

Marion Hospital Corporation d/b/a Marion Memorial Hospital and Southern Illinois Laborers' District Council Local 508, AFL-CIO affiliated with Laborers' International Union of North America, AFL-CIO. Cases 14-CA-25287 and 14-CA-25341¹

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN, TRUESDALE, AND WALSH

On April 29, 1999, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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 as discussed below, and to adopt the recommended Order as modified.²

The principal issues in this case are whether the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union in September 1998,³ and by withdrawing recognition from the Union in October. For the reasons set forth below, we find, in agreement with the judge, that the Respondent unlawfully refused to bargain in September and unlawfully withdrew recognition in October.

Factual Background

The facts, which are set forth more fully in the judge's decision, may be briefly summarized as follows. The Respondent and the Charging Party (the Union or Local 508) were parties to a series of 1-year collective-bargaining agreements, the most recent of which expired

¹ We have amended the case caption to include Case 14-CA-25341, which was inadvertently omitted by the judge.

² We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent has excepted, inter alia, to the judge including a provision in his recommended Order requiring the Respondent to preserve and, on request, provide at the office designated by the Board or its agents, copies of specified records necessary to analyze the amounts due under the terms of the Board's Order, including electronic copies, if such records are stored in electronic form.

Electronic documents, if they exist, are encompassed within the Board's traditional remedial language. See *Bryant & Stratton Business Institute*, 327 NLRB 1135 fn. 3 (1999). Regarding the requirement that the Respondent provide the necessary records at the office designated by the Board or its agents, we shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

³ All dates hereafter are in 1998, unless otherwise specified.

April 30, 1998. The parties actively engaged in negotiations for a successor agreement, making significant progress by their 10th negotiating session on July 7, and met several more times, including on August 20. Their next meeting was scheduled for September 9; however, on September 8 the Respondent notified the Union that it was unable to meet the next day because it had to prepare for a September 10 Board hearing in Cases 14-RD-1617 and 14-RC-11975.⁴ At the hearing, the petition in Case 14-RC-11975 was withdrawn. The parties agreed that the appropriate bargaining unit in Case 14-RD-1617 consisted of about 160 employees.

On September 10 and 11, the Union requested bargaining with the Respondent. The Respondent, by letter dated September 11, requested the Union to provide it with copies of the constitution and bylaws of both the International and Local Unions, raised questions about the International's and Local's no-raiding procedures, and questioned whether the Local Union was able to continue negotiating. Finally, the Respondent's letter stated that on receipt of the requested information, the Respondent would contact the Union to schedule a meeting "if warranted."

The Union sent seven letters between September 14 and October 22 requesting the Respondent to meet and bargain. The Union's September 14 letter also stated that the information requested by the Respondent pertained to internal union matters and was irrelevant to the negotiations. The Respondent renewed its information request in a September 21 letter.

On October 20, employee Woods, the Petitioner in Case 14-RD-1617, gave a letter to the Respondent stating in pertinent part: "We have 50% plus 1 signatures and we no longer wish to be represented by Laborer's Union Local 508." Attached were petitions signed by 82 employees and bearing the language, "We, the undersigned employees of [the Respondent] no longer wish to be represented by [the Union] or any other union and hereby request decertification of this union." All but seven of the signatures were dated between July 22 and August 6; the remaining seven signatures were dated October 15-20.

Based on the letter and the attached petitions, the Respondent's chief executive officer held meetings with employees on October 28, during which he told them that the Respondent would no longer recognize the Union, would deal directly with employees, would grant a 3-

⁴ On July 30, employee Joy Woods filed the petition in Case 14-RD-1617, seeking to decertify the Union; on September 1, the Laborer's International Union of North America, AFL-CIO, filed the petition in Case 14-RC-11975, seeking to represent some of the bargaining unit employees.

percent wage increase retroactive to May, and would begin conducting employee evaluations that would lead to merit increases. In November, the Respondent unilaterally altered the compensation scheme for medical transcriptionists and an employee was denied union representation during a disciplinary interview, contrary to the expired collective-bargaining agreement. The Union was never notified or given an opportunity to bargain about any of these changes.

The Judge's Decision

The judge found that the Respondent violated Section 8(a)(5) by its failure and refusal to bargain on September 11 and thereafter, by its withdrawal of recognition on October 28, and by its subsequent unilateral changes to employees' terms and conditions of employment. The judge also found that the Respondent violated Section 8(a)(1) by notifying employees of the unilateral changes on October 28.

Specifically, the judge found that the information sought by the Respondent on September 11 related to an internal union matter and was irrelevant to mandatory subjects of bargaining. Therefore, absent a meritorious defense, it was a violation of Section 8(a)(5) for the Respondent on September 11 to condition further bargaining on the receipt and evaluation of that irrelevant information.

The judge further found that the Respondent did not present a meritorious defense, i.e., it failed to show that on September 11 the Union lacked majority status or that the Respondent had a good-faith doubt of the Union's continuing majority status. He rejected the Respondent's assertion that the petition in Case 14-RC-11975 provided the Respondent with evidence of the Union's loss of majority support. The judge also rejected the Respondent's remaining "objective considerations" concerning the September 11 refusal to bargain, finding that neither individually nor in combination did they constitute good-faith doubt: the Union had sent the Respondent two 8(g) notices of intent to strike, but no strike ever occurred; 61 employees sent the Respondent copies of their resignations from the Union; the RD petition was filed July 30; the RC petition was filed September 1; and the Union violated Section 8(g) on September 9.

Turning to the October 28 withdrawal of recognition, the judge found that the Respondent did not have good-faith doubt of the Union's majority status based on objective considerations. Regarding the petition with 82 signatures that the Respondent received on October 20, the judge reiterated that it was relied on in an atmosphere tainted by unfair labor practices, i.e., the Respondent's refusal to bargain since September 11. Further, the judge found that 7 of the 82 signatures were not unit employees

when the Respondent withdrew recognition, so that there were actually only 75 employee signatures—not a majority of the bargaining unit.

The Respondent's Exceptions

The Respondent excepts, inter alia, to the judge's finding that it unlawfully refused to meet and bargain on September 11 and thereafter. The Respondent asserts that, even if it unlawfully refused to bargain in September, that conduct did not taint the withdrawal of recognition in October. The Respondent maintains that the employee petitions the Respondent received October 20 provided it with a reasonable uncertainty, based on objective considerations, that the Union represented a majority of unit employees. Thus, the Respondent asserts that its withdrawal of recognition, unilateral changes to employees' terms and conditions of employment, and its announcement of those changes did not violate the Act.

Discussion

While this case was pending, the Board issued *Levitz Furniture Co.*, 333 NLRB 717 (2001), in which the Board "reconsider[ed] whether, and under what circumstances, an employer may lawfully withdraw recognition unilaterally from an incumbent union."⁵ In *Levitz*,⁶ the Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny insofar as they permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith doubt of the union's continued majority status. The *Levitz* Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." *Id.*, However, the Board also held that its analysis and conclusions in that case would be applied only prospectively; "all pending cases involving withdrawals of recognition [will be decided] under existing law: the 'good-faith uncertainty' standard as explicated by the Supreme Court" in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). *Levitz*, supra at 728.

