

**Alcon Fabricators, a Division of Alcon Industries and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, and its Local 217.** Case 8-CA-26240

July 13, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND  
TRUESDALE

On March 27, 1995, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions, a supporting brief, and a response brief, and the General Counsel filed an answering 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 and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions,<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Alcon Fabricators, a Division of Alcon Industries, Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Refusing to recognize and bargain in good faith with the Union concerning terms and conditions of employment of the employees in the unit described below.”

2. Insert the following after paragraph 1(a) and reletter the subsequent paragraph.

“(b) Unilaterally changing the terms and conditions of employment of the employees in the unit described below.”

<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> In adopting the judge's conclusion that the Respondent unlawfully withdrew recognition, we find it unnecessary to pass on his discussion of the supervisory status of James Martin. We also place no reliance on his discussion of *Underground Service Alert*, 315 NLRB 958 (1994), and the continued viability of the good-faith-doubt defense.

<sup>3</sup> We have modified the judge's recommended Order and notice to more clearly reflect the judge's conclusions of law.

3. Substitute the following for paragraph 2(a).

“(a) Recognize and, on request, bargain in good faith about, inter alia, the February 22, 1994 wage increase with the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, and its Local 217, as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit, and continue to do so for 6 months thereafter as if the initial certification year had not yet expired:

All welders, welder-fitters, press brake operators, and material handlers at Respondent's 1234 West 78th Street, Cleveland, Ohio facility, excluding all office clerical employees, professional employees, guards, supervisors and all other employees.

4. Substitute the attached notice for that of the administrative law judge.

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.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, and its Local 217 as the exclusive representative for collective-bargaining purposes of the employees in the following appropriate unit:

All welders, welder-fitters, press brake operators, and material handlers at Respondent's 1234 West 78th Street, Cleveland, Ohio, facility, excluding all office clerical employees, professional employees, guards, supervisors and all other employees.

WE WILL NOT change the terms and conditions of employment of our employees without first bargaining with the Union.

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

WE WILL, on request, bargain with the Union with respect to rates of pay, hours of employment, and other terms and conditions of employment of the employees in the appropriate bargaining unit, including, among other things, the wage increase granted to employees

on February 22, 1994, and continue to do so for at least 6 months after the commencement of bargaining.

ALCON FABRICATORS, A DIVISION OF  
ALCON INDUSTRIES

*Nancy Recko, Esq.*, for the General Counsel.

*Alan G. Ross, Esq.* and *Susan C. Margulies, Esq.* (*Ross, Brittain & Schonberg Co., L.P.A.*), of Cleveland, Ohio, for the Respondent.

*Jerry Melillo*, of Cleveland, Ohio, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was tried in Cleveland, Ohio, on December 15, 1994. The principal issue presented is whether Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Charging Party (the Union) on February 22, 1994. A secondary issue is whether Respondent also violated Section 8(a)(5) on February 22 by unilaterally granting a wage increase to the unit employees. Respondent's answer denies that it violated the Act in any respect.<sup>1</sup>

Briefs were received from the General Counsel and the Union on January 19, 1995. Having reviewed the briefs and the entire record, and taking into account my recollection of the demeanor of the witnesses, I make the following

FINDINGS OF FACT<sup>2</sup>

I. DISCUSSION OF THE GENERAL COUNSEL'S  
ALTERNATIVE THEORIES

Counsel for the General Counsel advances two theories upon which Respondent could be found guilty of violating Section 8(a)(5) by its withdrawal of recognition from the Union: (1) that the withdrawal was premised upon an impermissible construction of pertinent law and (2) that, in any event, the proof of actual or apparent loss of majority required by controlling principles was not sufficient.

A. The Board has long held that after the expiration of a union's certification year, the union's virtually irrebuttable presumption of majority status becomes rebuttable. The employer may rebut the presumption in either of two ways: "(1) By showing that on the date recognition was withdrawn, the union did not in fact enjoy majority support, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain." *Master Slack Corp.*, 271 NLRB 78 (1984).

