Modern Drop Forge Company, Inc. *and* Workers Security League Union. Case 13–CA–33931

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On December 30, 1996, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

[1] We deny the General Counsel's motion to strike the Respondent's brief in support of its exceptions in which the General Counsel asserts, inter alia, that the Respondent relied on and referred to asserted factual matters not in the record. However, in doing so, we note that the Board considers only record evidence and arguments pertaining to that record evidence.

We also deny the Respondent's corrected motion to reopen the record because the motion involves, inter alia, evidence of events occurring after the close of the hearing, and evidence which we find would not require a different result in this case, including evidence concerning a unity agreement between the United Steelworkers of America and the Workers Security League Union. See *WXRK*, 300 NLRB 633 fn.1 (1990); and *Contemporary Guidance Services,* 291 NLRB 50 fn. 2 (1988).

[2] We do not pass on the judge's comments to the effect that, as a result of the Respondent's unlawful conduct, a fair and uncoerced vote in the Union's scheduled election for officers is impossible.

[3] In its brief in support of its exceptions and its corrected motion to reopen the record, the Respondent asserts that the recommended Order is moot because, after the close of the hearing, it took the required actions. As noted above, we deny the Respondent's motion and, furthermore, we do not find that the recommended Order set forth below is moot. The effects of any efforts to remedy the violations may be addressed in compliance, in any event, we do not find that the Respondent's asserted posthearing actions would constitute full compliance with the recommended Order. See, e.g., *Lear Siegler, Inc*., 295 NLRB 857, 861–862 (1989); and *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

We note that any issues arising from post-hearing events, including the question of the identity of the current legitimate designated agents of the Union, are left to compliance, and accordingly, we have modified the recommended Order to require the Respondent to bargain with the current legitimate designated agents of the Union without naming the agents.

We have also modified the recommended Order and issued a new notice to include a "cease and desist" provision with regard to the Respondent's discrimination against Smith to fully remedy the violation found.

Further, we have modified the recommended Order and issued a new notice to conform with the complaint and the violations found and to provide that the Respondent is to recognize and bargain in good faith with the Union's designated agents, without reference to any specific bargaining proposals.

Finally, we have modified the recommended Order in accordance with *Excel Container*, 325 NLRB 17 (1997).

ORDER

The National Labor Relations Board orders that the Respondent, Modern Drop Forge Company, Inc., Blue Island, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the duly designated agents of the Workers Security League.

(b) Refusing to remit to the League's duly designated agents dues that have been checked off and withheld since September 1995.

(c) Refusing to accept and process employee grievances submitted by the League's duly designated agents.

(d) Interfering with the administration of the League and rendering unlawful assistance to persons not duly designated agents of the League, by recognizing and bargaining with them instead of with the League's designated agents.

(e) Discriminating against Hessie Smith because of his union or other protected concerted activities.

(f) 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) Recognize and bargain in good faith with the League's duly designated agents until the Respondent complies with this Order, the runoff election is held, and recognition is granted to the union that is properly and lawfully selected by the employees.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of League Vice President Hessie Smith and within 3 days thereafter notify him in writing that this has been done and that the suspension will not be used against him in any way.

(c) Remit to the League's duly designated agents dues that have been checked off and withheld since September 1995, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Blue Island, Illinois, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 13,

[4] 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."

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 1995.

(f) 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.

APPENDIX

Notice To Employees
Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government

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

WE WILL NOT refuse to recognize and bargain with the duly designated agents of the Workers Security League.

WE WILL NOT refuse to remit to the League's designated agents the dues that have been checked off and withheld since September 1995.

WE WILL NOT refuse to accept and process employee grievances submitted by the League's duly designated agents.

WE WILL NOT interfere with the administration of the League and render unlawful assistance to persons not duly designated as agents of the League, by recognizing and bargaining with them instead of with the League's duly designated agents.

WE WILL NOT discriminate against Hessie Smith because of his union or other protected concerted activities.

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

WE WILL recognize and bargain in good faith with the League's duly designated agents until we comply with this Order, the runoff election is held, and we grant uncontested recognition to the union that is properly and lawfully selected by the employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the suspension of League Vice President Hessie Smith, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL remit to the League's duly designated agents dues that have been checked off and withheld since September 1995, with interest.

MODERN DROP FORGE COMPANY, INC.

Sheryl Sternberg, Esq., for the General Counsel.
Jeffrey K. Ross, Richard B. Lapp, and *Eric J. Gorman, Esqs.,* (*Seyfarth, Shaw, Fairweather & Geraldson*), of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Chicago, Illinois on August 12–15 and 27–30, 1996.[1] The charge was filed January 9 (amended January 23, February 12, and April 15). The complaint was issued May 7 and amended at the trial.

This is an extreme case of company interference with the right of employees to freely choose their representatives in a company-supported unaffiliated union.

In a Board election on December 8, an outside union (the Steelworkers) received more votes than unaffiliated Workers Security League Union (the League). Before 11 challenged ballots were resolved, the vote was 175 for the Steelworkers, 167 for the League, and 5 for no union. The revised tally of ballots on January 11 was 178 to 174 to 6, requiring a runoff.

Because the League's officers were supporting the Steelworkers—and because a group of 12 "loyalists" had failed both before and after the election to get sufficient employee support to remove the officers lawfully under the League's bylaws—the Company permitted the 12 loyalists to post copies of a notice in the plant, declaring that the offices of Vice President Hessie Smith (serving as acting president) and the three other officers were "hereby declared vacant." The notice announced that at a meeting to be held on December 17, nominations would be accepted and an election would be held by "hand vote."

About 40 loyalists (about 15 percent of the 270 to 275 League members) attended the December 17 meeting. They barred about 35 or 40 other members (including the League officers) from entering. They then purported to nominate and elect officers and delegates to serve until the next scheduled League election on January 11, 1997.

On December 21 the Company notified Hessie Smith and the other "former" officers and delegates that it "no longer considers [them] as the legitimate representatives of the Workers Security League for purposes of contract administration as of Monday, 12/18/95."

In the Company's December NewsNotes (its newsletter sent to employees' homes), which began with "A Christmas Message," the Company reported that the "former" officers and delegates were "summarily kicked out of office for their continued and unbelievable support of the United Steelworkers of America." It named the four "new" officers and seven delegates elected at a "special" League meeting on December 17 and stated that it "*hopes the [League] members will support* these new officers who were elected to represent the best interests of the Workers Security League and its members" (emphasis added).

[1] All dates are from September 1995 to May 1996 unless otherwise indicated.

The Company then engaged in further conduct that would delay any election runoff, giving the Company time to undermine employee support for the League's officers and to build support for the "new" officers and delegates.

While withholding checked-off League dues from the officers, the Company refused their request to bargain on a wage reopener (as originally requested in September) and refused to accept and process their employee grievances, or to meet on any issue. It instead recognized the loyalist-elected officers and delegates as agents of the League, accepted and processed their employee grievances, and bargained with them on the wage reopener issue.

It offered them from 3 to 5 percent increases in wages, with a 35-cent minimum, for all employees "retroactive to 11/16/95" and payable "in a single check" to the date of signing the wage reopener agreement. It reported in its April/May NewsNotes that "Accumulated backpay for eligible employees under this last proposal now amounts to $205,351.33 on 5/5/96."

Meanwhile on April 4, the Company issued a leaflet reporting to the employees that a Federal district court had found that the "former" officers were not removed, and the "new" officers were not elected, in accordance with the League's bylaws. It reported that the court had also issued a preliminary injunction barring the officers elected at the December 17 meeting from "acting as officers" of the League and had ordered them to withdraw their freeze on the League funds in the bank. Pointing out that the ruling was not binding on it, the Company refused to release the dues.

On April 9 the Company stated in another leaflet that all "contract proposals by the Company are withdrawn" (nullifying its offers of accumulated backpay) and warned that no negotiations would be scheduled until the League's "leadership is established as loyal to [League] members." It then engaged in a vilification campaign against the officers and made an implied threat of loss of backpay—in the hundreds of thousands of dollars—if the officers remained in office. It strongly implied, however, that if the employees would remove the officers and select "loyal" leadership, it would reinstate its offer of accumulated backpay.

The primary issues are whether the Company, the Respondent, (a) unlawfully interfered with the administration of the League and unlawfully rendered assistance to a dissident group of employees, (b) unlawfully refused to bargain with the League's authorized agents, and (c) discriminatorily suspended Hessie Smith, in violation of Section 8(a)(1), (2), (3), (4), and (5) of the National Labor Relations Act.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures steel forgings at its facility in Blue Island, Illinois, where it annually receives goods valued over $50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the League is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. League's loss of employee support

In 1992, after the prior collective-bargaining agreement expired, there was much discussion in the plant and at a League meeting about "trying to have a stronger union" and it being time to "bring in organized labor." The League members were "really tired of the way the contract was dragging," and "the people just felt as if it was time" to talk to a "real union." With a show of hands the members voted to have the Steelworkers attend a meeting and speak to the membership. (Tr. 465–466, 665; R. Exh. 116A at 30–31, 41–42.)

