

**T.L.C. St. Petersburg, Inc. and 1115 Nursing Home and Hospital Employees Union—Florida, Division of 1115 Joint Board.** Case 12—CA-14336-1

May 18, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On November 18, 1991, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and Charging Party filed answering briefs.

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,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

1. The judge found, and we agree, that the Respondent has not established a good-faith doubt, based on objective considerations, that the Union no longer enjoyed the support of a majority of the unit employees.<sup>3</sup> In so doing, we reject the Respondent's exception to the judge's decision to attach no weight to hearsay testimony by the Respondent's president, Gerard Beaudoin, concerning statements allegedly made to employee Ruthie Richardson and Supervisor Brenda Adams and conveyed to Beaudoin, in which certain employees purportedly repudiated the Union.

In order to justify the serious step of withdrawing recognition without an election, the Board requires that the bases on which an employer relies be objectively established. *Bolton-Emerson, Inc.*, 293 NLRB 1124, 1127 (1989); *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970), cert. denied 398 U.S. 929 (1970). Here, the Respondent has demonstrated only that Richardson and Adams conveyed purported employee statements to Beaudoin;

<sup>1</sup>In view of our decision, we need not reach the Respondent's exception to the judge's statement that the Respondent was required to demonstrate that 42 of the 82 unit employees had repudiated the Union.

<sup>2</sup>In addition to the remedy by the judge, we shall order the Respondent to make whole unit employees for any losses incurred as a result of the Respondent's unilateral implementation of a new benefits package, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>3</sup>See *NLRB v. Curtin Matheson Scientific*, 110 S.Ct. 1542 (1990); *Burger Pits*, 273 NLRB 1001 (1984); *Master Slack Corp.*, 271 NLRB 78 (1984).

neither Richardson nor Adams testified as to the statements made to them by the employees. Without the testimony of Richardson and Adams concerning the circumstances surrounding the employees' alleged statements, the Respondent has not satisfied its burden of proving that its good-faith doubt that the Union lost its majority status was based on objective factors and the judge properly accorded no weight to that aspect of Beaudoin's testimony.<sup>4</sup>

The Respondent argues that, even if each of the factors<sup>5</sup> on which Beaudoin relied is alone insufficient to support a good-faith doubt, "the cumulative force of the combination of [these] factors" nonetheless establishes that the Respondent was justified in withdrawing recognition from the Union. We disagree.

The Respondent's reliance on the small number of employees authorizing dues checkoff to support its good-faith doubt is misplaced. That is because, as the judge noted, the number of employees who have authorized the checkoff of union dues does not indicate—particularly in a right-to-work State such as Florida—how many employees favor union representation, whether or not they are members of the union. Similarly, as discussed above, the alleged oral employee statements purportedly repudiating the Union are of no evidentiary value. The remaining factors cited by the Respondent, whether considered individually or collectively, do not constitute sufficient objective considerations to warrant a good-faith doubt of the Union's continued majority support. Except for the 30 signatures on the petition, and arguably the 7 written resignations from the Union, the factors relied on by the Respondent are unreliable and unpersuasive indicators of employee sentiment. Thus the Respondent has not met its burden of showing that its withdrawal of recognition was based on objective evidence sufficient to establish that it had a good-faith belief of a lack of majority support. Therefore, the Respondent's withdrawal of recognition and unilateral changes in employees' terms and conditions of employment violated Section 8(a)(5) and (1) of the Act.<sup>6</sup>

<sup>4</sup>As the judge noted, *Sofco, Inc.*, 268 NLRB 159 (1983), on which the Respondent relies, is distinguishable; for, in that case, the supervisor who heard the employee repudiations testified and was subject to cross-examination concerning the statements and their surrounding circumstances. Such testimony by those who heard the employee statements is necessary in order to determine whether the employees unequivocally repudiated the Union. Indeed, it is, at the least, questionable whether the employees who allegedly told Richardson they did not want to sign the decertification petition until they heard "what promises Beaudoin would make to them" made statements amounting to unequivocal repudiations of the Union.

<sup>5</sup>Beaudoin testified that he relied on a petition signed by 30 employees, the employee statements discussed above, written resignations from the Union, the relatively small number of employees who had authorized dues checkoff.

