

Helnick Corporation and Hotel & Restaurant Employees International Union, Local 727. Case 10-CA-24153

January 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On July 2, 1990, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each 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 the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

1. The judge found, and we agree, that the Respondent's employee poll was unlawful because it was not conducted in accordance with the requirements of *Struksnes Construction Co.*, 165 NLRB 1062 (1967), and *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989).² Therefore, the results of the poll cannot be relied on as objective evidence supporting a reasonable doubt of the Union's majority status. The judge also found that the Respondent's withdrawal of recognition lacked objective considerations. We agree, but also find that it did not occur "in a context free of unfair labor practices." *Guerdon Industries*, 218 NLRB 658, 659 (1975). The record establishes that the Respondent

¹In adopting the judge's decision we make the following minor clarifications, which do not affect the judge's or our conclusions.

We do not rely on the judge's crediting of Union President Betty Archer that the Respondent assured her that she would be put to work when the remodeling was complete. We find no testimony by Archer to that effect. There is, however, sufficient testimony in the record to support the finding that Archer and others were assured of employment.

We agree with the judge that the Respondent's bargaining obligation attached when it informed employees that they could expect to be retained when it took over the operation. Although we do not place this conversation precisely on April 1, 1989, we find that it occurred in early April and that it preceded the hiring of any Concession Air employees. Similarly, we find that Louis Dobson became an agent of the Respondent in early April and that his agency preceded the threats of reprisal he made to the employees.

We find that Archer was not the only employee to submit an application and not be hired. Others applied and were not hired, but the Respondent's president, Robert Rutsis, knew that they had taken jobs elsewhere.

We note that in par. 8 of the analysis section of his decision, the judge inadvertently suggested that the relevant majority inquiry is whether the Respondent hired a majority of the predecessor's work force. In fact, as the judge indicated elsewhere in his decision, work force continuity turns on whether a majority of the alleged successor's employees had formerly been employed by the predecessor. See *Stroehmann Bros. Co.*, 252 NLRB 988, 993 (1980), enf. mem. 659 F.2d 1071 (3d Cir. 1981), cited by the judge.

²However, we note that the record supports a finding that only one employee was told by another employee to vote against the Union during the Respondent's poll, rather than the judge's finding that employees shouted at others to "vote no."

had committed prior unfair labor practices "of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Id.* at 661. These unfair labor practices included threats of reprisal, unilateral changes in terms and conditions of employment, and the refusal to hire the union president.³

2. The Respondent asserts that the judge erred in finding that it violated Section 8(a)(1) by threatening employees with reprisal in April 1989 because the relevant complaint allegation is barred by Section 10(b). In this connection, the Respondent notes that this threat was not alleged in a charge until the filing of an amended charge on November 6, 1989, more than 6 months after the threat occurred. We find no merit in this contention.

In *Kelly-Goodwin Hardwood Co.*, 269 NLRB 33, 36-37 (1984), the Board stated as follows:

It is well settled that the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge.

In the instant case, we find that the April 1989 threat of reprisal is closely related to the June 23, 1989 charge allegations that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union and violated Section 8(a)(3) by refusing to employ Union President Betty Archer. Specifically, we find that the threat of reprisal—not to distribute employment applications until it was determined why Archer hired an attorney—relates to the refusal to hire Archer as it shows the Respondent was both aware of and resentful toward Archer's activities as union president. We also find that this threat relates to and is part of Respondent's unlawful scheme to avoid having to recognize and bargain with the Union. Accordingly, as the threat alleged in the November 6, 1989 amended charge is similar to and arises out of the same course of conduct as the matters alleged in the timely June 23, 1989 charge, we conclude that the time limitation imposed by Section 10(b) of the Act does not preclude a finding of an 8(a)(1) violation.

Further, we note that this threat of reprisal was alleged in the June 30, 1989 complaint. As the Respondent first raised its 10(b) defense in its brief to the judge, the 10(b) defense was untimely raised with re-

³In agreeing with his colleagues that the poll was unlawful, Chairman Stephens relies solely on the ground that it did not occur in a context free of unfair labor practices.

spect to the complaint's inclusion of the allegation in question.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Helnick Corporation, Alcoa, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

⁴*McKesson Drug Co.*, 257 NLRB 466 fn. 1 (1981) (defense of Sec. 10(b) first raised in Respondent's brief to the administrative law judge was not raised in a timely manner).

Frank F. Rox Jr., Esq., for the General Counsel.
Anne Gordon Greever, Esq. and *J. Mark deBord, Esq.*
 (*Hunton & Williams*), of Richmond, Virginia, for the Respondent.
Paul L. Styles Jr., Esq., of Atlanta, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case on September 12, 13, and 14, and November 14, 1989, in Alcoa, Tennessee. The charge which gave rise to this case was filed on May 18 and amended on June 23 and November 6, 1989, by Hotel and Restaurant Employees International Union, Local 727 (the Union). A complaint and notice of hearing issued on June 30, 1989, which alleges, inter alia, that Helnick Corporation (Respondent), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), by threatening employees with reprisal for engaging in union activities; by threatening employees with discharge if they solicited assistance from the Board; by failing and refusing to hire Union President Betty Archer; by refusing to recognize and bargain with the Union as the representative of its employees; by making numerous unilateral changes without notifying the Union; and by conducting a poll of its employees on the question of whether they wanted to be represented by the Union.

