

**Transpersonnel, Inc. and General Drivers, Warehousemen and Helpers, Local 28, affiliated with International Brotherhood of Teamsters, AFL-CIO, CLC.** Case 11-CA-17507

September 28, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On May 27, 1998, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and brief and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified and set forth in full and below.

The key issue in this case is whether the Respondent's withdrawal of recognition from the Union was lawful. The judge found, and we agree, that the Respondent unlawfully withdrew recognition from the Union on May 9, 1997. We agree with the judge that the Respondent failed to establish that it had a good-faith reasonable uncertainty regarding the Union's majority status.

1. The Respondent excepts, inter alia, to the judge's finding of violations arising from a Respondent-called meeting for permanent replacement employees on April 6, 1997.<sup>2</sup> A brief recitation of the facts surrounding that meeting is in order. On April 6, on his way into the meeting, Respondent's eastern regional manager, Thomas Husvar, met employee Raymond Wray. Wray told Husvar that he did not want union representation and did not think other drivers did either. Wray then asked Husvar what Wray could do, and Husvar told him to ask questions during the meeting. At the meeting, attended by seven other employees, Wray asked what the employees could do to get rid of union representation. Husvar advised them that he needed some proof of their feelings in the form of a note or document. Thereafter, the eight employees signed a note stating "no union." At a break in the meeting, the eight employees presented the note to

Beth Burrell, a management representative who also attended the meeting.

The judge found that Husvar, by his conduct at the meeting, unlawfully solicited employees to sign statements saying they did not want union representation. Accordingly, the judge concluded that seven of the eight expressions of antiunion sentiment (i.e., excluding that of employee Wray who expressed his sentiments before the meeting)<sup>3</sup> were tainted and could not support the Respondent's contention of a reasonable uncertainty regarding the Union's majority status.

In its exception to this particular 8(a)(1) violation, the Respondent argues that the judge's finding violated its right to due process. The Respondent submits that the complaint did not allege that it engaged in unlawful solicitation at the April 6 meeting. Thus, according to the Respondent, the variance between the complaint's allegations and the judge's findings are prejudicial, and the judge's findings should not be upheld. The Respondent further argues that the violation found was not fully and fairly litigated at the hearing. It relies on the failure to allege the violation in the complaint, as well as the General Counsel's failure to mention the alleged violation in his opening statement or move to conform the complaint to the evidence after testimony by Husvar concerning the April 6 meeting. In these circumstances, the Respondent argues, it was denied fair notice and an opportunity at the hearing to offer a defense to the unalleged violation. Consequently, the Respondent contends that it was privileged to rely on the expressions of union rejection from all the employees at the April 6 meeting.<sup>4</sup> We find no merit in the Respondent's contentions.

The complaint alleged that the Respondent unlawfully solicited employees on multiple occasions to reject union representation. It did not specifically allege a violation based on the April 6 meeting. However, the issue presented by Husvar's April 6 statements was fully and fairly litigated at the hearing. As we stated recently in *Letter Carriers Local 3825*, 333 NLRB 343 (2001):

It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been

<sup>1</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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> On February 2, 1997, certain of the Respondent's employees went on strike. That strike was continuing on April 6, 1997.

<sup>3</sup> The judge found, and no party excepts, that the Respondent received valid, untainted statements rejecting union representation from employee Wray as well as from employees Dean Hefner and Franklin Harris. Hefner and Harris began working for the Respondent at some point after April 6 and thus they did not attend the April 6 meeting.

<sup>4</sup> On brief to the Board, the Respondent notes that it did not rely, for its May 9 withdrawal of recognition, on employee Johnny Blackburn's signing of the antiunion note at the April 6 meeting. The Respondent concedes that Blackburn had left its employ by May 9, 1997.

fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses.<sup>5</sup>

The facts presented at hearing meet these standards. The complaint alleged, and the judge found, that the Respondent unlawfully solicited employees to sign statements stating that they did not want union representation.<sup>6</sup> The April 6 violation involves another solicitation occurring in the same time period. Husvar testified on direct examination by the Respondent's counsel to the facts surrounding the April 6 meeting. The Respondent's counsel examined Husvar on the nature, content, and context of his statements, and fully briefed the lawfulness of the statements to the judge. Husvar's testimony was unrefuted by any witness and was credited by the judge. As the Respondent's own lead witness, a high-ranking official of the Respondent, undisputedly confirmed the unlawful conduct, and as the lawfulness of the conduct was fully briefed to the judge, we find that the matter was fully and fairly litigated. Accordingly, we affirm the judge's finding that Husvar's actions violated Section 8(a)(1) of the Act and that the April 6 employee expressions rejecting union representation, except for that of employee Wray, were tainted and invalid.

2. The Respondent further excepts to the judge's finding that it violated Section 8(a)(5) of the Act by its May 9, 1997 withdrawal of recognition of the Union. Even if we had accepted the Respondent's arguments and found that the April 6 employee note contained valid and untainted rejections of union representation, we would nevertheless conclude that the Respondent has not established that it had a good-faith reasonable uncertainty of the Union's continued majority status under *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998).<sup>7</sup>

<sup>5</sup> *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2d Cir. 1990). See also *Meisner Electric, Inc.*, 316 NLRB 597 (1995).

<sup>6</sup> The judge found, and we agree, that, at times other than the April 6 meeting, the Respondent unlawfully solicited employees Bradford Forkey, Grant Crow, and Johnny Emerson to reject union representation.

<sup>7</sup> While this case was pending, the Board issued *Levitz*, 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." In *Levitz*, 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 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." However, the Board also held that its analysis and conclusions in the case would only be applied prospectively; "all pending cases involving

According to the Respondent, it received, by May 9, 1997, valid disavowals of union support from 12 unit employees. The Respondent contends that the unit consisted of fewer than 24 employees. According to the Respondent, it had, as of May 9, valid disavowals of the Union from seven employees attending the April 6 meeting (i.e., excluding Blackburn, who had left its employ), plus the statements of employees Frank Harris and Dean Hefner, which the judge found were untainted. The Respondent also claims that, contrary to the judge's finding, the antiunion expressions of sentiment from employees Bradford Forkey, Johnny Emerson, and Grant Crow were valid and untainted.

The judge concluded that, as of May 9, 1997, when the Respondent withdrew recognition, the Respondent had at least 11<sup>8</sup> unit employees who were actively expressing their support for the Union by engaging in a strike. The Respondent contends that only nine unit employees were active strikers. The Respondent disputes the judge's finding that Merl C. Davidson and Earl Dople were striking employees.