When the Respondent in the present case withdrew recognition from the Union on February 22, 1994, counsel for the Respondent sent the chief union negotiator the following letter:

On behalf of Alcon Fabricators, the purpose of this letter is to advise the UAW that Alcon Fabricators, effective immediately withdraws recognition from the UAW as the representative of the employees set forth

in the Certification of Representative issued by the National Labor Relations Board in Case No. 8-RC-14789.

As you know, the Certification in the above referenced case issued on December 1, 1992. Thereafter, bargaining commenced on February 18, 1993. In accordance with the United States Supreme Court's decision in *Brooks v. NLRB*, 348 U.S. 96 (1954) Alcon Fabricators was required to recognize the UAW during the certification year. *Now that the first year since certification has passed, there is no longer a presumption of the Union's continuing majority status and therefore, Alcon Fabricators now declines to recognize or continue to bargain with the UAW.* [Emphasis added.]

Rather clearly, the letter misconstrues the *Brooks* case. *Brooks* held that the Board's view that an employer could not, absent unusual circumstances, withdraw recognition from a union within 1 year after a certification of election "seems within the allowable area of the Board's discretion in carrying out congressional policy." *Id.* at 104. The Court also noted that "the Board has ruled that one year after certification the employer can ask for an election or, if he has fair doubts about the union's continuing majority, he may refuse to bargain further with it." *Ibid.* (Footnotes omitted.)

Neither the Supreme Court nor the Board holds, as the Respondent stated in its letter, that once the certification year has passed, "there is no longer a presumption of the Union's continuing majority status and therefore" an employer has a right to withdraw recognition. Rather, as earlier shown, the Board's rule is, in the Supreme Court's words, that on the expiration of the certification year, if the employer has "fair doubts" about the union's continuing majority, it may refuse to bargain. The February 22 letter in effect states that because the certification year had ended, there was no presumption of majority and "therefore" recognition was being withdrawn. The General Counsel argues that since the "true basis" for withdrawal was an inaccurate proposition of law, it constituted a violation of Section 8(a)(5) and (1). Respondent's brief does not address this contention.

Despite the withdrawal letter's unmistakable claim that Respondent was entitled *as a matter of law* to terminate its relationship with the Union on expiration of the certification year, at the hearing Respondent produced three witnesses to testify to various remarks made by unit employees indicating dissatisfaction with the Union, remarks, the witnesses claimed, which underlay the decision to withdraw recognition. If, in fact, such a decisional process had occurred, I would be loath to rely on counsel's restricted statement in his February 22 letter of the legal basis on which Respondent was acting to brand the withdrawal as illegal. It must be said, however, that counsel's failure to refer in the February 22 letter to Respondent's entertaining a good-faith and reasonably grounded doubt of the Union's majority status throws a shadow on the testimony it adduced to that effect. Furthermore, the Board has at least suggested that such a failure may preclude later reliance on perceived loss of majority status. *Pollock Mfg.*, 313 NLRB 562 fn. 2 (1993); *Hilton Inn North*, 279 NLRB 45 fn. 1 (1986).

B. Respondent is engaged in the metal fabricating business. As of February 22, 1994, it employed welders, welder-fitters, press brake operators, and material handlers, all rep-

<sup>1</sup> There is no dispute, however, that it is appropriate for the Board to assert jurisdiction in this case.

<sup>2</sup> Certain errors in the transcript have been noted and corrected.

resented by the Union since the December 1992 certification, after the Union was elected by a vote of 10 to 6.<sup>3</sup>

Until recognition was withdrawn, the parties had held 35 negotiating sessions commencing in February 1993. During this period, the persons most significant to the hearing in this case were James Montemagno, who had been the plant manager for 7-1/2 years; James Martin, referred to as the plant supervisor; and Velda Kay Mullins, the human resources director and chief financial officer for Respondent, each of whom testified at the hearing. The plant is owned by President Richard Chalet, who, according to Mullins, "made the executive decision to cease recognizing the union," but who did not testify in this proceeding. On January 14, 1994, employee Errington filed a petition for decertification of the Union as the bargaining agent of the employees.