In its answer to the complaint, Respondent admitted certain allegations including the filing and serving of the charge and its status as an employer within the meaning of the Act. Respondent denied that Louis Dobson was an agent of Respondent and further denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, all parties filed timely briefs with me which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Helnick Corporation is a Kentucky corporation with an office and place of business located at Alcoa, Tennessee, where it is engaged in the operation of restaurant facilities and in-flight catering services at the Knoxville, Tennessee airport. Respondent annually purchases and receives goods valued in excess of \$50,000 directly from suppliers located outside the State of Tennessee. In addition, Respondent annually derives gross revenues in excess of \$500,000.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Hotel and Restaurant Employees International Union, Local 727 is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background and Bargaining History

McGhee-Tyson Airport, a municipal corporation, is owned by and services the city of Knoxville, Tennessee. At least since 1969, the airport has contracted with someone to operate the restaurant facilities and in-flight catering services. From 1969 until 1986, the airport concession was operated by Sky Chefs, a subsidiary of American Airlines, which was covered by the Railway Labor Act and not subject to jurisdiction of the Board. In 1969, the Hotel and Restaurant Employees International Union organized Sky Chefs employees in a nationwide bargaining unit. Following this organizing campaign, Sky Chefs granted the International Union voluntary recognition as the representative of employees in this nationwide unit. As a result, Local 727 was chartered to service the national collective-bargaining agreement at the Knoxville facility and to negotiate local wage supplements covering that facility.

In 1986, Concession Air bought certain of the Sky Chefs operations, including the Knoxville airport concession. Concession Air was not covered by the Railway Labor Act, but rather was subject to the Board's jurisdiction. Concession Air voluntarily recognized the International Union as the representative of employees in the nationwide Sky Chefs unit and adopted the terms of the existing collective-bargaining agreements. The nationwide Concession Air bargaining unit consisted of more than 3000 employees in more than 40 locations. Concession Air operated the restaurant facilities and in-flight catering services as well as the gift shop at the Knoxville Airport from 1986 through April 1989.

Since being chartered in 1969, Local 727 has administered the nationwide collective-bargaining agreement covering Sky Chefs and, later, Concession Air employees at the Knoxville airport. It has also negotiated local wage supplements applicable to those employees. It is unrefuted that the Local Union enjoys autonomy in the handling of its day-to-day affairs, including the processing of employee grievances at the Knoxville facility. Throughout the period relevant to this case, there have been approximately 35 employees at the Knoxville facility. The vast majority of Concession Air's em-

employees were members of the Union, as evidenced by the number of employees on dues checkoff.

B. Respondent is Awarded the Contract

In early 1989, the airport opened the food service contract for competitive bids. Concession Air bid on the contract but was unsuccessful. On February 22, 1989, the airport authority awarded the contract to Respondent on the condition that Respondent secure a minority business partner in compliance with Federal requirements.

Bob Rutsis, president and sole shareholder of Respondent, was familiar with the FAA's minority business requirement since he operated food service establishments under contract with the airports in Roanoke, Virginia; Tri-City, Tennessee; and Lexington, Kentucky. Rutsis was introduced to Louis Dobson, who had been employed for more than 40 years for the various food service contractors that had preceded Respondent. As supervisor for Concession Air, Dobson had directed the work of bargaining unit employees for many years. Between February 22 and May 1, 1989, when Respondent took over operations at Knoxville, Dobson continued as Concession Air supervisor while at the same time negotiating and, eventually, executing a partnership agreement with Respondent as the minority partner. After May 1, Dobson continued in a supervisory status with Respondent.

C. Events During Transition Following Award of Contract

By letter dated March 16, the International Union wrote to Respondent requesting that as successor to Concession Air, Respondent recognize and bargain with the Union.

On March 29, the Union's attorney, Paul Styles, visited the Knoxville airport restaurant, where he met Louis Dobson and a number of Concession Air employees.

On or about April 1, Rutsis came to Knoxville and met with a number of Concession Air employees. Among these employees was Local Union President Betty Archer, who had worked in the airport restaurant for a number of years.¹ During the meeting, Archer identified herself as the president of Local Union 727 and gave Rutsis a copy of the collective-bargaining agreement and pay scale applicable to Knoxville. Archer inquired about the employment prospects of the older workers, including herself, who she referred to as "gran-nies." Rutsis told Archer that when he has taken over operations such as this in the past, he has hired all the former employees. Employee Deborah Mardis recalled Rutsis stating that the predecessor's employees "would all have a job and . . . we didn't have [anything] to worry about." Although Rutsis denied making this statement, I credit Mardis. Rutsis himself admits that if the employees "checked-out," he intended to hire the "whole work force" of Concession Air. Rutsis also admitted that although he brought employment applications with him intending to hire the new work force, he decided not to do so at that time when he learned that the employees were represented by the Union. Rutsis testified:

¹Local Union President Betty Archer testified that she first met Rutsis during the second week of March 1989. Rutsis places the meeting in early April. The precise timing of this meeting is not critical since the significant events themselves are not in dispute.

I brought applications down to the airport on the day I met Betty Archer. And she told me we had a union. I didn't give applications until I went back and found out what the ramifications of the whole thing were.

