

**Penn Tank Lines, Inc. and Robert Miller and Freight Drivers, Warehousemen and Helpers, Local Union No. 390, affiliated with International Brotherhood of Teamsters, AFL-CIO and Joseph Steckler.** Cases 12-CA-19505, 12-CA-19746, and 12-CA-19774

November 29, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS  
LIEBMAN  
AND WALSH

On March 28, 2000, Administrative Law Judge Raymond P. Green issued the attached decision.<sup>1</sup> The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief supporting the cross-exceptions and answering the Respondent's exceptions.

The National Labor Relations 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,<sup>2</sup> and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

The parties' exceptions to the judge's decision raise two issues that warrant further discussion. First, we will address whether the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union. In so doing, we will consider whether the employees' October 29, 1998 decertification petition was tainted by unremedied

<sup>1</sup> The judge issued an Errata on April 6, 2000.

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

We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

The General Counsel has excepted to the judge's failure to address the complaint allegation that the Respondent violated Sec. 8(a)(1) by encouraging employees to form a drivers' committee in lieu of bargaining through the Union. The General Counsel relies on the credited testimony of driver Robert Miller concerning a conversation he had with the Respondent's human resources consultant, Charles Nicholas. Specifically, Miller testified: "[Nicholas] said . . . you guys would have been better off without the Union. You could have formed your own driver committee and represented yourself better, and wouldn't have had to pay the dues." Contrary to the General Counsel's assertion, we find that this statement did not unlawfully encourage employees to take future action to abandon the Union. Rather, the statement merely conveyed the economic reality that if the employees had decided instead to form their own committee, they would not now be subject to the dues that unions typically collect from the employees they represent. See *Office Depot*, 330 NLRB 640 (2000). Accordingly, we dismiss the complaint allegation that Nicholas's statement violated Sec. 8(a)(1) of the Act.

unfair labor practices. For the reasons set forth below, we find, in agreement with the judge, that the petition was tainted by unfair labor practices and that the Respondent unlawfully withdrew recognition from the Union based on that petition. Second, we will discuss whether the Respondent violated Section 8(a)(1) by warning employee Joseph Steckler for engaging in union activities. For the reasons set forth below, we find that the Respondent unlawfully warned Steckler.

Factual Background

The facts, which are set forth more fully in the judge's decision, may be briefly summarized as follows. On July 25, 1997, the Union was certified as the collective-bargaining representative of a unit of the Respondent's tanker truckdrivers. In December 1997, the parties began bargaining for a collective-bargaining agreement. Negotiations continued until October 29, 1998, without the parties reaching agreement on a contract. At that time, the Respondent withdrew recognition.

Drivers Joseph Steckler and Robert Miller were very active in the Union's organizing drive and were known by the Respondent to be ardent union supporters. Additionally, Steckler was part of the Union's negotiating team. On May 20, 1998,<sup>3</sup> the Respondent discharged Miller, allegedly for "job abandonment," even though the Respondent had granted him permission to attend to his seriously ill, hospitalized mother, who subsequently died.<sup>4</sup>

On October 1, the Respondent unilaterally reduced waiting-time and lost-time pay for employees. During October, driver Joe Rodriguez solicited employees' signatures on a petition indicating that they no longer supported the Union. On October 29, Rodriguez presented the Respondent with the petition bearing the signatures of 54 of the 61 drivers in the bargaining unit. The Respondent then withdrew recognition from the Union.

In early November, Steckler began soliciting employee signatures on a counterpetition showing employee support for the Union. On November 8, Terminal Manager Tom Lovett observed Steckler request Miller to sign the petition, which by that time had 34 signatures, including 25 of those drivers who had signed the antiunion petition. Steckler was suspended on November 9 for "harassing and threatening" other employees about the Union. On two subsequent occasions, Steckler was offered reinstatement if he would stop "harassing" other employees. He declined, insisting that he had a right to talk to other employees about the Union.

<sup>3</sup> All dates hereafter are in 1998, unless otherwise specified.

<sup>4</sup> On October 27, Miller received an offer to return to work on November 2, which he accepted.

### The Judge's Decision

The judge found that the Respondent violated Section 8(a)(3) when it discharged Miller in May. Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that the Respondent's animus against Miller's support for the Union was a motivating factor in the decision to discharge him. Based largely on credibility, the judge also found that the Respondent did not demonstrate that it would have terminated Miller for legitimate reasons even absent his extensive union activities.

