

**Vic Koenig Chevrolet, Inc. and District 111, International Association of Machinists & Aerospace Workers, AFL-CIO.** Cases 14-CA-22692, 14-CA-23085, and 14-CA-23290

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

On May 20, 1994, Administrative Law Judge Nancy M. Sherman issued the attached decision in Case 14-CA-22692. The Respondent filed exceptions with a brief in support and a motion to reopen the record. The General Counsel filed an answering brief to the Respondent's exceptions and an opposition to the Respondent's motion to reopen the record. Thereafter, the Respondent filed a reply brief in support of its exceptions. On November 22, 1994, the Board issued an Order granting the Respondent's motion to reopen the record and remanded the proceeding to the administrative law judge. On remand, Case 14-CA-22692 was consolidated for hearing with Cases 14-CA-23085 and 14-CA-23290. On June 8, 1995, Judge Sherman issued the attached supplemental decision in Case 14-CA-22692 and decision in Cases 14-CA-23085 and 14-CA-23290 (supplemental decision). The Respondent filed exceptions with a brief in support, the General Counsel filed cross-exceptions with a brief in support, and the Respondent filed a response to the General Counsel's 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, the supplemental decision, and the record<sup>1</sup> in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order set out in the judge's supplemental decision as modified.<sup>3</sup>

1. A central issue in this case is whether the Respondent violated Section 8(a)(5) by withdrawing recognition

from the Union on August 13, 1993. The resolution of this issue depends on whether the Respondent could show that at the time it withdrew recognition, the Union had in fact lost the support of a majority of the unit employees or that the Respondent possessed a reasonable doubt, based on objective evidence, and in a context free of unfair labor practices, that the Union had lost majority support. *Rock-Tenn Co.*, 315 NLRB 670, 672 (1994), *enfd.* 69 F.3d 803 (7th Cir. 1995). Because she found that the Respondent's withdrawal of recognition was not based on a reasonable doubt of the Union's continued majority status and did not occur in a context free of unfair labor practices, the judge concluded that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union. We agree with the judge that the Respondent violated the Act by unlawfully withdrawing recognition from the Union, but solely for the reasons set forth below.

The judge has fully set out the facts. In brief, the Respondent sells and services automobiles at its facility in Carbondale, Illinois. The Union has represented the Respondent's auto service employees since 1957. The most recent contract between the parties was effective from October 15, 1990, to October 15, 1993. At all relevant times, there were 11 employees in the bargaining unit.

In June 1993,<sup>4</sup> unit employees began discussing whether they wanted to keep the Union. In mid-July, unit employee Kenneth Blair called the Board's St. Louis office regarding the documentation of employee disaffection that would be needed to file a valid decertification petition. In late July, Blair spoke to unit employee James Rader, the union steward, about holding a vote concerning continued union representation. On Tuesday, August 10, Blair told each bargaining unit employee that he thought the employees needed to take a vote on the Union. Rader told Blair that he would go along with what the men wanted.

At about 11:30 a.m. on the same day, August 10, Blair and all the other unit employees except Ardell Yoast gathered to vote on whether the Union should continue to represent them. (Yoast testified that he did not participate in the vote because Blair was neither a union representative nor his "boss," and the vote was being held during working hours.) Blair distributed to the unit employees a handwritten ballot that read "Do you wish to stay in the Union?" with the instruction to circle "yes" or "no." The employees marked the ballots and put them in the ballot box. Blair and Rader then counted the ballots. Six of the employees had circled "yes" and four had circled "no." After they had tallied the vote results, Rader asked Blair whether "it was over with." Blair replied that it was over as far as he was concerned.

<sup>1</sup> The Respondent's request for oral argument is denied as the record and briefs adequately present the issues and positions of the parties.

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

Additionally, the Respondent asserts that the judge's findings are a result of bias and prejudice. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

<sup>3</sup> We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

<sup>4</sup> All dates hereafter refer to 1993 unless otherwise noted.

However, on the next morning, Wednesday, August 11, Rader told unit employees that Vic Koenig, the Respondent's president, was unhappy with the vote and wanted 100-percent participation.<sup>5</sup> Rader then drafted a document captioned "*Petition to Withdraw/We the undersigned wish to withdraw our membership from local 1242 of the I.A.M.A.W.,*" with numbers 1 to 11 written underneath. Unit employee Gregory Newell signed the document after numeral 6 and gave the document to Blair. Blair then signed the document after numeral 1 and unit employee Fred Tolar signed after numeral 2. After some employees objected to the petition on confidentiality grounds, it was agreed that a second balloting would be held about noon on Friday, August 13. Blair stated that if the August 13 balloting showed that a majority of the employees no longer wanted the Union to represent them, Blair would need the dissatisfied employees' signatures in order to file a valid decertification petition. Because Newell was planning to leave the facility directly after the vote on Friday, he took the document that he had just signed and, after Blair and Tolar had crossed out their signatures, placed it in an envelope, sealed it, and gave it to Rader.

On Thursday, August 12, Koenig, who had been informed that another vote would be held on Friday, August 13, tried several times without success to telephone Larry Downs, the Respondent's labor attorney. Because Koenig planned to be in Mississippi on August 13 when the second vote was held, he wanted to find out where Downs would be on that day. After learning that Downs would be in the office on Friday, Koenig left for Mississippi.

At about noon on Friday, August 13, a second balloting was held. Rader wrote out a second set of ballots which stated, "Do you wish to remain in the union?/Circle one/yes/no." Blair told the employees that if they voted out the Union, he would come around with a piece of paper for them to sign. After the employees had voted, Rader, Blair, and Service Manager Michael Sparks counted the ballots. The results of the balloting were seven "no" votes and four "yes" votes.

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<sup>5</sup>In her original decision, the judge found that at approximately 4:15 p.m. on Tuesday, August 10, Koenig had met with Rader and told Rader that he was not happy with the vote and wanted 100-percent participation. Upon the Respondent's submission of documentary evidence that established that Koenig was not at the facility on August 10, the Board remanded the case to the judge for further consideration of this factual finding and other related issues. We agree with the judge's finding, as set out in her supplemental decision, that no such conversation ever took place between Koenig and Rader and that Koenig had not in fact instructed Rader to hold a revote. Nevertheless, we also agree with the judge, based on her credibility determinations, that Rader did in fact tell his fellow employees on the morning of August 11 that Koenig was unhappy with the vote and wanted 100-percent participation.

Shortly after noon, Koenig, who, as explained above, was absent from the facility that day, called Sparks to find out the results of the balloting. After being informed of the tally, Koenig asked Sparks to call Blair to the phone. During their conversation, Blair and Koenig discussed obtaining employee signatures on a decertification petition. Either shortly before or immediately after his conversation with Koenig, Blair started soliciting employees to sign a petition expressing dissatisfaction with the Union. The employees, however, told Blair that they wanted individual petitions based on a concern for confidentiality. During a second phone conversation, Blair told Koenig that the employees did not want the Respondent to know who voted yes and who voted no, and Blair asked Koenig "how were we going to do this?". Eventually, it was agreed that the employees would put the documents in individual envelopes and seal them. Koenig suggested that either a minister who was a regular customer or Robert B. Schulhof, an attorney whom the Respondent sometimes consulted on nonlabor matters, should inspect the documents. Blair chose Schulhof.

After this second conversation with Koenig, Blair wrote out a document that stated: "Petition to Withdraw/I/we the undersigned wish to withdraw our membership from local 1242 of the I.A.M.A.W. (International Assn. of Machinist & Aerospace Workers Union)." Blair then xeroxed the document on the Respondent's copy machine. He gave a copy of the document, together with an envelope, to each of the nine employees working at that time (Newell having left for vacation). The employees returned the sealed envelopes to Blair.

While Blair was circulating copies of the petition, Koenig called Schulhof and told him that he needed Schulhof that afternoon, that "it was very important—that he had this union thing—this election and he wanted [Schulhof] to count the votes." When Schulhof was reluctant to take on the task because of prior commitments scheduled for that afternoon, Koenig told Schulhof to move them. Koenig added that he needed Schulhof and that he didn't "care what it cost." Schulhof then agreed to "certify" the votes for Koenig and the employees and that he would give Koenig the vote tally, but would not tell Koenig how individual employees voted and would keep the "ballots" in his own office.

After postponing his scheduled appointments, Schulhof drove to the Respondent's facility and met with Ervin Legendre, the Respondent's general manager. Legendre introduced Schulhof to Sparks and several other employees, including Blair. After Blair had given Schulhof the 11 sealed envelopes (including the one that Newell had signed on August 11), Schulhof was provided Koenig's empty office and was given the personnel files of the unit employees. Schulhof then

unsealed the envelopes and ascertained that 7 of the 11 petitions were signed. After comparing the signatures on the seven petitions with signatures in the respective personnel files, Schulhof concluded that the signatures on the petitions were authentic. Schulhof then placed the 11 petitions in a large envelope, sealed it, and signed it across the flap. After notifying Legendre and the employees of the results of the count, Schulhof drove back to his office and put the envelope into his file.

Later that afternoon, Koenig telephoned Legendre to find out the results of the count. Legendre told Koenig that the vote was seven to four to get rid of the Union. At Koenig's request, Legendre told him what the petition said. Koenig then telephoned Downs, his labor attorney. Downs told Koenig that the wording of the petition ("I/we the undersigned wish to withdraw our membership from" the Union) might be technically incorrect and informed Koenig that the petitions should have read "I do not want the Union to represent me anymore." Koenig then called Blair and told him that "on advice of counsel" the wording of the petition could be technically incorrect. After telling Koenig that the employees had voted out the Union, Blair asked Koenig what the petition should say "so it is right." After Koenig had dictated to Blair the phrasing that Downs had given him, Blair told Koenig that he was going to have the employees revote. Koenig requested Blair to switch the call to Legendre so that Koenig could get Schulhof to return to the facility.

After his call with Koenig ended, Blair had one of the Respondent's clerical employees type out a document that stated "I do not want the Union to represent me anymore" with spaces for a signature and date. After making copies of the document on the Respondent's xerox machine, Blair gave a copy of the document and a blank envelope to each of the nine unit employees working that afternoon. Blair told the employees that he had worded the first document incorrectly, and then asked them to sign, or not sign, the document, whichever they chose, and to put it in the envelope.

Meanwhile, when Schulhof returned to his office, his secretary told him that he had had several "emergency" calls from Legendre requesting Schulhof to call him "immediately" and that Schulhof "had to get back." Schulhof then called Legendre who explained that there had been a problem with the language on the petition and requested that Schulhof return and go through the verification procedure a second time. Schulhof then returned to the Respondent's facility, took the 10 envelopes into Koenig's empty office and determined that 6 petitions were signed and 4 were not. After again verifying the signatures on the signed petitions, Schulhof placed the 10 envelopes in a large envelope, sealed the envelope, and signed it over the

flap. After informing Legendre and the employees of the count results, Schulhof returned to his office and put the envelope in his file with the first envelope. Later in the afternoon, Koenig telephoned Legendre to find out the results of the count. Legendre told Koenig that the result was six to four to get rid of the Union. Koenig then told Legendre to write the Union a letter withdrawing recognition.<sup>6</sup>

After his telephone conversation with Koenig, Legendre drafted a letter to Rick Lezu, the Union's business representative. In his August 13 letter, Legendre stated that the Respondent was withdrawing recognition from the Union because the Respondent had "objective evidence which [gave it] a good faith as to the Union's majority status" [sic].<sup>7</sup> The letter further stated that the Respondent would honor the existing contract until its expiration on October 15, at which point the contract would be terminated. Lezu found Legendre's letter on Monday, August 16, wedged against the backdoor of the union hall.<sup>8</sup> Lezu replied to Legendre's letter the same day. In his letter, Lezu reminded Legendre of the results of the August 10 prounion vote and explained that members who wanted to terminate "their Union Shop status [had to] file a petition with the [NLRB] not less than sixty (60) days prior to the termination date of the Agreement in order for an election to be conducted by the NLRB to determine which party has majority status." By letter of September 1 to the Respondent, Lezu set out the dates on which he was available to meet for contract negotiations. By letter of September 2, Downs reminded the Union that the Respondent had previously withdrawn recognition based on a good-faith doubt of the Union's continued majority status and advised the Union that the Respondent would not negotiate with it lest the Respondent be found guilty of an unfair labor practice by negotiating with a minority union. The Respondent has not bargained with the Union since it withdrew recognition on August 13, some 2 months prior to the expiration of the contract.

Although the Respondent withdrew recognition from the Union during the term of the contract, it was still obligated to abide by the terms of that contract until its expiration. Thus, any withdrawal of recognition from the Union was in regard to the negotiation of a successor agreement. As the Board explained in *Abbey*

<sup>6</sup>During his last conversation with Koenig on August 13, Blair stated that he intended to take the "signatures" to the Board's St. Louis office. Koenig replied that Downs had said that this was not necessary.

<sup>7</sup>On August 11, Lezu had written the Respondent to advise it of the Union's desire to modify the contract that was about to expire and to request bargaining over a new agreement. The record does not indicate when the Respondent received Lezu's letter.

<sup>8</sup>The union hall was approximately 15 miles from Carbondale. Although the letter had the words "Certified Return Receipt Requested" written on it, there was no other evidence to indicate that Legendre had mailed the letter.

*Medical/Abbey Rents, Inc.*, 264 NLRB 969, 969 (1982):

Such an “anticipatory withdrawal of recognition” in relation to a future contract is lawful if and only if the employer can demonstrate that, on the date of withdrawal and in a context free of unfair labor practices, the union in fact had lost its majority status, or respondent’s withdrawal was predicated on a reasonable doubt based on objective considerations of the union’s majority status.

Applying this standard here, in her original decision the judge relied on her factual finding that Koenig had told Rader on August 10 that he wanted a revote taken with 100-percent participation to conclude that the Respondent’s withdrawal of recognition was unlawful. In this regard, the judge explained that Koenig’s instruction to Rader, which Rader passed on to the unit employees, “strongly suggested that the only election results which [Koenig] would honor would be the results of an election which the Union lost” and that such a message would invalidate even a Board-conducted election. The judge also found that Koenig’s instructions to Rader made Rader the Respondent’s agent for the purposes of conducting the August 13 revote, and that the Respondent failed to comply with the standards set out in *Struksnes Construction Co.*, 165 NLRB 1062 (1967), established to safeguard employee rights in the context of employer-conducted polling of employees’ union sentiments. The judge further found that the August 13 balloting was tainted because it did not take place in a context free of unfair labor practices. In this regard, the judge found that the Respondent had violated Section 8(a)(1) on August 10 by Koenig’s instructions to Rader that he was unhappy with the August 10 vote and wanted 100-percent participation. Finally, the judge found that the Respondent was precluded from relying on the August 13 petitions to support its contention that its withdrawal of recognition was based on a good-faith doubt of the Union’s continued majority status because the Respondent had provided more than the ministerial aid permitted by the Board to further its employees’ decertification efforts. Accordingly, the judge originally found that the Respondent had failed to show when it withdrew recognition “either that the Union in fact no longer retained majority support, or that [the] Respondent had a good faith doubt, founded on a sufficient objective basis and raised in a context free of unfair labor practices, of the Union’s majority support” and concluded that Respondent violated Section 8(a)(5) when it withdrew recognition from the Union.

As explained above, after the judge issued her original decision, the Board remanded the case to her for reconsideration of her finding that Koenig had told Rader that he was not happy with the August 10 vote

and wanted 100-percent participation and of her unfair labor practice findings arising from this factual determination. For the reasons set out in her supplemental decision, the judge found that Koenig had not, in fact, instructed Rader that he wanted a revote held and withdrew her finding that the Respondent had violated Section 8(a)(1) in this regard. The judge also withdrew her finding that Rader had acted as the Respondent’s agent in holding the revote. The judge reaffirmed, however, her finding that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union on August 13. In this regard, the judge found, as explained above, that Rader had told the unit employees on August 11 that Koenig wanted a second vote held and inferred from this “that employees concluded that Rader was arranging for a second balloting because Koenig had instructed him to do so.” Thus, the judge concluded, in effect, that the August 13 revote was employer-sponsored and again found it invalid because the Respondent had not provided the safeguards for employees set out in *Struksnes Construction*, supra. As to the signed documents that Schulhof verified, the judge found that they “were unreliable as a reflection of employees’ free choice” because, as explained in her original decision, the Respondent had provided more than ministerial aid to its employees’ decertification efforts. Finally, the judge found that the Respondent’s withdrawal of recognition was unlawful because it did not occur in a context free of unfair labor practices. In this regard, the judge, having withdrawn her finding of an 8(a)(1) violation arising from Koenig’s alleged August 10 instructions to Rader, now relied on her findings of unfair labor practices subsequent to August 13 to support her finding that the Respondent’s withdrawal of recognition occurred within a context of unfair labor practices and was therefore unlawful. In this regard, the judge found that these unfair labor practices invalidated the withdrawal of recognition because they “tend[ed] to prevent the union from proving majority status.”

As stated above, we adopt the judge’s finding that the Respondent’s August 13 withdrawal of recognition from the Union was unlawful. In so doing, however, we rely solely on the judge’s finding that the signed documents that the Respondent relied on to support its assertion that the Union had lost majority status were invalid because the Respondent had provided more than ministerial aid to its employees’ decertification efforts.<sup>9</sup>

<sup>9</sup> Thus, in finding the Respondent’s withdrawal of recognition unlawful, we rely neither on the judge’s finding that the August 13 revote was unlawful under *Struksnes Construction*, supra, nor on her finding that the withdrawal of recognition occurred in a context of other unfair labor practices. As to the former, we emphasize that in her supplemental decision the judge withdrew her finding that Rader was the Respondent’s agent for the purposes of holding the August 13 revote and found instead that the Respondent did not know of

In *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985), the Board set out the general legal standard applicable in evaluating an employer's conduct in the context of its employees' decertification efforts:

[I]t is unlawful for an employer to initiate a decertification petition, solicit signatures for the petition, or lend more than minimal support and approval to the securing of signatures and the filing of the petition. In addition, while an employer does not violate the Act by rendering what has been termed "ministerial aid," its actions must occur in a "situational context free of coercive conduct." In short, the essential inquiry is whether "the preparation[,] circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." [Fns. omitted.]

In elucidating the distinction between lawful ministerial aid and unlawful assistance, the Board stated in *Placke Toyota*, 215 NLRB 395, 395 (1974), that:

[a]lthough an employer does not violate the Act by referring an employee to the Board in response to a request for advice relative to removing a union as the bargaining representative, it is unlawful for him subsequently to involve himself in furthering employee efforts directed toward that very end. [Fn. omitted.]

In applying these criteria, the Board has found that an employer provided unlawful assistance to its employees in their efforts to remove a union as their bargaining representative not only when the employer provided the employees with concrete aid in their decerti-

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Rader's statement to employees to the effect that Koenig was unhappy with the August 10 vote and wanted 100-percent participation. We conclude therefrom that the August 13 revote was, in effect, an employee-sponsored poll and that therefore the standards set out in *Struksnes Construction* did not apply. Accordingly, we find that the Respondent could not have violated those standards here. As to the latter, as the Board noted in *Guerdon Industries*, 218 NLRB 658, 661 fn. 26 (1975), "there is no absolute proscription against questioning a union's majority status in the context of unfair labor practices. Rather, any unfair labor practices committed are weighed to see whether they, in fact, would preclude an employer from later withdrawing recognition from a union." (Emphasis added.) Thus, the issue here is whether the Respondent's unfair labor practices prior to or contemporaneous with the August 13 revote and petitions were "of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Guerdon Industries*, supra at 661. Since in her supplemental decision the judge withdrew her finding that Koenig unlawfully instructed Rader to hold a revote, the judge found, in effect, that the Respondent did not commit any unfair labor practices prior to or concurrent with the August 13 revote and petitions. We therefore find that the Respondent's withdrawal of recognition occurred in a context free of unfair labor practices. While we have adopted the judge's findings that the Respondent committed unfair labor practices on August 17, August 18, and thereafter, those unfair labor practices, occurring after the events of August 13, could not have tainted the revote or the petitions.

fication effort,<sup>10</sup> but also where the employer acted as a go-between in the furtherance of that effort. Thus, in *Pic Way Shoe Mart*, 308 NLRB 84 (1992), the Board found that the respondent unlawfully assisted its employees in the preparation of their decertification petition where the respondent, after being informed by an employee that she was interested in getting rid of the union, directly contacted a labor consultant, Ricker, and requested that he call the employee regarding the decertification effort. Later, after receiving copies of its employees' petitions, the respondent sent copies of them to Ricker and Ricker filed the decertification petition. The Board found that "by contacting Ricker to request aid for the employees' decertification efforts, and by accepting the employees' petitions and forwarding them to Ricker, the Respondent did more than merely provide ministerial aid to its employees." Id.

In *Ernst Home Centers*, 308 NLRB 848 (1992), on the other hand, the Board found that the employer did not provide more than ministerial aid to employees' decertification efforts when, in response to an employee's request for some "verbiage" for a decertification petition, the employer provided decertification language to the employee. The Board found that such conduct, merely replying to an employee's request for decertification language, in the absence of any evidence that the employer encouraged or suggested that the employee file the decertification petition, did not constitute a violation of Section 8(a)(1). Id.

Similarly, in *Eastern States Optical Co.*, supra, the Board found that the respondent did not provide more than ministerial aid to its employees in their preparation of a decertification petition although the Respondent's attorney, Bluestone, provided an employee, Rosenberg, with some assistance in the wording of a decertification petition on one occasion, and provided Rosenberg with certain information (the unit description, the names of the respondent's officials, and the fact that six signatures were probably sufficient for the petition) on a second occasion. In reaching this conclusion, the Board found it significant that Rosenberg had initiated the contact on both occasions, that Rosenberg had told Bluestone that the decertification effort was already in progress and Bluestone did nothing to encourage it, and that "Bluestone did nothing more than render editorial suggestions and supply readily available factual information." *Eastern States Optical Co.*, supra at 372. The Board concluded that although Bluestone "may have acted unwisely," his conduct did not rise to the level of unlawful assistance. Id.

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<sup>10</sup>See, e.g., *Dayton Blueprint Co.*, 193 NLRB 1100 (1971) (respondent's president helped prepare the decertification document, respondent provided the employee who filed the decertification petition with the company car to drive to the Board's Regional Office to file the petition, and respondent did not dock the employee's pay for the time it took him to file the petition).

We find that the facts in the present case are closer to those in *Pic Way Shoe Mart* and *Dayton Blueprint Co.* than to those in *Ernst Home Centers* and *Eastern Optical Co.* Accordingly, we agree with the judge that the Respondent provided more than ministerial aid in furtherance of its employees' decertification efforts and that the Respondent therefore was not free to rely on the results of the decertification balloting to support its contention that it had a good-faith doubt of the Union's majority status when it withdrew recognition from the Union.

As an initial matter, we observe that there were, in effect, three "ballots" held on August 13: the revote, the first set of 11 decertification ballots, and the second set of 10 decertification ballots, and that the Respondent was directly involved in two of those "ballots," the two decertification votes. In this regard, not only did Koenig himself initiate contact with employee Blair regarding the decertification effort after he learned the results of the August 13 revote, but he also arranged for attorney Schulhof, at whatever cost, to drop what he was doing and come to the Respondent's facility to open and verify the signatures on the decertification ballots. Also in furtherance of the decertification effort, the Respondent provided Schulhof with Koenig's empty office in which to work and with personnel files by which ballot signatures could be verified. Further, as to the second set of decertification ballots, the ones which the judge found the Respondent principally relied on in withdrawing recognition,<sup>11</sup> it was Koenig who informed Blair that the wording of the first ballots was incorrect and who then dictated to Blair the correct language.<sup>12</sup> Blair then used the Respondent's support staff and equipment to create the second set of decertification ballots that contained the proper language. While this was going on, the Respondent again contacted Schulhof and got him to return to the facility and repeat the verification process.

By asking Sparks to put employee Blair on the phone on August 13 to discuss the decertification effort, by enlisting the aid of attorney Schulhof in those efforts and providing support staff and equipment in furtherance of its employees' decertification efforts, and by informing Blair that the wording of the first ballots was incorrect in the absence of any request by him for such information and then dictating the correct

language to him, the Respondent encouraged and supported, and thus unlawfully assisted, its employees' decertification efforts.