Q. And that was the reason, at that time?

A. Yes, sir. That is why I came down to talk to the people and to hire people at that time.

When Rutsis decided to consult with counsel before hiring any employees, he did not pass out applications as he had intended. Instead, Rutsis returned to his office and consulted counsel to find out "what I was getting involved in before I got involved in it." Respondent's counsel advised Rutsis that he could avoid having to recognize the Union by hiring less than a majority of Concession Air's employees. In response to a question from me on the subject of whether Rutsis ever told employees he intended to hire all of them, Rutsis volunteered:

I don't remember ever saying that. I never said that I would hire the whole group. In fact, my lawyers told me not to say that. They said I should hire at least 50 percent new people.

Because Rutsis volunteered this information regarding that conversation with counsel, when an objection was raised to additional questions on the subject by Respondent's counsel later in the hearing, I ruled that Rutsis waived the attorney-client privilege regarding that specific conversation, but not other conversations, with counsel. I reaffirm that ruling. Rutsis admitted that aside from his attorney's advice and the terms of the collective-bargaining agreement between the Union and Concession Air, Respondent did not have any other reason for not honoring the Union's request for recognition. Rutsis testified:

Q. (By Mr. Styles) It turned out that you hired virtually all of the old people with Concession Air. I was just wondering. Did you have any other reason (other than counsel's advice) for not honoring the Union's request for recognition so that we could come in and negotiate with you about whatever changes it was that you needed to make in order to make your operation work?

A. (By Mr. Rutsis) I can't say as I did.

Q. And when was it that you decided that you would not go ahead and recognize the Union?

A. After I read the contract.

Sometime in early April 1989, after Rutsis' first meeting with Archer and the other employees, but before employment applications were distributed, Concession Air employee Phyllis Atchley came by the airport to bring in medical bills covered by Concession Air insurance. While she was there, Atchley approached Louis Dobson and asked for an employment application for Helnick for a friend. Atchley testified credibly that Dobson stated Rutsis would not give out employment applications until he found out why Betty Archer had hired a lawyer.² After being informed of this statement, Archer confronted Dobson. Archer asked Dobson if Rutsis was not going to hand out applications because she had hired

²Local Union President Archer had hired Styles, who by that time had already visited the airport restaurant.

a lawyer. Archer testified credibly that Dobson simply replied, "Well, why did you hire a lawyer?" Archer's testimony is undenied by Dobson.

Dobson's statement that Rutsis was withholding employment applications because Union President Archer had hired a lawyer spread rapidly among the employees. Employee Marilyn Murr testified credibly that she heard from three or four employees that applications were being withheld because Archer had hired a lawyer. Soon thereafter, employee Deborah Mardis informed Dobson that she was "getting up a petition" to demonstrate that the employees were not really all that interested in having the union. Mardis then circulated a petition among employees which read: "OUR MAIN CONCERN IS BEING EMPLOYED, NOT PARTICIPATING IN A UNION." The petition was signed by 15 to 20 Concession Air employees.

Though Mardis professed she could not recall when she circulated the petition, the most plausible conclusion is that this was done sometime between April 1 when Rutsis first met with Archer and other employees and April 12 when Rutsis returned to the Knoxville facility and began to hand out employment applications.³ Dobson allowed Mardis to type the petition on the typewriter at work.⁴ Mardis then took the petition around to her coworkers at work and encouraged them to sign it. Though Mardis denies doing so, I credit employee Marilyn Murr that Mardis encouraged her to sign the petition by telling her it would "help keep our jobs." As it related to this petition, Mardis' testimony was hostile, defensive, and evasive. I credit Murr. Respondent's own witness, Shirley Garner, admitted that employees discussed the need to keep their jobs in signing this petition. As Garner testified, "[T]hey said that Mr. Rutsis wouldn't honor [the] union, and so, all we wanted was our jobs."⁵

As indicated earlier, on April 12, Rutsis returned to the Knoxville facility where he distributed employment applications to employees of Concession Air. During this same trip, Rutsis began interviewing Concession Air employees for hire and at the same time took out the first of two employment advertisements in the local newspaper.⁶ After Concession Air employees completed their applications, they met briefly on an individual basis with Rutsis. During these brief meetings, which Respondent refers to as "interviews" for reasons which will become clear later in this decision, Rutsis hired a full complement of employees for the flight kitchen. The

³Respondent counsel's attempt at the hearing to suggest that the petition was circulated after employment applications were passed out is rejected. Employees Murr, Cable, and Garner all recalled signing the petition before receiving applications. Even Rutsis recalled hearing about the petition being circulated before applications were distributed.

⁴Respondent offered no evidence whatever to suggest that employees were routinely allowed to use typewriters at work without permission or for personal use.

⁵Mardis admitted that the names of Diane Brown and Phyllis Atchley were forged on the petition. Mardis admitted that employee Geneva Jones wrote Brown's name on the petition without authorization, simply because she believed Brown would want her to. Mardis admitted signing Atchley's name, but claims that Atchley, who was on sick leave at the time, gave her permission over the telephone. Atchley did not recall giving Mardis permission to add her name, though she volunteered that she was taking pain medication which sometimes made her groggy and which might cause her to forget having given Atchley permission to sign her name. In view of Mardis' defensive and hostile attitude regarding this petition, I have serious reservations about whether Atchley ever gave Mardis permission to sign her name.