The Board has held that while, in order to establish either of the two defenses available to an employer which withdraws recognition, the employer's burden of proof of such defenses is "a preponderance of the evidence," the Board will not find that an employer has sustained that burden "if the employee statements and conduct relied upon are not clear and cogent rejections of the union as a bargaining agent, i.e., are simply not convincing manifestations, take as a whole, of a loss of majority support." *Laidlaw Waste Systems*, 307 NLRB 1211, 1212 (1992). In applying the foregoing standard to the testimony presented by Montemagno, Martin, and Mullins, I believe that Respondent has failed to satisfy the Board's test.

The following summarizes the testimony proffered by Martin, Montemagno, and Mullins to support the claim of a good-faith and reasonably grounded basis for the decision made in February 1994 to withdraw recognition. The three managerial employees testified to remarks made to them by the named rank-and-file employees; no employees gave contradictory testimony.

#### James Martin

*Gravley*—December 1993—"casually" said that "he was against the union from the beginning and he thought it was a stupid idea."

*Busler*—December 1993—"he felt that he was betrayed by the union."

*Errington* and *Raymond*—December 1993—heard the two arguing. Raymond told Martin that he was "sick of all of the bullshit and he just wished it was over." Raymond was angry at Errington because he thought Errington was responsible for the "division" in the shop.

*Ford*—early September—big argument—Martin walked Ford back to area. Ford said "he wished that all this shit was over and he wished it would go back to the way it was before."

*Vinci*—repeatedly said he would "like to kick anybody's ass that had anything to do with it."

*Farkas*—October and November—"His statement to me was he thought the whole thing was a crock of shit."

<sup>3</sup>Of the 15 employees shown on the payroll register for the week of February 25, the unit status of 1 is contested. Respondent claims, as discussed hereafter, that James M. Martin, called the "Plant Supervisor," is a supervisor within the meaning of Sec. 2(11) of the Act.

*Raymond*—December or January—if he could get his raise he "could see to it that he union would be voted out."

Martin told all of the above to Mullins, about "biweekly."

#### James Montemagno

*Errington*—filed decertification petition in January 1994.

*Vinci*—December 1993—"tired of being pressured by the union organizers trying to be pressured into going for the union." After decertification petition, Vinci said "he was tired of being pressured by them and he said it would be over soon."

*Raymond*—December 1993—"he was tired of the union stuff and he just wished it was over." After decertification petition filed, Raymond said "if there was a vote, that the union would be out of there. He believed that all of the employees would be better off without it at that time."

*Gravley*—December 1993—"he didn't think it was a bad shop and he didn't think that they should have been doing what they did."

*Farkas*—December 1993—"he was tired of all of the pressure going on from it and that if they had a chance or if anybody had a chance to vote on it again that the union would be gone."

*Michael Montemagno*—"a lot of times he told me he was dissatisfied with them bringing the union in there."

*Ford*—after the decertification petition, "[h]e told me that he was talked into going along with the union and now he realizes that it was the wrong thing to do."

*Vanschoor*—around January 1994, "told me he was tired of all of the organizers pressuring him into it and that it was eventually going to be over." This was "current pressure" during the decertification effort.

Montemagno reported "[a] lot of the comments" to Mullins if he "thought it was a very important one."

#### Kay Mullins

*Raymond*—after September 1993, said that he was "sick of this union stuff" and had nothing to do with a charge filed by the Union.

*Bender*—around September 1993, Bender expressed concern that the negotiations would affect his insurance (his wife was seriously ill). He expressed that concern "many times."