A League committee spoke to the Steelworkers and invited them to attend a meeting. About five Steelworkers representatives attended the next meeting and answered questions. "[T]here was a very favorable reaction toward the Steelworkers." In another show of hands, "overwhelmingly . . . almost down to a person [they] felt that the Steelworkers should take over at that moment." (Tr. 665–666, 668–669; R. Exh. 116A at 43–47.) On January 27, 1993 the Steelworkers extended a formal invitation for affiliation, pointing out that the League would be chartered as an individual Steelworkers local (R. Exh. 2).

As negotiations with the Company progressed, however, interest in affiliating with the Steelworkers waned. The Company made a better offer, which the League accepted on March 10, 1993. After signing the contract (effective November 16, 1992 and expiring November 16, 1997) the League informed the Steelworkers that the members were not interested in affiliation at that time. (Tr. 466, 668–669, 988; G.C. Exh. 2; R. Exhs. 1, 116A at 54, 59–60.)

In the 1995 negotiations there were "a lot of problems" and members were "kind of fed up, and they talked about organized labor." Members were "tired of the way management was conducting contract negotiations, and they felt as if we needed a strong voice." (Tr. 322.) A "lot of individuals" were "unhappy with the way things were going on" and "expressed interest in the Steelworkers" (Tr. 650.)

League officers met with Steelworkers representatives on Thursday, September 7 and received authorization cards to pass out at the plant. By 4 p.m. Sunday, September 10, when a general membership meeting was held, a large number of cards had been signed. Additional cards were signed at the meeting. Vice President Hessie Smith, who counted the cards (and who impressed me most favorably by his demeanor on the stand as a truthful, forthright witness), recalled at the trial that the total number of cards was more than 162, the number of employees who signed the "I'm Voting Steelworkers!" petitions that were attached to a Steelworkers leaflet during the election campaign. (Tr. 305–306, 311–312, 404–405, 467–470, 648–651, 658–662, 735; R. Exh. 26.)

A Steelworkers representative at the meeting collected the authorization cards. As Hessie Smith recalled, there "was more of a pep rally type atmosphere at the September 10 meeting where everybody was gung-ho for the Steelworkers, let's do it, something of that nature." (Tr. 401, 468, 470.)

I note that one of the cardsigners was forge shop helper John Gough, who later became 1 of the 12 loyalists (then called

[1] The General Counsel's unopposed motion to correct the transcript, dated September 23, 1996, is granted and received in evidence as G.C. Exh. 53.

"concerned members") that campaigned and distributed leaflets against the Steelworkers, remaining loyal to the company-supported League in the representation election (Tr. 790–792, 1070). As a witness for the Company, Gould claimed that he was told when given the card to sign that if they could get enough signatures, "we can get [the Steelworkers] to come here and we can call a meeting [for them] to talk to us . . . . that signing the card wouldn't mean affiliation or joining the Steelworkers." When asked why he signed the card he answered: "Because we weren't happy with the representation that we were getting, and we wanted to talk to somebody else." (Tr. 754–758.)

Gough later conceded that "Evidently I did" read the card before signing it on September 7 and that the card says, "I authorize the United Steelworkers of America to represent me in collective bargaining." He still claimed that he was told the card was not to "get the Steelworkers in, it's just to talk to them . . . . to get them to come and talk to us." When asked why he wanted to talk to the Steelworkers, his only answer was, "I don't know." (Tr. 759–760, 766–767; G.C. Exh. 35.) Gough did not appear by his demeanor on the stand to be a credible witness. I discredit this testimony regarding what he was told about the purpose of the authorization cards.

2. Disclaimer of interest

On September 11 the Steelworkers filed a petition in Case 13–RC–19209 (R. Exh. 32).

The League's officers (called "original officers" at the trial to distinguish them from the "loyalists [Tr. 24]") decided to disclaim any interest in having the League appear on the ballot in the representation case. Believing that a majority of the members wanted the stronger Steelworkers to displace the weaker League, they considered the real contest to be one between the Steelworkers and the Company, which would oppose displacing the unaffiliated union.

As Vice President Hessie Smith credibly explained at the trial, "I felt at the time that the majority of the members wanted" to keep the League off the ballot and "I was really under the impression that by filing the disclaimer . . . it would be between" the Steelworkers and the Company, and if the vote was for "no union," then "you would still have the Workers Security League" (Tr. 385, 649). League Treasurer Robert Pucik also credibly testified that he believed the League would not be on the ballot, but it "would be still in effect" if the Steelworkers lost the election (Tr. 672–673).

League President Baker notified Robert Bates, the League's attorney. Bates responded on September 21 that "You have advised that the [League] desires to disclaim interest and not participate in the election. As indicated last week, upon written instruction from you I will notify the NLRB," but after doing so, "this firm withdraws as [League] counsel due to the appearance of a potential conflict of interest," without explanation (Tr. 478; R. Exh. 7.)

On September 23 Baker wrote Bates and notified him that he was authorized to make it known to NLRB "that we are disclaiming interest and participation in the election" (R. Exh. 11). On September 26 Bates wrote the Regional Director, with copies to the parties, that the League "disclaims interest *in representing the unit petitioned for* [emphasis added] and therefore does not desire to participate in the hearing or election to follow" (R. Exh. 13).

On the first day of the hearing in the representation case on October 3, when the hearing officer asked Baker if the League intends to intervene in this matter, Baker answered "No" (R. Exh. 116A at 6). Baker had been injured on the job and had been on disability leave since July 15, 1995 (Tr. 287, 1049; G.C. Exh. 45 at 312; R. Exh. 116B at 197).

3. Conflicting interpretations of disclaimer

At the representation hearing on October 3, when arguing that the League "must be on the ballot," the Company took the position that "the disclaimer is ineffectual" (R. Exh. 116A at 71). In the plant, however, the Company took the position that the League was disbanded: "No union" and "no labor contract."

Loyalist Daniel Wurtzbacher credibly testified that on the day the disclaimer was posted on a door in the forge shop office, he overheard Vice President Hessie Smith arguing with Forge Shop Supervisor Robert Clark about what the disclaimer meant. Wurtzbacher credibly recalled that Clark (who did not testify) said that the union was "disbanded" and there was "no union." There were other people (also who did not testify) around and Smith was "explaining in a loud conversation" that the union was not disbanded, that the League "was still intact and they were still handling grievances." (Tr. 809–811, 871–873; G.C. Exh. 31.)

Although the League's bylaws (G.C. Exh. 6, R. Exh. 89, art. 17) provide that it cannot be "disbanded or dissolved" without a two-thirds vote of the entire membership, Human Resources Vice President Jack Hennessey claimed at the trial that upon receipt of the disclaimer letter (G.C. Exh. 13), his understanding was that the disclaimer "voided the labor contract" and "effectively disbanded" the League as a union (Tr. 1007).

To the contrary, the League on September 29 posted an "Attention Employees" notice (R. Exh. 116G; Intervenor Exh. 4), signed by President Baker, stating in part that Former Attorney Bates' disclaimer letter

> does not state anywhere in it that the Union will be decertified and in my answer to the letter the Workers Security League states nothing about being decertified and not representing the employees. Everything stays in place until after the election. Employees will continue to pay Union Dues. The grievances will be handled by the Workers Security League . . . . There has been a misinterpretation about the disclaimer.

Despite this unambiguous clarification, the Company still took the position that there was "no union" and "no labor contract." It stopped deducting union dues and on October 11 unilaterally implemented a controversial Hammershop Unit Assignments Policy and Procedures because "There was no union." (Tr. 581–582, 1007–1008; G.C. Exh. 32.)

This occurred the week *after* the Company took the opposite position at the representation hearing on October 3, contending that "the disclaimer is ineffectual."

The Company's no-union, no-contract position aroused loyalist action. As employee Wurtzbacher credibly testified, "When I found out there was a disclaimer filed and that the [League] was going to be disbanded" (having overheard Supervisor Clark tell Hessie Smith that there was "no union"), he sought out a lawyer. This was Attorney Joseph Mazzone, who represented the loyalists in the representation case, in court

proceedings, and in wage reopener negotiations with the Company. (Tr. 792, 807, 868; R. Exh. 39.)

Vice President Jack Hennessey admitted at the trial that the "cooperation" between the Company's attorneys and Mazzone began on October 11 or 12, and "I know they basically [have] been on the same side since it started" (Tr. 558–560, 1122–1126; prenumbered and received G.C. Exh. 52, a three-page index of correspondence belatedly filed this month on December 6, 1996).

4. Change in position

Vice President Hessie Smith, in the absence of President Baker and without the benefit of legal counsel (after League Attorney Bates withdrew as counsel "due to the appearance of a potential conflict of interest"), was faced with the cutoff of dues income and with the adamant company stand that there was "no union" and "no labor agreement."

