

Sheridan Manor Nursing Home, Inc. and Communications Workers of America, Local 1168. Cases 3-CA-19083, 3-CA-19092, and 3-CA-19207

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On December 7, 1995, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply 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, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

The complaint alleges that the Respondent violated Section 8(a)(1) by soliciting employees to oppose the Union's announced contract ratification procedure and violated Section 8(a)(5) and (1) by withdrawing recognition of the Union as bargaining representative and by refusing to execute a collective-bargaining agreement. The judge dismissed the complaint in its entirety.

For the reasons below, we find that the Respondent violated Section 8(a)(1) by its solicitation to oppose the ratification procedure, and further violated Section 8(a)(5) and (1) by withdrawing recognition, but did not violate the Act by refusing to execute the collective-bargaining agreement.

1. The complaint alleges that the Respondent violated Section 8(a)(1) by soliciting employees to oppose the Union's announced procedure for ratifying the collective-bargaining agreement. Contrary to the judge, we find merit to this allegation.

In January 1994, the Union was certified to represent a unit of the Respondent's service and maintenance employees.² On January 5, 1995,³ the parties reached a tentative agreement on an initial bargaining agreement.⁴

¹ The General Counsel's unopposed motion to correct transcript is granted.

² The Respondent's answer to the complaint denies that the unit is appropriate but admits that the Union was certified to represent employees in this unit in January 1994. We grant the General Counsel's exception to the judge's exclusion of exhibits showing that on June 16, 1994, the Respondent took the position that licensed practical nurses (LPNs) were supervisors but that the parties thereafter reached a tentative agreement in October 1994 that "licensed practical nurse employees" were not statutory supervisors and that three LPN "nurse managers" were statutory supervisors.

³ All dates are in 1995 unless otherwise stated.

⁴ As part of the tentative agreement, the Union agreed to the Respondent's proposal that the agreement contain a maintenance-of-membership provision as opposed to a union-security provision, which the Union had proposed.

Union President Debora Hayes informed the Respondent's attorney, Thomas Schnitzler, and its administrator, John Barrett, that the Union's normal procedure was to submit the tentative agreement to its membership for ratification and that the ratification vote would be scheduled for January 12. Schnitzler asked if Hayes meant that all members of the bargaining unit would vote on the contract. Hayes answered that the Union had a long-standing practice that only members of the Union were permitted to ratify a contract.

On January 6 Barrett sent a memorandum to all employees, stating in relevant part:

The Union has now advised us that they will only permit those employees of Sheridan Manor who have already signed a membership card to the Union or who sign such a membership card at the meeting on January 12, 1995 to vote on the Company's proposal. We think this tactic by the Union is unfair and violates your freedom of choice. The Union is really telling you that you cannot vote on a contract that will cover you unless you agree to become a member before the vote. If you have signed a membership card or if you sign one in order to get the right to vote, the Union may then say that you are a member and that you must continue to pay dues to the Union during the life of the contract.

This would be wrong since it is an obvious effort to circumvent your right of free choice that we fought so hard for so long to preserve. You, of course, have the right to join the Union and sign a membership card if that is your desire and as long as you understand that you would be required to pay dues for the next two years. If, however, you are opposed to paying dues to the Union you should object now and refuse to sign a membership card, if you have not already done so. There is currently no requirement that any employee of Sheridan Manor become a member or pay dues to the Union. You have a right to resign from the Union if you are already a member and you also have a right to refuse to sign a membership card if the Union attempts to require you to sign one in order to vote on the contract.

Your freedom of choice is sacred and no one should try to take it away.

Hayes testified, without contradiction, that between January 6 and 12, he received two or three phone calls from individuals who identified themselves as employees of the Respondent. They stated that they were confused and upset by Barrett's memorandum. In addition, the Union received 14 written resignations from unit employees.

On January 9 or 10, employee Gloria Mathewson told Barrett that she was upset with the Union for allowing only members to vote on the contract and that she wanted to circulate a petition among the unit employees that they

no longer wanted the Union to represent them. On January 12 Mathewson submitted to Barrett a petition signed by 60 employees, along with a handwritten note from Mathewson that employee Madeliene Jamison did not want the Union. After reviewing the employee signatures, Barrett faxed a letter to the Union that it had received a petition signed by a majority of the unit employees indicating that they did not want the Union to represent them and that based on the petition the Respondent was withdrawing recognition.