1. Applying *Allentown Mack* to the Respondent's refusal to bargain on September 11 and thereafter, we find that the Respondent did not have a reasonable, good-faith uncertainty about the Union's majority status on September 11 and therefore violated Section 8(a)(5) by refusing to bargain. We find that the Respondent's asserted objective considerations as of September 11, either individually or in combination, do not establish reasonable uncertainty.

⁵ *Id.*

⁶ *Id.*, slip op. at 7.

In particular, we find, in agreement with the judge, and contrary to the Respondent's contention, that the filing of the representation petition in Case 14–RC–11975 did not provide the Respondent with evidence of the Union's loss of majority status. The petition was no longer pending when the Respondent refused to bargain on September 11; and, in any event, it is well established that an employer may not refuse to bargain because a rival petition for representation has been filed. *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 (1982). Nor did the decertification petition filed on July 30 in Case 14–RD–1617 provide the Respondent with a reasonable uncertainty about the Union's majority status. *Dresser Industries*, 264 NLRB 1088, 1089 (1982). Allowing an employer to refuse to bargain in the face of either a decertification petition, a petition for representation, or both, would not give due weight to the incumbent union's presumption of continuing majority status, especially considering that either type of petition may be filed with only 30 percent of the unit employees' support. *Ibid.*

Like the judge, we reject the Respondent's assertion that the 8(g) notices served by the Union in July without any subsequent strike activity provided the Respondent a valid basis on which to refuse to bargain with the Union. A union's inactivity does not give rise to a reasonable uncertainty about the Union's majority status. See, e.g., *Pennex Aluminum Corp.*, 288 NLRB 439, 441–442 (1988), *enfd.* 869 F.2d 590 (3d Cir. 1989).

Further, we find that the resignation forms of approximately 60 employees stating that they wished to remain financial-core members of the Union do not indicate a loss of majority support. On the contrary, by submitting such forms expressing their willingness to pay for the Union's representational services, even though they were not compelled to do so by a union-security clause at that time, those employees made clear their desire for continuing representation by the Union, even without the benefits of membership. Finally, we cannot find that the Respondent's unsubstantiated claim that the Union engaged in conduct violative of Section 8(g) provided it with uncertainty about the Union's majority status.

Accordingly, we conclude that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union on September 11 and thereafter.

2. We now turn to whether the judge correctly found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union on October 28. As an initial matter, we disagree with the judge's finding that all the signatures on the antiunion petitions the Respondent received on October 20 were tainted by the Respondent's September 11 unlawful refusal to bargain. To be sure, the judge is correct that the Board presumes

that "when an employer unlawfully fails or refuses to recognize and bargain with an incumbent union, any employee disaffection from the union that arises during the course of that failure or refusal results from the earlier unlawful conduct." *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996), *affd.* in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997), decision on remand 334 NLRB 399 (2001). Absent unusual circumstances, the presumption can be rebutted only if the employer can show that the disaffection arose after it resumed recognizing the union and bargained for a reasonable period of time, without committing further unfair labor practices that would adversely affect the bargaining. 322 NLRB at 178. Therefore, under *Lee Lumber*, only employee signatures dated *after* September 11 are presumptively tainted by the unlawful refusal to bargain. No such presumption of unlawful taint attaches to those employee signatures dated *before* September 11.

With this important distinction in mind, we will now consider whether, under the *Allentown Mack* standard, the Respondent established a reasonable, good-faith uncertainty about the Union's majority status. The record reveals that the bargaining unit consisted of 157 employees⁷ on October 28, when the Respondent withdrew recognition. As stated above, the petitions the Respondent received from employee Woods together with the letter appeared to contain the signatures of 82 employees. However, examination of those petitions reveals that of the 82 signatory employees, 7 were not unit employees⁸ on October 28 and 6 others⁹ signed the petition after the Respondent's refusal to bargain beginning on September 11. In sum, the bargaining unit consisted of 157 employees, but only 69 employee signatures on the antiunion petitions can be counted, 10 short of a majority. Such a showing is insufficient to establish a good-faith reasonable uncertainty as to the Union's continuing majority status. See *Levitz*, *supra*, slip op. at 728–729.

Aside from the petitions, the record contains no other evidence that might establish uncertainty as to the Union's continuing majority status. Furthermore, even if

⁷ GC Exh. 4, the list of bargaining unit employees, names 159 employees as of the October 28 pay period, but 2 of those employees (Mary J. Parks and Pamela Plumlee) are named twice on the list. Thus, after deleting the duplicate names, there were 157 bargaining unit employees at the time the Respondent withdrew recognition.

⁸ Damion Hill, Kathy R. Huff, Aimee Holmes, Deborah Guy, Charity Billingsley, Tracey Eisenhower, and Dixie Garris.

⁹ The signatures of Barbara Fofar, Brad Farthing, Ruth Waterman, and Pam Plumlee are dated October 15; Lisa Webb's signature is dated October 17; and Georgia Bione's signature is dated October 20. Dixie Garris' signature is dated October 19; however, as stated above, she was not a unit employee when the Respondent withdrew recognition. The Respondent has failed to rebut the presumption that these signatures were tainted by the unlawful refusal to bargain.

the Respondent had presented additional evidence of employee disaffection arising at the time it received the antiunion petitions, the *Lee Lumber* presumption of unlawful taint would apply. Because the presumption has not been rebutted, any such evidence would not be probative of a good-faith reasonable uncertainty.

Our dissenting colleague's disagreement with our decision is essentially limited to a single issue: He claims that five employees' resignations from union membership should be considered as contributing to a good-faith, reasonable uncertainty about the Union's majority status.¹⁰ The dissent's position, however, lacks support in fact and in law.

As stated in section 1, *supra*, the employees in question resigned their union memberships but expressed a willingness to continue supporting the union financially. Specifically, the resignation letters stated in relevant part as follows:

As a result of [the Union's] recent vote of intent to strike, my personal views on the matter have come to diverge from those of the union. In light of this difference of opinion and understanding the laws regarding replacement workers during an economic strike, I, [employee name,] do hereby resign my membership status in [the Union] to that of a financial core member only. This change in status is effective immediately and done with complete understanding and willingness as a non-member to fulfill my obligation to pay my fair share.

The employees submitted copies of the resignation letters to the Respondent.

On their face, the resignation letters merely state disagreement with the strike vote; they cannot reasonably be read as expressing opposition to union representation. On the contrary, by volunteering to pay for the Union's representational services, even though they were not compelled to do so by a union-security clause at that time, those employees made clear their desire for continued union representation.¹¹

Our position that the resignation letters do not indicate employee opposition to the Union is supported by Board and court precedent. "[I]t is well settled that unit em-

¹⁰ As indicated above, there were 157 employees in the unit. Thus, our colleague would find that the actions of a total of 74 employees, or 47 percent of the unit, are sufficient to create an uncertainty about the Union's majority status.

¹¹ Our dissenting colleague reads the letters differently. Focusing on the word "obligation," the dissent claims that the employees were limiting their willingness to pay dues to times when they were legally compelled to do so. Even under the dissent's strained interpretation, however, the salient fact remains that the letters do not express opposition to union representation.

ployees' nonmembership in a union does not establish that those employees do not want the Union to be their collective-bargaining representative. . . . Employees can have many reasons for desiring union representation but not to be union members. An employee's decision to become a union member or refrain from doing so is protected by the Act as a private matter." *Henry Bierce Co.*, 328 NLRB 646, 649-650 (1999) (footnotes omitted), *enfd.* in relevant part 234 F.3d 1268 (6th Cir. 2000). "Lack of interest in union activities or a disinclination to join the union does not imply opposition to the union as bargaining representative." *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 490 (2d Cir. 1975).

