**Amer-Cal Industries, Inc. *and* Chauffeurs, Teamsters and Helpers Union, Local No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 20-CA-17663 and 20-CA-17830

20 March 1985

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 5 December 1983 Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed exceptions and a supporting brief limited to the judge's decision regarding Case 20-CA-17830, and the Respondent filed an answering brief.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaints are dismissed.

[1] The Respondent has petitioned the Board to amend the "Rule on Maximum Rates for Attorney's Fees" (Sec 102 145, National Labor Relations Board Rules and Regulations) to be awarded under the Equal Access to Justice Act We do not pass on that petition as the matter before us does not implicate the Equal Access to Justice Act

[2] In adopting the judge's decision finding the Respondent did not unlawfully refuse to sign an agreed-on contract, Chairman Dotson and Member Dennis note that they did not participate in *Dresser Industries*, 264 NLRB 1088 (1982), and express no view here on whether that case was correctly decided

## DECISION

### STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding in which a hearing was held on October 17, 1983, is based on unfair labor practice charges filed in Cases 20-CA-17663 and 20-CA-17830 by Teamsters Local No. 150 (the Union) and complaints issued in those cases by the General Counsel of the National Labor Relations Board alleging that Amer-Cal Industries, Inc (Respondent) was engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).[1] The complaint in Case 20-CA-17663 alleges in substance that Respondent violated Section 8(a)(1) of the Act by soliciting the filing of a decertification petition in Case 20-RD-1761, by soliciting the showing of interest petition which accompanied that petition, and by attempting to coerce an employee to retract the testimony he had given the National Labor Relations Board in support of the charges herein. The complaint in Case 20-CA-17830 alleges in substance that Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to execute an agreed-upon collective-bargaining agreement covering a unit of employees represented by the Union. Respondent filed answers to the complaints denying the commission of the alleged unfair labor practices.[2]

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a California corporation with its office and place of business in Sacramento, California, where it is engaged in the rental of portable toilets and construction offices to commercial customers. Respondent's principal defense to the allegation that it violated Section 8(a)(5) and (1) of the Act by refusing to execute an agreed-upon collective-bargaining contract is that no agreement was reached on one of the terms of the contract, namely, Respondent's proposal that the signing of the contract was contingent upon the Union retaining its status as the employees' collective-bargaining representative in the decertification election proceeding pending before the Board in Case 20-RD-1761.

In the decertification proceeding before the Board in Case 20-RD-1761, Respondent in October 1982 entered into a Stipulation for Certification Upon Consent Election Agreement, approved by the Board's Regional Director, whereby Respondent consented to the Regional Director conducting an election to determine whether Respondent's employees desired to be represented by the Union. In this election agreement Respondent stipulated that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and also stipulated that "during the past year it received revenues in excess of $50,000 from customers who meet the direct jurisdictional standards of the National Labor Relations Board." Based on these stipulations, the Board assumed jurisdiction over the decertification proceeding in Case 20-RD-1761 and processed that petition which Respondent is relying on as a defense to its alleged improper conduct in this proceeding

The General Counsel contends, and I agree, that Respondent's aforesaid stipulations and admissions in the closely related decertification proceeding in Case 20-RD-1761 constitute a prima facie showing that during the time material to this consolidated proceeding Respondent was an employer engaged in commerce within the meaning of the Act and met one of the Board's appli-

[1] The charge in Case 20-CA-17663 was filed January 24, 1983, and amended March 25, 1983 The charge in Case 20-CA-17830 was filed March 25, 1983, and amended May 16, 1983 The complaints in these cases issued on March 28 and June 30, 1983, respectively, and an amended complaint consolidated for hearing by an order of the National Labor Relations Board's Regional Director issued June 30, 1983

[2] Respondent in its answers admits that the Union is a labor organization within the meaning of Sec 2(5) of the Act

cable discretionary jurisdictional standards. *Triton Construction Co.*, 191 NLRB 376, 377 (1971), *Perko's Enterprises*, 251 NLRB 522 (1980) See also *Empire Dental Co.*, 211 NLRB 860 (1974). For, "a state of affairs once shown to exist is presumed to continue to exist until the contrary is shown." *NLRB v. National Motor Bearing Co.*, 105 F 2d 652, 660 (9th Cir. 1939). Here, Respondent, "although contesting jurisdiction herein, neither asserted nor offered evidence to show that its operations have substantially changed since the earlier case . ." *Bordo Products Co.*, 117 NLRB 313, 314 (1957). See also *Greene County Farm Co-Op Assn. v. NLRB*, 317 F.2d 335, 336 (D.C. Cir. 1963).