Smith credibly testified that at the time the disclaimer was filed he thought the Steelworkers and "no union" would be on the ballot, that "you would still have the union" until the election, and that "I thought that you would still have the Workers Security League in place" if a majority of the employees voted "no union." He recalled that when the question was raised on the floor at the September 10 meeting about if "no union" won, he heard that "you would still have the Workers Security League in place." (Tr. 385–387.)

Smith also recalled, however, that when he told Supervisor Robert Clark that he did not think the disclaimer meant disbanding the League (Tr. 388–389):

> Robert was telling me that maybe what you intended to do and what you actually did was two different things, and that's when I first started to really understand what might be happening. . . . he was saying that we didn't have a union anymore.

Smith further recalled that "I took it upon myself to freeze" the League's funds because he "was starting to understand that indeed [the disclaimer] was going to dissolve" the League and he did not want to pay out salaries "because we wasn't functioning as a union" (Tr. 391). As acting president, he did not want to pay out funds for lost time, "Because the company had issued a lot of things and I was learning that a disclaimer of interest would really dissolve the union and I didn't think we had any right to use union funding" (Tr. 395–396).

By the time of the second day of the representation hearing on October 10, Hessie Smith (acting without legal advice) had changed his position about not disbanding the League—based on the Company's interpretation of the disclaimer.

On questioning by the Company's counsel, Smith testified on cross-examination (R. Exh. 116B at 177–178, 180):

> Q. [By Mr. Ross] Well, as you sit here right now, Mr. Smith, are you or are you not the vice president of the Workers Security League?
>
> A. If there is one in existence, yes. If not, no.
>
> Q. Well, as far as you know, based on what your understanding of what the disclaimer was, do you believe the Workers Security League is still in existence?
>
> A. No. I don't. Not right now.
>
> Q. Okay. And what's the basis for that belief?
>
> A. The basis of a belief is that the company is saying that [it] no longer exist[s].
>
> . . . .
>
> Q. Well, let me ask you this, did you intend to—by having the disclaimer issued, did you intend to disband the union?
>
> A. It was the intention to leave it between Steelworkers and no union because that [was] what a number of people felt it should have been.
>
> Q. So is it then fair to say that it was your intention to have the Workers Security League disbanded, out, kaput, gone?
>
> A. My intention was to not have them in the election.
>
> Q. Well, if they're not in the election, they're gone?
>
> A. Then it's my intention to have them disbanded.

5. Withdrawal of disclaimer and the election

On November 7, the parties in the representation case stipulated "that the disclaimer has been withdrawn" as of September 26 and that the League would appear on the ballot in the election, which was held on December 8 (Tr. 392, 440–441, 451–453; R. Exhs. 21, 116D at 354–364). On December 11, to clarify Mazzone's status, Baker and Hessie Smith wrote him that "As the elected officials of the [League], we are notifying you that effective immediately, your services as an attorney or advisor are neither needed or wanted" (Tr. 489; R. Exh. 27).

Smith testified that during the election campaign, "I supported what the majority of the members wanted" and "supported the Steelworkers" (Tr. 340). Photographs of him, Secretary Charles Johnson, and Treasurer Robert Pucik as well as photographs of three of the four delegates were printed on Steelworkers campaign material, along with the photographs of 32 additional employees and the written endorsements of 18 others (R. Exh. 25). The signatures of all four officers were among the 162 signatures on the "I'm Voting Steelworkers!" petitions attached to a Steelworkers leaflet (R. Exh. 26).

As shown on the January 11 revised tally of ballots, the original tally on December 8 was 175 votes for the Steelworkers, 167 for the League, and 5 for no union. The final tally on January 11, after 11 challenged ballots were resolved, was 178 for the Steelworkers, 174 for the League, and 6 for no union. (G.C. Exh. 17; R. Exh. 47.) The results of the election were therefore inconclusive both on December 8 and January 11, requiring a runoff.

B. Interference in Choice of Representatives

1. No intention to bargain with officers

Vice President Hennessey claimed at the trial that in the week after the December 8 election (the week of December 11), as far as he was concerned, "the original officers were still the authorized [League] representatives" (Tr. 591).

To the contrary, Hennessey had already told Vice President Hessie Smith, when refusing Smith's request that he turn over the union dues, that he considered the League officers "agents of the United Steelworkers of America." He had also told Smith that the three union bulletin boards were for the use of the League and "he didn't consider [Smith and the other officers] to be Workers Security League anymore" (Tr. 202–204, 227–228).

Hennessey admitted that before December 8, he "had received verbal requests from Hessie Smith to turn the dues over." The Company, after the disclaimer was withdrawn on November 7, had deducted the October, November, and December dues. Hennessey also admitted that in November he made the decision not to allow the officers to post notices on

the League's bulletin boards and "had given keys to the loyalists." (Tr. 533–537, 591, 1013.)

Moreover, in that same week of December 11, despite his claim that he considered the officers still to be the authorized representatives, Hennessey gave a clear signal to the employees that he had no intention of bargaining with the officers, but would bargain with League "members" or with a bargaining committee appointed by "authorized" representatives.

Hennessey did so in his Open Letter to the employees (Tr. 589–590; G.C. Exh. 34), notifying them that the employees had rejected the Steelworkers as their bargaining agent—even though the Steelworkers had received more votes in the election than the League.

The Open Letter reads (G.C. Exh. 34):

> Employee rejection of the [Steelworkers] as their bargaining agent on December 8th means that the [League] continues to represent all hourly paid production and maintenance employees.
>
> The NLRB election triggered by the [Steelworkers] petition has delayed discussions between the Workers Security League *members* and Modern Drop Forge Company on the wage reopener which provided both employees and [the Company] with the opportunity to discuss employees wage rates, incentive rates, Pay for Performance and the Broad Banding hourly wage compensation system. A letter notifying [the Company] of the employees' intent to reopen the labor contract for wage discussions was filed with the Company on 9/11/95 as required and therefore the contract is still open for a discussion of wage issues.
>
> The company believes that the delays in starting discussions of the wage reopener have gone on long enough and that [League] *members should contact their leadership representatives* and urge them *to form a Bargaining Committee* who would begin discussions as soon as possible.
>
> Employees with questions about the Labor Contract Wage Reopener status should contact their immediate supervisor or an *authorized* [League] representative. [Emphasis added.]

2. Attempted replacement of officers

a. Offices "declared vacant" by 12 loyalists

The problem was how to replace the officers with "authorized" representatives with whom the Company would bargain.

Loyalist Wurtzbacher, who had contacted Attorney Mazzone to represent the loyalists, revealed at the trial that both before and after the election, the group of 12 loyalists (calling themselves "concerned members") failed in getting a sufficient number of signatures on petitions to remove the officers (Tr. 828, 832–834, 838, 842, 852, 855–856).

The reason was obvious. The League had about 270 or 275 members (R. Exh. 116B at 91). There were 162 employee signatures on the "I'm Voting Steelworkers!" petitions that were attached to a Steelworkers leaflet (R. Exh. 26) and 175 votes for the Steelworkers on the December 8 tally of ballots (G.C. Exh. 17; R. Exh. 47). It was therefore apparently hopeless at that time to obtain the required signatures of "one-third of all the members" to file removal petitions and the approval of "two-thirds of the membership voting" to lawfully remove the officers under the League's bylaws. An approval of "two-thirds of the membership eligible to vote" was required to remove delegates. (G.C. Exh. 6; R. Exh. 89, art. 10.)

After the Company gave the signal that it would bargain with "authorized" representatives, the 12 loyalists issued a Declaration and Notice leaflet that omitted any reference to the League's bylaws requirements for nominating, electing, and removing officers (G.C. Exh. 2; R. Exh. 89, arts. 4, 10). The leaflet, purportedly issued on behalf of the League, had the names of Wurtzbacher and the 11 other loyalists typed at the bottom. (G.C. Exh. 5). The copy the Company introduced in evidence (R. Exh. 36) shows how the document was originally prepared, without the date of the meeting and without the typed names of the 12 loyalists. The evidence does not reveal who prepared the original copy.

The notice stated that the League is currently in a state of emergency and that the offices of president, vice president, secretary, and treasurer were "*hereby* declared vacant" (emphasis added). It also stated that notice is given that on December 17, a meeting would be held to accept nominations and that an election would take place "by hand vote." It promised that "all dues paying members in good standing will be eligible to participate."

The Company at least acquiesced and cooperated.

The Company acquiesced by permitting the notice to be posted on the League's bulletin boards and elsewhere in the plant. Hessie Smith credibly testified that he saw the notice posted on two League bulletin boards and also on the bulletin board at the entrance to the locker room, on two windows before the shop office, and by the water fountain in the trim and die repair area. (Tr. 207–208.) As found, the Company had changed the locks on the League's bulletin boards before the Board election and had given keys to the loyalists.

Vice President Hennessey admitted that he was advised that there was the notice in the plant, that somebody brought him a copy, and that no one in human resources told any supervisor to remove them (Tr. 573, 1037).

