

Laidlaw Waste Systems, Inc. and General Teamsters Union, Local 406, International Brotherhood of Teamsters, AFL-CIO¹ and William Bignall. Cases 7-CA-30378 and 7-CA-30286

July 10, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

The principal issue in this case is whether the Respondent lawfully withdrew recognition from the incumbent Union.

On July 30, 1991, Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

In finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, the judge stated that an employer may lawfully end its bargaining relationship with an incumbent union by overcoming the presumption of a union's continuing majority status with a "clear, cogent, and convincing" showing of either actual loss of majority status or of objective factors sufficient to support a reasonable and good-faith doubt of the union's majority. However, the judge cited cases which appear to be in conflict on whether the quoted standard of proof is appropriate. Cf. *Hutchinson-Hayes International*, 264 NLRB 1300 (1982), and *Westbrook Bowl*, 293 NLRB 1000, 1001 (1989), with *Bolton-Emerson, Inc.*, 293 NLRB 1124 fn. 2 (1989), enfd. 899 F.2d 104 (1st Cir. 1990).

It is well settled that an employer may rebut an incumbent union's presumption of majority status by demonstrating, at an appropriate time, that the union in fact no longer enjoys majority support or that the em-

ployer has a good-faith and reasonably grounded doubt of the union's majority status.⁴ The most recent Board decision and decisions prior thereto have not required an employer to meet a "clear, cogent, and convincing" standard in order to establish these defenses.⁵ To the extent that *Westbrook Bowl*, supra, and *Hutchinson-Hayes International*, supra, impose that standard, they are overruled. The Board's usual standard of proof is a preponderance of the evidence.⁶ Indeed, a "conventional" rule of civil litigation generally is that parties to such litigation "need only prove their case by a preponderance of the evidence"; and exceptions to that standard are "uncommon." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (citations omitted) (plurality opinion).⁷ We see no reason to apply a different standard to the affirmative defense involved here. Accordingly, we find that in order to rebut the presumption of an incumbent union's majority status, an employer must show by a preponderance of the evidence either actual loss of majority support or objective factors sufficient to support a reasonable and good-faith doubt of the union's majority.

This is not to say that the terms "clear, cogent, and convincing" have no significance at all in withdrawal of recognition cases. At least one court has suggested that when an employer's defense is based on "good faith reasonable doubt" of union majority, those terms are "primarily directed to the type of evidence relied upon" *NLRB v. Tahoe Nugget*, 584 F.2d 293, 297 fn. 13 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979).⁸ This makes sense given the types of evidence on which employers typically rely in good-faith doubt cases—statements by employees to supervisors reflecting varying degrees of hostility or indifference to the union, changes in affirmative support for the union, such as cessation of dues checkoff, and the like. It is fair to say that the Board will not find that an em-

⁴E.g., *Hajoca Corp.*, 291 NLRB 104, 105 (1988), enfd. 872 F.2d 1169 (3d Cir. 1989), and cases cited therein.

⁵See *Bolton-Emerson, Inc.*, supra; *Kelly's Private Car Service*, 289 NLRB 30, 42 (1988), enfd. 919 F.2d 839 (2d Cir. 1990).

⁶See, e.g., *Harowe Servo Controls*, 250 NLRB 958 (1980); *Longshoremen ILA Local 1291 (National Sugar)*, 142 NLRB 257, 258 (1963), enfd. 332 F.2d 559 (3d Cir. 1964).

⁷As that opinion further notes (id. at 254), the standard of proof for the affirmative defense at issue in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400, 403 (1983), is the normal preponderance standard rather than the "clear and convincing" standard.

⁸See also *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975), in which the court explained that the two means by which an employer defending a withdrawal of recognition can rebut the presumption of majority are "showing sufficient evidence to support a reasonable good faith doubt" or "proving by a preponderance of all evidence available at the time of the hearing that the Union in fact did not have majority support on [the date recognition is withdrawn]." The court described the evidence which an employer must produce as objective considerations for its good-faith doubt as evidence that is "clear, cogent and convincing." Id., quoting *NLRB v. Tragniew, Inc.*, 470 F.2d 669, 674-675 (9th Cir. 1972).

¹The name of the Charging Party has been changed to reflect the new official name of the International Union.