Based on the foregoing, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and meets one of the Board's applicable discretionary jurisdictional standards and that it will effectuate the purposes of the Act for the Board to assert jurisdiction over these cases.

## II THE ALLEGED UNFAIR LABOR PRACTICES

### A *The Evidence*

#### 1. Background

The Union represents a bargaining unit of Respondent's maintenance and service employees, including salespersons These employees were covered by a collective-bargaining contract between the Union and Respondent effective from September 1, 1981, until August 31, 1982 The Union, during the negotiations for a new collective-bargaining contract in March 1983, took the position that the parties had reached a complete agreement on all the terms of a new contract. Respondent refused to sign this agreement because, as it stated to the Union, it took the position that the contract reached by the parties was contingent on the outcome of the decertification proceeding pending before the Board in Case 20-RD-1761.

The decertification petition in Case 20-RD-1761 was filed September 3, 1982, by Respondent's employee Thomas Grates. In October 1982 all the parties to that proceeding entered into an election agreement, approved by the Board's Regional Director, in which they agreed that the Board's Regional Director would conduct a representation election among Respondent's employees represented by the Union to determine whether or not they still wanted to be represented by the Union. This election was held November 10, 1982 The election results were inconclusive because the challenged ballots were determinative. The Regional Director commenced to investigate the challenges but never announced the results of this investigation, if any, for on May 2, 1983, the Regional Director issued an order dismissing the decertification petition presumably because he had concluded that the Union's unfair labor practice charge filed in Case 20-CA-17663 alleging that Respondent was responsible for the filing of the decertification petition was meritorious. Respondent appealed the Regional Director's dismissal of the decertification petition to the Board. This appeal was still pending before the Board when the instant unfair labor practice cases were tried.

#### 2. The alleged illegal solicitation of the decertification and showing of interest petitions

The person in charge of Respondent's business operations is its vice president and general manager, William Weske. Marvin Williams is employed by Respondent as a dispatcher. During the time material herein Williams shared an office with Tom Grates, the Company's only salesperson. Williams and Grates, who were represented by the Union, were dissatisfied with union representation. Grates did not feel that a salesperson should be represented by the Union and objected to having to join the Union pursuant to the contractual union-security provision and publicly stated that he did not want to be represented by the Union. There is no evidence that Respondent or Weske personally were opposed to Respondent's employees being represented by the Union

Early in June 1982 Williams, who had expressed his unhappiness with union representation, was advised by his brother-in-law that there were ways of getting out of the Union by filing a decertification petition. Williams then went to Weske and asked what, if anything, Weske knew about employees petitioning the Labor Board to get out of the Union and whether Weske could find out where Williams could get such a petition. Weske told him that he had no knowledge about those matters but would seek the advice of Respondent's lawyer After speaking to Respondent's lawyer, Weske told Williams that the lawyer had told him that there was a form which requested the decertification of the Union that had to be filled out and submitted to the Labor Board and that the lawyer would send Weske a copy of that form. Thereafter, Weske gave Williams a blank decertification petition form which is used by the Board and which the lawyer had sent to Weske Weske also gave Williams the address of the Board's Regional Office where the completed petition should be sent. Weske handed Williams the petition with the Board's address and told him that this was the information that he had asked about. Williams took the blank decertification petition to the office which he shared with Grates where he filled it out. Williams discussed the petition with Grates, who helped him fill it out Also, on that day or the next, Williams solicited employees to sign the 30-percent showing-of-interest petition which must accompany the decertification petition Grates was one of the employees who signed the showing-of-interest petition. After xeroxing a copy of the decertification petition on the Company's duplicating machine for his file, Williams mailed the decertification petition and the accompanying showing-of-interest petition to the Board's Regional Office where, on June 21, 1982, it was received and docketed as Case 20-RD-1748 [3]

After filing the above-described decertification petition in Case 20-RD-1748, Williams received several telephone calls from employees indicating that they were hostile towards him for filing this petition. As a result he

