

**Chelsea Industries, Inc. and International Union,  
United Automobile, Aerospace and Agricultural  
Implement Workers of America (UAW), AFL-  
CIO.** Cases 7-CA-36846 and 7-CA-37016

August 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
FOX, LIEBMAN, AND HURTGEN

The issue presented by this case is whether, under the National Labor Relations Act, an employer has the right, after expiration of the certification year, to withdraw recognition from a union on the basis of an antiunion petition circulated and presented to the employer during the certification year.<sup>1</sup> Contrary to the judge, we hold, for the reasons set forth below, that an employer has no such right.<sup>2</sup>

The stipulated facts, as more fully set forth in the judge's decision, are as follows. In brief, on April 8, 1993, the Union was certified as the exclusive collective-bargaining representative of the employees in an appropriate unit. On November 15, 1993, the Board issued a Decision and Order<sup>3</sup> granting the General Counsel's Motion for Summary Judgment and finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union in order to test the Union's certification of representative. The Board ordered the Respondent to bargain with the Union. On February 3, 1994, the Respondent and the Union began negotiating for a collective-bargaining agreement, thus commencing the certification year.<sup>4</sup>

On February 9, 1995, the Respondent withdrew recognition from the Union. Although the parties' negotiations continued until that time, they had not reached

<sup>1</sup> On September 29, 1995, Administrative Law Judge Robert A. Giannasi issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, and the Respondent filed an answering brief and request for oral argument.

<sup>2</sup> On April 13, 1998, the Board issued a notice and invitation to file briefs in this case and *Levitz*, Case 20-CA-26596. That notice sought supplemental briefing by the parties in these proceedings, as well as interested amici, to address whether the Board should overrule *Celanese Corp. of America*, 95 NLRB 664 (1951), to the extent that it permits an employer to withdraw recognition from an incumbent union based on a reasonably grounded, good-faith doubt that the union enjoys majority support among bargaining unit employees, and various attendant issues.

In light of the age of this case and in order to avoid further delay, we have decided to leave the *Celanese* and subsidiary issues raised in the Board's April 13, 1998 notice to be addressed in *Levitz*.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>3</sup> *Chelsea Industries*, 312 NLRB No. 191 (1993) (unpublished).

<sup>4</sup> The parties' stipulation is consistent with Board law, which holds that "absent unwarranted delay by the union, the certification year after an employer's initial refusal to bargain commences on the date of the parties' first bargaining session." *Van Dorn Plastic Machinery Co.*, 300 NLRB 278, 279 (1990) (applying the principles of *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), enf. 939 F.2d 402 (6th Cir. 1991)).

agreement on an initial collective-bargaining agreement. In withdrawing recognition, the Respondent relied on a petition employees presented to it on November 21, 1994, which read: "We the undersigned employees of Chelsea Ind. do not want to be represented by the UAW." Employees circulated the petition on November 18 and 19, 1994, and the number of signatures on it represented a majority of the employees in the unit as of February 9, 1995. At the time of the withdrawal of recognition, there existed no unremedied unfair labor practice charges against the Respondent. Thereafter, on March 6, 1995, the Respondent unilaterally granted a wage increase to the bargaining unit employees.

On these facts, the judge recommended dismissal of the complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and by unilaterally granting employees a wage increase. Although the judge recognized that "the challenge to the Union's majority occurred within the certification year and thus had the potential of rendering further bargaining within that year meaningless," he nevertheless concluded, based on his analysis of Board precedent, that an employer may lawfully withdraw recognition outside the certification year based on evidence secured within the year. Specifically, the judge found that *United Supermarkets*, 287 NLRB 119, 120 (1987), enf. 862 F.2d 549 (5th Cir. 1989), the main case relied on by the General Counsel and the Union, was "undermine[d]" by "[o]ther cases."

In their exceptions, the General Counsel and the Union contend, inter alia, that *United Supermarkets* is still good law. As explained below, we find merit in these exceptions.