In my view, even if the testimony of the three witnesses were to be accepted at face value, it would fall short of establishing a fairly based doubt of continuing majority status. In *Destileria Serralles*, 289 NLRB 51, 52 (1988), enfd. 882 F.2d 19 (1st Cir. 1989), the Board approved the administrative law judge's standard, which distinguished between mere "disenchantment with the Union's past performance or a disinclination to be active Union members, as distinguished from a current desire to be rid of union representation." Accord: *Briggs Plumbingware v. NLRB*, 877 F.2d 1282, 1288 (6th Cir. 1989) ("employee statements of dissatisfaction with a union are not deemed the equivalent of withdrawal of support for the union as the exclusive bargaining representative . . . mere disparaging remarks about a union to management may have been made to incur the employer's favor."); *Cornell of California*, 222 NLRB 303, 306, (1976), enfd. 577 F.2d 513, 516 (9th Cir. 1978) ("Assuming such evidence may be one basis upon which a reasonable doubt could rest, in the absence of special circumstances it has not been held

to be and should not be sufficient by itself.”). In *Laidlaw Waste Systems*, supra, the Board relied in part on the fact that the decertification petition “did not say that the 15 signers did not desire union representation.” 307 NLRB at 1212.

It seems clear that the Board is demanding precision and clarity before it will permit an employer to terminate a collective-bargaining relationship based on remarks made by employees. In the present case, I count no more than statements by five employees which, assuming that they were actually made, could be said to have provided a “clear” basis for concluding that the speakers no longer wished to be represented by the Union.

These consist of, first, the statements made by Gravley, Ford, and Vinci to Martin in December 1993;<sup>4</sup> Montemagno allegedly heard only definitive rejections of union representation from Raymond, his brother Michael, and Ford; and neither of the two employees referred to by Mullins was sufficiently “clear.” Thus, giving Respondent’s witnesses the benefit of the doubt, only five employees (Gravley, Ford, Vinci, Raymond, and Michael Montemagno) made statements plainly indicating rejection of the Union, and Errington was known to have filed the petition (but see *Laidlaw Waste Systems*, supra).

When it comes to the “convincing” aspect of the standard of proof, Respondent also fails. Despite the absence of contradiction,<sup>5</sup> there is much in the testimony that was vague, unlikely, and generally not “cogent.” For example, Montemagno testified that prior to the 1993 election, employees Vinci, Errington, his brother Michael Montemagno, Gravley, and Farkas were “against” the Union. He did not elaborate on his basis for saying so, other than that Vinci was the Respondent’s observer at the election. He did say that after the decertification petition was filed in January 1994, Vinci told Montemagno “that he was tired of being pressured by them and he said it would be over soon.” But Montemagno also attributed to employee Vanschoor, also in January, a remarkably similar statement: “He told me that he was tired of all the organizers pressuring him into it and that it was eventually going to be over.”

Another example of what I considered to be Montemagno’s questionable reliability was his testimony that employee Raymond told him, in December 1993, that he “was tired of this union stuff and he just wished it was over,” and that after the decertification petition was filed, Raymond told him that if there was a vote, “the union would be out of there” and Raymond “believed that all of the employees would be better off without it at that time.” But Raymond had been a member of the Union’s negotiating committee, and, according to the credited testimony of UAW International Representative Jerome Melillo, who seemed to me to be a reliable witness, Raymond was present at the last negotiating session on February 7.<sup>6</sup>

<sup>4</sup> Those remarks attributed by Martin to Raymond and Farkas are at best ambiguous.

<sup>5</sup> Testimony may be discredited even if not contradicted. *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970).

<sup>6</sup> Mullins testified that Raymond was replaced by employee Stacey toward the end of the negotiations and, she believed, never reappeared. But, although Mullins took minutes of the bargaining sessions, including the names of those present, Respondent produced no notes of the February 7 meeting and did not ask for a recess to obtain the notes.

The testimony by Martin and Montemagno indicating that Raymond had turned against the Union is contravened not only by Raymond’s attendance at the final meeting as a union negotiator, but also by an internal logical inconsistency in Martin’s testimony. Martin stated that in December 1993, Raymond was angry at Errington for causing union-related “division” in the shop; since Errington was the employee responsible for thereafter circulating the decertification petition, then Raymond must have been speaking in *defense* of the Union.

