

H. P. Wasson & Company *and* Retail, Wholesale and Department Store Union, AFL-CIO. Case 25-CA-2616

March 13, 1968

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS FANNING AND ZAGORIA

On April 3, 1967, Trial Examiner John F. Funke issued his Decision in the above-named proceeding, finding that the Respondent had not engaged in the unfair labor practices charged and recommending that the complaint be dismissed, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a brief in support thereof, and the Respondent filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent with the following.

The facts are set out fully in the Trial Examiner's Decision; those pertinent to our Decision are summarized here. Retail, Wholesale and Department Store Union, AFL-CIO (the Union), was certified by the Board on August 25, 1965, as representative of certain warehouse employees of Respondent.

On November 19, 1965, the parties executed a 1-year collective-bargaining agreement. About August 24, 1966, the Union wrote to the Respondent, seeking to begin negotiations for a new contract to go into effect after expiration of the existing agreement. The Respondent's president, having received reports from supervisors that a few employees who had backed the Union earlier were now dissatisfied

with it,¹ retained an independent research firm to visit unit employees at their homes and ask them the following questions:

After the present labor contract expires on November 19, 1966, *do you or do you not* want the Retail, Wholesale and Department Store Union to continue to represent you as collective bargaining agent? Putting it another way, in a very simple way, "Do you or don't you want the Union at the warehouse?"

Although interviewers were instructed to tell employees, before asking the question, that the poll was being taken by an independent firm, that answers would not be connected with employees' names in the report to the Respondent, and that employees would not be prejudiced in any way because of their response to the question, there is no probative evidence of any employee being given these assurances by the interviewer. Each interviewer was accompanied by a court reporter, who recorded the questions and answers. On September 13, after receiving a report from the research firm that the majority of the unit employees no longer favored the Union,² the Respondent informed the Union that it would not negotiate because it had reasonable grounds to doubt the Union's majority. It also filed a petition with the Board for an election.

In our opinion, the evidence demonstrates that the interviews were conducted in a manner which necessarily would produce a coercive impact upon employees. Employees were visited in their homes, without any advance warning or explanation from their employer, by two-person teams of strangers representing themselves to be agents of the Respondent. Since one member of each interviewing team was a professional court reporter assigned to take a verbatim transcript of the questioning, it must have been plain to the employees that their answers were being recorded. Accentuating the departure from any routines associated with normal employment procedures, the visits were made either on a Friday evening or Saturday. Although the polling service reported that interviewers had told employees their answers would not be identified by name to the Respondent, and that no reprisal would be taken,³ the overall impression created by the unusual timing and procedure, unknown questioners hired by the Respondent, requirement to make a quick

¹ No employee chose to file a decertification petition under Section 9(c)(1)(A)(ii) seeking a new election on grounds that the Union no longer represented a majority of the employees in the unit.

² The results of the poll were: Yes, 7; No, 27; undecided, 5; refused, 1; not interviewed, 11.

³ In its report to the Respondent, the polling service stated that its interviewers introduced themselves as pollers hired by the Respondent, told employees their answers would not be identified to the Respondent by name,

and that there would be no reprisals. One employee, Mary Farley, testified that she had been asked about her views on the Union without any such introduction. On cross-examination, she conceded that something might have been said to her that she did not hear, but maintained that "to the best of my knowledge, it was not said to me." The Respondent did not call the reporter who had recorded the interview—although she was apparently in the hearing room during cross-examination—or produce the transcript of the interview.

response concerning union allegiance which would, plainly, be taken down and preserved for some purpose, and lack of preparation or acknowledgement from the Respondent that it would be sponsoring such a poll, could not surely be dispelled by a few words of reassurance, even if given.

Accordingly, we find, contrary to the Trial Examiner, that Respondent's poll of employees violated Section 8(a)(1) of the Act.

We also disagree with the Trial Examiner's finding that the Respondent did not violate Section 8(a)(5). It is well established that where, as here, a certified union requests an employer to negotiate a new collective-bargaining agreement to become effective upon the expiration of a 1-year agreement negotiated after the union was certified, there exists a presumption that the union retains the support of a majority of the employees in the unit; and the employer may refuse such request only if it can show by objective facts that it has a reasonable basis for believing that the union has lost its majority status since its certification.⁴ As indicated above, the Respondent concedes that reports of employee dissatisfaction with the Union did not provide sufficient grounds for believing that the Union had lost its majority status. Moreover, we have found that the poll, although perhaps intended to supply the objective evidence required for such a reasonable belief, was taken in a coercive atmosphere. The results of the poll were therefore unreliable. No other valid grounds have been advanced for believing that the Union's majority status had been dissipated. In these circumstances, and in view of the unfair labor practice committed by the Respondent in conducting the poll, we find that the Respondent by refusing to bargain with the Union on and after September 13, 1966, violated Section 8(a)(5) of the Act.