To foster collective bargaining and industrial stability, the Board has long held that a certified union's majority status ordinarily cannot be challenged for a period of 1 year. E.g., *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1952). If a representation petition is filed before the end of the certification year, the Board will dismiss it because "the mere retention on file of such petitions, although unprocessed, cannot but detract from the full import of a Board certification, which should be permitted to run its complete 1-year course before any question of the representative status of the certified union is given formal cognizance by the Board." *Id.* at 1508-1509.

In *Brooks v. NLRB*, 348 U.S. 96 (1954), the Supreme Court approved the Board's requirement that, absent unusual circumstances, an employer must recognize the union for the entire certification year, even if it is presented with evidence of the union's loss of majority.<sup>5</sup> As the Court explained in *Brooks*, the certification-year rule

<sup>5</sup> Three types of "unusual circumstances" have been recognized: defunctness of the certified union, schism within the certified union, and radical fluctuation in the size of the bargaining unit. 348 U.S. at 98. No such "unusual circumstances" are present here.

is intended, among other things, to give a union “ample time for carrying out its mandate on behalf of its members [without] be[ing] under exigent pressures to produce hothouse results or be turned out.” 348 U.S. at 100. In addition, the rule is intended to deter an employer from violating its duty to bargain: “It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time. . . .” *Id.* In short, the Court held that the “underlying purpose of this statute is industrial peace,” 348 U.S. at 103, and that the Board’s certification-year rule advances that goal.

Both *Centr-O-Cast* and *Brooks* were relied on in *United Supermarkets*, *supra*. In that case, the respondent withdrew recognition from the union after the certification year expired based on a petition it received during the certification year that showed that approximately 90 percent of the unit employees did not support the union. At the time it received the petition, the respondent had not remedied the serious unfair labor practices it had committed several years earlier.

The Board’s decision contained two central holdings. The Board cited *Brooks* for the proposition that “a union’s majority status cannot be challenged within its certification year.” 287 NLRB at 120. The Board cited *Centr-O-Cast* for the proposition that “[s]o strictly has the Board held to the conclusive nature of a newly certified union’s unchallenged status that it will dismiss representation petitions filed” during the certification year. *Id.* The Board then held as follows: “We believe that just as the petition could not raise a question concerning representation nor be acted on by the Respondent within the certification year, the Respondent cannot subsequently rely on it to justify a . . . withdrawal of recognition” outside the certification year. *Id.* In addition, the *United Supermarkets* Board held that the employee petition could not be relied on because it was tainted by the employer’s unfair labor practices. For both of these reasons, i.e., “the timing” of the petition (during the certification year) and “the circumstances existing when the . . . petition arose” (the unremedied unfair labor practices), the Board gave no effect to the employee petition and concluded that the employer’s withdrawal of recognition violated the Act. *Id.*

Thereafter, the respondent filed a petition for review with the Fifth Circuit. *United Supermarkets v. NLRB*, 862 F.2d 549 (1989). The court affirmed the Board’s decision and expressly agreed with both of the Board’s holdings. With regard to the Board’s first holding, the court stated (862 F.2d at 553):

[T]o give weight to this decertification petition would defeat the policy behind the special status given a union during the certification year. A union needs to be given a reasonable time to prove its worth to the employees

without added pressure from the employer. See *Brooks*, 348 U.S. at 100.

In addition, the court agreed with the Board’s second holding that the petition was tainted by the employer’s own unlawful conduct. Accordingly, the court upheld the Board’s determination that the employer violated Section 8(a)(5) of the Act by withdrawing recognition from the union.

We agree with the General Counsel and the Union that *United Supermarkets* is dispositive of the issue before us.<sup>6</sup> As discussed above, both the Board and the court squarely held that an employer may not withdraw recognition outside the certification year on the basis of evidence of loss of majority acquired within the certification year. That holding applies with equal force here, where the Respondent defends its withdrawal of recognition on the basis of a petition it received during the 10th month of the certification year. Of course, unlike *United Supermarkets*, the instant case does not involve an employee petition that was tainted by employer unfair labor practices. Therefore, what we have termed the second holding in *United Supermarkets* is not relevant here. But that distinction between the two cases in no way diminishes the applicability of the first holding of the *United Supermarkets* Board and court that, under *Brooks*, a certified union’s majority status may not be directly challenged by an employer on the basis of an employee petition submitted during the certification year.