Finally, we disagree with our dissenting colleague's assertion that the Respondent was privileged to rely on the results of the initial August 13 revote in withdrawing recognition from the Union. In this regard, we find without merit our dissenting colleague's underlying arguments to the effect that the employees' initial August 13 revote expressed an unequivocal rejection of the Union and that such a rejection represented a final expression of employee sentiment. As to the former argument, the question presented in the initial August 13 revote was "Do you wish to remain in the Union?". As explained above, such wording does not express the unequivocal repudiation of a union which the Board requires to serve as the basis for a good-faith doubt of majority status. Indeed, although our dissenting colleague, contrary to established Board law, would find otherwise, i.e., that such language expressed "a clear rejection of the Union," even the Respondent understood that it could not rely on such evidence to withdraw recognition lawfully from the Union. Thus, after learning the results of the initial revote, Vic Koenig encouraged and supported the decertification effort to ensure that the Respondent would acquire the requisite "objective evidence," i.e., the second set of decertification ballots, that could serve as the basis for an alleged good-faith doubt of majority status. As to the latter argument, even assuming that the initial August 13 revote expressed employee sentiment to reject the Union, we find, contrary to our dissenting colleague, that the Respondent was not privileged to rely on it as the employees' final expression in this regard. Thus, we observe that only 3 days prior to the August 13 revote, the employees had voted to keep the Union and had only agreed to a revote under the mistaken impression that Koenig insisted that such a revote be held. While we do not hold the Respondent responsible for Rader's conduct in announcing that Koenig wanted another vote, we find that the employees' shifting votes within such a short space of time establishes that the results of the initial revote, and thus the results of the two decertification ballots that followed, were not a foregone conclusion. For these reasons, we find, contrary to our dissenting colleague, that the results of the initial August 13 revote could not serve as objective evidence of the Union's majority status even if the Respondent had chosen, which it did not, to rely on those results in withdrawing recognition from the Union.

Finally, we find our dissenting colleague's assertion that we are "inconsistent" in our treatment of the August 10 and August 13 votes without merit. Simply put, if the employees voted on August 10 to remain in the Union, we do not think that it is "inconsistent" in light of that vote to question whether the initial August

<sup>11</sup> Thus, when Downs asked Koenig at the hearing in this case which set of "ballots" (i.e., decertification documents) he relied on in withdrawing recognition, Koenig testified that "[n]ot being a lawyer, I thought they were both good, but the second ballot was the one that you had told us that that was the way it had to be worded."

<sup>12</sup> In order to serve as the basis for good-faith doubt, a petition must express an unequivocal repudiation of the union. See *Phoenix Pipe & Tube Co.*, 302 NLRB 122 (1991), enf'd. 955 F.2d 852 (3d Cir. 1991), and cases there cited. We agree that the revote and first decertification ballots could not serve as a basis for a good-faith doubt of the Union's majority status because they did not express an unequivocal repudiation of the Union.

13 revote expressed the final will of the employees or to find that neither vote was dispositive of the issue of whether the employees wanted to continue to be represented by the Union. Thus, contrary to our dissenting colleague, we do not find the August 10 expression of employee sentiment to be “irrelevant” in the circumstances of this case. Nor, however, contrary to our dissenting colleague’s apparent assertion, do we find it dispositive of the issue presented. In these circumstances, we find it only proper to look to the evidence that the Respondent itself relied on in asserting that the Union had lost its majority status, the second set of decertification ballots.

As to the second set of decertification ballots upon which the Respondent did rely in withdrawing recognition, as explained above, but for the Respondent’s orchestrating the decertification effort that followed the initial revote and its providing the employees with the precise language for the second set of decertification ballots, the Respondent would not have acquired such alleged “objective evidence” of the Union’s loss of majority support. We agree with the judge that such assistance rendered the ballots invalid as a true indication of the employees’ support for the Union and that the Respondent could not rely on those results to support its asserted good-faith doubt. Accordingly, we find that the Respondent lacked a good-faith doubt of the Union’s majority status on August 13, the date that it withdrew recognition, and that the Respondent therefore violated Section 8(a)(5) by withdrawing recognition from the Union on that date.

Since the Respondent was obligated to recognize and bargain with the Union at all times after August 13, we adopt the judge’s findings of additional 8(a)(5) violations arising from the Respondent’s failure to abide by its duty in this regard. Thus, we agree with the judge that the Respondent violated Section 8(a)(5) by directly dealing with employees and announcing unilateral changes in wages and other terms and conditions of employment on September 27, 1993, by implementing unilateral changes in terms and conditions of employment in October 1993 and October 1994,<sup>13</sup> by dealing directly with an employee committee, and by appointing an employee intermediary to resolve employee grievances.

2. In her supplemental decision, the judge found, and we agree, that the Respondent violated Section 8(a)(3) and (4) by suspending employee James Rader for 5 days on June 8, 1994, and by issuing him a written warning on September 9, 1994. As to Rader’s June

suspension, the Respondent argues that even assuming that its suspension of Rader was unlawful, Rader should be denied a remedy because of his false testimony at the February 1994 hearing in this case. As to Rader’s September written warning, the Respondent asserts that it gave Rader the warning because he made a racially discriminatory remark to another employee and contends that the Board would, in effect, be condoning the use of such remarks in the workplace if it were to find the warning unlawful. For the following reasons, we find these arguments without merit.

As to the former issue, in the remedy section of her supplemental decision the judge addressed the issue of whether the relief normally afforded discriminatees in Rader’s place should be withheld in this case because Rader testified falsely at the February 1994 hearing.<sup>14</sup> We agree with the judge that it should not and that Rader is entitled to the standard relief for the violations found. Initially, we emphasize, as did the judge, that the issue here is not whether Rader has disqualified himself from further employment with the Respondent, for the Respondent never discharged Rader for his false testimony at the hearing. Nor did the Respondent ever impose on him any lesser form of discipline for that conduct. That the Respondent never took action against Rader for his false testimony is underscored by the fact that even when the Respondent suspended him in June 1994, the Respondent’s general manager, Legendre, testified that Rader’s false testimony was not a reason for the suspension and, in fact, the suspension was totally unrelated to Rader’s false testimony at the hearing. As the judge found, the Respondent imposed the discipline on Rader because of his support for the Union and his testimony in support of the Union at the hearing. In these circumstances, we agree with the judge that the Respondent cannot now seek to escape liability for its own unlawful actions by asserting, in effect, that the Board should discipline Rader for giving false testimony when the Respondent itself never disciplined him for that misconduct and when the Respondent’s own unlawful conduct which gave rise to the relief at issue was totally unrelated to it.

Finally, while we do not condone Rader’s misconduct at the hearing, we find that his misuse of the Board’s processes should not permit the Respondent to escape liability. As explained above, the issue here is not whether Rader’s misconduct disqualifies him from reinstatement, but only whether he should be denied relief for an unlawful suspension totally unrelated to

<sup>13</sup> The Respondent does not except to the judge’s finding that the October 1993 unilateral changes were unlawful on the ground that the Respondent implemented them during the term of the existing contract when, as explained above, the Respondent was still obligated to recognize and bargain with the Union over any proposed changes to that contract, and regardless of any obligation to negotiate a successor agreement.

<sup>14</sup> As explained above, in her supplemental decision the judge found that Rader had testified falsely at the hearing regarding a conversation with Koenig in which Rader alleged that Koenig had instructed him that he (Koenig) wanted a revote after the employees had voted to retain the Union. The judge found that no such conversation ever took place.

that misconduct. In view of the Respondent's virtual campaign to get rid of the Union which gave rise to numerous violations of the Act over more than a year and its targeting of Rader as the most prouion employee, we conclude that relief should be granted to afford Rader some protection against the Respondent's unlawful actions and to assure the Respondent's other employees that they may exercise their right to support the Union from which they may have been discouraged by the Respondent's unlawful conduct. See *Earle Industries*, 315 NLRB 310, 316 (1994), enf. denied 75 F.3d 400 (7th Cir. 1996).

As to the latter issue, we reject the Respondent's contention that by finding that the Respondent unlawfully disciplined Rader on September 9, the Board is somehow condoning the use of racially discriminatory remarks in the workplace. The facts underlying the discipline are straightforward. On the morning of September 9, Rader asked employee Blair where his "Toby" was. Rader was referring to employee Tolar, an apprentice who was working with Blair. Tolar overheard the comment and told Legendre that he was upset by it. Legendre, who had never heard the term, asked Tolar what it meant. Tolar explained that he thought that it was the same as being called a "black slave." (Legendre, Blair, Rader, and Tolar are white.) Legendre did not ask Rader about his use of the term, but gave Rader a written warning the same day for "calling other employees derogatory names such as "Toby.""

Initially, we observe that although the Respondent and the judge noted that the term "Toby" is used in Alex Hailey's book *Roots* as the name of a black slave, it is by no means certain that the Respondent's employees, who occasionally called each other by that name, generally understood it to mean a black slave. Indeed, Yoast, the Respondent's senior employee, testified without contradiction that employees had used the term "Toby" in regard to each other ever since he had been there. Yoast has worked for the Respondent since 1970, some 6 years before *Roots* appeared. While it cannot be determined with certainty what the employees in general, or Rader specifically, understood the term to mean, we emphasize that the meaning of the term is ambiguous<sup>15</sup> and that Rader credibly testified that he did not use the term in a derogatory sense. Thus, if Legendre had interviewed Rader before issuing him the written warning, he would have found that there had been a misunderstanding and that Rader had not used the term in the derogatory sense that Tolar took it. As the judge observed, the Respondent's failure to interview Rader in this regard prior to issuing him the warning is further evidence that the

<sup>15</sup> Yoast testified that he had also used the term "Toby" and explained that he understood it to mean that "somebody has got a free helper or something to do a job."

warning was unlawfully motivated. Finally, as noted above, employees had called each other "Toby" for years, sometimes within the hearing of management officials. Yet no employee except Rader was ever disciplined for using the term. This further supports the judge's finding that Rader was not in fact disciplined for his use of the term "Toby," but for his activities on behalf of the Union.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as set out in her supplemental decision as modified below and orders that the Respondent, Vic Koenig Chevrolet, Inc., Carbondale, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Within 14 days from the date of this Order, remove from its files any reference to the suspension of James Rader on June 8, 1994, and to the warning issued to him on September 9, 1994, and within 3 days thereafter notify him in writing that this has been done and that evidence of his unlawful suspension and warning notice will not be used against him in any way."

2. Substitute the following for paragraphs 2(i), (j), and (k).

"(i) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

"(j) Within 14 days after service by the Region, post at its facilities in Carbondale, Illinois, copies of the attached notice marked "Appendix."'<sup>31</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 17, 1993.

"(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

attesting to the steps that the Respondent has taken to comply.”

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

MEMBER COHEN, dissenting in part.

Contrary to my colleagues, I find that the Respondent lawfully withdrew recognition from the Union. In my view, the Respondent did not unlawfully assist the employee effort to decertify the Union. Therefore, the Respondent was privileged to rely on the expressed employee sentiment rejecting the Union.

The most critical fact in this case is that the employees, *prior to any Respondent involvement*, freely decided to abandon their support for the Union. The facts are fully set forth by my colleagues and the judge, and I shall only summarize them briefly here.

On August 10, the employees voted on the issue of whether they wanted the Union to continue to represent them. The employees voted in the affirmative, six to four.

On August 11, the union steward (Rader) told the employees that the Respondent’s president (Koenig) was unhappy with the vote. However, there is no credible evidence that Koenig expressed this idea to Rader. In fact, the credited testimony is to the contrary. The employees revoted on August 13, and rejected union representation seven to four.

It is clear that the August 13 vote was a valid rejection of the Union. As my colleagues concede, Rader’s comment on August 11 cannot be attributed to the Respondent, and it is therefore not a basis for challenging the August 13 vote.

All of this preceded any involvement by the Respondent. I therefore conclude that the employee vote of August 13 was untainted and was a clear rejection of the Union.

The Respondent’s involvement began on August 13, shortly after the vote. Koenig learned the results by telephone and asked to speak to Union Steward Blair. The two discussed obtaining employee signatures on a decertification petition. Blair said that he wanted to preserve employee confidentiality, and he asked Koenig how this could be accomplished. They agreed upon a procedure. Koenig suggested that the resultant votes could be counted by a minister-customer or by the Respondent’s counsel, Schulhof. Blair chose the latter.

Later on August 13, the employees signed petitions stating that they wished “to withdraw [their] membership in the Union.” Schulhof counted the signatures, and the Respondent provided office space and personnel files. There were 7 votes (unit of 11) to reject the Union.

Later the same day, Koenig’s labor attorney (Downs) told Koenig that the language of these petitions was technically incorrect. Downs said that the

correct language should be that the employees “do not want the Union to represent me.” Koenig relayed this to Blair. After Blair told Koenig that the employees had voted out the Union, Blair asked Koenig what the petition should say “so it is right.” Koenig then gave Blair the language suggested by Downs. The employees then voted six to four to reject the Union. Respondent provided clerical assistance with respect to the count.

As my colleagues note, the Board test for determining whether employer involvement in an employee decertification effort is unlawful is whether the employer provides more than “ministerial aid.”<sup>1</sup> Ultimately, the issue is whether the employer interfered with employee rights guaranteed by the Act. In applying the Board’s test, it is significant to ascertain whether the employer involvement comes while decertification efforts are germinating *or* whether the employer involvement comes *after* the occurrence of a free and fair expression of employee desires regarding the union.

My colleagues conclude that the Respondent unlawfully aided the decertification effort because: (1) Respondent President Koenig asked to speak with Blair regarding the decertification effort; (2) the Respondent enlisted the aid of its attorney, Schulhof, to review the decertification votes; (3) the Respondent provided clerical support; and (4) the Respondent, by Koenig, provided employees with proper decertification language.

The problem with this listing of events is that they all took place after the employees freely voted to reject the Union as their representative. As discussed above, there is a significant difference between an employer’s interference with employee choice, and an employer’s ministerial assistance to assure that the choice, having been freely made, is effectuated. The facts set forth above establish that this case falls within the latter situation.<sup>2</sup>

My colleagues assert that the first August 13 vote was not a rejection of union representation. In this regard, they quibble with the language used by the employees. That is, the employees said that they did not “wish to be in the union.” I would not thwart the will of the employees simply because their language was not lawyer-perfect. The issue is whether the employees understood that they were voting on the issue of union representation. It is clear that the employees understood that union representation was the issue. That was the issue discussed by employee Blair and the NLRB

<sup>1</sup> See, e.g., cases cited by my colleagues, *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985), and *Ernst Home Centers*, 308 NLRB 848 (1992).

<sup>2</sup> In *Pic Way Shoe Mart*, 308 NLRB 84 (1992), and *Dayton Blueprint Co.*, 193 NLRB 1100 (1971), relied upon by my colleagues, employers intervened in the employee decertification effort prior to any clear employee expression rejecting the union. Thus, in those cases, unlike here, the employer assistance was deemed to have encouraged the resulting employee expressions of their sentiments.

Regional Office in mid-July, and that was the issue discussed by Blair and employee Rader in late July. It was Blair who spoke to each unit employee immediately before the vote of August 10. In these circumstances, I would find that the employees, on August 10 and 13, were voting on the issue of union representation.<sup>3</sup>

Further, I note that my colleagues are inconsistent. They rely upon the vote of August 10 as an endorsement of union representation but give no credence to the August 13 vote rejecting union representation. Interestingly, the ballot language was the same.<sup>4</sup>

Based on the above, I conclude that the initial August 13 vote was a rejection of union representation.

Accordingly, the Respondent, in withdrawing recognition, was privileged to rely on the results of the decertification effort. Those results support a good-faith doubt of the Union's majority status.

#### 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 instruct or tell you not to attend union meetings; instruct you to tell other employees not to attend union meetings; promise you an increase in wages and benefits if you continue to be unrepresented by a union; increase wages and benefits to discourage union representation; or maintain a rule which limits your right to engage in solicitation protected by the Act, at times when neither the employee who is soliciting nor the employee being solicited is expected to be actively working.

WE WILL NOT unilaterally change conditions called for by a bargaining agreement which has not expired by its terms.

WE WILL NOT dominate, assist, or otherwise support the executive committee.

WE WILL NOT discourage membership in District 111, International Association of Machinists & Aerospace Workers, AFL-CIO, or any other union, by suspending employees, issuing warning notices to employees, or otherwise discriminating against employees

<sup>3</sup>*Phoenix Pipe & Tube Co.*, 302 NLRB 122 (1991), cited by my colleagues, is clearly distinguishable. There, the employees were simply seeking an election on the issue of union representation.

<sup>4</sup>It is irrelevant that the employees voted on August 10 in favor of the Union. The August 13 vote was the last expression of employee sentiment prior to Respondent's involvement, and that sentiment was a clear majority rejection of the Union.

with respect to hire or tenure of employment or any term or condition of employment.

WE WILL NOT suspend employees, issue warning notices to employees, discharge employees, or otherwise discriminate against employees, because they have filed charges or given testimony under the Act.

WE WILL NOT unlawfully withdraw recognition from the Union as the representative of the following unit of our employees:

All auto mechanics, automotive machinists, welders, trimmers, body and fender men, painters, electrical machinists, radiator repairmen, frame and front-end and their apprentices and oil, lube and undercoat men; and foremen and testers when using the tools of the trade, employed by us at our Carbondale, Illinois facility.

WE WILL NOT make unilateral changes, with respect to the wages, hours, and working conditions of the employees in the above-described unit, without giving the Union prior notice and an opportunity to bargain.

WE WILL NOT deal directly with employees in the above-described unit, with the executive committee, or with labor organizations other than the Union, with respect to such matters.

WE WILL NOT appoint employee intermediaries to appear on unit employees' behalf in discussions with management about grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL rescind our no-solicitation rule, to the extent that it limits your right to engage in solicitation protected by the Act, at times when neither the employee doing the soliciting nor the employee being solicited is expected to be actively working.

WE WILL immediately disestablish and cease giving assistance and support to the executive committee.

WE WILL make James Rader whole, with interest, for any loss of pay he may have suffered by reason of his unlawful suspension.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the suspension of James Rader on June 8, 1994, and to the warning issued to him on September 9, 1994, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that evidence of his unlawful suspension and warning notice will not be used against him in any way.

WE WILL, on the Union's request, rescind the October 1993 and October 1994 changes in unit employee's wages and benefits; but nothing in the Board's Order requires or authorizes us to take such action without the Union's request.

WE WILL make you whole, with interest, for any losses you may have suffered by reason of our changes

in wages and benefits in October 1993 and October 1994.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the above-described unit and, if an understanding is reached, embody the understanding in a signed agreement.

VIC KOENIG CHEVROLET, INC.

*Mary J. Tobey, Esq.*, for the General Counsel.

*Larry R. Downs, Esq.*, of Evansville, Indiana, for the Respondent.

*Mr. Roy Covington*, of Des Plaines, Illinois, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in St. Louis, Missouri, on February 8, 1994, pursuant to a charge filed on September 17, 1993, by District 111, International Association of Machinists & Aerospace Workers, AFL-CIO (the Union) against Respondent, Vic Koenig Chevrolet, Inc.;<sup>1</sup> an amended charge filed on October 13, 1993; and a complaint issued on October 20, 1993, and amended on February 4 and 8, 1994. The complaint in its final form alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by instructing an employee to conduct a revote (to be participated in by all employees) to determine whether the employees still wanted representation by the Union; by instructing an employee not to engage in union activities; by instructing an employee to instruct other employees not to engage in union activities; by threatening an employee with unspecified reprisals for union activities; by requesting employees not to attend a union meeting; and by promising employees an increase in wages and benefits if the employees would continue to oppose the Union. In addition, the complaint in its final form alleges that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union; by dealing directly with unit employees by offering and granting them an increase in wages and benefits if the employees would continue to oppose the Union; and by implementing wage changes without giving the Union prior notice and an opportunity to bargain.

On the basis of the record as a whole, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and Respondent,<sup>2</sup> I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a corporation, authorized to do business in Illinois, which has an office and place of business in Carbondale, Illinois, and is engaged in the retail sale and service of automobiles. During the 12-month period preced-

ing September 30, 1993, Respondent's gross revenues exceeded \$500,000, and Respondent purchased and received at its Carbondale, Illinois facility goods valued in excess of \$50,000 directly from points outside Illinois. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background

Before the events involved in this case, the Union had since 1957 represented Respondent's employees in an admittedly appropriate unit described *infra* in Conclusion of Law 3, consisting basically of Respondent's auto service personnel. The most recent contract was effective by its terms between October 15, 1990, and October 15, 1993.<sup>3</sup> Among the participants in the negotiations which led to this contract was Victor Koenig, who is Respondent's owner. In October 1990, during these negotiations, Koenig remarked that he had been doing the negotiations for almost 30 years, that he was not going to negotiate personally any longer, that this was his last one, and from then on the Union would be negotiating with his manager or with Attorney Larry R. Downs.<sup>4</sup>

### B. The Initial Balloting Regarding Continued Union Representation

About June 1993,<sup>5</sup> the unit employees started talking about whether they wanted to keep the Union. About mid-July, unit employee Kenneth Blair spoke to the NLRB's St. Louis office on the subject of what documents regarding employee disaffection would be needed to file a valid decertification petition. About late July, Blair spoke to unit employee Rader, the union steward, on the subject of having a vote about union representation. On August 9 or 10, unit employees Rader and Mark Ross were visited at Respondent's shop by

<sup>3</sup> The preamble to the bargaining agreement recites that the parties are Respondent and "Local Lodge No. 1242, District No. 111, International Association of Machinists and Aerospace Workers." The agreement includes a signature "For Local Lodge No. 1242" and another signature under "Approved: District Lodge 111, IAMAW." The charges are signed on behalf of "District 111, International Association of Machinists & Aerospace Workers, AFL-CIO"; and the amended charge alleges, *inter alia*, that Respondent had "failed and refused to set negotiating meetings and to negotiate a new collective bargaining agreement with the union." The complaint states that "District 111, International Association of Machinists & Aerospace Workers, AFL-CIO" is "here called the Union," and alleges that "the Union" is the employees' statutory bargaining representative. On the record, the parties stipulated that "the Union" had represented the employees since 1957. I see no reason not to accept the parties' disregard of the possible variances summarized in this footnote.

<sup>4</sup> This finding is based on Koenig's testimony. Because he appeared to have a clearer recollection of the conversation, I accept his version in preference to the testimony of unit employee James Rader, who on the Union's behalf participated in the negotiations and executed the contract, that "The best I can remember he said he would not negotiate another contract. He would not go through this again."

<sup>5</sup> All dates hereafter are 1993 unless otherwise stated.

<sup>1</sup> Respondent's name appears as corrected at the hearing.

<sup>2</sup> The unopposed April 20, 1994 motion of Respondent's counsel to amend his brief is granted.

union employees from other locations and by some other union officials. Although there is no direct evidence as to what was said, I infer that the union officials, at least, spoke in the Union's favor. On Tuesday, August 10, Blair told each employee in the bargaining unit that Blair thought the employees needed to take a vote on the Union.<sup>6</sup> When Blair reached Rader, he said that he would go with what the men wanted.

At all relevant times, the bargaining unit consisted of 11 employees, each of whom is identified in the record by name. At about 11:30 a.m. on Tuesday, August 10 (see *supra*, fn. 6), all of these employees except Ardell Yoast left the shop building. Blair passed to each of these 10 a handwritten paper ballot asking, "Do you wish to stay in the Union?" followed by instructions to circle "yes" or "no." Each of these 10 employees marked his ballot and put it in a box. Then, most of the employees returned to work. Blair and Rader each counted the ballots. Six of the employees had circled "yes" and four had circled "no." Rader thereupon asked Blair whether "it was over with," to which Blair replied that so far as he was concerned, yes. Blair had advised the 11th employee, Yoast, of the impending "election," but Yoast refrained from voting because (he testified) Blair was not either a union representative or Yoast's "boss" and the "election" was taking place during working hours.<sup>7</sup>

Blair credibly testified for Respondent that the employees talked about the Union after this balloting took place; he was not asked the extent or tenor of this discussion. Rader credibly testified for the General Counsel that after this balloting took place, the employees talked "some" about whether they favored the Union.

### C. *The Alleged Conversation Between Rader and Koenig After the First Vote*

At an undisclosed hour on Tuesday, August 10, Koenig, who had been in Chicago, Illinois, started to drive from Chicago to Nashville, Tennessee, a distance of about 450 miles. While he was en route, he telephoned Service Manager Michael Sparks at an undisclosed hour, but obviously after noon that day, for his messages. Sparks said "some guys" from another automobile agency had "come over and threatened" Respondent's employees.<sup>8</sup> Sparks further said that Respondent's employees "had held a poll" and, inferentially, told Koenig the results. This report precipitated a decision by Koenig to return to Carbondale, where his home and the dealership are located, and which is about 325 miles from Chicago.

<sup>6</sup>My findings as to what Blair said and did are based on Rader's testimony. My findings as to the date are based on the credible testimony of company witnesses Blair and Gregory Newell that the balloting generated by this activity occurred on Tuesday, August 10. As discussed *infra*, Rader testified that this activity occurred on August 11, a Wednesday.

<sup>7</sup>My findings in this paragraph are based on a composite of credible parts of the testimony of Rader, Yoast, Blair, and Newell. My finding as to the date is based on the testimony of Blair and Newell, both of whom testified for Respondent. See *supra*, fn. 6.

<sup>8</sup>Laying to one side Koenig's unobjected-to testimony about his conversation with Sparks, there is no evidence of any such threats. Sparks did not testify; see *infra*, fn. 18.