Mullins testified that as employees made antagonistic remarks to Montemagno and Martin about the Union, and they conveyed these sentiments to her, she began making notes, as instructed by Respondent’s attorney. When Mullins so testified at the hearing, I asked her to confirm that there were notes in existence “in which you memorialized statements that were made to you by employees or by supervisors about statements made to them by employees which were negative about the Union.”

At first, Mullins said “yes,” and then said that she was “not sure that the notes exist.” She further stated that on the first occasion on which she repeated something to the company attorney, he advised her to keep such notes, and she said that she would “of course” do that. When Mullins’ testimony finished at this point, and I asked Respondent’s counsel if there was anything else, fully expecting the notes to be produced as confirmation, counsel offered nothing further—neither the notes nor any explanation of why they were not being offered. This omission inescapably gives rise to the inference that notes would not support the testimony.

In all, it is my opinion that Respondent has fallen far short of meeting the Board’s standard of proving by a preponderance of the evidence employee statements and conduct which constitute “clear and cogent rejections of the union as a bargaining agent” by a majority of unit employees. There are problems with the testimony which raise a serious doubt as to whether all or any of the events which were described actually occurred, and just how much, if they occurred, they were embroidered. The failure of the February 22 letter of withdrawal to even mention any good-faith doubt of majority status, as earlier discussed, adds to my concern about the validity of this testimony, as does the failure of President Challet to testify about the extent of his own knowledge when he made the “executive decision.” Even taken at face value, moreover, a number of the statements described were vacuous and lacking the definition which the Board requires to satisfy the “clear and cogent rejections” test.

I conclude that Respondent has not shouldered the burden which the Board imposes on an employer seeking to justify a withdrawal of recognition after the expiration of the certification year, and therefore violated Section 8(a)(5) by such withdrawal.<sup>7</sup> I further conclude that Respondent also violated

<sup>7</sup> My conclusion is not affected by the issue of whether Martin is or is not a member of the bargaining unit. For the sake of completeness, however, I am of the opinion that Martin is probably a supervisor as contemplated by Sec. 2(5) of the Act, despite the fact that many of the managerial characteristics ascribed to him were of the secondary indicia variety, such as attending supervisory meetings, signing timecards, having a desk (which he apparently rarely uses, since he “spend[s] all day on the plant floor”), etc.

Section 8(a)(5) by unilaterally raising the pay of employees on February 22, 1994. *Rock-Tenn Co.*, 315 NLRB 670, 673 fn. 14 (1994).

As discussed above, Respondent attempted to prove that, at the time of withdrawal, the Union did not represent a majority of the employees in the unit or that Respondent entertained a good-faith and reasonably based doubt of the Union's majority status. It did not even approach the threshold of the former defense.

The latter defense has a venerable pedigree. *E. A. Laboratories*, 80 NLRB 625, 683-684 (1948); *Atlantic Journal Co.*, 82 NLRB 832-833 (1949); *Celanese Corp. of America*, 95 NLRB 664, 672-673 (1951). The doctrine is, however, not mandated by the statute, but is rather a gloss placed thereon by the Board. Whether the Board intends to preserve the defense is put into serious question by its recent decision in *Underground Service Alert*, 315 NLRB 958 (1994).

In *Underground Service*, after a decertification election was held, the Board ordered a hearing on a determinative challenged ballot. Prior to the hearing, however, the employer received a petition signed by a majority of the unit employees stating, in effect, that they no longer wished to be represented by the union. The employer promptly withdrew recognition from the union. The General Counsel argued to the Board that once the decertification election had been held (even though not yet resolved), that superior method of test-