The Union conducted the ratification meeting as scheduled on January 12. Although 68 employees had already become members of the Union, only 11 attended the meeting. The tentative agreement was unanimously approved, but the Respondent has refused to execute the collective-bargaining agreement subsequently submitted to it by the Union.

On this record, we find that the Respondent's January 6 memorandum to employees violated Section 8(a)(1). We recognize that under Section 8(c) of the Act an employer is free to express and disseminate its views or opinions, as long as such expressions contain no threat of reprisal or promise of benefit. We find, however, that in the circumstances of this case the Respondent "engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959).

It is well settled that contract ratification votes and procedures are "internal union affairs upon which an employer is not free to intrude." *London Chop House, Inc.*, 264 NLRB 638, 639 (1982). See also *Greensboro News Co.*, 244 NLRB 689 (1979); *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979); and *M & M Oldsmobile*, 156 NLRB 903, 905 (1966).

Viewed in light of that principle, the Respondent's January 6 memorandum unduly interfered with the employees' participation in the ratification process and discouraged membership in the Union. Thus, by means of the memorandum, the Respondent interjected itself into an internal union matter, about which no employee had complained. While characterizing the Union's ratification procedure as "unfair" and violative of the employees' "freedom of choice," it pointedly told employees that they "should object now and refuse to sign a membership card." It added that employees "have a right to resign from the Union if you are already a member and you also have a right to refuse to sign a membership card if the Union attempts to require you to sign one in order to vote on the contract." By this memorandum, the Employer clearly interjected itself into the ratification vote. Although a violation of Section 8(a)(1) does not turn on whether the interference or coercion succeeded,⁵ it is relevant that the memorandum did in fact disrupt the

ratification procedure. Specifically, several employees called the Union to complain about the ratification procedures; 14 employees submitted written resignations to the Union; an employee informed the Respondent that, because of the Union's ratification procedure, she would circulate a petition among the employees stating that they no longer wanted the Union to represent them; and only 11 of the 68 union members attended the ratification meeting.

Under these circumstances, we find that the Respondent went beyond merely providing information to its employees or expressing an opinion, but rather disrupted the Union's internal ratification procedures by soliciting and encouraging employees to refuse to comply with the lawful requirement that they be members of the Union in order to vote on the contract, and to resign or refuse to join the Union. By these actions, the Respondent unlawfully interfered in the relationship between the employees and their representative, in violation of Section 8(a)(1). See *Wire Products Mfg. Corp.*, 329 NLRB No. 23 (1999) (employer's encouraging employees to join the union to vote against ratification of contract and then to revoke their membership after voting unlawfully undermined union in eyes of employees); and *Shen-Mar Food Products, Inc.*, 221 NLRB 1329, 1333 (1976), *enfd.* in relevant part 557 F.2d 396 (4th Cir. 1977) (employer's honoring of untimely dues-checkoff revocations unlawfully interfered in relationship between employees and their union). See also *Albert Van Luit & Co.*, 229 NLRB 811, 813 (1977), *enfd.* 597 F.2d 681 (9th Cir. 1979) (solicitation of checkoff revocations); *Hexton Furniture Co.*, 111 NLRB 342, 345 (1955) (solicitation of membership resignations). Compare *Continental Nut Co.*, 195 NLRB 841, 857 (1972) ("employer does not intrude upon protected rights where it furnishes minimal assistance to employees who have independently decided to withdraw their support and approach the employer for help").

We further find that the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1) because the Respondent cannot rely on the petition since it was tainted by the Respondent's January 6 memorandum. It is well established that an employer cannot rely on an expression of disaffection by its employees which is attributable to its own unfair labor practices directed at undermining support for the Union. *Hearst Corp.*, 281 NLRB 764 (1986), *enfd.* 837 F.2d 1088 (5th Cir. 1988).

In determining whether a causal relationship exists between unfair labor practices and a union's loss of support, the Board considers several evidentiary factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational

⁵ *American Freightways Co.*, 124 NLRB at 147.

activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

Here, all of these factors tend to establish the requisite connection between the unfair labor practice and the Union's alleged loss of support.⁶ The petition materialized in a matter of days following the unfair labor practice; the subject of the Respondent's unlawful memorandum of January 6 was the motivating force behind the petition; and the unfair labor practice had an effect on employees' union membership and support and had a tendency to cause employee disaffection. Accordingly, we find that the petition was tainted by the Respondent's unfair labor practices. It follows that the Respondent could not rely on the petition as a valid expression of employee sentiment and, therefore, the Respondent's withdrawal of recognition based on the petition violated Section 8(a)(5) and (1). See *Davies Medical Center*, 303 NLRB 195, 206-207 (1991), *enfd. mem.* 991 F.2d 801 (9th Cir. 1993) (unlawful to withdraw recognition on basis of antiunion petition tainted by supervisors' unlawful encouragement of signatures); and *Texaco, Inc.*, 264 NLRB 1132 (1982) (unlawful to terminate collective-bargaining agreement based on tainted antiunion petition).

2. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) by refusing to execute a collective-bargaining agreement. The General Counsel contends that on January 5 the Respondent and the Union effectively reached complete agreement on all terms and conditions of employment to be incorporated in the bargaining agreement, and that when the agreement was ratified on January 12, the Respondent was required to execute the agreement on request. For the reasons below, we dismiss this allegation of the complaint.

It is well settled that mutual agreement on all material terms is an essential element of a binding collective-bargaining agreement, including the term of the agreement and the effective commencement and termination dates. *Transit Service Corp.*, 312 NLRB 477, 482-483 (1993); and *Koenig Iron Works*, 282 NLRB 717, 718 (1987). In the present case, neither the General Counsel nor the Union contests the fact, evidenced by testimony of the Union's president, that the parties failed to agree on when the tentative agreement would become effective.

On January 5 the parties left the bargaining table to await the January 12 ratification vote, but left blank the duration provision of the tentative agreement. The parties never reached a mutual understanding as to the agree-

ment's effective date.⁷ Indeed, it is evident that after January 5, the parties had wholly different dates in mind regarding the actual effective date. Thus, on January 11, the Respondent stated to the Union that the contract was to be effective "on signing" (after ratification), but at the January 12 ratification meeting the Union informed the employees that the effective date was the date the tentative agreement had been reached (January 5). This discrepancy was never resolved prior to the Respondent's withdrawal of recognition on January 12 and the Union's subsequent requests to execute the agreement. In these circumstances, and in the absence of mutual agreement on this material term,⁸ we find that the Respondent did not violate Section 8(a)(5) and (1) by refusing to execute the collective-bargaining agreement.⁹

THE REMEDY

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

Having found that the Respondent unlawfully withdrew recognition from the Union, we shall order it to recognize the Union as bargaining representative and, on request, bargain with the Union. In order to tailor the remedy to the nature of the Respondent's bargaining violation under the particular circumstances of this case, in which the unlawful withdrawal of recognition occurred

⁷ Union President Deborah Hayes testified as follows regarding the effective date of the agreement:

(HAYES) As far as I recall, we had no agreement on when the contract, on the actual date that would be put into the contract.

Q. I see. We had no, no agreement on the date?

A. No. The only place that we put on signing was in the wages article, and then we had a letter that clarified what our interpretation of on signing was.

Q. Right.

A. And I have no recollection of any agreement other than that.

Q. But we had no agreement as to a definite date, isn't that correct?

A. That's right.

Q. That it would be effective?

A. That's right.

⁸ *Liberty Homes*, 216 NLRB 1102 (1975), relied on by the General Counsel, is distinguishable. In that case, it was possible to infer from the evidence that the parties reached agreement on an identifiable effective date. That is not the case here and, indeed, Union President Hayes concedes in her testimony that there was no agreement of any kind on an effective date.

⁹ In concluding that the Respondent did not unlawfully refuse to execute the agreement, the judge found that ratification was a condition precedent to a binding agreement, a condition that was not satisfied prior to the receipt of the employees' petition on the morning of January 12. As the judge found, however, the subject of ratification was not a matter that the Respondent and the Union negotiated mutually but, instead, was a matter that the Union unilaterally imposed on itself. Put another way, the Union simply informed the Respondent during bargaining of its self-imposed internal union procedure for ratification. In these circumstances, the judge erred in finding that ratification was a condition precedent. See *Beatrice/Hunt-Wesson*, 302 NLRB 224 fn. 1 (1991).