⁶These advertisements appeared in the local paper during the week of April 16 and again on April 29.

coffeeshop and cocktail lounge were to be partially closed for remodeling, while the flight kitchen would not close. Accordingly, Rutsis hired employees for the flight kitchen first. During his brief meetings with individual employees hired for the flight kitchen, Rutsis informed them of the pay rate they would receive, what their insurance benefits would be, and how much vacation they would get. Rutsis met privately with some, but not all, Concession Air employees working in the coffeeshop and dining area. Rutsis told the waitresses from those areas, including Betty Archer and Marilyn Murr, that he intended to remodel the restaurant and that, after the takeover, he would not open it for approximately 2 months.

D. The May 1 Takeover

Those who bid on the contract to operate the restaurant and bar were required to include in their bids certain changes in the facilities, including changes to the cocktail lounge, remodeling of the dining room, the addition of a fast food section, and the addition of certain new equipment. When Respondent was awarded the contract, it planned to close the restaurant on May 1, except for a small portion of the coffeeshop, to complete these renovations. Apparently Respondent's plan to temporarily close a major portion of the restaurant was unknown to the airport authority. On the afternoon of April 30, Rutsis was told by the airport authority that it would not allow the restaurant to close. When Rutsis learned that the restaurant would have to remain open the following day, Rutsis instructed/requested Louis Dobson to call the Concession Air waitresses and offer them immediate jobs the following day. Dobson did so, and restaurant employees reported for work May 1 along with flight kitchen employees. Dobson did not offer a job to Union President Betty Archer. Respondent's failure to hire Archer is discussed in detail below.

On May 1, Respondent took possession and began operations.⁷ Over the next few days, more former Concession Air employees were hired. By the end of May, a majority of the positions in the coffeeshop and dining area had been filled, along with the in-flight kitchen. The parties stipulated that a majority of Respondent's employees were formerly employed by Concession Air.⁸ There is no question that Respondent is engaged in the same business formerly operated by Concession Air. At least as of the time of the hearing, even the physical appearance of the coffeeshop, dining room, and lounge had not changed, except for the location of the cash register. When it took over, even Respondent's menu was identical to take of Concession Air.

The job duties and daily working conditions of Respondent's employees remained the same as when the facility was operated by Concession Air. Respondent's operating hours were identical, and the job classification of employees remained unchanged. In fact, most of Respondent's employees were working in exactly the same jobs as they had previously worked for Concession Air. Supervision also remained the same. Louis Dobson was the primary supervisor

⁷Respondent technically began operations without a fully executed agreement with the airport authority. It appears, however, that the only thing lacking was the formalization of the minority partnership agreement between Dobson and Rutsis. When this arrangement was formalized, Respondent executed a lease on the restaurant property on May 19.

⁸At the time Respondent took over operations, there were approximately 30 employees in the Knoxville bargaining unit.

of all these employees for numerous years. He continued as such for Respondent and, as already eluded to, became the minority partner in the business.

It is undisputed that Respondent set the initial terms and conditions of employment of its Knoxville employees when it began operations on May 1, and that Respondent did go without consulting with the Union. Respondent eliminated all paid holidays and significantly reduced vacation benefits. Respondent canceled the sick leave procedure, eliminated severance pay, funeral leave, and call-in pay. Respondent also eliminated the existing seniority system and the employee grievance procedure. Perhaps most significantly, Respondent eliminated health insurance benefits, and no replacement benefits had been secured even as of the time of the hearing.

E. The Failure to Hire Betty Archer

As previously indicated, when Rutsis learned on April 30 that the restaurant would have to remain open the following day, Rutsis instructed Louis Dobson to telephone the Concession Air waitresses and offer them immediate jobs the following day. Dobson did not offer a job to Union President Betty Archer.

The record is silent as to any conversations between Rutsis and Dobson concerning the decision not to hire Archer. The record is clear, however, that the decision was Rutsis' since Respondent contends that the only reason Archer was not hired was because she failed to seek an interview with Rutsis during his visit to Knoxville on April 12. Respondent's posthearing brief claims that "every former Concession Air employee who testified at the hearing, except Archer, approached Rutsis concerning their individual employment status after they submitted their applications." Neither this claim nor Rutsis' asserted reasons for not hiring Archer are supported by the record.

Louis Dobson admitted that Archer was "one of the best employees we had." Despite this, she was the only employee who submitted an application to Rutsis who was not hired by Respondent. The evidence is uncontroverted that as early as April 1, Rutsis assured Archer she and the other "gran-nies" could expect to be hired. Archer filled out an employment application just like the other employees on April 12. Archer left the application with Respondent and returned to work the following day expecting a brief interview with Rutsis. After interviewing in-flight kitchen employees, Rutsis told Archer and two other employees that he intended to close the restaurant for 60 days and that only kitchen help would be retained immediately. I credit Archer that Rutsis assured her she would be put to work as soon as the remodeling was complete. Archer's testimony is undenied that in subsequently talking with Rutsis about the planned remodeling, Archer volunteered to help clean and stock after remodeling progressed.