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

³The Respondent contends that the bargaining order should be limited because of a decertification election which, it claims, was held on March 3, 1990. Even assuming the election was held on that date, we find no merit in the Respondent's contention. Thus, an election held that day would have been conducted in the presence of the unfair labor practices which we have found, and any loss by the Union would not represent the uncoerced sentiment of the employees on the issue of their continued representation by the Union.

ployer has supported its defense by a preponderance of the evidence if the employee statements and conduct relied on are not clear and cogent rejections of the union as a bargaining agent, i.e., are simply not convincing manifestations, taken as a whole, of a loss of majority support. The opposite of “clear, cogent, and convincing” evidence in this regard might be fairly described as “speculative, conjectural, and vague”—evidence that plainly does not meet the preponderance-of-the-evidence burden of proof. *NLRB v. Tahoe Nugget*, supra, 584 F.2d at 305.⁹

Applying this standard to the facts in this case, we agree with the judge that the Respondent has not effectively rebutted the presumption of the Union’s majority status at the time of the Respondent’s withdrawal of recognition. In summary, the credited facts are as follows. On February 15, 1990, employee Ronald Woolworth filed a decertification petition, with 15 signatures, with the Board. The next day, he told Operations Manager Christopher Fixari and Division Manager Brian Bussiere, “that what I considered a majority of the people had signed a petition to vote on a union.” Woolworth did not tell these two persons the number or names of the employees on the petition. He testified that he was unsure of the number of employees in the unit “but figured anywhere between 25 and 30.” He further testified that the petition “said that I am taking the petition to find out if the majority of Laidlaw employees would like to take a vote in the union.” The Respondent also failed to establish at the hearing the exact number of employees in the unit at the time the petition was filed.¹⁰

We agree with the judge that there is insufficient evidence to establish that the Union did not enjoy majority status at the time of the withdrawal of recognition. The petition did not say that the 15 signers did

⁹Member Raudabaugh believes that the phrase “clear, cogent and convincing,” as used by his colleagues, casts unnecessary doubt on the law in this area. In his view, there are two analytically distinct questions to be asked in cases where an employer relies on objective evidence to support a good-faith doubt of majority status. These questions are: (1) what *type* of evidence may be relied on by the employer; and (2) *how much* such evidence must the employer adduce in order to prevail. The discussion above does not modify, or even deal with, the law as to the first question. Since the issue is not raised herein, and since the law remains the same on this point, Member Raudabaugh would not confuse matters by seeking to characterize extant law by use of the phrase “clear, cogent and convincing.”

With respect to the second question, the instant case does clarify the law and holds that a *preponderance* of the evidence will establish the employer’s defense.

¹⁰The judge incorrectly stated that Division Manager Jeff Hughes first testified that he counted employees off the payroll, then “later admitted that Fixari and Bussiere did this.” Actually, Hughes testified, in the second instance, that he, Fixari, Bussiere, and the accounting department did this together. This error is nonprejudicial to the judge’s finding that the Respondent failed to establish at the hearing the exact number of unit employees at the time of the decertification petition or the withdrawal of recognition.

not desire union representation. In addition, since the size of the unit was not established, it has not been shown that there were 30 or fewer employees in the unit.

As to whether the Respondent had a reasonably based doubt of the Union’s majority status, we note that, at the time of the withdrawal of recognition, the Respondent did not know the number or names of the employees on the petition. Further, the Respondent was informed only that the petition signers wanted “to vote on a union.” The evidence is insufficient to meet the Respondent’s burden to demonstrate by a preponderance of the evidence objective factors sufficient to support a reasonable and good-faith doubt of the Union’s majority.

Based on the above, we adopt the judge’s finding that by withdrawing recognition on February 16, 1990, the Respondent violated Section 8(a)(5) and (1).¹¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Laidlaw Waste Systems, Inc., Coopersville, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹¹In adopting the judge’s finding that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from the Union, we do not rely on that part of the judge’s analysis in which he relies on the hastiness of the Respondent’s withdrawal of recognition after becoming aware of the decertification petition. Further, we find it unnecessary to pass on that part of the judge’s analysis which relies on the existing collective-bargaining agreements.