For these reasons, we conclude, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union in October. We also agree with the judge that the Respondent further violated Section 8(a)(5) by thereafter making unilateral changes in employee terms and conditions of employment, and violated Section 8(a)(1) by announcing these changes to employees.

3. For the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the employer's withdrawal of recognition. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where litigation of the Union's charges took several years and the Respondent's unfair labor practice was of a continuing nature and was likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Marion Hospital Corporation d/b/a Marion Memorial Hospital, Marion, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

“(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.”

CHAIRMAN HURTGEN, dissenting in part.

The Local Union represented the unit employees. The contract expired on April 30, 1998. After many bargaining sessions, the parties were unable to agree on a new contract. Another bargaining session was scheduled for September 9. However, on September 8, the Respondent told the Union that it could not meet on September 9 because it had to prepare for an NLRB hearing on September 10 in Cases 14—RD—1617 and 14—RC—11975.¹ At the hearing, the RC petition was withdrawn.

On September 10 or 11, the Local asked to resume bargaining. On September 11, the Respondent asked for copies of the constitution and bylaws of the International Union and the Local. The Respondent apparently believed that the documents would deal with the issue of whether the International could “raid” the Local, and whether the Local still had authority to bargain.² Respondent said that, on receipt of the information, further bargaining would take place if warranted. The information was never supplied.

On October 20, the Petitioner in the RD case told the Respondent that a majority of the unit employees no longer wished to be represented by that Local. There were 82 signatures on the petition. The unit had 157 employees. All but seven of the signatures were dated between July 22 and August 6. The remaining seven were dated October 15–20. Based on this letter and the employee signatures, the Respondent withdrew recognition on October 28.

I agree with my colleagues that the Respondent did not have a reasonable doubt of majority status on September 11. Further, I assume *arguendo* that Respondent has not shown the legal relevance of the information it sought on that date. Accordingly, I assume *arguendo* that the Respondent unlawfully refused to bargain on September 11 when it conditioned further bargaining on the receipt of the information.

¹ The former petition sought to decertify the Union. The latter petition was filed by the International, seeking to replace the Local as representative of a part of the unit.

² I note that the allegedly “raiding” petition was withdrawn on September 10.

However, I conclude that the Respondent acted lawfully when it withdrew recognition on October 28. As noted, there were 157 employees in the unit, and there were 82 signatures on the “decertification” petition. My colleagues correctly point out that seven signators were no longer employees on October 28. Further, six of them had signed after the September 11 refusal to bargain, and I assume *arguendo* that these signatures were tainted.

That computation leaves 69 signatures. In addition, I note that 61 employees resigned from the Local. The evidence shows that only 10 of these occurred after September 11. A total of 6 of the 61 resignees were in addition to the “decertification” signers. Only one occurred after September 11. As to the resignees, I agree that their resignations did not necessarily mean that they did not desire union representation. However, (and this is the crux of the matter), I conclude that the 69 signatures on the petition, coupled with the resignations, reasonably created “uncertainty” in the Respondent’s mind as to whether the Local had the support of a majority of the employees.³ Concededly, there is no proof that the Local had lost majority status. But, that is not the test. There was at least some uncertainty on the point.

Based on the above, I conclude that the withdrawal of recognition on October 28 was lawful.

Lynette K. Zuck, Esq., for the General Counsel.

Don T. Carmody, Esq. and Leonard W. Sachs, Esq. (Howard & Howard), for the Respondent.

Michael O’Hara, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Marion, Illinois, on January 26 and 27, 1999, pursuant to a complaint filed by the Regional Director for Region 14 of the National Labor Relations Board (the Board) on December 9, 1998, as amended at the hearing. The complaint is based on charges filed by Southern Illinois Laborers District Council, Local 508, AFL–CIO, affiliated with Laborers’ International Union of North America, AFL–CIO (the Charging Party or the Union). The complaint, as amended, alleges that Marion Hospital Corporation d/b/a Marion Memorial Hospital (the Respondent or the Hospital) committed violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The Respondent has by its answer denied the

³ *Allentown Mack v. NLRB*, 522 U.S. 359 (1998). My colleagues cite the settled proposition that “non-membership in a union does not establish that those employees do not want the Union to be their representative.” (Emphasis added.) I agree. My only point is that resignations from membership are a relevant factor to be considered.

The resigning employees said that they would fulfill their *obligation* to pay “fair share” dues. That declaration does not mean that they would voluntarily pay dues during a contract-hiatus period, i.e., when there is no union-security clause. There is no evidence that they did pay such dues.

commission of any violations of the Act and has asserted affirmative defenses.

On the entire record in this proceeding, including my observation of the witnesses who testified, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

A. The Business of Respondent

The complaint alleges, Respondent admits, and I find that at all times material Respondent has been an Illinois corporation with its principle offices and place of business located in Marion, Illinois (Respondent’s facility), where it has been engaged in the operation of an acute care healthcare institution, that during the 12-month period ending November 30, 1998, Respondent, in conducting its business operations described above, derived gross revenues in excess of \$250,000 and purchased and received at its Marion, Illinois facility goods valued in excess of \$50,000 directly from points outside the State of Illinois and has been an employer within the meaning of Section 2(2), (6), and (7) of the Act.

B. The Labor Organization

The complaint alleges, Respondent admits, and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

C. The Appropriate Unit

The complaint alleges, Respondent admits, and I find that at all times material the unit of employees set forth in *article 1—recognition* of the May 1, 1994 collective-bargaining agreement constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since then, the Union has been recognized as the representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from May 11, 1997, through April 30, 1998. At all times since May 1994, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Central Issues

This case involves the issues whether Respondent’s failure and refusal to meet with the Union for the purposes of collective bargaining and whether Respondent’s withdrawal of recognition from the incumbent Union violated Section 8(a)(5) and (1) of the Act and whether several unilateral changes in its employees’ wages and other terms and conditions of employment instituted by the Respondent pursuant to that withdrawal

¹ The following includes a composite of the undisputed facts and the admissions of Respondent, stipulations of the parties, and credited testimony and exhibits received. All dates are in 1998 unless otherwise stated.

of recognition violated Section 8(a)(5) and (1) of the Act and whether Respondent further violated Section 8(a)(1) of the Act by notifying the unit employees that it was no longer recognizing the Union, would deal directly with the employees, and would unilaterally implement changes in their wage and other terms and conditions of employment. Based on the facts as set out here and my analysis of the legal precedents discussed, I find that the refusal to meet with the Union, the withdrawal of recognition, and the unilateral changes were each violative of Section 8(a)(5) and (1) of the Act and that the notification of the employees of the above violated Section 8(a)(1) of the Act.