At about 4:15 that afternoon—Tuesday, August 10, Sparks told Rader that Koenig wanted to see Rader in the office. When Rader came to the office, Koenig said that he was not happy with the vote. He said that he wanted another vote taken, and wanted "100 percent participation." Rader replied that because the Union had prevailed by a two-vote margin and only one employee had failed to vote, a second vote would do no good. Koenig said, "I want 100 percent participation. Do you understand?" Koenig said, "Yes, sir," but again said that a second vote was not needed. Koenig again said, "I want 100 percent participation. Do you understand?" Rader said "Yes, sir," but for the third time said that a second vote was not needed. Koenig again said, "I want 100 percent participation. Do you understand?" and asked Rader if he could handle it. Rader said, "yes, sir, I understand." The meeting lasted 12 to 30 minutes. By the time Rader left the office, all the other employees had left for the day. Koenig testified that he reached his home in Carbondale, which is about 11 minutes from his office, at 5:30 p.m. on August 10.<sup>9</sup>

### D. *The August 11 Arrangements for a Second Vote*

On the following day—Wednesday, August 11—Rader told the other employees that Koenig was not happy with the vote, and that Koenig wanted 100-percent participation.<sup>10</sup> Rader drafted a document which was captioned, "Petition to Withdraw/We the undersigned wish to withdraw our membership from local 1242 of the I.A.M.A.W.," with numbers 1 through 11 listed thereunder.<sup>11</sup> Then, Blair or Rader gave Newell the document, which at that time bore no signatures. Newell signed the document after numeral 6, and gave it to Blair.<sup>12</sup> Inferentially at this point, Blair added the Union's

<sup>9</sup>My findings as to the substance of this Rader-Koenig conversation are based on Rader's testimony; the reasons for my findings as to its date are summarized *infra*, part II.D. For demeanor reasons, I do not credit Koenig's testimony that he never had such a conversation with Rader.

<sup>10</sup>My finding as to the substance of Rader's statement to the employees is based on credible parts of the testimony of Rader, Yoast, and Blair. On timely objection, such testimony was not received to show the truth of Rader's report about Koenig's statements; Rader was the first witness, Koenig was the last witness, and the General Counsel did not ask that the testimony about Rader's report to other employees be received under Rule 801(d)(1)(B) of the Federal Rules of Evidence. For demeanor reasons, I do not credit Newell's somewhat hesitant testimony that Rader did not say that Koenig wanted 100-percent participation and was not happy with the results of the vote. My finding that Rader made this report on August 11 is based on company witness Blair's testimony, as to the date corroborated in effect by Newell.

<sup>11</sup>My finding that Rader drafted this document on Wednesday, August 11, is based on the testimony of Newell, who signed it on that day (see *infra*). Rader testified that he prepared it "Thursday evening or Friday morning . . . August the 12th or . . . sometime in there—sometime before the second vote," which was conducted at about noon on Friday, August 13 (see *infra*).

<sup>12</sup>My finding that Newell gave the document to Blair is based on Newell's testimony, which for reasons stated *infra* I credit in preference to Rader's testimony that Newell gave the document to Rader. My finding that no signatures appeared on the document when Newell received it is based on Rader's testimony. Although Newell testified that when he received the document Blair's and Tolar's signatures had already been inserted after numbers 1 and 2 respectively, and had not yet been scratched out, he in effect cor-

complete name to the document, signed it after numeral 1, and then gave it to unit employee Fred Tolar, who signed the document after numeral 2. However, some of the employees protested this procedure on confidentiality grounds. Then, the men agreed that on Friday, August 13, they would conduct a second balloting.<sup>13</sup> Newell said that he was going to be on vacation on Friday, that he would be available before noon on that Friday and would be back if needed, but that he was leaving the immediate area at about 12:30 or 1 p.m. that Friday. The men agreed that the Friday balloting would be conducted at about noon. However, Blair said that if the balloting scheduled for August 13 showed that a majority of the men no longer wanted the Union, Blair would need the dissatisfied employees' individual signatures in order to be able to file a valid decertification petition (see *infra*, fn. 20), and that Newell was planning to leave the shop immediately after the balloting. Blair, Rader, Newell, and (perhaps) some of the other employees agreed that if on August 13 the employees voted the Union out, Rader was to give the document to Blair, but that if the employees did not vote the Union out, Rader was to get rid of the document. After Blair's and Tolar's signatures had been crossed out, Blair returned the document to Newell, who put it into an envelope, sealed the envelope, and gave it to Rader.<sup>14</sup>

As previously noted, on August 11 Blair or Sparks told Koenig that another vote on the Union would be taken on August 13. At 8:09 a.m. on Thursday, August 12, Koenig tried to telephone Larry R. Downs, Respondent's labor counsel, but Downs was not in his office. Between 3:30 and 3:53 that afternoon, Koenig made three more telephone calls to Downs, but was still unable to reach him. Koenig testified that he tried to call Downs because "I knew there was going to be a vote on Friday and I wanted to know where I could get ahold of him on Friday because I was going to call him from Mississippi," where Koenig planned to drive that evening. Eventually, Koenig ascertained on August 12 from Downs' receptionist that Downs would be in his office on August 13. Immediately after Koenig's last unsuccessful effort to reach Downs by telephone that day, Koenig left

roborated Rader's testimony otherwise by explaining that Newell inserted his own signature after number 6 because "I didn't want to be the first one to put my name on it."

<sup>13</sup>My finding as to the August 13 date is based on the testimony of Newell and Blair. Koenig testified that Blair or Sparks told Koenig on August 11 that a vote was planned for Friday, August 13; Blair testified to telling Sparks that the employees were going to take a vote on Friday.

<sup>14</sup>My findings as to what was done with the "Petition to Withdraw" after Newell had signed it, and why this was done, are based on inferences from credible portions of the testimony of Rader, Blair, Newell, and Attorney Robert B. Schulhof. I credit Blair's testimony that the "Petition to Withdraw" was drawn up because "Originally this is the way we were going to do it but the guys wanted confidentiality;" I believe that Rader was mistaken when he testified that his action in drawing up the document was occasioned by Newell's statement, when the men were arranging for a second balloting to be held on August 13, that he would be unavailable after noon on August 13. Schulhof credibly testified that on the afternoon of Friday, August 13, Blair gave him the document in a sealed envelope, and that when Schulhof opened the envelope and removed the document, Blair's and Tolar's signatures had been scratched off. Particularly in view of the portion of Blair's testimony quoted in this footnote, I do not credit his testimony that he did not know why his and Tolar's signatures were scratched off.

Carbondale for a short, prearranged vacation at Pickwick Lake, Mississippi, about 240 miles from Carbondale.

My finding that the Koenig-Rader conversation occurred on August 10 is based on company witness Blair's credible testimony that it was August 11 when Rader alleged to the other employees that Koenig was not happy with the vote and that Koenig wanted 100-percent participation, and on Rader's testimony (see p. 26, LL. 14-17 of the transcript) that he gave this report to the employees the day after Koenig made these statements to him.<sup>15</sup> Respondent contends that I should credit Koenig's testimony that no such conversation ever occurred, on the ground that Rader testified the conversation occurred face to face in Koenig's office after 4 p.m. on August 12 and the credible evidence shows that Koenig arrived at his home about 3:30 p.m. that afternoon and left his home at 4 p.m. that afternoon to drive directly to Pickwick Lake, Mississippi, without stopping at his office.<sup>16</sup> However, I conclude that Rader was merely confused as to the date of this conversation, and that such confusion does not call for rejection of his testimony as to the substance of what was said. Rader's confusion about dates but not sequence of events is shown by the contrast between (1) his testimony that his conversation with Koenig occurred late in an afternoon between the first balloting (which he and all other witnesses testified was held about midday) and the second balloting (which he and all other witnesses testified was held about midday on August 13); and (2) his testimony that his conversation with Koenig could not have occurred on August 11 "because we hadn't had the [first] vote yet," although he had previously testified (erroneously) that the first vote was conducted on August 11. I note, moreover, that Respondent's records show that Newell was on vacation on August 12 and 13, and that Rader testified, in effect, that Newell was actively working on the day of the Rader-Koenig conversation.

#### *E. Events on August 13; the Withdrawal of Recognition*

On Friday, August 13, at about 11:50 a.m. or noon, a second balloting was held, in front of Sparks' service desk in the parts department; just before the vote, Sparks left the service desk for his office. Rader drew up a second set of ballots which stated, "Do you wish to remain in the union?/Circle one/yes/no." Blair told the employees that if the Union was voted out, he would come back around with a piece of paper for them to sign. The employees put the ballots into a box, and most of them then went to lunch. Then, Rader called Sparks out of his office, and Rader, Sparks, and Blair counted the votes—seven no and four yes.<sup>17</sup> Rader

<sup>15</sup>I do not rely on such testimony to show the truth of Rader's report (see *supra*, fn. 10). Rather, I rely on the testimony of Rader, Blair, and Yoast to show the contents of the report, on Blair's testimony to show its date, and on Rader's testimony to show the temporal relationship between his report and his conversation with Koenig, about whose content Rader gave direct testimony.

<sup>16</sup>Such evidence includes the credible testimony of Patricia Jean Morgenthaler, who with her husband rode to Mississippi with the Koenigs, and telephone bills showing that Koenig made various calls from his car during the afternoon of August 12.

<sup>17</sup>My finding that Sparks participated in counting the votes is based on Rader's testimony, which for demeanor reasons I accept in

*Continued*

credibly testified that he conducted the second vote because Koenig had told him to; and that before Rader talked to Koenig, “There was [no plan for a second vote] as far as I was concerned. I thought it was over with” after the first vote.

Shortly after noon on August 13, Koenig, who was out of town on a brief vacation, telephoned Sparks to find out what the tally was. Sparks told him.<sup>18</sup> Then, Koenig asked Sparks to call Blair to the telephone.<sup>19</sup> Blair’s July 1993 discussions with the NLRB had led him to believe that the results of the August 13 balloting would not be acceptable as sufficient support for a decertification petition, and that such support would have to be shown by employee signatures.<sup>20</sup> I infer from Blair’s conduct between his first and his second telephone conversation with Koenig that day that during the first such conversation, they discussed the subject of obtaining such signatures.

Either shortly before or immediately after this conversation, Blair started to solicit employees to sign a petition whose phrasing is not shown by the record, but which, inferentially, expressed employee dissatisfaction with the Union. The employees told him that they wanted to have individual petitions, so nobody else would know how each one of them had voted. Koenig credibly testified that he and Blair had several telephone conversations that day. Inferentially during the second such conversation, Blair told Koenig that the employees did not want Respondent to know who voted yes and who voted no, and asked “how were we going to do this?”<sup>21</sup> I infer from Blair’s subsequent conduct that during this conversation the decision was ultimately reached that the employees would each be asked to put an appropriate document into a sealed envelope. Inferentially as to who was to inspect these documents, Koenig suggested using the services of a minister who was one of Respondent’s regular customers, or of Attorney Robert B. Schulhof, who has no particular expertise in labor law but who from time to time has

preference to Blair’s testimony that he advised Sparks of the tally after the count was completed.

<sup>18</sup>This finding constitutes an inference from Blair’s and Rader’s undisputed testimony that Sparks was immediately advised of the tally (according to Rader, because Sparks participated in counting the ballots; according to Blair, because he reported the tally to Sparks), and Koenig’s testimony that he asked for the tally. I do not credit Koenig’s testimony that “they didn’t have a tally,” for demeanor reason and because no reason appears why Sparks would have misrepresented the facts. Sparks did not testify. Although the complaint does not allege that he is a supervisor, his title is “service manager,” and his signature appears in a blank after the printed words “Approved by,” and over the printed title “Supervisor,” in personnel documents reflecting unit employees’ wage increases and vacation requests. Moreover, unit employees Rader and Yoast, both of them auto technicians, each testified that Sparks was his immediate supervisor. Further, at least after October 1, Sparks had the power to approve overtime work by employee Yoast. Cf. *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1269 (7th Cir. 1987).

<sup>19</sup>This finding is based on Blair’s credible testimony that Sparks gave him these instructions. For demeanor reason, I do not credit Koenig’s testimony that Sparks said Blair wanted to speak to Koenig. Sparks did not testify; see supra fn. 18.

<sup>20</sup>See National Labor Relations Board Casehandling Manual (Part II), Representation, Secs. 11003.1, 11022.3a, 11028, 11028.5.

<sup>21</sup>The quotation is from Koenig’s credible testimony.

acted as Respondent’s counsel in other matters. Blair opted for Schulhof.

After concluding this conversation with Koenig, Blair handwrote at about 1 or 1:30 p.m. a document which stated, “Petition to Withdraw/I/we the undersigned wish to withdraw our membership from local 1242 of the I.A.M.A.W. (International Assn. of Machinist & Aerospace Workers Union).” He made a number of copies of this document on Respondent’s copy machine,<sup>22</sup> and gave one (together with a blank envelope) to each of the 10 employees who were on duty that day, all of whom were then actively working. Rader credibly testified that he told Blair that Rader did not want to get the Union out, and that Blair told him to leave his copy of the document blank, put it back into the envelope and seal the envelope (see infra, fn. 24). Ten of the unit employees each returned to Blair a sealed envelope which contained a photocopied “Petition.” The 11th unit employee, Newell, was on vacation on August 13; he had returned to the dealership for the express purpose of casting a ballot, left the immediate area at about 12:30 or 1 p.m. that day, and (inferentially) did not receive from Blair an unsigned, photocopied “Petition” like those he distributed to the others.

Meanwhile, Koenig telephoned Schulhof that Koenig needed Schulhof “this afternoon,” that “it was very important—that he had this union thing—this election and he wanted [Schulhof] to count the votes.” Schulhof said that he was “really not too enthused about this. I’ve got other things planned and I’ve got other clients.” Koenig said, in substance, “Move them. I need you. I don’t care what it costs.” Schulhof said, “You better believe it is going to cost.” Koenig said, “I want you to count the votes.” Schulhof said, “Okay, I’ll be glad to do it. I will certify the votes to you and the employees” but that there was “no way” he was going to tell Koenig “who voted what . . . I’ll only give you numbers and that will be it.” Koenig acceded, but said that Schulhof should keep the “ballots” in his office.<sup>23</sup>

After postponing several appointments and a court call, Schulhof drove from his office to the dealership, a drive which took 5 to 8 minutes. When he arrived, he spoke with General Manager Ervin Legendre, an admitted supervisor, who introduced him to Sparks and to several of the mechanics, inferentially including Blair. After Legendre had left the area, Blair gave Schulhof 11 sealed envelopes. Ten of these each contained a signed or unsigned copy of the “petition” of which Blair had distributed photocopies earlier that afternoon, August 13. The eleventh sealed envelope contained the petition to which Newell had affixed his signature (on L. 6) on August 11.

After receiving this material, Schulhof was shown at his request into an empty office, which was normally occupied by Koenig, and was given at his request all the mechanics’ personnel files. Then, when left alone in the office, he unsealed the envelopes. Four of the envelopes contained blank

<sup>22</sup>Blair credibly testified that there is a copy machine outside the waiting room where everybody can use it.

<sup>23</sup>My findings as to the substance of this conversation are based on a composite of credible parts of Schulhof’s and Koenig’s testimony. For demeanor reasons, I credit Schulhof’s testimony that the secrecy matter was initially raised by him, and do not accept Koenig’s testimony that this matter was initially raised by Koenig.

“Petition to Withdraw” documents.<sup>24</sup> Six contained “Petition to Withdraw” documents which each bore the purported signature of a particular employee. The 11th contained the August 11 “Petition to Withdraw” which bore Newell’s signature and the scratched out signatures of Blair and Tolar. Schulhof compared each of the signatures to at least three signatures in every personnel file, normally the three most recent signatures. Schulhof, who had some expertise in authenticating signatures,<sup>25</sup> concluded that each of the seven signatures had been written by the same person who wrote that signature in Respondent’s personnel files.<sup>26</sup> My own comparison of these signatures leads me to the same conclusion.

After Schulhof had finished comparing the signatures, he counted the number of “Petitions” that were signed and the number that were unsigned, placed the “Petitions” in a large envelope, sealed it, and signed it across the flap. He notified Legendre, and the people in the shop, of the contents of the “Petition,” the number of people who had “voted” in favor (seven) and the number of people who had not (four), and the authenticity of the seven signatures. Then, Schulhof drove back to his office with the envelope containing the “Petitions,” and put the envelope into his file.

Later that same afternoon, Koenig telephoned Legendre and asked him for the results. Legendre said that it “was seven to four in favor of getting rid of the Union.” Legendre said that Schulhof had been in Koenig’s office, that Schulhof had taken a long time and had done a thorough job, and that Schulhof had said the signatures were valid. At Koenig’s request, Legendre told him what the “Petitions” said.

Then, Koenig telephoned Attorney Downs, who asked him what the wording was. When Koenig told him (“I/we the undersigned wish to withdraw our membership from” the Union), Downs said that “it might be technically incorrect,” and told Koenig that the “Petitions” should have said, “I do not want the Union to represent me any more.”<sup>27</sup> Koenig thereupon telephoned Blair and told him that “on advice of counsel . . . they could be technically incorrect.” Blair said, “I am telling you that we voted the Union out,” and asked,

<sup>24</sup>Laying this evidence to one side, the record fails to show whether anyone but Rader was advised to turn in a blank “petition” if he wanted to retain union representation.

<sup>25</sup>While in the Navy, he had been given several short courses conducted by the Federal Bureau of Investigation in signature identification and comparison, and had also been assigned to a job which entailed signing classified documents in and out. There is no evidence that Koenig knew about Schulhof’s experience in these respects. In addition, Schulhof had practiced law for 25 years, during which he had had some occasion to compare signatures.

<sup>26</sup>Blair and Tolar, whose signatures had been scratched off the August 11 petition signed by Newell, each signed a separate copy of the photocopied “Petition.” The employees whose signatures were authenticated by Schulhof did not include Yoast, whose failure to participate in the August 10 balloting in the Union’s favor had been the basis advanced by Koenig for rejecting the result. However, there is no evidence that Respondent knew at any material time that Yoast had not signed a petition, and no reason to suppose that Respondent knew at any material time that he had been the August 10 nonparticipant.

<sup>27</sup>See *NLRB v. Walkill Valley General Hospital*, 866 F.2d 632, 637 (3d Cir. 1989); *Pioneer Inn*, 228 NLRB 1263, 1266 (1977), enf.d. 578 F.2d 835 (9th Cir. 1978); *Stratford Visiting Nurses Assn.*, 264 NLRB 1026 (1982).

“what should it say so it is right?” Koenig repeated to Blair the phrasing which Downs had given Koenig. Blair wrote down what Koenig had told him, and said, “I am going to have them re-vote.” Koenig asked Blair to switch Koenig’s call to Legendre, because “I needed to get Schulhof back there.”

After this Blair-Koenig conversation ended, Blair had one of Respondent’s clerical personnel type up a document stating, “I do not want the Union to represent me anymore,” with spaces for a signature and a date.<sup>28</sup> After preparing a number of photocopies of this document on Respondent’s copy machine, Blair distributed a copy, along with a blank envelope, to each of the 10 unit employees who were working that day. He told them that he had worded the first paper wrong, and asked them to sign the paper or not sign it, whichever they chose, and put it into the envelope.

About 45 minutes after leaving the dealership, Schulhof returned to his office. His secretary told him that he had received several “emergency” calls from Legendre, who wanted Schulhof to call him back “immediately;” that Schulhof “had to get back.” Schulhof thereupon telephoned Legendre, who said that he wanted Schulhof to come back “immediately” and do the whole thing again. When Schulhof asked why, Legendre said that “there was something about the language,” without explaining just what.<sup>29</sup> Schulhof drove back to the dealership, where he received 10 envelopes from Blair. Nine of them were sealed; the tenth was unsealed, with a blank “I do not want” document tucked unfolded under the flap. This last envelope and “I do not want” document had been returned to Blair by employee Yoast, whose nonparticipation in the August 10 balloting (where six employees voted to keep the Union and four voted against) had prevented the unanimous participation on which Koenig insisted the evening after the August 10 vote. Once again, Schulhof went into Koenig’s office, asked a clerical employee for all the employees’ personnel files, and then opened the envelopes. He compared the signatures on each of the six signed “I do not want” documents with the signatures in that employee’s personnel file, and concluded as to each that the signatures had been written by the same person. My own comparison of these signatures leads me to the same conclusion.<sup>30</sup>

Then, he put all the documents into a large envelope, sealed it, signed it across the flap, went out, and notified both Legendre and the employees that 6 of the “ballots” had been signed, 4 were unsigned, and only 10 “voted.” After

<sup>28</sup>Because the first set of “petitions” were undated, they might have been unacceptable to the NLRB as a showing of interest to support a decertification petition; see part II, Sec. 11028.5 of the Casehandling Manual, *supra*. The first set of “petitions” which Blair drew up provided no space for a date and were not dated by the signatories; the record fails to show what prompted Blair to provide a space for a date in the second set.

<sup>29</sup>This finding is based on Schulhof’s credible testimony. In view of such testimony, I do not accept Rader’s uncorroborated testimony on direct examination, in effect withdrawn on cross-examination, that when Schulhof returned to the dealership, he said that the “petitions needed to be in a simple phrase. They were too complicated.” Schulhof credibly testified to the belief that the phrasing in the first set of petitions was “more incisive” than the phrasing in the second set.

<sup>30</sup>Laying Newell to one side, the same employees signed both the “Petitions” and the “I do not want” documents.

that, Schulhof drove back to his office and put this large envelope into his file with the first envelope, which contained the signed and unsigned "petitions" he had examined earlier that afternoon. These large envelopes remained in Schulhof's files until February 4, 1994, 4 days before the hearing before me. On that day, Attorney Downs (who represented Respondent before me) visited Schulhof's office, and Schulhof opened the envelopes.

Late in the afternoon of August 13, Koenig telephoned Legendre to find out the results of the "I do not want" count. Legendre said that the results were six to four to get rid of the Union. Koenig testified that Legendre told him what "the petition" said; the record fails to show how Legendre (who unexplainedly did not testify) obtained this information, or whether it was correct. In addition, Legendre said that the signatures were valid, that Schulhof guaranteed them, and that he would keep them in his safe "forever." Koenig told Legendre to write the Union a letter withdrawing recognition.

By letter to Koenig dated August 11, 1993, Union Business Representative Rick A. Lezu had advised Respondent of a desire to modify the current bargaining agreement, which was to expire on October 15. The letter further stated, "[W]e are ready and willing to meet with you for the purpose of negotiating a new Agreement. Please contact the undersigned to arrange the time, date and place for a meeting to commence negotiations." Attached was a copy of a "Notice to Mediation Agencies" from the Union also dated August 11. The record fails to show when Respondent received this material. By letter to Lezu dated August 13, 1993, Legendre stated, in part:

[T]he Company has objective evidence which gives the Company a good faith as to the Union's majority status [sic]. The Company is therefore withdrawing recognition from the Union . . .

The Company will honor the existing contract until its expiration on October 15, 1993, at which point the contract is terminated.

Attorney Downs asked Koenig at the hearing, "In withdrawing recognition, did you rely on the first or second set of ballots which Mr. Schulhof had used?" In reply, Koenig testified, "Not being a lawyer, I thought they were both good, but the second ballot was the one that you had told us that that was the way it had to be worded. If that is what the men wanted, that was how it had to be worded." Koenig was not asked, and did not testify, as to the extent (if at all) he relied on the August 13 "yes/no" anonymous ballots drawn up by Rader. As to the first balloting, taken on August 10 and won by the Union, Koenig testified, "I talked to my General Manager [Legendre] and told him that it was like doing a vote in a presidential election, just making an X without your name . . . I didn't really consider it a vote. I considered it a poll . . . I just looked upon it like it wasn't that important at that time." As previously noted, the report that the Union prevailed in that August 10 balloting had caused Koenig to drive on August 10 to Carbondale (where the dealership is located) instead of Nashville.

Inferentially during Koenig's conversations with Downs on August 13 (see *infra*, fn. 31), Koenig asked Downs how long the employees' action would keep the Union out. Downs er-

roneously replied that no NLRB election could be held for a year. During Koenig's last conversation with Blair on August 13, after Schulhof had inspected and driven away with the "I do not want" documents, Blair said that he planned to bring the "signatures" to the NLRB's Regional Office in St. Louis, where he intended to file a decertification petition. Koenig replied that Downs had said "it wasn't necessary."<sup>31</sup> Blair expressed satisfaction at not having to drive to St. Louis, which is about 100 miles from Carbondale (see *infra*, fn. 32).

Although the words "Certified Return Receipt Requested" are typed immediately above addressee Lezu's name on Legendre's August 13 letter withdrawing recognition, there is no other evidence that this letter was ever mailed. By letter to Legendre dated August 16, Lezu stated that he had found the August 13 letter on Monday, August 16, wedged against the back door leading into the union hall, which is located in a city about 15 miles from Carbondale. After describing the August 10 vote which the Union won by a vote of six to four, Lezu's letter to Legendre went on to say:

the members who may wish to terminate their Union Shop status must file a petition with the National Labor Relations Board not less than sixty (60) days prior to the termination date of the Agreement in order for an election to be conducted by the NLRB to determine which party has majority status.<sup>32</sup>

By letter to Koenig dated September 1, Lezu set forth various dates which he had available to meet for contract negotiations. By letter to Lezu dated September 2, 1993, Company Attorney Downs stated, in part:

As the Company informed you by letter dated August 13, 1993, the Company has a good faith doubt of the Union's continued majority status and withdrew recognition. That action is lawful under *Brown & Root, Inc.*, 308 NLRB [1206] (1992).