It is undisputed that on October 1 the Respondent reduced the waiting-time and lost-time pay for drivers without providing notice and an opportunity to bargain to the Union. The judge therefore concluded that the Respondent violated Section 8(a)(5) by making these unilateral changes.

The judge found that the Respondent's October 29 withdrawal of recognition was unlawful because, inter alia, the employee petition on which it was based was tainted by unremedied unfair labor practices. He relied in particular on Miller's unlawful discharge and the unlawful unilateral reduction in drivers' waiting-time and lost-time pay.

The judge also found that the Respondent violated Section 8(a)(3) and (1) by suspending Steckler on November 9, by conditioning his reinstatement on his refraining from engaging in union activities, and by ultimately discharging him. Specifically, the judge found that the Respondent's terminal manager, Tom Lovett, observed Steckler soliciting drivers' signatures on the prounion counter-petition and accused Steckler of harassing and threatening other drivers. When Steckler denied the accusations, Lovett suspended him. The judge further found that Lovett met with Steckler later in November and in December to offer him reinstatement if Steckler would stop "harassing" the other drivers. Steckler refused Lovett's offers, asserting his right to discuss the Union with other employees, and was not reinstated. The judge concluded that the Respondent "produced no evidence that [Steckler's] alleged conduct consisted of anything other than his talking to employees and expressing his support for the Union."

### Discussion

1. The Board has long held that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union. *Olson Bodies*, 206 NLRB 779, 780 (1973). As one court has stated, a "company may not avoid the duty to bargain by a loss of

majority status caused by its own unfair labor practices." *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995).<sup>5</sup>

The issue then is one of causation. In cases involving a general refusal to recognize or bargain with an incumbent union, "the causal relationship between the unlawful act and subsequent loss of majority support may be presumed." *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 178 (1996), enfd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997), decision on remand 334 NLRB 399 (2001). In other cases, the Board has identified several factors as relevant to determining whether a causal relationship exists. These causation factors include the following: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

With respect to proximity in time and nature of the violation, the record shows that the Respondent's unlawful unilateral reduction in employees' waiting-time and lost-time pay occurred on October 1, less than a month before the withdrawal of recognition. Moreover, the loss in pay occurred on the same day that the Union agreed to allow the Respondent to raise employees' hourly wage by \$1 in order to facilitate hiring. The Respondent's unilateral action, then, demonstrated its power to undercut economic gains that were collectively bargained. Where unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear. Cf. *Alachua Nursing Center*, 318 NLRB 1020, 1030-1031 (1995).

Further, although the discharge of Miller occurred approximately 5 months before the withdrawal of recognition, in the circumstances of this case, we do not believe that the passage of time would reasonably dissipate the

<sup>5</sup> On March 29, 2001, the Board issued *Levitz*, 333 NLRB 717, in which it "reconsider[ed] whether, and under what circumstances, an employer may lawfully withdraw recognition unilaterally from an incumbent union." *Levitz*, however, has no bearing on our decision today because *Levitz* expressly limited its analysis "to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions." *Id.* at fn. 1. In addition, the Board held in *Levitz* that its analysis and conclusions in that case would only be applied prospectively. *Id.* at 729.

We do not adopt the judge's personal comments concerning how he believes Board law should be changed.

effects of the Respondent's conduct.<sup>6</sup> It is well settled that the discharge of an active union supporter is exceptionally coercive and not likely to be forgotten.<sup>7</sup> This unlawful conduct "goes to the very heart of the Act," *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941), and reinforces the employees' fear that they will lose employment if they persist in union activity. *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enf. 833 F.2d 310 (4th Cir. 1987).

The final two *Master Slack* factors focus on the effect of the unlawful conduct on protected employee activities. The Respondent's discharge of an active union adherent would likely "have a lasting inhibitive effect on a substantial percentage of the work force" and "remain in [employees'] memories for a long period." *NLRB v. Jamaica Towing*, 632 F.2d 208, 213 (2d Cir. 1980). In addition, by unilaterally changing the employees' terms and conditions of employment, the Respondent "minimize[d] the influence of organized bargaining" and "emphasiz[ed] to the employees that there is no necessity for a collective-bargaining agent." *May Department Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). In sum, the Respondent's unlawful conduct is of a type that reasonably tends to have a negative effect on union membership and to undermine the employees' confidence in the effectiveness of their selected collective-bargaining representative. In light of this conduct, it is not surprising that an employee petition rejecting the Union would surface.