<sup>6</sup>We also reject the Respondent's suggestion that, even if each factor on which Beaudoin relied cannot be established objectively,

*Continued*

2. For the reasons stated by the judge, we reject the Respondent's exception to the judge's finding that it had an obligation to respond to the Union's letters of August 30, 1990, and January 11, 1991. Assuming for argument's sake that the Respondent treated the August 30 letter as simply a statement of its contractual obligation to provide the information described in the letter, and not as a request that it provide the information, we note that any ambiguity as to the purpose of the letter was resolved when the Union sent an identical letter on January 11.<sup>7</sup> Thus, at least as of January 11, Respondent knew or should have known that the Union was requesting information. The judge found, and we agree, that there was a statutory obligation to furnish this information. Accordingly, the Respondent's failure to furnish to the Union the requested information as outlined in its letter of January 11, 1991, violated Section 8(a)(5) and (1).

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, T.L.C. St. Petersburg, Inc., St. Petersburg, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

“(c) Make whole unit employees for any loss they may have incurred as a result of the unilateral implementation of a new benefits package, in the manner set forth in footnote 2 of this decision.”

3. Substitute the attached notice for that of the administrative law judge.

they nonetheless should be considered in determining his good faith in withdrawing recognition from the Union. The standard the Respondent proposes would alter the test from one of objective considerations to one in which the Respondent's good faith could be established by subjective factors. We decline to depart from longstanding precedent.

<sup>7</sup>See also *East Texas Steel Castings Co.*, 191 NLRB 113, 114 (1971) (any doubt about union's desires resolved by filing of charge and issuance of complaint).

#### 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 refuse to recognize and bargain with 1115 Nursing Home and Hospital Employees Union-Florida, Division of 1115 Joint Board as the exclusive bargaining representative of all the employees in the bargaining unit described below.

WE WILL NOT make unilateral changes in your wages, hours, or working conditions, and WE WILL NOT bypass the Union and deal directly with you on such matters, including soliciting you to participate in a company resolution committee.

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 notify the Union in writing that: (1) we now rescind our December 27, 1990 withdrawal of recognition from the Union; (2) we now recognize the Union as the exclusive bargaining representative of the employees in the bargaining unit; (3) we immediately will furnish the information the Union requested by its letters of August 30, 1990, and January 11, 1991; (4) the Union's physical access to TLC's St. Petersburg nursing home is restored for the purposes enumerated in article 5 of the collective-bargaining agreement which expired December 31, 1990; (5) at the Union's written request, we will rescind all or any part of the benefits package which TLC, effective January 1, 1991, unilaterally implemented; and (6) at the Union's request, we will meet and bargain.

WE WILL rescind our December 27, 1990 withdrawal of recognition from the Union.

WE WILL immediately furnish to the Union the information it requested by its letters of August 30, 1990, and January 11, 1991.

WE WILL restore to the Union physical access to our St. Petersburg nursing home for the purposes enumerated in article 5 of the collective-bargaining agreement which expired December 31, 1990.

WE WILL, at the Union's request, rescind all or any part of the benefits package which TLC, effective January 1, 1991, unilaterally implemented, and WE WILL make employees whole, with interest, for any losses they may have incurred as a result of our unlawful implementation.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All employees, including porters, maids, laundry workers, nurses aides and orderlies, gardeners,

dishwashers and kitchen helpers, ward clerks, and maintenance employees employed at TLC's St. Petersburg, Florida facility; but excluding all registered nurses, licensed practical nurses, office staff, physical therapists, watchmen, supervisors, and guards as defined in the Act.

#### T.L.C. ST. PETERSBURG, INC.

*Evelyn M. Korschgen, Esq.* and Michael B. Frost, Esq., for the General Counsel.

*Jeffrey L. Braff, Esq. (Cohen, Shapiro, Polisher, Shiekman and Cohen)*, of Philadelphia, Pennsylvania, for TLC.

*Stuart A. Weinberger, Esq. (Richard M. Greenspan, P.C.)*, of White Plains, New York, for the Charging Union.

#### DECISION

##### STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. As its collective-bargaining agreement with Union 1115 was about to expire, TLC withdrew recognition from the Union. Finding that the employer, TLC, did not carry its burden of rebutting the Union's presumption of majority status, I further find that TLC violated Section 8(a)(5) of the Act on December 27, 1990, when it withdrew recognition from Union 1115 and thereafter, effective January 1, 1991, unilaterally changed benefits and otherwise refused to recognize and bargain with the Union. I order TLC to recognize and to bargain with Union 1115 and, if the Union so requests, to rescind the unilateral changes in benefits.