The Company cooperated by excusing loyalist Wurtzbacher for "union business" on December 16 (the day before the hand vote) to consult with Attorney Mazzone, evidently to plan the purported election. Wurtzbacher was not a union officer or delegate. (Tr. 555–556, 886–887; R. Exhs. 39, 125.)

b. Loyalist election of "new" officers and delegates

At the meeting on Sunday, December 17, the loyalists reneged on the promise in the Declaration and Notice leaflet that "all dues paying members in good standing will be eligible to participate."

The loyalists held the meeting in the banquet hall of the school that is located across the street from the plant. When Vice President Hessie Smith arrived, one of the loyalists instructed the security guard (from A&R Security, which provided the Company's security service) "that I wasn't allowed in the meeting." Smith remained at the school. He observed about 40 members attend the meeting and about 35 or 40 other dues paying members in good standing being refused entrance. (Tr. 208–212, 277, 571; G.C. Exh. 7.) Loyalist Wurtzbacher credibly recalled that those who were prevented from entering included all four officers and two of the delegates (Tr. 904–906).

Inside the meeting about 40 loyalists (about 15 percent of the members) purported to nominate and elect four officers and seven delegates to serve temporarily until the next scheduled League election on January 11, 1997 (Tr. 430, 578–579). In the

Company's December NewsNotes (its newsletter sent to employees' homes [Tr. 224]), which began with "A Christmas Message," the Company reported (G.C. Exh. 9 at 1, 8) that

> A special Workers Security League meeting was held on 12/17/95 to elect new officers and delegates to replace the former [League] officers and delegates who were summarily kicked out of office for their continued and unbelievable support of the United Steelworkers of America.
>
> [New officers and delegates named.]
>
> These officers and delegates have hired attorney Joe Mazzone to assist them in contract negotiations with the Company. [The Company] expects to be contacted about beginning discussions on the wage reopener very soon. [The Company] hopes that the [League] members *will support these new officers who were elected to represent the best interests of the Workers Security League and its members.* [Emphasis added.]

On December 18 Hessie Smith, "On behalf of the members and officers" of the League, wrote Vice President Hennessey complaining about "the illegal actions that took place this weekend" (G.C. Exh. 7):

> A group of 40 people decided to have their own Workers Security League election of officers. [Company] security guards turned away members in good standing and denied them the right to vote. In other words, a handful of less than 20 percent of the workers . . . took it upon themselves to decide all 380 employees fate.
>
> . . . .
>
> We want to inform you that if you in any way recognize or support this group, you will be in clear violation of Federal Law.

Hennessey responded in his December 21 letter, in which he advised Smith in part (G.C. Exh. 8):

> Modern Drop Forge Company will recognize any group of legitimate Workers Security League supporters, even if they are only elected for a temporary period in order to begin discussions between the Company and the employees regarding the labor contract wage reopener. . . .
>
> You and the other former [League] officers and delegates are *hereby* advised that [the Company] no longer considers you as legitimate representatives of the . . . League for purposes of contract administration as of Monday, 12/18/95. [Emphasis added.]

3. Bargaining with the "new" officers and delegates

Faced with the threat that the Company would bargain with the officers and delegates who were purportedly elected in the December 17 loyalist meeting, the League officers hired Attorney Pasquale Fioretto as the League's attorney, replacing Attorney Bates who had withdrawn as counsel in September (Tr. 477).

On January 5 Fioretto sent Vice President Hennessey a letter, advising that he was counsel for the League and stating in part (G.C. Exh. 12; R. Exh. 44):

> First, the Workers Security League, through its lawfully elected officers, hereby demands that the Company bargain with them over the wage reopener and discuss various work-related grievances over the past several weeks.
>
> . . . .
>
> Moreover, we have been informed that the Company has in its possession union dues which it collected from all bargaining unit members for the months of October, November, and December 1995. The Company refused to forward the dues to the Union. . . . The Company has no authority to retain said union dues.

In response, Hennessey wrote Fioretto a letter on January 8, stating in part (G.C. Exh. 13; R. Exh. 46):

> Modern Drop Forge Company has never been contacted by the former Workers Security League officers regarding initiation of discussions over the wage reopener issue. We have, however, been contacted recently about some work-related grievances which occurred after 12/17/95 and we have recognized the new Workers Security League officers and delegates as employee representatives.
>
> It is our understanding that the members of the Workers Security League held an emergency meeting on Sunday, 12/17/95, to fill vacancies in the officer and delegate positions . . . .
>
> The Company is currently holding approximately 3 months in union dues which we will continue to hold in an escrow account until we are directed to pay it to the Workers Security League by their new labor lawyer, Joseph Mazzone. . . . I suggest if you have any questions about the distribution of that money, you should contact Mr. Mazzone, who I am sure can clarify the matter for you.
>
> If you have any questions about the current leadership of the Workers Security League union and who [the] Company recognizes, I suggest you also discuss that matter with Mr. Mazzone, who has been retained by the Workers Security League loyalists to represent them and to assist them with the negotiating process.
>
> I would also like to suggest that any future communications about these matters be directed to our labor lawyer, Jeff Ross . . . I am sure he would be glad to answer any of the questions you might have about this matter.

Hennessey admitted that between December 18 and April the Company "refused to accept grievances that the original officers attempted to file" and "to allow the original officers and delegates to attend grievance meetings." He also admitted that he and the supervisors "refused to meet with the original officers" about "any issues." (Tr. 567–568.) On March 5, responding to a grievance signed by President Baker and Vice President Hessie Smith, who were seeking a remittance of the union dues to the "proper union officers," Hennessey wrote Baker stating (R. Exh. 66):

> Please be advised that we cannot accept the grievance you have filed on 2/23/66 without it being signed by a Workers Security League officer or delegate.
>
> If you'd like to file this grievance, I suggest you contact one of the current officers or delegates of the [League] and ask them to sign it for you.

In the meantime between January 16 and April, while refusing to bargain with the original officers, Hennessey held seven bargaining sessions on the wage reopener with loyalist-elected officers and delegates and their attorney Mazzone (Tr. 215, 573, 1044–1046).

The lead article in the Company's February 29 NewsNotes (G.C. Exh. 29) was entitled, "Company/Workers Security League wage reopener talks continue." On the second page

under the heading "Increases Retroactive to 11/16/95 When Agreed," the Company announced that

> All agreed upon pay increases pursuant to the wage reopener discussions will be *retroactive to 11/16/95. Special one-time checks will be issued when the agreement on the wage reopener is reached and both parties sign and execute the wage reopener agreement*. [Emphasis added.]

In its March 29 NewsNotes, under the title "What's happening with wage reopener negotiations," the Company referred to its proposals for higher percent increases, minimum guarantees, and incentive rate increases. It concluded (G.C. Exh. 30 at 3):

> The Wage Reopener discussions are temporarily on hold due to the time demands on [League] officers and delegates and their attorney caused by the former [League] officers' and delegates' lawsuit against the current [League] officers and delegates in Federal Court. [League] officers and their attorney and other concerned employees had to appear on two hearing dates this month—Tuesday, 3/12 and Thursday, 3/14—to testify about the circumstances leading to the election of new officers on 12/17/95. Negotiations should resume after the judge issues his ruling on or about 4/1/96.
>
> Backpay estimates based on the current Company proposal as of the week ending 3/24/96 come to over $128,107.19.
>
> *When the final Wage Reopener agreement is reached, all eligible employees will receive a single check for backpay earned from 11/15/95 to the date of the Wage Reopener agreement signing*. [Emphasis added.]

By April the Company had raised the amount of its wage reopener increases, retroactive to November 16 and payable "in a single check" to "the date of the Wage Reopener agreement signing." In its April/May NewsNotes it reported, in exact dollars and cents, the amount of backpay that would have accumulated by May 5 under its last offer to the loyalist-elected officers and delegates. The report reads (G.C. Exh. 18 at 15):

> The company's last wage reopener proposal called for a 5% increase in Forge Shop and Cold Press incentive rates and a guaranteed 3% with a minimum of $.35 per hour increase for all hourly employees retroactive to 11/16/95. Accumulated backpay for eligible employees under this last proposal now amounts to $205,351.33 as of 5/5/96.

4. Withdrawing offer of accumulated backpay

Meanwhile on April 4 the Company issued a leaflet regarding the "Federal Court Ruling 4/4/96" (G.C. Exh. 24). The leaflet states in part:

> Judge Leinenweber this morning ruled in favor of the former Workers Security League officers and issued a preliminary injunction barring the [League] officers elected at the 12/17/95 meeting from acting as officers of the Workers Security League and ordered them to withdraw their freeze on the [League] union funds held at Interstate Bank of Oak Forest.
>
> Judge's Findings of the Facts Limited to:
>
> > The former [League] officers and delegates were not removed from office under the Workers Security League Constitution and Bylaws. The new [League] officers elected on 12/17/95 were not elected in accordance with the Workers Security League Constitution and Bylaws.
>
> Company Not a Party to This Suit
>
> The Judge's ruling in this matter . . . is not binding on the Company because the Company was not party to this suit. Therefore, the issue as to who are the proper representatives of the [League] is still undecided from the Company's standpoint.