⁶ We find it unnecessary to reach the issue of whether the petition actually established a good-faith doubt or belief on the Respondent's part regarding the Union's loss of majority. Further, we do not adopt that portion of the judge's decision pertaining to the unit inclusion or exclusion of employees on medical leave. See generally *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *SuperValu, Inc.*, 328 NLRB No. 9 (1999).

shortly after tentative agreement on all contractual terms other than an effective date, we shall order the Respondent, on request, to bargain with the Union concerning the remaining unresolved subject, the effective date of the bargaining agreement. This remedy returns the parties to the status quo ante that likely would have existed in the absence of the Respondent's unlawful withdrawal of recognition—a ratified tentative agreement (absent an effective date) accompanied, in all likelihood, by additional postratification bargaining regarding the effective date. Accordingly, if an understanding is reached on the effective date of the tentative agreement ratified on January 12, 1995, following such bargaining, the Respondent shall be required to execute the bargaining agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Sheridan Manor Nursing Home, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from, and refusing to recognize and bargain with, Communications Workers of America, Local 1168, as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below.

(b) Soliciting employees to oppose the Union's announced ratification procedure for the collective-bargaining agreement.

(c) 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 the Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning the effective date of the tentative bargaining agreement ratified on January 12, 1995, and if an understanding is reached on the terms and conditions of employment, embody the understanding in a signed agreement:

Included: All full-time and regular part-time service and maintenance employees, including nurses' aides, certified nurses' aides, orderlies, housekeeping employees, dietary aides, recreation or activity aides, cooks, laundry employees, certified nurses' aides coordinator, technical employees, licensed practical nurses, treatment nurses, certified occupational therapy assistant, and clerical employees employed by the Respondent at its Tonawanda, New York facility.

Excluded: Registered nurses, certified occupational therapist, certified physical therapist, dietitian, social

workers, other professional employees, guards, and supervisors as defined in the Act.

(c) Within 14 days after service by the Region, post at its Tonawanda, New York facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members 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 January 6, 1995.

(d) 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.

MEMBER HURTGEN, dissenting.

I do not agree with my colleagues that the Respondent violated Section 8(a)(1) by telling its employees of its view that all employees (not just union members) should be permitted to vote on the issue of contract ratification. Contrary to the suggestion of my colleagues, the mere fact that an employer comments on internal union matters is not sufficient to make the comment unlawful. For example, there is nothing in the Act to preclude an employer from noncoercively stating its views regarding candidates for union office. A fortiori, there is nothing in the Act to preclude an employer from commenting on a matter that affects the employer more directly, e.g., the ratification of a contract. Thus, for example, there is nothing in the Act to preclude an employer from recommending to employees that they should ratify a proposed contract. As long as the comment is simply an expression of a point of view, it is protected by Section 8(c). The Respondent here did no more than that. It did not tell employees to insist on voting as nonmembers. It did not tell them to become nonmembers. It simply told them of their right to do so. Surely, it is not unlawful to apprise an employee of this fundamental statutory right.

My colleagues cite the principle that contract ratification votes and procedures are "internal affairs upon

¹⁰ 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."

which an employer is not free to intrude.” However, that principle has not been applied to preclude lawful employer statements of opinion. Rather, in the cases cited by my colleagues, employers took unlawful action in response to various ratification activities.¹ Here, the Respondent did not retaliate in any fashion against employees. It also did not threaten reprisal or promise a benefit for any employee ratification activity. Thus, under the literal terms of Section 8(c), the Respondent’s statements cannot be unlawful.

In my colleagues’ view, the Respondent’s remarks “disrupted” contract ratification. I do not agree. The ratification vote was held. Concededly, some employees were persuaded by the Respondent’s remarks, and protested the Union’s “members only” policy. However, the fact that employees are persuaded by 8(c) opinion is hardly a reason to condemn the opinion. In short, the Respondent merely stated its 8(c) opinion as to how the ratification process should be conducted.²

Based on the above, I find that the January 12, 1995 employee petition was not tainted by unlawful conduct. The Respondent was presented with a petition in which 60 unit employees stated that they did “not want a union.” There was no 8(a)(1) misconduct to taint the petition. The question is therefore simply whether the Respondent had a reasonably based good-faith doubt justifying its withdrawal of recognition.

I believe that the Respondent did have such a doubt. Significantly, my colleagues do not affirmatively argue to the contrary. They argue only that the basis for the doubt was tainted by 8(a)(1) conduct. However, as discussed above, there was no 8(a)(1) conduct.

In light of the above, it is not necessary to have extended discussion of the clear proposition that the Respondent’s doubt was based on objective considerations.

