

St. John Trucking, Inc. and Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.¹ Case 25-CA-20121

July 19, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On September 28, 1990, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions and a supporting brief, the Intervenors filed exceptions, and the General Counsel filed limited cross-exceptions and a brief in support. The General Counsel also filed a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions⁴ and to adopt the recommended Order.

¹On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

²The judge made several inadvertent factual errors throughout his decision, some of which were the subject of exceptions filed by the parties. For clarity, we shall correct the more obvious errors: The dates of the hearing were April 17 and 18, 1990, not 1989; counsel for the Intervenors is Brown, not Morgan; counsel for the Intervenors, not counsel for the Respondent, presented the 10 employee witnesses at the hearing; complaint par. 7(b) was amended at hearing to allege that the Respondent had refused to recognize and bargain with the Union since July 25, 1989; Michael Chestnut left the Respondent's employ on January 13, 1990, not July 13, 1990; the witness employed at Berry Material Stone Quarry is named William Richard Jr., not Richardson; employee Roger Richardson testified that he told Jerry St. John that he "didn't think we needed the union," not that "we need the union"; G.C. Exh. 2 is a list of 14 employees, not 13, who were in the Respondent's employ as of June 21, 1989, not April 18, 1990; Roger Richardson is a truckdriver, not a mechanic; and the Respondent should be referred to as "Employer" in the notice to employees. A new notice is attached. None of these errors affect the outcome of the case.

³The Respondent and Intervenors have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

With respect to the specific exception that the judge erred in crediting employee Richardson's affidavit over his testimony at the hearing, we note that this action is well within settled Board precedent. See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

⁴The judge concluded that the Respondent violated Sec. 8(a)(1) by interrogating or polling the employees about their union sentiments, relying in part on *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989). Chairman Stephens agrees with the judge's conclusion here, but does so based on the analysis set forth in his concurring opinion in *Texas Petrochemicals*. Members Devaney and Raudabaugh also agree with the judge, but find it unnecessary to rely on *Texas Petrochemicals*.

The General Counsel excepts to the judge's failure to find that the Respondent was precluded from raising objective considerations as a defense to the withdrawal of recognition charge because the circumstances in which the de-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, St. John Trucking Inc., North Vernon, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

fense arose were not free from unfair labor practices. We agree with the General Counsel that an assertion of doubt as to a union's majority status based on objective considerations "must be raised in a context free of unfair labor practices." *Impressions, Inc.*, 221 NLRB 389, 403 (1975). *Nu-Southern Dying & Finishing*, 179 NLRB 573 fn. 1 (1969). Here, the judge found that the Respondent violated the Act by interrogating or polling its employees. In light of this type of unlawful conduct, we agree with the General Counsel that Respondent was not privileged to raise a doubt as to the Union's majority status.

We note, however, that if we were to reach this issue, we would agree with the judge that the Respondent failed to establish that it had a good-faith doubt based on objective considerations as to the Union's majority status prior to withdrawing recognition from the Union.

Inasmuch as we adopt the judge's discrediting of Jerry St. John's testimony concerning employees' purported statements about the Union in July through September 1989, we do not rely on the judge's alternative finding in the analysis and conclusions section of his decision that even if such statements were made, all were made after the Respondent withdrew recognition from the Union and therefore could not support the Respondent's defense of good-faith doubt of the Union's majority status. We note that in the course of making this finding, the judge inadvertently put the date of the Respondent's withdrawal of recognition at June 25, 1989, rather than July 25, 1989. We nevertheless agree that the asserted statements, if made, could not support the Respondent's defense, because the statements indicated not that the employees did not want the Union to represent them, but merely that the employees should have the right to decide whether they wanted to be represented by the Union.

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.

WE WILL NOT interrogate or poll you about your interests, activities, or sympathies on behalf of the Union.

WE WILL NOT unlawfully withdraw recognition of, or refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135, a/w Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive bargaining representative of our employees, in the bargaining unit described below:

All truck driver employees at Employer's North Vernon, Indiana facility; BUT EXCLUDING all office clerical employees, all professional employees, all other employees, all guards and supervisors as defined by the Act.

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

WE WILL on request, bargain with the Union as the exclusive bargaining representative of all employees in the appropriate unit and, if an agreement is reached, embody such agreement in a signed contract.

ST. JOHN TRUCKING, INC.

Richard J. Simon, Esq., for the General Counsel.
Ron Morgan, President (Southeastern Employers Association, Inc.), of Bristol, Virginia, for the Respondent.
Steven J. Chestnut (Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135), of Indianapolis, Indiana, for the Charging Party.
Robert J. Brown, Esq., of North Vernon, Indiana, for the Intervenors.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. Upon a charge of unfair labor practices filed on August 31, 1989, by Chauffeurs, Teamsters, Warehousemen and Helpers, Local No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America against St. John Trucking, Inc. (the Respondent), a complaint and an amended complaint were filed on October 10, and April 9, 1989, respectively, by the Regional Director for Region 25, on behalf of the General Counsel.