I presided at the trial of this case in Tampa, Florida, on August 21, 1991, pursuant to the March 18, 1991 complaint and notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 12 of the Board. The complaint is based on a charge filed January 10, 1991 (and later amended) by 1115 Nursing Home and Hospital Employees Union—Florida, Division of 1115 Joint Board (Union, 1115, or Charging Party) against T.L.C. St. Petersburg, Inc. (TLC, Company, or Respondent). All dates are for 1990 unless otherwise indicated.

The General Counsel alleges in the complaint that TLC violated Section 8(a)(5) of the Act by refusing, since about August 30, 1990, to furnish information requested by the Union; withdrawing recognition from the Union about December 27 and thereafter failing to bargain with the Union; unilaterally implementing a benefit package about January 1, 1991; and about January 7, 1991, bypassing the Union, dealing directly with unit employees, and refusing the Union access to TLC's facility in St. Petersburg, Florida.<sup>1</sup>

By its answer TLC admits certain factual matters but denies violating the Act.

<sup>1</sup>Complaint par. 19 actually alleges that by these acts "Respondent has failed and refused . . . to bargain . . . in good faith . . . within the meaning of Section 8(a)(1) and (5) of the Act." There are no independent 8(a)(1) allegations and there is no conclusory paragraph that TLC has interfered with, restrained, or coerced employees within the meaning of Sec. 8(a)(1) of the Act. Hence, the 8(a)(1) is derivative only, as in Sec. 8(a)(5) and (1).

On the entire record, including my observation of the demeanor of the single witness, and after considering the briefs filed by the General Counsel,<sup>2</sup> the Union, and TLC, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Company (Respondent TLC) a Florida corporation, operates a nursing home in St. Petersburg, Florida, where it provides in-patient medical and professional care services for geriatric patients. During the past 12 months, The Company has derived gross revenue of at least \$100,000. In these 12 months the Company has purchased goods worth \$5000 or more direct from points outside Florida. I find that Respondent TLC is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION INVOLVED

TLC admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Case Presentations

Calling no witnesses, the General Counsel presented the Government's case-in-chief by way of the pleadings, joint exhibits, a stipulation containing 11 numbered fact statements (G.C. Exh. 2), and then rested. Charging Party 1115 also rested. (1:20.) After an opening statement, Respondent TLC called the only witness, Gerard M. J. Beaudoin, TLC's president since February 1990, and rested. (1:28, 186.)<sup>3</sup>

###### B. TLC Withdraws Recognition December 27, 1990

###### 1. Allegations

Complaint paragraph 13 (as slightly modified at the hearing, 1:25) alleges that TLC withdrew recognition from the Union on December 27, and complaint paragraph 14 (as amended at the hearing, 1:26) alleges that since January 1, 1991, TLC has failed and refused to recognize and bargain with the Union. Paragraph 19 alleges that the conduct violates Section 8(a)(5) and (1) of the Act. Admitting the facts, TLC denies violating the Act.

###### 2. The recognized bargaining unit

As reflected in the stipulated facts, for about 5 years before mid-October 1988 the Union had been recognized by TLC's predecessor, Wedgewood Health Care (WHC), as the exclusive bargaining representative for employees in the bargaining unit at the St. Petersburg, Florida nursing home. WHC had recognized the Union in a series of collective-bargaining agreements, with the most recent collective-bargaining agreement effective by its terms for the period January 1, 1987, through December 31, 1990. The recognized bar-

<sup>2</sup>The General Counsel attached a proposed order and a proposed notice to the Government's brief.

<sup>3</sup>References to the single-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's, R. Exh. for Respondent TLC's, and Jt. Exh. for the joint exhibits. Charging Party 1115 offered no exhibits.

gaining unit, which the parties have stipulated as being appropriate, is described as:

All employees, including porters, maids, laundry workers, nurses aides and orderlies, gardeners, dishwashers and kitchen helpers, ward clerks, and maintenance employees employed at TLC's St. Petersburg, Florida facility; but excluding all registered nurses, licensed practical nurses, office staff, physical therapists, watchmen, supervisors, and guards as defined in the Act.

Purchasing WHC's St. Petersburg nursing home on October 12, 1988, and thereafter operating it basically unchanged as WHC's successor, TLC also adopted the terms of the existing collective-bargaining agreement. On December 13, 1990, TLC and Union 1115 began negotiations for a renewal contract of the collective-bargaining agreement set to expire December 31.