For all these reasons, we find that the Respondent's unlawful conduct would reasonably have led to employee disaffection from the Union and would have undercut the Union's support among the employees. Under these circumstances, the Respondent could not lawfully challenge the Union's majority status on the basis of an antiunion petition that arose while those unfair labor practices remained unremedied. Therefore, we conclude that by withdrawing recognition from the Union on October 29, and by refusing to bargain with it, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. We now turn to whether the judge erred by failing to find that the Respondent violated Section 8(a)(1) by warning driver Joseph Steckler for engaging in Union activities.

The judge made the following findings. In early November, employees reported to Terminal Manager Tom Lovett that Steckler was asking them to sign a petition in favor of the Union. On November 8, Lovett observed Steckler soliciting Miller to sign the petition. The next

day, Steckler was called into Lovett's office. Lovett told Steckler that he had received reports that Steckler was "harassing the drivers" and "I am warning you to leave those men alone." Later that same day, the Respondent suspended Steckler for "harassing and threatening" employees about the Union.

As stated above, the judge found that the Respondent "produced no evidence that [Steckler's] alleged conduct consisted of anything other than his talking to employees and expressing his support for the Union," and concluded that the suspension violated Section 8(a)(3). The judge, however, neglected to make a finding about Lovett's statements to Steckler before he was suspended. A supervisor's "warning" an employee about soliciting signatures on a union petition would reasonably cause him to fear adverse action for engaging in such protected activities. We find that Lovett's admonition to Steckler to "leave the men alone" would reasonably tend to interfere with Steckler's free exercise of his Section 7 right to solicit employees to sign the petition favoring the Union, in violation of Section 8(a)(1). See *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

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 & Bldg. 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." *Id.* 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

<sup>6</sup> Significantly, Miller's return to work did not occur until after the withdrawal of recognition.

<sup>7</sup> The judge specifically found that "Miller was a pronoun employee who was willing to make waves if necessary."

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.

Moreover, in this case, the Respondent did not cease its unlawful conduct when it withdrew recognition from the Union on October 29. Rather, it continued to purge its work force of active union supporters by suspending, and ultimately discharging, union bargaining committee member Joseph Steckler. The suspension and discharge of Steckler occurred shortly after the Respondent learned that Steckler was collecting signatures on a prounion petition. Realizing that union support still existed among the unit employees, the Respondent moved, without delay, to prevent that support from growing by suspending and then discharging the instigator. In these circumstances, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees will be able to fairly decide for themselves whether they wish to continue to be represented by the Union or adopt some other arrangement.

(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 practices were of a continuing nature and were 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 Respondent, Penn Tank Lines, Inc., Ft. Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning employees not to engage in union activities.

(b) Suspending or discharging employees because of their membership in, or support for, Freight Drivers, Warehousemen and Helpers, Local Union No. 390, affiliated with International Brotherhood of Teamsters, AFL-CIO.

(c) Conditioning reinstatement to employment on employees refraining from engaging in union or other protected concerted activities.

(d) Unilaterally changing wages, hours, or other terms and conditions of employment, without first notifying and bargaining with the Union.

(e) Unlawfully withdrawing recognition from the Union and refusing to bargain with it as the exclusive collective-bargaining representative of the employees employed in the bargaining unit described below in paragraph 2(d).

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

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

(a) Within 14 days from the date of this Order, offer Joseph Steckler full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole Robert Miller and Joseph Steckler for any loss of earnings and other benefits resulting from their suspension and/or discharge, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and/or discharge of Robert Miller and Joseph Steckler and, within 3 days thereafter, notify them in writing, that

this has been done and that the suspension and/or discharge will not be used against them in any way.

(d) 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:

Included: All petro chemical transport drivers employed by the Employer at its facility located at 1150 Spangler Road, Fort Lauderdale, Florida 33316.

Excluded: All other employees, office clerical employees, sales employees, dispatchers, guards, and supervisors as defined in the Act.

(e) Rescind the unilateral change in its policy regarding waiting-time and lost-time pay, and reinstate the former policy.

(f) Make whole all bargaining unit employees for any loss of earnings and other benefits resulting from the unilateral change in the waiting-time and lost-time pay. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(g) 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.

(h) Within 14 days after service by the Region, post at its facility in Fort Lauderdale, Florida, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, 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 Re-

<sup>8</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."

spondent 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 May 20, 1998.

(i) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

#### 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 warn employees not to engage in union activities.

WE WILL NOT suspend or discharge employees because of their membership in, or support for, Freight Drivers, Warehousemen and Helpers, Local Union No. 390, affiliated with International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT condition reinstatement to employment on employees refraining from engaging in union or other protected concerted activities.