We adopt, *pro forma*, the Trial Examiner's finding that the Respondent did not violate Section 8(a)(5) of the Act by granting merit wage increases to employees in the unit involved in this case, to which no exceptions were taken.

THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The acts of the Respondent set forth above, occurring in connection with its operations as described in the Trial Examiner's Decision, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and

obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain with the Union as the exclusive bargaining representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

CONCLUSIONS OF LAW

We hereby adopt the Trial Examiner's Conclusion of Law, his Conclusion of Law 2, and substitute the following:

"2. All warehouse employees, including checkers and markers, loaders, stockmen, clerical employees, and porters employed at Respondent's warehouses located at 400 N. Capitol Avenue and 1302 N. Meridian Street, Indianapolis, Indiana, but excluding all carpenters, painters, electricians, appliance repairmen, truckdrivers and all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act."

"3. Since August 23, 1965, the Union has been exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act."

"4. By refusing on or about September 13, 1966, and at all times thereafter, to bargain with the Union as the exclusive collective-bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act."

"5. By the aforesaid refusal to bargain, and by conducting a coercive poll of its employees, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act."

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

⁴ *Celanese Corporation of America*, 95 NLRB 664, 673; *Laystrom Manufacturing Co.*, 151 NLRB 1482, enforcement denied 359 F.2d 799 (C.A. 7), accord, *United States Gypsum Company*, 157 NLRB 652.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, H. P. Wasson & Company, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All warehouse employees, including checkers and markers, loaders, stockmen, clerical employees, and porters employed at warehouses located at 400 N. Capitol Avenue and 1302 N. Meridian Street, Indianapolis, Indiana, but excluding all carpenters, painters, electricians, appliance repairmen, truckdrivers and all other employees, guards and supervisors as defined in the Act.

(b) Conducting coercive polls of its employees.

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

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its warehouses at 400 N. Capitol Avenue and 1302 N. Meridian Street, Indianapolis, Indiana, copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25,

in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT refuse to bargain collectively with Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT conduct coercive polls of our employees.

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

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All warehouse employees, including checkers and markers, loaders, stockmen, clerical employees, and porters employed at our warehouses located at 400 N. Capitol Avenue and 1302 N. Meridian Street, Indianapolis, Indiana, but excluding all carpenters, painters, electricians, appliance repairmen, truckdrivers and all other employees, guards and supervisors as defined in the Act.

H. P. WASSON &
COMPANY
(Employer)

Dated By

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204, Telephone 633-8921.

⁵ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JOHN F. FUNKE, Trial Examiner: Upon a charge filed September 16, 1966, by Retail, Wholesale and Department Store Union, AFL-CIO, herein the Union, against H. P. Wasson & Company, herein the Respondent, the General Counsel issued a complaint alleging Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. The answer of the Respondent denied the commission of any unfair labor practices.

This proceeding, with all parties represented, was heard before Trial Examiner John F. Funke at Indianapolis, Indiana, on January 4 and 19, 1967. At the conclusion of the hearing the parties were granted leave to file briefs and briefs were received from the General Counsel and Respondent on March 6.

Upon the entire record in this case and from my observation of the witnesses while testifying, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is an Indiana corporation operating a department store and other retail stores and two warehouses in Indianapolis. During the past year Respondent's sales of goods and materials exceeded \$500,000 and Respondent shipped in interstate commerce goods and materials valued in excess of \$50,000. Respondent, during the same period, purchased goods and materials valued in excess of \$50,000 from States other than the State of Indiana. Respondent is engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Refusal to Bargain

On August 23, 1965, the Union was certified by the Regional Director for Region 25 as the exclusive collective-bargaining representative of Respondent's warehouse employees in a unit described as follows:

All warehouse employees, including checkers and markers, loaders, stockmen, clerical em-

ployees, and porters employed at Employer's warehouses located at 400 N. Capitol Avenue and 1302 N. Meridian Street, Indianapolis, Indiana. But excluding all carpenters, painters, electricians, appliance repairmen, truckdrivers and all other employees, guards and supervisors as defined in the Act.