Tinamarie Pappas, Esq., for the General Counsel.
Susan K. Grebeldinger, Esq., of Denver, Colorado, for the Respondent.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD JR., Administrative Law Judge. I heard this case on October 30, 31, 1990, in Grand Rapids, Michigan, pursuant to a consolidated complaint issued May 29, 1990, alleging that Respondent terminated William Bignall and refused to bargain with and withdrew recognition from the Union as the employees’ collective-bargaining representative in violation of Section 8(a)(1), (3), and (5) of the Act.

On the entire record, including my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation engaged in trash collection and disposal at its location in Coopersville, Michigan. Respondent’s annual gross revenues exceed \$500,000 and it annually purchases goods valued in excess of \$50,000

and received at Coopersville, Michigan, directly from outside Michigan. As admitted, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization as defined by Section 2(5) in the Act.

II. THE UNFAIR LABOR PRACTICES

Respondent purchased two ongoing trash collection and disposal firms owned by GSX Corporation in Grand Rapids, Michigan, where GSX did business as Bell Pick-Up Service, and 39 miles away, Muskegon, Michigan—where GSX did business as Independent Collection—in October 1986. The Union represented employees at Grand Rapids under a contract with GSX in effect at the time of Respondent's purchase, and it is stipulated that Respondent then "succeeded to and adopted" the agreement. (G.C. Exh. 3.) As further agreed, Respondent and the Union entered into a collective-bargaining agreement for the Muskegon facility employees effective December 1, 1986. (G.C. Exh. 4.) Each agreement covered a bargaining unit of drivers, helpers, and mechanics. The Grand Rapids agreement contains an automatic renewal provision specifically allowing the parties to give each other notice to reopen for negotiations without forestalling the agreement's renewal, a significant term discussed below. (G.C. Exh. 3, p. 10.)

Respondent entirely moved its operations from the above two cities into a single facility located in Coopersville, Michigan, which lies alongside Interstate Highway 96 which nearly directly connects Grand Rapids and Muskegon, and is a mid-point—some 19 or so miles—from each former location, on August 1, 1988. The parties agreed that there were no unit employees at Coopersville prior to and up to the date of the move. They further agreed that the employees "merged" into the new location from Grand Rapids were covered by the Grand Rapids contract, the employees "merged" into the Coopersville facility from Muskegon were covered by the Muskegon agreement, that employees hired by Respondent subsequent to August 1, 1988, were covered by the Grand Rapids contract, at least until May 31, 1989; and that both contracts remained in effect for the Coopersville facility as of the date of the merger. The parties further stipulated that on or about August 4, 1988, the Union was the majority representative for the Coopersville facility employees in the unit described in the complaint.

There is no dispute that the effective dates for the Muskegon contract are December 1, 1986, through November 30, 1990. The Grand Rapids contract bears an effective date June 1, 1986, until May 31, 1989, but provides for automatic 1-year renewal absent notice by either party to "cancel or terminate this Agreement." (G.C. Exh. 3, p. 10.) The same provision specifically permits on timely notice by one party to the other at least 60 days prior to May 31, 1990, negotiation of specific changes while desiring to continue the agreement absent such notice to cancel or terminate. The Union sent notice to Respondent by letter dated March 24, 1989, of its "desire to continue the Agreement" while requesting negotiations on some changes or revisions in some terms. (G.C. Exh. 6.) It is admitted that neither side sent the other a notice to cancel or terminate. Since the Union's timely notice to Respondent specifically communicated only the desire to continue this contract with a request to negotiate revisions, a right expressly guaranteed by the parties' agreement, I find

that agreement, absent any notice to forestall automatic renewal, renewed for another year until at least May 31, 1990. *Empire Screen Printing*, 249 NLRB 718 (1980).¹

The parties met for negotiations on June 6, July 20, and December 19, 1989, aiming towards a possibly overall or consolidated agreement, and discussed wages, uniform allowance, mechanic certification standards, down time pay, and an incentive plan, without reaching agreement.