The amended complaint alleges that Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its unit employees, in violation of Section 8(a)(1) and (5) of the Act.

Respondent filed an answer on October 20, 1989, denying that it has engaged in unfair labor practices as alleged.

The hearing in the above matter was held before me in Vernon, Indiana, on April 17 and 18, 1989. Briefs have been received from counsel for the General Counsel and the representative of the Respondent, which have been carefully considered.

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all times material, a cooperation duly organized under, and existing by virtue of the laws of the State of Indiana, where it maintains a place of business at North Vernon, Indiana (the facility), where it is engaged in the business of interstate and intrastate transportation of freight, commodities, and related services.

During the pass 12 months, Respondent, in the course and conduct of its business operations provided services valued in excess of \$50,000 to L. P. Cavett Co., Force Construction Co., Inc, and Kentucky Stone Co., d/b/a Berry Materials.

At all times material, L.P. Cavett Co., has maintained its principal office and place of business in Lockland, Ohio, and places of business in the State of Indiana, where it has been continuously engaged as a contractor in the business of constructing roads. During the pass 12 months L. P. Cavett Co.,

purchased and received at its jobsites products, goods and materials valued in excess of \$50,000 directly from points located outside the State of Indiana.

At all times material, Force Construction Co., Inc. has maintained its principal office and places of business in Columbus, Indiana, where it is, and has been continuously engaged as a general contractor. During the pass 12 months, Force Construction Co., Inc., purchased and received at its Indiana jobsites products, goods, and material valued in excess of \$50,000 directly from points located outside the State of Indiana.

At all times material, Kentucky Stone, Co., d/b/a Berry Material, has maintained its principal office at Louisville, Kentucky, and places of business in the Commonwealth of Kentucky and in North Vernon, Hayden, and Versailles, Indiana, where it is and has been continuously engaged in the sale of stone and related products. During the pass 12 months, Kentucky Stone Co., sold and shipped from its facilities in the State of Indiana products, goods, and materials valued in excess of \$50,000 directly to points located outside the State of Indiana.

The complaint alleges, the parties and Respondent stipulated, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the parties stipulated, and I find that Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America are, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Information

Respondent was formed in 1962, and since that time has engaged in the transportation of freight, commodities, stones and sand from various suppliers, and delivers them to specified jobsites. The company hired two employees in 1964 and more in 1967. In 1989 there were 12 trucks and 12 drivers.

The parties stipulated that at all times material, the following named persons occupied the positions set opposite their respective names, and are now, and have been at all times material, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

George St. John	Treasurer and Owner
Jerry St. John	Vice-President

The parties further stipulated that the following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All truck driver employees at Respondent's North Vernon, Indiana facility; BUT EXCLUDING all office clerical employees, all professional employees, all other employees, all guards and supervisors as defined by the Act.

The Respondent admitted that since 1980, the Respondent has entered into collective-bargaining agreements with Teamster Local 135, the most recent of which agreement expired in April 1989 (G.C. Exh. 3). Respondent also admits that in April 1989, Respondent agreed with the Union to extend the current contract for 30 days (G.C. Exh. 4).

In response to the allegations in the complaint, the Respondent affirmatively alleged in its answer that "the Employer has refused to recognize the Union since all unit employees of the Employer wish to vote as to their desires. There is pending before the Regional Director for Region 25, an R.D. Petition filed by the employees (see 25-RD-1052) and an R.M. Petition filed by employer (see 25-RM-557). In addition, Local 135 picketed employees and all employees crossed the picketed line and went to work. This would appear *good-faith doubt* as to whether Union represents employees. Current contract terminated April 30, 1989. Union has not been certified by NLRB."¹

B. Documentary Correspondence and Testimonial Conversations Between the Union and Respondent

Respondent's Treasurer and Owner, George St. John, testified that on April 24, 1989, Union Representative Ron Hudson called his office at 8:45 a.m. and asked for him. Since he was not there, Hudson asked to have George St. John call him. George called Hudson at 9:25 a.m. and got the answering machine. George called Hudson again at 11:25 a.m. and Marilyn answered the phone.

When Hudson finally called him, George refused to sign a heavy and highway agreement but offered the current contract in effect. However, the parties could not reach an agreement and George told Hudson that was his final offer. Although George never signed the heavy and highway agreement, he has negotiated a miscellaneous contract with the Teamsters and he admitted he did not engage in further negotiations with the Union after May 2, 1989.

Shortly after George St. John made his final offer to the Union on May 2, 1989, he turned his negotiations over to Ron Morgan, but stated he personally has never refused to meet with the Union.