In *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), the Supreme Court, in resolving an issue of reasonably based good-faith doubt, stated at 371:

¹ In *London Chop House*, 264 NLRB 638 (1982), an employer discharged an employee for circulating a document seeking to encourage other employees to vote against contract ratification. In *Greensboro News Co.*, 244 NLRB 689 (1979); *Martin J. Barry Co.*, 241 NLRB 1011 (1979), and *M & M Oldsmobile*, 156 NLRB 903 (1966), employers refused to bargain and/or refused to execute contracts because of the ratification procedures used by the union.

² *Wire Products Mfg. Corp.*, 329 NLRB No. 23 (1999), cited by my colleagues, is distinguishable. There, an employer twice urged employees to join the union, vote against contract ratification and then resign from the union. This employer conduct was contemporaneous with another 8(a)(1) violation. That is, the employer falsely told employees that their resignation would mean that they could stop paying dues. This was false because there was a union-security clause. The employer thereby undermined both the union and the contract in the eyes of employees. Here, the Respondent’s statement of opinion regarding who should vote on contract ratification falls far short of undermining the union or a union contract. Unlike the employer in *Wire Products*, the Respondent gave no false information. It merely stated that all employees should have a vote on a matter having an impact on all of them.

It must be borne in mind that the issue is not whether the [evidence of disaffection] clearly establishes a majority in opposition to the union but whether it contributes to a reasonable uncertainty whether a majority in favor of the union existed.

In the instant case, 60 employees signed the antiunion petition. Another employee, who was absent on the day of the circulation of the petition was said to be in agreement with it. At that time, the unit consisted of 116 to 124 employees, depending on various issues of eligibility concerning 8 employees.

Adding together the employee petition, the report of an additional employee’s disaffection and the circumstances surrounding the status and the sentiments of the disputed eight individuals, the Respondent could reasonably be at least uncertain regarding whether there was majority support for the Union. Accordingly, the Respondent’s withdrawal of recognition was lawful. I would dismiss this allegation of the complaint.³

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Communications Workers of America, Local 1168, as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT solicit employees to oppose the Union’s announced ratification procedure for the collective-bargaining agreement.

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

³ Had I found merit in the complaint’s 8(a)(1) allegation and its 8(a)(5) withdrawal of recognition allegation, I would join my colleagues in finding that the parties did not reach agreement on all material terms of a contract. Thus, I would join in dismissing the complaint allegation that the Respondent unlawfully refused to execute a collective-bargaining agreement.

In light of my conclusions, I find it unnecessary to pass on whether the parties agreed that contract ratification was a condition precedent to reaching a binding agreement.

WE WILL recognize the Union as the exclusive bargaining representative of our employees in the bargaining unit described below.

WE WILL, on request, bargain with the Union concerning the effective date of the tentative bargaining agreement ratified on January 12, 1995, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

Included: All full-time and regular part-time service and maintenance employees, including nurses' aides, certified nurses' aides, orderlies, housekeeping employees, dietary aides, recreation or activity aides, cooks, laundry employees, certified nurses' aides coordinator, technical employees, licensed practical nurses, treatment nurses, certified occupational therapy assistant, and clerical employees employed by us at our Tonawanda, New York facility.

Excluded: Registered nurses, certified occupational therapist, certified physical therapist, dietitian, social workers, other professional employees, guards, and supervisors as defined in the Act.

SHERIDAN MANOR NURSING HOME, INC.

Ronald Scott, Esq., for the General Counsel.

Thomas P. Schnitzler, Esq. (Jackson, Lewis, Schnitzler & Krupman), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on July 24, 25, and 31, 1995, in Buffalo, New York. The various charges in this case were filed by Local 1168, Communications Workers of America (the Union) on January 10, 1995, and at various dates thereafter, alleging that Sheridan Manor Nursing Home, Inc. (Respondent) had violated Section 8(a)(1) and (5) of the Act. An amended consolidated complaint thereafter issued on June 30, 1995, alleging violations of Section 8(a)(1) and (5) of the Act as charged.

On the entire record in this case, including my observation of the demeanor of the witnesses, and a consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACT

Respondent is a New York State corporation engaged in the operation of a nursing home located in Tonawanda, New York. In connection with such operation, Respondent annually derives a gross income in excess of \$100,000. Additionally, Respondent annually purchases and receives at its Tonawanda facility goods and products valued at in excess of \$5000, which are shipped directly from points located outside the State of New York.