On April 9 (the month before it issued its April/May NewsNotes, discussed above), the Company issued a leaflet nullifying the offered accumulated backpay in its proposals to the loyalist-elected officers and delegates. After stating in the leaflet (G.C. Exh. 28) that the Company "will recognize any loyal [League] members . . . for representing employees in any disciplinary action situation," it stated under the heading "Status: Wage Reopener," in part:

> No negotiations scheduled until [League] leadership is established as loyal to [League] members.
>
> All contract proposals by the Company are withdrawn . . . .

Thus, the Company was clearly notifying the employees that it had been willing to offer accumulated backpay to the loyalist-elected officers and delegates, but that it would not make such an offer to the League's officers and delegates.

In its May 13 leaflet, issued 6 days before a May 19 recall vote, the Company encouraged all "loyal" League members to "be sure to cast their vote on [the loyalists'] recall petition" (G.C. Exh. 26; R. Exhs. 82, 115) and encouraged them again in its April/May NewsNotes (G.C. Exh. 18 at 4, 15). It is in that same NewsNotes (at 15), under the heading "Wage Reopener Discussions Update," that the Company notified the employees the exact amount of backpay that would have accumulated through May 5 under its last proposal. This was *after* the Company issued the notice on April 9 that "All contract proposals by the Company are withdrawn."

Having refused to negotiate with the League's officers and having withdrawn all its contract proposals, the Company was making an implied threat before the recall vote that the employees may lose the offered accumulated backpay if the recall of the officers failed and they remained in office.

On the other hand, by notifying the employees in the April/May NewsNotes the exact amount of the backpay that would have accumulated by May 5 under the Company's "last wage reopener proposal" (to the loyalists before the Federal district court's ruling on April 4), the Company strongly implied that if one condition were met, it would be willing to reinstate the offer of wage increases, retroactive to November 16 and payable when the wage reopener agreement is signed. The condition was that the League members remove the officers and select leadership that was, to the Company's satisfaction, "loyal" to League members.

The League members were therefore faced at the May 19 recall vote with the choice of (a) voting to remove the officers, as the Company sought, or (b) voting against their removal and running the risk of jeopardizing the hundreds of thousands of dollars of backpay that would accumulate by the time an agreement could be reached in wage reopener negotiations with "loyal" League leadership.

5. Vilifying League officers

After notifying the employees on April 4 that the Federal district court had enjoined the loyalist-elected officers from "acting as officers" of the League, the Company engaged in a vilification campaign against the League's officers—further interfering with the right of the employees to freely choose their representatives in the company-supported unaffiliated union.

On April 19 the Company issued a leaflet (G.C. Exh. 25) with the heading, "Modern Files Unfair Labor Practice Against Reinstated [League] Officers and Delegates." Among many allegations denigrating the League's officers in the two-sided, legal-size leaflet, the Company accuses the "reinstated" officers of abandoning their responsibility to bargain by "not request[ing] bargaining with the Company over the wage reopener at any time during the fall of 1995." It ignored the fact, as discussed above, that Hennessey had insisted that there was "no union" until the disclaimer was withdrawn and had told Hessie Smith in November that "he didn't consider [Smith and the other officers] to be Workers Security League anymore."

The leaflet concluded by asserting that the leadership had not maintained any credibility with the Company's management "in terms of wanting to work with the Company to solve day-to-day labor contract administration issues" because the Company believed that the current League leadership "cannot serve two masters at the same time"—further threatening not to bargain with the League's officers.

On May 13, before the May 19 recall vote, the Company issued the be-sure-to-vote leaflet, which repeatedly called the officers the League's "puppet officers."

The Company referred in the leaflet (G.C. Exh. 26) to the League's charges filed by Attorney Fioretto on January 9 in this proceeding. The charges (G.C. Exh. 1A) alleged that the Company violated Section 8(a)(5) by withholding union dues, refusing to negotiate over the wage reopener, and refusing to accept and process grievances. The May 13 leaflet stated that the "same old worn out unfair labor practices filed by the [League] puppet officers in January of this year have been turned into complaints against the Company" by the Board.

The May 13 leaflet concluded, under the heading "Loyal [League] Members . . . Stand Up for Your Rights":

> The legitimate members of the [League] have taken the appropriate steps to remove the [Steelworkers] puppet officers of the [League] from office. The vote regarding the recall and removal of those officers and delegates has been scheduled for Sunday, May 19 at 10 a.m. at [the school across the street from the plant]. All loyal [League] members should be sure to cast their vote on that recall petition.

Two days later, on May 15, the Company issued another leaflet entitled "Summary of [League] Leadership's Failure to Represent Members' Interests 6/92–6/95." It contained a full legal-size page of criticism, denigrating the officers' leadership. (G.C. Exh. 27.)

In its April/May NewsNotes (G.C. Exh. 18 at 4), the Company encouraged League members to vote on removing the officers by reporting that "180 or more" members had signed a recall petition. It stated that under the League's bylaws, "up to 2/3 of the membership must vote for the removal."

The Company then in that NewsNotes (at 5), referring to its "unfair labor practice [charge] against Steelworkers union and its agents," recited two full columns of accusations against the League leaders in support of the charges. It concluded: "Any employee with questions about the Company unfair labor practices charges against the [Steelworkers] and its local agents should contact their department supervisor."

Despite the implied threat of loss of backpay unless the League members remove the officers—conduct that clearly tended to coerce the employees to remove the League's officers—and despite the Company's vilification campaign against these officers, a sufficient number of members continued to support the officers in the May 19 vote to block their removal.

In constrast to the number of members (reputedly 175 to 180) who publicly signed the recall petitions, the May 19 secret vote was 80 to 62, with 10 disputed ballots, This was less than the required two-thirds of the members voting. The vote is the subject of additional litigation. (Tr. 379–380, 935, 776; R. Exhs. 54, 82, 86.)

6. Contentions of the parties

The General Counsel contends (Br. 23) that after the sham December 17 election, the Company rushed to recognize the "wholly illegitimate" loyalists officers and "precipitously agreed to negotiate with them about the wage reopener." It "negotiated with [them] for seven negotiating sessions" and "refused to deal with anyone but the loyalists concerning the filing and processing grievances." The Company was not concerned that the loyalist officers "had no legitimate claim to act as authorized representatives of the League" and the Company's unlawful assistance to them "furthered its own goal, i.e., to dictate to its employees who should and should not hold League office and be League representatives."

The General Counsel further contends (Br. 26) that the Company's actions were taken to undermine the original officers' "chances of re-election in the League's January 1997 internal election for officers and delegates, and to ensure that the loyalists will be elected in their place." The General Counsel concludes (at 27): "These attempts by [the Company] to influence and even select their employees' collective-bargaining representatives constitutes unlawful interference in the League's administration and unlawful assistance to the loyalists. Therefore [the Company] has violated Section 8(a)(1) and (2) of the Act."

The Company contends in its brief (Br. 15–16):

> The parties do not dispute that Modern Drop Forge Company recognized and bargained with a group of [League] loyalists who were elected as union officers at the December 17, 1996 emergency meeting. The Board argues that by recognizing and bargaining with the [League] loyalists, the Company unlawfully interfered with and rendered assistance to that faction of the Union. The Board finds scant support for its position, however, in the case law. Indeed, Modern Drop Forge Company's decision to recognize and bargain with the [League] loyalists was lawful and proper.

7. Concluding findings

a. Controlling principles

The general rule is well established, as held in *Howland Hook Marine Terminal*, 263 NLRB 453, 454 (1982)—cited by the Company in its brief (Br. 11–12)—that

> Section 8(a)(5) requires an employer to recognize the agents of its employees' collective-bargaining representative. The designation of such agents is *purely an internal union* affair. [Emphasis added.]

It is also well established, as held in *Whitewood Maintenance Co.*, 292 NLRB 1159, 1169 (1989), that the legal theories underlying the 8(a)(2) and (5) allegations are related. An employer "may not refuse a demand to recognize and bargain with [one union] in violation of Section 8(a)(5), and if it recognizes and bargains with any other labor organization, it necessarily violates Section 8(a)(2)."

In *Farmers Energy Corp. v. NLRB*, 730 F.2d 1098, 1101–1102 (7th Cir. 1984), a case in which the employer engaged in conduct "designed to aid it in asserting control over the employees' bargaining representative [the CIU, an unaffiliated union]," the court specifically recognized "the employees' right to freely choose a bargaining representative." Although in a different fact situation from here, the court held that the employer's selection of "the employee to represent" the CIU "strongly suggests that the employees did not freely control their choice of a bargaining representative."

In *Midwestern Mining*, 277 NLRB 221 fn. 1, 254 (1985), the Board found that a message from the employer's top-level management was that it "favored the CIU and would reward employees who supported that [union]" because it would not be "that much of an expense." The Board held that this message, in sharp contrast with the employer's "outspoken and unlawful efforts to undermine employee support for the UMW [an affiliated union]," constituted unlawful "assistance and support of a union" that the employer "felt it could better control" and violated Section 8(a)(2) and (1) of the Act.