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Martin's statutory powers are not overwhelming. He testified that he has verbally "warned" employees, but that appears to have been more counseling than "discipline," as required by the Act. Martin testified that before an employee is suspended, Martin and the plant manager "discuss" the decision, but no examples were given and no specific occasions were alluded to. He also said that the plant manager bases his decision of whether to retain a probationary employee on Martin's "judgment." Only once, and that occurred just a few weeks before the hearing, has Martin issued a written warning (and a 3-day suspension) to an employee, at a time when the plant manager was not present. His authority to "assign" and "direct" employees seems to be of the routine variety. Martin is the company representative on the safety committee. He trains new welders and fitters. He said that he would have "input" as to whether an employee deserved a raise or not, but did not testify about the effectiveness of such recommendations. Martin said that when there has been a layoff in the past, it is his "judgment" as to who should be let go. He further said that he "can allow or not allow time off." He "confers" with the plant manager as to whether and by whom overtime should be worked. He "breaks up" gatherings and makes sure that people are working.

Plant Manager Montemagno testified that he personally spends 90 percent of his workday on the shop floor; in a small facility like Respondent's, decisionmaking of any consequence during that period must logically be done under the direct supervision of Montemagno. However, Martin is in charge during Montemagno's absences; the record gives no indication of when those occur other than that he goes to the main office two blocks away several times a day. Martin is hourly paid but earns over \$40 per week more than the next highest paid employee, and, while called a leadman at first, became a "supervisor" after 3 years and received a raise at that time. He is shown on the employee payroll list, while Manager Montemagno is not.

The call is a close one, but I am inclined to think that Martin is more than a leadman, given his participation not merely in supervising the work done by the employees, but also in managing personnel aspects of the employer-employee relationship. This conclusion seems to be compelled by *Essbar Equipment Co.*, 315 NLRB 461 (1994).

ing the union's majority status precluded the employer from withdrawing recognition.

The Board agreed with the General Counsel. It stressed the uncontroversial principle that "a secret-ballot Board-conducted election is the preferred method of ascertaining free choice" and quoted approvingly the observation of the Court of Appeals for the Eighth Circuit in *NLRB v. Cornerstone Builders*, 963 F.2d 1075, 1078 (1992), that "unilateral withdrawal of recognition is generally a poor substitute for an election proceeding." After citing other authorities to the same effect, the Board stated in *Underground Service*, supra at 960:

Thus, it is widely recognized that Board-conducted elections can better effectuate the promotion of industrial peace than unilateral employer withdrawals of recognition based on evidence of a union loss of majority support presented directly to employers because, among other factors, Board-conducted elections are a more reliable indicator of employee wishes.

After further discussion in *Underground Service* of this preference for elections, the Board held that the employer had violated Section 8(a)(5) by rescinding recognition during a delay in the election process that had been triggered by the filing of the decertification petition. It distinguished *Atwood & Morrill Co.*, 289 NLRB 794 (1988), in which a decertification petition had been filed but was blocked and hence no "election process [was] underway" at the time the employer withdrew recognition on the basis of written statements rejecting representation signed by a majority of the unit employees. While there appears to be some potential conflict among the Board members as to whether there should be a difference in result depending on the eventual outcome of the election, *Underground Service*, supra at 961 fn. 8, that issue (or, indeed, the issues of whether an election has been held or a decertification petition has been filed in the first instance) seems irrelevant.

The Board recognizes at some length in *Underground Service* that both it and courts of appeals have extolled the use of election proceedings over verbal indications of employee sentiment or the several other inferential sources, such as a decline in union membership or grievances filed, to which employers have resorted in attempting to demonstrate a case of good-faith doubt. As the court in *NLRB v. Cornerstone Builders*, supra, stated at 1078: "[U]nilateral withdrawal is based on the subjective belief of an inherently biased party. . . . Until validation, the effectiveness of the unilateral derecognition is uncertain." In addition to uncertainty, permitting unilateral rescission of recognition lends itself to serious mischief. Many employers have virtually nothing to lose but their unions by exercising their conditional right to withdraw based even on flimsy evidence. If the employer's case ultimately turns out to be unconvincing, it will simply be ordered to recognize and bargain with the union (and, if it has adversely changed any terms of employment, to return them to the status quo ante). But after the passage of 2, 3, or 4 years of litigation, an appropriate question may be "What union?" As the Court of Appeals for the Ninth Circuit aptly summarized in *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 301-302 (1978):

When the employer chooses to unilaterally disrupt an established bargaining relationship without an election, the threat to industrial peace must be counterbalanced by good cause. When the employer has doubts, the goal of the Act would be better served by filing an election petition. [Footnotes omitted.]

