

**Exxel-Atmos, Inc. and United Steelworkers of America, AFL-CIO.** Case 22-CA-17889

December 16, 1992

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

In this proceeding the Board must determine whether the Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully withdrawing recognition from the Union.

On July 23, 1992, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions to the judge's decision and a supporting brief. The General Counsel filed limited cross-exceptions.

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 brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Exxel-Atmos, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(b) and reletter the remaining paragraph as 1(c).

<sup>1</sup> The 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding (at one point designated an "alternative finding" by the judge) that the Respondent violated Sec. 8(a)(1) and (5) of the Act on May 7, 1991, by refusing to meet with the Union's full bargaining committee to engage in any "formal" negotiations. We further adopt his finding that it withdrew recognition by that refusal, together with its refusal to bargain, unless and until the employees voted in an election. We therefore find it unnecessary to pass on the judge's alternative findings based on actions subsequent to May 7. We have modified the Order to include a provision requiring the Respondent to cease and desist from refusing to meet with representatives of the employees designated by the Union.

The judge inadvertently refers to June 10 and 12, 1990, and July 1990. The correct dates are September 10 and 12, 1990, and July 1991. The judge also misspells the surname "Appelgate" throughout his decision. The correct spelling is "Applegate." Finally, the judge improperly cites the case number for the Respondent's RM petition. The correct case number is 22-RM-679.

"(b). Refusing to meet with the representatives of the employees as designated by the Union."

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

## 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 withdraw recognition from or refuse to meet and bargain collectively with United Steel Workers of America, AFL-CIO (the Union), as the exclusive bargaining representative of our employees in the appropriate bargaining unit set forth below.

WE WILL NOT refuse to meet with the representatives of the employees designated by the Union.

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

WE WILL on request, recognize, meet, and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of our employees in the unit described below, regarding wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract. The appropriate unit is:

All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

EXXEL-ATMOS, INC.

*Steven Kessler, Esq.* for the General Counsel.  
*Francis J. Connell III, Esq. (Drinker, Biddle & Reath)*, of Philadelphia, Pennsylvania, for the Respondent.  
*Daniel G. Applegate*, Staff Representative, of Bethlehem, Pennsylvania, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by United Steelworkers of America, AFL-CIO (Charging Party or the Union), on August 8, 1991, and September 11, 1991<sup>1</sup> respectively, the

<sup>1</sup> All dates are in 1991 unless otherwise indicated.

Regional Director for Region 22 issued a complaint and notice of hearing on November 27, alleging that Exxel-Atmos, Inc. (Respondent), violated Section 8(a)(1) and (5) of the Act, by in substance withdrawing recognition from and refusing to bargain with the Union.

The trial with respect to the issues raised by the complaint was held before me in Newark, New Jersey, on March 16 and March 27, 1991.

Briefs have been filed by General Counsel and Respondent. The certification of service filed with General Counsel's brief dated May 29, 1991, indicates that service was made by certified mail on Respondent's attorney, and by regular mail on the parties. Such certification does not indicate how service was made on the administrative law judge. However, a cover letter dated May 29, 1991 to me states "enclosed please find an original and 3 copies of the General Counsel's brief in the above-captioned matter."

On June 18, Respondent submitted a reply brief dated June 16, 1991, although it neither asked for nor received permission to file such a document. In the reply brief, Respondent contends that General Counsel's brief was untimely and should be rejected. Respondent argues that since General Counsel did not in its papers indicate that service of the brief to the administrative law judge was hand delivered or made by fax, the assumption is that the brief was not so served, and was therefore untimely, since the due date for receipt was May 29, 1991. Respondent further contends that therefore General Counsel had in his possession a copy of Respondent's brief, and had the opportunity to fashion his arguments in response to Respondent's brief, an advantage denied to Respondent.

Respondent in its reply brief then responded to General Counsel's brief asserting that General Counsel made various misstatements of fact and law.

By letter dated June 25, 1991, General Counsel urges that since Respondent neither asked for nor received permission to file a reply brief, that the brief be rejected and not considered. Moreover, with respect to the filing of its own brief, General Counsel asserts that a copy was hand delivered to the Division of Judges on May 29, 1991, in a timely fashion, and the failure to so indicate on the certification of service was an inadvertent error.

Although General Counsel did not file a supplementary certification or affidavit of service indicating hand delivery of the brief on May 29, which would have been appropriate, I shall accept his assertion in his letter that timely service was effectuated in that manner. Therefore, I shall deny Respondent's request to reject General Counsel's brief.

However, in view of the uncertainty created by General Counsel's failure to properly establish timely service, I deem it appropriate to receive and consider Respondent's reply brief notwithstanding its failure to request permission to file such a document. Accordingly, I shall deny General Counsel's request to reject Respondent's reply brief.

Based on my review of the entire record,<sup>2</sup> I make the following

<sup>2</sup>While every apparent or nonapparent conflict in the evidence may not have been specifically resolved herein, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is hereby discredited.

## FINDINGS OF FACT

### I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation with an office and place of business in Somerset, New Jersey (Respondent's facility), where it has been engaged in the manufacture, sale and shipment of non-gas aerosol delivery systems. During the past year, Respondent sold and shipped from its facility, products, goods, and materials valued in excess of \$50,000 directly to points outside the State of New Jersey.

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

It is also admitted and I find the Union is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

### II. FACTS

In the summer of 1990, the Union began an organizational campaign amongst Respondent's employees. After obtaining cards from a majority of employees, the Union filed a petition in Case 22-RC-0360. On August 13, 1990, the parties entered into a stipulation providing for an election, as well as a stipulation with respect to eligibility to vote consistent with *Norris Thermador*, 119 NLRB 1301 (1958). The list contained 19 names.

By September 7, 1990, Respondent having concluded that a majority of employees in the agreed-upon bargaining unit desired to be represented by the Union, faxed to the Union an agreement signed by its president, Peter Gould, to recognize it as the exclusive representative of Respondent's employees in a unit of production and maintenance employees, quality control employees, laboratory technicians, and senior technicians. On the same day, Daniel Applegate, the Union's staff representative responded also by fax, accepting recognition, and requesting that he be telephoned in order to arrange dates for negotiation.