I find that these principles are controlling. The "employees' right to freely choose a bargaining representative" must be respected. Unlawfully recognizing and bargaining with persons other than the union's designated agents violates Section 8(a)(2), the same as recognizing and bargaining with the wrong union.

b. Extreme case of company interference

As found, this is an extreme case of company interference with the right of employees to freely choose their representatives in a company-supported unaffiliated union—or, in the words of the Board in *Midwestern Mining*—a union the Company "felt it could better control."

The Company was unwilling to deal with the lawfully designated agents of the League, preferring to deal with loyalists. The Company was obviously determined to have the League's officers replaced with loyalists who would support it in opposing the stronger Steelworkers in any runoff election, in the hope of ensuring a victory for the weaker League.

The Steelworkers had received more votes in the December 8 election than the League, but not a majority. Before 11 challenged ballots were resolved, the Company began engaging in conduct to make sure that if the League did not received a majority of the votes in the final tally, any election runoff would be delayed, giving more time to undermine employee support for the League's officers and build support for loyalist officers and delegates.

The League's bylaws require a two-thirds vote to remove both officers and delegates. The Company realized that this requirement for lawfully removing the officers could not be met because a group of 12 loyalist (calling themselves "concerned members") had already failed, both before and after the December 8 election, in getting sufficient employee support.

The Company therefore permitted the 12 loyalists to post copies of a notice in the plant, bypassing the required recall procedure and declaring that the offices held by the League officers were "hereby declared vacant." The notice also bypassed the required nomination and election procedure and announced that at a meeting on December 17, nominations would be accepted and an election would be held by "hand vote."

About 40 loyalists held the purported election at the December 17 meeting where about 35 or 40 other members in good standing, including the League officers, were denied entrance. The Company then reported to the employees in its Christmas newsletter that the "former" officers and delegates were "summarily kicked out" of office for their "continued and unbelievable support" of the Steelworkers and that it hopes the League members would support the "new" officers who were "elected to represent the best interests of the Workers Security League and its members."

Refusing any dealings with the League's designated agents in administering the collective-bargaining agreement expiring November 16, 1997, the Company bargained with the loyalist-elected officers and delegates on a wage reopener, offering them wage increases retroactive to November 16, 1995, with accumulated backpay that would amount to $205,351.33 by May 5, 1996.

Meanwhile, after reporting to the employees that the Federal district court's April 4, 1996 preliminary injunction barring the loyalist officers "from acting as" League officers, and stating that the court's ruling "is not binding" on it, the Company on April 9, 1996 withdrew all its contract proposals and informed the employees that no further negotiations would be scheduled until League leadership was established as "loyal" to the members.

The Company then engaged in a vilification campaign to further undermine employee support for the League's designated agents and made a coercive implied threat that the employees may lose the offered accumulated backpay if the employees failed to remove the officers. It strongly implied, however, that it would reinstate the offer of accumulated backpay if the employees removed the officers and selected "loyal" representatives.

The League members were faced with the choice of (1) voting to remove the officers, as the Company sought, or (2) voting against their removal and running the risk of jeopardizing the hundreds of thousands of dollars of backpay that would accumulate by the time an agreement could be reached in wage reopener negotiations with "loyal" representatives.

c. Cited Board case distinguished

In its defense, the Company primarily relies on the Board's specific rulings in *Howland Hook*, above, 263 NLRB at 454. I agree, however, with the General Counsel (Br. at 19) that *Howland Hook* in these specific rulings is "distinguishable from the instant case."

The Company submits in its brief (Br. 11–12) that in *Howland Hook*, "an employer faced competing claims to recognition by two individuals claiming to be the authorized union steward. After the employer recognized one individual as steward, the other filed Section 8(a)(3) and (5) charges. Rejecting those claims, the Board absolved the [employer] and held that it

had fulfilled its bargaining duty despite recognizing only one of the stewards." The Company quotes the Board's following reasoning (263 NLRB at 454):

> [T]o find otherwise would be to require the Respondent to go behind the conflicting representations and claims of authority and to evaluate those claims in terms of the Local's bylaws. *Section 8(a)(5) did not obligate the Respondent, in such circumstances, to interpret the Local's bylaws or to evaluate the motives behind the conflicting demands made. Rather, the resolution of the dispute herein is left to the internal procedures of the ILA*. [Emphasis added.]

Here, however, the Company did not leave the dispute over the status of the League's officers to the "internal procedures" of the League under its bylaws. It made the decision itself not to recognize the League's designated agents. It permitted the group of 12 loyalists to post copies of the hereby-declared-vacant notice in the plant, bypassing the internal procedures in the League's bylaws for removing and replacing officers.

In *Howland Hook* the Board specifically found that the union president selected an interim steward, that the executive board selected another, and that each acted "with apparent authority to speak on behalf of the Local." The Board explained (263 NLRB at 454 fn. 6):

> The Local's bylaws do not address the appointment or selection of interim stewards. While the bylaws do place much authority in the office of president to act on behalf of the Local, they also state that the executive board is the "highest governing authority" within the Local between membership meetings. Thus, in asserting the authority to select the interim steward, the executive board members were raising, at least, a colorable claim."

Here, the circumstances were entirely different. The loyalist-elected officers and delegates obviously did not have even a colorable claim to those positions.

Moreover, in *Howland Hook* the Board specifically found that the internal union dispute was "unrelated to the employer's bargaining obligations." The Board held in that case that "there is no evidence that the [employer] seized upon the dispute within the Local as a means of avoiding its bargaining obligations." In this proceeding, however, as the General Counsel points out (brief at 20), "there is ample evidence that the [Company] has done just that, seized upon the League's internal dispute as a pretext for avoiding its bargaining obligations with the less favored original officers."

d. Violation of Section 8(a)(2)

The Company has ignored the well-established rule, as held in *Howland Hook*, above, 263 NLRB at 454 (1982), that the designation of agents of employees' collective-bargaining representative is "purely an internal union" matter.

The Company flouted the League members' right to freely choose whether to retain their designated agents in the unaffiliated union. It decided itself that the agents should be replaced, regardless of the wishes of the members.

The Company recognized the loyalist-elected "new" officers and delegates who did not have even a colorable claim to those offices. It refused to deal with the League's designated agents and bargained with the "new" officers and delegates from January 16 until it notified the employees on April 4 that the Federal district court had issued a preliminary injunction barring the "new" officers "from acting" as League officers. It continued refusing to bargain on the wage reopener with the League's designated agents.

In *Midwestern Mining*, above, 277 NLRB 221 fn. 1 (1994), the Board drew the sharp contrast in the employer's message supporting an unaffiliated union, with its "outspoken and unlawful efforts to undermine employee support for the [affiliated union]." The Board held that the employer unlawfully assisted and supported the unaffiliated union, which it "felt it could better control," violating Section 8(a)(2) and (1) of the Act.

Here, in sharp contrast with its support of the "new" officers and delegates, the Company engaged in a vilification campaign against the League's officers. It also made the coercive implied threat that the employees may lose accumulated backpay unless the League members removed the officers, but strongly implied that it would reinstate the backpay offer if "loyal" representatives were selected.

I find that the Company was motivated in large part by its determination to replace the League's designated agents with loyalists who would support it in opposing the stronger Steelworkers in the runoff election, in the hope of ensuring a victory for the weaker League, which it felt it could better control.

I therefore find that the Company interfered with the administration of the League, and rendered unlawful assistance to the loyalist-elected officers and delegates, by recognizing them on December 18 and bargaining with them until April 4, instead of recognizing and bargaining with the League's designated agents, violating Section 8(a)(2) and (1) of the Act.

I further find that even if the Company recognized and bargained with the loyalist officers and delegates with a good-faith belief that they represented "the best interests of the Workers Security League and its members"—rather than the interest of the Company in defeating the stronger Steelworkers and retaining the weaker League, which it felt it could better control—that was a decision for the League members to make, without company interference or coercion.

Whether the League officers who supported the Steelworkers in the election should have been replaced with members who remained loyal to the company-supported unaffiliated League was "purely an internal union" matter for the League members—not the Company—to decide.

C. Refusal to Bargain with League's Designated Agents

1. Findings of the 8(a)(5) violations

Having found that the Company violated Section 8(a)(2) and (1) by recognizing and bargaining with the loyalist officers and delegates purportedly elected on December 17, I find that the Company likewise violated Section 8(a)(5) and (1) by refusing to bargain on the wage reopener with the League's designated agents. As discussed about, it is well established as held in *Whitewood Maintenance*, above, 292 NLRB at 1169, that the legal theories underlying the 8(a)(2) and (5) allegations are related.

The League's designated agents are President Charles Baker, Vice President Hessie Smith, Secretary Charles Johnson, Treasurer Robert Pucik, and Delegates Jim Feidner, Richard Kivo, Andre Peterson, and Walter Waushon (Tr. 1069; G.C. Exh. 1(i) par. 7).