In regard to Davidson, the Respondent submits that he was a probationary employee and that the judge erred in finding that he supported the strike. The Respondent contends that it was "unable to confirm" that Davidson supported the strike and it therefore presumed that he had quit his employment. We reject the Respondent's argument. The judge found, and we agree, that the evidence, including the testimony of Union Agent Richard Maxwell, established that Davidson supported the Union. In any event, Davidson is presumed to support union representation absent a contrary expression of sentiment. Thus, assuming that that the Respondent was "unable to confirm" that Davidson supported the strike, this fact would fail to establish that Respondent had any reasonable uncertainty regarding Davidson's status. Similarly, the fact that Davidson was a probationary employee has

withdrawals of recognition [will be decided] under existing law: the 'good faith uncertainty' standard as explicated by the Supreme Court" in *Allentown Mack*.

<sup>8</sup> The judge found that these included Merl C. Davidson, Vernon Payden, James Prater, Bobby Rice, Gary Scott, Frank Sellars, Jimmy Snyder, Bernard Swenson, Clyde Whitaker, William Wilkins, and Earl "Dale." The Respondent notes that Earl "Dale" is in fact Earl Dople. The judge did not resolve the status of one additional employee—Jerry McDaniel—but left for compliance a determination on whether he was a striking employee. The Respondent contends that McDaniel was unable to perform his job because of injury and should not be considered a striking employee. Solely for the purpose of resolving the withdrawal of recognition issue before us, we shall assume, as asserted by the Respondent, that McDaniel was not a striking employee. This does not change the result reached in this case. Nor does it preclude the General Counsel, at compliance, from seeking a remedy on behalf of McDaniel.

no bearing on his status as a striking employee supporting the Union. Thus, we agree with the judge's conclusion regarding Davidson.

In regard to Dople, the Respondent argues that Dople terminated his employment before February 2, 1997, and therefore the judge erred in concluding that Dople was a striking employee as of May 9, 1997. The Respondent argues that Dople's name should not have been included on the union dues-checkoff list and that Dople was not included among those who offered to return to work unconditionally. Because the record does not permit us to resolve the issue of Dople's status, we shall assume that Respondent is correct regarding Dople and that Dople left the Respondent's employ before February 2, 1997. Thus, for purposes of resolving the withdrawal of recognition issue before us, we shall assume that Dople was neither a striking employee nor a unit employee.<sup>9</sup> Having done this, we conclude that, as of May 9, 1997, 10 strikers, including Davidson, clearly indicated their support for the Union.

In addition, the judge found, and as noted we agree, that the antiunion statements of three other employees (Bradford Forkey, Grant Crow, and Johnny Emerson) were tainted because the Respondent unlawfully solicited these employees to reject union representation. These three expressions of antiunion sentiment therefore cannot be counted toward the tally of those employees expressing opposition to the Union. Therefore, at all times material, the Union is presumed to have enjoyed the continued support of at least 13 employees in a unit of no more than 23 employees.<sup>10</sup> The Respondent had no reasonable basis to question the union support of these 13 employees. The Respondent, at most, had valid expressions of disaffection from nine unit employees.<sup>11</sup> Therefore, the Respondent failed to establish that, as of May 9, 1997, it held a good-faith reasonable uncertainty regarding the Union's majority status. See *Marion Memorial Hospital*, 335 NLRB No. 80 (2001). Therefore, the Respondent

was not privileged to withdraw recognition from the Union.<sup>12</sup>

Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(1) and (5) when it withdrew recognition from the Union.

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 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.

<sup>9</sup> We do not preclude the General Counsel, at compliance, from arguing that Dople is entitled to a remedy.

<sup>10</sup> As we have assumed that Earl Dople was not in the unit, the unit decreases to no more than 23 employees.

<sup>11</sup> The Respondent also contends that it could reasonably rely on employee Wray's April 6 statement to Manager Husvar that Wray believed that "other drivers" did not want union representation. However, Wray's statement cannot establish the Respondent's defense. Certainly, in context, Wray was not speaking for the striking employees. Nor could Wray speak for employees hired after April 6 but before May 9. Thus, at most, Wray's comment lent some support that the other employees attending the April 6 meeting did not support the Union. As noted above, assuming that all the April 6 rejections of union representations were valid, the Respondent nonetheless has failed to show a good-faith reasonable uncertainty.

<sup>12</sup> We would reach the same conclusion even if we agreed, which as discussed above we do not, that Respondent was entitled to presume that Davidson had quit. In that event, the Union would still presumptively enjoy the continued support of at least 12 employees in a unit of no more than 22 employees, a clear majority.

(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 of the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegation in this case.<sup>13</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent Transpersonnel, Inc., Spartanburg, South Carolina, its officers, agents successors, and assigns, shall

1. Cease and desist from

(a) Soliciting its employees to sign statements stating that they do not want union representation.

(b) Interrogating its employees about the employees' desires regarding collective-bargaining representation.

(c) Refusing to recognize and bargain in good faith with General Drivers, Warehousemen, and Helpers, Local

28, affiliated with International Brotherhood of Teamsters, AFL-CIO, CLC as the exclusive collective-bargaining representative of its employees working at the Kohler Company in Spartanburg, South Carolina.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of 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 of service of this Order, recognize and, on demand by the Union, bargain collectively with the Union as the exclusive collective-bargaining representative of the Respondent's employees at the Kohler Company in Spartanburg, South Carolina, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

(b) Within 14 days from the date of this Order, offer to those unfair labor practice strikers who unconditionally offered to return to work full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make whole all employees affected by the Respondent's unlawful actions on and after May 9, 1997 for any loss of earnings and other benefits suffered as a result of the unlawful action, in the manner set forth in the remedy section of the judge's decision. Backpay is to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) 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.

(e) Within 14 days after service by the Region, post at its facilities in Spartanburg, South Carolina, copies of the attached notice marked Appendix.<sup>14</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's author-

<sup>13</sup> We shall modify the judge's recommended Order to conform to the violations found and the remedies imposed. We shall also modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997). Finally, we shall further modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

<sup>14</sup> If this Order is enforced by a judgment of the United States court of appeals, the words in the notice "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."

ized representative, shall be posted by the Respondent and maintained by it 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 those 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 removed its presence from 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 April 6, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps 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 solicit our employees to sign statements stating they do not want representation by General Drivers, Warehousemen and Helpers, Local 28, affiliated with International Brotherhood of Teamsters, AFL-CIO, CLC or any other labor organization.