We now turn to consider *Rock-Tenn Co.*, 315 NLRB 670 (1994), *enfd.* 69 F.3d 803 (7th Cir. 1995), the case that the judge believed undermined *United Supermarkets*. *Rock-Tenn* involved an employer withdrawal of recognition at the end of the certification year based in part on an employee petition circulated 3 months after the union was certified. Carefully analyzing the Board and court opinions in *United Supermarkets*, the *Rock-Tenn* judge correctly stated that the two holdings of *United Supermarkets* “stand independent” of each other. 315 NLRB at 679. Relying on what we have termed the first holding of *United Supermarkets*, the *Rock-Tenn* judge concluded that the certification-year petition was “so premature as to render it irrelevant.” *Id.* In affirming the judge, the *Rock-Tenn* Board did not express any dis-

<sup>6</sup> Contrary to the Respondent’s assertions, the Board’s holding in *Hinde & Dauche Paper Co.*, 104 NLRB 847 (1953), does not authorize an employer to withdraw recognition after the expiration of the certification year based on an employee decertification petition received during the certification year. In that case, there was no 8(a)(5) withdrawal-of-recognition allegation, nor was there any indication that the respondent actually withdrew recognition after the certification year expired. Similarly, in *Suzy Curtains, Inc.*, 309 NLRB 1287 (1992), also relied on by the Respondent, there was no allegation that the respondent unlawfully withdrew recognition from the union after expiration of the certification year. Rather, each case addresses the issue of whether the respondent unlawfully proposed that the duration of the collective-bargaining agreement be coextensive with the certification year. Because that issue is not presented here, we do not pass on it in this case.

agreement with the judge's reliance on *United Supermarkets*. In fact, the Board specifically stated that it agreed with the judge that the employee petition "was premature" and "cannot be relied upon as evidence of the Union's loss of majority support." 315 NLRB at 672.

The *Rock-Tenn* Board also addressed an issue not present here, i.e., whether the respondent violated Section 8(a)(5) by announcing during the certification year that it would withdraw recognition from the union at the end of the certification year and would not bargain with the union for a successor agreement. In finding that the respondent had violated the Act, the Board applied the standards established for determining the legality of an "anticipatory withdrawal of recognition." In this connection, the Board quoted from *Abbey Medical/Abbey Rents*, 264 NLRB 969 (1982), enf.d. 709 F.2d 1514 (2d Cir. 1983), as follows:

Such an "anticipatory withdrawal of recognition" in relation to a future contract is lawful if and only if the employer can demonstrate that, on the date of withdrawal and in a context free of unfair labor practices, the union in fact had lost its majority status, or respondent's withdrawal of recognition was predicated on a reasonable doubt based on objective considerations of the union's majority status.<sup>7</sup>

In sum, *Rock-Tenn* contains two legal theories that are in conflict. As the judge here recognized, under the *United Supermarkets* theory, "an employer cannot withdraw recognition outside the certification year based on evidence within the year"; whereas under the "anticipatory withdrawal of recognition" theory, "an employer may lawfully announce an intent to withdraw recognition after the end of the certification year, based on evidence within the year." The *Rock-Tenn* Board failed to acknowledge this inconsistency in its decision.

In view of the judge's comment that *Rock-Tenn* undermined *United Supermarkets*, this case presents the Board with an appropriate opportunity to reexamine and clarify *Rock-Tenn*. For the reasons discussed below, we conclude that *Rock-Tenn* erroneously relied on the *Abbey Medical* "anticipatory withdrawal of recognition" precedent.