Union Representative Ron Hudson died on May 6, 1989, and later during the month of May he was succeeded by David Young, current business agent for Edinburgh, Indiana and the Respondent's employees.

In a letter dated June 7, 1989, from the Union (David Young) to Respondent (G.C. Exh. 7), the Union advised as follows:

This letter will serve to notify you that the Union by and through its duly authorized representative is requesting to meet with you in order to negotiate a new collective bargaining agreement. If you are refusing to comply with this request, we would appreciate a response from you stating the reason why.

This Union is also requesting an explanation from you as to why you refused to accept the grievance filed by Mr. Michael Goodpaster protesting his discharge.

We will expect a reply from you no later than June 15, 1989.

David Young testified that he telephoned George St. John, on the same date (June 7, 1989), introduced himself as David Young, the business agent of Local 135, and informed him that Business Agent Ron Hudson had passed away, and he (Young) was assuming Hudson's union duties. He said he also told St. John the contract had expired and he (Young) wanted to commence negotiations for a new collective-bargaining agreement. George St. John said okay, he could not meet this week but asked him to call him next Monday or Tuesday.

Based on rumors since the summer of 1989 from employees Bill Garrity, Roger Richardson, Jim Brunner, Galyean Derringer, Ross Collins, Evans, Malcomb, Hubert, and Eddie Megel that employees wanted to vote on whether they wanted to be represented by the Union, George St. John said he (George) filed an RM petition on June 19, 1989 which was withdrawn.

Young testified that on or about June 12, 1989, he called George St. John and asked him about meeting to negotiate. George told him Ronald Morgan, Respondent's representative, would handle the negotiations for him. The following day (June 13, 1989) Young said he called Morgan, introduced himself as business agent for Local 135 and Respondent's employees, and informed him that Respondent was obligated to meet and negotiate with him. They discussed briefly the miscellaneous contract, the heavy and highway contract, and they agreed to get together at a later date.

Young further testified that he sent a letter to Respondent (George St. John) on July 25, 1989 (G.C. Exh. 5) as follows:

This letter will serve to notify you that Teamsters Local Union No. 135 is requesting to meet with you in order to negotiate a new Agreement.

I would appreciate your response as soon as possible and am offering the following as possible meeting dates: Monday, July 31; Tuesday afternoon, August 1; or Friday, August 4, 1989.

Please contact me regarding the above matter to schedule a meeting time and date.

George St. John acknowledged he received the Union's July 25, 1989 letter of request to meet and negotiate for a new agreement (G.C. Exh. 5).

A letter dated August 9, 1989 (G.C. Exh. 6) from the Southeastern Employer's Association, Inc., signed by Ronald Morgan, President, to the Union (David Young) was advised by Respondent that there existed a good-faith doubt as to whether the Union represented the employees of the Respondent; that Respondent has noted that the Union was not certified by the NLRB; and that the Association (Respondent) would suggest a petition for an election to clarify the question.

In a letter from the Union (David Young, G.C. Exh. 8) to Respondent (George St. John) dated August 21, 1989, the Union stated:

On June 25, and July 25, 1989, correspondence was sent to you requesting meeting dates to negotiate a new agreement. As of this date, I have not received a phone call nor letter from you.

It is imperative that we meet as soon as possible to bring this contract to an honorable conclusion and resolve these differences.

¹ The facts set forth above are not in conflict in the record.

I will expect to hear from you no later than Friday, August 25, 1989.

The Union proceeded to picket St. John Trucking at the L. P. Cavett job, September 1989, but not Cavett, because Respondent had not signed a contract. The picket line was established the first part of September 1989. Hubrecht was on the picket line in the Bloomington area. He (David Young) told Hubrecht he did not know all of the St. John employees and that was because he bumped into some of them in the street. Young acknowledged that he had the authority to negotiate miscellaneous contracts provided he secured the signature on the heavy and highway contract.

In his affidavit to the Board dated September 26, 1989, (G.C. Exh. 10), Respondent (George St. John) acknowledged:

I have not bargained with the Union after I received the Unions July 25, 1989 letter because I had a good faith doubt that the Union represented a majority of my employees.

C. Did Respondent Interrogate or Poll Its Employees About Their Union Sympathies?

Roger Richardson, a truckdriver employed by Respondent 11 or 12 years, testified to subpoena that he gave an affidavit to the Board July 20, 1989; and that about 6 or 7 weeks prior thereto, on or about June 5, 1989, while in the shop, Bill Garrity approached him in the presence of Jerry St. John, vice president of Respondent. Both he and Garrity asked Jerry St. John why could they not hold their own election on whether or not they wanted a union. Jerry asked him (Richardson) how he felt about the Union and if the employees had an election what would he do. Richardson said he told Jerry he did not think the employees needed a union because the Union never did anything for him. He said Jerry St. John told them they should be able to hold an election—they had a right to hold one. Richardson said Jerry St. John also told him he had asked other employees how they felt about the Union. Although, truckdriver William Garrity testified that Jerry St. John did not ask him how he felt about the Union, it is particularly noted that Garrity did not testify that Jerry St. John did not ask Roger Richardson how he felt about the Union.

