bargaining had elapsed between the date of recognition on March 1 and the date of withdrawal of such recognition on May 22. In *Keller Plastics*, chiefly relied on by the General Counsel in this case, recognition was voluntarily granted by the employer on February 16, and 3 weeks later on March 10 a contract was executed by the union and the employer. Sometime prior to March 10 the union had lost its majority. This fact was unknown to the employer on March 10 when the contract was executed. The contract contained a union-security clause requiring all employees to become members of the union. The five-

¹⁷ The composition of the mechanics unit at this point is somewhat uncertain in the record. The mechanics originally numbered six. All but Eakin signed authorization cards (Wentz, Sattelberg, Collins, Santiago, and Hopfer). Eshenbaugh indicated in his testimony that as of May 22 there were three mechanics. From the record it appears that at least Eakin, Santiago, and Hopfer remained. The loss of either Wentz or Sattelberg is unexplained. However, even with them both, the layoff of Collins and the withdrawal from the Union of Santiago and Hopfer resulted in a loss of majority support.

member Board found that the 3-week period between February 16 and March 10 was a "reasonable period" and that, as of March 10, the union "remained the statutory bargaining representative" of the employees regardless of the actual loss of majority status. In *Brennan's Cadillac*, chiefly relied on by counsel for the Company in this case, voluntary recognition was granted by the employer on October 22. On November 3 the union forwarded the employer a proposed contract, and between December 5 and February 27 (the following year) eight bargaining sessions were held. The unit involved five salesmen, who had commenced a strike on February 23. On February 27, three of the five salesmen notified the employer they no longer wished to be represented by the union and requested the employer to cease bargaining with the union on their behalf. On February 28 the three salesmen returned to work and on March 1 the employer in effect withdrew its recognition of the union. The Board found that a reasonable period of time had been offered the union to bargain and that the bargaining relationship it obtained by voluntary recognition was given a "fair chance to succeed." Thus the Board held that the actual majority status of the union at the time of withdrawal of recognition became relevant in determining whether the employer was entitled to question the union's majority status.¹⁸ In the above finding and holding, the Board noted that the employer had engaged in meaningful good-faith negotiations over a substantial period of time, that there was no contention that the employer engaged in any unfair labor practices or in any manner interfered with its employees' desires for or against the union, and that no impasse in bargaining has been reached.

The case at hand fits into the *Brennan's Cadillac* mold with one significant exception, which I think is determinative in this case. I find no substantial period of time had elapsed over the bargaining period. Good progress had been made at the March 23 and April 13 bargaining sessions. In fact, Eshenbaugh and O'Donnell commented on the smoothness and progress of the bargaining, and Eshenbaugh remarked in his testimony that after the April 13 session there was "tentative agreement on a good many of the issues" and that a complete agreement could possibly have been arrived at with one more bargaining session. No date was set for the next session at the end of the April 13 session, primarily because Eshenbaugh wanted to wait until the Company's tractor-trailer sale on May 21. The bargaining period was not extended by any fault of the Union and, under the facts of this case, I find that the bargaining relationship obtained by voluntary recognition was not given a fair chance or reasonable time to succeed. I further find and conclude that as of May 22 the Union continued as the exclusive representative of the mechanics at the Niagara Falls terminal for the purposes of collective bargaining, and the Company's withdrawal of that recognition was violative of Section 8(a)(1) and (5) of the Act as alleged in the complaint.

¹⁸ In *Brennan's Cadillac*, Members Penello, Murphy, and Walther formed the majority while Chairman Fanning and Member Jenkins dissented citing, among other cases, *Keller Plastics*.

On the foregoing findings of fact and initial conclusions, and on the entire record, I make the following

CONCLUSIONS OF LAW

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

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

3. The appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

All mechanics employed by the Respondent Employer at its terminal located in Niagara Falls, New York, excluding truckdrivers, supervisors, and guards.

4. By virtue of Section 9(a) of the Act, on and after March 1, 1981, the Union became and remains the designated and exclusive bargaining representative for the appropriate unit set out in paragraph 3, above, for the pur-

pose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

5. On May 22, 1981, the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing its recognition of the Union as the bargaining representative of an appropriate unit of its employees, as set out in paragraphs 3 and 4 above.

6. The unlawful action and conduct concluded in paragraph 5, above, and found herein, affected commerce within the meaning of Section 2(6) and (7) of the Act.

7. Other than the misconduct concluded in paragraph 5, above, the Respondent has not otherwise violated the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to recognize and bargain with the Union upon request, and to post an appropriate notice.

[Recommended Order omitted from publication.]