On the very same day, September 7, 1990, Respondent laid off five bargaining unit employees, including many of the Union's key supporters. Applegate upon being informed about the layoffs, immediately telephoned Respondent's attorney, Francis Connell III. Applegate complained to Connell about the layoff of the employees and asked that they be put back to work. Connell replied that the decision to lay off was based solely on economic factors and that Respondent was losing money. Applegate also asked Connell to set up a meeting to bargain and negotiate a contract. Connell responded that he would check with Gould about available dates. Applegate suggested any day during the next week, commencing September 10.

On checking with his client, Connell discovered that the only date available for a meeting was Wednesday, September 12. Accordingly, Connell called the Union's office and left a message on a tape machine that Respondent would be willing to meet with Applegate and the Union on September 12 at 3:30 p.m. On Monday, September 10, Applegate called Connell and they confirmed a meeting for September 12 at 3 p.m. at Respondent's premises. Applegate advised Connell that he would be bringing with him his assistant director, Manny Mihrail. Later that morning, Mihrail called Connell and asked if the meeting could be rescheduled for Thursday

or Friday, September 13 or 14. Connell replied that he would be out of town on those days. Mihrail told Connell that he would change his appointment and be available for the September 12 meeting.

However, at 12:15 p.m. that day, a message was taken at Connell's office from Applegate cancelling the meeting. The message read, "can't meet with you on Wednesday. Will reschedule." On that same day, September 1, 1990, Michael Donnelly, one of the employees laid off by Respondent, filed charges with the Region in Case 22-CA-7244, alleging Respondent had violated Section 8(a)(1) and (3) of the Act by laying off Donnelly and four other employees because of their membership and activities on behalf of the Union. On September 13, 1990, the Union filed a similar charge in Case 22-CA-17253. Later that day, Applegate called Connell and informed him that the Union had filed charges with respect to the layoff, and that he had asked the Region to consider the charges as blocking charges vis a vis the election scheduled for October 5, 1990. Connell subsequently telephoned the Board agent, Eric Shechter, to confirm Applegate's information concerning the election. According to Connell, Shechter informed him that as far as he (Shechter) knew, the Union had not asked the Board to block the election, and as far as he knew, the election would go forward after the unfair labor practices were disposed of. At some subsequent point, undisclosed by the record, the election scheduled for October 5, 1990, was postponed.

On October 9, 1990, Connell sent a 14-page position paper to the Region, in connection with the pending unfair labor practice charges. In that document, Connell asserted that after the bargaining session was postponed, "the NLRB subsequently notified the Company that the Union had decided to refuse the Company's offer of voluntary recognition." Connell admitted in his testimony that he could not recall the Board agent specifically stating that the Union was "refusing the Company's offer of recognition," but claims that he would not have written it in the position paper, had it not been told to him. Applegate denies that he ever told the Board agent that the Union was refusing the Respondent's offer of recognition. There is no evidence that the Union ever received or saw a copy of Respondent's position paper, submitted to the Board by Connell.

Between September 13, 1990, and May 7, 1991, neither Applegate nor anyone else from the Union made any efforts to contact Respondent concerning negotiations or for any other reason.

The above findings with respect to the events up to May 7, 1991, are based on a synthesis of the credible testimony of the witnesses, plus my evaluation of documentary evidence submitted by the parties. Thus, I credit Connell, contrary to Applegate's testimony and conclude that a bargaining session had been scheduled for September 12, and was subsequently canceled by the Union.

In that connection, I rely principally on Connell's calendar which included the meeting on that date with a line through it, Respondent's phone memo dated September 10, indicating a message from Applegate to Gould, reading, "cancel meeting on Wednesday," plus Connell's memorandum to his file dated September 11, 1990, which described fully the circumstances consistent with his testimony. Although Applegate also submitted his calendar which did not have any entries for September 12, I find Respondent's evidence on this

issue more persuasive, and conclude that Applegate probably neglected to include the meeting in his calendar for June 12 since it was canceled later on in the very same day, June 10, 1990, that the meeting had been agreed to.

Additionally, I have not credited Applegate's testimony that he tried to call Gould once a month, from October 1990 to May 1991, in order to request negotiations and on each occasion left a message to call back. Rather, I credit the testimony of Respondent's clerical employees supported by their examination of Respondent's phone records, that no such messages were left, as well as the fact that all calls for Gould would have been directed to his successor Robert Shiels, who replaced Gould as president of Respondent in November 1990. I would also note the Region's order consolidating cases and dismissing petitions which issued on December 5, 1991. That document asserts that the Union requested Respondent to bargain *after* (emphasis added) disposition of pending unfair labor practice charges. Finally, I rely on Applegate's own testimony as to why he did not follow up on his alleged efforts to call Respondent only once a month. He explained his failure to make a more substantial effort to contact Respondent, by pointing out that the unfair labor practice charges were still pending and he was hoping that the employees would be returned to work as a result of such charges. I conclude therefore that Applegate and the Union decided not to make any efforts to negotiate with Respondent, until the disposition of the unfair labor practice charges. I further conclude that when Applegate called Respondent on May 7, 1991, that he was aware at that time that the charges were going to be dismissed unless withdrawn, and that is the reason that he made the call at that time to attempt to commence negotiations with Respondent.<sup>3</sup>

On May 7, Shiels returned Applegate's telephone call. Applegate requested that Respondent meet with him and his committee of employees to negotiate a contract. Shiels replied that would agree to meet with Applegate one on one to discuss what the issues are and for him (Shiels) to find out "where we were." However, Shiels also told Applegate that there would be no formal negotiations unless the employees voted for representation by the Union in an election. Shiels added that he wanted the employees to have an opportunity to pick their bargaining representatives or at least vote for their wishes. Shiels emphasized that he felt firmly about that. Applegate responded that an election was not necessary, since the Union had the cards and had a written agreement by Respondent for recognition.<sup>4</sup> Applegate would not agree to Shiels' request for a one on one meeting, insisting that the parties commence formal negotiations immediately with the full bargaining committee present.