The experience of employee Marilyn Murr was almost identical to that of Archer on April 12, yet she was hired to come in on May 1 and Archer was not. Murr credibly testified that, like Archer, she filled out an employment application and gave it to Rutsis on April 12. Murr testified that when she turned in her application, Rutsis informed Murr the restaurant would be closing for remodeling. Murr testified credibly that they spoke only concerning the closing and remodeling of the facility; that there was no discussion con-

cerning wages or other terms and conditions of employment.⁹ Murr's informal conversation with Rutsis was no more (and no less) an interview than Archer's conversations with Rutsis on April 12 and 13. Indeed, it appears that Rutsis' "interviews" with all Concession Air employees were nothing more than such informal conversations, except that employees working in the in-flight kitchen were told their rates of pay and other working conditions since it was already known that they would be reporting to work immediately. Archer's informal conversations with Rutsis were as much an interview as his informal conversations with other employees. To the extent there was not a more formal interview, it was because Rutsis left the impression with Archer that none was needed. Respondent's explanation for not hiring Archer is so patently transparent that an inference of unlawful motivation is warranted. In view of Rutsis' admission that he decided not to recognize the Union "after I read the contract," I believe the only plausible conclusion that can be drawn is that Rutsis also decided not to hire Archer because of her status as president of the Union who was responsible for that contract. Accordingly, I find that by failing to hire Betty Archer, Respondent violated Section 8(a)(1) and (3) of the Act.

F. The Threat of Discharge

Employee Deborah Mardis testified that by the time employees received their first paychecks from Respondent and saw the benefits they were no longer receiving, they became "upset" and began to talk about "going to the Labor Board." When Mardis heard this discussion among employees, she approached Dobson and told Dobson what she had heard. Mardis testified that Dobson responded by stating, "Do it and you'll be fired." Dobson, asked about this statement by Respondent's counsel on direct examination, never unequivocally denied making this statement. Instead, he stated only that he could not "remember" doing so. I credit Mardis.

G. Respondent's Refusal to Recognize the Union and its Employee Poll

On May 11, Union Attorney Styles telephoned Respondent's attorney. Styles inquired about the status of the Union's demand for recognition, to which the Union had received no response. Respondent's counsel assured Styles that a response would be forthcoming.

The unfair labor practice charge here was filed on May 18 and served on Respondent on May 24. By letter dated May 26, Respondent refused to recognize the Union, asserting that Respondent "did not make any commitment to hire all or any of Concession Air's employees prior to finalizing the individual hiring decisions which have been made thus far" and that Respondent "has a good faith doubt that your union represents a majority of employees."

On May 26, Respondent conducted a poll of employees on the issue of union representation. Rutsis posted a notice to employees announcing an employee meeting to be held at 1 p.m. that afternoon. Attendance was mandatory. Rutsis spoke to employees from an outline. Rutsis told the gathered em-

⁹I found Murr's testimony before me to be both credible and plausible. I am not persuaded that the "statement" taken from Murr by Respondent's counsel in building its defense is more accurate. Murr impressed me as forthright and candid, and I credit her oral testimony.

employees that the poll was being taken to see if employees still wanted the Union, and that employees could vote however they wanted. While Rutsis told the assembled employees that the outcome of the vote would have no effect on their jobs, Rutsis admits that some employees may have come in later and they were not told that no reprisal would be taken against them if they chose the Union.

Shirley Parsons, manager of a travel agency located in the airport conducted the actual poll for Respondent. Parsons instructed employees on the voting procedure, and told them to mark either "yes" or "no" on their ballots. Parsons told employees to go behind a table that was placed on its side to mark the ballots. Rutsis remained present in the room the entire time. Further, Respondent's counsel who traveled from Virginia to be present at the poll, remained behind a partition near the polling area during the meeting and the balloting. Employees were permitted to talk amongst themselves during the voting. Various employees were engaged in small group discussions. Some employees even shouted at other employees to "vote no" as the balloting progressed. The final tally was 6 in favor of union representation and 14 against.

The parties stipulated that Respondent did not give advance notice to the union of its intent to conduct the employee poll.

Analysis and Conclusions

The Agency Status of Louis Dobson

Certain factors suggest that Respondent President Rutsis and Louis Dobson began to form the early stages of a business relationship even before Respondent was awarded the contract to operate the Knoxville Airport restaurant facilities and in-flight catering services. Rutsis testified that he considered asking several different people to join him as the minority business partner in bidding on that contract. Rutsis testified, "Louis Dobson had been there in excess of 40 years and we felt that he had the management background that the government required *so that we could win this contract.*" (Emphasis added.) Louis Dobson testified as well that he became interested in the joint venture opportunity early in the process from talking with Airport Authority Board Member Lorenzo Grant. Dobson testified, however, that he lost interest and that his interest was not reawakened until very late April or even early May, after Respondent had actually begun operations. Rutsis and Dobson both testified that it was not until early May that it became clear they would have a business partnership. Dobson struck me as being particularly evasive about the formation of his business relationship with Rutsis. Even Rutsis, who for the most part was exceptionally candid, impressed me as being evasive on this issue. Rutsis testified that in order to comply with the requirement of a minority business partner, Airport Authority officials assisted Rutsis by putting him in touch with a local business person who he was considering as a minority business partner. Rutsis further testified that it was not until sometime around May 5 that this other person decided not to participate. Rutsis then supposedly approached Dobson again to make sure he understood the program, and Dobson agreed to participate. This purported sequence of events, however, is belied by the fact that Dobson signed Respondent's concession agreement as corporate vice president, and this document is dated May 1.