B. Facts

Respondent operates an acute healthcare institution in Marion, Illinois. In September 1994, when the institution was operated as a public hospital, the Illinois State Labor Board certified Southern Illinois Laborer's District Council to represent the Hospital's employees in two voting units. In November 1996, Respondent purchased the Hospital and it ceased to operate as a public hospital. Respondent and the Union have been signatory to successive 1-year collective-bargaining agreements covering employees in the certified units. The most recent collective-bargaining agreement expired April 30, 1998. The parties entered into negotiations for a successor agreement. Agreement was reached on most provisions but not on wages, pensions, and an incentive wage program for medical record transcriptionists. At the 10th negotiating session which was held on July 7, a Federal mediator met with the parties and Respondent presented its "best offer," which included a 3-percent wage increase, change in the incentive program for medical records transcriptionists, and no change in the 401k plan contribution. At the mediator's suggestion, the Union held a ratification vote on July 16. The membership rejected the Hospital's offer and authorized the issuance of a strike notice. On July 29 the parties agreed that the Union would rescind the strike notice, agree to a press moratorium and continue negotiations.

On August 4, negotiations were resumed and the Union made a counterproposal of a 50-cent-per-hour wage increase, retention of the incentive program, and either contributions to the Laborer's pension plan or an increase in contributions to the 401(k) plan. The Hospital asked for time to "cost out" the Union's proposal and the parties tentatively agreed to meet on August 7 but did not meet on that date as Respondent had not completed the costing-out of the Union's proposal.

The parties met again on August 20, which was their final negotiation meeting. At that meeting the Hospital stated it would give a 3-percent increase, which the Union could allocate between wages and the 401(k) plan. The Union asked for a 50-cent-per-hour wage increase and an increase in contributions to the 401(k) plan and dropped its demand for the Laborer's pension plan. The parties agreed to meet on September 9 with the mediator. However, on September 8 the Hospital sent a FedEx letter to the Union canceling the September 9 meeting stating that it had to prepare for a Board hearing set on September 10 in Cases 14-RD-1617 and 14-RC-11975. Employee Joy Woods had filed the petition to decertify the Union in Case 14-RD-1617 on July 30 and the Laborer's International had filed a representation petition seeking representation

of employees in some of the Hospital's departments. These cases were consolidated for hearing. At the hearing on September 10, the petition in Case 14-RC-11975 was withdrawn. Evidence was taken with respect to the appropriateness of the unit in Case 14-RD-1617. The Union and the Hospital agreed at the hearing that the unit consisted of about 160 employees.

The Union sent the Hospital letters dated September 10 and 11 requesting it to bargain. The Hospital sent the Union a letter dated September 11 requesting that the Union provide it with a copy of the constitution and bylaws of the International and Local and questioned the International and Local claims to represent employees in view of no raiding procedures, and questioned whether the Local was able to continue negotiations and stated that on receipt of the requested information it would contact the Union to schedule a meeting "if warranted." The Union sent additional letters dated September 14, 15, 17, 18, and 22 and October 7 and 22 requesting that the Hospital meet and bargain. In its letter of September 14, the Union stated that the information requested by the Hospital was irrelevant to contract negotiations. The Hospital renewed its request for information by letter to the Union dated September 21.

On October 20 Joy Woods, the Petitioner in Case 14-RD-1617, gave the Hospital a letter which stated, "We have 50% plus 1 signatures and we no longer wish to be represented by Laborer's Union Local 508." Eight decertification petitions containing a total of 82 signatures were attached to the letter.

Pursuant to this letter, Hospital Chief Executive Officer Ron Seal, an admitted supervisor and agent of the Hospital, held six small group meetings with employees at the Hospital's facility on October 28 and told them the Hospital would no longer recognize the Union, would deal directly with employees, and would implement a 3-percent raise for the employees retroactive to May 1 and that the Hospital would begin conducting evaluations of employees who would receive merit raises based on their evaluations.

On November 16, Business Office Manager Bill Jones, an admitted supervisor and agent of the Hospital, informed an employee that she could not have a union steward present during a disciplinary interview because the employees were no longer represented by the Union. The expired contract, by which the parties had been abiding, provides at article 4, section E, "Whenever a supervisor or management representative conducts a conference with an employee to discuss a matter which will result in the discipline or adverse evaluation of the employee, the employee shall be given the opportunity to have present at such conference the union representative of the employee's choice." Article 8, section E, 4 provides, "Discipline shall be imposed in private. An employee may include a Union representative during any meeting involving disciplinary action."

On about October 28, Respondent implemented a system providing for merit raises based on annual employee performance evaluations, which it described to employees in the small group meetings.

On about November 5, Respondent granted unit employees a 3-percent wage increase, retroactive to May 1 as announced in the October 28 and 29 meetings.

On about November 6, Respondent eliminated the incentive wage program for unit employees employed as medical records transcriptionists and on November 13, granted these employees a 15-percent wage increase in lieu of their incentive wage program and implemented a salary cap for this position.

In each of the foregoing instances, Respondent did not give notice to the Union of these unilateral changes and the Union did not agree to them.

The General Counsel asserts that most of the facts in this case are undisputed and that the testimony of its witnesses, most of whom are current employees, should be credited. The General Counsel notes that Respondent offered documents but failed to present any witnesses or credible support for its defenses and urges that I credit the testimony of the General Counsel's witnesses in all respects. I find merit in the General Counsel's position and find the witnesses presented to be credible witnesses and credit their testimony.

The 8(a)(5) and (1) Allegations

The General Counsel's contentions as set out in her brief:

"Respondent violated Section 8(a)(5) of the Act by its refusal to meet and bargain with the Union and its withdrawal of recognition from the Union." "The information sought by the Respondent in its letters of September 11 and 14," and on which it conditioned further bargaining, "relates to internal union matters, is not relevant, and conditioning further bargaining on the provision of this information is no defense to an 8(a)(5) proceeding," citing *Florida Ambulance Service*, 258 NLRB 459, 464 (1981); *Nomad Division Skyline Corporation, Inc.*, 240 NLRB 737 (1979), aff'd. 613 F.2d 1328 (5th Cir. 1980). Moreover, "Respondent's request for the information was made after the representation petition was withdrawn. The mere filing of a decertification petition does not permit an employer to withdraw from bargaining with an incumbent union. At the time Respondent refused to bargain in September, there was no evidence that Respondent had a good-faith doubt as to the Union's continued majority status," citing *Dresser Industries, Inc.*, 264 NLRB 1088, 1089 fn. 7 (1982). Thus Respondent, "by this conduct, unlawfully refused to meet and bargain with the Union." Respondent's affirmative defense to the withdrawal of recognition allegation must fail as "it did not possess a good faith doubt about the Union's continued majority status."

"An employer may rebut the presumption of the continued majority status of an incumbent union and withdraw recognition if it can show that either the union in fact no longer has the support of a majority of the unit employees, or that the employer has a reasonably based doubt, based on objective considerations, as to the union's continued majority status. Any such doubt, however, must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. In cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, however, the causal relationship between unlawful

act and subsequent loss of majority support may be presumed," citing *Lee Lumber & Building Material Corp.*, 327 NLRB 175, 176-177 (1966), aff'd. in relevant part 117 F.3d 1454 (D.C. Cir. 1997). "It has long been held that the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice or to persuade them to abandon collective bargaining altogether," citing *Lee Lumber*, supra, citing *Karp Metal Products*, 51 NLRB 621, 624 (1943). "Here, Respondent and the Union last met on August 20. The withdrawal of recognition took place after Respondent's refusal to meet since about September 11, after the issuance of the complaint, and in a context of unremedied unfair labor practices of the sort likely to have a significant continuing detrimental impact on employees, causing them to become disaffected from the Union. Accordingly, Respondent was not privileged to withdraw recognition and make unilateral changes," citing *Tocco, Inc.*, 326 NLRB No. 128 slip op. at 6 (1998); *Americare Pine Lodge Nursing*, 325 NLRB 98 (1997); *Lee Lumber*.