On June 17, Applegate and Shiels again spoke by telephone, and the conversation was virtually identical as the May 7 discussion between them.

I have credited Shiels' version of the conversations between him and Applegate. While Shiels recalled that the discussions took place in early 1991, I find his testimony con-

<sup>3</sup> Although the charges were withdrawn on May 31, I find it likely that the Union had been notified of the Region's decision to dismiss the charges absent withdrawal, and were still deciding whether or not to withdraw the charges when Applegate made his call.

<sup>4</sup> Shiels admitted that he was familiar with the September 7, 1990 agreement by Respondent to recognize the Union, signed by Gould, Shiels' predecessor as president.

cerning dates not to be accurate, in view of the phone logs, and the other evidence as detailed above, which indicates that the Union did not call until May when it became aware that the charges were to be dismissed. I also credit Shiels that there were two conversations between him and Applegate, which is also supported by Respondent's phone memo dated June 17. This memo reflects that on June 17, Shiels left a message with Jesus Osuna, Respondent's vice president that he (Shiels) wants to see Osuna about a phone conversation between Shiels and Applegate of the Union. I conclude that this June 17 memo refers to the second conversation between Shiels and Applegate, wherein Shiels recalled that the substance of the discussion was identical to his May 7 conversation with Applegate.

By letter dated July 16, 1991, to Shiels, Applegate requested that Respondent call him at their earliest convenience to arrange mutually acceptable dates for contract negotiations. On Respondent's receipt of the July 16 letter on July 17, Shiels instructed Osuna to call Applegate the first thing next morning.<sup>5</sup> On July 18, at 8:49 a.m., Osuna placed a call to the Union at the telephone number on the Union's July 16 letter, 908-287-4011. Applegate was not there, so Osuna left a message with his full name, phone number, and that he was from Exxel, and asked Applegate to return the call.

Applegate asserts that the message that he received read only "Jesus," without any last name, phone number, or other identification, so he did not know that his call had been returned by Respondent.

William O'Donnell, who had been a bargaining unit employee until he was promoted to supervisor in April 1991, heard talk in July 1991 that Respondent would be commencing negotiations with the Union. O'Donnell had circulated a petition on September 11, 1990, when he was a bargaining unit employee. The petition which he prepared without any involvement from or knowledge of Respondent's supervisors, was entitled "Petition to keep Union out." It went on to read, "We the *EMPLOYEES* of EXXEL container, DO NOT want to be represented by the United Steel workers Union nor any other Union. We do our own talking." O'Donnell's signature appeared first, followed by the signature of seven other bargaining unit employees, Vinny Dao, Nick Rybski, Robert Barney, Ghanshyam Patel, Thakorbai Patel, Bhanabhai Patel,<sup>6</sup> and Thuy T-Phan. A date of September 11, 1990 appeared next to each of the names. Of the eight names on the petition, seven of them, (all but Thy Phan) testified herein and confirmed their signatures on the petition, and except for employee Rybski, that they had signed the petition in September 1990.<sup>7</sup> O'Donnell testified that he circulated the petition when he found out Respondent intended to recognize the Union. After obtaining these signatures, O'Donnell called the NLRB and was allegedly told that "I did not follow procedure, that this has no validation, basically it wasn't up to me to do this." O'Donnell then placed the petition in the glove box in his truck, where it remained until July 1991.

On or about July 24, 1991, O'Donnell after hearing about the possibility of Respondent negotiating with the Union, de-

cid to inform Respondent about the petition. O'Donnell informed Osuna that he (O'Donnell) had a petition indicating that the employees didn't want a union, which was signed in September 1990, and asked if Osuna wanted to see it. Osuna replied that he did not know if it would do any good, but that he would like to see the petition. O'Donnell then gave the petition to Osuna. Osuna asserts that the receipt of petition created a doubt in his mind whether the Union had lost their majority status. At that time, Respondent employed 14 employees, and the list contained 8 signatures, all of whom were still employed by Respondent.<sup>8</sup>

After consulting with its attorney, Respondent prepared an inter office memo dated July 25, and posted it in the plant. The memo reads as follows:

*EXXEL/ATMOS, INC.*

*INTER-OFFICE MEMO*

TO: All Shop Personnel  
FM: Bob Shiels  
DATE: JULY 25, 1991  
SUBJECT: UNITED STEELWORKERS UNION

We want to let you know of recent events concerning the United Steelworkers Union.

We have received a letter from the union demanding that we bargain and negotiate a contract which would establish your wages, hours and working conditions.

However, we have also learned that a number of you signed a petition in September, stating that you do not want union representation. We're trying to decide what to do.

We really believed, when we recognized the Union, that a majority of you wanted the union. However, in light of this petition, we are not sure what to do. e plan to decide soon to make the right decision for all concerned.

If you have any questions, please feel free to ask Jesus Osuna, Steve Leggin, Gene Paino, or your supervisors.

Subsequent to the posting of this memo, on July 25, employee Robert Barney told Respondent's plant supervisor Steve Leggin "I don't want no Union." Leggin wrote a memo to this effect dated July 25 at 2:35 p.m., after reporting the conversation to Osuna.<sup>9</sup>

Eugene Paino, Respondent's vice president of technical services, testified that on or about August 1, employee Nick Rybski came to him and expressed antiunion sentiments. According to Paino, Rybski mentioned that he "wasn't too fond of unionism," that he was "anti-union," and that he "didn't want to see a Union in Exxel." Paino further testified that he immediately reported the conversation to Osuna, who wrote a memo dated August 1, stating that Paino had told Osuna at 1:30 p.m. on that date, that Niels Rybski did not want a union." Rybski, while admitting that his signature appeared on the 1990 petition, did not recall having signed it, nor did he recall any conversations with Paino or any other Respondent official in 1991 where he stated that he did not

<sup>5</sup> The record does not reflect what Shiels instructed Osuna to say to Applegate.