Counsel for the General Counsel asked Richardson did Jerry St. John ask him (Richardson) about the subject of an election first, or did he (Richardson) raise the question to Jerry St. John about employees' holding an election to determine whether they wanted the Union. When Richardson said he could not remember and was confronted with his affidavit given to the Board July 20, 1989, Richardson reluctantly admitted that Jerry St. John came to him and asked him "how I felt about the Union, and if they had an election what would I do?," as Richardson previously stated in his affidavit. Richardson also acknowledged that his recollection was possibly better in July when he gave his affidavit to the Board than it was when he testified in this proceeding April 1990.

On cross-examination Respondent's representative (Morgan) interrogated Richardson about the Government's taking his affidavit, and Richardson proceeded to testify that he was tried when his affidavit was taken and that he did not read the affidavit before he signed it; that the Government's representative who took his affidavit did not read the affidavit

to him (Richardson); and that he (Richardson) later told General Counsel before the trial that paragraph 6 of his affidavit was not typed the way he told the story to the Government representative.

I do not credit Richardson's testimony in this regard because I was not persuaded by his demeanor, in the face of his signed affidavit, that he was testifying truthfully. Moreover, it is particularly noted that in his affidavit, Richardson acknowledged he read his affidavit before he signed it. Consequently, I credit Richardson's statements in his affidavit as being more truthful, reliable, and consistent with other credited evidence of record, *infra*. Although Jerry St. John testified that he only talked to Richardson and other employees about the Union whenever they asked him questions about the Union, I was not persuaded by the demeanor of Jerry or the self-serving nature of his statement that his latter state it was truthful.

With respect to the above-discussed conversation between Jerry St. John and employees Richardson and Garrity, Jerry St. John, vice president of Respondent, testified that he talked to Richardson and other employees whenever they came to him and asked questions about the Union. However, it is noted that in his affidavit given to the Board September 26, 1989, Jerry St. John did not deny that he asked employees questions about the Union, but only stated he did not recall going to them and asking such questions. In view of other statements in his affidavit which are not consistent with his testimony that he was testifying truthfully, I discredit Jerry St. John's testimony in this regard, and credit Roger Richardson's testimony. I also attribute greater credibility to Richardson's account of the conversation over Jerry St. John's, because Richardson is still in the employ of Respondent. *Coca Cola Co.*, 196 NLRB 892, 893 fn. 5 (1972).

Consequently, based on the foregoing credited testimony, I find that Jerry St. John did ask Richardson and other employees how they felt about the Union. In doing so, Respondent's interrogation or polling of employees coerced them in the exercise of their protected rights, in violation of Section 8(a)(1) of the Act.

D. Respondent's Contended Doubt of Majority Status

In support of its contention that it had a good-faith doubt that the Union did not represent a majority of its employees, Respondent introduced the following evidence.

George St. John testified that he filed the RM petition because there were *rumors* that the men wanted to have a vote on "this." George first stated he heard the rumors during the summer of 1989, and on further examination, said it was late March to mid-April. He said he heard the rumors from no certain individual, and later he named most of the employees in the unit.

George St. John stated in his affidavit of September 21, 1989, that employees Richardson, Garrity, Derringer, Ross and other unnamed employees said other employees told them, at some time or another, that they did not want to be represented by the Union but they wanted to vote on it. However, it is noted that Ross and Derringer specifically testified that they told George and/or Jerry St. John they thought the employees should have the right to vote on whether or not they wanted to be represented by the Union. Neither said they told either of the St. Johns that they did not want the Union to represent them and other employees.

Employee Garrity testified that he told the St. Johns he thought the employees had the right to vote and when he was asked whether the St. Johns asked him how he would vote, he said they did not ask him how he would vote, and if they had asked him, he would not have told them. It would appear from this answer by Garrity that he did not tell either of the St. Johns that he did not want the Union to represent him.

Consequently, I discredit the testimony of George St. John that the aforementioned four employees told him they did not want to be represented by the Union, and that other employees told them they shared in their view. Notwithstanding, even if either of the four employees told the St. Johns that other employees told them they did not want to be represented by the Union, such hearsay assertions about what other employees said cannot constitute sufficient objective considerations to support either a withdrawal of recognition of the Union, or a reasonable doubt that the Union did not represent the majority of the employees. *Louisiana-Pacific Corp.*, 283 NLRB 1079 (1987).

Jerry St. John identified General Counsel's Exhibit 2 (a letter dated June 21, 1989) addressed to the Board's Regional Office, which states that:

A majority of the employees on this list came forth and said they wanted to vote on whether or not to belong to the Union. This list includes all of our employees with the exception of owners of a company.