"Respondent may contend that the Union did not enjoy majority status because the International filed a petition seeking an election in a unit consisting of 70 of the 160 employee unit represented by the Local . . . the representation petition was withdrawn on September 10, 9 days after its filing. Regardless the mere filing of a representation petition by an outside challenging union will not require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union," citing *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 (1982).

"Respondent may also contend that the Union did not enjoy majority status because employees did not participate in a strike and resigned their union membership. However the evidence establishes that the Union never requested that employees strike. As to employee resignations from the Union, the resignations do not constitute evidence that employees no longer desire to be represented by the Union." "Respondent submitted 43 resignations executed during the period July 20 through August 5, 10 resignations executed during the period September 11 through September 18 and 7 undated resignations." "These resignations coincide with the Union's July and September strike notices. However, a careful review of these resignations discloses that all of the resignations, with one exception, indicated that employees are resigning their membership and electing to be a 'financial core member', which change in status is 'done with complete understanding and willingness as a nonmember to fulfill my obligation to pay my fair share.' Accordingly it is clear that these employees still desire to be represented by the Union and were willing to pay their share of the Union's costs of representational activities such as collective bargaining, contract administration, and grievance adjustment." Rather, the resignation from their union membership supports an inference that these employees were not able to financially afford honoring a strike and did not want to be fined for crossing a picket line.

The General Counsel contends further that the “evidence establishes that 82 employees signed decertification petitions during the period July 22 through October 20. Seven of the signatures were obtained during the period October 15 through 20, after Respondent’s unlawful refusal to meet and bargain in September.” In response to the General Counsel’s subpoena of documents showing the unit employees employed by Respondent during the pay period including October 28, Respondent provided the document received in evidence as General Counsel’s Exhibit 4 which shows there were “a total of 166 unit employees, less 7 employees who were hired after October 28. While the decertification petition shows a numerical majority of 82 employees in a 159-employee unit, a careful examination of the decertification petition (GC Exh. 3) indicates certain employees signed the decertification petition whose names do not appear on General Counsel’s Exhibit 4: Damon Hall (GC Exh. 3(b), 3rd name); Aimee Holmes (GC Exh. 3(c), 8th name); Deborah Guy (GC Exh. 3(d), 4th name); Rocky Langley (GC Exh. 3(e), 10th name); Charity Billingley and Tracy Eisenhauer (GC Exh. 3(f), 7th and 13th names); and Dixie Garris (GC Exh. 3(i), 2nd name). These seven employees cannot be counted in the group relied on by Respondent for its good-faith doubt if they do not appear on the list of employees employed at the time Respondent withdrew recognition. Accordingly only 75 of the 159 employees indicated an interest in no longer being represented by the Union, and Respondent did not have objective considerations that the Union no longer represented a majority of employees.”

The General Counsel further contends:

In order to lawfully withdraw recognition from the Union, Respondent must have actual proof of lack of majority support or a good-faith doubt regarding the Union’s continued majority status, based on sufficient objective considerations where those considerations are not the result of Respondent’s efforts. *Shen Automotive Dealership Group*, 321 NLRB 586, 595 (1996). Respondent has not met its burden of establishing that the Union lost majority status or it had objective considerations that its obligation to bargain with the Union was terminated by loss of majority status. And, as noted above in item B, employee disaffection occurred in a context that was not free from Respondent’s unfair labor practices. *Shen Automotive*, supra; *Safe-Way Door*, 320 NLRB 849, 851 (1996).

Thus, the evidence establishes that the parties had a Section 9(a) relationship and that the Employer violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union and refusing to recognize and bargain with the Union regarding the terms of a successor collective-bargaining agreement.

Respondent’s Contentions as Set Out in Their Brief

“Point I: Local 508 did not represent a majority of the RD employees on September 11.”

Respondent’s initial reaction to the filing of the RC petition by the International on September 1 was that it constituted a competing demand for recognition and contradicted any presumption that Local 508 continued to represent a majority of

the RD employees. The Hospital’s requests for information were justifiable and totally compatible with other prevailing “objective considerations,” and “enhanced those ‘objective considerations’ to the point of excusing the Respondent from any continued duty to bargain vis a vis the RD unit.”

Union President Randall J. Mayhew’s testimony, if credited, establishes that Local 508 filed the RC petition on September 1 demanding continued recognition in a collective-bargaining unit substantially different from the previously recognized unit. Mayhew’s testimony, if believed, is an admission that “Local 508 consciously sought, as of September 1, recognition and certification of a unit of employees so drastically different from that which underlie prior negotiations that Local 508’s RC Petition was destructive of the RD unit alleged in the complaint.”

Point II: The Hospital’s Request for Information does not constitute a refusal to meet for bargaining.

“As discussed, infra, in point III, sufficient objective considerations existed which would have permitted the Hospital to withdraw from bargaining as of September 11. However, the Hospital did not do so . . . the General Counsel is attempting to equate the Hospital’s conditioning the continuation of bargaining on the receipt of responses to its requests for information as a refusal on the Hospital’s part to bargain. The record . . . does not support this conclusion.”

“The express language of the Hospital’s September 11 request for information . . . contradicts Local 508’s allegation that the Hospital refused to engage in further collective bargaining negotiations.” The letter specifically states: “Once we are in receipt of the requested information, we will contact you to schedule a date upon which to meet, if warranted.” The plain language of the letter demonstrates that the Hospital was merely exercising its right to express information from Local 508 which was relevant to the bargaining process.”

“At the time of its request for information, the Hospital was faced with conflicting claims of representation—Local 508 was demanding to conclude bargaining and at the same time, the International had interposed a competing demand for recognition in the form of the RC petition. At a minimum, the Hospital’s right to renew the Recognition clause in Article I of the parties expired collective bargaining agreement . . . through continued bargaining with Local 508 was placed in doubt.”

Point III: Objective considerations existed as of September 11, 1998, to support a reasonable good-faith doubt that Local 508 continued to represent a majority of employees.

On September 11, the Hospital had a “reasonable good-faith doubt” as to the Union’s continued majority status based on the following objective considerations:

- (1) Local 508 served the first 8(g) notice, dated July 17, 1998, and no activity occurred.
- (2) Local 508 served the second 8(g) notice, dated July 24, 1998, and no activity occurred.
- (3) Sixty-one employees submitted copies of their resignations from union membership to the Hospital.

(4) Joy Woods filed the RD petition on July 30, 1998.

(5) The International filed the RC petition on September 1, 1998, effectively demanding recognition as the collective-bargaining representative for a substantial component of the historical contract collective bargaining unit. See *Gary Steel Products Corp.*, 127 NLRB 1170 (1960); and *National Welders Supply Co.*, 145 NLRB 948 (1964).

(6) Local 508 engaged in unlawful activity in violation of Section 8(g) on September 9, 1998.