<sup>6</sup> The three Patels are not related.

<sup>7</sup> As noted above, in September 1990, the bargaining unit consisted of 19 employees.

<sup>8</sup> As noted, O'Donnell whose name also appeared thereon, was a supervisor in July 1991.

<sup>9</sup> Leggin's testimony in this regard was corroborated by Barnes.

want the Union. Rybski did recall complaining to Osuna in 1990 about having to go into the Union because he "Rybski" was a salaried employee. Additionally Rybski's affidavit unequivocally denies having spoken to anyone else about the Union subsequently, and denies further that he had spoken to Paino, Osuna, or any other representative of Respondent concerning his preferences regarding the Steelworkers or any other Union.

Additionally, Tomasco testified that on July 26, employee Ghanshyam Patel approached him and stated that he (Ghanshyam) didn't want the Union anymore. Tomasco asserts that he reported this to Leggin, and overheard Ghanshyam tell Leggin that "he" didn't want the Union, and that "we" didn't want the Union, without any further identification of "we." Leggin, however, recalls that Tomasco informed him that Ghanshyam had said to Tomasco that he (Ghanshyam) and Sudhirnbai, Bhanubhai, and Thakorbbhai Patel did not want a Union.<sup>10</sup> Leggin also testified that when he spoke to Ghanshyam in Tomasco's presence, Ghanshyam confirmed that he plus the other three Patel's did not want the Union. Ghanshyam on direct examination confirmed that he had spoke to Tomasco and Leggin in July 1991, and told them that "we don't want a Union." He added that what was meant by "we" was the four Patels, but he did not testify that he specifically told either supervisor what he meant by "we," nor on what basis he asserted that the four Patels did not want a Union. On cross-examination, Ghanshyam changed his recollection, and asserted that his conversation with Tomasco and Leggin about the Union was before Tomasco became a supervisor, and was to the best of Ghanshyam's recollection in February and March 1991.

Leggin and Tomasco also testified that during their conversation with Ghanshyam, Ghanshyam suggested that they speak to the other Patels about the matter. Thus, they assert that Gunshyam went with them in the shop to Bhanubhai Patel and told Leggin to ask Bhanubhai. Leggin and Tomasco allege that Leggin replied that the employees were supposed to have something to tell him. At that point, Leggin claims that Ghanshyam spoke to Bhanubhai in an Indian dialect, that Leggin did not understand. Then according to Leggin and Tomasco, Bhanubhai told Leggin and Tomasco that he (Bhanubhai), Sudhirnbai, and Thakorbbhai did not want the Union.<sup>11</sup>

Bhanuhai and Thakorbbhai both testified that they signed the petitions in 1990, because they did not want to "join the Union." However, they both deny having any conversations with Leggin or any supervisor about the Union.

Sudhirnbai Patel, who did not sign the petition, testified that in July 1991, Leggin approached him in the cafeteria and asked if he wanted the Union. Sudhirnbai testified that he replied that he did not want the Union. Leggin gave no testimony about a conversation with Sudhirnbai, nor was any memo introduced of that conversation.

Osuna did write a memo dated July 26, 1991, which asserts that Tomasco was told by Ghanshyam Patel that, quote, "me, Bhanna, Sudi and Thako don't want a Union." The

memo further asserts that this was brought to my attention on July 26th, Friday at 3:30 p.m.

On July 31, Applegate signed and mailed the charge in the instant case to the Board, which was filed on August 2, 1991, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively with representatives of its employees.<sup>12</sup>

Meanwhile, after receiving the reports from supervisors concerning employee sentiments, plus a copy of the July 1990 petition, Osuna testified that Respondent in early August based on those factors doubted the Union's majority status. Therefore, after consultation with its attorney, Respondent filed an RM Petition in Case 22-RM-679 on August 7, with a letter from Shiels dated August 5, setting forth the facts supporting the petition. The following factors were relied upon by Respondent in its letter to support its alleged doubt of the Union's majority status.

Exxel no longer believes that the Steelworkers' Union represents a majority of the collective-bargaining unit for the following reasons:

1. Exxel's management has recently learned that, on September 11, 1990 (four days after the Company voluntarily recognized the Steelworkers), eight members of the bargaining unit signed a petition stating that they did not want to be represented by the Steelworkers or by any other union. A copy of the petition is enclosed. This petition was not presented to management until July 1991.
2. Within the past few days, six members of the bargaining unit have advised management, either directly or indirectly, that they do not wish to be represented by the Steelworkers or by any other union.
3. Neither the September 11, 1990 petition, nor the recent anti-union comments were solicited by management in any way.
4. The bargaining unit at this time, and for the past several months, consists of only thirteen employees. Six of these thirteen<sup>13</sup> employees have recently expressed their desire not to be represented by the union. At least one other employee signed the September 11, 1990 petition.
5. The Company was advised by the Board in September or October of 1990 that the union had refused the Company's offer of voluntary recognition, and the union in fact made no effort to bargain with the Company at any time between September 7, 1990 and July 17, 1991.

Based on the foregoing factors, we seriously doubt that the Steelworkers Union currently represents a majority of the employees in the bargaining unit. We believe that the only way to determine the true wishes of the majority of our employees is to do so through a Board-supervised election.

On or about August 6, Applegate telephone Osuna. After a discussion about why Applegate had not returned Osuna's July 18 call, Applegate informed Osuna that he had filed un-

<sup>10</sup> As noted, none of the Patels are related to one another.

<sup>11</sup> As noted however, Ghanshyam on cross-examination indicated that these events took place in February or March 1991.

<sup>12</sup> A copy of this charge was not received by Respondent until August 8.

<sup>13</sup> Respondent concedes that this number was incorrect, and that the unit consisted of 14 employees.

fair labor practice charges against Respondent, and Osuna told Applegate that Respondent was filing a petition with the Board for an election.

The instant complaint was issued on November 27. On December 5, the Region issued an order consolidating Case 22-RC-10360 and Case 22-RM-629, and dismissing both petitions because of the issuance of the complaint, but adding that the petitions are subject to reinstatement after disposition of the unfair labor practice case.