[3] The description of the circumstances set forth in this paragraph surrounding the filing of the decertification petition in Case 20-RD-1748 is based on the uncontradicted testimony of Weske and Williams They impressed me as sincere and reliable witnesses whose testimony, in significant respects, was not inconsistent

decided to withdraw the petition and, about July 10, 1982, mailed a withdrawal request to the Board's Regional Office which, about July 20 1982, was approved by the Board's Regional Director. Williams told Grates and Weske that he had submitted the withdrawal request. When Weske asked why Williams had done this, Williams explained that he had received telephone calls from employees saying that they objected to the filing of the petition and that this made him uncomfortable because, as a dispatcher, it was necessary for him to work closely with these employees. Weske replied by telling Williams that since it was Williams' petition that Williams could do whatever he wanted with it. When Williams told Grates that he had withdrawn the petition, Grates indicated that he was unhappy about Williams' action and told Williams that he, Grates, intended to file another decertification petition to take the place of the one Williams had withdrawn. Williams explained to Grates that he had withdrawn the petition because he was getting harassed by the employees and did not like this because he had to work with them. Grates replied by stating that as a salesperson he did not have to work with the other employees and would file the petition. Grates asked where Williams had gotten the petition. Williams told him that he had picked it up from Weske.[4]

Following his above-described conversation with Williams, Grates went to Weske's office and asked whether Weske knew that Williams had withdrawn his decertification petition.[5] When Weske answered in the affirmative, Grates told him that he was unhappy about Williams' actions and that as one of the cosigners of the showing-of-interest petition Grates intended to write the Board a letter protesting Williams' withdrawal of the decertification petition. Grates also asked Weske to get him a decertification petition so that he could send it to the Board in place of Williams' petition. Weske replied by stating that if Grates wanted to write the Board a letter that it was Grates' business, but that Weske would get him the decertification petition he requested

About July 16, 1982, Grates mailed a typed letter to the Board's Regional Office which was dated July 16, 1982, and which reads as follows:

> I recently co-signed a petition asking the NLRB to hold an election, for the employees of Amer-Cal Sanitation Company, to decide the status of Union representation.
>
> It has come to my attention that the petition be withdrawn and the opportunity to cast a vote be cancelled As a member of Teamsters Local #150 and co-signer of the petition filed by Mr. Williams, I request that the election be held as scheduled.

Before mailing this letter Grates showed it to Weske Also during this same period of time Respondent's lawyer sent Weske a blank decertification form which Weske gave to Grates, along with the address of the Board's Regional Office where the petition should be mailed.

Early in September 1983, Grates, after filling out and signing the decertification petition he received from Weske, mailed it to the Board's Regional Office which docketed it on September 3, 1982, as Case 20–RD–1761. On that day the Board's Regional Office informed Grates, by letter, that in order for the Board to proceed with his decertification petition Grates would have to submit a showing-of-interest petition signed by at least 30 percent of the employees represented by the Union. Thereafter, Grates submitted such a showing-of-interest petition signed by Grates and two other employees represented by the Union Grates placed the showing-of-interest petition on Williams' desk for his signature. Williams refused to sign the petition. He told Grates that he did not want to "fool with it again "

The above-described circumstances surrounding the filing of the decertification petition in Case 20–RD–1761 are based entirely on the testimony of Weske except for the solicitation of Williams' signature on the showing-of-interest petition which is based on Williams' testimony. Grates' version of the circumstances surrounding the filing of the decertification petition and the showing-of-interest petition differs significantly and conflicts sharply with Weske's and Williams' versions.

Grates testified that Weske, after informing him that Williams had withdrawn his decertification petition or intended to withdraw it, solicited Grates to send a letter to the Board asking that the decertification election be held as scheduled. According to Grates his letter to the Board dated July 16, 1982, was prepared by Weske and typed by Weske's secretary, Jeanne Osborn, after which Grates simply signed the letter and returned it to Weske who mailed it.

Grates further testified that Weske thereafter told him that because Williams had already withdrawn his petition that Grates' July 16, 1982 letter to the Board had not done any good and asked Grates to file a new decertification petition with the Board. When Grates agreed to this suggestion, Grates testified, Wesked handed him a decertification petition form which had already been completed and that Grates simply signed the petition and returned it to Weske who said he would mail it.