If the Company met with you, it could be found guilty of an unfair labor practice for bargaining with a minority Union. The Company therefore will not set up any negotiation dates with the Union.<sup>33</sup>

<sup>31</sup> My finding that Downs' statement about the Union's being kept out was made during his August 13 conversations with Koenig is based on inferences from the advice which Koenig thus gave Blair after talking with Downs earlier that day about pending union matters. Downs' August 17 letter of correction to Koenig (see *infra*, part II,G) discloses on its face that Downs' erroneous advice was given before 1:44 p.m. on August 17, and Koenig's inquiry to Downs was almost certainly occasioned by the activities during the afternoon of August 13.

<sup>32</sup> See generally *Abbey Medical/Abbey Rents, Inc.*, 264 NLRB 969 (1982), *enfd.* 709 F.2d 1514 (9th Cir. 1983). The 1990-1993 bargaining agreement would have barred until its October 15 expiration date a representation petition filed after Monday, August 16. Because Schulhof had put all the signed "petitions" in his office files before this final Blair-Koenig conversation on August 13, Blair might have had some difficulty filing a timely decertification petition supported by a timely filed proof of interest; see *Casehandling Manual*, *supra*, (Part II), Representation, Sec. 11003.1.

<sup>33</sup> Cf. cases cited *infra*, fn. 42, and *Film Consortium, Inc.*, 268 NLRB 436 fn. 4 (1983).

Respondent has not bargained with the Union since August 13, 1993.

#### F. Koenig's Conversation with Rader on August 17

On August 16, the union representative called Rader and asked him to set up a union meeting for 5 p.m. on August 18. Rader told the other employees that there would be a union meeting, that it was strictly an informational meeting, that attendance was not mandatory, but that Rader thought they should go. Rader said that the employees had heard Koenig's side, and that they needed to hear the union representative's side because the employees did pay his wages and he worked for them.

Thereafter, on an undisclosed date and hour before about 4:20 p.m. on August 17, Koenig drafted, with the assistance of Attorney Downs, a set of notes to be used by Koenig in talking to Rader. At about 4:20 p.m. on August 17, Service Manager Sparks told Rader that Koenig wanted to see Rader in Koenig's office. Present during this meeting were Rader and Koenig. Koenig said that he had a few things to say, and that when he finished, Rader could ask questions. Rader sat down.

Koenig said that "we didn't have a union" and wanted to get things to normal. He said that he was tired of "all the rumors and lies and back-stabbing" and "all the arguing that is going on." He said that he was "in this to win, this is not a game," and that Rader should be on the team. Koenig went on to say that he did not like the Union and "all the [scatological noun] and tension it causes." Koenig said that "we'll fight to the end," that "you [are] the one they think of when they think of the Union," and that Rader was "stuck in the middle." Koenig said that Rader would be treated the same as everyone else; but that if the "rumors" continued, Koenig was going "to let it all hang out and defend" himself. That meant, said Koenig, that he was going to sue Rader for slander; that if Koenig had to he would tell Blair and Tolar what Rader had said about their being liars and thieves; and that they, too would likely sue Rader for slander. Rader, who credibly testified to the belief that he had not slandered Koenig, "I had respect for the man," denied having slandered him, and asked several times what Koenig meant about his allegations of slander by Rader, but Rader did tell Koenig that Blair was a "lying, stealing m—f—."<sup>34</sup> Koenig said that if Rader was sued for slander, he would have to spend thousands of dollars even if he won. Koenig further said that he would tell "everyone else" that Rader had offered "to sell them out if [Koenig] would have contacted [Rader] 30 days ago instead of the men coming to [Koenig]."<sup>35</sup> Koenig asked how much "fun" Rader would

have working for Respondent if all the other employees were angry at him, or how much "fun" he would have paying lawyers to defend himself in a slander suit. Koenig said that he knew there was going to be a union meeting on August 18, and that "We both know [the] purpose of [the] union meeting is to keep [things] stirred up."

Koenig said that he did not want Rader to go to the union meeting, that Koenig wanted Rader to tell the men not to go, and that Rader was "not going." Rader said that it was his right and his duty to go. Koenig said that he did not want Rader to go, that Koenig wanted Rader to tell the men not to go, and that if Rader did go, or did not tell the men not to go, there would be a serious aftermath; that Rader could be taken to court and sued for slander by Koenig or Blair. However, Koenig said, "If [the] Union doesn't stir up [scatological noun] and rumors stop I've got no reason to say anything and we can get back to normal."

Then, Koenig said, "You got any questions [?] You understand what I just said?" Rader said that he was neutral. Koenig said that he did not believe that. Koenig went on to say, "join my side and set . . . the union . . . to rest. Bury it so we can start anew. Give me one year. Start working for me." Koenig then said that "we wanted to . . . move things forward so that we could both make more money and to get this bitterness out of the path and move on to a better future for both of us." Rader thereupon walked out the door.<sup>36</sup>

Rader did not tell his fellow employees not to attend the August 18 union meeting. The record fails to show whether he attended.

#### G. Koenig's August 18 Speech

A 60-day period during which any petition filed by the employees or Respondent, requesting an NLRB election, would have been barred by the current bargaining agreement, began about August 17; see *Leonard Wholesale Meats*, 136 NLRB 1000 (1962). At 1:44 p.m. on August 17, Attorney Downs faxed to Koenig a letter to him from Downs, whose content is described infra, and a draft speech to be given by Koenig to the employees. At about 12:30 p.m. on August 18, Koenig met with all 11 of the unit employees in his office. After thanking them for "voting the Union out," he read the speech drafted by Respondent's counsel, with certain changes which Koenig had inserted on the draft.

Koenig said that one of the employees had asked him "what it meant since a majority of you told me you didn't want the Union any more." Koenig went on to say that he had told the employees "it meant the Union couldn't come back for one year." Koenig stated that this representation

<sup>34</sup> Rader credibly testified to reaching this conclusion from Blair's conduct in the "August [1993] situation" about the Union. Rader testified in February 1994, "I won't say that I dislike him but I have worked with better people."

<sup>35</sup> The quotation is from Koenig's preprepared notes. Koenig testified that the August 17 meeting "was precipitated by Mr. Rader insisting on talking to me on Wednesday, August 11," and that on August 11, Rader told him that Blair and Tolar were "liars, thieves, and two-faced." Koenig further testified that on August 17, he told Rader that if the "back stabbing . . . arguing [and] all the rumors and things" continued, "I would tell the rest of the men that on the August 11 meeting he had tried to sell them down the river to try to cut a deal with me . . . that if I would have come to see him

instead of the men coming to see me he could have gotten rid of the Union." The record is otherwise silent as to any August 11 meeting other than the employees' meeting (which did not include Koenig, so far as the record shows) at which they decided on an August 13 balloting.

<sup>36</sup> My findings as to the August 17 Rader-Koenig conversation are based on a composite of credible parts of their testimony and on Koenig's notes, which he drew up mostly in preparation for the meeting but to some extent immediately afterwards, and much of which he read to Rader. Quotations in the text are from Koenig's testimony or notes. For demeanor reason, I do not credit Koenig's testimony that his remarks to Rader were limited to reading Koenig's preprepared statement plus some extemporaneous remarks after Rader said he was neutral.

had been based on counsel's advice, and that counsel "now has told me that's not right, that the one year only applies if there's an NLRB election." Holding up the letter from Downs which had been faxed to Koenig with the draft speech, Koenig said, "I don't understand the legal gobbledegook he's come up with now in the letter he wrote me . . . because as far as I'm concerned, what you did is have an election<sup>37</sup> . . . he told me that if you felt like I wasn't treating you right 4 or 5 months from now, you could have an election then and *not* have to wait one year . . . I made a mistake in what I told you, but that mistake benefits you. The real facts are that you don't have to give [me] a year to prove myself" (emphasis in original).

Koenig went on to express appreciation of "the confidence a majority of you expressed in . . . me when you told . . . me you didn't want the Union any more. I don't think you would have done it if you didn't think . . . I would treat you right. Based on your choice, the Company sent the Union a letter saying it would not bargain a new contract with the Union."

Then, Koenig stated that the Union had called a meeting for that night, and "That means there's a black cloud hanging over our heads, and I've got to worry about more garbage from the Union instead of spending time thinking about . . . our future." Koenig went on to say:

As you decide what to do, let's talk about a few questions that I have heard some of you ask.

1. Can the Union force me to go? Absolutely not. Just as going is . . . your right under the law, not going to the meeting is also your right and there's not a thing the Union can do about it. They cannot fine you or anything like that. If the Union does threaten you, it's just more of their [scatological term] because the law says they can't do anything.

Koenig further said that the Union must have arranged for a meeting at the Holiday Inn, which would cost the Union money, rather than wherever regular meetings were held, because "The Union is hoping that you will forget about all the things they haven't done for you in the past few years after you get a few free beers under your belt . . . . When the beer does start flowing, be careful what you say or, more importantly, what you sign, because you may regret it when you're thinking straight the next morning." Then, Koenig said:

A third question I've heard kicked around is, "What am I saying to the Union by going to the meeting and just listening?" That's a good question . . . .

To me, going to that Union meeting is just like feeding a stray cat or having a parasite. Like the dog, the Union will keep coming back if you feed it by going to the meeting, but with the Union it's much worse than it is with any stray animal.

All a stray cat will do is eat your food and [scatological verb] in your yard. I'm afraid the Union, though, will keep things stirred up with their lies and

rumors just like they have the past 30 days or so . . . . To me, these past 30 days of Union rumors and lies have been just like having that stray . . . cat in your house.

I'm sick of it—you've spoken loud and clear—and I just want to get on with building our future, but instead we've got this black [cloud] over our heads so I've got to spend my time worrying about how to answer the Union rumors and lies.

On the other hand, if you've enjoyed all the Union [scatological noun] of the past few weeks, go to the Union meeting, encourage that stray cat, but don't be surprised if it [scatological verb] in your house.

[The Union] may also tell you what they were going to get you in a new contract. If I were them, I don't know how much I'd be bragging about what I'd gotten for raises at some of these other shops. They'll make promises they can't keep. Only I can make a promise and keep it 100% at VKC.

At this point, Koenig stated that before the Union received Respondent's letter saying Respondent would not be bargaining with the Union, Respondent had received from the Union a letter which he was going to read to the employees. The letter stated, in part (emphasis in original):

In order to comply with the IAM Grand Lodge Policy governing Union Dues, it is necessary that we have the following information concerning the hourly wage rates of Union Members employed in your Shop or Plant.

We must have the individual hourly rates of all employees in the bargaining unit, based on a forty (40) hour week on the *LAST PAY PERIOD IN AUGUST, 1993*.

It will not be necessary that you list the names of the individual employees, however, it is necessary that we have the number of employees in each classification and their individual hourly rates.

Then, Koenig said:

This letter says to me all the Union is interested in is finding out how much money you make so they can charge you the most money possible for Union dues.

I look at this letter, and what it means, and then I hear the rumor that the Union is saying you should go to their meeting out of loyalty and respect. You voted to give me a one year trial and now they want to change it after 5 days. Where is the loyalty [?]

Holding up the union letter, Koenig stated that "stuff like that" made him "sick." He concluded his speech with the following remarks:

That's enough on questions about going to the Union meeting but I do want to talk with you about two more questions I was asked today—I was asked—

<sup>37</sup> Counsel's draft had read, "I don't understand the legal gobbledegook he's come up with now in this letter he wrote me (HERE HOLD UP LETTER) because as far as I'm concerned what you did was like having an election."

Will it help end all this if I don't go? What will I be saying to the Union if I don't go?

The message will be clear—you'll be telling the Union you're tired of their [scatological expression] and don't want to pay them any more money. You'll be cutting them off, not feeding them, and then this [scatological expression] will stop.

All I'm asking is that you give me the one year trial that you voted last Friday. Let's bury this union talk, cover it over and go on with our lives so that we can both make more money.<sup>38</sup>

#### H. *The Allegedly Unlawful Unilateral Conduct and Direct Dealing*

The first charge here, which in substance alleged various violations of Section 8(a)(1) of the Act (including those alleged in the complaint during the period before this charge was filed), was received by Respondent on September 20, 1993. Respondent's regular monthly meeting of service men was conducted about September 27 at a Ramada Inn, where dinner was served to those present. Those present consisted of Koenig, Legendre, Sparks, and almost all the technicians and body men, but not Union Steward Rader. Koenig said that he would give the unit employees an increase of 25 cents an hour, bonuses for employees whose flat-rate hours (a term explained, *infra*) exceeded particular totals for the week, and a bonus (to be distributed among everyone) consisting of 5 percent of the month's profit.

Service technician Yoast said that he wanted to be changed from a flat rate to a straight hourly rate. The flat rate for a particular job consists of the straight hourly rate multiplied by the number of hours General Motors Corporation (for which Respondent is a franchised dealer) states it will pay for the performance of that job under warranty; Yoast was then being paid the flat rate for both warranty and nonwarranty work.<sup>39</sup> Yoast expressed the opinion that payment on a flat-rate basis was unfair to him, because sometimes he had to abandon his own repair assignment in order to help other mechanics figure out problems in their repair assignments, for which only the latter could claim worktime; and because Yoast's work largely consisted of trying to find the reason for "drivability problems" (such as an intermittent electrical connection) whose source may take much more time merely to find than General Motors will allow for repair. The other employees expressed agreement with Yoast.

Thereafter, on October 1, Yoast and Koenig signed a document which was captioned "Agreement" and read as follows:

I request to be put on straight hourly rate of \$12.55 per hour until further notice. I do not consider this as a reduction in my pay or benefits and I understand that I may go back to flat rate upon one weeks notice. I understand that overtime may only be worked with the permission of the Service Manager or General Manager.

<sup>38</sup> This last paragraph was added by Koenig to counsel's draft.

<sup>39</sup> The bargaining agreement which was to expire on October 15 stated that mechanics would be paid the number of flat-rate hours produced, or 87-1/2 percent of their flat rate hourly base for all customer-charged hours actually worked, whichever was greater.

Yoast's hourly rate under the October 15, 1990–October 15, 1993 bargaining agreement was \$12.30, 25 cents less than that specified in the October 1, 1993, "Agreement" between Yoast and Koenig. Yoast credibly testified in February 1994 that he was currently making more money than he had under the union contract.

On October 4, 1993, every bargaining unit employee was given a document captioned "Technicians Pay Plan Effective 10/4/93–10/4/94." This document specified a pay increase of 25 cents an hour, a monthly bonus based on 5 percent of the net profit of both the service and body shops, and a new paid holiday for veterans and reservists. In addition, "One man may work a straight hourly rate if he and the company agree. He may choose to go to flat rate with one week's notice. The company may put this man on flat rate with one week's notice." Also, "\$500.00 will be set up each month in a contest for technicians." These changes in wages and benefits were implemented on October 4, 1993, admittedly without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and its effects. As previously noted, Respondent's bargaining agreement with the Union expired by its terms on October 15, 1993. Pursuant to the bonus plans set forth in the document distributed to the employees on October 4, bargaining unit employees each received bonus payments of about \$27 on November 3 and \$23 on December 14.

#### Analysis and Conclusions

##### 1. Whether Respondent violated Section 8(a)(1) by instructing employee Rader to conduct a re-vote

As described *supra*, part II.B, on August 10 employee Blair passed out handwritten ballots to his fellow employees, which asked, "Do you wish to stay in the Union?" followed by instructions to circle "yes" or "no." All of the employees except Yoast cast ballots, employees Blair and Rader counted them, and both of them then stated that "it was over with." Employee Yoast decided not to cast a ballot. As Respondent does not appear to question, employee Blair when proposing and arranging for a vote, the 10 employees who participated in the vote when employee Blair asked them to, the 1 employee (Yoast) who declined Blair's invitation to participate in the vote, and the 2 employees (Blair and Rader) who counted the ballots and verbally expressed acquiescence in the result, each thereby engaged in activities protected by Section 7 of the Act, which gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, [and] the right to refrain from any or all such activities . . ." See *Cleveland Sales Co.*, 292 NLRB 1151, 1156 (1989). Accordingly, Respondent violated Section 8(a)(1) of the Act when Koenig, who is Respondent's owner, told employee Rader that Koenig was not happy with the vote, and and told Rader, emphatically and repeatedly, to conduct another vote with "100 percent participation."<sup>40</sup>

<sup>40</sup> *Eau Claire Press Co.*, 260 NLRB 1072, 1073 (1982); *Keystone Lamp Mfg. Corp.*, 284 NLRB 626, 634–635 (1987), *enfd.* 849 F.2d 601 (3d Cir. 1988), *cert. denied* 488 U.S. 1041 (1989).

2. Whether Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union by letter dated August 13

For most purposes, a union enjoys an irrebuttable presumption of majority support during the effective period (up to 3 years) of a collective-bargaining contract to which the union is a party.<sup>41</sup> However, after the contract has expired by its terms, an employer may lawfully withdraw recognition from the union if he can rebut the union's presumption of majority status by showing that at the time of the refusal to bargain, either (1) that the union did not in fact enjoy majority support; or (2) that the employer had a good-faith doubt, founded on a sufficient objective basis and raised in a context free of unfair labor practices, of the union's majority support.<sup>42</sup> It is true that in the instant case Respondent withdrew recognition about 63 days before the contract expired. However, Respondent's letter of withdrawal stated that Respondent would honor that contract until its expiration,<sup>43</sup> and was received during a period when a representation petition could have been filed without being barred by the contract. Accordingly, as to recognition of the Union after the contract expired and for the purposes of negotiating a successor agreement, the legality of Respondent's action in withdrawing recognition is controlled by the line of cases illustrated by those cited in footnote 42, supra; see *Abbey Medical/Abbey Rents*, supra, 264 NLRB 969. Although the defenses of actual loss and good-faith belief in loss of majority are conceptually distinct, in the instant case (as will appear) they are interrelated.

Initially, I note that on August 10, 3 days before Respondent withdrew recognition from the Union, a majority of the employees had voted among themselves, by secret ballot, for continued union representation. At that time, and even disregarding the presumption of continued majority flowing from the Union's long incumbency and existing contract, there was no basis whatever for questioning the Union's majority status or for any company claim of good-faith doubt of such majority. However, Koenig's statements to employee Rader a few hours after this August 10 election, which statements Rader relayed to the other employees on August 11, showed that Koenig was dissatisfied with the election solely because the Union had won it; such statements thereby strongly suggested that the only election results which he would honor would be the results of an election which the Union lost.<sup>44</sup> Such a message would likely be sufficient to

invalidate even a Board election lost by the Union; see *S & G Concrete Co.*, 274 NLRB 895, 897 (1985); *Madison Industries*, 290 NLRB 1226, 1230 (1988).

Moreover, employee Rader arranged for a second balloting, to be held on August 13, solely because on August 10 his employer, Koenig, had unlawfully instructed Rader to do so. Accordingly, I agree with the General Counsel that for the purpose of conducting the August 13 balloting, Rader was Respondent's agent. Further, although there is no evidence that Rader told his fellow employees in terms that he was arranging for a second balloting because Koenig had instructed him to do so, I infer that at least some of the employees so concluded, in view of Rader's status as the Union's steward and his report to them that Koenig had said he was unhappy with the August 10 vote and wanted 100-percent participation. Accordingly, I conclude that as to the employees' wishes regarding union representation, the reliability of the August 13 secret balloting must be judged by the standards set forth in *Struksnes Construction Co.*, 165 NLRB 1062 (1967), as supplemented in *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1061, 1063-1064, 1074 (1989), remanded as modified 923 F.2d 398 (5th Cir. 1991).<sup>45</sup>

The *Struksnes/Texas Petrochemicals* standards for employer polling of employees were developed to accommodate the statutory goal of stable collective-bargaining relationships, the employer's practical interest in determining whether he may legitimately withdraw recognition from a union, and the employees' right freely to choose whether or not to be represented.<sup>46</sup> In connection with protection of such employee rights, the Board has observed that any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to infringe on his Section 7 rights.<sup>47</sup> The *Struksnes/Texas Petrochemical* standards are: (1) the purpose of the poll is to determine the truth of a union's claim of majority; (2) this purpose is communicated to the employees; (3) assurances against reprisal are given; (4) the employees are polled by secret ballot; (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere; and (6) the employer has provided the union with reasonable advance notice of the time and place of the poll. The Board has held that the results of a poll which fails to conform with the *Struksnes* standards may not be used to justify the withdrawal of recognition; see *Roanwell Corp.*, 293 NLRB 20, 23 (1989).

As to the August 13 "yes/no" poll, the only one of these standards which was clearly satisfied was the secret-ballot requirement. This poll plainly failed to satisfy the requirements, which are directed to protecting employee freedom of

<sup>41</sup> *NLRB v. Iron Workers Local 103 (Higdon Construction)*, 434 U.S. 335, 343 (1978); *Hajoca Corp.*, 291 NLRB 104 (1988), enf. 872 F.2d 1169 (3d Cir. 1989).

<sup>42</sup> *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542, 1545 (1990); *Laidlaw Waste Systems*, 307 NLRB 1211 (1992); *Hajoca*, supra, 291 NLRB 104.

<sup>43</sup> As discussed infra, part II,I,4, Respondent did not in fact do so.

<sup>44</sup> That Koenig meant precisely this is shown by his subsequent conduct and his testimony. Although the only criticism—other than the result and the anonymity of the ballots—he ever voiced as to the August 10 election was the fact that one unit employee had failed to participate in an election which the Union won 6 to 4, in explaining why he withdrew recognition on August 13 Koenig described as "good" the "second ballot" inspected by Schulhof, even though Schulhof had advised Respondent that only 10 employees had "voted" and Schulhof withheld from Respondent the identity of the employees who had signed the "I do not want" documents.

<sup>45</sup> *Hohn Industries*, 283 NLRB 71, 77 (1987); *American Temper- ing, Inc.*, 296 NLRB 699, 708 (1989), enf. 919 F.2d 731 (3d Cir. 1990).

<sup>46</sup> See *Texas Petrochemicals*, supra, 296 NLRB at 1059-1063.

<sup>47</sup> *Struksnes*, supra, 165 NLRB 1062; *Johnnie's Poultry*, 146 NLRB 770, 774775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). Thus, in the instant case the employees repeatedly expressed concern at safeguarding the identity of the employees who favored the Union and those who did not; supra, parts II,D,E. Indeed, such likely employee concerns were recognized by Attorney Schulhof when he warned Koenig that there was "no way" Schulhof would tell Koenig "who voted what."

choice, that the employees be advised that the purpose of the poll was to determine the truth of the Union's claim of majority (indeed, the employees were advised, in effect, that this was not the purpose); and that the employees be given assurances against reprisal (indeed, in disregard of the employees' statutory right to refrain from voting at all, they were told that they had to participate). Moreover, Respondent had engaged in the unfair labor practice of instructing employee Rader to conduct a second balloting in which all employees had to participate regardless of their statutory right to refrain therefrom, and created a coercive atmosphere by telling the employees (through Rader) that Respondent was requiring a second balloting even though there was nothing whatever to impugn the reliability of the August 10 balloting, which had the "unhappy" result of a union victory. Furthermore, although it is true that one of the participants in the August 11 arrangements for a second balloting on August 13 was the union steward (employee Rader), I am doubtful whether this constituted reasonable advance notice of the poll to the Union, in view of the fact that Rader was a rank-and-file employee who had been rendered Respondent's agent in connection with arranging for the balloting by virtue of Koenig's unlawful instructions to Rader to arrange for such a balloting, obviously for the purpose of procuring a different result.

In short, as to the August 13 "yes/no" poll, the results were insufficiently reliable to show that the Union had in fact lost its majority.<sup>48</sup> Such results should be discounted for the further reason that Respondent's action in arranging the poll, simply because Respondent did not want its employees to be union represented and without any basis whatever for doubting the Union's majority, and at least arguably without giving the Union advance notice of the time and place of the poll, had an unjustifiable, potentially disrupting and unsettling effect on the statutory goal of stable collective-bargaining relationships; see *Texas Petrochemicals*, supra, 296 NLRB at 1061-1062.

Although Koenig was not asked and did not testify about whether his decision to withdraw recognition was based at all on the results of the August 13 "yes/no" poll, he did testify that this decision was based primarily on the second set of "ballots" which Schulhof had "used." However, I conclude that this second set of "ballots" neither shows that the Union had in fact lost its majority, nor constitutes a sufficient objective basis on which Respondent could find a good-faith doubt of the Union's majority support. Thus, these documents came into existence shortly after and because of the August 13 poll which Respondent unlawfully told Rader to conduct and whose results are unreliable for the reasons previously explained; more specifically, employee Blair told

his fellow employees that he would come around with a piece of paper for them to sign if the Union was voted out during that poll, and the second set of Schulhof "ballots" (as well as the first set) evolved from Blair's planned "piece of paper." Accordingly, I conclude that as to the employees' desires, the second set of "ballots" (as well as the first set) was no more reliable than the underlying poll as evidence that the Union no longer had a majority.