WE WILL NOT interrogate our employees concerning their desire for or against union representation.

WE WILL NOT refuse to bargain with General Drivers, Warehousemen and Helpers, Local 28, affiliated with International Brotherhood of Teamsters, AFL-CIO, CLC as collective-bargaining representative of our employees at the Kohler Company in Spartanburg, South Carolina.

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

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees working at the Kohler Company in Spartanburg, South Carolina.

WE WILL offer those unfair labor practice strikers who unconditionally offered to return to work, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole, with interest, all employees affected by our unlawful actions on and after May 9, 1997, for any loss of earnings and other benefits suffered as a result of our unlawful actions.

#### TRANSPERSONNEL, INC.

*Jasper C. Brown Jr., Esq.*, for the General Counsel.  
*John G. Creech, Esq.* and *Glenn L. Spencer, Esq.*, of Greenville, South Carolina, for the Respondent.  
*Richard L. Maxwell*, of Taylors, South Carolina, for the Charging Party.

#### DECISION

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held on January 28 and 29, 1998, in Spartanburg, South Carolina. Documents received in evidence show that the charge was filed on May 19 and amended on July 1 and August 25, 1997. A complaint issued on August 29, 1997.

#### I. JURISDICTION

Respondent admitted that it is an Illinois corporation and an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (Act). Its eastern regional manager testified that it is a driver leasing division of Manpower, Inc. In this instance Respondent leased drivers, primarily long-term drivers, to Kohler. The drivers were supplied to Kohler's dispatch location.

#### II. LABOR ORGANIZATION

Respondent admitted that General Drivers, Warehousemen and Helpers, Local 28, affiliated with International Brotherhood of Teamsters, AFL-CIO, CLC (Union) is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint alleged that Respondent engaged in conduct in violation of Section 8(a)(1); that employees at Spartanburg, South Carolina, went out on strike and thereafter made unconditional offers to return to work; that the employees' strike was prolonged by Respondent's unfair labor practices; and that Respondent has unlawfully refused to recognize the Union in violation of Section 8(a)(1), (3), and (5) of the Act.

*A. The 8(a)(1) Allegations*

1. Solicitation to sign statement disavowing the Union

*a. Tom Husvar*

Eastern Regional Manager Thomas Husvar testified about a meeting Respondent held for striker replacement drivers on April 6, 1997. As Husvar was walking into the meeting driver Raymond Wray told him that he did not want union representation and that he did not believe the people wanted union representation. Husvar told Wray to ask those questions during the meeting. Raymond Wray asked during the meeting, what could they do about union representation. Husvar told the employees that it was their decision whether to have union representation and that Transpersonnel could not encourage or discourage them to have a union. Husvar told the employees that if they did not want a union, Respondent would have to have some proof of their feelings, a note or a document or something saying that. Subsequently, at a break, an employee gave Management Official Beth Burrell a note stating "no union." Eight employees had signed the note.

Bradford Forkey testified that he formerly worked for Respondent as an over-the-road driver assigned to the Kohler plant. Joanne Hurt interviewed Forkey at a motel in Spartanburg. The interview occurred about 5 days before he first reported to work on April 13, 1997. At the end of the interview Hurt told Forkey to report for work Sunday provided everything checked out. Hurt said they were under a union strike and she asked Forkey if he minded working under that circumstance. Forkey replied that he did not mind.

On the morning Forkey first reported to work, driver Frank Patterson told him to see Eastern Regional Manager Tom Husvar. Patterson said "that Tom wanted to see me about signing a paper."

Husvar was in a car in the parking lot. Forkey walked to the car and said that Frank had said Husvar wanted to see him about signing a paper. Husvar told Forkey that he wanted Forkey to sign a paper "about not belonging to the Union." "Or, wanting the Union representation." Forkey agreed and wrote "I Bradford Forkey does not want to work under the representation of a union."

Thomas Husvar testified that he was present when Forkey and other new drivers first met at the Ryder shop to start work for Respondent on April 13. The Ryder shop was the home base where tractors are domiciled for the Kohler operation. Husvar testified that Forkey came over to him and said, "Frank says I need to talk to you. I need to sign something." Husvar asked what was Frank talking about. Forkey replied that "Frank's talking about this Union situation." Husvar asked if Patterson had told Forkey what was taking place, about the meeting last week and that the drivers had signed a petition not to join the Union. Forkey replied, "No." Husvar explained to Forkey what had taken place. He told Forkey that he was a permanent replacement, that Respondent was having a labor dispute and he went over the history of bargaining and that there were labor board charges against Respondent that had been dismissed or were pending. Forkey said that he had his fill of unions and did not want to be a member of the Union. Forkey said that he would sign a statement. Husvar said that he

did not have to do that then but could think about it. Forkey said that he would do it then. Forkey signed something and handed it to Husvar.

(1) Findings

*(a) Credibility*

I was impressed with the demeanor of Bradford Forkey. He was under subpoena to testify on behalf of General Counsel. Forkey's testimony regarding his April 13 conversation with Thomas Husvar illustrated a firm recollection of that event. He specifically denied that Husvar said anything about the history of the labor dispute with the Union. Instead, he recalled that Joanne Hurt had mentioned that during his initial interview.

On the other hand I was not impressed with Husvar's testimony. His testimony was to the effect that when Forkey came to him in the parking lot on April 13, he gave Forkey the impression that he was totally unaware of why Forkey had walked over. However, Husvar admitted that he told Forkey about the replacement drivers signing a petition not to join the Union. According to Husvar, Forkey told him that Frank Patterson had sent him to Husvar and had said that Forkey needed to sign something. However, according to Husvar's testimony nothing was said to the effect that Forkey needed to sign something showing that he did not want to be represented by the Union. Instead, apparently after Husvar told Forkey about Respondent's dispute with the Union and the replacement's employees petition not to join the Union, Forkey volunteered to sign a statement showing that he did not want union representation. I find that scenario is improbable. It is difficult to accept that Forkey deduced from the information Husvar testified he gave to Forkey, that a statement declaring that he did not want union representation was needed by Respondent.

In any event, due to the record and Husvar's demeanor, I do not credit his testimony to the extent it conflicts with credited evidence.