Jerry further testified that each of the employees named on the list had come to him prior to June 21 and informed him they thought they should have the right to make a decision on whether they wanted to be represented by the Union. He said he told them they should have that right and he also told Garrity to check with the NLRB in Indianapolis.

However, Jerry St. John denied that in late May or early June 1989, he polled or interrogated employees concerning union membership, activities or sympathies. Truckdriver William Garrity testified that Jerry St. John did not conduct a poll of the employees about their union interests and sympathies. Jerry St. John acknowledged he gave an affidavit (G.C. Exh. 9) to a Board agent on September 26, 1989, and that he read and signed it.

In his affidavit, Jerry St. John stated on page 2, paragraph 3:

After obtaining this information from Richardson and Garrity, I do not recall going to other employees and asking them whether or not they wanted to vote on whether or not to be in the Union. I do not presently recall doing so.

At the bottom of the page of his affidavit, he said "none of the employees told me that they didn't want to be represented by a union." Since the date the contract expired (April 30, 1989) to date, no employee has told me that he does not want to be represented by a union at all, Teamsters or any other, or words to that effect.

Also, on page 3 of Jerry St. John's affidavit (G.C. Exh. 9) he said:

Although I have never heard all of the employees say that they didn't want the Union, nor have I heard all

of them say they wanted to vote on whether or not they should belong to the Union.

Bill Garrity testified that he sent a letter (G.C. Exh. 2) to the Board which he and all of Respondent's employees signed to vote on whether or not they wanted to belong to the Union. He acknowledged he is paying counsel (Morgan) for representing the employees who signed the list and that they can pay him or not pay him, if they so choose. Garrity stated that he does not belong to Local 135 although he used to belong to it for 6 or 7 years. When he has problems he said he talks to George St. John and that the Union has never done anything for him. He did not picket and the pickets were not employees of the Respondent, but were mostly strangers to them.

Garrity admitted he has known George St. John for many years and that he had contacted Jerry St. John and asked him how could he get in touch with the NLRB. Jerry told him he thought the NLRB would help the employees, if that was their position. Before the employees signed the petition, he said he did not want the Union to represent him; and that he only talked to Roger Richardson before he went to Morgan's office to have him draw up the petition. The petition was his (Garrity's) idea, and he did not talk to the other employees beforehand. Nonetheless, all of the employees went to Morgan's office and signed the affidavit. He did not talk with any of them after they signed.

Paragraph 7(b) of the complaint was amended as paragraph 9(b) as follows:

As of April 18, 1990, the following employees except Leonard Ross and Joseph Defibaugh signed the list (General Counsel's Exhibit 2) and were in Respondent's employ:

- | | |
|----------------------|----------------|
| 1. Timothy Collins | Truck Driver |
| 2. Kelly Combs | Truck Driver |
| 3. Raymond Derringer | Truck Driver |
| 4. Kyle Evans | Truck Driver |
| 5. Bill Garrity | Truck Driver |
| 6. Donald Galyean | Mechanic |
| 7. Hubert James | Truck Driver |
| 8. Warren Malcomb | Mechanic |
| 9. Edward Megel | Dozer Operator |
| 10. Roger Richardson | Mechanic |
| 11. Leonard Ross | Truck Driver |
| 12. Ronald Rowlett | Truck Driver |

Joseph D. Defibaugh, Michael Chestnut, and Albert Symons no longer worked for Respondent after the summer of 1989, ending in October 1989. They were all truckdrivers.

Analysis and Conclusions

It is established by the uncontroverted evidence that the Respondent and the Union have been parties to collective-bargaining agreements since 1980, and the Union has been so recognized as the collective-bargaining representative of Respondent's truckdriver employees. The last contract between the parties was by its terms in effect until April 1, 1989. However, that agreement was extended by agreement of parties through April 30, 1989 while the parties continued negotiations unsuccessfully for a new agreement.

When a negotiator for the Union, Ron Hudson died May 6, 1989, his negotiating duties with the Respondent were assumed later in May by David Young.

Business Agent Young contacted Respondent by letter and telephone on June 7, 1989 and informed it of the death of Hudson; that he (Young) was assuming Hudson's negotiating duties; that the contract had expired April 30, and he was requesting an opportunity to meet with Respondent to commence negotiations for a new contract. The parties agreed to meet or communicate on or about June 12 and 13 to negotiate or establish a time to negotiate.

However, during the interim, the credited evidence established that Respondent (Vice President Jerry St. John) approached truckdriver Roger Richardson, and asked Richardson how he felt about the Union, and if the employees had an election what would he do. Jerry St. John also told Richardson he had asked other employees the same questions. When Richardson— said "we" need the Union, truckdriver William Garrity, who had appeared during a part of a conversation, asked Jerry could the employees hold their own election on whether or not they wanted to be represented by the Union. Jerry said he had no problem with the idea, that he thought they should have the right to vote on whether or not they want the Union.