WE WILL NOT unilaterally change wages, hours, or other terms and conditions of employment, without first notifying and bargaining with the Union.

WE WILL NOT unlawfully withdraw recognition from the Union 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 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, within 14 days from the date of the Board's Order, offer Joseph Steckler full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Robert Miller and Joseph Steckler for any loss of earnings and other benefits resulting from their suspension and/or discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and/or discharge of Robert Miller and Joseph Steckler, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspension and/or discharge will not be used against them in any way.

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:

Included: All petro chemical transport drivers employed by the Employer at its facility located at 1150 Spangler Road, Fort Lauderdale, Florida 33316.

Excluded: All other employees, office clerical employees, sales employees, dispatchers, guards, and supervisors as defined in the Act.

WE WILL rescind the unilateral change in our policy regarding waiting-time and lost-time pay, and reinstate our former policy.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits resulting from the unilateral change in the waiting-time and lost-time pay, plus interest.

PENN TANK LINES, INC.

*Michael Maima, Esq.*, for the General Counsel.

*Stewart Keene, Esq.*, for the Respondent.

*Libby Herrera-Navarrete, Esq.*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Miami, Florida, on December 13 and 14, 1999. The charge and amended charge in Case 12-CA-19505 were filed by Robert Miller on May 28 and August 5, 1998. The charge and amended charge in Case 12-CA-19746 were filed by the Union on November 2 and December 10, 1998. The charge and amended charges in Case 12-CA-19774 were filed by Joseph Steckler on November 12 and December 7, 1998, and January 29, 1999.

On August 30, 1999, the Regional Director issued a consolidated complaint in these cases which alleged as follows:

1. That following a Board-conducted election, which was held on July 1997, the Union was certified as the exclusive collective-bargaining representative in the following unit of employees:

Included: All petro chemical transport drivers employed by the Employer at its facility located at 1150 Spangler Road, Fort Lauderdale, Florida 33316.

Excluded: All other employees, office clerical employees, sales employees, dispatchers, guards and supervisors as defined in the Act.

2. That in or about April 1998, the Respondent by its agent, Charles Nicholas, encouraged employees to form a drivers committee in lieu of bargaining through the Union.

3. That on or about May 20, 1998, the Respondent, for discriminatory reasons, discharged Robert Miller.

4. That on or about October 1, 1998, the Respondent, without notification to or bargaining with the Union, unilaterally reduced the rates of pay for "waiting" time and time lost due to equipment breakdowns for employees in the bargaining unit.

5. That on or about October 29, 1998, the Respondent illegally withdrew recognition from the Union.

6. That in or about November 1998, the Respondent by Tom Lovett, its terminal manager, threatened employees with unspecified reprisals if they engaged in union activities.

7. That on or about November 8, 1998, the Respondent, by Lovett, created the impression of surveillance.

8. That on or about November 8, 1998, the Respondent, by Lovett, threatened to suspend an employee if he engaged in union activity.

9. That on or about November 8, 1998 Respondent, for discriminatory reasons, either suspended indefinitely or discharged Joseph Steckler.

10. That on or about November 20, 1998, the Respondent conditioned Steckler's reinstatement on him ceasing to engage in union or other protected concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Charging Party, Freight Drivers, Warehousemen and Helpers, Local Union No. 390, affiliated with International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

The Respondent is engaged in the business of delivering gasoline and diesel fuel. The facility involved in the present case is located in Port Everglades, Florida, and the Respondent has been contracted by Mobil Oil to make deliveries. Previously, the job of delivering this product was conducted by Mo-

bil's own employees before that company decided to contract that work out. Some of the Respondent's drivers were previously employed by Mobil and there is evidence that some were angry because when they were dropped by Mobil, they lost benefits and suffered a diminution in pay.

Respondent's terminal manager in 1997 and until March 1998 was Mike Pittman. In March 1998, Pittman was replaced by Tom Lovett. The Respondent admits that Pittman, Lovett as well as Charles Nicholas and dispatcher Raymond Sangster, were supervisors and/or agents as defined in Section 2(11) and (13) of the Act.

Joseph Steckler and Robert Miller were both employed as drivers, the former from September 1995 and the latter from September 1996.

The Union organizing drive started in early 1997 and employee Joseph Steckler was particularly active in soliciting support for the Union. Also active was employee Robert Miller.

The organizational campaign eventually led to the filing of a representation petition. An election conducted under the auspices of the NLRB was held in July 1997. The Union won and was certified.