To the extent there are conflicts, I credit the testimony of Bradford Forkey and discredit the testimony of Thomas Husvar and Joanne Hurt, which is in conflict with Forkey. I credit Husvar's testimony regarding the April 6 meeting. That testimony was not in dispute.

*(b) Conclusions*

The credited testimony shows that Thomas Husvar asked Bradford Forkey to sign a paper about not wanting union representation, on April 13, 1997. The credited testimony of Forkey proved that he had said nothing before that time to show that he did not want to be represented by the Union.

Thomas Husvar testified that among other things, he told replacement employees on April 6, that they were permanent replacements; that if the employees did not want union representation, Respondent would have to have some proof; and his testimony showed that employees were permitted to circulate and sign a "no union" statement during that meeting.

I find that Husvar solicited employees to sign statements showing they did not want union representation. That conduct tends to interfere with, coerce, and restrain employees in the exercise of their rights under Section 7 of the National Labor

Relations Act (Act), and constitutes a violation of Section 8(a)(1) of the Act.

*b. Joanne Hurt*

Dean Hefner started working for Respondent in April 1997. When Hefner first applied he asked if the job was union and said that he would not work for a union. Hefner recalled that either Joanne Hurt or Raymond Wray talked to him about the Union shortly after he started working and asked him if he would sign a statement that he did not want the Union. He agreed saying that he didn't want a union to begin with. He recognized a note he signed on April 22, 1997, stating, "I Dean cannot afford a union job and do not want one." Hefner testified that he put the statement in an envelope addressed to Joanne Hurt. Raymond Wray told him that the envelope would be forwarded to Hurt.

Hefner admitted that he gave an affidavit in which he testified:

After I was hired and working, someone told me that if I was not interested in working for a union would I just leave a statement saying I wasn't. I can't be absolutely certain but I believe this person who told me this was Hurt, who has since quit the Company. No one coerced me or forced me to sign the paper, attached hereto as Exhibit A that I sent to Joann Hurt in Charlotte. I left it in an envelope with my settlement sheets at Kohler in Spartanburg. I wrote on the envelope to her attention. I did this within a couple of days of the date I put on this paper. This occurred probably the first week that I worked there.

Johnny Emerson testified that he was Dean Hefner's driving partner on the Kohler job for Respondent. He recalled a conversation with Joanne Hurt within a month after he started working for Respondent in May 1997. Dean Hefner told Emerson that he had talked with Joanne Hurt on the phone and that she wanted Emerson to phone her. Emerson phoned Hurt and she told him that if it was his intention that he did not want to work for a union, if he would write it down and send it to her. Emerson did that.

Joanne Hurt left Respondent in June 1997. She was an operations manager in charge of the Kohler account and she was responsible for interviewing and hiring permanent replacements for the employees that stuck on February 2, 1997. She made a general statement to each person she interviewed. She said that South Carolina was a right to work State and that there was a strike going on but that some people had chosen to work. That people coming to work would not lose their jobs and they were permanent replacements. She made sure each applicant understood there had been people that had decided to join the Union and people that decided not to join the Union.

Hurt first talked to Dean Hefner about going to work on another account other than Kohler. Hurt mentioned there were a couple of people driving down from the Greensboro, North Carolina area to go to work on the Kohler account. Hefner said that he did not want anything to do with unions so Kohler would be his last choice. Subsequently, Hefner told Hurt that he would be interested in driving on their Kohler account. Hefner also told Hurt that a friend of his, Johnny Emerson, was looking

for work and that he would like to team up in driving with Emerson. Hefner told Hurt that Emerson felt the same way he did about unions (Tr. 197).

Joanne Hurt testified that she interviewed Hefner and Emerson. Emerson asked if they would be without benefits if the strike was resolved and they did not join the Union. Hurt told them it was a right to work State and their benefits would be the same no matter whether you join the Union or not.

In regard to receipt of a statement from Emerson, Hurt testified:

Well, it was against the law for me to ask for a statement. I never asked for a statement. There was a time when they called in for their,[sic] you know, the drivers called in every morning and talked to me. You know: Where are you? What are you doing? How are things going? And at that point, Dean had said, "You know, we're trying to fax this thing over to you." They were in a truck stop. I said, "What thing are you trying." You know. And he said, "Well, this piece of paper. I asked Johnny for his statement," and I said, "Okay, fine. What's wrong?" and he said, "We can't get the fax to work." I said, "Fine, whatever you're trying to sent to me, stick in your stuff and just mail it."

Subsequently, during her testimony under redirect examination, Hurt testified that Hefner "gave me the general impression that he had a statement about not wanting the Union that they were trying to fax."

Hurt recalled the statement from Emerson showed that he was not interested in union representation. She testified that the statement confirmed what Emerson had already told her during his interview. Later Hurt was unable to find Emerson's statement and she asked him if he did not remember the statement.

(1) Findings

(a) *Credibility*

I was not impressed with the demeanor of Dean Hefner. He demonstrated an inability or unwillingness to recall whether it was Supervisor Hurt or employee Wray that asked him to sign a statement that he did not want union representation. In a pre-hearing affidavit Hefner was somewhat more positive in his recollection although, even then, he stated that he was not absolutely certain but believed that Joanne Hurt asked him to sign a statement. I am also unable to credit the testimony of Joanne Hurt. I was especially skeptical regarding her testimony about talking to Dean Hefner about his attempt to fax a statement from Johnny Emerson. According to Hurt's testimony under direct examination Hefner neither said nor did she inquire, as to what the statement involved. However, on redirect examination, Hurt admitted that Hefner gave her the general impression that Emerson's statement dealt with his not wanting the Union.

I was impressed with Johnny Emerson's demeanor. He testified under subpoena and is currently employed by Respondent. Emerson admitted that he had told Dean Hefner how he felt about the Union a considerable time before he started working for Respondent.

*(b) Conclusions*

In view of my inability to credit the testimony of Dean Hefner, I am unable to find that Joanne Hurt solicited Hefner to disavow the Union.

The credited evidence did prove that Supervisor Hurt told employee Johnny Emerson that if it was his intention to not work for a union, he should write that down and send it to her. Emerson testified that Joanne Hurt brought up the subject of the Union during that phone conversation. I find that constitutes solicitation to petition against union representation in violation of Section 8(a)(1) of the Act.