### III. ANALYSIS

The applicable legal principles necessary to decide the instant matter are succinctly summarized by the Board in *Royal Coach Lines*, 282 NLRB 1037, 1987, enf. denied on other grounds 838 F.2d 47 (2d Cir. 1988).

The Board has consistently held that where, as here, an employer has validly extended voluntary recognition to a union, the union is entitled to an irrebuttable presumption of majority status until a reasonable time for bargaining has elapsed. *Rockwell International Corp.*, 220 NLRB 1262, 1263 (1975); *Keller Plastics Eastern*, 157 NLRB 583, 587 (1966). A reasonable time is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions. *Brennan's Cadillac*, 232 NLRB 255 (1977). Once a reasonable time for bargaining has elapsed, the union enjoys a rebuttable presumption of majority status. This presumption can be rebutted by the employer's showing that at the time of its refusal to bargain, the union did not have majority status in fact, or that the employer had a good-faith doubt of the union's majority status based on objective factors. See generally *Bartenders Assn. of Pocatello*, 213 NLRB 651 (1974); *Cain's Generator Co.*, 237 NLRB 1198 (1978). [Id. at 1038.]

Here, there is no dispute that Respondent voluntarily recognized the Union as the collective-bargaining representative of its employees on September 7, 1990. The next question to be determined is whether or not a reasonable time for bargaining had elapsed when Respondent withdrew recognition from the Union. However, before resolving that issue, it must be determined when Respondent actually withdrew recognition from the Union.

In that regard, General Counsel contends that Respondent withdrew recognition from the Union by virtue of Shiels' response to Applegate's request for bargaining on May 7, 1991. Respondent disagrees, contending that this conversation did not amount to a withdrawal of recognition, and that recognition was not withdrawn until August 1991. I am in agreement with General Counsel's analysis of Shiels' remark, and find that while Shiels did not use the words withdrawal of recognition in his response, no other reasonable interpretation of his words is warranted. Thus, while he did agree to meet with Applegate on a "one on one" basis, to discuss what the issues were, Shiels made absolutely clear to Applegate that he did not wish to meet with the Union's full bargaining committee, and that he would not engage in "formal" negotiations with the Union, unless and until the employees voted in an election. Shiels told Applegate that he wanted the employees to have an opportunity to pick their

bargaining agent, and added that he "felt firmly" about that. Thus, I conclude that the totality of Shiels' remarks amounted effectively to a withdrawal of recognition. *Paramount Poultry*, 294 NLRB 867 (1989); *Lexington Cartage Co.*, 259 NLRB 55, 56-58 (1981). (Employer attended four negotiation sessions with the Union, and at each one made no counterproposals, and stated that it was the position of the employer that the Union did not represent a majority of employees, and therefore it was not obligated to bargain with the Union. Held that the employer withdrew recognition at first meeting that it made the above statements.)

Respondent argues that Shiels never actually foreclosed subsequent bargaining sessions with the Union, and that his request for an initial get acquainted meeting with Applegate was not unreasonable, nor did it constitute a withdrawal of recognition. I do not agree. In my view, if Shiels' intent as contended by Respondent was to engage in future negotiations with the Union and its full committee after his "get acquainted" meeting with Applegate, it was incumbent upon him to make that position clear. Not only did Shiels not do so, but his other remarks that he would insist on an election among Respondent's employees, notwithstanding its prior recognition of the Union, clearly demonstrates Respondent's position. I conclude that Shiels was obviously unhappy with the decision of his predecessor as chief executive of Respondent, to recognize the Union, and that he did not consider himself bound by that action.<sup>14</sup> Thus, Shiels was agreeing to meet with Applegate as a courtesy to see what the issues were, at the same time he was clearly informing the Union that he did not consider Gould's agreement to recognize the Union binding upon him or Respondent, and that he would require the Union to demonstrate its majority status by winning an election, before commencing actual bargaining. This position amounts to a withdrawal of recognition and I so find.

Having so found, the question of reasonable time for bargaining becomes largely irrelevant, since Respondent does not even argue, as well it should not based on this record, that it doubted the Union's majority on May 7, 1991, nor that it was aware of any basis for taking such a position. Thus as noted in May 1991, Respondent was not aware of the petition signed in September 1990, and had not been informed by any employees about their dissatisfactions with the Union until July 1991. In such circumstances, Respondent's withdrawal of recognition in May 1991, prior to its having any doubt of the Union's majority, must be found violative of Section 8(a)(5) of the Act. It is well settled and not disputed by Respondent, that Respondent cannot rely on expressions of antiunion sentiment that came to its attention after the withdrawal of recognition, in order to justify such prior withdrawals of recognition. *Manna Pro Partners*, 304 NLRB 782, 788 (1991); *Republic Engraving & Designing Co.*, 236 NLRB 1150, 1156 (1978); *Odd Fellows Rebekah Home*, 233 NLRB 143, 144 (1977).

Accordingly, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union on May 7, 1991.

While I need not go any further in my analysis in order to dispose of the instant matter, I do deem it appropriate to

<sup>14</sup>I note that Respondent was not represented by counsel in May 1991 when Shiels took this position.

make additional alternative findings. Thus, since the question of whether Respondent's conduct in May 1991 constituted a withdrawal of recognition is not totally free from doubt, I shall analyze the matter further, on the alternative assumption, as argued by Respondent that the withdrawal of recognition did not take place until August 1991, when Respondent filed its RM petition and formally withdrew recognition from the Union.