Moreover, the reliability of the signed documents as a reflection of employees' free choice is further impugned by Respondent's connection with the procedure for obtaining them. Thus, when Blair told Koenig about the employees' desire to conceal their choice regarding union representation, Koenig provided the services of Attorney Schulhof to verify, count, and preserve both sets of documents, and told him that Koenig did not "care what it costs," to which Schulhof replied, "You better believe it is going to cost." In addition, Koenig learned from Schulhof (via Supervisor Legendre) what the "petitions" had said; relayed this to Company Labor Attorney Downs; was told by Downs that the wording might be "technically incorrect" and that the petitions "should have said"; telephoned Blair that counsel had said the "petitions" might be "technically incorrect"; and when Blair predictably asked what the "petitions" should have said, repeated to him Attorney Downs' proposed rewording, which Blair wrote down and used.<sup>49</sup> Moreover, because the creation and circulation of both sets of documents occurred among automobile servicemen during regular working hours, I infer that Koenig must have realized that working hours and some of Respondent's office support facilities were being used by the employees for this purpose.<sup>50</sup> Further, Koenig was specifically advised that Schulhof had used Koenig's office for a "long time" to validate the signatures, and the personnel files from which Schulhof obtained the exemplars used by him were obviously provided by Respondent's office staff with the at least tacit consent of general manager Legendre. Taken as a whole, such employer conduct exceeds the ministerial aid which can be supplied by an employer to an employee's decertification activities without vitiating a subsequent decertification petition.<sup>51</sup> A decertification petition so aided by the employer will be disregarded, partly because such employer activity draws into question whether the signatures resulted from the employees' free choice, and partly because to entertain such an employer-aided petition would have much the same unjustifiable disruptive effect on the stability of labor relations as would be caused by entertaining a petition filed by the employer himself in the absence of sufficient grounds to doubt the

<sup>48</sup> In so concluding, I give little weight to any failure by the Union to receive advance notice of the time and place of the poll. Such a requirement contributes to the likelihood not only of a reasoned and informed choice without the shortcomings of a last-minute, one-sided, whirlwind campaign by the employer, but also of genuinely secret and honestly tallied ballots cast by eligible employees only but by any eligible employee who wanted to vote. However, Respondent did not (so far as the record shows) campaign before the balloting, and the circumstances of the August 13 "yes/no" poll, in a relatively small unit, strongly suggest both the reality and the employees' perception of accurately tallied secret ballots cast by all eligible employees.

<sup>49</sup> In other words, Koenig in effect invited Blair to ask for the rewording proposed by Downs. Cf. *Ernst Home Centers*, 308 NLRB 848 (1992), and *Poly Ultra Plastics*, 231 NLRB 787, 787 fn. 2, 790 (1977), both of them cited by Respondent. In these two cases, the employees' inquiry was in no respect prompted by the employer.

<sup>50</sup> The record directly shows that Blair used the office copy machine and the services of Respondent's clerical personnel. From the probabilities of the case, I infer that he also used Respondent's stationery supplies.

<sup>51</sup> See *Craftool Mfg. Co.*, 229 NLRB 634, 636-637 (1977); *Weisser Optical Co.*, 274 NLRB 961 (1985), enfd. 787 F.2d 596 (7th Cir. 1986), cert. denied 479 U.S. 826 (1986); *Central Washington Hospital*, 279 NLRB 60, 64-65 (1986); *Hearst Corp.*, 281 NLRB 764 (1986), enfd. 839 F.2d 1088 (5th Cir. 1988).

union's majority.<sup>52</sup> Accordingly, the aid thus afforded by Respondent in connection with the signed documents precludes Respondent from relying thereon in support of its contention that it had reasonable grounds to doubt the Union's majority status.<sup>53</sup>

For the foregoing reasons, I conclude that Respondent has failed to show that when it withdrew recognition, either that the Union in fact no longer retained majority support, or that Respondent had a good-faith doubt, founded on a sufficient objective basis and raised in a context free of unfair labor practices, of the Union's majority support. Indeed, because all the conduct relied on by Respondent resulted from Respondent's unlawful action in instructing employee Rader to take a second vote, motivated by Respondent's unhappiness with the Union's victory in the first vote, to find that Respondent acted lawfully in withdrawing recognition would permit Respondent to profit from its own wrong.

3. Whether Respondent violated Section 8(a)(1) through Koenig's August 17 remarks to employee Rader

As previously found, on August 17 Koenig called employee Rader into Koenig's office; ordered him not to attend the forthcoming union meeting, that Rader was "not going;" and further said that Koenig wanted Rader to tell the men not to go. Koenig went on to say that if Rader did go to the union meeting, or did not tell the men not to go, there would be a serious aftermath; that Rader could be sued for slander by Koenig or by employee Blair. I agree with the General Counsel that such remarks constituted a violation of Section 8(a)(1) by Respondent. *Keystone Lamp Mfg. Co.*, supra, 284 NLRB at 634-635.

4. Whether Respondent violated Section 8(a)(1) through Koenig's August 18 speech and the economic improvements effected in early October; whether Respondent violated Section 8(a)(5) by making these improvements and by bargaining with unit employees individually

As previously found, on August 18 Koenig delivered a speech to the employees in which he thanked them for voting the Union out, and stated that if in 4 or 5 months they felt he was not treating them right, they could vote the Union back in. He stated that he did not think the employees would have voted the Union out if they did not think he would treat them right. He went on to say that the Union's action in scheduling a meeting for that evening meant that "a black cloud [is] hanging over our heads" which compelled him to worry about the Union rather than thinking about "our future." Then, he said that just as going to the union meeting was the employees' right under the law, not going was also their right. He said that the Union likely scheduled a meeting in a hotel facility for which the Union would have to pay, rather than in a regular union hall, because "The Union is hoping that you will forget about all the things they haven't done for you after you get a few free beers under your belt . . . . When the beer does start flowing, be careful . . . what you sign, because you may regret it." Koenig said that

going to the union meeting was "just like feeding a stray cat or having a parasite. Like the dog, the Union will keep coming back if you feed it by going to the meeting, but with the Union it's much worse than it is with any stray animal." He stated that the employees had "spoken loud and clear," and that he wanted to get on with "building our future, but instead we've got this black [cloud] over our heads." He went on to say that "on the other hand," if the employees chose to "go to the Union meeting, encourage that stray cat," they should not "be surprised if it [scatological verb] in your house." He remarked that union promises of raises in a new contract would be "promises [the Union] can't keep. Only I can make a promise and keep it 100%." Then, after accusing the Union of trying to charge the employees "the most money possible for Union dues," he stated that he had heard "the Union's saying you should go to their meeting out of loyalty and respect. You voted to give me a 1-year trial and now they want to change it after 5 days. Where is the loyalty [?]." He went on to say that by failing to go to the Union meeting, the employees would be telling the Union that they were tired of it and did not want to pay it any more money. He concluded with the words, which he himself had added to Attorney Downs' draft,

All I'm asking is that you give me the one year trial that you voted last Friday. Let's bury this union talk, cover it over and go one with our lives so that we can both make money.

Economic improvements for all of the unit employees were announced by Koenig about 6 weeks later (a week after Respondent received the initial charge here) and were put into effect on October 4, 12 days before the union contract expired by its terms.

I agree with the General Counsel that Respondent violated Section 8(a)(5) and (1) by putting economic improvements into effect on October 4. Because made while the parties' collective-bargaining agreement was in effect, these unilateral changes violated Section 8(a)(5) and (1) of the Act whether or not Respondent was under a duty to recognize the Union after the contract expired. *W. A. Krueger Co.*, 299 NLRB 914, 915 (1990); *NLRB v. Manley Truck Line*, 779 F.2d 1327 (7th Cir. 1985). Moreover, because Respondent's withdrawal of recognition from the Union was unlawful, Respondent's unilateral changes violated Section 8(a)(5) and (1) for the additional reason that they were effected without giving the union notice and an opportunity to bargain. *Litton Business Systems v. NLRB*, 111 S.Ct. 2215, 2221 (1991); *Louisiana Dock Co. v. NLRB*, 909 F.2d 281, 286 (7th Cir. 1990); *T.L.C. St. Petersburg, Inc.*, 307 NLRB 605 (1992). Furthermore, because Respondent was at all material times under a duty to bargain with the Union as the employees' exclusive representative, Respondent further violated Section 8(a)(5) and (1) by dealing directly with the employees regarding their wages and benefits. *Continental Insurance Co. v. NLRB*, 495 F.2d 44, 50 (2d Cir. 1974); *Fabric Warehouse*, 294 NLRB 189, 191-192 (1989), enfd. 902 F.2d 28 (4th Cir. 1990); *Henry Bierce Co.*, 307 NLRB 622, 633-634 (1992); see also *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 57-64 (1975); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338-339 (1944).

<sup>52</sup> See *Modern Hard Chrome Service Co.*, 124 NLRB 1235, 1236-1237 (1959); *Union Mfg. Co.*, 123 NLRB 1633 (1959).

<sup>53</sup> See *Insular Chemical Corp.*, 128 NLRB 93, 93 fn. 1, 98 (1960); see also the cases cited supra, fn. 51.

In addition, I conclude that irrespective of Respondent's duty to continue to recognize the Union, Respondent independently violated Section 8(a)(1) when Respondent on September 27 promised employees an increase in wages and benefits and when Respondent on various dates between October 1 and 4 implemented these promises. As to Respondent's promises, I conclude that they carried with them the implication that they were conditioned on the employees' not being union represented, in view of (1) Koenig's August 17 statements to employer Rader that Rader should "bury" the Union so "we can start anew. Give me one year . . . move things forward so that we could make more money and to get this bitterness out of the path and move on to a better future for both of us"; and (2) Koenig's August 18 speech to the employees where, after thanking them for voting the Union out, he said that the Union could not keep any promise of raises that it might make, that only he could make a promise and keep it, that the employees did not have to give him a year to prove himself, that the employees would not have told him they did not want the Union any more unless they thought that he would treat them right, that the Union's announcement of a union meeting meant he had to worry about this "black cloud" instead of thinking about "our future," and "All I'm asking is that you give me the one year trial that you voted last Friday. Let's bury this union talk [and] cover it over . . . so that we can both make more money." Moreover, I conclude that Respondent's action in keeping these promises was similarly motivated, and, therefore, constituted an additional violation of Section 8(a)(1). *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *NLRB v. Century Moving & Storage*, 683 F.2d 1087, 1091 (7th Cir. 1982); *Pincus Elevator & Electric Co.*, 308 NLRB 684, 692 (1992).<sup>54</sup> Finally, I agree with the General Counsel that Respondent violated Section 8(a)(1) when Koenig asked the employees on August 18 not to attend the union meeting scheduled for that evening, particularly because of Koenig's concomitant strong implication that their going to the meeting would interfere with his "building our future" when he could make and keep a promise of "more money." *Key-stone*, supra, 284 NLRB at 634-635.

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

All auto mechanics, automotive machinists, welders, trimmers, body and fender men, painters, electrical machinists, radiator repairmen, frame and front-end and their apprentices and oil, lube and undercoat men; and foremen and testers when using the tools of the trade,

<sup>54</sup> Respondent's posthearing brief states (p. 19) that on September 27, 1993, Koenig "was merely advising the employees of their yearly increase." The 3-year bargaining agreement which was to expire on October 15, 1993, had called for one across-the-board wage increase to become effective on October 15, 1992, 2 years after the effective date of the agreement.

employed by Respondent at its Carbondale, Illinois facility.

4. Respondent has violated Section 8(a)(1) of the Act by instructing employee Rader to conduct a re-vote on the subject of union representation; by instructing him on August 17, 1993, (a) not to attend a union meeting and (b) to tell other employees not to attend; by telling employees on August 18, 1993, not to attend a forthcoming union meeting; by promising employees an increase in wages and benefits if the employees would continue to be unrepresented by the Union; and by implementing that promise.

5. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive bargaining representative of the unit described in Conclusion of Law 3.

6. Respondent has violated Section 8(a)(5) and (1) of the Act by making unilateral changes in conditions called for by a bargaining agreement which had not expired by its terms; by withdrawing recognition from the Union; by making unilateral changes in wages and benefits without giving the Union notice and an opportunity to bargain; and by dealing directly with unit employees regarding their wages and benefits.

7. The unfair labor practices found in Conclusions of Law 4 and 6 affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, Respondent will be required to bargain with the Union, on request. In addition, Respondent will be required, on the Union's request, to rescind the changes in wages and benefits instituted in October 1993; but nothing in this Order shall require or authorize Respondent to take such action without the Union's request. Although it seems unlikely that any employees suffered any losses in consequence of such changes, as a precautionary matter a make-whole order will issue. In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>55</sup>

#### ORDER

The Respondent, Vic Koenig Chevrolet, Inc., Carbondale, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Instructing employees to conduct a re-vote on the subject of union representation.
  - (b) Instructing or telling employees not to attend a union meeting.
  - (c) Instructing employees to tell other employees not to attend a union meeting.

<sup>55</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.

(d) Promising employees an increase in wages and benefits if the employees would continue to be unrepresented by a union.

(e) Increasing wages and benefits to discourage union representation.

(f) Unilaterally changing conditions called for by a bargaining agreement which has not expired by its terms.

(g) Unlawfully withdrawing recognition from District 111, International Association of Machinists & Aerospace Workers, AFL-CIO as the representative of the following unit of Respondent's employees:

All auto mechanics, automotive machinists, welders, trimmers, body and fender men, painters, electrical machinists, radiator repairmen, frame and front-end and their apprentices and oil, lube and undercoat men; and foremen and testers when using the tools of the trade, employed by Respondent at its Carbondale, Illinois facility.

(h) Making unilateral changes, with respect to the wages, hours, and working conditions of the employees in that unit, without giving District 111 prior notice and an opportunity to bargain.

(i) Dealing directly with employees in that unit with respect to such matters.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) On District 111's request, rescind the changes in unit employees' wages and benefits effective in October 1993, but nothing in this Order shall require or authorize Respondent to take such action without District 111's request.

(b) Make employees whole, with interest as called for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for any losses they may have suffered by reason of Respondent's unlawful unilateral action in October 1993.

(c) On request, bargain with District 111 as the exclusive representative of the employees in the aforesaid unit with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

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

(e) Post at its facilities in Carbondale, Illinois, copies of the attached notice marked "Appendix."<sup>56</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being duly 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.

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

## 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 instruct you to conduct a re-vote on the subject of union representation; instruct or tell you not to attend union meetings; instruct you to tell other employees not to attend union meetings; promise you an increase in wages and benefits if you continue to be unrepresented by a union; or increase wages and benefits to discourage union representation.

WE WILL NOT unilaterally change conditions called for by a bargaining agreement which has not expired by its terms.

WE WILL NOT unlawfully withdraw recognition from District 111, International Association of Machinists & Aerospace Workers, AFL-CIO as the representative of the following unit of our employees:

All auto mechanics, automotive machinists, welders, trimmers, body and fender men, painters, electrical machinists, radiator repairmen, frame and front-end and their apprentices and oil, lube and undercoat men; and foremen and testers when using the tools of the trade, employed by us at our Carbondale, Illinois facility.

WE WILL NOT make unilateral changes, with respect to the wages, hours, and working conditions of the employees in that unit, without giving District 111 prior notice and an opportunity to bargain.

WE WILL NOT deal directly with employees in that unit with respect to such matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL, on District 111's request, rescind the October 1993 changes in unit employees' wages and benefits; but nothing in the Board's order requires or authorizes us to take such action without District 111's request.

WE WILL make you whole, with interest, for any losses you may have suffered by reason of our changes in wages and benefits in October 1993.

WE WILL, on request, bargain with District 111 as the exclusive representative of the employees in the above unit and, if an understanding is reached, embody the understanding in a signed agreement.

VIC KOENIG CHEVROLET, INC.

Mary J. Tobey, Esq., for the General Counsel.

<sup>56</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."

*James F. Hendricks Jr., Esq.*, of Chicago, Illinois, for the Respondent.  
*Mr. Anthony Albright*, of Des Plaines, Illinois, for the Charging Party.

SUPPLEMENTAL DECISION IN CASE 14-CA-22692; DECISION IN CASES 14-CA-23085 AND 14-CA-23290

STATEMENT OF THE CASES

NANCY M. SHERMAN, Administrative Law Judge. The original charge in Case 14-CA-23085 was filed against Respondent Vic Koenig Chevrolet, Inc., by District 111, International Association of Machinists & Aerospace Workers, AFL-CIO (the Union) on June 24, 1994, and amended on August 10, 1994; the original complaint in that case was issued on August 10, 1994. The original charge in Case 14-CA-23290 was filed against Respondent by the Union on October 18, 1994, and amended on November 28, 1994. A consolidated complaint in both of these cases was issued on November 29, 1994.

Meanwhile, on November 22, 1994, the Board issued an order granting Respondent's motion to reopen the record in Case 14-CA-22692, in which I had issued a decision on May 20, 1994;<sup>1</sup> in that Order, the Board remanded that case to me to reopen the record and for further consideration of certain findings made by me in my May 1994 decision.

Thereafter, on November 30, 1994, counsel for the General Counsel (the General Counsel) filed a motion to consolidate all three cases. Although Respondent opposed this motion, Respondent has not requested the Board for permission to take an interim appeal (as permitted by Sec. 102.26 of the Board's Rules and Regulations) of my action is granting the motion to consolidate.

The hearing in the cases thus consolidated was held before me in St. Louis, Missouri, on January 19 and 20, 1995. The findings of fact and conclusions of law herein are based on the evidence adduced at that hearing and at the February 1994 hearing on which my May 1994 decision was based, on the demeanor of the witnesses who testified at these hearings, and on the briefs filed by the General Counsel and Respondent after the February 1994 hearing and the January 1995 hearing, respectively.

I. ISSUES RAISED IN CONNECTION WITH THE REOPENING OF THE RECORD IN CASE 14-CA-22692

*A. The Date and Content of a Conversation Between Company Owner Vic Koenig and Employee James Rader During the Week Ending August 14, 1993*

The additional evidence received at the reopened hearing in Case 14-CA-22692 is directed to an alleged conversation between Vic Koenig, who is Respondent's owner, and employee James Rader, the Union's steward. In my May 1994 decision, I found that Koenig said that he was not happy with the vote which the employees had conducted among themselves on Tuesday, August 10; that he wanted another

vote taken; and that he wanted 100-percent participation; and that he told Rader to arrange for such an election notwithstanding Rader's assertions that a second vote would do no good (p. 4, LL. 6-18). In so finding, I relied upon Rader's testimony, and discredited Koenig's testimony that he never had such a conversation with Rader (p. 4, LL. 32-35). I further found that this conversation occurred at about 4:15 p.m. on Tuesday, August 10 (p. 4, L. 4) on the basis of testimony by employee Ken Blair that on August 11 Rader described to him and other employees such a conversation with Koenig, and on Rader's testimony that this conversation occurred at about 4:15 p.m. and that he told other employees about it on the day after it occurred (p. 6, LL. 5-9). The testimony and exhibits tendered by Respondent at the reopened hearing establish that no conversation could have occurred between Koenig and Rader in Koenig's office at 4:15 p.m. on August 10, because Koenig was absent from his office all that day, and was a hundred miles or more away from his office between 9:30 a.m. and 6:04 p.m. that day.

Rader testified that during the week ending August 14, he had only one conversation with Koenig in his office. The credible evidence at the February 1994 hearing shows that no such conversation could have occurred on August 12 after 3:30 p.m. (see p. 6, LL. 44-46, of my May 1994 decision). I accept Koenig's testimony at the January 1995 hearing, to some extent corroborated by his testimony at the February 1994 hearing (see p. 13, LL. 40-49 of my May 1994 decision), that he had this conversation in his office with Rader on the evening of Wednesday, August 11. Although I doubt the veracity of Koenig's testimony about the contents of this conversation, and of his and Supervisor Michael Sparks' testimony about the events which immediately preceded and followed it (see *infra*, fn. 3),<sup>2</sup> the date and hour of this conversation virtually exclude the possibility that the conversation included the remarks which Rader testimonially attributed to Koenig and himself. More specifically, because the employees (including Rader) had already arranged at about noon that day for a second vote to be taken on August 13, Rader would probably not have voiced objections to Koenig about a second vote if Koenig had proposed one-as he would in any event have realized was unnecessary except in the somewhat unlikely event that his August 11 information about these plans reached him after, rather than before, his conversation with Rader (see p. 5, LL. 18-19, 35-36 of my May 1994 decision). Accordingly, I hereby withdraw my May 1994 factual findings as to the Rader-Koenig conversation that week (see p. 4, LL. 6-18, 32-35). In addition, I withdraw my factual findings on page 6, lines 5-23 (ending with "11"); line 39; and lines 41 (beginning with the word "and")-43; except (a) as to lines 12-14 (beginning with the words "the credible" and ending with the word "office"); and (b) the beginning of the last sentence in the paragraph.<sup>3</sup>

<sup>2</sup> The pleadings filed after the issuance of my May 1994 decision establish Sparks' supervisory status.

<sup>3</sup> However, I accept Rader's denial of Sparks' testimony, on direct examination by Respondent's counsel, that during a private conversation on August 11, Rader told Sparks that if "you guys would have come to me earlier, I could have got this thing handled for you. Like, right now, I could give you a nine to two count to get the union out." As to this matter, Sparks' veracity is impeached by his testimony that he had never told anyone about this conversation be-

*Continued*

<sup>1</sup> Typographical errors in my original decision have been noted and corrected. Also, on p. 13, L. 29, the quotation is from the testimony of James Rader, and not from the testimony or notes of Vic Koenig; cf. p. 14, L. 43.

This change in my factual findings calls for deletion from my May 1994 Conclusion of Law 4 the finding that Respondent has violated Section 8(a)(1) of the Act by instructing employee Rader to conduct a revote on the subject of union representation (p. 25, LL. 16–17); deletion of paragraph 1(a) from my May 1994 recommended Order (p. 26, L. 9); and deletion of words 4–15 from the second full paragraph of my May 1994 recommended notice. In addition, this change in my factual findings also calls for deletion of the last 2 sentences in footnote 26 of my May 1994 decision (p. 9, LL. 41–46); the words on page 10 beginning with “whose” on line 14 and ending with “vote” on line 17; page 18, lines 9–28 and 44–46; page 19, lines 16 (beginning with the word “However”)–27 (ending with the word “agent”), lines 41–48; page 20, lines 23 (beginning with the word “Moreover”)–35; the sentence beginning on page 20, line 38 and ending on page 21, line 5; page 21, lines 13 (beginning with the word “which”)–16 (ending with the word “and”); and page 22, lines 19 (beginning with the word “Indeed”)–23.

*B. The Reliability Vel Non of the August 13 Yes/No Balloting*

Credited testimony by company witness Ken Blair discloses that before conducting the “yes/no” balloting on August 13, Rader told the employees that Koenig had said he was unhappy with the August 10 vote and wanted 100-percent participation.<sup>4</sup> I infer that the employees believed this to be true. Moreover, for the reasons discussed in my May 1994 decision (p. 19, LL. 27 [beginning with the word “Further”]–29), I infer that employees concluded that Rader was arranging for a second balloting because Koenig had in-

fore testifying about it, and had not discussed his testimony with either Koenig or company counsel prior to the hearing; I credit Respondent’s counsel with more thorough trial preparation than Sparks admitted to.

Koenig testified at the February 1995 hearing that Rader told him that

if [Koenig] had come to him prior to all of this happening, he’d have gotten rid of the union this time . . . . But . . . since [Koenig] had talked to Ken Blair, that we might have to sign an agreement this time, but he’d have them out in three years. Then [Rader] went on to say that Ken Blair and Fred [Tolar] were liars, thieves and two-faced [;that Rader] had seven votes now . . . ; and if [Koenig] would give them 35 cents an hour one year or 45 for two years, he’d get rid of the union now. He’d have a nine to two vote.

As to the context of these alleged remarks, denied by Rader, the instant record discloses only that Blair had by that time taken some exploratory action directed to decertifying the Union. I am unable to reconcile Koenig’s testimony about the content of this August 11 conversation with his testimony that less than a week later, after telling Rader that Koenig did not believe Rader’s assertions of neutrality about the Union, Koenig urged him to join Koenig’s side, set the Union to rest, and “bury” it. However, I find it unnecessary to determine what was said during this August 11 conversation.