## 2. Interrogation

*a. Joanne Hurt*

Although he applied for work on April 15, Johnny Emerson actually started working for Respondent around the first of May 1997. As shown above, Emerson testified about a phone conversation with Joanne Hurt in May 1997. According to Emerson's testimony under cross-examination, Joanne Hurt asked him what his feelings were about the Union. Emerson told her that he was just not comfortable working for a union. Hurt told Emerson that if it was his intention that he did not want to work for a union, if he would write it down and send it to her. Emerson did that.

Emerson denied that the Union was mentioned during his job interview or by a management official at any time before the above-phone conversation with Hurt. On cross-examination he testified that he was not sure whether there was any mention of a strike during his initial interview.

## 3. Findings

*a. Credibility*

As shown above I credit the testimony of Johnny Emerson and discredit the conflicting testimony of Joanne Hurt.

*b. Conclusions*

The "test for determining the legality of employee interrogation regarding union sympathies is 'whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of their statutory rights.'"<sup>1</sup>

As to whether Hurt's comments tended to restrain or interfere with employees' rights, the evidence showed that Hurt questioned Emerson as to how he felt about union representation. Joanne Hurt testified that Dean Hefner told her that Emerson didn't want anything to do with the Union. Emerson admitted that he told Hefner, perhaps years before, how he felt about unions. However, Emerson had not taken a position on the union question at Respondent. As shown above, Respondent actively supported its replacement employees' efforts to disenfranchise the Union. The information sought by Hurt involved Emerson's involvement in decertification efforts. Specifically, Hurt was inquiring into whether Emerson would sign a statement showing that he did not want the Union. The record shows that Emerson was truthful in his response to Hurt. There was no showing that Respondent had a valid purpose in seeking

to determine how Emerson stood on decertification. Hurt did not tell Emerson why Respondent needed the information and she did not assure Emerson against reprisals. Under the circumstances, I find that Hurt's interrogation of Emerson was a violation of Section 8(a)(1) of the Act. *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1255-56 (5th Cir. 1992); *Baptist Medical Systems*, 288 NLRB 1160 (1988); *Southwire Co.*, 282 NLRB 916 (1982); *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). See also *National Labor Relations Board v. McCulloch Environmental Services, Inc.*, 5 F.3d 923 (5th Cir. 1993).

## 4. Additional allegations

The February 2, 1997 strike was prolonged by unfair labor practices:

Did Respondent solicit a petition to remove the Union:  
Striking Employees made unconditional offers to return to work:

Since June 10, 1997, Respondent has refused to reinstate employees that struck on February 2, 1997.

The parties stipulated that Respondent and the Union engaged in good-faith bargaining in 1996 but did not reach a collective-bargaining agreement. A lawful impasse was reached. Respondent lawfully implemented matters included in its last collective-agreement offer to the Union. On February 2, 1997, the Union engaged in an economic strike. The Respondent lawfully replaced the employees that were engaged in the strike.

Richard Maxwell testified that Thomas Husvar came into the cafeteria where the strikers were gathered before setting up the picket line on February 2, 1997. Husvar saw the striking employees including Merl C. Davidson. Respondent, in its brief, questioned whether Davidson was an employee on the contention that he had not completed his probationary period before the strike.

Husvar testified that two employees continued to work when the others struck on February 2, 1997. Those included full-time employee Raymond Wray and one casual employee named Grant Crow.

As shown above, Respondent held a meeting for replacement drivers on April 6, 1997. Raymond Wray told Thomas Husvar that he did not want union representation and that he did not believe the people wanted union representation. Husvar told Wray to ask those questions during the meeting. Husvar explained to the meeting that the replacement drivers had been hired as permanent replacements and that they would have a job even if the striking drivers elected to offer to return to work. Raymond Wray asked what could they do about union representation. Husvar told the employees that it was their decision whether to have union representation and that Transpersonnel could not encourage or discourage them to have a union. Husvar told the employees that if they did not want a union, Respondent would have to have some proof of their feelings, a note or a document or something saying that. Later, as the meeting took a temporary break, an employee handed a note to Beth Burrell. The note indicated "no union," and was signed by all the employees that attended the meeting—eight employees. Those eight included Raymond Wray. Grant Crow did not sign

<sup>1</sup> *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), citing *Service Master All Cleaning Services*, 267 NLRB 875 (1983).

that note. Husvar testified that Crow was not at the April 6 meeting.

Beth Burrell gave the note to Thomas Husvar. Burrell worked directly under Huvar's supervision. She supervised Joanne Hurt. Husvar testified that he did not see the drivers circulating the note during the meeting.

When the meeting resumed after the break, Lynn Osterhout, one of the drivers, asked Husvar, "What do we do now?" Husvar replied that he had "their expression that this was what they so desired; however, there would have to be representation and similar information from a majority of the employees." Husvar went on to say that they were adding new employees and "if they felt the same way, when we received a majority of the employees that were expressing they didn't want the Union, then there was something that we could do about it, but until that time I would just keep the note on file."

Respondent hired Franklin Harris, Brad Forkey, Dean Hefner, and Johnny Emerson between April 6 and May 9. Respondent received notes from each of those four stating the respective employee did not want to be represented by the Union. However, Huvar and Hurt were unable to find the statement signed by John Emerson. Huvar then went to Emerson and Hefner and had each write a statement that Emerson had previously sent in a statement saying that he did not want union representation. Emerson recalled that he signed a note during May 1997. He acknowledged signing the note in a statement to Respondent dated July 14, 1997.

Richard Maxwell met with Tom Husvar at Shoney's in Gaffney, South Carolina, on April 25, 1997. The meeting was set up in order to discuss possible negotiation dates. Huvar told Maxwell that Respondent was hiring striker replacements. Maxwell asked Husvar if he was replacing union members and were the members not able to return to work. Husvar replied that he needed to check with his attorney and get back to Maxwell on that.

Husvar testified about his April 25 meeting with Maxwell. He recalled that he told Maxwell Respondent had hired 11 or 12 striker replacements and could not negotiate those employees' rights as permanent replacements for economic strikers. Maxwell said that he thought that could be negotiated. Husvar said that he would check with his attorneys.

Respondent wrote the Union on May 9 and withdrew recognition.

Richard Maxwell testified that 11 union members were on checkoff at the time of the February 1, 1997 vote to strike. Maxwell testified from the Union's January 8, 1997 checkoff billing to Respondent (GC Exh. 9) that all 13 members listed on that billing remained employees on May 9, except for Franklin Sanders and Anthony Rogers. The billing is sent to Respondent with the presumption that members listed on the checkoff are employees and should have their union dues withheld.