Respondent contends that these “objective considerations in combination” support a reasonable good-faith doubt as to Local 508’s majority status. It contends that the withdrawal of the RC Petition on September 10 “does not diminish the impact of the filing of the RC Petition as an objective consideration as of September 11” and cites in support thereof *Upper Mississippi Towing Corp.*, 246 NLRB 262 (1979), wherein the Board found that the withdrawal of a competing representation petition “did not eliminate the petition as a source of objective consideration” in the circumstances of that case wherein the Local Union sponsoring the competing petition withdrew the petition under pressure from its own parent organization to cease organizing activity in compliance with the parent organization’s “no raiding” policy. Respondent argues that likewise in the instant case, the RC petition was withdrawn “because the unions knew the petitioned—for unit was inappropriate and the petition would be dismissed in lieu of withdrawal.”

Point IV: Additional objective considerations existed as of October 28 to support a reasonable good-faith doubt that Local 508 continued to represent a majority of employees.

Ample “objective considerations existed as of September 11 to support a reasonable uncertainty of the continued majority of Local 508 to provide a defense to paragraph 6 of the complaint. However, additional objective considerations attached between September 11 and 28, so as to compel dismissal of the withdrawal of recognition allegation through a sustaining of the Hospital’s first affirmative defense.

Local 508’s unequivocal refusal in its letter of September 14 to answer the concerns of the Hospital expressed in its letters of September 11 and 21 with respect to the filing of the RC petition by the International supported the Hospital’s inference that “the International either was competing with Local 508 and had successfully organized the RD unit with Local 508’s acquiescence, or . . . had injected itself into the fray in a desperate attempt to retrieve bargaining rights in the interest of its Local for at least a portion, albeit a minority segment, of the Union’s prior stronghold.”

Further Respondent relies on the October 20 submission to its administrator of “a compendium of several lists containing the *uncoerced* signatures of 82 individuals employed in the RD unit, all but 7 of which were dated prior to September 1, and every one of which was dated prior to October 20.” Respondent thus asserts that the October 20 list of signatures establishes an objective consideration supporting a reasonable uncertainty of Local 508’s continued majority status as of October 28. Whether the signatures are measured “against the incumbent RD unit employed at the time the signatures were obtained (144 individuals), or at a time the signatures were delivered to

the Hospital (155 individuals), a clear majority of the RD Employees ‘no longer wish[ed] to be represented by Laborer’s Union Local 508 or any other union . . . and requested decertification of the Union.’” (GC Exh. 3.)

Point V: Assuming, arguendo, the Hospital refused to meet in negotiations, such conduct does not diminish the objective considerations prevailing as of October 28, 1998.

In this regard Respondent recognizes that in *Lee Lumber & Building Material Corp.*, the Board adopted a rebuttable presumption that “when an employer unlawfully fails or refuses to recognize and bargain with an incumbent union, any employee disaffection from the union that arises during the course of that failure or refusal results from the earlier unlawful conduct.” The Board further held that in “the absence of unusual circumstances” the presumption can only be rebutted by the employer’s showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining.

Respondent contends that the circumstances surrounding the filing of the RC petition in the instant case are analogous to the unusual circumstances identified in *Brooks v. NLRB*, 348 U.S. 96, 98–99 (1954) “(i.e., (1) the certified union dissolved or became defunct, (2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international, or (3) the size of the bargaining unit fluctuated radically within a short time).

Respondent argues further that “In the absence of a presumption of taint, in order to defeat either of the Hospital’s Affirmative Defenses, any unfair labor practice of the Hospital ‘must have caused the employee disaffection here or had a ‘meaningful impact’ in bragging about that disaffection,” citing *Master Slack Corp.*, 271 NLRB 78 (1984). Respondent argues that “Because only five employees added their signatures to the Petition after September 11, and because in any event, as of October 28, 79 signatures adequately evidenced the Union’s lack of continued majority support . . . the impact, if at all, attributable to garnering two additional signatures of dissenting employees, as a matter of law, cannot be meaningful,” citing *Purolator Products*, 289 NLRB 986 (1988), in which the Board held employer did not violate the Act by the withdrawal of recognition based on objective considerations notwithstanding unremedied unfair labor practices and citing *St. Louis Auto Parts Co.*, 315 NLRB 717 (1994).

Point VI. The General Counsel failed to establish by a preponderance of evidence that the Hospital refused to bargain with the Union in a unit appropriate for collective bargaining.

Respondent apparently argues that the three prior collective-bargaining agreements between the parties are insufficient to establish the appropriateness of the unit alleged in the complaint, that “Mahew’s testimony establishes that Local 508 abandoned 86 employees who constituted not only a substantial component of the previously recognized contract collective bargaining unit, but a majority of the employees in that unit.”

Point VII: The Administrative Law Judge should reconsider the Ruling which denied the Hospital the opportunity to present further evidence in support of its second affirmative defense.

Until “Mahew’s startling contention, the Hospital was completely unaware that Local 508, by filing the RC petition seeking recognition and certification in a unit comprised of a minority of RD employees, had actually abandoned representation of the majority of the RD employees as of September 1, triggering the Second Affirmative Defense interposed by the Hospital . . . at the outset of the Respondent’s case-in-chief.”

Mayhew’s admission at the instant hearing that Local 508 filed the RC petition came as a total surprise. The understanding of the Hospital was that the petition had been filed by the International. The Hospital was entitled to present additional evidence in support of its second affirmative defense. Respondent asserts that it should be afforded “the opportunity to muster evidence to demonstrate even more convincingly that, by filing the RC petition, Local 508 was simply acknowledging that it no longer represented the RD employees who were not employed within the RC unit.” “Mayhew . . . testified that Local 508 probably had submitted a ‘showing of interest’ in support of the RC Petition.” The Hospital should now have an opportunity “to adduce testimony from the employees within the RD unit relative to whether they accepted or declined an invitation from Local 508 to execute a” showing of interest authorization, as well as the circumstances surrounding the salutation of such an authorization.” Such “proof would also be probative of whether Local 508 abandoned Hospital employees on whose behalf the Union supposedly was insisting upon bargaining.”

Analysis

I find that Respondent violated Section 8(a)(5) and (1) of the Act by its failure and refusal to bargain with the Union on September 11 and 14 and thereafter and by its withdrawal of recognition on October 28 and its institution of unilateral changes in the unit employees’ terms and conditions of employment on October 28 and thereafter in total disregard of the Union’s status as collective-bargaining representative and by its failure to provide notice to the Union and afford it an opportunity to bargain concerning the changes in the unit employees’ terms and conditions of employment. I further find that Respondent violated Section 8(a)(1) of the Act by notifying the employees of the institution of unilateral changes.

Initially, I find that it is undisputed that the Respondent failed and refused to meet and bargain with the Union by its letters of September 11 and 14 and thereafter. Its subsequent withdrawal of recognition was designed to divest the unit employees of representation by the Union and did not occur in the absence of unfair labor practices. Respondent has presented a number of defenses and arguments which in and of themselves do not support its position but has by its accumulation of these items sought to construct a defense to the allegations in the complaint. However, I find that none of the asserted defenses have merit and that the combination of several meritless defenses do not support its affirmative defenses in this case.

Respondent relies on *Upper Mississippi Towing*, supra. In *Upper Mississippi Towing*, the Board had before it, statements

made by the representative of the Charging Party Union in that case to the Employer’s attorney that (1) a rival union was obtaining so many authorization cards from within the unit that the Charging Party Union would never be able to win an election (2) that the representative needed more time to develop and implement a revised employee health insurance program and that the Charging Party could not win an election until he did so and (3) in order for the Charging Party to win an election, any new insurance plan would have to originate with the Charging Party Union. In that case the Board held these explicit statements were sufficient to support an objectively based reasonable doubt about the Charging Party Union’s majority status. However, in the instant case before me there was no evidence of any statement by union officials or representatives concerning any doubt of the Union’s majority status. I thus find that *Upper Mississippi Towing* and the instant case are inapposite.