In *Rock-Tenn*, the anticipatory withdrawal of recognition occurred during the certification year; by contrast, in the *Abbey Medical* line of cases cited in *Rock-Tenn*, the anticipatory withdrawal of recognition occurred during the term of a collective-bargaining agreement and in the context of an established bargaining relationship.<sup>8</sup> Al-

<sup>7</sup> The other "anticipatory withdrawal of recognition" cases cited in *Rock-Tenn* are *Wilshire Foam Products*, 282 NLRB 1137 (1987), and *R.J.B. Knits*, 309 NLRB 201 (1992).

<sup>8</sup> In *Abbey Medical*, the union was recognized in 1972; the withdrawal of recognition occurred in 1980. In *Wilshire Foam*, the parties had a 20-year bargaining history before recognition was withdrawn. In *R.J.B. Knits*, the union was recognized in 1988; the withdrawal of recognition occurred in 1992.

though both challenges occurred during times when the union's majority status is ordinarily presumed to be irrefutable, there are important differences between the two situations. As the facts of this case illustrate, in the first year following the union's certification, negotiations often commence in the aftermath of a contested representation proceeding. When the parties appear at the negotiating table during the certification year, they must attempt to put their differences behind them and forge a new bargaining relationship. The difficulty of their undertaking is complicated by the fact that they are negotiating for the first time without any prior contract or experience to guide them. See, e.g., *Ford Center for the Performing Arts*, 328 NLRB 1 (1999). Therefore, the need is great for an insular period in which the bargaining relationship can stabilize and succeed free from distraction. Permitting an employer to "anticipatorily" challenge the union's majority before the full 12 months have elapsed violates the very purposes of the certification-year rule as explained in *Brooks*: a union would be placed under "exigent pressures to produce hothouse results or be turned out" and an employer would "know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties. . . ." 348 U.S. at 100.

Significantly, in the years following the Board's 1987 decision in *United Supermarkets*, *Rock-Tenn* is the only case where the Board has applied the "anticipatory withdrawal of recognition" theory in the context of the certification year. Thus, *Rock-Tenn* is questionable precedent for applying the theory in certification-year cases.

In short, to the extent that *Rock-Tenn* extended the *Abbey Medical* line of case law to situations involving the certification year, *Rock-Tenn* must be regarded as an aberration that is in conflict not only with the Board's prior decision in *United Supermarkets* (on which *Rock-Tenn* itself relied), but also with the Supreme Court's historic decision in *Brooks*. Accordingly, we overrule *Rock-Tenn* to the extent that it suggests that, based on evidence received during the certification year, an employer may announce that it intends to withdraw recognition from the union at the end of the certification year.

In light of the foregoing, we hold that *United Supermarkets* is the precedent that governs this case.<sup>9</sup> Under

<sup>9</sup> Nothing in *United Supermarkets* or our decision here undermines the Board's practice of permitting a showing of interest collected during the certification year to be used to support an election petition filed outside the certification year. Further, that practice does not support the Respondent's position here for two reasons. First, an election based on a showing of interest collected during the certification year would nonetheless be held *outside* the certification year. The actual test of the union's majority status, therefore, would occur after the certification year had expired. In contrast, the Respondent's withdrawal of recognition in this case is based on evidence concerning the Union's majority status that arose during the certification year. Second, the Supreme Court has repeatedly held that it is appropriate for the Board to distinguish between employees voting to reject a union in an election, on the one hand, and an "employer relying on employee rights in refusing to

*United Supermarkets*, an employer may not withdraw recognition from a union outside of the certification year based on evidence received within the certification year.<sup>10</sup> Therefore, the Respondent's February 9, 1995 withdrawal of recognition was unlawful, and it further violated Section 8(a)(5) by unilaterally granting a wage increase to the unit employees on March 6, 1995.

#### ORDER

The National Labor Relations Board orders that the Respondent, Chelsea Industries, Inc., Chelsea, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Unlawfully withdrawing recognition from International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, the Union, and refusing to bargain with it as the exclusive collective-bargaining representative of the employees employed in the unit described below in paragraph 2(a).