Thomas Huvar testified that Grant Crow worked the first 2 weeks of the strike. Crow then asked that Respondent not assign him work during the strike. He periodically phoned Respondent regarding the status of work and the strike. Huvar testified that he encouraged Crow to return to work. He told Crow that the drivers had a meeting and some of the drivers signed a petition that they did not want to be represented by a

union and that the numbers were growing stronger all the time. Crow said that Huvar knew how he felt about that and if there was anything he could do he would. Huvar replied, "Grant, if you feel that way and you want to express that feeling to us, send it do [sic] us in writing." Crow asked Huvar to send him a statement showing what Huvar wanted. Huvar testified that he wrote Crow and Crow used that as a guideline and wrote back to Respondent that he did not want the Union to represent him (R. Exh. 8).

After receiving Respondent's withdrawal of recognition, Maxwell held a meeting of members on June 6, 1997. Maxwell explained that Respondent had taken the position they were withdrawing recognition of the Union. Maxwell stated during the meeting, that Respondent was engaged in unfair labor practices by withdrawing recognition and other incidents. During that meeting the members voted to return to work without condition.

On June 6, 1997, the Union wrote Respondent that named employees were making unconditional offers to return to work. Respondent admitted that the following employees made unconditional offers to return to work on or about June 6, 1997:

Jerry McDaniel	Gary Scott
Joe Whitaker	Bobby Rice
Vernon Payden	James Prater
Jimmy Snyder	

All the striking union member employees presented themselves at their dispatch location on June 7. The Union contacted a person named Kelly with Respondent and told her the workers were reporting to work unconditionally.

On June 10 Respondent responded to the Union's June 6 letter and acknowledge receipt of unconditional offers to return to work from Jerry McDaniel, Joe Whitaker, Vernon Payden, Jimmy Snyder, Gary Scott, Bobby Rice, and James Prater. Respondent stated that "no employment opportunities are immediately available; however, each employee will be placed on a preferential hiring list for employment and will be recalled when driving jobs or substantially equivalent positions for which they are qualified become available." Respondent requested documentation that McDaniel and Payden are medically qualified to meet lifting requirements.

Husvar testified that McDaniel was off work since June or July because of an injury. Respondent and McDaniel eventually agreed to a settlement of his disability claim, which, according to Husvar, included an agreement that McDaniel would not be able to perform his job (R. Exh. 14).

Respondent admitted that the following employees made unconditional offers to return to work on or about June 30, 1997:

Ben Swenson	Frank Sellars
William Wilkins	Merl C. Davidson

On July 30, 1997, the Union wrote Respondent that Jerry McDaniel, Joe Whitaker, Vernon Payden, Jimmy Snyder, Ben Swenson, Gary Scott, Bobby Rice, James Prater, Frank Sellars, William Wilkins, and Merl C. Davidson were unconditionally offering to return to work.

## (1) Findings

(a) *Credibility*

As shown herein, a great deal of the evidence regarding these additional allegations is un rebutted; or involves stipulation of the parties; or involves credibility determinations that are shown above. As to the specific matters that do not involve stipulations, I credit the testimony of Richard Maxwell regarding the incidents at the cafeteria on February 2. That testimony was not disputed. Additionally, I credit the undisputed testimony of Richard Husvar that two employees continued to work on February 2. I credit Husvar regarding the April 6 meeting of replacement employees. That testimony was not disputed.

I credit Husvar regarding the hiring of four employees between April 6 and May 9, 1997, and I credit his undisputed testimony regarding his conversation with Grant Crow. I credit Richard Maxwell's account of his meeting with Husvar on April 25. That testimony was in accord with the testimony of Husvar. I also credit Maxwell's testimony regarding members on check-off. That testimony and the full record show that at least 11 union members were employed by Respondent on May 9. Those included Merl Davidson, Vernon Payden, James Prater, Bobby Rice, Gary Scott, Frank Sellars, Jimmy Snyder, Bernard Swenson, Clyde Whitaker, William Wilkins and Earl Dale. Jerry McDaniel may have been another employee. The record evidence was not fully developed but it appears he was off work due to a disability, which prevented him from returning to work. If necessary, his status may be considered in compliance proceedings.

Respondent argued that Merl Davidson was not an employee on the contention that he was a probationary employee. Since it was unable to determine if Davidson was involved in the strike, he was considered to have quit his job during the strike. I find that the record does not support that argument. Credited evidence shows that Davidson was one of the employees that gathered for the strike on February 2. Regardless of his probationary or permanent job status, he is entitled to protection because of his strike activities.

I credit Maxwell's undisputed testimony regarding the June 6 meeting of union members. I credit the above-mentioned evidence regarding unconditional offers to return to work.

(b) *The February 2, 1997 strike was prolonged by unfair labor practices: did Respondent solicit a petition to remove the Union*

Respondent withdrew recognition on May 9, 1997. General Counsel contended that action was illegal and that it converted the economic strike into an unfair labor practice strike. Respondent contended that it had a good-faith reason based on objective considerations to withdraw recognition. It pointed out that it had received written notice from a majority of its bargaining unit employees that they did not want the Union to represent them.

The written notices received by Respondent included the note signed by eight employees that attended the April 6 meeting. The note stated "[N]o union" and was erroneously dated April 7. Subsequently between April 7 and May 9, it received

five more statements signed by unit employees showing the respective employee did not want union representation.

The evidence also shows that 11 unit employees were engaged in the strike. Therefore, according to Respondent's contention, the bargaining unit could have included as many as 24 employees on May 9. Respondent argued that more than one-half those employees expressed to it, their desire to reject the Union.

There is a presumption that a union continues to enjoy majority status upon the expiration of a collective-bargaining contract. The burden of rebutting that presumption rests on the party who would do so. *Pioneer Inn*, 228 NLRB 1263 (1977); *Rose-Terminix Exterminator Co.*, 315 NLRB 1283, 1287 (1995). The presumption may be rebutted by showing that the union has actually lost its majority support or that the employer had a good-faith doubt based on objective consideration that the union continued to have majority support. The good-faith doubt must be raised in a context free of unfair labor practices. *Terrell Machine Co.*, 173 NLRB 1480, 1480-1481 (1969).