<sup>4</sup>My reasons for concluding that Koenig did not make such statements moots the General Counsel’s motion that the testimony about Rader’s report to other employees be received under Rule 801(d)(1)(B) of the Federal Rules of Evidence. Cf. *Tome v. United States*, 115 S.Ct. 696 (1995).

structed him to do so.<sup>5</sup> Accordingly, for the reasons set forth on page 20, lines 1–23 (ending with the word “participate”) of my May 1994 decision, the results of this second “yes/no” balloting were insufficiently reliable to show that the Union had in fact lost its majority. To be sure, because Respondent had no way of knowing that the employees had been misled into believing that the second “yes/no” balloting had been directed by Koenig, its results might at least arguably have provided a sufficient objective basis, in a context free of unfair labor practices, for withdrawing recognition from the Union. However, the record is barren of evidence that in withdrawing recognition, Respondent relied at all on the second “yes/no” balloting.<sup>6</sup>

Further, because the employees believed that the August 13 “yes/no” balloting had been instigated by Koenig, the signed documents received by attorney Schulhof later that day were unreliable as a reflection of employees’ free choice for the reasons set forth on page 21, line 15–page 22, line 14 of my May 1994 decision. To be sure, Respondent’s reliance on these documents in support of its withdrawal of recognition must be evaluated on the basis of my finding that Respondent did not know that the employees believed Koenig had instigated the August 13 “yes/no” balloting. However, I adhere to my finding that Respondent has failed to show that when withdrawing recognition, Respondent acted in a context free of unfair labor practices, within the meaning of the line of cases exemplified by *Hajoca Corp.*, 291 NLRB 104, 105 (1988), *enfd.* 872 F.2d 1169 (3d Cir. 1989). Such a requirement is imposed partly because, where an incumbent union has not been shown to possess minority status at the time the employer withdrew recognition, to permit such action by an employer who engages in unfair labor practices which tend to prevent the union from proving majority status would, as a practical matter, enable him to use his own unlawful conduct as a means of overcoming the in-

<sup>5</sup>Thus, although employee Yoast had chosen not to participate in the August 10 “yes/no” balloting arranged by employees Rader and Blair, Yoast did participate in the August 13 “yes/no” balloting, and inserted an unsigned petition in the first set of envelopes collected by Blair later that day. While Rader himself knew the real impetus behind the August 13 balloting, his vote could not have affected the result. Moreover, he did not sign any of the “petition” documents collected by Blair on August 13.

<sup>6</sup>As to the initial (Aug. 10) “yes/no” balloting, which the Union won, Koenig testified at the January 1994 hearing, “I didn’t really consider it a vote. I considered it a poll”; at the February 1995 hearing, he characterized it as a “straw.” I do not credit Koenig’s testimony at the reopened hearing that his August 10 decision to return to Carbondale that evening, rather than to drive to Nashville as he had initially intended, was due solely to Sparks’ report that on August 10 another dealership’s unionized employees had been trying to intimidate Respondent’s employees in connection with the August 10 balloting; and was unrelated to the results of the balloting. Notwithstanding Koenig’s testimonial explanation that negotiations with the Union would be handled only by his attorney and his supervisors, he must have realized that as to any negotiations with the Union by any agent of Respondent, the ultimate interest was his own, as Respondent’s owner. Moreover, although Koenig testimonially attributed his return to Carbondale to a perceived “duty . . . to talk to that dealer, or at least to get things under control,” after his return he did nothing about the intimidation allegedly reported by Sparks. Although Supervisor Sparks testified for Respondent, he was not asked about this matter, and there is no probative evidence that any such intimidation ever occurred.

cumbent union's presumption of continued majority status. However, 2 days after the Union's August 16 receipt of Respondent's letter withdrawing recognition, and a day or so after being advised of then company counsel's error in advising Koenig that the documents signed by the employees on August 13 would keep the Union out for a year, Koenig conducted an employee meeting on August 18 during which, after unlawfully urging employees not to go to the union meeting scheduled for that evening, he strongly implied that such attendance would interfere with his "building our future" when he could make and keep a promise of "more money." Koenig directed a rather similar message to employee Rader on the preceding day.<sup>7</sup> Furthermore, a few weeks later, Koenig unlawfully promised employees an increase in wages and benefits with the implication that it was conditioned on the employees' not being unionized; and thereafter, he unlawfully granted such increases for the purpose of keeping the shop union-free. Manifestly, such unfair labor practices have precluded any reliable determination as to the Union's majority status at any relevant time after the August 10, 1993, balloting where the Union prevailed. I note, moreover, that as a practical matter any election requested by the Union after Respondent's withdrawal of recognition might well have been irretrievably tainted by, at the very least, Respondent's August 17 and 18 unfair labor practices.<sup>8</sup>

For the foregoing reasons, I adhere to the Conclusions of Law in my May 1994 decision, except as to the following language in Conclusion of Law 4: "by instructing employee Rader to conduct a revote on the subject of union representation."

<sup>7</sup> Respondent contends that because of the evidence which caused me to discredit Rader's testimony as to his conversation with Koenig before the withdrawal of recognition, as to the August 17 conversation I should withdraw my May 1994 findings to the extent that they are based on Rader's testimony. However, as to the August 17 conversation I adhere to my previous findings. Thus, Rader's testimony is indirectly corroborated by Koenig's testimony and notes as to his August 18 address. Moreover, Koenig is not a very reliable witness. For example, his own notes as to the August 17 and 18 meetings cannot be reconciled with the portions of his testimony which Respondent's brief summarizes (pp. 18-19) as, "Respondent had no animus toward the union; on the contrary Koenig testified that he was neutral about the union vote on August 10th and saw advantages and disadvantages to its existence."

<sup>8</sup> More specifically, such unfair labor practices could probably not be urged as objections to any election held pursuant to a petition filed by the Union after August 18 or 19, 2 or 3 days after the day on which the Union found Respondent's withdrawal letter wedged against the back door of the Union's hall in Herrin, Illinois, about 100 miles from the nearest NLRB Regional Office in St. Louis. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). Furthermore, although Respondent's withdrawal letter advised the Union that Respondent would comply with its legal duty to honor the current contract until the October 15 expiration date, Respondent's October 4 breach of this obligation could likely not be urged as an objection to any election held pursuant to a petition filed after October 4.

## II. THE UNFAIR LABOR PRACTICE ALLEGATIONS IN THE NOVEMBER 1994 COMPLAINT

The November 1994 complaint alleges that Respondent has violated Section 8(a)(1) of the Act by maintaining an unlawful restriction on solicitation activity protected by the Act; has violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation of, and rendering unlawful assistance and support to, an "executive committee;" has violated Section 8(a)(3), (4), and (1) of the Act by suspending, and issuing a written warning to, employee James Rader; and has violated Section 8(a)(5) and (1) by (a) dealing directly with that committee and other employees, (b) appointing an employee intermediary to resolve employee grievances, and (c) unilaterally raising wages, and changing the calculation of wage rates for certain purposes, without giving the Union prior notice and an opportunity to bargain with respect to this conduct and its effects.

### A. Allegedly Unlawful No-Solicitation Rule

The pleadings establish that since at least September 1989, Respondent has maintained the following rule in its employee handbook:

#### Solicitations

Solicitations and collection of funds will not be allowed on company property or time. Any exceptions must have approval of management.

I agree with the General Counsel that to the extent that this rule is applicable to solicitation activity in connection with the exercise of employee rights under Section 7 of the Act, the maintenance of the rule violates Section 8(a)(1) of the Act. Rules which proscribe such activity when neither the employee engaging in the solicitation nor the employee being solicited is expected to be actively working are presumptively unlawful. Further, any rule is unlawful which requires employees to secure permission from their employer as a precondition to engaging in such protected activity during such periods. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992); see also *Montgomery Ward & Co. v. NLRB*, 692 F.2d 1115, 1120 (7th Cir. 1982), cert. denied 461 U.S. 914 (1983). The instant prohibition would be unlawfully broad even if it merely forbade such solicitation on "company . . . time," because such language could encompass all times when the employee is on the clock. *Hoyt Water Heater Co.*, 282 NLRB 1348, 1357 (1987); *Florida Steel Corp.*, 215 NLRB 97, 98-99 (1974). In the instant case, such an interpretation is rendered yet more reasonable by the fact that the prohibition extends, without exception, to "company property," although employees are obviously going to be present on "company property" during periods (such as bathroom breaks) when they are not expected to be actively working. Respondent has presented no evidence of any management interest that might even arguably justify such restrictions and thereby overcome the presumptive unlawfulness of its no-solicitation rule. Accordingly, the rule is unlawful notwithstanding the absence of evidence that it has been enforced.

*Alaska Pulp Corp.*, 300 NLRB 232, 234 (1990), enfd. 944 F.2d 909 (9th Cir. 1991); *Industrial Wire Products*, 317 NLRB 190, 192 (1995).

B. *Alleged Violations of Section 8(a)(2), (5), and (1) of the Act*

1. The appointment of employee Ross as “intermediary”

A few days before September 20, 1994 (see *infra* fn. 9), Supervisor Sparks told unit employee Ardell Yoast that unit employee Mark Ross was going to be “the intermediary.” Sparks said that if the employees had any problem, they were supposed to go to Ross rather than Koenig. Sparks went on to say that if Ross could not work the problems out with the employees, the employees should talk to Sparks and, if the employees could not work out the problems with Sparks, Ross would go on the employees’ behalf (and outside their presence) to talk to Koenig. In discussing with unit employee Robert Swaar about whether to accept the position of “intermediary,” Ross told Swaar that Ross’s duties would consist of trying to resolve disagreements or problems between employees or between an employee and Respondent, and (if necessary) to seek management’s help in resolving differences between employees. Although Swaar told Ross that Swaar would be supportive of him if he accepted the position, Swaar credibly testified that he was not involved in any employee meetings, discussions, or voting to choose Ross as intermediary. Similarly, employee Yoast credibly testified that so far as he knew, no employee meetings or votes were held to choose Ross as intermediary. There is no evidence that any such employee meetings, discussions, or votes were ever conducted. I infer that he was selected as “intermediary” by management.

Yoast credibly testified without objection that Ross told him unit employee Blair had preceded Ross as “intermediary.” Blair testified for Respondent but was not asked about this matter.

2. Formation of an alleged employer-dominated “labor organization;” alleged direct dealing; alleged unilateral changes

From the evidence adduced in the February 1994 hearing, Koenig learned the identity of those who had signed the August 1993 antiunion petitions and those who had not. In September 1994, Koenig decided to create a four-employee group which, “so that I had a fair spread,” was to consist of two employees who had signed such petitions and two who had not, and to consist of two each from the body shop and the mechanical shop. The group selected by Koenig consisted of body shop employees Michael Dixon and Greg Newell and mechanical shop employees Ardell Yoast and Mark Ross; of these four employees, Ross and Newell had signed such petitions. Yoast credibly testified that he had heard Supervisor Sparks refer to this group as the “executive committee,” and it is so identified in the complaint; for the purposes of convenience, the group will be so referred to herein.

About September 20, these four employees were called by management to Koenig’s office during regular working hours, for a conference which lasted about 15 minutes. Yoast, who was paid on an hourly basis, was paid for the

time he spent at this and a subsequent conference; the record fails to show whether the other three (whose pay is not necessarily controlled solely by the number of hours they work; see p. 17, LL. 14–17 and fn. 39 of my May 1994 decision) received any pay allowance for their time at such conferences. Yoast, who was the only employee member of this group who testified before me after this conference was held, credibly testified that before the conference began, he did not know what he had been called to Koenig’s office for. Koenig testified, “Five minutes before that group came in, they didn’t have any idea what I was coming up with.” He further testified that employee Ross was the first member of this group to arrive at Koenig’s office; that just prior to the meeting, Ross asked him “in passing” to look at pay for the next year, “I was told by somebody else to see if we could get a dollar an hour;”<sup>9</sup> and that Koenig replied that he believed his obligation was to keep up with the cost of living, plus having the highest wages in the area.

During this conference, which was also attended by Supervisor Sparks, Koenig said that “it was that time of year again . . . October 1 was the anniversary,” and that Respondent would have a new pay plan. He said that as far as wages were concerned, his goal was to make sure the employees could stay up with the cost of living, and that he would do everything to make sure that Respondent’s wages were the highest and that it was fair. Koenig said that he just needed to know if there was anything that they would like Respondent to address. Koenig said that he wanted specific ideas from them to improve productivity and the shop’s ability to get work out, for both the employees and Respondent to make more money, and to make the shop a better place to work. The employees asked Koenig to start tightening up on absenteeism and tardiness, because the size of their pay for a particular job depends to a significant extent on how rapidly they can complete the job, and their work is slowed up if they have to take over an absent employee’s incomplete job and, in consequence, must spend time finding out what has to be done in order to finish it, and where the parts are. Koenig said that he would look into the matter. A few weeks later, effective October 1, Respondent implemented a policy under which more than three unexcused absences (including, perhaps, tardinesses) per year would lead to “some repercussions.” Inferentially thereafter, one of the unit employees was reprimanded and suspended for tardiness; the complaint does not allege this discipline and suspension to be unlawful.

The employees said that everybody should receive a “CCT” (Chevrolet Certified Technician) or “ASE” certification in his specialty; these are certifications issued by Chevrolet (a brand of vehicles sold by Respondent) to persons who pass a test to establish their competence in a particular field. Regardless of the number of hours actually needed to perform a warranty repair, Chevrolet normally reimburses Respondent for the number of “flat rate hours” which the Flat Rate Manual specifies for the job. Someone (possibly Sparks or Koenig) said that Chevrolet was more

<sup>9</sup>In view of this evidence, I infer that Ross’ appointment by management as an “intermediary” preceded September 20. Yoast credibly testified that he learned from Sparks about this appointment in the “time zone” of Koenig’s September 20 conference with the executive committee, but Yoast could not remember whether his conversation with Sparks took place “right before” or “shortly” after the September 20 conference.

likely to pay for more hours than specified in the Manual if the employee who had failed to complete the repair within the "flat rate hours" allowed therefor by the Manual had received such a certification; in addition to benefiting Respondent, this extra allowance frequently caused an increase in the employee's paycheck (see *infra* fn. 12). Koenig agreed to imposing the certification requirement. He further stated that under the old system, Respondent had been paying for the test if the employee passed it; but that under the new system, Respondent would pay for the test whether or not the employee passed it. Respondent's subsequent action in connection with the certification is described *infra* part II,B,3.

Someone suggested that "in a gray area," Respondent should claim from Chevrolet the higher arguable Flat Rate Manual hourly allowance for a repair, and pay that number of hours to the employee, whether or not Chevrolet agreed to the higher allowance.<sup>10</sup> Koenig credibly testified to remarking that if Respondent made such a request to Chevrolet, Respondent might experience some difficulty in being paid for a time allowance which Chevrolet would otherwise pay for without controversy. No further steps were taken in this connection. Although Koenig testified, in effect, that it was he who brought up the "gray area" suggestion, I infer from Koenig's admitted subsequent comments on this suggestion that it was advanced by an employee or employees.

The persons present also discussed the application of Respondent's policy with respect to customer complaints about unsatisfactory repairs which the customer had already paid for. Respondent was then following the practice of requiring an employee to "eat" the "W.D.O." (work done over) time for a defective repair, but paying employees for other repairs performed because of customer complaints relating to repair jobs.<sup>11</sup> Koenig expressed the opinion that in administering this policy, Respondent had been absorbing costs which were actually the employees' fault, and that Respondent would have to go back to the normal policy; "it had drifted off course a little bit and we were going to put it back on course." The employees voiced no objection. Respondent's subsequent action in connection with this matter is described *infra* part II,B,3.

About a week later, Supervisor Sparks told Yoast that he had to go up for another meeting. Present at that meeting were Yoast, Dixon, Ross, Newell, and Koenig. Koenig asked these four employees to talk with the other employees and "see if we could come up with another way of making more money, and how to get the percentages worked out so everybody would work harder to make more money."<sup>12</sup> Koenig asked the employees for "more specific" ideas, and to work

on some of his ideas on "how to put the money to make it interesting so [the employees] would work for the extra money on that percentage basis;" he explained that he wanted "to get more detail for another meeting for later" and wanted the employees to work on their and his ideas to get them "finalized out for the next meeting." Yoast suggested that customers be charged for diagnostics on electrical work and on drivability, because Chevrolet would not pay for it. So far as the record shows, no action was taken in connection with Yoast's suggestion in this respect.<sup>13</sup>

### 3. Additional unilateral changes

At a meeting of Respondent's technicians in early October 1994, Koenig read to them a document which was distributed to all unit personnel on October 11, 1994, and which set forth wages and other conditions of employment to be effective for 1 year effective October 3, 1994.<sup>14</sup> Comparison between this document and the October 1993 document described in my May 1994 decision (see p. 17, LL. 39-45) discloses at least the following differences: All technicians received a pay increase of 20 cents an hour. Journeymen mechanic technicians who attained 50 or more flat rate hours for a particular week would be paid for the following week an hourly wage of \$13.30 or \$13.60 an hour; under the October 1993 pay system, journeymen mechanic technicians who attained this level of flat rate hours would be paid for the following week a flat rate hourly wage of \$13. Journeymen body technicians who attained 53 or more flat rate hours for a particular week would be paid for the following week an hourly wage of \$13 to \$13.60; under the October 1993 pay system, journeymen body technicians who attained this level of flat rate hours would be paid for the following week a flat rate hourly wage of \$12.75 or \$13. Apprentice mechanic technicians who attained 50 or more flat rate hours in a particular week would receive for the following week an increase of 25 or 30 cents an hour; under the October 1993 pay system, apprentice mechanic technicians who attained this level of flat rate hours would be paid for the following week a 70-cent increase in their total flat rate hourly wage. Apprentice body technicians who achieved 53 or more flat rate hours in a particular week would receive for the following week an hourly increase of 20 to 30 cents; under the October 1993 pay system, apprentice body technicians who attained this level of flat rate hours would be paid for the following week a 20- to 70-cent increase in their total flat hourly wage. As to an employee who works a straight hourly

<sup>13</sup> My findings about this meeting are based on Yoast's testimony, which for demeanor reasons I credit in preference to Koenig's testimony that no such meeting occurred (see *infra*, fn. 14).

<sup>14</sup> Koenig credibly testified that about 5 minutes before the meeting began, he conducted "a little sneak preview" during which he read to the employees whom he had called together on September 20 the pay plan which, immediately thereafter, he announced to the employees generally. He was not asked the names of the employees who attended this "sneak preview." Yoast testified to having attended two meetings (about a week apart) between Koenig and the four-employee group; and to having heard about a third meeting, between Koenig and the other three, when Yoast returned from vacation. I credit Yoast's testimony about the date and contents of a second meeting a week or so after the first one, and conclude that the "sneak preview" described by Koenig was the third such meeting rather than (as he testified) the second and last.

<sup>10</sup> Art. XI, sec. 3 of the 1990-1993 bargaining agreement provided, "If the time allotment for any job in the Flat Rate Manual is obviously inequitable or non-competitive, the Employer shall continue to use such manual rate and either Party hereto may apply for adjustment . . ." Unadjusted disputes as to such matters were subject to the contractual grievance procedure.

<sup>11</sup> Art. XI, sec. 3 of the 1990-1993 bargaining agreement suggests that "W.D.O." was not taken into account at all in determining how much employees were to be paid.

<sup>12</sup> At all material times, Respondent has followed the practice of paying mechanics the number of flat rate hours produced, or 87-1/2 percent of their flat rate hourly base for all customer charged hours actually worked, whichever is greater. See p. 17, LL. 14-17 and fn. 39 of my May 1994 decision.

rate, the following language was deleted: "The company may put this man on flat rate upon one week's notice." Provisions for a technicians' contest with cash prizes were deleted. Also, "For all technicians are required to obtain certification through the Chevrolet Certified Technician program. Vic Koenig Chevrolet will pay 100 percent of the cost of the test. Failure to participate or intentionally failing the test will result in termination of employment."<sup>15</sup> Further, all technicians were required to participate in the A.S.E. program in their area of repair, with Respondent to pay the entire cost of the test; but a technician who failed to participate was required to reimburse Respondent for the full cost of the test, and failure to obtain certification "could result in no work assigned in that area of repair or supervision by certified technician while repairs are being done." In addition, "Time required to correct a W.D.O. is not covered by the [percentage] guarantee if it results in a technician billing less hours than his guaranteed hours . . . Part warranty repairs and good will adjustments are not included in W.D.O.s." (cf. supra fn. 11).

All of these changes were implemented by Respondent on October 4, 1994, without giving the Union notice or an opportunity to bargain. Since February 8, 1994, the date of the first hearing before me, Respondent has continued to refuse to recognize and bargain with the Union, based on Respondent's position that Respondent has no obligation to bargain because recognition was lawfully withdrawn.

#### 4. Analysis and conclusions

##### a. *The 8(a)(2) and (1) allegations*

Section 8(a)(2) of the Act forbids an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." As Respondent does not appear to question, Respondent "dominated," "interfered with the formation or administration of" and contributed "support" to the executive committee, within the meaning of Section 8(a)(2); more specifically, Respondent decided to create the committee, decided how many persons were to serve on the committee, decided the basis on which to select the committee members, decided on the identity of those who were to serve thereon, decided when and where it was to convene, ordered the employee members to attend, and paid at least one employee (Yoast) for the time he spent during the meetings. See *Electromation, Inc.*, 309 NLRB 990, 995 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994). Nor can there be any doubt that the committee satisfied the requirements, set forth in the statutory definition (Sec. 2(5)) of the term "labor organization," that employees participate therein.

However, Respondent contends that its conduct in connection with the committee did not violate Section 8(a)(2), on the ground that the committee did not satisfy the further requirement, also set forth in the statutory definition of the term "labor organization," of existing "for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." I disagree. Thus, after Koenig had requested the committee to give him specific

ideas for purposes which included enabling the employees and Respondent to make more money and making the shop a better place to work, the committee employees proposed that the completion time for jobs (for which the employees were largely paid on an essentially piecework basis) be diminished by diminishing absenteeism/tardiness and consequent expenditure of time incidental to transferring absentees' incomplete jobs to employees who were present. In response, Koenig said that he would look into the matter, and Respondent thereafter did in fact take some steps to diminish employee absenteeism. Also, the employees proposed that every employee be required to receive a certification in his specialty, a certification which increased the chances that the Respondent would receive from Chevrolet for warranty repairs, and the employees would consequently receive from Respondent, credit for more hours than the Flat Rate Manual called for; this proposal was accepted by Koenig, who also stated that Respondent would thereafter pay for more employee certification tests than previously. In addition, it was proposed to Koenig that in doubtful areas of warranty repairs, Respondent should pay the employees the arguably higher allowance whether or not Chevrolet eventually agreed thereto; Koenig rejected this proposal, and gave the employees his reasons for rejecting it. In short, the committee made proposals with respect to "wages" and "conditions of work," within the meaning of the statutory definition of the term "labor organization;" and Respondent accepted some (in whole or in part) and rejected others. I find that the relationship between the committee and Respondent entailed the bilateral mechanism process which constitutes "dealing" within the meaning of Section 2(5). *E. I. du Pont Co.*, 311 NLRB 893, 894 (1993); *Electromation*, supra at 995 fn. 21, 35 F.3d at 1161. Because the committee had been in existence for a relatively short time (since about 4 months before the hearing), and had met on only three occasions (including a 5-minute "preview" from Koenig of Respondent's October 1994 changes in wages and working conditions), and because at the second meeting Koenig solicited the committee to prepare for "another meeting for later . . . the next meeting" by, inter alia, consulting their fellow employees about a "percentages" system which would enable the employees (as well as Respondent) to "make more money," I conclude that the committee existed for a purpose of following, and in fact followed, "a pattern or practice" of dealing with Respondent with respect to wages and working conditions, and that such dealings did not constitute an "isolated instance;" see *E. I. du Pont*, supra at 894. Finally, because the employees' proposals covered all or most of the employees (including those who were not present), and because Koenig asked the committee to consult with other employees about changes in "percentages," I conclude that the committee was acting in a representative capacity (see *Electromation*, supra, at 994 fn. 20, 1002 (concurring opinion)).

For the foregoing reasons, I find that Respondent violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation of the executive committee and rendering unlawful support to it.

##### b. *The 8(a)(5) and (1) allegations*

In view of my finding that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union in August 1993, I further find that Respondent

<sup>15</sup>This is an exact quotation from the document, including punctuation.

violated Section 8(a)(5) and (1) of the Act (1) by appointing employee Ross as an “intermediary” who, if employee problems could not be worked out by him or Sparks, was to go to Koenig about such problems on the employees’ behalf; (2) by dealing directly with the executive committee and the employees on the committee; and (3) in October 1994, by unilaterally raising wages, and modifying its existing practice with respect to crediting employees in its wage rate calculation with time required to correct a W.D.O., without giving the Union prior notice and an opportunity to bargain. See the cases cited in my May 1994 decision, page 24, lines 2–11; see also, *E. I. du Pont*, supra, 311 NLRB at 918–919; *Missouri Portland Cement Co.*, 284 NLRB 432, 433 (1987).

### C. Alleged Discrimination Against James Rader

#### 1. Background

James Rader has been working for Respondent as an auto service technician since about March 1984.<sup>16</sup> About 1988, he became the Union’s steward. In October 1990, he participated, on the Union’s behalf, in the negotiation and execution of the most recent bargaining agreement between Respondent and the Union, which agreement expired by its terms on October 15, 1993.

My decision in *Koenig I* issued on Friday, May 20, 1994, and was served on Respondent by mail. My findings in that case adverse to Respondent were based partly on Rader’s testimony, which in significant respects I credited in preference to Koenig’s testimony.