(b) Unilaterally granting bargaining unit employees a wage increase without notice to or bargaining with the Union as the exclusive collective-bargaining representative of the employees employed in the bargaining unit described below.

(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 and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees, shipping and receiving employees, quality control employees employed by Respondent at its facility located at 320 North Main, Chelsea, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) On the specific request of the Union, rescind the wage increase that was granted March 6, 1995.

(c) Within 14 days after service by the Region, post at its Chelsea, Michigan facility, copies of the attached no-

tice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 February 9, 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.

Unlike my colleagues, I find that the Respondent lawfully withdrew recognition from the Union. I would therefore dismiss the complaint.

On November 21, 1994, i.e., 9-1/2 months into the certification year, Respondent received a petition signed by a majority of the employees. The petition said that these employees did not wish to be represented by the Union. The petition was untainted by any misconduct by the Respondent. Respondent did not act on the petition until February 9, 1995, i.e., after the end of the certification year. Respondent withdrew recognition at that time.

In sum, Respondent received an untainted petition after 9-1/2 months of bargaining. Respondent obviously knew that it could not withdraw recognition at that point, and Respondent did not do so. *There is no suggestion that the petition-signers changed their minds in the next 2-1/2 months.* Thus, *at the critical time*, i.e., at the time of the withdrawal of recognition, Respondent had a good-faith doubt, i.e., an uncertainty, as to whether the Union continued to represent a majority.<sup>1</sup> Accordingly, such withdrawal was not unlawful.

My position is supported by *Rock-Tenn*, 315 NLRB 670 (1994), *enfd.* 69 F.3d 803 (7th Cir. 1995). In that case, the Board clearly stated that "an employer may lawfully announce an intent to withdraw recognition after the end of the certification year, based on evidence within that year." Clearly, if the employer can announce that it will do so, it can proceed to do so after the end of

bargain" on the other hand. See *Auciello Iron Works*, 517 U.S. 781, 790 (1996); *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27, 50 fn.16 (1987); and *Brooks v. NLRB*, 348 U.S. at 103.

<sup>10</sup> To the extent that earlier cases such as *Vulcan Steel Tank Corp.*, 106 NLRB 1278 (1953), and *Grace and Hornbrook Mfg.*, 225 NLRB 15 (1976), suggest that an employer can withdraw recognition at the end of the certification year based on evidence received during that year, they did not survive *United Supermarkets*, and we explicitly overrule them today.

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup> *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998).

the certification year. My colleagues effectively concede that *Rock-Tenn* requires dismissal of the allegations in this case. They therefore overrule that case. In addition, because still other cases would require dismissal herein, they overrule those cases as well.<sup>2</sup>

In addition, even if *Rock-Tenn* is overruled, that would simply mean that an employer cannot *announce* during the certification year that it will withdraw recognition after that year. However, Respondent herein made no such announcement. Thus, there did not exist the supposed danger that such an announcement would disrupt bargaining during that year.

In overruling *Rock-Tenn*, my colleagues say that it is inconsistent with *United Supermarkets*. In my view, the cases are not inconsistent. *United Supermarkets* is distinguishable from *Rock-Tenn* and from the instant case. It is true, as my colleagues point out, that the Board, in the circumstances of *United Supermarkets*, stated that the respondent could not rely on the petition presented during the certification year to justify a later withdrawal of recognition. However, the *United Supermarkets* Board immediately went on to find that the underlying expression of nonsupport for the union was itself unreliable as an indicator of uncoerced employee sentiment because it arose when the respondent had not yet fully remedied its many unfair labor practices. Indeed, the Board said that this latter factor was “[m]ore significant” than the untimeliness of the petition. *United Supermarkets*, supra at 120. In concluding that the respondent had acted unlawfully, the Board cited “the timing and the circumstances existing when the decertification petition arose—during the certification year and while the Respondent continued to delay taking remedial action for its own unlawful prior actions . . . .” *Id.* (emphasis added).