Respondent argued that 13 unit employees signed and presented to Respondent, statements disavowing union representation. The General Counsel argued that some of those statements were tainted by illegal actions of Respondent.

Initially, I note that the record does not involve a dispute as to the disavowal by employees Raymond Wray and Franklin Harris. The only evidence in the record shows that Wray told Thomas Husvar that he didn't want the Union to represent him, as they approached an April 6 meeting. There was no showing that Husvar did anything to cause Wray to make that comment. As to Harris, there was no evidence that Respondent influenced his signing a statement marked received by Respondent, on April 15, 1997, stating that Harris was not joining the Union. Moreover, as shown above, the General Counsel failed to prove that the disavowal of Dean Hefner was tainted.

However, there are questions regarding the remaining statements of disavowal.

As shown above Respondent Eastern Regional Manager Thomas Husvar was present at an April 6 meeting when eight replacement drivers signed a statement entitled "no union—04-07-98." One of those eight was Raymond Wray and, as shown above, Wray had already told Husvar that he did not want to be represented. The remaining seven signatures appear to be those of Daniel Osterhout, Mark Thompson, Doug Gregg, Marshall Smith, Johnny Blackburn, Dean Gant, and Frank Patterson.

The Board found in *Mathews Readymix, Inc.*, 324 NLRB 1005 (1997), that decertification was tainted by management. At footnote 16, Member Fox stated her opinion that decertification petitions were tainted "by the circumstances surrounding the solicitation of signatures during the break in the mandatory safety meeting called by the Respondent on April 11."

Here, there was also a meeting called by management. At least two management officials, Thomas Husvar and Beth Burrell, were present during the meeting. Husvar presided over the meeting. Unlike the situation in *Mathews Readymix*, there was no break in the meeting until the no union note was circulated, signed by eight employees and given to Management Representative Beth Burrell. In *Mathews Readymix, Inc.*, the management representatives presence during circulation of the

petition while the meeting was on break, influenced Member Fox. She found that management presence could reasonably lead employees to believe that management authorized the circulation of the petitions and wanted the employees to sign them. Here, management representatives were also present but the signing of the petition actually occurred during the meeting. Husvar and Burrell were present throughout the meeting while the employees circulated and signed the note stating no union. Respondent then used that note and advised its employees they needed more signatures before establishing a majority and taking action regarding union representation. As shown above, after he received the petition against representation, Husvar suggested to the drivers that Respondent was adding new employees and if those employees felt the same way, Respondent could do something about union representation when they received a majority expression against the Union.

I am convinced that Husvar's comments during that meeting were in violation of Section 8(a)(1) and that those comments illegally influenced seven unit employees to sign a petition against union representation. I find those seven signatures were illegally tainted and cannot be considered as objective factors in Respondent's withdrawal of recognition.

Subsequently, as shown above, Thomas Husvar illegally solicited employee Bradford Forkey to sign a statement disavowing union representation and Joanne Hurt illegally solicited a disavowal from employee Johnny Emerson. I find that both those statements were illegally tainted and cannot be considered as objective criteria for Respondent to withdraw recognition.

Additionally, the testimony of Thomas Husvar shows that he illegally influenced Grant Crow to sign a statement that he did not wish to be represented by the Union. As shown above, Husvar testified that he told Crow that the drivers had a meeting and some of the drivers signed a petition that they did not want to be represented by a union and that the numbers were growing stronger all the time. Crow said that Husvar knew how he felt about that and if there was anything he could do he would. Husvar replied, "Grant, if you feel that way and you want to express that feeling to us, send it do [sic] us in writing." Crow asked Husvar to send him a statement showing what Husvar wanted. Husvar testified that he wrote Crow and Crow used Husvar's writing as a guideline and wrote back to Respondent that he did not want the Union to represent him (R. Exh. 8).

Therefore, I find that 10 of the signatures relied on by Respondent in withdrawing recognition were tainted by Respondent's illegal activity. Only 3 of approximately 24 employees in the bargaining unit submitted statements that provided an objective basis for Respondent to determine that those employees did not desire to be represented by the Union. That was far less than a majority.

However, Respondent argued in its brief, that a good-faith doubt may be established through second hand statements such as the statement made by Raymond Wray to Thomas Husvar on April 6 and a statement made by Dean Hefner to Joanne Hurt regarding Johnny Emerson. Wray told Husvar that he did not want union representation and that he did not believe the people wanted union representation.

The Supreme Court dealt with a similar question in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). In that matter, the employer elected to poll its employees as to whether they desired to continue union representation. In considering whether the employer demonstrated a good-faith doubt which justified its poll of the employees, the Court considered evidence that two employees had made statements to management to the effect they felt other employees did not want union representation. The Court held that "absent some reason for the employer to know that [the employees] had no basis for (their) information, or that [the employees were] lying, reason demands that the statement[s] be given considerable weight." 522 U.S. at 370.

The Court found that one of the two employees at issue in *Allentown Mack Sales* was a union shop steward and a member of the union's bargaining committee and that the administrative law judge had found that the employee did not indicate personal dissatisfaction with the union. Here, the situation is quite different. Raymond Wray was not a union member. He was not on their checkoff and the testimony of Business Agent Maxwell showed that Wray was not a member. Wray was one of two employees that refused to go out on strike. The record established that Wray was biased against the Union and that Respondent was aware of that bias.

However, more importantly, was the reaction of Thomas Husvar after Wray told him that he did not support the Union and he did not believe the people did. Rather than taking a neutral position on the matter of union representation, Husvar replied that Wray should bring up that question in the upcoming meeting. When Wray questioned what the employees could do about union representation, Husvar did tell the employees that it was their decision and Respondent did not encourage or discourage them to have a union. However, he had preceded that statement with a comment that the employees were permanent replacements for the strikers and would have a job even if the strikers sought to return to work. Husvar responded to Wray's question by telling the employees that if they did not want a union, Respondent would need proof of their feelings, "a note or a document or something saying that." During the meeting the employees circulated a "no union" note which was signed by all the employees present. Husvar was present throughout the meeting. Even though he testified that he did not see the note being circulated, it is obvious that the employees knew only that he and Beth Burrell were there and neither objected to the circulation of the note. Under those circumstances, especially against the background of Husvar's comments, the employees could have felt that management was agreeing to their activities in petitioning for the removal of the Union. Of course, the meeting had also included Husvar's comments regarding those employees' status (i.e., that they were permanent replacements for the striking employees). I am convinced that action by Husvar directly influenced the employees in their decision and constituted an unfair labor practice.