The Union's request for information

The parties met on January 17, 1990, to discuss grievances over Respondent's discharge of employee Robert Pagel for an alleged safety violation, Bill Kooi for a false entry on his employment application, and Rick Sullivan and William Ogan for allegedly failing a required physical examination.² An amalgam of the credible testimony reveals that during the course in the parties' discussions Respondent presented its reasons for the actions and made files "available," in a sense, to the union representatives to review and read portions aloud, but refused to make or send copies (in some instances there had been earlier requests made) of the requested information for the Union's own use though, it is clear, these grievances, and others, were forecasted for arbitration if not resolved then or at anticipated additional negotiations. Operations Manager Christopher Fixari testified flat out that Respondent had offered "to make copies [for the Union] during the meeting . . .," repeating the assertion under direct examination twice, only to admit under my question seeking his confirmation on this issue that he had not at any time made an offer. It is clear in each instance that the requested information was relevant to the Union's representational duties, and such is not contested. But Respondent witnesses testified the Union made no requests for their own copies of the particular file documents at the January 17 meeting and, in any event, Respondent contends on brief that the Respondent's oral communications and availability of its files to the Union at the meeting suffice to satisfy its duty under the Act.

Union Representative Gary Case testified that the Union requested copies of Bill Kooi's medical application and employment application at the meeting on January 17 and that Respondent's division manager, Jeff Hughes, said they would be provided. Further, Case testified that in response to his request Respondent representatives said they would supply the Union with the test results concerning employees Ogan and Sullivan, the laboratory name, the initial and confirming test results, and the levels in the chemicals found, but that no such materials have been given to the Union. He testified that the Union requested the safety rule or regulation involving Pagel, and that Hughes' response was that the Company would supply those rules.

Employee witness Robert Pagel testified that Operations Manager Christopher Fixari told Pagel he had violated one of

¹ Questioned about the date when negotiations had resumed since the parties' last meeting, Union Representative Gary Case, using this date as a framework of references referred to the agreement's "expiration" date of May 31, 1989. Case in no way was making a legal conclusion but rather his comment had to do with placing a date in response to counsel's question, and in context no other interpretation is warranted.

² There is no allegation that the Union made a request for information regarding a fifth grievance over the discharge of Emil Culp.

the rules on a written list during Pagel's termination interview, "one of our safety code rules" and that during the January 17 meeting Jeff Hughes apologized to Case for not supplying the material and told Fixari "to give them the stuff," Fixari nodding in acknowledgement. Counsel for Respondent left the corroborating and believable testimony of Case and Pagel untouched during her examination of witnesses Hughes and Fixari and I credit the former witnesses that the Union asked for and has not received copies of the described information bearing materials.

I further find that the reading of certain information from the files by Respondent representatives aloud with an opportunity—expressly granted or implied by circumstances—for the Union to look at unspecified materials in the files was not sufficient provision of information as against supplying the copies of information requested. Case could not reasonably be expected to memorize all the relevant information suitable for the give and take in grievance discussions then or for purposes of the forecasted arbitration, let alone decide which factors were in fact relevant or helpful to understanding the relative merits in the parties' positions and write them down given the numerous grievances under consideration, the substantial number of details contained in the several documents requested and being subjected to the pressing dynamics in live bargaining then underway. On the other hand the burden on Respondent to supply copies of the requested documents or written information was negligible and given that its manner of allegedly supplying the information, as described above, was burdensome and time-consuming thus likely to impede the process of bargaining because of the unreasonable demand on Case, I find Respondent failed to fulfill its collective-bargaining duties under the Act. *American Telephone Co.*, 250 NLRB 47, 53–54 (1980); *Teamsters Local 851 (Northern Air)*, 283 NLRB 922, 926 (1987); *Electrical Workers IBEW Local 497 (Apple City Electric)*, 275 NLRB 1290 (1985). Compare *Roadway Express*, 275 NLRB 1107 (1985) (single page letter).

Respondent's withdrawal of recognition

Respondent withdrew recognition from the Union in a letter dated February 16, 1990, sent to Union Representative Gary Case. (G.C. Exh. 2.) Its only defense in support of this action raised at the hearing before me is the filing of a decertification petition the day before on February 15 by employee Ronald Woolworth, a second-shift mechanic at the Coopersville facility.

Woolworth secured 15 employee signatures in support of an RD petition he had filled out beforehand, and had kept in his locked tool box undisclosed by him to management before he filed the petition in the Board's Region 7 Office on February 15.