Grates also testified that upon receipt of the Board's letter asking him to submit a 30-percent showing-of-interest petition he gave the letter to Weske who had Osborn type the showing-of-interest petition which Weske then gave to Grates for his signature and that Grates, after signing it, immediately returned it to Weske who stated he would get two of the other employees to sign the showing-of-interest petition before sending it to the Board. Grates testified that this was the last time he saw the showing-of-interest petition

I am of the opinion that the description of the circumstances surrounding the filing of the decertification and showing-of-interest petitions in Case 20–RD–1761 pre-

[4] The above description of Williams' conversation with Grates is based on Williams' undenied testimony When he testifed Williams impressed me as an honest witness Grates testified that when Williams told him that he had withdrawn the decertification petition that Grates responded by stating, "I guess I'll have to file it "

[5] Grates, when he testified initially, was unable to recall whether this conversation with Weske took place before or after Williams had told Grates he had withdrawn the decertification petition Later as a rebuttal witness Grates testified that his conversation with Weske occurred prior to his conversation with Williams I have not credited this testimony because demeanorwise Grates did not impress me as a credible witness

sented by Weske and Williams must be credited and Grates' version rejected. My reasons for this opinion follows. (1) The testimonial demeanor of Weske and Williams was good, whereas Grates' was poor; (2) the probabilities of the situation do not favor Grates' testimony because there is no evidence that Respondent, or Weske, were opposed to union representation or were antagonistic toward the Union so as to make it plausible that Weske would solicit employees to sign a decertification petition; (3) Weske did not solicit the filing of the decertification and showing-of-interest petitions filed by Williams shortly before Grates' petitions, but as in the case of Grates' petitions Weske's sole connection with Williams' petitions was to furnish Williams with a blank decertification petition and the address to which the petition should be mailed; and (4) Grates presuambly is biased against Respondent because in December 1982 he was discharged by Respondent which contested his claim for unemployment compensation insurance.[6] It is for all of these reasons that I have rejected Grates' and credited Weske's and Williams' description of the events connected with the filing of the decertification petition in Case 20-RD-1761 and the accompanying showing-of-interest petition.

In crediting Weske's testimony, I have considered the testimony of Respondent's witness Jeanne Osborn, Weske's secretary, that she did not have an independent recollection of whether or not she typed Grates' July 16, 1982 letter to the Board or the decertification or the showing-of-interest petitions in Case 20-RD-1761 or whether Weske instructed her to type these documents. Osborn did not give me the impression that she was merely using a lack of memory as a means of avoiding giving testimony which would be damaging to her employer. Rather, demeanorwise she impressed me as a sincere witness who due to the passage of time and the fact that she types so many different letters and documents had no independent recollection about the disputed documents. Indeed the fact that Grates' July 16, 1982 letter to the Board misspells the word "reference," in the caption, and that another misspelled word was corrected by an erasure rather than by the use of correcting liquid, and the corrected letter was not placed on the same level as the rest of the lettering in the misspelled word, warrants an inference that Osborn, a trained and experienced secretary, did not type this letter.

### 3. The alleged coercive solicitation of Grates to repudiate his testimony

Grates, who was discharged by Respondent in December 1982, on January 25, 1983, submitted an affidavit to the Board in support of the Union's charge in Case 20-RD-17633 which charge alleges, among other things, that Respondent violated the Act by soliciting Grates to file a decertification petition.

On February 11, 1983, at the conclusion of a hearing held by the State of California Unemployment Appeals Board involving Grates' claim for unemployment insurance, it is undisputed that Weske spoke briefly with Grates in the hallway outside of the hearing room. Grates testified that Weske asked, "What's all this crap with the NLRB" and told Grates that, "with what you are doing, you will have a hell of a time getting unemployment from [Respondent]." Weske's account of this conversation conflicts with Grates' account. Weske testified that he initiated the conversation by telling Grates that he was sorry about the way things had turned out and asked Grates, "What's with this business with your affiliation on the NLRB"[7] and that Grates replied that he was unable to live on unemployment compensation and had been in touch with the Union and that Grates and the Union were going to work something out. Weske testified that he responded to Grates' comments by motioning for Respondent's lawyer, who had momentarily left the area, to rejoin them and that when the lawyer rejoined them that Weske asked if Grates would mind repeating his remarks. Grates repeated that he could not get along and live on unemployment insurance benefits and that he had contacted the Union and that something was going to be worked out.

Grates also testified that following their February 11, 1983 conversation that Weske phoned him at home on three separate occasions. In late February 1983 or early March 1983; in mid-March 1983; and the last time 2 or 3 days later. Grates testified that the first time Weske phoned Weske told him that the testimony he had given the NLRB was causing Respondent a lot of trouble and that Grates was stupid to have given such testimony and asked whether Grates would consider changing his testimony. Grates testified that the second time Weske phoned Weske told him that they were getting on Weske's case at the Company because of the charge with the NLRB and asked Grates if he would consider changing his testimony. And the third and last time Weske phoned, Grates testified, Weske told him that he was causing a lot of trouble and pointed out that the family which owned Respondent was very influential and could make it very difficult for Grates to get a job. Weske specifically denied having engaged in the above-described conduct and further testified that he has never telephoned Grates' home.