I find, that Respondent has failed to establish that on September 11 when Respondent initially refused to bargain, that the incumbent union no longer represented a majority of the unit employees, or that Respondent had a good-faith reasonable doubt based on objective considerations regarding Local 508’s majority status. Rather none of the reasons listed by Respondent as grounds for its refusal to bargain and ultimate withdrawal of recognition were sufficient to establish either that Local 508 no longer represented a majority of the unit employees on September 10 or to establish that Respondent had a good-faith reasonable doubt based on objective considerations regarding Local 508’s majority status. Consequently, the combination of these assertions by Respondent as purported grounds for Respondent’s unlawful acts do not bolster Respondent’s defenses in this case. Thus Respondent’s refusal to bargain on September 11 and thereafter violated Section 8(a)(5) and (1) of the Act.

I find also that the presumption set out in *Lee Lumber* is applicable here to sustain the General Counsel’s position that the refusal to bargain contributed to Local 508’s loss of majority (if in fact there was a loss of majority) as the additional signatures were obtained after Respondent’s unlawful refusal to bargain at a crucial period in the parties’ bargaining relationship while the parties were engaged in unsuccessful prolonged contract negotiations. Respondent’s refusal to bargain on September 11 and thereafter sent a strong message to the unit employees that the Union could do no more for them as Respondent would no longer meet with the Union. This is the type of unfair labor practice that will dissipate support for a union that is then seen as powerless to help the employees. See also *Americare Pine Lodge Nursing*, and *Tocco, Inc.*, supra.

With respect to Respondent’s Point I argument that the Union did not represent a majority of the RD employees as of September 11, I find that Respondent has failed to prove this part of its defense as the evidence does not establish that the request for information was based on “objective considerations” so as to excuse Respondent from its duty to bargain. Respondent’s purported reliance on the testimony of Local 508 President Mahew’s testimony at the instant hearing that Local 508 authorized the filing of the RC petition by an International organizer even if credited, does not constitute an abandonment of the unit employees but rather relates to an internal union

matter and the withdrawal of the petition by the International on September 10 left intact Local 508's status as collective bargaining representative of the unit employees. In *RCA Del Caribe*, supra, cited by the General Counsel, the Board held that an employer may not rely on a withdrawn petition as evidence of a loss of majority by a union. In that case the Board held at 965 that the "mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union. Under this rule, an employer will not violate Section 8(a)(2) by postpetition negotiations or execution of a contract with an incumbent, but an employer will violate Section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition has been filed by an outside union." This case clearly covers the instant case before me. Thus the mere filing of the representation petition by the International or arguably Local 508 neither required or permitted Respondent to withdraw recognition or to refuse to bargain as it did by its letters of September 11 and 14. Moreover the petition had been withdrawn by the International on September 9 and was no longer pending on September 11 when Respondent initially refused to bargain giving even less credence to Respondent's alleged legitimate concern that it not risk violating the Act by engaging in further bargaining with the Union. Furthermore as set out in *RCA Del Caribe* Respondent assumed no risk of violating Section 8(a)(2) of the Act by continuing to bargain. I thus find Respondent's affirmative defense to the refusal to bargain allegation is without merit.

With respect to Respondent's Point II argument that its request for information does not constitute a refusal to meet for bargaining, it is clear that if Respondent had merely requested information, there would have been no refusal to bargain. However, Respondent conditioned further bargaining on the receipt of the information to determine whether it would honor the Union's request for bargaining "if warranted." The information sought by Respondent related to an internal union matter and Respondent was not entitled to condition further bargaining on the receipt of this information which was irrelevant to mandatory subjects of bargaining or the bargaining process.

With respect to Respondent's Point III argument Respondent relies on six listed alleged "objective considerations" as of September 11 to support a reasonable good-faith doubt of Local 508's continued majority status. Items (1) and (2) are that Local 508 served the Hospital with 8(g) notices of intent to strike as required to provide health care facilities adequate notice under Section 8(g) of the Act and that no-strike activity occurred after the notices were served. The issuance of these notices and the absence of a strike do not constitute evidence of a loss of majority. Rather they merely show that the Union complied with the notice provision set out in the Act and that no strike occurred. It is a giant leap from this to conclude that this constituted a loss of majority. Item (3) relied on by Respondent is that 61 employees submitted copies of their resignations from union membership to the Hospital. However, as contended by for the General Counsel, the withdrawal forms on their face state that the employees wish to remain financial core members paying fees for representation and merely support the inference that the employees were resigning membership in

order to avoid a possible fine that could be imposed by the Union on members who chose not to strike. This does not constitute a loss of majority. Item (4) is that employee Joy Woods filed the RD petition on July 30, 1998. However, the mere filing of a decertification petition is not evidence of a loss of majority. Item (5) is the filing of the RC petition on September 1, by the International which was withdrawn on September 10 and accordingly could not be relied on as an objective consideration supporting a reasonable good-faith doubt on September 11. Item 6 is an unidentified alleged unlawful activity by Local 508 in violation of Section 8(g) of the Act (presumably picketing) and does not support an inference of a lack of majority. None of these items either individually or in combination support a reasonable good-faith doubt as to Local 508's continued majority.

Respondent in its Point IV argument asserts that additional objective considerations existed as of October 28 to support a reasonable good-faith doubt of Local 508's majority status. It cites Local 508's failure to provide the information requested concerning the filing of the RC petition which had already been withdrawn prior to Respondent's letter of September 11 and which related to internal union matters, which information was irrelevant to bargaining. Respondent further relies on the presentation on October 20 by Joy Woods, of a "compendium of several lists containing the 'uncoerced' signatures of 82 individuals employed in the RD unit, all but 7 of which were dated prior to September 1" and contends that this was an objective consideration of a loss of majority. I find however that this did not constitute evidence of a loss of majority and admittedly occurred after the Respondent's unlawful refusal to bargain commencing on September 11 and Respondent was not entitled to rely on it as an objective consideration of a loss of majority as it was not relied on in an atmosphere free of unfair labor practices. I further find as contended by the General Counsel that Respondent has failed to establish that a majority of the unit employees signed the decertification petition as the decertification petition shows that only 75 of the 159 employees at the time of the presentation of the petition had signed the petition as the petition contained seven names that were not then on the current list of employees.

In its Point V argument Respondent contends that its refusal to meet in negotiations does not diminish the objective considerations prevailing as of October 28 when it announced it would no longer recognize the Union, would deal directly with the unit employees and announced the implementation of several unilateral changes in the wages, hours and other terms and conditions of employment of the unit employees. I find however that this refusal to bargain was the type of unfair labor practice likely to dissipate the employees' support for the Union. *Lee Lumber*; supra; *Tocco*, supra; *Americare Pine Lodge Nursing*, supra.

In its point VI argument, Respondent attacks the appropriateness of the unit for collective bargaining and asserts that reliance on the historical bargaining unit is inappropriate and that Mahew's testimony establishes that the unit was abandoned by the Union. I find otherwise as set out above.