The election was by direction of the Board and the tally of ballots showed the following results:

Approximate number of eligible voters	47
Votes cast for Petitioner	25
Votes cast against participating labor organization	17
Valid votes counted	42
Challenged ballots counted	5
Total votes plus challenged ballots	47

On November 19, 1965, the parties executed a collective-bargaining agreement. (General Counsel's Exhibit 2.) The agreement was for a period of 1 year with an automatic renewal clause unless 60-day notice of termination was given. It also provided for maintenance of membership and a dues checkoff for union members who executed a checkoff authorization. (Article II.) It contained a provision for wages (Article XIV) which included the following exemption:

It is agreed that the hourly rates set forth above shall be considered as minimum rates. The Company shall have the right, at any time during the life of this Agreement, to pay above such minimums [sic] where such action is based upon the ability, skill or performance of the individual employee.

In mid-August of 1966 the Respondent granted merit wage increases to 17 employees in the certified unit.¹ (All but three were union members.) The increases were in the amount of 10 cents per hour, except for one employee who received 25 cents, one who received 12-1/2 cents, and one who received 5 cents. (General Counsel's Exhibit 28.) These were the first merit increases granted since the Union had filed its petition for an election on September 9, 1963; the petition which led to the election.² These increases were admittedly granted without notice to or consultation with the Union.

According to Harry E. Webber, warehouse supervisor, no merit increases had been granted to such a number of employees before. Webber, however, had only been warehouse supervisor since January. Both Webber and Dexter M. Radove, personnel director for the Respondent, testified that the reason for the increase was to afford protection against a "tight labor market" allegedly existing at this time in Indianapolis by raising the wage standards of qualified personnel. The selection of em-

¹ It was estimated that there were approximately 85 to 90 employees at the two warehouses, about 50 of whom were embraced in the unit.

² The Respondent apparently took the position it could not grant merit increases while this petition was pending. There was, therefore, a lengthy hiatus in the granting of merit increases.

ployees was based on merit sheets prepared by supervisors on August 16.³ Webber testified that while he had participated in the ratings in August he had never rated employees prior to that date. He had not, however, been a supervisor at a time when merit increases had previously been given.

On or about August 24 the Union wrote Respondent asking for negotiations leading to a new collective-bargaining contract. (General Counsel's Exhibit 4B.) Louis Wolf, president of Respondent, testified that, based on the high turnover in personnel since the election and reports from his supervisors that employees had expressed dissatisfaction with the Union and with paying union dues, he doubted that the Union retained its majority status.

Harry Webber testified that certain employees expressed their dissatisfaction to him. I agree with the General Counsel that some of his testimony is too remote in time to be relevant to the issue of the Union's majority in August and September. Webber's testimony with respect to Bonnie Vaughan (February), Elizabeth Smiley (January), Garnett Burns (January), Dorthory Fritsch (January), and Mabel Zerbe (March) will be disregarded. As to his testimony that Hazel Murphy told him in August that she had not voted for the Union and would not vote for it, this is not the testimony of a disaffecting employee—she had never been an adherent. I shall accept his testimony that Mildred McNeeley told him she had not wanted the Union in the first place and now wanted out; that Violetta Wyrick told him that although she was a member she was not for the Union; that Florence Griffith told him she did not want to be represented by the Union and wanted out; that Florence Connel told him she had signed a card and that there had been a deduction from her paycheck for dues which she did not believe was authorized; that Hilda Thiesing told him she had joined because she thought it was a closed shop and that she would lose her job or be laid off first if she did not join; that J. P. Lloyd told him she had joined only because she believed that if there was a layoff the employees who were not members would not be called back.

At the conclusion of Webber's testimony the hearing was recessed for 15 days to give the General Counsel opportunity to provide rebuttal. When the hearing reconvened, the General Counsel offered no witnesses in rebuttal.

On September 13 the Respondent replied, declining to meet because Respondent had "reasonable grounds for believing that your organization no longer represents a majority of the employees in the bargaining unit." (General Counsel's Exhibit 5.) On that same day Respondent filed a petition for an election with the Board in Case 25-RM-217. (Respondent's Exhibit 4.)

Prior to September 13 President Wolf contacted Dorothy Mae Walker, president of Walker

Research, Inc., a firm which performed marketing research studies, public relations consulting, and other services for its clients. She met with Wolf and George Ryan, counsel for Respondent, and was asked if she would be willing to take a poll, involving one question only, of Respondent's employees. The question:

After the present labor contract expires on November 19, 1966, *do you* or *do you not* want the Retail, Wholesale and Department Store Union to continue to represent you as your collective bargaining agent? Putting it another way, in a very simple way, "Do you or don't you want the Union at the warehouse?"