### 3. TLC withdraws recognition

Beaudoin testified that on December 26 two employees, Ed Gonzalez and Ruthie Richardson, gave him a petition (R. Exh. 12) containing 44 signatures. (1:93-94, 117, 151-152.) The petition bears the caption:

WE, THE EMPLOYEES AT T.L.C. WISH NO LONGER TO HAVE THE LOCAL UNION 1115 REPRESENT US AT T.L.C. ST. PETERSBURG.

Believing the 44 signatures constituted a majority of the bargaining unit, Beaudoin telephoned the Union, asking for Secretary-Treasurer Tannenbaum. When Tannenbaum returned Beaudoin's call the next day, December 27, Beaudoin informed him of the petition and the number of signatures, read the caption to him, and advised Tannenbaum that TLC as of that time was withdrawing recognition from the Union and ceasing contract negotiations. (1:117-118, 151-153.) The parties have stipulated that on December 27 TLC withdrew its recognition of the Union. (G.C. Exh. 2 at 9.) The parties further stipulated that when recognition was withdrawn, the unit consisted of 82 employees. (1:14-16, 172-174; Jt. Exh. 5.) Thus, a majority of the unit would be 42.

Beaudoin testified that when he spoke with the Union's Tannenbaum on December 27 he had in mind four factors to support his withdrawal of recognition: (1) the petition, (2) oral statements by employees as reported by Brenda Adams and Ruthie Richardson, (3) checkoff register, and (4) written resignations. (1:118, 147, 153.) Based on all these factors (discussed separately, below), Beaudoin thought that 60 to 70 unit employees no longer wished to be represented by the Union. (1:152.) The General Counsel and the Union contend that the actual number is short of the necessary 42.

### 4. Applicable law

At the expiration of a collective-bargaining agreement, the union enjoys a rebuttable presumption of majority status. *NLRB v. Curtin Matheson Scientific*, 110 S.Ct. 1542 (1990); *NLRB v. Imperial House Condominium*, 831 F.2d 999 (11th Cir. 1987); *Worldwide Detective Bureau*, 296 NLRB 148 (1989); *Century Papers*, 284 NLRB 1151, 1157 (1987). To rebut the presumption and lawfully withdraw recognition of the union, the employer must establish that one (or both) of

two conditions existed on the date recognition is withdrawn: (1) the union did not in fact enjoy majority support, or, the more usual option, (2) the withdrawal of recognition and the accompanying refusal to bargain were based on a good-faith and reasonably grounded doubt—demonstrated by objective factors—of the union's majority status. *Curtin Matheson*, supra; *Burger Pits*, 273 NLRB 1001 (1984); *Master Slack Corp.*, 271 NLRB 78, 84 (1984). Moreover, the atmosphere must be free of any unfair labor practices having a meaningful impact in bringing about the employees' repudiation of the union. *Master Slack*.

The Fifth Circuit views the employer's burden a "heavy" one to be discharged with "clear and convincing" evidence. *United Supermarkets v. NLRB*, 862 F.2d 549 (5th Cir. 1989). Fifth Circuit decisions before the September 30, 1981 circuit split bind the Eleventh Circuit. *Bickerstaff Clay Products v. NLRB*, 871 F.2d 980 fn. 8 (11th Cir. 1989). The Fifth Circuit's "clear and convincing" standard predates creation of the Eleventh Circuit. See, for example, *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 859 (5th Cir. 1978) ("convincing evidence"). Even if the Eleventh Circuit applies that standard, the Board does not, *Bolton-Emerson*, 293 NLRB 1124, 1127 (1989), and I am bound to apply Board law. *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989), remanded on other point 923 F.2d 398 (5th Cir. 1991).

Evidence of employee rejection of the union must come from the employees themselves, and not from the employer on their behalf. *Montgomery Ward & Co.*, 210 NLRB 717 (1974). This does not mean that at trial the employer is required to call the employees as witnesses and elicit their testimony before an administrative law judge. An employer may rely on quoted comments of the employees and not on self-serving general assertions by the employer that in its opinion the employees do not support the union. *Sofco*, 268 NLRB 159, 160 fn. 10 (1983). Although the employer may prove the employee statements through the supervisor or other employer representative who heard them, testimony of supervisors quoting reports by employees on third-party employee comments is hearsay which the Board disregards. *Manna Pro Partners*, 304 NLRB 782 (1991); *Sofco*, id. This result doubtlessly obtains because any such hearsay would not be subject to testing by cross-examination.