On January 4, 1994, the Board certified the Union as the collective-bargaining representative for a unit of Respondent's employees consisting of:

All full-time and regular part time service and maintenance employees, including nurses' aides, certified nurses' aides, orderlies, housekeeping employees, dietary aides, recreation

or activity aides, cooks, laundry employees, certified nurses' aides coordinator, technical employees, licensed practical nurses, treatment nurses, certified occupational assistant, and clerical employees.

The parties commenced collective-bargaining negotiations on February 7, 1994. Throughout these negotiations, Deborah Hayes, union president, and two bargaining unit employees represented the Union. Thomas Schnitzler, Respondent's labor attorney; John Barrett, administrator; and Denis Sarac, associate administrator, represented Respondent.

During the initial bargaining sessions, it was agreed that any agreement that was reached on a particular proposal, was a tentative agreement, not binding, until final acceptance. In this connection, Hayes repeatedly stated that she would have to take any proposed final agreement to the employees for ratification, and that a "no" vote meant a "yes" vote for a strike.¹

The parties met on November 18. During this session the parties discussed proposals where the parties were not in agreement. At one point in the meeting, Hayes stated that any final offer by Respondent would be brought before the unit employees for a ratification vote and that any vote rejecting such offer would be a vote authorizing a strike.

On December 20, 1994, the Union distributed to all unit employees a written memorandum summarizing the present state of the negotiations. The memorandum also stated:

[I]t has been agreed that the Union and Home bargaining committees will meet on Thursday, January 5, 1995. At that time we will obtain the Home's best offer and will then bring it to you for a vote. We have planned a ratification meeting for Wednesday, January 12, 1995.

On January 5, 1995, the parties again met. During this meeting, all open proposals were resolved and a tentative agreement for a contract was reached. Hayes again stated that this tentative agreement would have to be ratified before acceptance by union members.

Barrett credibly testified that this was the first time that Hayes had indicated that only union members would vote on the contract. During all prior negotiating sessions Hayes stated that unit employees would vote concerning a ratification of any proposed collective-bargaining agreement.

On January 6, Hayes distributed a memorandum to all unit employees stating that "on January 5, 1995 the Union and Employer bargaining committees met in contract negotiations and reached a tentative agreement on a first contract." In several other places, the memorandum referred to a tentative agreement. The memorandum also stated that "a No vote on the contract is a yes vote for a strike against your employer."

At the conclusion of this meeting, Hayes requested the list of the unit employees currently employed by Respondent. Such list, which appears to be a payroll list, was faxed to the union office on January 6. The list contained 134 unit employees.

On January 6, Respondent also distributed a memorandum to all unit employees. The memorandum stated in part that throughout the collective-bargaining negotiations, Respondent

¹ My findings of fact in connection with the collective-bargaining negotiations are based on the testimony of Hayes and Sarac, which for the most part is mutually consistent. Wherever there is any inconsistency, I credit Sarac because his testimony impressed me as being more believable and consistent with the Union's usual procedure requiring ratification.

had consistently taken a position against compulsory union membership. The memorandum also stated that it was Respondent's position that it was unfair to exclude nonunion members from the scheduled January 12 ratification vote.²

On the morning of January 12, Barrett was presented with a petition signed by 60 unit employees, and a note signed by unit employee Gloria Mathewson which states that she spoke with unit employee Madaline Jamison, who told her on January 12 that she did not want a union. Jamison was out sick at the time. It is not alleged that Respondent solicited this petition. The signatures on the petition were checked against the signatures of the 113 unit employees and appeared to be genuine. There is no evidence that the signatures were not genuine. Barrett, thereafter, sent a letter to Hayes informing the Union that Respondent had received a petition signed by a majority of the unit employees indicating that they did not want union representation, and that based upon such petition Respondent was withdrawing recognition of the Union. The letter was received by Hayes prior to the January 12 ratification meeting.

It was stipulated by the parties that of the 134 employees set forth in Respondent's list of January 6, 12 were not employed on January 12. It was also stipulated that three dietary aides not on either list should be part of the unit. Thus, the number of unit employees employed on January 12, the date recognition was 116. There is a dispute as to the status of eight employees who were deleted by Respondent's January 12 list. The General Counsel alleges that two of these employees were per diem employees who should be included and the other six employees were employees on disability or compensation.

The Union's ratification meeting took place on January 12, as scheduled. Eleven union members were present and voted unanimously to accept Respondent's last contract offer.