The Board holds that an employer is entitled to file such a petition "to question the continued majority of a previously certified incumbent union," if it can demonstrate a reasonable doubt based on objective considerations. *United States Gypsum Co.*, 157 NLRB 652, 656 (1966). For the reasons fully discussed in *Underground Service Alert*, supra, requiring an employer to take the election route makes a good deal of sense. Not only may the existence of reasonable grounds for doubt be tested at the threshold by the Regional Director with whom the petition is filed, but, if such grounds exist, an election can quickly be held to determine the question. Instead of years, the issue of representation can normally be resolved in weeks or months, and in a manner which is universally regarded as the most accurate indicator of employee sentiment.

Despite the longevity of the good-faith withdrawal doctrine, the Board is entitled to change policy. The Board may not be inconsistent, but it can be inconstant, if, when it "departs from controlling precedent," it presents a "reasoned explanation for the departure." *Stardyne Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994). The agency's position need only be "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). Whether or not the Board would wish to apply a new construction of the Act to the instant case, there appears to be ample reason for adopting a different approach, as discussed above.

#### CONCLUSIONS OF LAW

1. The Respondent, Alcon Fabricators, a Division of Alcon Industries, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace & Agricultural Implement Workers, UAW, and its Local 217, is a labor organization within the meaning of Section 2(5) of the Act.

3. By withdrawing recognition on February 22, 1994, from the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit, Respondent violated Section 8(a)(5) and (1) of the Act:

All welders, welder-fitters, press brake operators, and material handlers at Respondent's 1234 West 78th Street, Cleveland, Ohio, facility, excluding all office clerical employees, professional employees, guards and supervisors and all other employees.

4. By unilaterally granting a wage increase to employees in the foregoing bargaining unit on February 22, 1994, Respondent violated Section 8(a)(5) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of the Act.

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to take certain remedial action.

#### THE REMEDY

Following tradition, a cease-and-desist order should issue, and the customary notices should be posted. In the absence of any indication that Respondent did not bargain in good faith during the first year of negotiations, it should be required to bargain in good faith for at least 6 months after negotiations recommence. *Rock-Tenn Co.*, supra, 315 NLRB 670 fn. 2. Finally, should the Union wish to bargain about the February 22, 1994 wage increases, Respondent should do so.

On these findings of fact, conclusions of law, and the entire record in this proceeding, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondent, Alcon Fabricators, a Division of Alcon Industries, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with the Union regarding terms and conditions of employment as the exclusive collective-bargaining representative of the employees in the unit found appropriate in the conclusions of law set out above, and continue to do so for 6 months thereafter as if the initial certification year had not expired.

(b) 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) On request, bargain with the Union about, inter alia, the February 22, 1994 wage increase.

(b) Post at its facility at 1234 West 78th Street, Cleveland, Ohio, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>8</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>9</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## 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.

WE WILL NOT, as required by the Board, refuse to bargain with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, and its Local 217 as the exclusive representative for collective-bargaining purposes of the employees in the following appropriate unit:

All welders, welder-fitters, press brake operators, and material handlers at our 1234 West 78th Street, Cleveland, Ohio, facility, excluding all office clerical employees, professional employees, guards, supervisors and all other employees.

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

WE WILL, upon request, bargain with the Union with respect to rates of pay, hours of employment, and other terms and conditions of employment of the employees in the appropriate bargaining unit, including, among other things, the wage increase granted to employees on February 22, 1994.

ALCON FABRICATORS, A DIVISION OF ALCON  
INDUSTRIES