When the parties communicated again on June 12, they discussed the miscellaneous and heavy and highway contracts but no agreement was reached. Respondent said they would be getting together again, but 6 days later, Respondent filed an RM petition Case 25—RM—554.

Jerry St. John stated in his letter of June 21, 1989, that a majority of Respondent's employees said they wanted to vote on whether the employees wanted to be represented by the Union (G.C. Exh. 2). It was established at the hearing in June 1989, that 3 of the employees named on the list of 13 employees were not truckdrivers. Notwithstanding, the letter does not state that the employees informed St. John they did not want to be represented by the Union, but simply that they wanted to vote on whether they wanted to be represented by the Union. However, when the St. Johns gave the above testimony or statements of what the employees told them, it is clear that a majority of employees did not tell him they did not want to be represented by the Union. Under these circumstances, I find that the employees' statements to George or Jerry St. John do not constitute sufficient objective considerations to support Respondent's withdrawal of recognition of the Union, because the employees did not want to be represented by the Union, or a reasonable doubt that the Union did not represent a majority of the employees. *Laverdiere's Enterprises*, 297 NLRB 826 (1990); *Byran Memorial Hospital*, 279 NLRB 222 (1986).

On July 25, 1989, the Union (Young) again requested Respondent to meet to negotiate a new agreement on any days between July 31 and August 4, 1989.

The Respondent withdrew its request for its RM petition and the withdrawal was approved the same day and dismissed. In a letter dated August 9, 1989, Respondent informed the Union that there existed a doubt whether the Union represented its employees; and that the Union is not certified by the NLRB. Respondent suggested a petition for an election to determine the representative status of the Union.

Although the Union sent another letter to Respondent dated August 21 requesting a meeting to negotiate a new agreement, it did not receive a response from Respondent. An RD petition was filed with the Board by truckdriver William Garrity on August 30, and the Union filed the charge herein on August 31, 1989.

The Union called Respondent (Morgan) September 11 and requested a meeting to negotiate a new agreement. Respondent (Morgan) informed the Union it had nothing to say because of the decertification petition.

Although Jerry St. John stated in his affidavit of September 26, 1989 that in July 1989, employees Richardson and Garrity asked him if they had any say in whether or not they were union or nonunion, and that Richardson said there were more than just himself who thought they should have the right to decide; that on or about September 18, 1989, employee Derringer asked him (Jerry) if the employees' were going to be able to decide that question; or that during July and August 1989, he heard every unnamed employee at one time or another, tell him or each other, that they should have the right to decide whether they want to be represented by the Union; and that he (Jerry) could only recall 3 of 10 employees stating they should have the right to decide.

Based on the foregoing uncorroborated testimony and demeanor of Jerry, I do not credit his testimony, and I find that none of the unidentified employees told Jerry St. John, nor did Jerry over hear any of said employees unequivocally state that they did not want to be represented by the Union.

In any event, even if employees made such statements to Jerry St. John, whose testimony or statements I do not credit, it is especially noted that the statements attributed to the employees were all made after the Respondent withdrew recognition of the Union on June 25, 1989. Jerry St. John's statements and testimony are not supported by any employee witnesses. Such alleged statements by employees do not support a defense of objective-considerations. *Louisiana-Pacific Corp.*, 283 NLRB 1079, 1080 (1987); *Laverdiere's Enterprises*, supra.

It is clear from the credited testimony, supra, that on or about June 15, 1989, Jerry St. John, vice president and supervisor of Respondent, came to Richardson and asked him how he felt about the Union and if they (the employees) had an election what would he do; and that he, Jerry, had asked other employees the same questions. At the time of the above conversation on or about June 15, 1989, the record does not show that Respondent had, or expressed it had, a good-faith doubt about the Union's continued majority status.

Nor did Respondent present any objective considerations about the Union's majority status on or before its letter of June 21, 1989. Consequently, I find that Respondent's (Jerry) interrogation or polling of employee Richardson and other employees constituted an interference with, restraint upon, and coercion against the exercise of employees' protected rights, in violation of Section 8(a)(1) of the Act. *Texas Petrochemical Corp.*, 296 NLRB 1057 (1989).

Respondent (George St. John) admitted that since it received the Union's July 25, 1989 letter requesting a bargaining meeting, it has not bargained with the Union because it had a good-faith doubt that the Union represented a majority of its employees. Respondent reiterated its refusal to bargain with the Union for the same reason in its August 9, 1989 letter to the Union. Additionally, Respondent also asserted in

its answer and in its testimony at the hearing that it has refused to recognize and bargain with the Union since its receipt of the Union's August 9 request to bargain because it had a good-faith doubt whether the Union represented a majority of its employees.