Dobson gives an even more incredible version of the way in which his relationship with Rutsis was formalized. Dobson testified that he first interviewed with Respondent around May 3 or 4, and that he filled out an application sometime between May 5 and 10. Even Rutsis testified that Dobson filled out his employment application in mid-April 1989, at the same time as other employees, and Rutsis admits that Dobson was "one of the first" individuals to inquire as to his employment status.¹⁰ Dobson testified that when he went to work on May 4, 3 days after Respondent took over operations at the Knoxville Airport, he still did not know he was employed by Respondent. Dobson asserted, "there was nothing definite on it." When Dobson was pressed on this point, Dobson even claimed he did not know he was employed by Respondent until "I got my first paycheck." Even after being confronted with the concession agreement, dated May 1, which Dobson signed as corporate vice president, Dobson denied being employed by Respondent as of that date.

While Rutsis and Dobson did not finalize their minority business relationship with the Airport Authority until mid-May, I believe the record warrants a conclusion that Dobson was an agent of Respondent in labor relations matters much earlier. There is no question that Rutsis considered Dobson the most desirable and viable minority business partner even before Respondent was awarded the concession contract. Rutsis himself testified that Dobson's participation could help Respondent win the contract. The record also makes it very clear that from the day Respondent was awarded the contract, Rutsis actively courted Dobson to be his business partner. I credit Local Union President Betty Archer that in early April 1989, she questioned Rutsis specifically concerning Dobson's status with Respondent. Rutsis told Archer at that time that Dobson would be in "management." When Respondent's plan to temporarily close the restaurant was precluded by the Airport Authority on April 30, it was Dobson who called the existing waitresses and told them to report to work the following day for Respondent. Further, Dobson signed Respondent's concession agreement the very next day on May 1 as corporate vice president. In my view, the record supports a conclusion that at least from the time of the conversation in early April between Rutsis and Archer, Rutsis held out Dobson to employees and prospective employees as being a management representative. The fact that their relationship was not legally formalized with the Airport Authority until mid-May is not controlling. I find that from early April onward, Rutsis held out Dobson to employees as his agent. I find that from April 1, 1989, Dobson's acts vis-a-vis employees are attributable to Respondent. Accordingly, I find that when Dobson told employees Rutsis would not give out employment applications until it was determined why Union President Betty Archer had hired a lawyer, Respondent threatened employees with reprisal because of the Union, and Respondent thereby violated Section 8(a)(1) of the Act. Further, I find that when Dobson told employees that if they complained to the Labor Board, they would be fired, Respondent further violated Section 8(a)(1) of the Act.

¹⁰Dobson's employment application is undated, as were the vast majority of documents bearing on the relationship between Dobson and Respondent.

The Successorship Issue and Unilateral Changes

It is now well established that the Board scrutinizes seven criteria in determining whether one employer constitutes the legal successor to another employer for purposes of collective bargaining. The Board looks for substantial continuity in (1) business operations; (2) plant; (3) work force; (4) jobs and working conditions; (5) supervisors; (6) machinery, equipment, and methods of production; and (7) product or service. *Eastone of Ohio*, 277 NLRB 1652 (1986). Not all of these criteria need be present in order to find a continuity in the employing enterprise such that a successorship will be found. Rather, a successorship determination must be based on a consideration of the totality of circumstances. The Board does not accord controlling weight to any single factor.

When Respondent assumed the food services contract at the Knoxville Airport, it continued to operate the same restaurant using essentially the same equipment which existed prior to the takeover. It offered the public the identical product which had been offered by the prior business. Respondent's primary on-site supervisor was Louis Dobson, who performed the same duties for the previous employer. Respondent hired a substantial majority of its work force from among the Concession Air employees, and their jobs, classifications, and day-to-day working conditions have remained the same. Employees worked essentially the same hours doing the same work as before.

Respondent argues that the Knoxville facility is not an appropriate bargaining unit because it was formerly part of a larger, nationwide voluntarily recognized unit comprised of all of Concession Air's airport employees. The history of collective bargaining shows, however, that the local union has negotiated separate wage supplements for the Knoxville facility and has been responsible for processing individual grievances that may have arisen at the Knoxville facility. An all-employee single-plant unit has historically been recognized by Board precedent as the presumptively appropriate unit. The Board examines the structure of the employing industry rather than the internal structure of the union to determine whether the smaller unit remains appropriate. When, as here, a new owner succeeds to only a portion of the former employer's operation but continues the business under circumstances that would otherwise demonstrate successorship status, the Board has required the new employer to recognize and bargain with the incumbent union. *Stewart Granite Enterprises*, 255 NLRB 569 (1981); and cases cited therein. Based on the continuity of business operations, the physical structure involved, the machinery, equipment, and methods of production, the identity of product and service, and the continuity of jobs and day-to-day working conditions, as well as the fact that a majority of Respondent's work force came from the predecessor employer, there can be little doubt that Respondent is a successor employer, and I so find.