However, such an analysis does not preclude assessing whether Respondent's conduct in May and June 1991, although not amounting to a withdrawal recognition has otherwise violated the Act. In my judgment Respondent's position on meeting with the Union, as expressed by Shiels in May and again in June 1991, even if not construed as a withdrawal of recognition, does establish a violation of Section 8(a)(1) and (5) of the Act. I note initially that Section 7 of the Act gives employees the right to bargain through representatives of their own choosing. Generally speaking, an employer has no right to dictate to a Union who its representatives may be during bargaining, unless it establishes "a clear and present danger to the collective bargaining process," or that the presence of the objected to party would create ill will and make bargaining impossible. *Milwhite Co.*, 290 NLRB 1150, 1151 (1988), *Dilene Answering Service*, 257 NLRB 284, 291 (1981). Here, while Shiels agreed to meet with the Union, he insisted on a one on one meeting with Applegate, despite Applegate's protestations that his bargaining committee be present as well. Neither Shiels nor Respondent have asserted that the presence of the Union's bargaining committee presented a clear and present danger to the bargaining process or would create ill will or make bargaining impossible. Thus, Respondent's insistence on meeting only with Applegate is violative of Section 8(a)(5) of the Act. *Dilene*, supra.

Moreover, Section 8(d) of the Act requires that the Employer "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached." Thus, Respondent does not satisfy its obligations under the Act by merely agreeing to meet with the Union, or to listen to the Union's assertions of "what the issues are or where we are." Respondent must agree to "confer" and to negotiate an agreement with the Union and to execute a written contract incorporating any agreement reached. Respondent cannot simply sit and listen to the Union's proposals, make no counterproposals, all the while insisting that the Union demonstrate its majority status by winning an election, before it engages in "formal" negotiations. *Lexington Cartage*, supra. See also *Southern Lumber Co.*, 229 NLRB 187, 191 (1986) (fact that employer offers to bargain on one condition of employment, layoff procedure, is no defense to a charge of refusing to bargain over other mandatory subjects of bargaining).

It seems to me that Respondent did not offer to fulfill its obligations to bargain collectively with the Union by Shiels' imposition of the above-described conditions for a meeting, and that the Union was amply justified in refusing to meet in such circumstances. Respondent, as noted, argues that Shiels was merely suggesting an initial get-acquainted meeting with Applegate, and did not foreclose subsequent meet-

ings wherein full bargaining could take place. However, as I have observed above, Shiels did not give any indication that he contemplated such future meetings and bargaining, and to the contrary insisted on an election before any such bargaining could occur.

Accordingly, based on the foregoing, I make the alternative finding that even if Respondent's position in May, and reaffirmed in June, is not construed as a withdrawal of recognition, it nonetheless establishes a refusal to meet and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

This brings me to the question of whether a reasonable time for bargaining had elapsed in August 1991, when Respondent admittedly withdrew recognition from the Union. Respondent argues that a reasonable time had expired by August 1991, since nearly 11 months had expired since Respondent voluntarily granted recognition to the Union. Citing *Tajon, Inc.*, 269 NLRB 327 (1984), and *Brennan's Cadillac*, 231 NLRB 225 (1977), where the Board found periods of 2-1/2 to 4 months, respectively, to be reasonable amounts of time, Respondent contends that the instant case should be treated similarly. Respondent further asserts that the Union was entirely to blame for the failure of the parties to meet and bargain, and that Respondent should not be blamed for the delay. I do not agree.

As noted, the test for determining what is and what is not a reasonable time is determined by what "transpires during the time period under scrutiny rather than the length of time elapsed." *King Soopers, Inc.*, 295 NLRB 35, 37 (1989). Various factors considered by the Board in making such a determination include whether the parties are bargaining for a first contract; whether the employer engaged in a meaningful good-faith negotiations over a substantial period of time; and whether an impasse in negotiations had been reached. *Gerrino Restaurant*, 306 NLRB 86, 88-89 (1991); *VIP Limousine*, 276 NLRB 871, 877 (1985).

Based on the above criteria, it is clear that a reasonable time had not elapsed when Respondent formally withdrew recognition in August, notwithstanding the fact that 11 months had expired since recognition was granted. *VIP Limousine*, supra at 877. The parties were bargaining for a first contract, there was no negotiations over a substantial period of time, and of course no impasse had been reached. Indeed, there was in fact no negotiations at all during this period. *Gerrino*, supra at 89.

Nor do I agree that the blame for the failure of negotiating sessions to have occurred can be attributed solely or even primarily to the Union's dilatory tactics, as Respondent contends. It is true that the Union did cancel the one negotiation session that had been scheduled in September 1990, and thereafter decided to postpone further efforts to reschedule a meeting, pending resolution of the unfair labor practice charges that it filed concerning Respondent's layoff of employees. However, while this decision of the Union resulted in no attempts to set up a meeting for a period of 8 months, since the layoffs involved a substantial number of employees in the unit (over 25 percent), I do not find it unreasonable for the Union to postpone bargaining until the charges were resolved and the number of employees in the unit was determined. In any event, Respondent cannot contend that the Union abandoned its interest in the employees, since it was vigorously processing the unfair labor practice charges with

the Board. *Greater New Orleans Artificial Kidney Center*, 233 NLRB 1467, 1468 (1977); *Unoco Apparel*, 215 NLRB 89, 91 (1974).

More significantly, I note that Respondent made no objection to the Union's apparent decision to postpone further bargaining until the resolution of the charges. Respondent made no effort to attempt to schedule another meeting during the period, apparently acquiescing in the Union's desire to resolve the charges first. Indeed, as of November 1990, when Shiels replaced Gould as president, it is obvious from Shiels' own testimony that any attempts to bargain by the Union to meet with Respondent from that time on, would have been met with the same unlawful response made by Shiels in May; i.e. Respondent would meet only with Applegate, but would not engage in any bargaining unless and until the Union won an election.<sup>15</sup> In such circumstances, Respondent cannot rely on the Union's delay in scheduling bargaining to establish that a reasonable time for bargaining had elapsed. *Driftwood Convalescent Hospital*, 302 NLRB 586, 587, 589 (1991).