Thus, the Board’s holding in *United Supermarkets* was that an employer cannot lawfully withdraw recognition from a Union based on a petition filed during the certification year in a context of unremedied unfair labor practices. Further, in affirming the Board, the Fifth Circuit emphasized, inter alia, that the respondent’s unremedied serious unfair labor practices tended to interfere with the free exercise of employee rights at the time of the petition.

Thus, the critical inquiry is whether there is a doubt on the date of withdrawal of recognition. Clearly, there was such a doubt, i.e., uncertainty, in this case. The employees had recently expressed their desire not to be represented, and they had not recanted that expression.

In sum, in the instant case, the Respondent, in a context free of unfair labor practices, relied on an untainted petition, clearly not stale, signed by a majority of unit employees. Contrary to my colleagues, I do not read current Board law as proscribing the Respondent’s with-

drawal of recognition simply because the petition that it relied on appeared during the certification year. The Respondent acted appropriately by allowing the full certification year to expire before withdrawing recognition. That action was lawful and in accord with the Section 7 choice of the employees.

#### 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 unlawfully withdraw recognition from International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO and unlawfully refuse to bargain with it as the exclusive collective-bargaining representative of the employees employed in the bargaining unit described below.

WE WILL NOT unilaterally grant bargaining unit employees a wage increase without notice to or bargaining with the Union as the exclusive collective-bargaining representative of the employees employed in the bargaining unit described below.

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.

WE WILL recognize and, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time production and maintenance employees, shipping and receiving employees, quality control employees employed by Respondent at its facility located at 320 North Main, Chelsea, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL, on the specific request of the Union, rescind the wage increase that was granted March 6, 1995.

CHELSEA INDUSTRIES, INC.

<sup>2</sup> *Vulcan Steel Tank Corp.*, 106 NLRB 128 (1953); and *Grace & Hornbrook Mfg.*, 225 NLRB 15 (1976).

*Ellen Rosenthal, Esq.*, for the General Counsel.

*Susan T. Teff, Esq.* and *Steven J. Fishman, Esq.*, of Bloomfield Hills, Michigan, for the Respondent.

*John G. Adam, Esq.*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was submitted to the Judges Division on August 1, 1995, pursuant to a stipulation that waived a hearing before an administrative law judge. It was thereafter assigned to me to issue a decision. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Charging Party Union and thereafter making unilateral changes by granting employees a wage increase without affording the Union an opportunity to bargain. The Respondent filed an answer denying the essential allegations in the complaint. The parties filed briefs, which I have received, read and considered.

Based on the formal documents, the stipulation of the parties and the stipulated record here, I make the following

##### FINDINGS OF FACT

###### A. The Stipulated Facts

The stipulation of facts in this case reads as follows:

1. (a) The charge in Case 7-CA-36846 was filed by the Charging Party on February 15, 1995, and a copy was served by certified mail on Respondent on February 17, 1995.

(b) The charge in Case 7-CA-37016 was filed by the Charging Party on March 24, 1995, and a copy was served by certified mail on Respondent on or about March 27, 1995.

2. At all material times Respondent, a corporation, with an office and place of business in Chelsea, Michigan (Respondent's Chelsea facility), has been engaged in the manufacture, nonretail sale, and distribution of straightened cut wire and related products.

3. During the calendar year ending December 31, 1994, Respondent, in conducting its business operations described above in paragraph 2, purchased and received at its Chelsea facility, goods and materials valued in excess of \$50,000, which goods and materials were shipped to Respondent's facility directly from points outside the State of Michigan.