The next day he told Fixari and Brian Bussiere, division maintenance manager, "that what I considered a majority of the people had signed the petition to vote on a union." He convincingly insisted that he never gave either of them the number of employees who had signed the petition, or their names. Woolworth said he was unsure of the number in the unit but "figured anywhere between 25 and 30" and said, "I never got an exact count of how many people actually worked there." At the hearing Woolworth's testimony, after reviewing the petition, that there were 15 signatures on it was verified. Woolworth testified regarding the petition: "It

said that I am taking the petition to find out if the majority of Laidlaw employees would like to take a vote on the union." Woolworth said he told Fixari and Bussiere, "I think I have the majority of vote [sic] here so I sent the petition in," and steadfastly denied mentioning any numbers.

At the hearing Respondent witnesses Fixari and Bussiere claimed that Woolworth had told them he had 19 employees (Bussiere said 18 or 19) to vote the Union out, to decertify the Union; that (according to Fixari) the majority of the guys did not want the union. Fixari then phoned Robert Arquilla, director of human resources, and told him that Woolworth had told him that 19 people had signed a petition *not wanting the union anymore*. (Emphasis added.) Fixari admitted that in his affidavit concerning these conversations he nowhere said that Woolworth had stated a majority of employees did not want the Union. Arquilla testified he checked the *number* of employees on a computer at his desk and found that would be a "majority," recalling there were 29, 30, or 31, then "around 30." He admitted that Fixari was his sole source of information regarding the RD petition, that he never saw any writing or document stating employees did not want union representation, and that no employee said such to him, not recalling whether he ever spoke to Woolworth. For his part, Division Manager Jeff Hughes, under leading questions, testified he counted unit employees on February 16 off the *payroll*, later admitting that Fixari and Bussiere did this, and that employees on sick leave might not have been included on the payroll depending on the length of their absence, and that he didn't know whether or not the list referred to earlier had all the unit employee names on it. Finally, Respondent offered a payroll list of the week ending February 17 and Hughes didn't know whether that list had all the names on it either. Since the list was unreliable, unauthenticated, and incomplete, it was rejected. (R. Exh. 10.) I reject the testimony of Fixari and Bussiere where it conflicts with that of Woolworth. Fixari, already caught in an outright falsehood earlier was further shown to have untruthfully colored his testimony by attributing statements to Woolworth concerning a majority not wanting the Union, and like Bussiere, was continuously fed leading questions, hence I credit Woolworth's unbiasedly based and calmly consistent account. Even doing so I note the fact that Woolworth candidly asserted he did not know the exact number in the unit but figured he had at least half signed on the petition and that Respondent itself failed to establish that number at the hearing adding even more unreliability to its defense of relying on a majority being in support of the decertification petition, for absent a clear accurate determination of what the unit size was on February 15 or 16 it would be impossible to determine what a majority was.

Analysis

The Board has held that, it is well established that an employer that seeks to end its collective-bargaining relationship with an incumbent union by withdrawing recognition from the union must overcome the presumption of the union's continued majority status "with a 'clear, cogent, and convincing' showing of either actual loss of majority status or of objective factors sufficient to support a reasonable and good-faith doubt of the union's majority." *Hutchinson-Hayes International*, 264 NLRB 1300, 1304 (1982). *Westbrook Bowl*, 293 NLRB 1000 (1989); compare, *Bolton-Emerson*,

293 NLRB 1124 fn. 2 (1989), where the “clear, cogent and convincing standard” is said not to be required. In *Wells Fargo Armored Service Corp.*, 290 NLRB 881 (1988), the Board adopted the administrative law judge’s decision wherein he set forth the following “long-standing legal principles” governing the withdrawal of recognition:

An employer who refuses to bargain with an incumbent union may rebut the presumption of majority status by establishing either (1) that at the time of the refusal to bargain the union in fact did not enjoy majority status, or (2) that the refusal was predicated on a good-faith and reasonably grounded doubt, supported by objective considerations, of the union’s majority support.