Left for resolution is the issue of when that successorship status attached. Ordinarily, a successor-employer's bargaining obligation arises when the new employer commences operation at the newly acquired facility and reaches a "representative capacity." *Fall River Dying Corp. v. NLRB*, 482 U.S. 27 (1987). In certain circumstances, however, an employer's bargaining obligation may arise prior to reaching a full employee complement. As was stated by the Supreme Court:

[T]here will be circumstances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms [and conditions of employment]. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

In the instant case, it is indeed clear, and in fact admitted by Rutsis, that Respondent initially intended to retain the vast majority, if not all, of the predecessor's work force, and only changed its plans upon discovery that the predecessor's employees were unionized. In Rutsis' very first meeting with employees and Union President Betty Archer in early April, Rutsis informed employees that it was his practice and he intended to hire all, or essentially all, of the predecessor's employees. Rutsis admits that his plans changed only because he was advised by counsel not to hire more than 50 percent of his employees from the predecessor's work force. Only then did Respondent formulate the intention to try to avoid a bargaining obligation by not hiring certain people because they were part of a group represented for purposes of collective bargaining by a union, an intention which is clearly discriminatory and unlawful. Prior to devising this unlawful scheme, which circumstances prevented Respondent from carrying out, Respondent had openly committed itself at an earlier date to hire Concession Air's employees. In these circumstances, I find that Respondent's bargaining obligation attached as of April 1, 1989, when Rutsis informed employees they could all expect to be retained when he took over the Knoxville concession contract. The record does not reflect that Rutsis discussed in any detail with any employee at that time the numerous changes in fringe benefits which he later made. Under such circumstances, Rutsis was not free to set terms and conditions of employment without first consulting with the Union. *A-1 Schmidlin Plumbing Co.*, 284 NLRB 1506 (1987). See also *Freemont Ford*, 289 NLRB 1290 (1989). There is no indication whatever that at the time the bargaining obligation attached on April 1, Respondent had any reason to doubt the Union's majority status. Since Respondent hired a majority of actively employed Concession Air employees with no hiatus of operation, the Union is presumed to have enjoyed continuing majority status as long as the unit remains appropriate for collective bargaining. See *Stroehmann Bros. Co.*, 252 NLRB 988 (1980). Accordingly, I find that by eliminating health insurance benefits, eliminating holidays, reducing vacation benefits, eliminating sick leave, eliminating seniority, and otherwise unilaterally changing the wages, hours, and working conditions of employees, Respondent violated Section 8(a)(1) and (5) of the Act.

Although Respondent clearly did not have objective considerations on which to doubt the union's majority status at the time the bargaining obligation attached, Respondent contends that based on the employee petition, Respondent obtained objective evidence which gave rise to a good-faith doubt and which then caused Respondent to conduct the May 26 poll of employees. Respondent argues that based on the results of the May 26 poll, Respondent had objective evidence that a majority of employees did not wish to be represented for purposes of collective bargaining by the union. Counsel for General Counsel and the Union, on the other

hand, argue that the employee petition was, at best, ambiguous and, at worst, tainted. Further, they argued that the May 26 poll was unlawful because it failed to meet *Struksnes Construction Co.*, 165 NLRB 1062 (1967)] requirements and because Respondent failed to notify the Union that it was going to conduct the poll. I find that counsel for General Counsel and the Union have the more persuasive argument. I note first that the employee petition does not state, nor even clearly imply, that employees do not wish to be represented by the Union. The petition simply states that employees would choose their jobs over the Union if necessary. The employees' primary concern was their jobs, not the Union. The reason for the wording on this petition is no mystery when viewed in the context surrounding its distribution among employees. Rumors were widespread, due in large part to Louis Dobson, that Rutsis was not going to distribute employment applications since Local Union President Betty Archer had hired an attorney. In such circumstances, Respondent may not now claim that the petition created a doubt about the Union's majority status.

In *Struksnes Construction Co.*, supra, the Board articulated those circumstances under which the polling of employees is lawful: (1) the purpose of the poll is to determine the truth of a union's claim of majority; (2) this purpose is communicated to employees; (3) assurance against reprisals are given to employees; (4) balloting is secret; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. In *Texas Petro Chemicals Corp.*, 296 NLRB 1057 (1989), the Board added a sixth requirement that "an employer provide the union with reasonable notice of the time and place of the poll." I conclude that the May 26 poll conducted by Respondent was tainted for several reasons. First, and perhaps foremost, the poll was not conducted in an atmosphere free of other unfair labor practices. The employees had been told by Dobson that Rutsis would not give out employment applications until it was determined why Union President Betty Archer had hired a lawyer; Respondent had avoided hiring Union President Betty Archer because of her status with the Union; Respondent had unilaterally discontinued many of the fringe benefits previously enjoyed by them without prior consultation with the Union; and employees had been told by Dobson that if they complained to the Labor Board, they would be fired, all of which I find to be unlawful. Further, I note that as the poll itself was being conducted, Respondent President Rutsis remained in the room the entire time, which itself tends to create a coercive atmosphere for employees. This, combined with the fact that some employees even shouted at other employees to "vote no" as the balloting progressed leads me to conclude that under any circumstances the May 26 poll was tainted. Accordingly, I find that by conducting the poll, Respondent violated Section 8(a)(1) of the Act.

Finally, the parties stipulated that Respondent did not give advance notice to the Union of its intent to conduct the May 26 poll. Respondent argues that it would be unfair to find it to have violated Section 8(a)(1) and (5) of the Act by having conducted this poll unilaterally because "between the time that Helnick conducted its poll and the date of the hearing, the Board added [this] requirement to the long standing *Struksnes* principles." I reject this argument. Even in *Texas Petro Chemicals*, wherein the Board first adopted the requirement of advance notice, the Board applied that require-

ment to the facts of that case, and found that Respondent had violated Section 8(a)(1) and (5) of the Act. There is no less reason for applying that requirement in this case. I find that by failing to give advance notice to the Union of its intent to conduct the employee poll, Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

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

2. Hotel & Restaurant Employees International Union, Local 727, is a labor organization within the meaning of Section 2(5) of the Act.