#### 2. The 5-day suspension

General Manager Ervin Legendre, who is admittedly a supervisor within the meaning of the Act, testified that on a date he was not asked to give, but inferentially during a conversation with Koenig on the morning of June 2, 1994, Koenig asked Legendre to remind Koenig of what would happen if the men in the shop signed a petition that they did not want to work with Rader. Legendre further testified that on the morning of June 2, Koenig asked him to investigate a conversation between Rader and Parts Manager Doug Wood, who is admittedly a supervisor within the meaning of the Act.

As to how Legendre conducted this investigation, he testified that he “went and talked to department managers, [supervisors] Mike Sparks and Doug Wood initially,” and other employees that he thought might know something about the incident; according to Legendre, when an employee replied that he did not know anything, Legendre did not pursue the matter. Neither Wood nor Sparks testified about the content of the conversations referred to in Legendre’s testimony. Legendre testified that Wood outlined to him “a conversation that [Wood] and Jim Rader had in front of the men’s bathroom in the service department, with regard to calling some other employees informants, and not being involved in a meeting that had happened.” Still according to Legendre, he then asked Wood to write down what had happened, and

told Wood that Legendre would discuss it with him later. According to Legendre, Wood later gave him a note, dated June 2, which stated that at about 9 a.m. that morning, as Wood was walking from the parts department to the restroom, Rader approached him and started to tell him how Rader had “missed out on the big meeting that went on between Mark Ross, Ken Blair, and Greg Newell and inferred that they were somehow some kind of informant” for Koenig. The note went on to say:

As we walked through the restroom door, [Rader] saw [Ross] standing in the restroom and immediately quit talking and walked away. These comments by [Rader] made [Ross] extremely upset, that it was inferred by [Rader] that [Ross] was in on some secret meeting and was an informant to Mr. Koenig on the goings on in the service department.

The note then made the following assertions, which (so far as the record shows) had never been previously made to Koenig, Legendre, or anyone else:

This is just one of the many incidents which I have witnessed in the past several [months] in which Jim Rader, many times in the presence of customers, has, while waiting at the parts counter, or in the service [department] made comments in which he says that this place is poorly operated and/or the product we sell is a piece of junk. This no doubt causes our customers to be less than [faithful] in our abilities and attitudes. I feel in general that Jim has come to be a source of many problems and bad attitudes in the service [department] and parts [department].

This memorandum and Legendre’s testimony about what Wood told him were not received in evidence to show the truth of the reports made by Wood to Legendre. Rader credibly testified without contradiction that Wood never said anything to him about comments which he made in the parts department. Wood, who is admittedly a supervisor, did not testify, nor was his absence explained. Ross did not testify either. Koenig testified for Respondent, but was not asked about any June 2 conversation with Legendre or any conversation with Wood about Rader. Legendre testified that the memorandum which (according to him) was given to him by Wood was kept in Legendre’s company files in the normal course of business and as a part of his overall investigation of the Rader incidents for disciplinary purposes.

Legendre testified on direct examination (without corroboration from Koenig) that Koenig told him employee Fred Tolar had some information which Legendre should look into in his investigation; Legendre’s testimony at least implies that Koenig said this to Legendre during their conversation during the morning of June 2. On cross-examination, Legendre testified that Tolar “came to me” about these “complaints” because service manager Sparks was busy. Legendre was not asked the date or hour of his initial contact with Tolar about this matter. Legendre testified that he asked Tolar to put his information about the incident into writing. Tolar did not testify. Legendre testified that on June 3, he met in his office with Tolar and Sparks; Legendre further testified that immediately after this conference, he wrote a memorandum which is headed “June 3, 1994/12:58,” and

<sup>16</sup> As of September 1994 and February 1995, he was the only journeyman technician in Respondent’s employ who had not received a Chevrolet Certified Technician certificate. However, Respondent does not contend that this circumstance had anything to do with his discipline.

that he kept this document in his investigative file in his office in the normal course of his business. Sparks, who is admittedly a supervisor, testified for Respondent, but was not asked about this matter. Legendre testified that during this June 3 meeting, Tolar gave him a note which Legendre had never seen before, and which bears the notation at the top "2 June 94/8:20 a.m. C.D.T." This note states, and Legendre testified that during this June 3 conference Tolar told him, that Rader had said he was going to "rile" Ross about being an informant, and that Rader had further said he believed Ross to be an informant because employee Mike Dixon had told Rader that Blair, Newell, and Ross were having a meeting and that Ross was informing. The note went on to say that Tolar thereupon said that this made him an informant, too, because he was there also, to which Rader replied that he guessed he would have to watch "all you [obscene plural noun]." Neither Tolar's at least alleged note, nor Legendre's memorandum (which is consistent with his testimony), was received in evidence to show the truth of the contents.<sup>17</sup>

Legendre testified that if Ross had not been upset at Rader's at least allegedly calling him an informant, Legendre would probably never have been asked to investigate the incident, and that he believed Rader's at least alleged conduct to be more egregious because Ross was at least allegedly upset. Legendre testified that in Sparks' presence, he asked Ross whether he had overheard the conversation between Wood and Rader in which Ross had been called an informant, and that Ross said yes; such testimony by Legendre was not received to show the truth of Ross's report. Legendre went on to testify that Ross "was fairly well mortified, or put out, or certainly was mad about it . . . It was obvious to me, from my meeting with him, that he was very upset." Legendre testified that he asked Ross to give him a written statement of the incident, and that Ross said no, he was a man and would handle his own defenses. Ross did not testify. Supervisor Sparks testified for Respondent, but was not asked about any Legendre-Ross conversation in Sparks' presence. Legendre thereafter prepared a memorandum, which according to Legendre he kept in his "investigative file" in the normal course of his business, of his at least alleged conversation with Ross; this memorandum was not received in evidence to show the truth of the contents. The memorandum contains the statements, not referred to in Legendre's testimony, that Ross said he had been behind the bathroom door when he overheard the Rader-Wood conversation, and that Ross further said he had never heard Rader say that Dixon had called Ross an informant (cf. *infra*, fn. 18).

Legendre testified that in Sparks' presence, Legendre asked unit employee Dixon whether he had been a party to calling Ross an informant; that Dixon said no and speculated that this report had been made out of a jealous belief that

he was "the one to beat" as a body technician (Rader serviced brakes and air conditioning); and that Dixon asked who had started this report. Supervisor Sparks testified for Respondent, but was not asked about this at least alleged conversation. Legendre's testimony in this respect was not offered for the truth of Dixon's at least alleged representations to Legendre.

Later that day, Legendre prepared a memorandum regarding this alleged conversation and other matters discussed below. This memorandum, which according to Legendre was kept in his "investigative file" in the normal course of his business, was not received in evidence to prove the truth of the matters asserted. The memorandum, although not Legendre's testimony, attributes to Dixon the statement that there was a lot of backstabbing going on, that everyone had to watch his back closely, and that "now there was someone else he would have to watch. My [impression] was that he was referring to Rader."<sup>18</sup> Dixon did not testify, nor did Legendre ask him to write out a statement, as Legendre had requested other persons to do during his investigation.

Blair testified for Respondent at the reopened hearing (as well as the initial hearing), but was not asked about this June 2 incident. Newell testified for Respondent at the initial hearing, but did not testify at the reopened hearing. The evidence fails to show whether Legendre's investigation of this incident included any questioning of Blair or Newell.

Legendre testified that when he was questioning Respondent's personnel about the informant incident, he "began to find out a whole bunch of things that [had] happened that I didn't know had happened . . . I was appalled at the whole thing." Legendre went on to testify that "Because I began to hear things and discover things . . . that led me to believe that I had just uncovered a real bag of worms," he went around to the managers and employees who worked with and around Rader, and asked if they knew anything had happened. According to Legendre, he asked the employees if any of them had overheard the informant incident, or any of the conversation with regard to that; and whether there were any other incidents going on with respect to Rader, that they did not feel were "appropriate, in the course of business." Legendre testified that when he asked various employees if they had any information or anything that was relevant to the investigation, Gary Hanley (an employee in a nonunit job classification) started to list a number of things which had happened to him and that he had observed. Legendre went on to testify that Hanley thereafter gave him a memorandum which Legendre then reviewed with Hanley. The memorandum, which is dated June 3, alleges that on May 4 and 5, 1994, Rader purposely tried to irritate Hanley by being "very loud and rude" in making such comments as referring in front of customers to vehicles in scatological terms or as "junk Chevrolets;" commenting, when the parts department did not have a particular part in stock, that "[t]his would be

<sup>17</sup>Legendre's June 3 memorandum also attributes to Tolar the assertion, not included in Tolar's note, that Rader had "bragged" about keeping at home "some sort of Computer file and or paper record . . . which would show that he was being given jobs out of his classification" in order to show he was due some extra pay. Legendre was not specifically asked about this alleged statement. Rader was not asked whether he made this statement. However, he testified, in effect, that all his job assignments were within his classification, and that he did not use a home computer used by his wife. Respondent does not appear to contend that this alleged statement had anything to do with his discipline.

<sup>18</sup>As to his conversation with Dixon, Legendre testified, "[O]ut of that conversation came that information. The rumor got started. And it was quoted to me that Jim Rader was the person who started the rumor about the informants, a so-called meeting." This testimony aside, the only evidence about an alleged subsequent conversation on June 3 between Legendre and Sparks is a statement in the memorandum that Sparks told Legendre that Dixon had told Sparks that the "rumor" discussed in the Legendre-Sparks-Dixon meeting emanated from Rader.

a good [obscenity] place to start a parts department,” and that the parts department would probably have the part in stock if it were for a model T; and obscenely describing the mental abilities of “circus advisors” (a sarcastic term for “service advisers”). The memorandum concluded with the following language:

I've heard Jim Rader stab everyone in the back including myself. I cannot name dates because it happens so frequently. He seems to love to try and start arguments, generally making your day miserable. I feel Jim Rader is worth zero to this company.

This memorandum was not received in evidence to show the truth of the contents. Hanley did not testify. Rader credibly testified without contradiction that Hanley never complained to Rader about what he was doing; and that Wood never said anything to him about comments he made in the parts department. Legendre testified that he had not been told about the May 4 and 5 Hanley incidents by Hanley, Wood, or anyone else at the time such incidents occurred; that Legendre had no first-hand knowledge about whether Hanley had at that time reported them to Wood, although “I think [Hanley] did;” and that when Legendre asked Wood during the June 2 investigation whether he had heard about the May 4–5 incident, Wood said that he had. Supervisor Wood did not testify. Legendre testified that he kept the Hanley document in Legendre’s investigatory file in his office, in the normal course of business.

During this investigation, Legendre admittedly did not talk to Rader. On June 3, Legendre wrote Koenig a memorandum which mentioned Koenig’s earlier request to remind him of what would happen if men in the shop signed a petition that they did not want to work with Rader. Legendre testified that on dates he was not asked to give (but between June 3 and 8, assuming the veracity of his testimony regarding his purported investigation), he conferred with Sparks and Koenig; that Legendre expressed the opinion to Koenig that Rader should be discharged; and that after discussion, these three members of management decided to give Rader a 1-week suspension. Sparks and Koenig both testified for Respondent, but were not asked about this matter. Legendre further testified that before he gave Rader a document (G.C. Exh. 15, discussed *infra*) on June 8, Legendre and Koenig discussed it with Respondent’s counsel.

On June 8, Rader was called to Legendre’s office, where Rader met with Legendre and Sparks. Legendre had brought with him a typewritten letter to Rader, dated June 8, which was received in evidence as General Counsel’s Exhibit 15. This letter stated that about August 17, 1993, Rader had been “warned about disruptive behavior and spreading rumors about other employees” (see my May 1994 decision, p. 13, L. 5–p. 14, L. 6); and that on December 14, he had been “issued a warning for [his] conduct” and told that “future instances of such conduct will lead to discipline up and including discharge.”<sup>19</sup> Legendre continued to read Rader the letter through the following material (emphasis in original):

<sup>19</sup> See *infra*. This December 1993 warning (dated December 8 but issued on December 14) was purportedly directed to alleged requests by Rader for permission to leave early. There is no evidence or claim that Rader ever in fact left early without permission.

Now it has come to our attention that you are spreading false rumors, making derogatory comments about customer cars, making false and derogatory comments about other employees, and insulting the personnel of our Parts and Service, Departments by using foul and abusive language when referring to them. Most of these were done in the presence of customers.

*SUCH ACTIVITY WILL NOT BE TOLERATED*

Then, Legendre read to Rader a typewritten memorandum (R. Exh. 36, not received in evidence to show the truth of the matter asserted), with the typewritten date June 8, 1994, which stated, *inter alia*, that during a conversation with Wood Rader had called Ross and others a derogatory name; that Ross had “overheard” this conversation and it had “caused him great stress and anguish;” and that Rader had told Tolar that Rader planned to rile Ross, thereby giving “obvious evidence of your intent to carry out your threat to upset Mark Ross.” As previously noted, Wood’s at least alleged note to Legendre said that Rader’s statement that Ross was an informer had been made at a time when Rader did not know that Ross could overhear him; and a similar statement as to Ross’ location is attributed to Ross in Legendre’s file memorandum about this interview. In addition, the memorandum which Legendre read to Rader stated that on May 4 and 5, in customers’ presence, Rader had described customers’ vehicles in scatological terms and as “junk Chevrolets;” and that on May 16 he had described a customer’s Spectrum in scatological terms while customers were present. Also, the memorandum stated that in front of customers and other employees, Rader had insulted Respondent’s service adviser personnel by calling them (in obscene language) stupid “circus advisors,” and had insulted Respondent’s parts department and parts personnel by saying that “this would be a good [obscenity] place to start a parts department.”

At this point, Legendre asked Rader if he had any comments. On advice of counsel, whom Rader had retained following his August 17, 1993, interview during which Koenig had raised the possibility of expensive slander lawsuits against Rader unless he failed to attend a union meeting and to tell other employees not to attend, Rader said no. However, Rader did ask whether he was being discharged. Legendre said no and, after a brief pause, read him the following material from General Counsel’s Exhibit 15:

Having not heeded your previous warning, you are hereby gives a (1) week disciplinary layoff effective immediately. Should your behavior not improve you will receive further discipline up to and including discharge.<sup>20</sup>

General Counsel’s Exhibit 15 contains the typewritten statement, before the typewritten signatures of Sparks and Legendre, “Read to Jim Rader and a copy handed to him.” Legendre gave Rader a copy of this document, which was

<sup>20</sup> My findings as to this interview are based mostly on Legendre’s testimony, which is consistent with the physical condition of G.C. Exh. 15 and is to some extent corroborated by the notes which Legendre made to himself in preparation for the conference. Although Rader testified that at his request, Legendre signed and dated G.C. Exh. 15, the only dates on the document are either written by Rader or typewritten.

signed in handwriting by Legendre and Sparks either before or at the end of this conference. Respondent's Exhibit 36 begins with the typewritten words "June 8, 1994/Read to Jim Rader," and is not signed. Rader was not given a copy of this document. Legendre testified that if Rader had denied the allegations in these documents, Respondent "might have done something different." However, Legendre did not specifically ask Rader whether he had done the things Legendre was accusing him of doing.

This interview led Rader to believe that eventually, he was going to get fired. He had never before requested unemployment compensation, believed that receiving it required a 1-week waiting period, and apparently believed that this requirement would be satisfied by evidence of a 1-week suspension preceding the discharge. On June 9, 1994, he went down to the unemployment compensation office, where he was told to take a number because three or four people were ahead of him. When his number was reached, he told the woman at the front desk that he "needed to sign up for [his] waiting week," and gave her a copy of his suspension notice. He did not orally tell her, or anyone else at the unemployment compensation office, that he had been discharged. Without looking at his suspension notice, she made a copy of it, gave him three or four forms, and told him to fill them out and hand them to her; she did not tell him how to fill them out. He filled them out and returned them to her. She set up an appointment for the following day.

One of the forms filled out by Rader bears the printed heading "Reason for Separation-Explanation" printed material immediately under this heading calls for the employee's name, address, social security number, and telephone number, all of which Rader filled out. Immediately under this material is the heading, "Claimant's [statement] on discharge from last employment." Then, the form contains the following printed material:

This form is important to you. Please read the explanation carefully before you answer the questions.

Explanation: When a person is in any way responsible for his being dismissed, laid off, or discharged from his last job, the law requires us to decide, if there has been "misconduct connected with his work . . ." a person [is] ineligible for benefits for a specified period of time if he has been discharged for misconduct connected with the work.

In a blank preceded by the printed question "When were you told you were being dismissed?", Rader inserted the date of his suspension. In a blank preceded by the printed question "Who discharged you?", Rader inserted "General Manager" (Legendre's title). In a blank preceded by the printed question "What reason did he give for letting you go?", Rader wrote, "Disruptive behavior." He filled out other blanks which stated that he had been warned on December 14, 1993, about his conduct (see *infra*); he checked a "no" box after the printed inquiry "Do you think you should have been discharged?"; and, after the printed inquiry "If no, explain why," he wrote "Labor hearing in Feb. 1994[.] I am a union steward." After he submitted this and the other forms, the unemployment compensation office crossed out the lower part of the printed form, headed "Claimant's Statement on Voluntary Leaving." The form

calls for the employee's signature after the printed statement, "I have made this statement for the purpose of obtaining unemployment insurance, knowing that the law provides penalties for false statements or withholding of facts." Rader signed the form without asking anyone at the unemployment compensation office why he was filling it out.

On the following day, Rader kept his appointment with a man whom Rader testimonially described as "the deputy or the adjudicator, or whatever they call them now, the guy that would handle my case." Rader told him that Rader was on a disciplinary layoff for 5 working days and was "filing for [his] waiting week." The man said that there was no problem with "filing the waiting week," and in the event that Rader was dismissed, he was to bring his paperwork and come back to the unemployment office. Rader never received any unemployment compensation payments.

Supervisor Sparks testified to the following effect: During the week of May 16, 1994, when he, employee Tolar (who did not testify), and about four customers were in the parts department, Rader entered the parts-department reception area (a room about 8 by 12 feet) to obtain a part which he needed to repair a Spectrum owned by a customer who was not then present. In the customers' presence, Rader gave a scatological description of the car he was repairing, and said that he was not sure whether the car could be repaired even with the part which he was obtaining. The customers were all startled, and some appeared to be angry; Sparks testified to the opinion that the customers were upset because they had no idea whether he was working on their car. After Rader had left the parts department, Sparks told him never to say anything like that again in front of customers; Sparks' concern was that Rader had said this in front of customers. Then, as each customer left the parts department, Sparks followed him to a point out of the employees' earshot and assured him that Rader was not working on his vehicle. One customer replied, "Do all of your technicians behave that way?"

Sparks' testimony about this alleged incident during the week of Monday, May 16, is consistent with one of the allegations spelled out in the memorandum which Legendre read to Rader (but did not give him) on June 8. However, the memorandum at least implies that Legendre did not find out about the alleged incident until Legendre's investigation of the June 2 incident, Sparks did not testify that he ever told anyone else about the alleged incident, and Legendre did not testify about the source of his information as to this alleged incident or the date on which he received such a report. Rader testified that he did not recall whether or not he made such a remark at all, but he did deny making any such remark in the known presence of customers (of whose presence he must have been aware if Sparks' testimony is unreservedly accepted), and also denied the conversation with Sparks testified to by him. I credit Rader for demeanor reasons and in view of the considerations summarized (*supra* at fn. 3).

The foregoing testimony by Sparks aside, Rader and the General Counsel's other employee witnesses gave virtually the only record testimony which is probative of what Rader in fact did in connection with the allegations which Legendre testified to having received.

1. Rader credibly testified without contradiction that he has for years been making derogatory comments (including

scatological comments) about customers' cars while he was working on them, in the presence of other technicians and employee Hanley and, perhaps, in the presence of Supervisor Wood, but not, to Rader's knowledge, in Sparks' presence. Further, Rader credibly testified that he tries to be careful not to make such remarks around customers. Rader, Yoast, and Swaar all credibly testified that throughout their employment with Respondent (as to Yoast, 25 years), outside customers' presence, they and other technicians had made derogatory comments (including scatological comments) about cars they were repairing.<sup>21</sup> All three of these technicians credibly testified that laying Rader to one side, nobody (so far as they knew) had ever been disciplined for using those kinds of terms about cars; nor is there any evidence otherwise. Sparks testified that as to such remarks in customers' presence, he had never "had this happen before"; I credit such testimony except as to his implication that Rader had made such remarks in customers' presence. Laying to one side Sparks' discredited testimony about the alleged Spectrum incident, there is no probative, nonhearsay evidence that Rader ever in fact made such comments in customers' presence.

2. Rader credibly denied without contradiction that he had ever made in the presence of Respondent's service advisers, or to his knowledge in the presence of customers, any of the remarks about Respondent's service advisers which the June 8 letter attributed to him; nor is there any probative, nonhearsay evidence that he ever made such remarks in customers' presence. He further credibly testified that he could not recall ever calling the service advisers stupid (although "I could have"); nor is there any probative, nonhearsay evidence that Rader ever did so. Rader credibly testified that on occasion, he had made fun of the parts department, by remarking that this would be a good place to make a parts department, in front of other technicians, Wood and Hanley, but not in the known presence of customers; nor is there any probative, nonhearsay evidence that Rader ever made such remarks in customers' presence. He credibly testified that he had made these remarks, about the service advisers and the parts department, in a joking manner. Rader, Yoast, and Swaar all gave uncontradicted and credible testimony that other employees had made similar remarks. All three of them credibly testified that laying Rader to one side, nobody (so far as they knew) had ever been disciplined for such conduct; nor is there any evidence otherwise. Rader could not recollect being disciplined prior to June 8, 1994, for making these types of statements, nor is there any evidence otherwise.

3. As to the incident involving Mark Ross, Rader credibly testified without contradiction to the following effect: About June 2, as Rader was leaving the water fountain, he encountered Supervisor Wood just outside the restroom door. Rader remarked to Wood that Ross was a "snitch," in a manner which Rader testimonially characterized as neither funny nor hostile. At that time, unbeknownst to Rader, Ross was on the other side of the bathroom door, within earshot. Ross thereupon walked out of the bathroom door and denied being a snitch. After receiving the June 8 disciplinary notice, Rader

<sup>21</sup> Sparks, who has been Respondent's service manager since 1989 and spends about half his time in the work area, testified that outside customers' presence, employees do make such remarks, although "very rarely." Legendre, who performed the duties of Respondent's service manager between 1967 and about 1988, was not asked about this matter.

apologized to Ross, and said, "I say things that I shouldn't say. I should watch what I say . . . if I offended him, I was sorry." Rader did not have a conversation with Tolar, as described in Tolar's at least alleged memorandum to Legendre, in which Rader allegedly told Tolar that Rader was going to rile Ross about being an informant, and that Dixon had told Rader that Blair, Newell, and Ross were having a meeting and Ross was informing.

The record fails to show why Rader called Ross a snitch. Respondent's employees call each other names on a daily basis. These names have included "Power Steering Pulley" (directed to an employee who had put such a part on backwards); "Lifter" (directed to employee Yoast, because he had to remove an intake manifold in order to install lifters which had not been installed before Yoast inserted the push rods, which accordingly dropped to the floor of the engine compartment); "Granny" (directed to an employee who was dating women older than he); "Taco" and "Cheech" (directed to an employee of Hispanic origin, who laughed about it); "Old Guy," "Old Timer," and "Old Man" (directed to Yoast, an employee for 25 years, who never voiced any resentment at such names); "Sloth Man," "Brain Dead" and "Dummy Dick" (directed by Supervisor Wood and employee Hanley to employee Green; according to Yoast, "they laugh about it"); obscene names (at least some of which the employees laughed about); "Dummy"; "Silly"; "Bad"; and accusations of cheating. The subjects of such name-calling usually responded by calling another name back. Supervisor Sparks spends about half his time in the work area. Legendre testified that he had given "verbal" and "even . . . written warnings" to employees for name-calling, although he could not recall the identity of any employee so disciplined. Legendre went on to testify that as to the names involved, "Some of them [were] clearly X-rated, during fits of temper, and things of that nature. For the most part, [the discipline] would be take the person aside and tell them not to do things like that ever again." Yoast, who has worked for Respondent for 25 years, credibly testified that laying Rader to one side, he did not know of any employees' having been disciplined for name-calling. Similar testimony was given by Swaar, an employee for almost 10 years. Rader, an employee for 10 years and a steward for 6 years, credibly testified that himself aside he had never heard of anyone else's being disciplined for making as to the parts department the kind of name calling for which Rader was allegedly disciplined. In January 1995, employee Yoast credibly testified to the opinion that during the past couple of years but excluding the past few months, as to Rader's name-calling, teasing, and language with other employees, "I didn't pay any attention" to Rader's conduct; it "was no different than anybody else."