However, the Board has long held that a contractually recognized bargaining representative of employees' enjoys an irrebuttable presumption of majority status during the life of the contract, and a rebuttable presumption of majority status after the contract expires. *Bickerstaff Clay Products*, 286 NLRB 295 (1987); *Base-Wyandotte Corp.*, 276 NLRB 498 (1985).

There is no dispute that the contract in the instant case expired April 30, 1989. Since it is unequivocally established by the evidence that Respondent has refused to recognize and bargain with the Union only 11 weeks after the contract expired, its refusal occurred during the effective period of the Union's rebuttable presumption of majority status. Under these circumstances, Respondent's doubt of majority status must be based on objective considerations.

It has been long held that an employer may lawfully poll its employees about their continued support for an incumbent union, as well as it may withdraw recognition from an incumbent union whenever it makes a prerequisite showing of sufficient objective considerations on which an employer can base a reasonable doubt about the Union's continued majority status. *United States Gypsum Co.*, 157 NLRB 652, 653 (1966).

In addition to evidence supporting a reasonable doubt, the employer must also provide the union with reasonable advance notice of the time and place of the poll, and that the poll itself must be conducted in accordance with the procedural safeguards set forth in *Struksnes Construction Co.*, 165 NLRB 1062 (1967), as follows:

- (1) the purposes of the poll is to determine whether the Union enjoys majority support;
- (2) the purpose is communicated to the employees;
- (3) assurances against reprisals are given to the employees;
- (4) the employees are polled by secret ballot; and
- (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

In the instant case, the Respondent probably did comply with safeguard (1), in that its polling of the employees was to determine whether the Union still enjoyed majority status.

Respondent did not comply with safeguard (2) because the evidence does not show that Respondent communicated the purpose of its poll to employee Richardson or other employees.

The evidence fails to show that Respondent complied with safeguard (3) because it is not shown that Respondent (Jerry St. John) gave Richardson or any other employees whom he asked about the Union, assurances against reprisals. He merely told them they should have the right to decide whether or not they wanted to be represented by the Union.

Nor does the evidence show that the employees were polled by secret ballot as is required by safeguard (4).

The credited evidence has not only failed to show that Respondent did not engage in unfair labor practices or otherwise created a coercive atmosphere, but instead, has established that Respondent created a coercive atmosphere when

it interrogated or polled employee Richardson and other employees, by asking them how they felt about the Union and how would they vote if the employees held a union election. No assurances were given them against reprisals. Such polling or interrogation of employees is coercion against employees' Section 7 protected rights, and are in violation of Section 8(a)(1) of the Act. *Struksnes Construction Co.*, supra.

Respondent's Contended Objective Considerations

In an effort to show that employees did not want the Union to represent them, Respondent introduced the testimony of the following employees:

Warren Malcomb, a mechanic in Respondent's employ 16 years, testified that he is not and never has been a member of the Union (Teamsters) and he was never asked to become a member.

Ronald Rowlett was in the employ of the Respondent 2 years as a truckdriver. He testified he is not and never has been a member of the Local or the Teamsters. He denied Jerry St. John said anything to him about the Union and he did in fact drive his truck across the picket line.

Kyle Evans was in the employ of the Respondent 11 years and is a friend of George and Jerry St. John. He testified that Jerry St. John never talked to the employees about the Union and that he (Evans) drove through the picket line. He also said he does not know the Union's business agents.

James Brunner has been a truckdriver with the Respondent since 1974. He testified that he did not know the Union's business agents.

Timothy Collins was employed by the Respondent as a truckdriver. He testified that he had never talked to Jerry St. John about the Union and he acknowledged he saw David Young, business agent for the Union on the picket line with other strangers.

Kelly Combs, employed by the Respondent as a truckdriver, testified that Jerry St. John never contacted him about union affairs. He said he drove through the picket line.

Raymond Derringer, employed by the Respondent nearly 2 years, testified that he was not a member of the Teamsters or the Local and that he never talked to any member of the Union. He further testified he talked to Jerry and probably to George St. John about employees having a right to determine whether they wanted to be represented by the Union. He said he started the conversation.

Donald Galyean, a mechanic, testified he never talked to the Union's business agents and he never talked to Jerry St. John about the Union.

Edward Megel was in the Respondent's employ 12 years. He testified he crossed the picket line and that the St. Johns never talked to him about the Union.

Leonard Ross employed as a truckdriver for one year, testified he was not a member of the Local and that he had never discussed the Union with the St. Johns.

The parties stipulated that Michael Chestnut left the employ of the Respondent on July 13, 1990; Danny Defibaugh left the employ of the Respondent November 18, 1989, and that Al Symons left the Respondent's employ November 25, 1989.