Mrs. Walker was instructed to interview the employees at their homes and a court reporter was to accompany the interrogator and to take down the conversation. A report of the results, not identifying the employees, was to be given to Respondent or to Ryan. The Research interviewers were instructed to make the following statement to the employees:

Hello, I am Mrs.—of Consumer Research Service and we have been employed by H. P. Wasson and Company to take a short opinion survey among all warehouse employees. (Pause, then state—slowly—) We want to ask you a question, *but* before we do so, we want you to know that in our report to Wassons, you will not be identified by name. Instead, we will report *only* the number of "yes" answers and the number of "no" answers to our one question. We also wish to assure you that you will not be prejudiced in any way by the results of this survey or by your answer to my question.

The question was then read to the employee and the answer recorded. Walker reported the results as follows:

yes	7
no	27
undecided	5
refused	1
not home	7
on vacation	2
couldn't locate	<u>2</u>
total	51

Wolf testified that he was never informed of the identity of the employees with respect to their responses and that the transcripts of the interviews were never made available to him. The transcripts were ordered to enable Respondent to prepare its defense to the complaint herein, and were seen only by Respondent's counsel.

Only one employee testified as to the interrogation. This was Mary Farley who testified that at the time the research interviewer reached her home she

³ These merit rating sheets were not offered in evidence by either the General Counsel or Respondent

was entertaining company and that she was "ired" by the interruption. She stated she was asked only the question quoted above and could not remember that she had been told her name would not be used and that no reprisals would be taken against her. (Her first testimony was that the preliminary statement had not been read to her.)

The Walker report was received by Respondent on September 13, the day Respondent filed its petition for an election and rejected the Union's bargaining request.

B. Conclusions

1. The merit wage increases

No language could be more unambiguous than that in the exemption clause in article XIV. The reservation by Respondent of the right to grant unilateral merit wage increases was complete. No notice to the Union is required by the contract.⁴ The only qualification provided is that such increases be based on ability, skill, and performance. The General Counsel, who had access to the merit rating sheets, did not offer them to establish that these qualifications were not met. Since the reservation of such a right is neither contrary to the law nor to Board policy, its exercise could not be unlawful unless motivated to discourage membership in the Union and rejection of the Union as bargaining agent. The only evidence to support this contention is entirely inferential and is based on the fact that the increases were granted as the contract reopening period approached and the contingency of another election was in the offing. I find this insufficient. Here we have a Company free from prior unfair labor practices and which, on the record of the case, has displayed no hostility toward the Union. It had withheld merit increases since September 1963 because of the pendency of a petition for an election, so it does appear that a substantial number might have been due. It is true, of course, that the increases might have been staggered over the months since the signing of the contract in November 1965, or granted at any prior time. Respondent's answer to this, as I understand it, is that the labor market in Indianapolis grew "tight"

during the summer of 1966 and it felt it necessary to maintain a competitive wage scale. This is an argument almost impossible to refute unless a study in depth were made of the labor market and prevailing wages in Indianapolis during this period. I think it suffices to say that while the increases are subject to suspicion, the General Counsel has not sustained his burden of proof. I do not find Respondent violated Section 8(a)(5) by this unilateral action.

2. The polling of employees

The method used to poll employees has been set forth above. The Respondent first insulated itself from the poll by having it conducted by an independent research council. It then immunized itself against any coercive impact by the preliminary statement read to the employee by the interrogator which promised protection of identity and freedom from reprisal.⁵ Since the Board requires that an employer submit objective evidence to support his good-faith doubt of the continued majority status of an incumbent union,⁶ it must, for I cannot believe that those words were intended as a ploy to entrap an employer into other unfair labor practices if he makes an effort to secure the required objective evidence, accept evidence obtained by interrogation free coercion. I do not know what other means could be used which would not subject an employer to a similar charge.⁷ It may well be that the requirements of *Laystrom* and *U. S. Gypsum* will suggest numerous and diverse tactics for meeting the "objective evidence" test and that the General Counsel will feel it incumbent that he test these tactics for legality as they arise. Certainly the decisions themselves provide no guidelines. The General Counsel, in his brief, suggests that all Respondent was required to do was to submit an affidavit from Webber setting forth his conversations with the employees in which they expressed their dissatisfaction with the Union. In the immediately preceding sub-heading of his brief the General Counsel states that the Trial Examiner could, on the basis of Webber's testimony, make a finding of disaffection as to only two employees. The General Counsel's own argument establishes the necessity for the poll.⁸ It would seem curiously inconsistent for the Board to direct

⁴ General Counsel states that the Union's agreement was conditioned on notice to it. Raulston's testimony was that the Union did not object but "wanted to know when the merit increase was given and then who they were given to, and the reasons." Raulston had to be led by the General Counsel to use the word "notice." Raulston's testimony on this point violates the parole evidence rule and is disregarded. The clause required no clarification or interpretation.