On January 13, Hayes informed Respondent's attorney, Schnitzler, that the proposed contract had been ratified and that she would prepare a contract for Respondent's signature. Respondent refused to execute this contract notwithstanding several further attempts by the Union to effect such execution.

Analysis and Conclusion

The Board has held that an employer ordinarily does not have standing to challenge the union's method of ratification, or the lack thereof, in connection with the union's acceptance

² In relevant part Respondent's memorandum states:

The Union has now advised us they will permit only those employees of Sheridan Manor who have already signed a membership card to the Union or who sign such membership card at the meeting on January 12, 1995 to vote on the Company's proposal. We think this tactic by the Union is unfair and violates your freedom of choice. The Union is really telling you that you cannot vote on a contract that will cover you unless you agree to become a member before the vote. . . . This would be wrong since it is an obvious effort to circumvent your right of freedom of choice that we have fought so hard for so long to preserve. You of course have the right to Join the Union and sign a membership card if that is your desire as long as you understand that you would be required to pay dues for the next two years. If, however, you are opposed to paying dues to the Union you should object now and refuse to sign a membership card, if you have not already done so. There is currently no requirement that any employee of Sheridan Manor become a member, or pay dues to the Union. You have a right to resign from the Union if you are already a member and you also have the right to refuse to sign a membership card if the Union attempts to require you to sign one in order to vote on the contract.

of an employers contract offer. *Childers Products Co.*, 276 NLRB 709, 711 (1985), *affd. mem.* 791 F.2d 915 (3d Cir. 1986).

In *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991), the union and employer, as part of the negotiations specifically and mutually agreed in writing that ratification by the unit employees was a precondition to acceptance of the "tentative agreement." Thus, rather than the union imposing the limitation of ratification upon itself, both parties agreed in writing to require ratification to make their "tentative agreement" binding.

In the instant case, unlike in *Childers*, *supra*, the parties did not mutually agree to make ratification binding before acceptance of the tentative agreement reached on January 5. However, the Union clearly imposed such limitation on itself. This is evidenced by Hayes' statements throughout the course of contract negotiations that the contract had to be ratified, and a "No" vote for ratification was a vote to strike. It is further evidenced and amplified by the Union's letter to all unit employees distributed on January 6, that such ratification would provide "the opportunity to either accept or reject the contract."

In *Beatrice/Hunt-Wesson*, *supra*, Chairman Stephens in his concurring opinion stated that until such time as the union conducts the ratification vote agreed on by both parties, the agreement was tentative and the employer was not obligated to execute such contract. In the instant case, I conclude that the Union imposed on itself a ratification vote as a condition precedent to acceptance of the parties, "tentative agreement" and that the Union failed to conduct such ratification vote prior to Respondent's receipt of the employee's petition and its withdrawal of recognition. Thus, I further conclude that there was no binding contract between the parties at the time that recognition was withdrawn.

The issue now is whether Respondent had a good-faith belief that the Union no longer represented majority of unit employees at the time it withdrew recognition from the Union.

Section 8(c) of the Act permits an employer to express any views or opinions and to express them orally, in writing or in any other manner as long as such expression "contains no threat of reprisal or promise of benefit." I find that Respondent's January 6 letter, set forth above in the facts section of this decision, to all employees contained no threat of reprisal or promise of benefit violative of Section 8(a)(1). The letter does not reasonably solicit employee opposition to the Union's ratification process. The contents of the letter accurately set forth the Union's eligibility requirements for participating in the ratification vote. Moreover, such letter was consistent with Respondent's position expressed throughout the entire course of collective-bargaining negotiations, wherein Respondent opposed membership in the Union as a condition of continued employment. Accordingly, I find no violation of Section 8(a)(1) as alleged.

The petition received by Respondent on January 12 set forth clearly that the employees who signed the petition "do not want a union." The petition contained 60 signatures of Respondent's employees who are admittedly unit employees presently employed. The General Counsel does not contend that petition was unlawfully obtained. Respondent's administrator, Barrett, credibly testified that when he received the petition, he and his office manager checked the signatures on the petition with the unit employees set forth on the January 12 payroll. As described above, Respondent deleted from the January 6 payroll 21 employees that Respondent no longer considered to be employed. The payroll at this point was 113 employees. Based on

the 60 signatures plus the Gloria Mathewson hearsay statement that employee Jamison did not want a union, Barrett concluded, after consultation with his attorney, that the Union no longer represented a majority of the unit employees. Based on this information, Respondent by a letter dated January 12, withdrew recognition.