Citing *Alexander Linn Hospital*, 288 NLRB 103 (1988). Applying that standard, I find first that there was no evidence that at the time of the refusal to bargain (and withdrawal of recognition) on February 16, 1990, the Union in fact did not enjoy majority status. Secondly, I find that Respondent did not have a good-faith and reasonably grounded doubt supported by objective consideration of the Union’s majority support. Without being presented with the names of employees allegedly in support of the RD petition and with no reliable understanding of whether a majority in fact even supported the petition, which sought only a vote on the union, Respondent precipitously withdrew recognition without benefit of waiting for the Board’s procedures to thereby resolve any doubts it had, on the very same day it learned about Woolworth’s actions. The hastiness alone belies any objectivity. *Midway Golden Dawn*, 293 NLRB 152 (1989). It never even saw the petition before breaking off the long-standing relationship with the Union. Respondent recites on brief that the Board has held that an employee’s report to the employer that all 16 employees on the job had signed a statement that they no longer wanted to be represented by the Union gave the employer “objective evidence that the Union had lost its majority status.” *Storer Communications*, 297 NLRB 296 (1989). Counsel urges that case in defense of Respondent’s conduct here. There, the Board based its decision finding the respondent violated Section 8(a)(5) by withdrawing recognition from the union on the fact that the action was not taken in a context free of serious unfair labor practices, and mentioned by way of dictum the presence of objective evidence. Not stated there was whether the Board would have based a no-violation finding solely under the “objective evidence” standard as applied to those facts. Moreover, the petition sought only an election, and proof of majority support was lacking while in the cited case a statement was accompanied by an undisputed numerical majority of unit employees professedly no longer wanting to be represented by the Union—all the above making the cited case most clearly distinguishable and thus uncontrolling. See *Bryan Memorial Hospital*, 279 NLRB 222, 225 (1986).

There being further no legal basis for Respondent to rely solely on the filing of the RD petition itself when it withdrew recognition and refused to bargain with the Union, or on Woolworth’s unverified assertion that a majority supported it, I find Respondent’s conduct violated Section 8(a)(5) of the Act. *Dresser Industries*, 264 NLRB 1088, 1089 (1982); *Redok Enterprises*, 277 NLRB 1010, 1012 (1985), and cases cited above.

There is a further issue’s resolution that provides an additional basis for this finding that the parties did not address, but which the record evidence and reasonable inferences therefrom provide sufficient illumination to determine.

The findings in the opening portion of this decision at section II above establish that the parties’ collective-bargaining agreements by their terms remained effective following Respondent’s relocation to Coopersville, indeed the parties stipulated that at the time of this relocation the Union was majority representative of all the employees and they applied their existing contracts to all employees at Coopersville, those drawn from both Grand Rapids and Muskegon each some 19 or so miles from Coopersville, as well as to all new hires. The nature of Respondent’s operations collecting and disposing trash remained the same with the natural effect arising from a single location of a more integrated operation.

It is apparent the parties decided to seek an overall contract due to the single-sited more integrated character in operations, and they stipulated that a single overall unit would be an appropriate unit at the hearing. There can be little doubt that such facility wide unit, were the matter of appropriate unit to be heard de novo, would be found appropriate, absent a controlling bargaining history. But the contract units which settled employment terms for all the employees at Coopersville were longstanding agreed-upon units which were not inappropriate on their face or as containing statutory exclusions and even as important, by merely entering into efforts to negotiate such an “over-all” agreement neither party waived its ongoing contractual rights, nor the Union its representational rights resting in their valid existing and ongoing binding contracts, which had clearly survived the Respondent’s relocation. *El Torito-La Fiesta Restaurants*, 295 NLRB 493 (1989). There the Board quoted, from *Harte & Co.*, cited below that:

[A]n existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement. *Westwood Import Co.*, 251 NLRB 1213, 1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982); *General Extrusion Co.*, 121 NLRB 1165, 1167–1168 (1958). See also *Marine Optical*, 255 NLRB 1241, 1245 (1981), enfd. 671 F.2d 11 (1st Cir. 1982). [*Harte & Co.*, 278 NLRB at 948 (1986).]

Supra at 495. The Board also made reference to *Coastal Cargo Co.*, 286 NLRB 200 (1987), wherein it had found the parties’ collective-bargaining agreement to have remained in effect for its duration and, citing *Hexton Furniture Co.*, 111 NLRB 342 (1955), that the Union accordingly enjoyed an irrebuttable presumption of majority status. Id. at 495. See also *Epe, Inc. v. NLRB*, 845 F.2d 483 (4th Cir. 1988). Since the Union enjoyed an irrebuttable presumption of majority status as of the time the RD petition was filed—untimely with respect to both surviving contracts duration,³ manifestly Respondent could not rely on the petition and surrounding circumstances described above to question the Union’s

³ The petition was filed February 15, 1990, untimely as to the contracts’ expiration dates set forth above. *Abbey Medical/Abbey Rents*, 264 NLRB 969 (1982).

irrebuttable presumption of continuing majority status and for this reason as well, on contract principles of compelling importance given the value to a "national labor policy of industrial peace" being furthered, Respondent's action violated its bargaining duties under Section 8(a)(5) of the Act. *Id.* at fn. 6. On both theories Respondent's actions recited in its letter to the Union dated February 16, 1990, violated Section 8(a)(5) of the Act.