The Company's vice president Hennessey admitted at the trial that since December 18, the Company "has refused to meet

with the original officers to negotiate about the wage reopener in the existing contract" (Tr. 568).

Concerning the union dues that the Company has checked off since September, the Company is still holding them in escrow, despite the repeated oral and written requests for Hennessey to remit them to the League's officers (Tr. 234, 430–431, 591; G.C. Exhs. 12, 14, 15; R. Exhs. 44, 77, 85). On January 8 Hennessey refused to remit the checked-off dues "until we are directed to [by the loyalists'] new labor lawyer, Joseph Mazzone" (G.C. Exh. 13; R. Exh. 46). After the Company notified the employees on April 4 that the Federal district court had ruled against the loyalist-elected officers, Hennessey told Hessie Smith that he would not turn over the dues because "he didn't considered us as being officers and delegates" of the League, but "considered us" agents of the Steelworkers (Tr. 234).

Concerning grievances, the Company has stipulated that between December 17 and April 4, it "would only accept grievances under the collective-bargaining agreement that were signed by an officer or delegate of the loyalist faction of the Workers Security League." It also stipulated that the Company now (after April 4) "does not require either a League officer or a delegate to sign the grievance before the Company will accept it." (Tr. 1068–1069; G.C. Exh. 33.) On April 9, as found, the Company notified the employees in a leaflet (G.C. Exh. 28) that it would recognize any loyal League members "for representing employees in any disciplinary action situation."

2. Unfounded defenses

a. Requests to bargain not timely filed

The Company contends in its brief (Br. 3, 7–9, 22) that the Company was never obligated to bargain with the original officers on the wage reopener because there was no timely request to bargain. It contends that there were five reopener requests made by the original officers: two that were indisputably too early and three, indisputably too late.

The Company contends that two identical copies of the original reopener request (R. Exhs. 4A and B) were received on September 11 and 12, before the reopener window period, and three were received in 1996, "long after the window period expired." Regarding the 1996 requests, the Company refers to League Attorney Fioretto's January 5 demand to "bargain over the wage reopener" (G.C. Exh. 12; R. Exh. 44), League President Baker's and Vice President Hessie Smith's April 14 renewed request to bargain "over the outstanding wage reopener issue" (G.C. Exh. 14; R. Exh. 77), and Baker's and Smith's May 31 renewed request (G.C. Exh. 15; R. Exh. 85).

The Company received one copy of the wage reopener request on September 12, as stamped on the League's letter (G.C. Exh. 3). The wage reopener provision in the agreement (G.C. Exh. 2; R. Exh. 1, art. 17(i)) specifies a 60-day window period that begins September 16, 4 days later. The Company, however, did not rely on this early submission of the reopener request when refusing to bargain with the League's officers.

After the December 8 election, in the week of December 11 as found, Vice President Hennessey sent an open letter to the employees (G.C. Exh. 34), acknowledging receipt of a letter "to reopen the labor contract for wage discussions" and stating that "therefore the contract is still open for a discussion of wage issues."

Then, after the purported election on December 17, the Company recognized and bargained on the wage reopener with the loyalist-elected officers and delegates (who had not even a colorable claim to those positions) in the hope of building support for "these new officers" who were elected, according to the Company, "to represent the best interests of the Workers Security League and its members."

On December 21 Hennessey informed Hessie Smith that the Company would recognize the loyalists "to begin discussions between the Company and the employees regarding the labor contract wage reopener." Neither in that letter nor in Hennessey's January 8 letter in response to Attorney Fioretto's January 5 bargaining demand letter did Hennessey rely on the early submission of the September wage reopener request as a reason for refusing to bargain on the wage reopener. The Company did not respond to Baker's and Smith's April 14 and May 31 renewed requests to bargain on the wage reopener (Tr. 575).

Having acknowledged receipt of the League's September request to reopen the contract for wage discussions, having informed the employees in December that "the contract is still open for a discussion of wage issues," and having bargained with the loyalist-elected officers and delegates on the wage reopener to build employee support for "these new officers," the Company has obviously waived the contractual 60-day window requirement.

I reject the contention as a clear afterthought.

b. Not sent by registered mail

The Company contends in its brief (Br. 8 fn. 8) that "Even if the original officers had made and demanded to bargain over the reopener, those demands would have been invalid under the contract. The [collective-bargaining agreement] expressly requires that bargaining demands under the reopener provision be in writing and sent by registered mail," citing the second paragraph of article 17(i) of the agreement (G.C. Exh. 2; R. Exh. 1), which reads in part:

> All notices regarding either party's intention to request a reopening under this article shall be given by registered mail. . . .

This provision obviously refers to the September wage reopener request, not to the League's repeated requests that the Company bargain on the wage reopener, after the Company acknowledged that "the contract is still open for a discussion of wage issues."

The League's September 12 wage reopener request (G.C. Exh. 3; R. Exh. 4B), which the Company accepted as the wage reopener, was sent by certified mail (R. Exh. 4B).

I reject this contention as another clear afterthought.

c. Confusion over source of requests

The Company contends in its brief (Br. 18–20) that because the Company was confused about the source of the original officer's bargaining demands, the League's demands were properly rejected.

This is a defense that the Company first raised as an afterthought on April 4, when reporting to the employees in a leaflet that the Federal district court had ruled against the loyalist-elected officers. The Company concluded the report (G.C. Exh. 24) with the statement that it would continue to hold the dues until the League officers repudiate their unity and joint bargaining agreements with the Steelworkers and "clarify that [the League] leadership represents the Workers Security League."

The Company was referring to the short-lived position taken by the League officers in December, before hiring counsel to

oppose the Company's bargaining on the wage reopener with the loyalist-elected officers and delegates. The League officers had been without the benefit of legal counsel since the League's former attorney withdrew as counsel in September "due to the appearance of a potential conflict of interest" and since the Company began withholding the checked-off union dues, cutting off the League' only source of income (Tr. 430–431).

Under these circumstances, on December 17 (the same day that the loyalists held a meeting and purportedly elected new officers and delegates), the League officers signed a unity agreement with the Steelworkers. The agreement (R. Exh. 35) stated that "Over 98% of us believe we need a union contract and union protection" and that "until the final question of union representation is resolved by the workers," the Steelworkers and League commit themselves to forming a joint bargaining committee. The League officers signed it on the uninformed belief that in this way, "everybody could be represented" (Tr. 431–433).

On December 21 Hennessey responded to Hessie Smith's December 18 letter (G.C. Exh. 7), in which Smith stated that recognition of the loyalist-elected officers would violate Federal law. Hennessey advised Smith (G.C. Exh. 8) that the League's officers and delegates "are hereby advised that [the Company] no longer considers you as legitimate representatives" of the League "for purposes of contract administration as of Monday, 12/18/95."

On that same day, December 21, Smith (as acting League president) signed a letter with a Steelworkers representative (R. Exh. 42), requesting that the Company engage in joint bargaining. The Company immediately, and of course properly, rejected such bargaining (G.C. Exh. 22).

Shortly afterwards, the new League attorney Fioretto communicated with the Company, making it clear that the League was then seeking bargaining only on its own behalf. In a letter to Hennessey on January 5 (G.C. Exh. 12; R. Exh. 44), Fioretto stated that he "is counsel for" the League and that

> First, the Workers Security League, through its lawfully elected officers, hereby demands that the Company bargain with them over the wage reopener . . . .

The evidence shows that the Company understood at that time that the League, being represented by an attorney, was seeking bargaining only on its own behalf.

By January 8, when Hennessey answered Fioretto's January 5 bargaining demand that the Company bargain with the League's "lawfully elected officers," the Company was already on notice that the League had ceased joining with the Steelworkers in issuing literature to the employees. A Steelworkers leaflet, dated January 4, was issued in the name of the Steelworkers organizing committee, the same as in the Steelworkers preelection campaign. The Steelworkers had issued all its preelection campaign literature in the name of its organizing committee (R. Exhs. 18, 22–23, 94–96), except its leaflets issued in the name of the Steelworkers itself (R. Exhs. 12, 25–26).

Moreover, in Hennessey's January 8 response (G.C. Exh. 13; R. Exh. 46), he said nothing about refusing to bargain because he believed or suspected that the League was still seeking joint bargaining. He refused to bargain because

> [W]e have recognized the new Workers Security League officers and delegates as employee representatives.
>
> . . . .
>
> If you have any questions about the current leadership of the Workers Security League union and who [the] Company recognizes, I suggest you . . . discuss that matter with Mr. Mazzone, who has been retained by the Workers Security League loyalists to represent them and to assist them with the negotiating process.
>
> I would also like to suggest that any future communications about these matters be directed to our labor lawyer, Jeff Ross . . . I am sure he would be glad to answer any of the questions you might have about this matter.