3. By Vice President and Supervisor Louis Dobson telling prospective employees that Respondent would not give out employment applications until it was determined why Union President Betty Archer had hired a lawyer, Respondent thereby threatened employees with reprisal because of their union activity in violation of Section 8(a)(1) of the Act.

4. By Vice President and Supervisor Louis Dobson telling employees that if they complained to the Board they would be fired, Respondent violated Section 8(a)(1) of the Act.

5. The following employees of Helnick Corporation constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by Helnick Corporation at its Alcoa, Tennessee, facility; but excluding professional employees, guards and supervisors as defined in the Act.

6. At all times material, the Union has been the representative of a majority of the employees in the unit described above for purposes of collective bargaining, and, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment.

7. Helnick Corporation is a successor employer to Concession Air.

8. By refusing to recognize and bargain with the Union as the representative of its employees and by unilaterally changing terms and conditions of employment, Respondent violated Section 8(a)(1) and (5) of the Act.

9. By discriminatorily denying employment to Betty Archer, Respondent violated Section 8(a)(1) and (3) of the Act.

10. By unilaterally conducting a poll of employees on the issue of union representation without notifying the Union of its intention to do so, Respondent violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Because Respondent unlawfully refused to recognize and bargain with the Union as the representative of its employees and unilaterally changed terms and conditions of employment, I shall order it to bargain on request; to restore the sta-

tus quo ante by restoring the conditions it unilaterally changed and by continuing them in effect until it fulfills its bargaining obligation, and to make employees whole for any loss of wages or other benefits due to Respondent's unilateral action, with interest, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), and for any benefits it unilaterally discontinued.

Because Respondent discriminatorily denied employment to Betty Archer, I shall order it to offer her employment and to make her whole for any resulting loss of earnings and other benefits. I recognize that Respondent may have already offered Archer employment in order to toll its backpay liability, but I shall nevertheless formulate my order in the normally accepted language so as not to create any ambiguity about Respondent's obligation to Archer.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Helnick Corporation, Alcoa, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening reprisal against employees because they are represented for purposes of collective bargaining by a labor organization.

(b) Threatening to discharge employees for contacting or seeking assistance from the Board.

(c) Denying employment to, or otherwise discriminating against, any employee for being a member of or supporting a labor organization.

(d) Refusing to recognize and bargain with Hotel and Restaurant Employees International Union, Local 727, as the exclusive representative of its employees in the appropriate unit described below

All employees employed by Helnick Corporation at its Alcoa, Tennessee, facility; but excluding professional employees, guards and supervisors as defined in the Act.

(e) Unilaterally changing terms and conditions of employment without prior notice to, and consultation with, the Union.

(f) Unilaterally conducting a poll of employees without giving advance notice to the Union.

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

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

(a) Offer Betty Archer immediate employment to the job she would have received if she had not been discriminated against or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges she might have enjoyed, and make her whole for any loss of earnings and other benefits which she may have suffered by reason of the discrimination against her by paying her a sum of money equal to the

¹ 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.

amount she normally would have earned from the date of the discrimination against her to the date of the offer of employment, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹²

(b) Recognize and, on request, bargain with Hotel and Restaurant Employees International Union, Local 727 as the exclusive representative of the employees in the appropriate unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Restore the terms and conditions of employment that it unilaterally changed and continue them in effect until it fulfills its bargaining obligation.

(d) Make whole employees for any loss of wages due to its unilateral action and for any benefits it unilaterally discontinued in the manner set forth in the remedy section of the decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Alcoa, Tennessee, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted immediately upon receipt and be maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

¹² Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

¹³ 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."

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

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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

WE WILL NOT threaten reprisal against employees because they are represented for purposes of collective bargaining by a labor organization.

WE WILL NOT threaten to discharge employees for contacting or seeking assistance from the Board.

WE WILL NOT deny employment to, or otherwise discriminate against, any employee for being a member of or supporting a labor organization.

WE WILL NOT refuse to recognize and bargain with Hotel and Restaurant Employees International Union, Local 727 as the exclusive representative of our employees in the appropriate unit described below:

All employees employed by Helnick Corporation at its Alcoa, Tennessee, facility; but excluding professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change terms and conditions of employment without prior notice to, and consultation with, the Union.

WE WILL NOT unilaterally conduct a poll of employees without giving advance notice to the Union.

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

WE WILL offer Betty Archer immediate employment to the job she would have received if she had not been discriminated against, or, if the job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges she might have enjoyed, and make her whole for any loss of earnings and other benefits which she may have suffered by reason of the discrimination against her by paying her a sum of money equal to the amount she normally would have earned from the date of the discrimination against her to the date of the offer of employment, less net interim earnings, with appropriate interest.

WE WILL recognize and, on request, bargain with Hotel and Restaurant Employees International Union, Local 727 as the exclusive representative of the employees in the appropriate unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL restore the terms and conditions of employment that we unilaterally changed and continue them in effect until we fulfill our bargaining obligation.

WE WILL make whole employees for any loss of wages due to our unilateral action and for any benefits we unilaterally discontinued.

HELNICK CORPORATION