In December 1997, the parties commenced bargaining. At the table, the Union was led by its then-president, Morgan, and by employees Steckler and Bumbry. The employer was represented by its human resources consultant, Charles Nicholas, and by Mike Pittman, who, at the time, was the terminal manager.

Steckler described the initial period of bargaining as being difficult inasmuch as the Company's negotiators, under the direction of Nicholas, stalled and challenged every paragraph of a proposed contract.

In 1998, Morgan was replaced by Gerry Pape as union president and she took over at the bargaining table. Also at that time, Nicholas was replaced at the bargaining table by Stewart Keene.

Negotiations continued until October 29, 1998, when the employer withdrew recognition.

#### *B. The Unilateral Change Allegation*

The Respondent admitted that on or about October 1, 1998, it reduced the waiting-time and lost-time pay for bargaining unit employees. It also admitted that these matters were mandatory subjects of bargaining and that it did not give the Union notice of these changes and an opportunity to bargain about them. Accordingly, on these undisputed facts, I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act.<sup>1</sup>

#### *C. The Allegations Regarding Steckler*

Joseph Steckler was hired by the Respondent as a driver in September 1995. He testified that he was the one who contacted the Union in January 1997, and that he actively solicited his coworkers to join. Steckler gave un rebutted testimony that on or about February 27, 1997, at a regular meeting, terminal manager Pittman stated that he heard rumors about a union

coming into Port Everglades and that the employees could not talk about the Union on company premises. (This is outside the 10(b) period and not alleged in the complaint.)

According to Steckler, on or about May 13, 1997, another employee asked him about a union meeting and he told this employee that he couldn't talk about that just then. Steckler testified, without contradiction, that Pittman walked up and asked him to go to the office where he reminded Steckler that he could not talk about the Union on company property. Simultaneously, Pittman changed Steckler's schedule from having Saturday and Sundays off to having Tuesday and Thursdays off. (Also outside the 10(b) period.)

In May 1997, Steckler had an accident which he described as minor and involving a small dent and scratch to the vehicle he was driving. He was given a 3-day suspension for this accident. The General Counsel produced evidence that another driver, having an accident with a comparable injury, was given a 1-day suspension. (This too is outside the 10(b) period.)

As noted above, an NLRB-conducted election was held in July 1997 and the Union won. This resulted in it being certified as the collective-bargaining representative of the employees in the above-described unit on July 25, 1997.

Also as noted above, Steckler was one of two employees chosen to assist the Union during negotiations.

As the negotiations were going slowly, some of the employees became disenchanted and Joe Rodriguez, another driver, seems to be the person who began expressing antiunion sentiments. In the summer of 1998, Rodriguez, according to Steckler, picked two arguments with him, one of which resulted in a suspension to Steckler but not to Rodriguez.

In or about October 1998, Rodriguez solicited employees to sign a petition indicating their nonsupport for the Union. And by October 29, 1998, Rodriguez obtained 54 signatures out of about 61 drivers which he presented to terminal manager Lovett.

In the first week of November 1998, Steckler started soliciting the drivers to sign a counter petition supporting the Union. He did this off company premises and on break times. On November 8, he asked Miller to sign this petition. This apparently was seen by or reported to Lovett because, on the following day, Steckler was called into Lovett's office and, in the presence of bookkeeper Rochelle Sheflin, told that he was harassing and threatening the other drivers. Steckler denied that he did so but he was sent home with a suspension.

When asked, Sheflin testified, in effect, that what Lovett meant by harassment was that Steckler was speaking about the Union to the other employees. Her testimony in this regard was as follows:

Q. When you were asked to come in and witness this conversation between Mr. Lovett and Mr. Steckler, as you've now told us, Ms. Sheflin, did Mr. Lovett explain what he meant by harassing the drivers?

A. Just going up to them and constantly at them.

Q. About what?

A. The Union.

Insofar as the alleged threats or harassment by Steckler, the Respondent produced no evidence that this alleged conduct

<sup>1</sup> The evidence indicates that in January 1999 the employer retracted these changes. I shall therefore leave it for compliance to determine what if any amount of money is owed to employees.

consisted of anything other than his talking to employees and expressing his support for the Union.

Subsequent to his suspension, Lovett met with Steckler on two occasions (November 20 and December 3, 1998), and offered to reinstate him if he would stop "harassing" the other drivers. Steckler refused to accept this conditional offer as he insisted that he had the right to talk about the Union to the other employees.