It was months later, on April 4, that the Company told the employees in a leaflet (G.C. Exh. 24) that the officers must "clarify that [the League] leadership represents the Workers Security League." Although the Company never communicated this message directly to them, the League's officers complied. In their April 14 letter to Hennessey (G.C. Exh. 14; R. Exh. 77), Baker and Smith stated, in part, that

> The Workers Security League, by and through its officers, on behalf of the bargaining unit members, hereby renews its request that the Company meet and bargain with us over the outstanding wage reopener issue.

Getting no response, the two League officers on May 31 sent Hennessey another letter (G.C. Exh. 15; R. Exh. 85), renewing the request in the identical words. Again the Company did not respond (Tr. 575).

After obtaining legal advice, the League's officers never repeated their mistake of attempting to engage in joint bargaining so that "everybody could be represented" (Tr. 431–433.) Although the Steelworkers continued to issue organizing literature, the leaflets were all issued in the name of the Steelworkers organizing committee, as shown by the exhibits the Company introduced in evidence (R. Exhs. 50, 55, 76).

I discredit Hennessey's denial—to a question asked on direct examination by company counsel—that he "received any information which suggested to [him] that the unity agreement between the original officers and the Steelworkers was not in full force and effect in accordance with its terms" (Tr. 1043). The League's officers have never sought joint bargaining after getting legal advice. The Company was on notice that all the literature issued after the League hired Attorney Fioretto was issued by the Steelworkers in the name of its organizing committee. Furthermore, Fioretto's bargaining demand on January 5 and Baker's and Hessie Smith' bargaining requests on April 14 and May 31, clearly stated that the League was seeking bargaining on its own behalf.

I find the Company's contention that it was confused about the source of the League's bargaining demands was fabricated, after the district court's April 4 ruling, to justify its refusing to bargain on the wage reopener with the League's designated agents.

I therefore reject this defense as unfounded.

d. Other unfounded defenses

I reject the contention in the Company's brief (Br. 11 fn. 12) that "even if they had any claim to authority within the [League], the original officers repeatedly manifested their politically-motivated intent not to bargain with the Company under the reopener provision." This contention is based on loyalist Wurtzbacher's claim that Hessie Smith was continually refusing, in "maybe four or five different conversations," to bargain

on the wage reopener—telling Wurtzbacher roughly around February that the original officers "didn't want the employees to know what there was to offer" (Tr. 801–805). I discredit this part of his testimony.

I also reject the inaccurate contention in the Company's brief (Br. 11 fn. 12) that "To be sure, since April 1996 the original officers have made renewed (untimely) bargaining demands, but only on behalf of their joint [Steelworkers-League] negotiating committee which they admit is still in effect."

I further reject the inaccurate contention in the Company's brief (Br. at 22) that the League's officers affiliated with the Steelworkers.

3. Concluding findings

I find that since December 18, the Company has unlawfully refused to bargain on the wage reopener with the League's designated agents and has refused to remit to them the withheld union dues that have been checked off since September 1995, violating Section 8(a)(5) and (1).

I also find that from December 18 until April 4, the Company unlawfully refused to accept and process employee grievances submitted by the League's designated agents, further violating Section 8(a)(5) and (1).

D. Suspension of Vice President Hessie Smith

On January 18 the Company gave Hessie Smith a 3-day, in-house suspension for being absent on January 11, when he signed the revised tally of ballots for the League. Others present at the opening of the challenged ballots and the signing included Hennessey and Company Attorney Ross. Smith had signed the original tally of ballots for the League at the December 8 election. (Tr. 258–261, 549, 1047–1048; G.C. Exhs. 16–17; R. Exh. 47.)

The Company admits in its brief (Br. 21) that it disciplined Smith because, according to the Company, he was not a League officer at the time (having been purportedly replaced in the loyalists' December 17 meeting) and "had no authority" under the collective-bargaining agreement to "attend the vote count on behalf" of the League.

The evidence shows that Smith was the leading spokesman for the League's designated agents, whom the Company was unlawfully refusing to recognize, and that he was representing the League on January 11 at the counting of the challenged ballots, see *Magnesium Casting Co*., 250 NLRB 692 fn. 2 (1980), enfd. 668 F.2d 13 (1st Cir. 1981) (suspension for attending Board hearing).

Particularly in view of this evidence, I find that the General Counsel has carried the burden of proving that Smith's protected union activity, a designated agent of the League, and Smith's absence from work to represent the League at the counting of the challenged ballots, were substantial and motivating factors in the Company's decision to suspend him. *Wright Line*, 251 NLRB 1083 (1980).

I further find that the Company has failed to meet its burden to prove that it would have suspended Smith in the absence of his representation of the League. Hennessey admitted at the trial that he disciplined Smith for being absent on "personal" instead of "union" business (Tr. 1048). In sharp contrast to its disciplining Smith, the Company not only excused loyalists from work for purportedly representing the League on "union" business, but it paid them for their lost time (Tr. 519, 546–549, 573; R. Exh. 125).

I therefore find that the Company discriminatorily suspended Hessie Smith for engaging in protected union activity, to discourage employees from supporting the League's designated agents, and for representing the League at the Board proceeding, violating Section 8(a)(3), (4), and (1).

E. Necessary Remedial Actions

The Company has deprived the employees of their representation by the League's designated agents for now over a year.

Instead of allowing a timely runoff election to take place after the inconclusive December 8, 1995 election, the Company engaged in conduct that has delayed the runoff for an indefinite period of time, giving the Company time to undermine employee support for the League's designated agents.

The Company recognized and bargained on the wage reopener with loyalist-elected officers and delegates who had not even a colorable claim to those positions. It continued doing so until April 4, 1996, when it notified the employees that the Federal district court had barred those purported officers from "acting as officers" of the League. On April 9 the Company withdrew its offers of wage increases retroactive to November 16, 1995, payable "in a single check" to "the date of the Wage Reopener agreement signing," and refused to schedule any further negotiations on the wage reopener until the League leadership was "established as loyal to [League] members."

Next, to further undermine employee support for the League's designated agents, the Company engaged in a vilification campaign against them and made a coercive implied threat before the May 19, 1996 recall vote that the employees may lose hundreds of thousands of dollars of accumulated backpay unless they voted to remove the League's officers. Despite this coercive conduct, a sufficient number of League members continued to support the League's officers to block their removal.

One result of the Company's unlawful conduct is that a fair, uncoerced vote for new officers and delegates in the next scheduled League election on January 11, 1997, is obviously made impossible.

A *second result* is that the employees are still being denied the retroactive wage increases that were offered to the loyalist-elected officers and delegates, before the Company announced the court's enjoining the purported officers on April 4, 1996, from "acting as officers" of the League and before the Company withdrew all its contract proposals on April 1.

A *third result* is that the employees may lose the hundreds of thousands of dollars of accumulated backpay, which the Company offered to the loyalist-elected officers and delegates, but refused to offer to the League's designated agents.

A *fourth result* is that the employees—who have been deprived of representation by the League's designated officers and delegates since December 18, 1995, and are now being deprived of a fair, uncoerced vote for new officers and delegates in the scheduled League election on January 11, 1997—may face further deprivation of freely chosen bargaining representatives in 1997.

Because of the company-induced delay of the runoff election, the employees may be deprived of uncontested representation during the upcoming negotiations to renew the current collective bargaining, which has a November 16, 1997 expiration date.

Under these unusual circumstances, I find that the Company must be required to take remedial actions that includes the following, to effectuate the purposes of the Act.

1. Recognize and bargain in good faith with the currently designated agents of the League, immediately offering to them the Company's last wage reopener proposal (which it withdrew on April 9, 1996), including the offer of pay increases retroactive to November 16, 1995, payable in a single check to the date of signing the wage reopener agreement. As the Company reported to the employees in its April/May NewsNotes (G.C. Exh. 18 at 15), the offered accumulated backpay then amounted to "$205,351.33 as of 5/5/96."

2. Continue to recognize and bargain in good faith with the currently designated agents as the authorized officers and delegates of the League until all the remedial actions are taken, the runoff election is held, and the Company grants uncontested recognition to the union that is properly and lawfully selected by the employees in the runoff election.

CONCLUSIONS OF LAW

1. By interfering with the administration of the Workers Security League Union and rendered unlawful assistance to the loyalist-elected officers and delegates, by recognizing them on December 18, 1995, and bargaining with them until April 4, 1996, instead of recognizing and bargaining with the League's designated agents, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(2) and (1) and Section 2(6) and (7) of the Act.

2. By refusing since December 18, 1995, to bargain on the wage reopener with the League's designated agents and by refusing to remit to them the withheld union dues that have been checked off since September 1995, the Company has violated Section 8(a)(5) and (1).

3. By refusing from December 18, 1995, until April 4, 1996, to accept and process employee grievances submitted by the League's designated agents, the Company further violated Section 8(a)(5) and (1).

4. By discriminatorily suspending League Vice President Hessie Smith on January 18, 1996, the Company violated Section 8(a)(3) and (4).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including the necessary remedial action described above.

[Recommended Order omitted from publication.]