The June 8, 1994 suspension letter received by Rader also refers to a "verbal warning" notice issued to Rader on December 14, 1993, for the stated reasons that he had "repeatedly challenged supervision" with requests for permission to leave early, although "In most instances other employees have heard your comments, and it's been clear to you there was more alignment work to do. The company considers this conduct as disruptive, insubordinate, and violation of company rules . . . Future instances of such conduct will lead to further discipline up to and including discharge." This warning notice was received by Rader more than 6 months before the first charge filed after my May 1994 decision, and

the complaint does not allege that the warning violated the Act.<sup>22</sup> Rader never in fact left early without permission. After receiving this December 14, 1993 warning notice, Rader never asked permission to leave early on the ground of lack of work, although on occasion he would have made such requests but for the warning.<sup>23</sup> Rader testified that for 5 or 6 years before receiving this warning notice, he had from time to time asked for permission to leave early, without being disciplined for making such requests. He further credibly testified that other employees had asked to be sent home early when work was slow, and that so far as he knew, they had not been disciplined for making such requests. Rader aside, there is no evidence that anyone was ever disciplined for making such requests.

### 3. The September 1994 reprimand

After receiving his 5-day suspension on June 8, 1994, Rader talked very little to his fellow employees; he tried to go in, do his job, keep his mouth shut, and go home. In the latter part of 1994, technician Blair was training apprentice Tolar in certain areas. On September 9, 1994, in Blair's presence, Rader referred to Tolar as Blair's "Toby" (see *infra* fn. 27). This remark was made within earshot of Tolar.<sup>24</sup> Rader made this remark in a joking manner; Blair smiled when he heard it, and Rader walked away with a smile on his face.

Legendre testified that Tolar came to the office in a "distracted," "upset," "anguished, put out, [and] mad" condition, and stated that he wanted to lodge a complaint against Rader for calling him a "Toby," a "Tobias." Legendre credibly testified that he asked Tolar to prepare a written memorandum about Rader's conduct.<sup>25</sup> Tolar thereupon wrote a complaint (dated September 9 at 1:45 p.m.) which attributes to Rader the remarks, "Where is your Toby? . . . where is your new Toby? . . . Ah, here comes Tobias." Further, the document alleges that these remarks are "derogatory

<sup>22</sup> The bargaining agreement which expired by its terms in October 1993 provides (emphasis in original), "If no customer-charged work is available and the Company *requests* the employee to stay at work, the Company will pay the employee his Flat Rate hourly base for such unproductive time." However, during at least most of the relevant period, after an employee's first 2 hours on the clock he was not paid if he had no work to do. Sparks testified that Rader had been looking for a job elsewhere. Rader testified that if he wanted to go home, he would have called in sick and not shown up at all. So far as the record shows, as to absence due to illness, Respondent has made no changes since the expiration of the 1993 bargaining agreement, which suggests that such absence is unpaid (see art. XI, sec. 3).

<sup>23</sup> This finding is based on Rader's testimony. Sparks testified that until early January 1995, Rader had continued to make such requests, although less often than before his reprimand, usually when there was work for him to do. I credit Rader, in view of his testimony, in a somewhat different connection (*supra* at fn. 22), that if he wanted to go home, he would have called in sick and not come to work at all.

<sup>24</sup> Tolar did not testify. I credit Blair's testimony that Tolar was about 10 feet away, in view of the inconsistencies in Rader's testimony as to the distance (his estimates varied from 18 feet to 50 feet).

<sup>25</sup> Blair testified that Tolar reduced his complaint to writing *sua sponte* and before talking to Legendre. Because the written complaint states that Legendre had been informed of the incident, I credit Legendre's testimony that Tolar wrote it at Legendre's request.

[sic], inflammatory, and racist." Legendre, who had never before heard the term "Toby" used, asked Tolar what it meant. Tolar said that he thought it was the same as calling him a black slave. Legendre, Rader, Blair, and Tolar are all white. There is no evidence that either Rader or anyone else has ever referred to either of Respondent's two black employees as "Toby."

At 4:10 p.m., Legendre called Rader into the office and asked him whether he was referring to other employees as "Toby," "someone's Toby." Rader said yes. Then, in Sparks' presence, Legendre read to Rader the following type-written statement:

You are reminded of several past warnings and a suspension which you received as a result of your misconduct.

It has come to management attention that you are again calling other employees derogatory names such as "Toby" and referring to said employees as another employee "Toby." This conduct is not permitted and you are to immediately cease and desist such behavior. Please understand that any additional infractions of this nature can result in your dismissal.

Then, Legendre asked Rader whether he had any questions. Rader said no, but said that he wanted the document to be signed and dated. Legendre did so, and gave it to Rader.

After receiving this discipline, Rader apologized to Tolar about making these remarks, Tolar said that he was sorry that he "jumped the gun," and Rader said that "it was in the past, let's forget it."<sup>26</sup>

Most of Respondent's employees had for 5 or 7 years used the term "Toby," in a joking manner, to refer to an employee who obtained parts for a working partner.<sup>27</sup> On occasion, such remarks had been made in the presence of Supervisor Sparks, who according to Tolar's note had been informed of the incident Tolar complained about.<sup>28</sup> Rader had used the "Toby" term in a normal tone, without raising or lowering his voice; he credibly testified that he did not in-

<sup>26</sup> After testifying that he apologized to Tolar, Rader went on to give the sincere testimony, "If [I] had of thought that he would have took it as a derogatory comment, I wouldn't have said it." It is unclear whether he told this to Tolar.

<sup>27</sup> The Africa-born hero/progenitor of Alex Haley's *Roots* bitterly resented the fact that when he became a slave in Virginia about 1767, his owner did not address him by the name Kunta Kinte given him by his parents 17 years earlier but, instead, imposed on him the name "Toby" (see ch. 44, p. 214 of the 1976 Doubleday edition). The record fails to show the connection, if any, between the book's description of this event and the use of this term by Respondent's automobile servicemen. Although Respondent's counsel referred to *Roots* during the hearing, in his brief, and in post-hearing correspondence, the portions referred to do not consist of this incident; rather, counsel has referred to certain subsequent incidents where the hero was referred to or addressed as "Toby" by other slaves. Portions of *Roots* not referred to by counsel show that the hero also resented being so addressed by other slaves. See p. 305 (ch. 62), p. 341 (ch. 68), and p. 665 (ch. 118) of the Doubleday edition. Although I read this 688-page book when it was first published, I have not reread it for purposes of writing this decision.

<sup>28</sup> Sparks testified for Respondent, but was not asked about this matter.

tend this term to be derogatory toward Tolar. Laying himself to one side, he had never heard of any employee's being disciplined for using that term. Similarly, Swaar credibly testified that Rader aside, Swaar had never heard of an employee's being disciplined for using that term; nor is there any evidence otherwise. Swaar credibly testified to having been unaware that management had any objection to the use of that term.

#### 4. Analysis and conclusions

As to Respondent's motivation for disciplining union steward Rader in June and September 1994, I note, as an initial matter, that Koenig intensely disliked the Union and was anxious to get and keep it out of the shop. Koenig's dislike of the Union is demonstrated by the speech which he admittedly read to all of the unit employees on August 18, 1993 (see p. 14, L. 15-p. 16, L. 48 of my May 1994 decision). According to Koenig's own testimony, during this speech he repeatedly referred to the Union and its conduct in scatological terms; he stated that certain union conduct was "garbage," made him "sick," and constituted "lies"; he expressed appreciation of "the confidence a majority of you expressed in . . . me when you told . . . me you didn't want the Union any more"; and he told the employee that going to the union meeting that evening "is just like feeding a stray cat or having a parasite. Like the dog, the Union will keep coming back if you feed it by going to the meeting, but with the Union it's much worse than it is with any stray animal." In addition, Koenig promised in September 1993 to increase all the unit employees' wages, and to institute a bonus program, if the employees were unrepresented by the Union; and, for the purpose of keeping the Union out of the shop, implemented those promises in October 1993. Further, after having been advised that in the second "yes/no" balloting a majority of the employees had voted against the Union, Koenig on two occasions told attorney Schulhof to come to Respondent's shop and count the petitions which (for the purpose of filing a decertification petition) Blair had collected after the balloting, and "I don't care what it costs," to which Schulhof replied before leaving his office, "You better believe it is going to cost." Moreover, Koenig's own testimony and notes show that he specifically resented Rader's own role in the Union. Thus, on August 17, 1993, Koenig admittedly told Rader that he was the one the employees thought of when they thought of the Union; that Respondent was "in this to win, this is not a game"; and that Rader should be on the team; that Koenig did not believe Rader's protestations of neutrality; and that Rader should "join my side and get . . . the union . . . to rest. Bury it so we can start anew. Give me one year. Start working for me." Furthermore, Rader was one of the only two employees (the other being Yoast) who testified for the General Counsel during the February 1994 hearing; and the evidence in that case, which was tried in Koenig's presence, indicated that Yoast was genuinely neutral as to the Union's retention.

My May 1994 decision, which recommended that Respondent be required to resume recognizing the Union, shows on its face that it is based to a significant extent on Rader's testimony, much of which is undenied. Particularly because of the belief which Koenig expressed on August 17, 1993, that Rader's then conduct was directed toward keeping the Union in the shop, I infer that Koenig's demonstrated re-

sentment of such conduct by Rader extended to Rader's February 1994 action in giving testimony which tended to achieve the same result.

In the absence of any other evidence as to the motive for Koenig's remarks to Legendre a few days after the receipt of my May 20, 1994 decision, that Legendre should remind him of what would happen if the men in the shop signed a petition that they did not want to work with Rader (a union steward for 6 years), I infer that Koenig's request was motivated by resentment of Rader's union activity and the fact that he had testified before me. That this was likewise the motive for Koenig's request, that Legendre investigate a conversation between Rader and Supervisor Wood, is indicated not only by the temporal relationship between that request and Koenig's remarks about an anti-Rader employee petition, but by various peculiarities in Respondent's evidence regarding that purported investigation and its alleged expansion.

Thus, although Legendre testified that his purported investigation of Rader was initiated by instructions from Koenig (who was not asked about this matter) to investigate a conversation between Rader and Supervisor Wood, Wood unexplainedly did not testify. Further, the memorandum which Legendre read to Rader during his June 1994 disciplinary interview alleged, among other things, that by using to Wood a name derogatory of Ross, Rader was carrying out a preexisting plan to "rile" Ross, although Legendre's file included at least alleged representations by both Ross and Supervisor Wood that, in effect, Rader had no way of knowing that Ross was within earshot. Furthermore, Legendre continued to pursue his "investigation" of Rader after Ross (by Legendre's own testimony) had refused to give him a written statement about the Rader-Wood conversation and said that Ross was a man and would handle his own defense, even through Legendre testified to the belief that he never would have been asked to investigate the incident if Ross had not been upset thereby. In addition, during the "investigation" Legendre did not talk to Rader. Moreover, Supervisor Wood never talked to Rader about comments which Rader made in the parts department, a substantial subject of Wood's at least alleged June 2 memorandum to Legendre. Furthermore, although employee Hanley's at least alleged June 3 memorandum to Legendre claimed, among other things, that on May 4 and 5 Rader had purposely tried to irritate Hanley by making certain remarks, Hanley never complained to Rader about what he was doing, there is no probative evidence that Hanley ever complained to Wood, nobody reported such incidents to Legendre at the time they occurred, and there is no evidence that before Legendre's at least alleged discussion with Hanley on June 2 or 3, Hanley ever complained about Rader to any supervisor or to anyone else. Also, although Respondent's evidence summarized up to this point raises questions (to understate the case) as to the legitimacy of Respondent's motives for investigating Rader and the honesty of that investigation, and although Legendre's testimony contains internal inconsistencies as to why employee Tolar's report about Rader was directed to Legendre, Legendre was the only management witness who testified about what or who prompted the various reports about Rader (including the report allegedly from Supervisor Wood), and the only management witness who testified about the management conferences which preceded, accompanied, and followed his "investigation." Further, the dis-

ciplinary memorandum physically given to Rader on June 8 stated that the conduct for which he was allegedly being disciplined constituted a failure to "heed" a "previous warning" in which Koenig said that he would sue Rader for slander, and encourage similar suits by employees, unless Rader stopped "all the rumors and lies and back-stabbing [and] arguing," which conduct Koenig attributed to the "tension" caused by the Union (see p. 13 L. 6-p. 14 L. 6 of my May 1994 decision).

Finally, with the exception of Sparks' discredited testimony about the alleged Spectrum incident and about Rader's alleged requests to leave early after his December 1993 warning, Respondent's witnesses gave no probative testimony whatever as to what Rader really did in connection with the ostensible reasons for his June 1994 discipline. Standing alone, this omission would likely not be particularly significant; even if the reports made to Legendre were untrue, Respondent could likely have effected lawful discipline against Rader if such discipline had been motivated by an honest belief in their truth. However, Legendre's failure to give Rader any opportunity to discuss the accusations against him until the disciplinary interview where Legendre gave or read to him the typewritten disciplinary memorandums themselves (although not the allegedly underlying reports), and the other evidence that Legendre's investigation was initiated and pursued in an effort to procure a plausible pretext for taking action against Rader because of his union activity and his January 1994 testimony before me, strongly suggest that Respondent knew or suspected that what Rader actually did do could not plausibly be urged as motivating Respondent's disciplinary action. Such a conclusion is called for by the record evidence. Thus, although Rader had in fact made derogatory comments (including scatological comments) about cars he was repairing, he and other technicians had done this for years; some such comments were overheard by Sparks; laying Rader's June 1994 discipline to one side, nobody had ever been disciplined for such conduct; and there is no credible probative evidence that Rader ever made such comments in the presence of customers. Similarly, although Rader had in fact made humorous remarks about Respondent's service advisers and its parts department, he and other technicians had previously made similar remarks without being disciplined therefor, and there is no credible probative evidence that he ever made such remarks in the presence of customers. Finally, although Rader did call employee Ross a "snitch," Respondent's employees call each other names on a daily basis; laying Rader to one side, any warnings which may have been issued for name-calling involved names which were "clearly X-rated, during fits of temper, and things of that nature," and mostly consisted of private oral directions "not to do things like that ever again"; and laying Rader to one side, there is no evidence that any employee had ever been disciplined for the use of names deriding other employees' ethnic origin, age, choice of women friends, intelligence, competence, or industry, although such name-calling frequently occurs in the shop.

For the foregoing reasons, I conclude that the General Counsel has shown by a preponderance of the evidence that Rader's June 1994 suspension was motivated, at least in part, by Rader's union activity and his having testified before me in January 1994. Upon such a showing, Respondent can avoid being adjudicated a violator of the Act only if Re-

spondent can prove by a preponderance of the evidence that its actions were based on legitimate reasons which, standing alone, would have induced the employer to take the same personnel action. *NLRB v. Advance Transportation Co.*, 979 F.2d 569, 574 (7th Cir. 1992); *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993).<sup>29</sup> Respondent has failed to make such a showing. Rather, as found above, an honest investigation by Respondent would have disclosed that Rader had merely been engaging in conduct in which he and others had long engaged without discipline. It is true that the June 1994 disciplinary letter also relied on the disciplinary letter directed at Rader in December 1993 for requesting permission to leave early on the allegedly unwarranted claim that there was no work to do. However, Rader credibly denied having made such requests after his December 1993 discipline, it is undenied that he never in fact left early without permission, employee Swaar had from time to time asked permission to leave early without being disciplined for making such requests (although he had never made such requests when there was work to do); laying Rader to one side nobody (so far as the record shows) had ever been disciplined for making such requests; and although in June 1994 Rader was suspended for 5 days, Swaar received only a 3-day suspension in October 1994 for in fact leaving early without permission and failure to attend an after-work shop meeting.

In view of Legendre's testimony that Rader's February 1994 testimony before me was not a factor in Respondent's decision to suspend him, I need not and do not consider whether his suspension would have been lawful if motivated, in whole or in part, by the fact that some of his testimony was untruthful. Whether this circumstance should affect the relief to which Rader would otherwise be entitled is discussed under "The Remedy," infra.

Further, I find that the General Counsel has shown, by a preponderance of the evidence, that the September 1994 disciplinary letter issued to Rader was motivated, at least in part, by Rader's union activity and the fact that he testified before me. In addition to the evidence summarized supra that Respondent resented such activity, I note that the September 1994 disciplinary letter specifically referred to his unlawful June 1994 suspension. Moreover, Legendre by his own admission did not attach any significance to Rader's "Toby" remark until Tolar (who is white) expressed the opinion that he was being called a black slave. However, so far as the record shows, Legendre failed to make any inquiry at all as to whether Rader, or any other employee except Tolar, was placing a similar interpretation on what, to Legendre, was a brand new characterization. Further, if Legendre had troubled to make such an inquiry, he would have learned that Rader did not intend the comment to be derogatory, and that for

<sup>29</sup> Accord: *NLRB v. Horizon Air Services*, 761 F.2d 22, 27 (1st Cir. 1985). In *Fields v. Clark University*, 817 F.2d 931, 936-937 (1st Cir. 1987), the First Circuit pointed out that *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-401 (1983), approved the Board's position that where there is proof of a forbidden motive with respect to an employer's personnel action, as to whether the employer would nonetheless have taken the same action for lawful reasons the burden of persuasion rests with the employer. The First Circuit stated, in effect, that *Transportation Management* had thereby overruled the First Circuit's contrary position in *NLRB v. Wright Line*, 662 F.2d 899, 905 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), on which Respondent relies in its posthearing brief to me.

years it had been used around the shop in a nonderogatory sense. Particularly in view of Legendre's failure to explore whether Tolar's at least alleged complaint was merely the result of a misunderstanding between him and Rader as to the meaning of the term "Toby," and might be resolved by a discussion between them and Rader rather than on the basis of an assumption (which Legendre allegedly chose to make) that Rader meant to be offensive, I conclude that Respondent has failed to show that it would have disciplined Rader in the absence of his protected activity.

Accordingly, I find that by suspending Rader on June 8, 1994, and disciplining him on September 9, 1994, Respondent has violated Section 8(a)(3), (4), and (1) of the Act.

#### 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 and the executive committee are labor organizations within the meaning of Section 2(5) of the Act.

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

All auto mechanics, automotive machinists, welders, trimmers, body and fender men, painters, electrical machinists, radiator repairmen, frame and front-end and their apprentices and oil, lube and undercoat men; and foremen and testers when using the tools of the trade, employed by Respondent at its Carbondale, Illinois facility.

4. Respondent has violated Section 8(a)(1) of the Act (1) by instructing employee Rader on August 17, 1993, (a) not to attend a union meeting and (b) to tell other employees not to attend; (2) by telling employees on August 18, 1993, not to attend a forthcoming union meeting; (3) by promising employees an increase in wages and benefits if the employees would continue to be unrepresented by the Union; (4) by implementing that promise; and (5) by maintaining an unlawfully broad no-solicitation rule.

5. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive bargaining representative of the unit described in Conclusion of Law 3.

6. Respondent has violated Section 8(a)(5) and (1) of the Act by making unilateral changes in conditions called for by a bargaining agreement which had not expired by its terms; by withdrawing recognition from the Union; by making unilateral changes in wages and benefits in October 1993 and October 1994 without giving the Union prior notice and an opportunity to bargain; by dealing directly with the executive committee and with employees regarding their wages and benefits; and by appointing an employee intermediary to appear on employees' behalf in discussions with management about grievances.

7. Respondent has violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation of, and rendering unlawful assistance and support to, the executive committee.

8. Respondent has violated Section 8(a)(3), (4), and (1) of the Act by suspending employee James Rader on June 8, 1994, and issuing him a written warning on September 9, 1994.

9. The unfair labor practices found in Conclusions of Law 4, 6, 7, and 8 affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

10. Respondent has not violated the Act by instructing employee Rader to conduct a revote on the subject of union representation.

#### THE REMEDY

Having found that the Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, Respondent will be required to rescind its unlawful no-solicitation rule, and to bargain with the Union, on request. In addition, Respondent will be required, on the Union's request, to rescind the changes in wages and benefits instituted in October 1993 and October 1994; but nothing in the Order shall require or authorize Respondent to take such action without the Union's request. Also, Respondent will be required to make the unit employees whole for any losses they may have suffered in consequence of such changes. Further, Respondent will be required to disestablish the executive committee, and to rescind the appointment of any employee whom it has appointed as intermediary.

The question remains of whether the relief to be afforded Rader (an employee of more than 11 years' service) should be affected by my finding that during the February 1994 hearing before me, he did not tell the truth about the contents of a conversation with Koenig. I conclude that as to Rader, the customary order should issue. This case does not put at issue whether Rader has disqualified himself from employment with Respondent; rather, Respondent has chosen to retain him in its employ. Further, although Respondent has successfully urged that certain portions of his testimony should be disbelieved, Respondent has never contended that the customary relief should be withheld should I find (as I have found) that he was unlawfully disciplined. Moreover, Respondent took such action against Rader because of his protected union activity, as well as his action in testifying before me; and to permit the records of such discipline to remain in his files would operate as a continuing threat that eventually, Respondent will punish him for such protected activity; see *Sterling Sugars*, 261 NLRB 472 (1982). Indeed, I note that the disciplinary letter unlawfully issued to Rader in September 1994 relied to some extent on his unlawful disciplinary suspension in June 1994. While I do not condone Rader's conduct in giving untruthful testimony before me (nor, for that matter, similar conduct by Koenig), on balance I believe that the customary remedy should be given. See *Blue Circle Cement Co.*, 311 NLRB 623, 625 fn. 10 (1993), enf. 41 F.3d 203, 211 (5th Cir. 1994); *Owens Illinois*, 290 NLRB 1193 (1988), enf. 872 F.2d 413 (3d Cir. 1989); see also, *ABF Freight Systems v. NLRB*, 114 S.Ct. 835 (1994). Accordingly, Respondent will be required to make Rader whole, with interest, for any loss of pay he may have suffered by reason of his unlawful suspension, to expunge from its files any reference to his unlawful suspension and his unlawful warning, to provide him with written notice of such expunction, and to inform him that Respondent's unlawful conduct will not be used as a basis for further personnel action concerning him.

All payments required hereunder are to be calculated as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as called for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>30</sup>

#### ORDER

The Respondent, Vic Koenig Chevrolet, Inc., Carbondale, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing or telling employees not to attend a union meeting.

(b) Instructing employees to tell other employees not to attend a union meeting.

(c) Promising employees an increase in wages and benefits if the employees would continue to be unrepresented by a union.

(d) Increasing wages and benefits to discourage union representation.

(e) Maintaining a rule which limits employees' right to engage in solicitation protected by the Act, at times when neither the employee who is soliciting nor the employee being solicited is expected to be actively working.

(f) Unilaterally changing conditions called for by a bargaining agreement which has not expired by its terms.

(g) Dominating, assisting, or otherwise supporting the executive committee.

(h) Discouraging membership in District 111, International Association of Machinists & Aerospace Workers, AFL-CIO, or any other labor organization, by suspending employees, issuing warning notices to employees, or otherwise discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(i) Suspending employees, issuing warning notices to employees, discharging employees, or otherwise discriminating against employees, because they have filed charges or given testimony under the Act.

(j) Unlawfully withdrawing recognition from the Union as the representative of the following unit of Respondent's employees:

All auto mechanics, automotive machinists, welders, trimmers, body and fender men, painters, electrical machinists, radiator repairmen, frame and front-end and their apprentices and oil, lube and undercoat men; and foremen and testers when using the tools of the trade, employed by Respondent at its Carbondale, Illinois facility.

(k) Making unilateral changes, with respect to the wages, hours, and working conditions of the employees in that unit, without giving the Union prior notice and an opportunity to bargain.

(l) Dealing directly with employees in that unit, with the executive committee, or with labor organizations other than the Union, with respect to such matters.

(m) Appointing employee intermediaries to appear on unit employees' behalf in discussions with management about grievances.

(n) 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) Rescind its no-solicitation rule, to the extent that it limits employees' right to engage in solicitation protected by Section 7 of the Act, at times when neither the employee doing its soliciting nor the employee being solicited is expected to be actively working.

(b) Immediately disestablish and cease giving assistance and support to the executive committee.

(c) In the manner set forth in that part of this decision headed "The Remedy," make James Rader whole for any loss of pay he may have suffered by reason of his unlawful suspension.

(d) Remove from its files any reference to the suspension of James Rader on June 8, 1994, and to the warning issued to him on September 9, 1994, and notify him in writing that this has been done and that evidence of his unlawful suspension and warning notice will not be used as a basis for future personnel action against him.

(e) On the Union's request, rescind the changes in unit employees' wages and benefits effective in October 1993 and October 1994, but nothing in this Order shall require or authorize Respondent to take such action without the Union's request.

(f) In the manner set forth in that part of this decision headed "The Remedy," make employees whole for any losses they may have suffered by reason of Respondent's unlawful unilateral action in October 1993 and October 1994.

(g) Rescind the appointment of any employee as an "intermediary."

(h) On request, bargain with the Union as the exclusive representative of the employees in the aforesaid unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

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

(j) Post at its facilities in Carbondale, Illinois, copies of the attached notice marked "Appendix."<sup>31</sup> Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly 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

<sup>30</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>31</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."

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.

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

Paragraph 5,A of the October 20, 1993 complaint is dismissed.