Respondent's point VII that I reconsider my denial of Respondent's motion to continue the hearing is denied as Respon-

dent has not demonstrated what, if any additional relevant information it could offer as an affirmative defense of the Union's loss of majority or that it has been prejudiced in any manner. Rather it had an adequate opportunity to put on evidence at the hearing but chose to put on no testimony.

CONCLUSIONS OF LAW

1. Respondent, Marion Memorial Hospital, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Southern Illinois Laborers' District Council Local 508, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit of employees set forth in the collective-bargaining agreement constitutes a unit appropriate for the purposes of collective bargaining as follows:

AGREEMENT

Marion Memorial Hospital, Marion, Illinois (the Hospital), and Southern Illinois Laborers' District Council Local 508, Laborer' International Union of North America, AFL-CIO (the Union), acting pursuant to law as the exclusive bargaining agency for the employees covered by the Agreement, agree as follows:

ARTICLE 1—RECOGNITION

Section A—The Hospital hereby recognizes the Union as the exclusive bargaining agent for all full and regular part-time employees in the following classifications and positions:

<i>Classification</i>	<i>Position</i>
A.	Nurse Assistant
B.	Nutrition Aide Nutrition Worker I Nutrition Worker II
C.	Environmental Service Worker I Environmental Service Worker II
D.	Transporter
E.	Medical Records Admission/Discharge Medical Records Secretary I Secretary I Secretary II Pathologist Sec./Transcriptionist IS Manager Lab File Clerk Physical Therapy Aide
G.	Unit Secretary
H.	Central Processing Tech Admitting Clerk
I.	Billing Clerk
J.	Coding Clerk (Non-cred.)
K.	Groundskeeper Engineering Worker I Engineering Worker II Engineering Worker III
L.	Phlebotomist Lab Tech I Lab Tech II Lab Tech III

	Lab Tech IV Histology III
M.	Coding Clerk (ART or CCS)
N.	Tumor Registrar
O.	Utilization Reviewer Surgical Tech Medical Records Transcriptionist
R.	Respiratory Tech I Respiratory Tech II Respiratory Tech III Respiratory Tech IV Cardio Tech I Cardio Tech II Cardio Tech III

At all times since May 1994, Local 508 has been the exclusive collective-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

4. Respondent violated Section 8(a)(5) and (1) of the Act by:

- (a) Failing and refusing to meet with the Union for purposes of collective bargaining.
- (b) Withdrawing recognition from the Union.
- (c) Dealing directly with unit employees rather than the Union.

(d) Implementing 3-percent wage increases retroactive to May 1, 1998, and a system of merit raises based on annual performance evaluations.

(e) Eliminating the incentive wage program for unit employees employed as medical records transcriptionists.

(f) Eliminating the practice of providing employees with the opportunity to have a union representative present during disciplinary conferences.

(g) Granting a 15-percent wage increase to unit employees employed as medical records transcriptionists and implementing a salary cap for that position.

5. Respondent violated Section 8(a)(1) of the Act by notifying employees that:

- (a) Respondent was withdrawing recognition from the Union.
- (b) Respondent would deal directly with employees rather than the Union.

(c) Respondent was implementing a 3-percent wage increase retroactive to May 1, 1998, and a system of merit raises based on

6. The above unfair labor practices in conjunction with Respondent's status as an employer affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in violations of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative actions to effectuate the purposes of the Act and post the appropriate notice. It is recommended that Respondent rescind its withdrawal of recognition from the Union, that it bargain with the Union for a reasonable time, that on request by the Union it rescind any or all of the unilateral changes and restore the status quo and that it make the employees whole for any loss of earnings

or benefits sustained by them as a result of the withdrawal of recognition and implementation of unilateral changes in its employees' terms and conditions of employment in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and make whole the Union for all loss of dues collections and other expenses it may have incurred as a result of the unlawful acts of the Respondent. Interest shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²

The General Counsel has in her brief requested that I include in the recommended Order modified language regarding Respondent providing records for computing backpay. Whereas the standard backpay order requires Respondent to "preserve and make available," its payroll and other records for computing backpay, which would not require that Respondent "provide" the records, the General Counsel seeks to shift to Respondent the burden of collecting and providing these records to the Regional Office, thus placing the cost of this on the wrongdoer. The General Counsel also requests that the Respondent be ordered to provide to the Region an electronic copy of the records to the Region in the event that Respondent already maintains the necessary payroll records in digital form. I grant the General Counsel's request for the modified order as within the Board's remedial power to issue this order and find that this is not unduly burdensome and that any burden caused to Respondent thereby should properly be placed on it as the wrongdoer in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Marion Hospital Corporation d/b/a Marion Memorial Hospital, Marion, Illinois, its officers, agents, successors, and assigns shall

1. Cease and desist from
 - (a) Failing and refusing to meet with the Union for purposes of collective bargaining.
 - (b) Withdrawing recognition from the Union.
 - (c) Dealing directly with employees rather than the Union.
 - (d) Unilaterally implementing wage increases, instituting a system of merit raises based on annual performance evaluations, eliminating incentive pay programs, eliminating the practice of providing employees with the opportunity to have a union representative present during disciplinary conferences, granting wage increases to medical records transcriptionists and implementing a salary cap for these positions, without affording the Union notice and an opportunity to bargain concerning these mandatory subjects of bargaining.
 - (e) Notifying employees that it is withdrawing recognition from the Union, that it will deal directly with employees rather than the Union, that it is implementing a 3-percent wage in-

² Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. §6621.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

crease retroactive to May 1, 1998, and a system of merit raises based on annual performance evaluations.

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

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Rescind its withdrawal of recognition from the Union.

(b) On request bargain with the Union as the exclusive representative of the employees in the appropriate unit as set out in the parties' collective-bargaining agreement of 1994, and in successive collective-bargaining agreements up to and including the one which expired on May 1, 1998, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) On request by the Union, rescind any or all unilateral changes unlawfully implemented and restore the status quo.

(d) Make its employees whole for any loss of earnings or benefits and make the Union whole for any loss of dues or expenses incurred they may have sustained as a result of the Respondent's unfair labor practices, with interest, as set out in the Remedy.

(e) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in digital form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(f) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 11, 1998.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY 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 withdraw recognition from Southern Illinois Laborer's District Council, Local 508, AFL-CIO and refuse to bargain with said union concerning the rates of pay, wages, hours, and terms and conditions of our employees in the following appropriate unit:

All employees in the unit set out in the 1994 labor agreement and successive ones thereafter including the agreement which expired on May 1, 1998.

WE WILL NOT institute unilateral changes in the pay, wages, hours, and terms and conditions of employment of our employees.

WE WILL NOT notify our employees that we will engage in direct dealing with our employees rather than the Union and that we will institute unilateral changes in the pay, wages, hours, and other terms and conditions of employment of our employees.

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

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

WE WILL, on request by the Union, rescind any or all unilateral changes in wages, hours, or other terms and conditions of employment and restore the status quo.

WE WILL make our employees whole, with interest, for any loss of earnings or benefits they may have suffered as a result of our withdrawal of recognition from the Union and our institution of unilateral changes in the wages, hours, or other terms and conditions of employment.

WE WILL make whole the Union for all loss of dues collections and other expenses it may have incurred as a result of our unlawful acts, with interest.

MARION HOSPITAL CORPORATION
D/B/A MAR-ION MEMORIAL HOSPITAL