Moreover, once the Union did make attempts to schedule negotiation sessions in May, June, and July, Respondent unlawfully refused to agree to do so, clearly demonstrating that the failure to have bargaining sessions from May to August was primarily attributable to this unlawful conduct of Respondent. In this connection, Respondent relies on the fact that Osuna did attempt to telephone Applegate in response to the Union's July written request for negotiations, and that due to an error in the Union's transmission of the message, Applegate did not return the call. However, I place little or no significance on this error by the Union, since there the record is not clear as to what Osuna intended to say to Applegate. I note that Respondent adduced no testimony as to the content of the conversation between Shiels and Osuna, when Shiels instructed Osuna to call Applegate.<sup>16</sup> Thus, there is no basis to conclude that even if Osuna intended to schedule a meeting with Applegate, that the conditions would have been any different than they were in May and June, when Shiels unlawfully conditioned his agreement to meet, on a meeting with Applegate alone, with further negotiations to be scheduled only if the Union were successful in the election.

Accordingly, based on the foregoing analysis and authorities, I conclude that a reasonable time for bargaining had not elapsed when Respondent formally withdrew recognition from the Union in August 1991. Having so concluded, it then becomes unnecessary for me to make any findings on the sufficiency of Respondent's objective considerations for withdrawing recognition since absent a reasonable time for bargaining having elapsed, evidence of employee dissatisfaction with the Union is irrelevant. *Driftwood*, supra at 589; *Gerrino*, supra at 89.

However, since I have been making alternative findings in this decision already, I do deem it appropriate to continue such an approach, and shall analyze further on the assump-

tion that a reasonable time for bargaining had elapsed by August, when recognition was formally withdrawn.

In that event, however, it must be noted that I have also found above, that Respondent's conduct in May and June of refusing to meet and bargain with the Union (even assuming it did not constitute a withdrawal of recognition) was violative of Section 8(a)(1) and (5) of the Act. Such conduct by Respondent which strikes at the heart of the Union's legitimate role as representative of its employees, would likely have contributed to the Union's loss of standing among the unit employees, thereby rendering unreliable any subsequent employee dissatisfaction with the Union. *Midway Foodmart*, 293 NLRB 152 fn. 2 (1989). Therefore, the withdrawal of recognition even if construed as having not being effectuated until August, was still tainted by these unremedied unfair labor practices committed by Respondent, and is therefore unlawful. *Lee Lumber & Building Material*, 306 NLRB 408, 410 fn. 15 (1992); *Bay Area Mack*, 293 NLRB 125, 131 (1989); *Midway Foodmart*, supra.

So, in sum, I have concluded above that (a) Respondent withdrew recognition from the Union on May 7, when it had no doubt of the Union's majority status; (b) even if it was found that recognition was not withdrawn until August as contended by Respondent, that a reasonable time for bargaining had not elapsed; and (c) even if a reasonable time had elapsed by August, that Respondent's unremedied unfair labor practices tainted its subsequent withdrawal of recognition.

Thus, only if all three of the above findings are reversed, does it become necessary to evaluate the sufficiency of the objective considerations relied on by Respondent in withdrawing recognition. although I consider such an eventuality unlikely, I shall make such an evaluation in keeping with my decision to make alternative findings.

Respondent, in its letter signed by Shiels, filed in support of its RM petition, sets forth in substance three reasons as objective considerations which allegedly formed the basis for its doubt that the Union represented a majority of its employees. One of the reasons asserted in that document indicates that Respondent was "advised by the Board in September or October of 1990 that the Union had refused the Company's offer of voluntary recognition, and the Union, in fact, made no effort to bargain at any time between September 7, 1990 and July 17, 1991."

Although this assertion appeared in Respondent's position paper submitted to the Board in connection with the ULP charge and in the instant letter, Connell who testified at the hearing, could not recall the Board agent making this statement to him, but claims that he would not have written it in the position paper had it not been told to him. Particularly, where the Union through Applegate has credibly denied ever making such a statement to the Board agent, I find Connell's testimony insufficient to conclude that the Union ever had refused Respondent's offer of voluntary recognition. Moreover, I note that no testimony was adduced from either Shiels or Osuna that in fact Respondent relied on the alleged refusal to accept recognition by the Union, in concluding that the Union lost its majority status. Indeed, the only testimony in any way related to this issue was Osuna's response that Respondent understood that the election was postponed as a result of the unfair labor practice charges that had been filed against Respondent. Finally, in my view, Respondent is not

<sup>15</sup> In fact, as noted, Shiels testified that he believed that these conversations took place in January 1991, shortly after he became president. However, as also noted, I have concluded based on other more objective evidence that he was mistaken as to the dates of these conversations with Applegate, and they occurred on May 7 and June 17.

<sup>16</sup> Indeed, Shiels did not testify at all about the matter.

entitled to rely upon secondhand advice received from Board agents as to what the Union allegedly told the agent concerning its recognition desires. Cf. *Kuna Meat Co.*, 304 NLRB 1005 fn. 2 (1991), and cases cited.

Accordingly, I conclude that Respondent cannot place any reliance on this alleged statement to support its withdrawal of recognition.

Respondent places its principal reliance upon the petition executed by eight bargaining unit employees in September 1990, stating they do not want to be represented by the Union, but not submitted to Respondent until July 1991. The petition, which in July 1991, contained the names of seven bargaining unit employees as of that date, was given to Respondent by Supervisor Bill O'Donnell who had prepared and circulated the petition in September 1990, when he was a unit employee. General Counsel argues that Respondent cannot rely on the petition, because it was received from O'Donnell who was a supervisor at the time he transmitted to Respondent, and that the petition is therefore tainted by O'Donnell's participation in its preparation and circulation. *Walker Mfg. Co.*, 288 NLRB 888 (1988). I do not agree. The critical question to be determined is O'Donnell's status at the time that he became involved in the preparation and circulation of the petition, not the time that he presented it to higher officials of Respondent. Since it is clear that O'Donnell was not a supervisor in September 1990, and there is no evidence of any supervisory involvement in the petition at that time, I conclude that O'Donnell's mere transmission of the petition to Respondent in July 1991, when he was a supervisor, does not taint the petition.<sup>17</sup>

However, I agree with General Counsel's alternative position and citation of authority, that Respondent cannot rely on the petition, because it was executed at a time that no question concerning representation could have been raised. *United Supermarkets*, 287 NLRB 119, 120 (1987). Thus, since had the petition been submitted to Respondent in September 1990, when it was signed, clearly a reasonable time for bargaining would not have expired, and it could not have been considered as a basis to question the Union's majority or withdraw recognition at that time.<sup>18</sup> *Royal Coach*, supra. Thus, since Respondent could not rely on the petition in September 1990, it cannot subsequently rely on it to justify a more timely withdrawal of recognition in July 1991. *United Supermarkets*, supra; see also *VIP Limousine*, 276 NLRB at 878.