One area of difference is that of the relevance of union membership, membership resignations, numbers of employees on dues-checkoff, and numbers of revocations of dues-checkoff authorizations. As cited in TLC's brief at 22-23, the Sixth Circuit views this matter—particularly a rapid decline—as being a relevant factor to be weighed in the overall assessment of objective considerations. *Landmark International Trucks v. NLRB*, 699 F.2d 815 (6th Cir. 1983); *Thomas Industries v. NLRB*, 687 F.2d 863 (6th Cir. 1982). The Eleventh Circuit, where this case arises, also weighs this factor. *Bickerstaff Clay Products v. NLRB*, 871 F.2d 980 (11th Cir. 1989). However, under Board law this factor is irrelevant because it does not equate to a repudiation of representation by the incumbent union. *Bolton-Emerson*, 293 NLRB 1124, 1127 (1989); *Colonna's Shipyard*, 293 NLRB 136, 139 (1989); *Stratford Visiting Nurses*, 264 NLRB 1026 (1982).

Especially is that so in a right-to-work state. *Colonna's; Imperial House Condominium*, 279 NLRB 1225, 1237 (1986). Although the Union asserts that Florida is a right-to-

work state (Br. at 16), no party paused long enough to offer evidence of that fact or to cite statute or Florida state case on the point. Even so, in Imperial House, cited by the Union, Judge Howard Grossman finds Florida to be a right-to-work state. Imperial House, *id.* at fn. 21. In the absence of evidence that Florida has repealed its law, the presumption is that the law's existence remains. *Paperworkers v. International Paper Co.*, 920 F.2d 852 fn. 7 (11th Cir. 1991).

Determining whether an employer entertains a good-faith doubt of a union's majority status is a question of fact. *Bickerstaff*, *supra*. I turn now to summarize the facts pertaining to the four factors President Gerard Beaudoin asserts that he relied on when, on December 27, he withdrew recognition from the Union.

#### 5. TLC's withdrawal factors

##### a. *The petition*

The petition consists of three separate pages, each bearing the caption which I quoted earlier. Perhaps because the pages were circulated separately, the 44 signatures include several duplicates, names of employees no longer in the unit on December 27, and 1 supervisor. Thus, all parties agree, and I find, that only 30 of the 44 names are to be counted as expressing a desire that Union 1115 not represent them. (G.C. Br. at 4, 11-12; U. Br. at 5, 11; TLC Br. at 14, 18.)

##### b. *Employee statements*

Beaudoin testified that within the 4 to 6 weeks before December 27 Ruthie Richardson, a unit employee circulating the petition, told him that she did not want the Union representing her and that four other unit employees (James Boyd, Mary Bristol, Carol Jackson, and Gloria Robinson) did not want the Union at TLC but declined to sign the petition because they first wanted to know what promises Beaudoin would make to them and because they were concerned the Union would retaliate against them. On advice of counsel, Beaudoin did not approach the four to corroborate Richardson's report. (1:96, 112-115, 139-140; G.C. Exh. 7.)

Richardson's reported description of the comments of the four other employees demonstrates why the inability to cross examine Richardson, the person who allegedly spoke with the four employees (apparently as she circulated the petition), renders such hearsay reports worthless. At the trial I overruled hearsay objections by the General Counsel and the Union, ruling that I would be guided in my decision by the case law. (1:92, 102, 113-114.) Now sustaining the objections, I attach no weight to the hearsay reports. *Manna Pro Partners*, *supra*. Richardson's name is among the 30 valid ones on the petition, I do not count her name again.

A similar report was made to Beaudoin by Brenda Adams, TLC's director of housekeeping, a member of management who reports directly to Beaudoin. (1:116, 176.) Between December 13 and 25, Beaudoin testified, Adams reported that all eight employees under her supervision told her that they wanted out of the Union, did not want to be represented by the Union, but were afraid to sign the petition because of what the Union might do. (1:101-102, 111-112, 133-134; G.C. Exh. 7.) The eight employees named by Adams to Beaudoin are: Linda Avant, Willie Belle Dixon, Frances Pilley, Rochelle Watson, Jane Weeks, Vicki Wilcox, Ella Wright, and Woodrow Wynn.