William Bignall's termination

Respondent terminated garage mechanic William Bignall on March 1, 1990, as medically unqualified for duties. Bignall seriously injured himself while working on March 29, 1989, when a cable twisted, causing the chain to slip from a hook and to snap back around his head. Bignall underwent surgery involving anterior cervical fusion C 5, 6, and a lumbar laminectomy. On January 5, 1990, his neurosurgeon wrote "At this point he is having some neck pain and shoulder pain with any kind of exertion." The doctor placed these restrictions: no overhead lifting, should not work with his head hyperextended, and should not have to do repetitive bending, twisting, and stretching, nor lift objects over 25 pounds in weight. (G.C. Exh. 20.) By April 4, 1990, after his termination Bignall was given *permanent restrictions* as follows:

1. No excessive bending, stretching, twisting.
2. No lifting overhead (up to 25 pounds occasionally).
3. No prolonged sitting.
4. Must be able to change positions frequently or as needed.
5. No prolonged standing.
6. No lifting over 40 pounds. [G.C. Exh. 23.]

Bignall's position as mechanic required him to work on heavy duty dump or trash trucks 11 feet or higher, doing repair work underneath while lying horizontally looking up, securing spare parts from shelves over 6 feet high, operating a pulley to work on truck engines, changing a gear box weighing up to 600 pounds, handling and changing truck tires weighing 40 or more pounds, and lifting starters weighing 100 pounds, sometimes by himself. He was the only mechanic on his shift.

The record shows that Bignall was an active member on the Union's negotiating committee during meetings with Respondent and there is evidence of some degree of union animus by Respondent representatives on unspecified dates "early" in 1989 and "between February and March 1990," including unexplained coldness towards him by Respondent officials when Bignall delivered status reports concerning his medical condition while in the injury related status and would converse with employees,

The record shows Respondent considered Bignall for other positions, but it determined in each instance, for example, tire changing and early morning truck starting that it could not risk injury to Bignall—in the latter case because if the truck would not start Bignall would be required to repair it, and in the former case because the tire changing was beyond his restricted abilities. The record shows that there were no clerical openings for Bignall and he was not shown to be qualified as dispatcher. Counsel for the General Counsel

aply argues that Respondent's alleged policy based reason not to continue employees in a workmen's compensation category—such as Bignall occupied after his accident—for more than a year is shown to be unevenly enforced at best because another employee was allowed to stay in such category for more than 2 years and was terminated at the same time as Bignall. Further, in a letter to Respondent its insurance carrier noted Bignall appeared qualified to be a truck washer, which communication Respondent corrected in a later phone call to the letter writer and characterized as a misunderstanding of the duties in such position, which required use of a high pressure hose, on a truck 12 feet 6 inches high, requiring use of a brush and pressure power wash, hyperextending and twisting while controlling a water pressure of 1600 to 2000 pounds per square inch. There was no janitor position in the shop. Finally, the record does show as pointed out by counsel for General Counsel that in past cases of injured employees Respondent has accommodated them in other positions until their recovery and return to duty but these cases involved temporary impairment unlike Bignall's case which was obviously serious and left him impaired prior to his termination, and became officially permanent impairment after the termination by April 4, 1990.