The Respondent's contention that Steckler was discharged for cause is rejected. It is clear to me that the evidence in this case demonstrates that the suspension and subsequent refusal to reinstate Steckler was motivated solely by Steckler's support for and activities on behalf of the Union and his efforts in November 1998 to solicit employees to sign a prounion petition. I therefore conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act in this regard.

#### *D. The Allegations Regarding Robert Miller*

Robert Miller was hired by the Respondent as a driver in September 1996. Like Steckler, Miller also supported the Union and expressed his support to his coworkers.

On or about August 26, 1997, Miller was present at the Mobil rack when a small spill of gasoline occurred. Whether this presented an immediate danger is debatable, but in any event, Miller expressed, in no uncertain terms, his concern to the other drivers. As a consequence, Miller was given a half-day suspension and he filed an unfair labor practice. Regarding this event, in an affidavit executed by Terminal Manager Pittman, he stated:

Robert Miller's ranting about the Mobil employees having exposed him and others to danger by having spilled fuel out in the area of the loading bays should have been kept between management and himself. Miller, however, chose to involve other employees. I remember seeing him in the driver's room ranting to other employees about what he had observed under the rack. Miller's incident occurred around shift change. Miller didn't have to involve anyone else in it. The other employees in the driver's room were trying to do their work.

The unfair labor practice charge filed by Miller was eventually resolved by way of a non-Board settlement pursuant to which the suspension was retracted and Miller was paid \$50. This settlement was agreed to in March 1998.

Although I am not here to relitigate the merits of the foregoing unfair labor practice charge, the circumstances show that the Respondent had ample reason to believe that Miller was a prounion employee who was willing to make waves if necessary.

Miller testified that in late March or early April 1998, he had a conversation with Nicholas at the facility where among other things, the latter stated that the employees would be better off without a union and that they could have formed a committee to deal with their problems. Although this is denied by Nicholas, I shall credit Miller.

Miller was sent a letter on May 20, 1998, notifying him of his discharge, ostensibly for failing to report to work without giving notice of his absence. This letter read as follows:

As a result of your failure to report off for work without notice, Job Abandonment, your employment with Penn Tank Lines, Inc. has been terminated effective today, May 20, 1998.

The facts in this case do not, in my opinion, support the employer's claim that Miller was absent without leave. And given the other evidence of antiunion animus, I shall conclude that the motivation for Miller's discharge was because of his union and/or protected concerted activity.

Miller's mother became sick and had to enter a hospital on May 11, 1998. Miller promptly notified his supervisor, Raymond Sangster, about his mother's illness and asked permission to take off from work. Sangster conceded that he gave permission and that he told Miller that he did not have to call in every day but could come back when he was ready.

On May 12, 1998, Miller decided to come to work on the evening shift. Nevertheless, he left after half a shift because he got word that his mother's situation had worsened. Miller testified that he told the night dispatcher that he needed to go.

Miller credibly testified that on Wednesday, May 13, he again called Sangster about his mother's condition and told him that he would not be coming to work. He testified that Sangster told him that he could stay out as long as he needed and that he didn't have to call in every day.

On May 14, Miller's mother had the operation but on May 15, she died. (These 2 days were Miller's regular days off.) As he needed to take care of funeral arrangements, Miller credibly testified that on May 15, he called and spoke to dispatcher Shaun Johnson and told him that he would not be coming in. He testified that Johnson told him to call when he was ready to return.

Between May 15 and 20, 1998, Miller was involved in funeral affairs and was largely away from his own home.

On May 20, 1998, Miller received written notice that he was fired for failing to come to work and failing to call in.

Based on this set of circumstances, I find wholly unconvincing, the assertion by the Respondent that it discharged Miller for good cause. Rather, in accordance with *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), I conclude that the General Counsel has made out a prima facie showing of discriminatory motive for Miller's discharge. By the same token I find that the Respondent has not shown that it would have discharged Miller for legitimate reasons. I therefore conclude based on this record that the discharge of Robert Miller violated Section 8(a)(1) and (3) of the Act.<sup>2</sup>

#### *E. The Withdrawal of Recognition*

As noted above, the Union was certified as the exclusive collective-bargaining representative in July 1997. Thereafter bargaining commenced but during the period of time that the company was represented by Nicholas, the bargaining was slow and unproductive.

In or about September 1998, the Company faced with a shortage of qualified drivers and an inability to retain those it

<sup>2</sup> I note that Miller subsequently received on October 27, 1998, an offer to return to work on November 2, which he accepted.

had, determined that it needed to give its drivers an immediate wage increase. Accordingly, at a meeting held on September 20, 1998, the Employer proposed that it be allowed to give an interim \$1 an hour wage increase even in the absence of an executed collective-bargaining agreement. After consulting with the employee representatives, Union President Pape agreed to this idea and sent a letter to that effect on September 22, 1998. (In part, Pape's agreement was based on her feeling that the Respondent was, at this time, more amenable to making progress in the negotiations.)