As Pilley signed the petition (notwithstanding the reported fears), it raises a question of just how reliable the report is from Supervisor Adams. Moreover, as Adams did not testify she could not be cross examined respecting the circumstances under which her eight employees expressed themselves to her. That is, did each one volunteer this expression to Adams, or did Adams, the person holding power over their employment, approach her employees and solicit these expressions?

In *Sofco*, 268 NLRB 159, 160, 165 (1983), the plant manager described comments and conversations which he personally heard or had. He could be, and was, cross examined on his descriptions. Thus, it appears that, under Board law, the supervisor who heard the employee comments or had the conversations with unit employees must testify so that he or she may be cross examined. The ability to cross-examine at least the supervisor is absolutely vital since the employer is not required to call the unit employees themselves. Accordingly, now sustaining the objections of the General Counsel and the Union, I attach no weight to Beaudoin's testimony about the reports of Supervisor Brenda Adams, and I shall not count the seven names she listed in addition to Frances Pilley who did sign the petition.

##### c. *Checkoff register*

Beaudoin testified that on December 27 he thought there were only about 25 unit employees who had authorized their union dues to be deducted by checkoff. (1:91, 175.) There actually were 32. (G.C. Exhs. 3, 4; 1:142-147, 175, 182-183.) However, under Board law the number of employees who have authorized their union dues to be checked off is irrelevant because no one knows how many employees who favor union representation do not become or remain union members authorizing dues checkoff. See the cases I cited in the discussion of applicable law, plus *Hotel & Restaurant Employees*, 213 NLRB 651, 652 (1974). Particularly is this true, as here, in a right-to-work state such as Florida. Accordingly, I attach no weight to this factor.

##### d. *Written resignations*

Beaudoin names 10 employees who, as of December 27, had resigned their union membership. (1:148-149.) Several of the names are in dispute on the basis that the Union had notified TLC that the resignations were untimely, under the Union's constitution and bylaws, or simply stale because signed in 1989, with one dated in 1988. There is no dispute that 3 of the 10, Michelle Brooks, Tyrone Brown, and Alphonso Collins, subsequently (and well before December 27) had revoked their resignations. (G.C. Exh. 5; 1:158-159.) That Beaudoin counted these three as late as the trial detracts from his efforts to show a good-faith doubt.

Discounting the three who revoked leaves seven. Even if all 7 were counted they would bring TLC's total only to 37, well short of the 42 needed. I therefore find it unnecessary to analyze the seven resignations any further.

#### 6. Conclusions

Having found that no more than 37 employees from a unit of 82 can be counted, as of December 27, in the category of those repudiating representation by Union 1115, it is clear, and I find, that on December 27, 1990, the Union continued

to enjoy a presumption of majority support among the employees of the bargaining unit. Moreover, TLC cannot otherwise claim a good faith doubt here. The factors TLC relies on either are legally irrelevant—such as hearsay reports and less than a majority on dues checkoff—or else insufficient in number to justify a good-faith finding.

Accordingly, as alleged in the General Counsel's complaint, I find that Respondent TLC violated Section 8(a)(5) and (1) of the Act by (1) withdrawing recognition from the Union on December 27, 1990, and (2) since January 1, 1991, failing and refusing to recognize and bargain with the Union.

### C. Other Refusal-to-Bargain Violations

#### 1. Introduction

The complaint alleges four other acts or refusals to be violative of Section 8(a)(5) of the Act. My finding of continued majority status, with no good-faith withdrawal of recognition on December 27, essentially dictates findings of violations as to these others. Indeed, TLC briefs only as to one of the four, a request for information. That is the only allegation on which a question is raised by TLC.

#### 2. Bypassing the Union

As amended, the complaint alleges, the answer admits, and I find that about January 7, 1991, TLC bypassed the Union and dealt directly with unit employees "by soliciting employees to participate in a Company resolution committee." I find that TLC violated Section 8(a)(5) and (1) by such conduct.

#### 3. Denial of physical access

TLC admits that, as alleged in complaint paragraph 18, since about January 7, 1991, it has failed and refused to allow Union representatives physical access to the St. Petersburg nursing home. The collective-bargaining agreement provides for this access, and such a condition survives contract expiration. *Colonna's Shipyard*, 293 NLRB 136, 141 (1989). By such conduct TLC, I find, has violated Section 8(a)(5) and (1) of the Act.

#### 4. Benefits package unilaterally implemented

TLC admits that on January 16, 1991, retroactive to January 1, it unilaterally implemented a benefit package affecting rates of pay, wages, hours of employment, and other terms and conditions of employment. By such admitted conduct TLC, I find, violated Section 8(a)(5) and (1) of the Act, as alleged.