As I have already indicated, supra, Weske's testimonial demeanor was that of a sincere witness who appeared to be telling the truth, whereas Grates did not impress me as being a credible or a reliable witness. It is for this reason that I have credited Weske's and rejected Grates' above-described testimony.

### 4. The alleged unlawful refusal to sign an agreed-upon contract

The Union's contract with Respondent was scheduled by its terms to expire August 31, 1982. In May 1982 the

[6] I note that it was after his discharge that Grates went to the Union and the Board with his allegation that Respondent had solicited him to file the decertification petition

[7] Weske's reference to Grates' "affiliation" with the NLRB during this conversation was perfectly reasonable because shortly before the conversation the Union had filed its charge in Case 20-CA-17663 accusing Respondent of soliciting Grates to file his decertification petition Also Union Business Respresentative Manuian had indicated to Weske that the Union knew that it was Respondent, rather than Grates, that was responsible for the filing of the decertification petition

Union notified Respondent of its intent to terminate the contract after its expiration and to negotiate the terms of a new contract On June 25, 1982, the Union by letter submitted to Respondent a contract proposal. The representatives of Respondent and the Union held their first negotiating session on September 16, 1982, the first date on which they were all available to meet.

Respondent at the start of the September 16, 1982 bargaining session presented the Union with a written contract proposal which was in the form of a letter from Respondent's negotiator, Attorney Dennis Murphy, to the Union's negotiator, Business Agent Angela Manuian, which in its final paragraph stated. "It is understood that the contract proposal is contingent upon the Union retaining representation status in the decertification election now pending."[8] Nothing was said at this meeting about this portion of Respondent's contract proposals. The meeting ended with the parties failing to reach agreement on all of the terms of the contract.

The parties' next bargaining session took place late in September 1982 at which time they discussed the disputed issues particularly the health, welfare, and pension proposals. The meeting ended with the parties still unable to reach agreement on all the terms of the contract.

On October 21, 1982, at the next negotiating session, the Union submitted a revised contract proposal. During this meeting each party revised their respective proposals, but the meeting ended with the parties still apart on certain items.

On October 26, 1982, Respondent's negotiator, Attorney Murphy, wrote the Union's negotiator, Business Agent Manuian, as follows:

> On September 16, 1982, I wrote you setting forth the position of [Respondent] with respect to modification of the Collective Bargaining Agreement the [Union] and [Respondent]. At our most recent negotiation session of October 21, 1982, [Respondent] agreed to make certain modifications with respect to that offer. So that there is no misunderstanding as to the position of [Respondent], I am writing this letter to set forth the disposition
>
> [Respondent] remains firm in the position it set forth in its September 16, 1982 letter except as to the modifications set forth here.

The letter then went on to detail these modifications, which dealt with the subjects of employees' health, welfare, and pension programs; a guaranteed 30-hour workweek; a guarantee that bargaining unit work would be performed by unit employees; and overtime. The letter did not directly or by implication indicate that Respondent was modifying its position taken in the September 16, 1982 letter that its contract proposal was contingent upon the outcome of the pending decertification proceeding.

On November 4, 1982, Union Business Agent Manuian telegramed Attorney Murphy that, "[o]n November 3, 1982 the employees of [Respondent] represented by the [Union] voted to accept the Employer's proposal dated September 16, 1982 as amended October 26, 1982 including the provision adding mother-in-law and father-in-law to article 23 as previously agreed." Shortly thereafter Manuian transmitted to Murphy copies of what the Union felt was the agreed-upon contract and asked that Respondent sign it.

On November 10, 1982, Attorney Murphy wrote Business Agent Manuian as follows:

> I have received and reviewed your draft of the Collective Bargaining Agreement for execution by Amer-Cal and Teamsters Local 150. In reviewing the draft, I note that it accurately sets forth the agreement of the parties in most respects. The exceptions are as follows:
>
> 1. The contract purports to be effective the first day of September and continues through August 1, 1983. I believe that this is inappropriate as the company specifically stated, during negotiations, that there would be no retroactivity. This retroactive period would result in a cost to the company in that the pension contributions would then be required for the months of September and October. I believe that a November 1, 1982 contract date would be appropriate which should continue through October 31, 1983; and
>
> 2. By my letter of September 16, 1982, I pointed out that the term of the agreement would be contingent upon continued representation of the employees by the Union. This question will be resolved by the Decertification Election which is scheduled for November 10, 1982. Therefore, I would suggest that we either refrain from executing the contract until after the results of that election or, in the alternative, place in the contract, a provision recognizing the fact that the term is contingent upon the Union's success in the Decertification Election.
>
> If you have any questions regarding these comments, please do not hesitate to contact me.