In the meantime, and at dates not entirely known to me, one of the other drivers, Joseph Rodriguez, started soliciting signatures for a petition to oust the Union as the bargaining representative. In this regard, two drivers, James Prendergast and Jorge Lopez, testified without contradiction that they were told by Rodriguez that the purpose of signing this petition was to get a \$1 an hour wage increase. As neither Rodriguez nor any of the other employees testified about the petition, I have no idea as to the circumstances and statements that were made to other drivers in an effort to induce them to sign this petition.

With respect to the petition solicited by Rodriguez, James Steckler testified that he noticed that during this time, Lovett and Rodriguez all of sudden became very chummy and had lunches together. There was, however, no firm evidence that Rodriguez's efforts to solicit signatures was orchestrated by the Company.

By October 29, 1998, the antiunion petition had 54 signatures, a number well in excess of a majority. This was presented to Lovett and on that same date, the company sent the following letter to the Union.

Please be advised that Penn Tank Lines, Inc., Port Everglades facility is withdrawing recognition of IBT Local 390, effective immediately.

This action has been precipitated by an overwhelming majority of the bargaining unit at this facility requesting by petition that such action be taken.

Commencing on November 2, 1998, Steckler began soliciting signatures to a counter petition indicating employee support for the Union. (As noted above, this led to his discharge.) And by November 8, 1998, Steckler had obtained 34 signatures, a number which also constituted a majority. Of the 54 people who signed the antiunion petition, 25 also signed the pronoun petition.

Under existing Board law, a union, having been certified pursuant to a Board-conducted election, is entitled to an irrebuttable presumption of majority status for 12 months following its certification. *Ray Brooks v. NLRB*, 348 U.S. 1077 (1954). However, under existing Board law, after the certification year expires and in the absence of a collective-bargaining agreement, the presumption becomes one, which is rebuttable. And if the employer has objective evidence on which it can base a good-faith doubt of majority support for the Union, it may withdraw recognition without violating Section 8(a)(5) of the Act. *Laidlaw Waste System*, 307 NLRB 1211 (1992); *Celanese Corp.*, 95 NLRB 664 (1951). Moreover, under existing case law, an employer may withdraw recognition based on a good-faith doubt even where there is evidence of postwithdrawal

majority support for the Union. *AMBAC International Ltd.*, 299 NLRB 505, 506 (1990).

On the face of it, the antiunion petition that was presented to the employer on or about October 29, 1998, and which was signed by a majority of the bargaining unit employees would seem to be the type of evidence upon which the employer could assert a good-faith doubt.

Nevertheless, there is evidence in this case that the petition was solicited by a promise that it would be the mechanism through which the employees would obtain a substantial wage increase. Thus, although the Employer "knew" by October 29, 1998, that a majority of its work force had signed a petition to oust the Union, it could not have known (unless having participated in its solicitation), the circumstances that these signatures were obtained. The Employer could not know what if any promises were made to each employee. The Employer could not know if employees signed their names because they truly wanted to be rid of the Union or because they simply wanted to be rid of the solicitor. The Employer could not know whether employees signed simply because their friends signed. Nor could it know whether any threats were made or if the purpose of the petition was misrepresented to the prospective signers. In short, it is easy to obtain signatures on cards or petitions and, in my opinion, this evidence relating to majority status is not particularly persuasive in determining what employees really want. Such evidence is, in my opinion, a poor substitute for a fair election conducted under the auspices of the NLRB or equivalent State agency.

The National Labor Relations Act, at Section 9, has procedures whereby employees, through secret-ballot elections may elect to be represented by a union for collective-bargaining purposes. Likewise, inasmuch as the Act permits employers or employees to file election petitions to *oust* an incumbent union, it seems to me that it would be far more efficient, economical, and consistent with employee free choice for elections to be the preferred method for resolving such questions instead of having them litigated in the context of an unfair labor practice trial.<sup>9</sup> In this regard, it seems to me that exactly the same principles should be applicable in determining if an employer is required to grant initial recognition in the absence of an election as when an employer is seeking to withdraw recognition from an incumbent union.