#### 5. Failure to furnish requested information

The stipulated facts (G.C. Exh. 2 at 6, 7) disclose that by certified letters dated August 30, 1990 (Jt. Exh. 3), and January 11, 1991 (Jt. Exh. 4), the Union requested, and TLC has failed to respond or furnish, the following data:

In accordance with our existing Collective Bargaining Agreement which states, "The Employer shall forthwith give the Union a list of regular employees covered by this Agreement including categories, wages and dates of employment and shall thereafter promptly

furnish the names, dates of employment, categories, and wages of any new regular employees in the Collective Bargaining Agreement."

Any questions please contact our office.

TLC took no action in response to the Union's duplicated letter, Beaudoin testified, because it is merely a "statement." "That's why I read it and I just filed it away." (1:119.) Conceding that its inaction, "except perhaps to laugh" (Br. at 28), was not unlawful because the letter is merely a declaratory statement requesting no action, TLC argues that no violation can be found.

Citing cases such as *Keauhou Beach Hotel*, 298 NLRB 702 (1990), the General Counsel argues that even if the Union's letter is ambiguous, TLC was obligated to request a clarification. (Br. at 20.) In *Keauhou Beach* the Board wrote:

It is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information.

Whether drafted from arrogance, carelessness, or indifference, the Union's letter is less than a model of clarity. Nevertheless, Beaudoin, I find, knew very well that the Union was requesting the data described in the letter, and for unit employees. (Consistent with the collective-bargaining agreement, and common sense, the last three words of the requested data should not refer to the collective-bargaining agreement but should read "in the bargaining unit." The meaning is obvious to anyone acting in good faith, and a clarification could have been requested.) The information is necessary and relevant. Beaudoin's "file and forget" attitude reflects his overall lack of good faith. I therefore find that TLC, as alleged, violated Section 8(a)(5) and (1) of the Act by failing and refusing to supply the requested information to the Union.

### CONCLUSIONS OF LAW

1. Respondent TLC has failed to rebut the Union's presumption of continuing majority status.

2. TLC has engaged in unfair labor practices within the meaning of 29 U.S.C. § 158(a)(5) and (1) and 29 U.S.C. 152(6) and (7).

### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. I also shall order TLC (1) to furnish the Union the requested information, (2) to grant the Union physical access to TLC's St. Petersburg nursing home in accordance with past practice and the provision of the expired collective-bargaining agreement, and (3) on written request of the Union, to rescind the benefit package, or any part, unilaterally implemented on the effective date of January 1, 1991.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, T.L.C. St. Petersburg, Inc., St. Petersburg, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition of the Union as the exclusive bargaining representative of all the employees in the bargaining unit described below in paragraph 2(b).

(b) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with the Union as the exclusive bargaining representative of all the employees in the bargaining unit.

(c) Unilaterally implementing a benefits package affecting terms and conditions of employment of employees in the bargaining unit.

(d) Refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the employees in the bargaining unit.

(e) Bypassing the Union and dealing directly with unit employees by soliciting them to participate in a company resolution committee.

(f) Denying union representatives physical access to the St. Petersburg nursing home.

(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) Notify, in writing, 1115 Nursing Home and Hospital Employees Union—Florida, Division of 1115 Joint Board that TLC rescinds its withdrawal of recognition from the Union and that TLC recognizes the Union as the exclusive bargaining representative of the employees in the bargaining unit.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All employees, including porters, maids, laundry workers, nurses aides and orderlies, gardeners, dishwashers and kitchen helpers, ward clerks, and maintenance employees employed at TLC's St. Petersburg, Florida facility; but excluding all registered nurses, licensed practical nurses, office staff, physical therapists, watchmen, supervisors, and guards as defined in the Act.

(c) Immediately furnish the Union with the information it requested by the letters dated August 30, 1990, and January 11, 1991.

(d) Notify the Union in writing that TLC restores to the Union physical access to TLC's St. Petersburg nursing home for the purposes enumerated in Article 5 of the collective-bargaining agreement between the parties which expired December 31, 1990.

(e) At the Union's request, rescind all or any part of the benefits package unilaterally implemented effective January 1, 1991, at the St. Petersburg facility.

(f) Post at its St. Petersburg, Florida nursing home copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>4</sup>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.

<sup>5</sup>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."