Respondent attempts to distinguish *United Supermarkets*, supra, on the grounds that the case did not involve a voluntary recognition, but a certification, which Respondent argues "is treated very differently than a case where the one year certification bar applies." However, while there are differences between voluntary recognition and certification in various respects, I do not believe that there is any difference with respect to the principles applicable to the question involved here. Thus, in *Keller Plastics Eastern*, 157 NLRB 583 (1966), the Board held that in a bargaining relationship

<sup>17</sup> *Walker Mfg. Co.*, supra, cited by General Counsel, is not to the contrary, as that case deals with well-settled principles involving supervisory participation and involvement with a petition at the time that the petition was executed by the employees.

<sup>18</sup> It is also noteworthy that the petition contained only 8 signatures out of a unit of 19 employees in September 1990, less than a majority of employees in the unit.

"established as a result of voluntary recognition of a majority representative . . . like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain." Id at 587. Thus, the Board treats all types of recognition similarly with respect to the requirement that a "reasonable time to bargain" must be afforded. While in a certification situation, a reasonable time is defined as at least one year, and in other situations the determination is based on a number of factors, there is no difference when it comes to evaluating the quantum of evidence necessary to support an employer's good-faith doubt, between a bargaining relationship established by a certification vis a vis other methods such as voluntary recognition.

Therefore, I conclude that Respondent cannot rely on the petition executed in September 1990, to support its assertion that it reasonably doubted the Union's majority status in July or August 1991.

That leaves for consideration Respondent's final contention, that it received direct and indirect communications from employees in July 1991, that they did not wish to be represented by the Union. Since Respondent's own witnesses, as well as its letter supporting the RM petition, indicate that at best 6 employees expressed their dissatisfaction with the Union, this number constituting less than a majority of the 14 employees in the unit, would be insufficient to establish a reasonable doubt, even if credited, and even if all of the statements were deemed sufficient to establish a desire not be represented by the union. *Dy-Dee Wash*, 228 NLRB 389, 390 (1977). Therefore, I have concluded that it is unnecessary to resolve the confusing and often contradictory testimony of Respondent's own witnesses, as to what was said by employees to its supervisors when and by whom concerning union representation.<sup>19</sup>

Moreover, an evaluation of the statements allegedly made to Respondent's supervisors does not permit Respondent to rely on some of the assertions to establish its alleged reasonable doubt of majority status. Thus, Respondent concedes that as to two of the six employees who allegedly expressed their antiunion sentiments, two of them, Sudhirnbai and Thakorbai Patel did so only through the statements of other employees. The Board, supported by the Courts has consistently placed little or no reliance on statements of employees purporting to represent the views of other employees. *Manna Pro Partners*, 304 NLRB at 783; *Westbrook Bowl*, 293 NLRB 1000, 1001 (1989); *Larsen Supply Co.*, 289 NLRB 295 (1988); *Alexander Linn Hospital Assn.*, 288 NLRB 103, 109 (1988); *Bryan Memorial Hospital v. NLRB*, 814 F.2d 1259, 1263 (8th Cir. 1987); *NLRB v. Wallkill Valley General Hospital*, 866 F.2d 632, 637 (3d Cir. 1989). Therefore, Respondent cannot rely on the statements of the other Patels (who are not related) to establish the antiunion sentiments of these two employees.<sup>20</sup>

<sup>19</sup> For example, Paino testified that Rybski made direct statements to him concerning his dissatisfaction with the Union. Rybski did not recall such a conversation and his pretrial affidavit specifically denies having such a conversation. The record also contains substantial contradictions concerning the purported conversations with the various Patels which I have described above, which I shall not resolve.

<sup>20</sup> The record does reflect according to Sudhirnbai's testimony, that he was approached by Supervisor Leggin in the cafeteria and asked if he wanted the Union. In response to this inquiry, Sudhirnbai testified that he responded that he did not want the Union. Respondent

Accordingly, the best that can be said for Respondent's "objective considerations," comes down to direct statements from only 4 employees out of a unit of 14 employees, which indicate dissatisfaction with union representation, which is far from sufficient to establish a reasonable doubt of the Union's majority status.

Therefore, based on the foregoing analysis and authorities, I find that Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union, whether it is found that the withdrawal took place in May as contended by General Counsel and as I have found, or in August as asserted by Respondent.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing on and after May 7, 1991, to meet and bargain with the Union, and by withdrawing recognition from the Union at that time as the exclusive majority representative of its employees in an appropriate unit, Respondent has violated Section 8(a)(1) and (5) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>21</sup>

cannot rely on this conversation, even if credited to establish its reasonable doubt, since the information emanated from an unlawful interrogation. *Hajoca Corp.*, 291 NLRB 104, 105 (1987), *enfd.* 872 F.2d 1169, 1176 (3d Cir. 1989). Moreover, since neither Leggin nor any supervisor testified about this alleged conversation, and no memo in Respondent's file referred to it, I conclude that Respondent did not rely on this fact in making its decision to withdraw recognition, and cannot rely on it in this proceeding.

<sup>21</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.

#### ORDER

The Respondent, Exxel-Atmos, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and refusing to meet and bargain collectively with united Steel Workers of America, AFL-CIO (the Union), as the exclusive bargaining representative of its employees in the appropriate bargaining unit set forth below.

(b) 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) On request, recognize, meet and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit described below, regarding wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody it in a signed contract. The appropriate unit is:

All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by Respondent at its Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Somerset, New Jersey, copies of the attached notice marked "Appendix."<sup>22</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, 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.

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

<sup>22</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."