In *NLRB v. Gissel Mfg. Corp.*, 395 U.S. 575 (1969), the Board abandoned the test set out in *Joy Silk Mills*, 85 NLRB 1263 (1949), which asked whether the Employer had a "good faith doubt" as to the Union's majority status when it refused to recognize a union. Instead it proposed, and the court adopted a standard whereby an employer's refusal to recognize a union (having majority support), would only be unlawful (in the absence of an election or in cases where the union lost an elec-

<sup>9</sup> In a decertification proceeding, the election normally will be held in the existing collective-bargaining unit. Therefore, there would be little need for any prolonged hearing to determine who would be eligible to vote. Accordingly, absent a blocking unfair labor practice charge, an election should normally take place within a relatively short period of time.

tion), where the Employer's conduct made the holding of a fair election improbable.<sup>10</sup>

After *NLRB v Gissel*, supra, an employer's good-faith doubt, or lack thereof, became irrelevant in determining if an employer was obligated to recognize a union that was trying to become an incumbent. Applying the principle of equivalence, it seems to me that the employer's good faith should be equally irrelevant when determining if its withdrawal of recognition from an incumbent union is either legal or prohibited under the Act. As the employer, (or its employees), has the option of filing a petition for an election if it has a reasonable basis for questioning a union's continuing majority support, it seems to me that the preferred method of resolving the question of representation should be the Board's election processes unless it is shown that the Union's conduct has made a fair election an unlikely possibility.<sup>11</sup>

In sum, I would recommend that the Board conclude that petitions, or other manifestations by employees to oust a union, in the absence of unremedied unfair labor practices, would be sufficient evidence upon which the employer could either conduct an employee poll or file a decertification petition. On the other hand, I would recommend that the mere presentation of such a petition to the employer should not give it a basis for withdrawing recognition. Thus I would not follow a unitary standard in dealing with evidence of employee disaffection with union representation.

In the present case, I would also conclude that the Employer's withdrawal of recognition was flawed by my earlier conclusions that it had discriminatorily discharged Robert

<sup>10</sup> In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court distinguished between three categories of situations insofar as the propriety of granting a bargaining order to remedy an employer's unfair labor practices. The first category involved the "exceptional" case where "outrageous" and "pervasive" unfair labor practices are committed. The second category involves "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. As to this second category, the Court held that a bargaining order would be proper to remedy an employer's unlawful conduct which had the effect of making a fair election unlikely where at some point the Union had majority support amongst the employees. The third class of cases, concern those where minor or less extensive unfair labor practices have been committed which would have a "minimal impact" on an election. The Court held that in the third category of cases, a bargaining order would be inappropriate to remedy an employer's unfair labor practices.

<sup>11</sup> It is, of course, conceivable that in an effort to influence employees, a union may engage in illegal conduct. This, however, can be litigated in the context of objections to an election and/or an 8(b) unfair labor practice charge. If the Board concluded, after a hearing, that a union's conduct was so egregious as to make a fair election improbable, it could order that the Union be decertified instead of ordering that a new election be held.

Miller and that it had made a unilateral change. As these unfair labor practices were unremedied at the time of the withdrawal of recognition, I conclude that the withdrawal itself was tainted. *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996).

#### CONCLUSIONS OF LAW

1. By discriminatorily discharging Robert Miller on May 20, 1998, and by discharging Joseph Steckler on November 8, 1998, the Respondent violated Section 8(a)(1) and (3) of the Act.

2. By conditioning reinstatement of Steckler on his waiver of his rights to solicit support for Freight Drivers, Warehousemen and Helpers, Local Union No. 390, affiliated with International Brotherhood of Teamsters, AFL-CIO, the Respondent has violated Section 8(a)(1) and (3) of the Act.

3. By unilaterally changing its policy regarding waiting time, the Respondent violated Section 8(a)(1) and (5) of the Act.

4. By withdrawing recognition from the Union and by refusing to bargain, the Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The aforesaid violations affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. The evidence does not, in my opinion, establish that the Respondent has violated the Act in any other manner encompassed by the complaint.

#### REMEDY

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

The Respondent, having discriminatorily discharged Robert Miller and Joseph Steckler, it must to the extent that it has not already done so, offer reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharges to the dates of reinstatement or valid reinstatement offers, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977).

Inasmuch as I have concluded that the Respondent has violated Section 8(a)(5) of the Act by making a unilateral change in waiting time, I shall recommend that it be ordered to reinstate its former policy and to make employees whole, with interest, to the extent it has not already done so.

Finally, I shall recommend that the Respondent, upon request of the Union, recommence bargaining with the Union and bargain in good faith.

[Recommended Order omitted from publication.]