I find that Respondent was not justified in considering Wray's comments as demonstrating what the other employees felt about union representation. I base that finding on the record evidence that Respondent knew of Wray's feelings about the Union and in view of Husvar's almost immediate intervention

into the question of union representation by his reaction to Wray's question during the meeting.

As to Dean Hefner's comment to Joanne Hurt that Johnny Emerson felt the same way about the Union that he did, I find that Respondent was justified in considering that as evidence of dissatisfaction by Emerson. I make that finding despite the record evidence which demonstrated that Hefner's comments were based on something Emerson may have said years earlier, and which had no relationship to the current dispute.

*Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), should be distinguished from the instant case in one other respect. There the employer elected to poll the employees regarding union representation. Here, Respondent withdrew recognition from a union with a history of reaching collective-bargaining agreements with Respondent. That withdrawal followed Respondent's direct intervention into the employees' disclaimer process. That intervention included actions in violation of provisions of the Act.

Respondent also argued in its brief, that the record proved (1) actual loss of the Union's majority, and (2) that it had a good-faith doubt of the Union's continued majority status. As to (1), it argued that the evidence proved that as of May 9, there were no more than 9 or 10 striking employees; there were 12 active drivers and that it had received 12 untainted petitions of employees that they did not want union representation. As shown above, I find that Respondent did not receive 12 untainted signatures. Instead it received far less. I find that Respondent had received only untainted statement from Raymond Wray and Franklin Harris that each did not want union representation; and from Dean Hefner that he and Johnny Emerson opposed unions. Therefore, I find that the evidence did not prove that the Union had actually lost majority support.

As to point (2), Respondent agreed that the jurisprudence requires that it must show that it had a good-faith doubt of the Union's continued majority in a context free of unfair labor practices. *Terrell Machine Co.*, 173 NLRB 1480 (1969). Here, as shown above, there was no showing of a good-faith doubt and Respondent's did not withdraw recognition in an atmosphere free of unfair labor practices. The record shows that Respondent may have had a good-faith doubt as to whether only 4 of some 24 employees, would reject union representation.

At most, Respondent had expressions of opposition to union representation, from 3 of its 24 employees. Respondent argued on the basis of *Allentown Mack Sales & Service v. NLRB*, supra, that it need not show knowledge of an actual majority opposition to union representation. However, here the numbers are no where near what would be needed to prove a good-faith doubt.

I find that Respondent did not have an objective basis to believe that the Union had lost its majority status. Respondent's May 9 withdrawal of recognition was illegal in violation of Section 8(a)(1) and (5) of the Act.

Striking Employees made Unconditional Offers to Return to Work: Since June 10, 1997, Respondent has Refused to Reinststate Employees that Struck on February 2, 1997

As shown above, when he met with Union Agent Maxwell on April 25, Thomas Husvar told Maxwell that he could not

negotiate the rights of permanent replacements. However, Husvar told Maxwell that he would check with his attorneys and get back with Maxwell as to whether he was correct in that comment. Husvar never did get back with Maxwell on that matter.

Subsequently, during the first union meeting after Respondent withdrew recognition the striking employees voted to return to work. On June 7 those employees presented themselves at Respondent's dispatch location and announced they were ready to work. The record failed to show that drivers were reinstated.

The strike was economic from its February 2 inception until Respondent unlawfully withdrew recognition on May 9, 1997. I am convinced that Respondent's activity in violation of Section 8(a)(1) and its unlawful withdrawal of recognition were designed to undermine employees' support for the Union. *Hearst Corp.*, 281 NLRB 746 (1986); *American Linen Supply Co.*, 297 NLRB 137, 145 (1989). That unlawful conduct affected the employees' withdrawal from union representation.

The record shows that Respondent's unlawful conduct converted the economic strike into an unfair labor practice strike no later than May 9, 1997. When an employer illegally withdraws recognition, the employees are deprived of their bargaining representative and are precluded from reaching agreement on a contract and settling an economic strike. Withdrawal of recognition has the affect of prolonging the strike and converts the strike into an unfair labor practice strike. *Rose Printing Co.*, 289 NLRB 252 (1988); *Sanderson Farms*, 271 NLRB 1481 (1984); *American Linen Supply Co.*, supra at 146.

Therefore, all employees that were engaged in the unfair labor practice strike on or after May 9, 1997, are entitled to reinstatement even if it is necessary for Respondent to terminate employees hired as replacements on or after that date. As economic strikers from February 2, all strikers are entitled to reinstatement upon the opening of each striker's former job or a substantially equivalent position.

The record is not complete as to whether employees were denied reinstatement rights as economic or unfair labor practice strikers. The parties did stipulate that the economic strikers were lawfully replaced. However, the record is unclear as to when or if, those positions or substantially equivalent positions, became vacant; whether the positions were filled by strikers or others; and the timing of events after employees made unconditional offers to return to work and after the strike was converted to an unfair labor practice strike. Those issues may be determined if necessary in compliance proceedings.

#### CONCLUSIONS OF LAW

1. Transpersonnel, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Drivers, Warehousemen and Helpers, Local 28, affiliated with International Brotherhood of Teamsters, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent by soliciting its employees to sign statements stating they do not want union representation; and by interrogating its employee about his feelings about the Union, engaged in conduct in violation of Section 8(a)(1) of the Act.

4. The Union is and has been at material times the collective-bargaining representative of Respondent's employees covering employees at the Kohler Company in Spartanburg, South Carolina.

5. Respondent, by withdrawing recognition from the Union as exclusive collective-bargaining agent of its employees at the Kohler Company in Spartanburg, South Carolina, has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

#### THE REMEDY

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

As I have found that Respondent has unlawfully withdrawn recognition from the Union, I shall order that Respondent recognize and, on demand, bargain with the Union as the unit employees' collective-bargaining representative. I shall also recommend that Respondent make the unit employees whole for all losses they suffered because of its unlawful withdrawal of recognition and, if it is shown that unit employees were unlawfully denied reinstatement in accord with their rights as unfair labor practice strikers on or after May 6, 1997, that Respondent be ordered to offer full and immediate reinstatement to each such employee to his or her former job or, if that job no longer exists, to a substantially equivalent position, terminating if necessary any employee hired after the strike was converted to an unfair labor practice strike.

[Recommended Order omitted from publication.]