⁵ Although 40 employees were interviewed and the General Counsel was given 15 days in which to obtain the testimony of the employees respecting the manner of polling, only one witness was called. She stated, above, that she could not remember that the preliminary statement was read to her but also admitted she was both confused and angry at the time and that the statement could have been read and she did not hear it.

⁶ *Laystrom Manufacturing Co.*, 151 NLRB 1482, *United States Gypsum Company*, 157 NLRB 652.

⁷ An employer confronted with a demand for new negotiations with a

union whose certification is more than a year old is caught in a serious dilemma by court and Board decisions. Had the Respondent in this case signed a contract with the Union it would have, if the results of the poll are accepted, engaged in an unfair labor practice, whether or not it acted in good faith. (*N.L.R.B. v. International Ladies' Garment Workers' Union [Bernhard-Altmann Texas Corp.]*, 366 U.S. 731.) Had it refused to bargain under *Laystrom* and *Gypsum* unless its doubt was supported by objective evidence. In this case the Respondent was charged with an unfair labor practice because it sought, by means which I find free from coercion, to obtain such evidence. There should be some path from such a dilemma which does not lead the employer into ambush.

⁸ The General Counsel also argues that there was no assurance against reprisal. The charitable assumption is that he either did not read or did not understand the last sentence of the preliminary statement. As to the reason for taking the poll the question as posed reveals its purpose.

an employer to make known the names and addresses of its employees in an appropriate unit to a Regional Director and available to the union⁹ and to permit the union to visit the employees at their homes for the purposes of solicitation and persuasion and then to find an employer guilty of an unfair labor practice for visiting them, not for the purpose of solicitation or persuasion, but for obtaining evidence, in a noncoercive manner, which the Board itself has required.¹⁰

I find the poll taken by Walker Research at Respondent's direction did not violate the Act.¹¹

3. The refusal to bargain

Respondent defends against the refusal-to-bargain charge by asserting that, as a result of the poll taken by Walker Research, it had a good-faith doubt that the Union continued to represent a majority of employees in the bargaining unit.

The landmark case, as Respondent's brief points out, is *Celanese Corporation of America*, 95 NLRB 664. Therein the Board held that the union's majority would be presumed to continue after the end of the certification year but that the employer could refuse to bargain with the union on the ground that it had a *good-faith* doubt as to the union's majority. It stated the prerequisites for raising the issue, *supra* at 673, as follows:

By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case. But, among such circumstances, two factors would seem to be essential prerequisites to any finding that the employer raised the majority issue in good faith in cases in which a union had been cer-

tified. There must, first of all, have been some reasonable grounds for believing that the union had lost its majority status since its certification. And, secondly, the majority issue must *not* have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union.

In the *Laystrom* and *U. S. Gypsum* cases the Board added the qualification that the doubt must be based on objective evidence, a requirement which led Respondent to take the poll. Since I have already found that the circumstances under which the poll was taken did not violate the Act and that the merit increases granted by unilateral action were not granted to dissipate the Union's majority, I find that the doubt was supported by objective evidence (see results, above) and that it was not raised in a context of unfair labor practices.

I find that Respondent did not refuse to bargain with the Union in violation of Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and the Union is a labor organization within the meaning of the Act.
2. Respondent has not engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

RECOMMENDED ORDER

It is recommended that the complaint be dismissed in its entirety.

⁹ *Excelsior Underwear Inc.*, 156 NLRB 1236.

¹⁰ The General Counsel has described the impact of Respondent's poll in his brief as follows.

One need only envision the knock on the door of the employee's home, his opening the door to be confronted by a stranger who asks the portentous question set out above, while a court reporter solemnly regards the whole conversation, to see the restraining effects of this survey. It is almost unbelievable that there would be a non-conformist able to resist Respondent's pressure by refusing to answer or an employee courageous enough to answer in the affirmative.

The short answer to this outburst is that the General Counsel had 2 weeks in which to obtain evidence that any employee had been coerced and obtained none. None, at least, was offered. Apart from this I do not see that exaggeration or vituperation contribute to a brief. A Trial Examiner asks only that the facts of the case be succinctly and accurately stated and that the applicable law be set forth. He is not interested in a trial attorney's opinion of Respondent's conduct.

¹¹ *Blue Flash Express, Inc.*, 109 NLRB 591; *Johnnie's Poultry Co.*, 146 NLRB 770, 775.