4. At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. At all material times the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

6. At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(3) of the Act:

Ron Thompson	President
Dana Jenick	Director of Human Resources

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

All full-time and regular part-time production and maintenance employees, shipping and receiving employees, quality control employees employed by Respondent at its facility located at 320 North Main, Chelsea, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

8. On October 19, 1990, the Charging Party filed a petition in Case 7-RC-19431 seeking to represent the employees in the unit. An election was held on December 20, 1990. The Charging Party filed objections to the election. On August 27, 1991, the Board issued a Decision and Direction of Second Election. A rerun election was held on October 11, 1991. The Respondent filed objections to the second election. On April 8, 1993, the Charging Party was certified by the Board as the exclusive collective-bargaining representative of the employees in the unit. The Respondent refused to bargain with the Charging Party in an attempt to test the certification and the Charging Party filed a charge in Case 7-CA-34712. A Motion for Summary Judgment was subsequently filed and on November 15, 1993, the Board issued its Decision and Order directing the Respondent to recognize the Charging Party. *Chelsea Industries*, 312 NLRB No. 191 (1993) (not published). The Respondent did not seek review of the Board's decision.

9. At all times since April 8, 1993, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the employees in the unit for the purposes of collective bargaining.

10. The Charging Party's certification year commenced on about February 3, 1994, when Respondent and the Charging Party commenced negotiations.

11. On February 9, 1995, Respondent, by letter, by its attorney, Steven J. Fishman, withdrew its recognition of the Charging Party as the exclusive collective-bargaining representative of the unit (Exh. A).

12. In withdrawing recognition on February 9, 1995, Respondent relied on an employee petition circulated by employees in the unit on November 18 and 19, 1994, and presented to the Respondent on November 21, 1994, by employees in the unit. (Exh. B.) The petition was signed by 57 unit employees.

13. Between November 21, 1994, and February 9, 1995, six employees in the unit who had signed the petition terminated their employment with the Respondent.

14. On February 9, 1995, there existed a total of 89 employees in the unit. (Exh. C is a seniority list of unit employees dated February 1, 1995. On February 9, 1995, the unit contained the same employees as listed in Exh. C, except that Michael Dunaway had terminated his employment.)

15. The petition referred to above in paragraph 12 contains the valid signatures of 51 employees in the unit as of February 9, 1995. The number of signatures on the petition constitutes the numerical majority of the unit as of February 9, 1995.

16. Although collective bargaining between Respondent and the Charging Party was continuing prior to February 9, 1995, they had not, as of February 9, 1995, reached agreement on an initial collective-bargaining agreement.

17. On February 9, 1995, there existed no unremedied unfair labor practice charges against the Respondent.

18. No secret-ballot election was conducted among the employees in the unit prior to the Respondent's February 9, 1995, withdrawal of recognition to determine whether or not the employees desired to be represented for the purpose of collective bargaining by the Charging Party.

19. About March 6, 1995, Respondent, by its agent Ron Thompson, granted unit employees a wage increase.

20. The subject set forth above in paragraph 19 relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject of bargaining.

21. Respondent engaged in the conduct described above in paragraph 19 without prior notice to the Charging Party and without affording the Charging Party an opportunity to bargain with Respondent with respect to this conduct.

###### B. Discussion and Analysis

A Board-certified union is entitled to an irrebuttable presumption of its representative status for 1 year following its certification. This is because it "should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out." *Brooks v. NLRB*, 348 U.S. 96, 100 (1954). After the end of the certification year, however, that presumption becomes rebuttable. At that point, an employer can rebut the presumption and lawfully withdraw recognition by showing either that the union does not in fact enjoy majority support or that the employer had a reasonable, objectively based doubt of the union's majority status. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990).

In the instant case, the stipulated record clearly establishes that Respondent withdrew recognition after the end of the Union's certification year based on a petition that showed a majority of its employees did not support the Union. Both in November 1994, when the petition was signed and, in February 1995, when the Respondent withdrew recognition, the Union lacked majority support. Thus, the withdrawal of recognition would appear to be proper under settled law, except for the fact that the petition was secured within the certification year, more than 9 months after the parties commenced negotiations and less than 3 months before the withdrawal of recognition. The Respondent committed no unfair labor practices, so there can be no contention that Respondent bargained in bad faith or tainted the petition by engaging in unlawful conduct.