Laidlaw Waste Systems, 307 NLRB 1211 (1992), reaffirmed the Board's well-settled position that an employer may rebut an incumbent union's presumption of majority status by demonstrating that at an appropriate time, the union no longer enjoys majority support, or that the employer has a good faith and reasonably grounded doubt of the union's majority status. An employer may establish such reasonably grounded doubt by a preponderance of the evidence.

Counsel for the General Counsel contends in footnote 33 of his brief, citing *Laidlaw*, supra, that when an employer undertakes to determine the size of the unit and has defended its decision to withdraw recognition on the numerical evidence of the petition, it should not be heard to say that same evidence formed a reasonably grounded doubt as to the union's continued majority status. I do not read *Laidlaw* as requiring such an election. In any event, the size of the unit, as established by the evidence in this case, set forth above is in dispute.

As set forth above, Respondent's January 6 payroll listed 134 unit employees. The January 12 payroll listed 113. During the course of the trial the General Counsel agreed with Respondent's contention, as to the unit size, that 12 employees eliminated from the January 6 payroll were indeed no longer unit employees. Both parties agreed that three employees not listed on either payroll were actually employed by the Employer and should be included on the January 12 payroll. The status of eight individuals are in dispute. The General Counsel contends that two of the disputed employees are per diem employees and six employees are on compensation or disability and all eight employees should be included in the unit.

As set forth above since per diem employees were not a classification of employees set forth in the certification or the agreed on bargaining unit, I conclude that they were properly excluded by Respondent in determining the size of the unit on January 12. The remaining six employees were on disability or compensation as of January 12. Respondent's administrator, Barrett, testified as to the facts on which Respondent concluded that such employees were no longer employed by Respondent as of January 12.

Barrett testified that Michelle Bedding went on workmen's compensation leave on November 1993 and was still receiving workmen's compensation benefits as of January 12, and in fact through this trial in July 1995. Barrett also testified that in her personnel file there was a doctor's statement that Bedding would not be able to return to work as a nurse.

Barrett testified that Tammy Costanzo's last day of work was March 7, 1994, as the result of a workmen's compensation injury. Barrett testified without contradiction that he personally reviewed the documentation in her file which established that

she was unable to return to work, and was regarded as a terminated employee.

Barrett testified that Tammy Konarski left her employment in April 1994 because of a workman's compensation injury. Konarski began collecting unemployment in August 1994. Although her personnel indicates that on November 8, 1994, she was released to work without restrictions, it does not appear that she has contacted Respondent seeking work at any time since such release.

Barrett testified that Latonya Pugh left Respondent and went on maternity leave in June 1994. Barrett credibly testified that Pugh's maternity leave was a duration of 6 to 8 weeks. As of January 12, she had not returned to work, nor would it appear that she had contacted Respondent at any time from June 1994 through January 12, 1995, concerning her employment. On March 5, 1995, Pugh was rehired as a new employee.

Barrett testified that Molly Ann Krajcer left Respondent on December 1993, after her physician placed restrictions on her ability to work due to her pregnancy. She has never returned to work. Krajcer did file charges on May 1994, with the Equal Employment Opportunity Commission (EEOC) and the New York State Division for Human Rights, alleging an unlawful termination due to sex discrimination.

Barrett testified that Angela Phillips left Respondent on October 1993 when she suffered a heart attack. There is no evidence that Phillips contacted Respondent between October 1993 through January 12, 1995. Phillips was hired as a new employee in March 1995.

I conclude that the evidence concerning the status of the above employees is insufficient for me to make a finding favorable to the General Counsel. In this regard, the General Counsel failed to produce any of the six employees, set forth and discussed above, in support of his contentions. The General Counsel's evidence consists of admissions on cross-examination by Barrett and some documents contained in the personnel files of some employees. In any event, it is clear to me, that within the meaning of *Laidlaw*, Respondent had reasonable cause to believe that the above named individuals were not employed as of January 12.

Thus, on January 12, 1995, Respondent was aware that 60 unit employees did not want the Union to represent them, and had reasonable cause to believe that the number of unit employees employed by Respondent was on that date was 116. Accordingly, I conclude that Respondent did not violate Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union on January 12, 1995.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not violated Section 8(a)(1) and (5) of the Act as alleged.

[Recommended Order for dismissal omitted from publication.]