There was no duty on Respondent to create a new position for Bignall. *Ducane Heating Corp.*, 273 NLRB 1389, 1393 (1985). And while it can reasonably be argued that the inconsistency in Respondent's administration of the 1 year on workmen compensation status policy and its unpersuasive explanation why it did not offer Bignall the job of truck washer as advised by its carrier as within his limitations viewed in light of Respondent's animus cast suspicion on Respondent's alleged motive for Bignall's termination and establish a prima facie case in support of the complaint allegation, I find that the record clearly establishes that Respondent would have discharged Bignall even aside from his union-connected and protected concerted activities, thus the termination was lawful. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). I find nothing unreasonable in Respondent's well-supported judgment that given his injury-caused impairment Bignall was not medically qualified to work at its facility. Nor does the timing for Respondent's action arouse undue suspicion over the bona fides in Respondent's actions. Respondent's headquarters staff representative out of courtesy notified a newly hired representative at the Coopersville facility of Respondent no more than 1 year on workmen's compensation on medical leave status policy concerning both Bignall and another employee at Coopersville who had been in such category longer (although that employee's time in such category was uncertain due to his coming back and departures during the timespan involved) whereupon both employees were shortly thereafter terminated which further indicates that Bignall was not the victim of disparate treatment.

CONCLUSIONS OF LAW

1. Laidlaw Waste Systems, Inc. is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2) of the Act.

2. General Teamsters Union, Local 406, International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees including drivers, helpers, mechanics, container maintenance and container delivery employees employed by the Respondent at and out of its facility located at 250 64th Avenue, Coopersville, Michigan; but excluding all salesman, clerical employees, managerial employees, professional employees, technical employees, confidential employees, gatemen, guards and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material and continuing to date, the Union has been the exclusive collective-bargaining representative of all the Respondent's employees employed in the unit set forth in Conclusion of Law 3.

5. By withdrawing recognition from and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees employed in the unit set forth in Conclusion of Law 3; and by refusing to provide the Union with copies of documents bearing information necessary and relevant to the Union's representation duties in the processing of employee grievances on the Union's request, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. The acts have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(7) of the Act.

7. Respondent's termination of William Bignall did not violate Section 8(a)(1) or (3) of the Act.

REMEDY

Having found that the Respondent has committed various unfair labor practice, I will recommend that it be required to cease and desist therefrom and to take other actions designed to effectuate the purposes and policies of the Act. I will recommend to the Board that the Respondent be required to recognize and bargain collectively in good faith with the Union as the exclusive bargaining representative of unit employees and that it be required, on agreement, to embody the terms of the agreement in a signed, written contract. It will further be recommended that the Respondent cease and desist from refusing to provide the Union with copies of documents bearing information necessary and relevant to the Union's representation duties. I will also recommend that Respondent be required to post a Board notice advising its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Laidlaw Waste Systems, Inc., Coopersville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with General Teamsters Union, Local 406, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive collective-

⁴If 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.

bargaining representative of employees in the above-described unit.

(b) Refusing to provide the Union with copies of documents containing information necessary and relevant to the Union's representation duties.

(c) In any like or related means 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) Recognize and, on request, bargain collectively in good faith with General Teamsters Union, Local 406, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive representative of its Coopersville, Michigan employees, and, if agreement is reached, embody the terms of the agreement in a written signed document.

(b) Provide the Union with copies of documents containing information necessary and relevant to the Union's representation duties in processing the grievances over their discharges filed by Robert Pagel, Bill Kooi, Bill Ogan, and Rick Sullivan.

(c) Post at the Respondent's Coopersville, Michigan, facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, 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.

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

(3) IT IS FURTHER ORDERED that the complaint allegation that Respondent violated Section 8(a)(5) of the Act on or about the date of December 19, 1989, and that it terminated William Bignall in violation of Section 8(a)(1) and (3) of the Act be and they are dismissed as unproven.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain in good faith with General Teamsters Union, Local 406, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive collective-

bargaining representative in the appropriate bargaining unit which is:

All employees including drivers, helpers, mechanics, container maintenance and container delivery employees employed by the Respondent at and out of its facility located at 250 64th Avenue, Coopersville, Michigan; but excluding all salesman, clerical employees, managerial employees, professional employees, technical employees, confidential employees, gatemen, guards and supervisors as defined in the Act.

WE WILL NOT refuse to provide the Union with copies of documents containing information necessary and relevant to the Union's representation duties.

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

WE WILL, on request, recognize and bargain collectively with General Teamsters Union, Local 406, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive representative of employees employed at our Coopersville, Michigan bargaining unit and, if agreement is reached, embody the terms of that agreement in a written signed document.

WE WILL furnish the Union the copies of documents containing information necessary and relevant to the Union's representation duties.

LIDLAW WASTE SYSTEMS, INC.