The General Counsel and the Union contend that the Respondent violated the Act, because an antiunion petition secured within the certification year can never be utilized to withdraw recognition outside the certification year. I cannot agree. Thus, I find the withdrawal of recognition here to have been lawful.

In support of their position, the General Counsel and the Union rely on *United Supermarkets*, 287 NLRB 119 (1987), *enfd.* 862 F.2d 549, 553 (5th Cir. 1989). In that case, the Board found unlawful the employer's withdrawal of recognition after the expiration of the certification year, based on a decertification petition signed by a majority of the employees within the certification year. The General Counsel and the Union point to the following specific language in the Board's decision (287 NLRB at 120):

We believe that just as the petition could not raise a question concerning representation not be acted on by the Respondent within the certification year, the Respondent cannot subsequently rely on it to justify a more timely withdrawal of recognition.

Other cases, however, undermine the quoted language. For example, in *Rock-Tenn Co.*, 315 NLRB 670 (1994), *enfd.* 69 F.3d 803 (7th Cir. 1995), although the Board found the employer's withdrawal of recognition unlawful, it reaffirmed a line of cases that legitimize "anticipatory" withdrawals of recognition. Those cases hold that an employer may lawfully announce an intent to withdraw recognition after the end of the certification year, based on evidence, within the year, of the union's actual loss of majority or the employer's objectively based good-faith doubt of majority. 315 NLRB at 672, and cases there cited. Thus, those cases appear to refute the notion that an employer cannot withdraw recognition outside the certification year based on evidence within the year.

Moreover, the circumstances in which the Board found unlawful withdrawals of recognition in *United Supermarkets* and *Rock-Tenn*, the cases chiefly relied on by the General Counsel and the Union, are distinguishable from those presented here. In both those cases, the Board found violations because of evidence that the antiunion petitions there were tainted by unremedied unfair labor practices. In *United Supermarkets*, the Board viewed such evidence as "[m]ore significant" than the fact that the petition surfaced 5 months into the certification year, when bargaining was just beginning. 287 NLRB at 120. In *Rock-Tenn*, there were two antiunion petitions. The Board found that the first petition was inoperative because it was both premature and stale. It was premature because it was secured "only a few days after the first bargaining session," and stale because it was 6 months old by the time of the withdrawal of recognition. More significantly, the second antiunion petition was unsupported by a majority of the employees and, in any event, was tainted by the employer's unfair labor practices. Indeed, in *Rock-Tenn*, the union had submitted evidence of actual majority after the submission of the two petitions and before the withdrawal of recognition. 315 NLRB at 672-673. In contrast, here, there were no unfair labor practices to taint the petition. Even apart from this difference, the

petition in the instant case was neither premature nor stale. The petition here surfaced well into the certification year, after 9 months of bargaining. Nor was it so far in advance of the withdrawal of recognition that it could be deemed superceded by the passage of time or intervening events.

Both the General Counsel and the Union argue, in the alternative, that Respondent here could not withdraw recognition without going to a Board election. There have been suggestions that the end of a bargaining relationship should be based on the same formalities that attend its commencement. See the decision of Judge Bernard Ries in *Alcon Fabricators*, 317 NLRB 1088 (1995). Those suggestions would appear to have particular force here, where the challenge to the Union's majority occurred within the certification year and thus had the potential of rendering further bargaining within that year meaningless.

But this would require a change in Board law, a task I am not authorized to undertake. I therefore do not reach that issue. What I do find, however, is that Respondent had the right, under present Board law, to withdraw recognition after the end of the certification year, based on a petition, untainted by unfair labor practices and submitted within the certification year, which showed that a majority of its employees did not wish the Union to represent them. Accordingly, I find that the Respondent has not violated the Act.

#### CONCLUSION OF LAW

The General Counsel has not proved by a preponderance of the evidence that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended:

#### ORDER

The complaint is dismissed in its entirety.

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<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.