William Richardson, Jr. has been employed at Berry Material Stone Quarry in Hayden 13 years where employees are represented by Local 135. He testified that as a front-end loader, he saw a picket at Berry Material, when Business

Agent Young told him on three occasion not to load a St. John's truck because the Union was putting a picket up against St. John trucking; and that as a Teamsters' member, he (Richardson) was not to load; that his contract said it was alright to refuse to load St. John's trucks. Richardson said he told Young he would have to talk to his boss and the Union steward, Dan Hgue.

Conclusion

It is particularly noted that the testimony of 10 of the above-named employees is interesting and not at all corroborative of Jerry's testimony. Only four of the employees witnesses testified they were not a member, nor has ever been a member of the Union. However, such a statement does not indicate that either of the four employees did not want the incumbent Union to represent them.

Four of the above-named employees testified that they crossed the Union's picket line, two testified they did not know the Union's business agent, but neither said they no longer wanted the incumbent Union to represent them.

Seven of the 10 above-named employee witnesses said Jerry St. John never said anything to them about the Union, and one of the same 7 employees (Evans) said he is a friend of the St. Johns' (Respondent). Although I would not credit all seven of the employees' testimony in this regard, it is irrelevant whether their testimony is credited or not, because, neither of the seven employees testimony in this regard may be construed as indicating they did not want the Union to represent them.

Only employee Derringer testified that he probably initiated a conversation with George St. John about the employees having a right to determine whether they wanted to be represented by the Union. While I credited this undisputed testimony by Derringer, it is not an unequivocal statement that Derringer actually did not want to be represented by the Union. Even if it could be construed that he was asking for an election, or had indicated he no longer wanted to be represented by the Union, he is only 1 of the 10 employees who so testified. As such, his single expression could not be attributed to a majority of the employees.

Nor can employee Richardson's testimony that he refused to comply with union agent Young's instructions not to load a truck, constitute an indication that he did not want to be represented by the Union.

Respondent's Reliance on *John Deklewa & Sons*

The Respondent also argues that Respondent is engaged in the building and construction industry, and pursuant to *John Deklewa & Sons*, 282 NLRB 1375 (1987), it was privileged to withdraw recognition of the Union herein on expiration of the contract (Apr. 30, 1989).

The above argument does not appear to be available to Respondent as a defense because the Board has specifically held that an employer who delivers material such as concrete to building sites is not an employer engaged in the building and construction industry. *J. P. Sturrus Corp.*, 288 NLRB 668 (1988). In the instant case, Respondent acknowledged it is engaged in the transportation of materials (stone and sand) to jobsites for contractor customers.

In further support of the above conclusion, it is noted, as counsel for the General Counsel points out, that the expired

contract between Respondent and the Union does not contain clauses that are characteristic of prehire agreements in the construction industry. In the instant case, the union-security clause has a 30-day grace period for union membership, while the standard period for membership in the construction industry contracts is 7 days. Consequently, based on the evidence in this record, I find that the Union is a Section 9 bargaining representative and not an 8(f) bargaining representative. *J. P. Sturrus Corp.*, supra, to which the *Deklewa* case might apply.

I therefore conclude and find on the foregoing credited evidence and cited legal authority, that Respondent has failed to establish a good-faith doubt of the Union's majority by sufficient objective considerations to rebut the rebuttable presumption of the Union's majority status. Having failed to establish actual loss of majority or rebutting presumed majority status of the Union, I further find that Respondent unlawfully interrogated or polled employees about their union sympathies and unlawfully withdrew recognition of the Union, and by doing so, Respondent failed and refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

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

CONCLUSIONS OF LAW

1. The Respondent, St. John Trucking, Inc., is an employer engaged in commerce, and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit of truckdrivers employed by Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All truck driver employees at Respondent's North Vernon, Indiana facility; BUT EXCLUDING all office clerical employees, all professional employees, all other employees, all guards and supervisors as defined by the Act.

4. At all times material, the Union has been, and is now, the exclusive representative of all employees in the aforesaid

bargaining unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By polling and interrogating its employees about their union interests, activities, and sympathies, the Respondent has interfered with, restrained and coerced its employees in the exercise of their protected Section 7 rights, in violation of Section 8(a)(1) of the Act.

6. By withdrawing recognition and refusing to recognize and bargain with the Union, the exclusive representative of the bargaining unit employees, concerning rates of pay, wages, hours, and other terms and condition of employment, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, St John Trucking, Inc., North Vernon, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating or polling its employees concerning their interests, activities or sympathies for the Union.

(b) Engaging in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

²If 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.

(c) Unlawfully withdrawing recognition of the Union and failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of the employees.

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

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

(a) On request recognize and bargain with the Union as the exclusive representative of all employees in the afore-described appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at Respondent's North Vernon, Indiana facility copies of the attached notice marked "Appendix."³ Copies of the notice on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material.

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

³If 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."