The next communication between the parties took place on March 25, 1983, when Manuian wrote Murphy as follows:

> Enclosed you will find seven (7) copies of the current contract between Amer-Cal Industries and Teamsters Local Union No. 150 with the changes that are consistent with our agreement. They are as follows: Effective on the 1st day of November, 1982, and shall continue until October 31, 1983, with no retroactivity. The reference to health and welfare benefits prior to November 1, 1982, in Article XVI, has been deleted.
>
> Please secure signature on behalf of the Employer and return six (6) copies to this office at your earliest convenience. Upon receipt, same will be ex-

[8] As described in detail, supra, employee Grates filed a petition with the Board in Case 20-RD-1761 on September 3, 1982, seeking to decertify the Union as the representative of Respondent's employees On November 10, 1982, an election was held in that case, however, the results were inconclusive because of challenged ballots The decertification petition in Case 20-RD-1761, as described in detail supra, was still pending before the Board on the day of the unfair labor practice hearing in these cases

ecuted on behalf of the Union and three (3) fully executed copies will be returned to your office for the Employer's files.

On April 13, 1983, in response to Manuian's March 25, 1983 letter, Murphy wrote Manuian as follows:

> Thank you for your letter of March 25, 1983 enclosing seven copies of the contract negotiated between Teamsters Local 150 and Amer-Cal Industries, Inc. As you know, the company's offers with respect to collective bargaining have been contingent upon Local 150 retaining representation status in the decertification election. This position was accepted by Local 150 by its telegram of November 4, 1982 As that contingency has yet to occur, the agreements have yet to become effective. If Teamsters Local 150 retains representation status after the final determination of the results of the decertification election, Amer-Cal will then sign the Collective Bargaining Agreement and give it retroactive effect back to November 1, 1982 [9]

Lastly, there is no evidence of the Union ever objecting to Respondent's proposal that the execution of a contract was contingent upon the outcome of the pending decertification proceeding. Indeed, there is no evidence that the Union ever mentioned this proposal during the negotiating sessions or in its correspondence with Respondent.

### B. *Conclusionary Findings*

#### 1. Weske's alleged illegal solicitation of the decertification and showing-of-interest petitions filed by employee Grates

As I have found, supra, employee Grates was unhappy with union representation and when he learned that employee Williams had withdrawn his decertification petition Grates decided to file a decertification petition himself. Grates told General Manager Weske that he intended to file a decertification to replace Williams' and asked Weske to get a decertification petition for him. Weske complied with Grates' request and in addition to furnishing Grates with a blank decertification petition gave him the address where the completed petition should be mailed. As I have found, supra, there is insufficient evidence to establish that Weske encouraged, promoted, or assisted Grates with the preparation or the filing of the showing-of-interest petition or that it was Weske, rather than Grates, who solicited the employees' signatures for the showing-of-interest petition. Weske's sole connection with the filing of Grates' decertification and showing-of-interest petitions was to secure a blank decertification petition for Grates at Grates' request and to give Grates the address where the completed petition should be mailed.

Weske's above-described conduct does not constitute a violation of Section 8(a)(1) of the Act because it is not illegal for an employer to furnish information to employees when the employees have independently decided to exercise their statutory right to decertify a union and seek their employer's advice and their employer other than providing the requested information does not actively encourage, promote, or assist the employees in repudiating their collective-bargaining representative *Jimmy-Richard Co*, 210 NLRB 802, 803 (1974); *KDI Precision Products*, 176 NLRB 135, 138 (1969). See also *Placke Toyota*, 215 NLRB 395 (1974). Respondent's conduct herein did not go beyond the mere ministerial act of assistance and did not constitute an attempt to have or induce Grates to file a decertification petition. I therefore shall recommend that these allegations be dismissed.

#### 2. Weske's alleged coercive attempts to have employee Grates repudiate the testimony Grates gave to the Board

As I have found, supra, Grates was not a credible witness, whereas Weske credibly denies Grates' testimony that on four separate occasions Weske attempted to coerce him into retracting the testimony he had given to the Board. I therefore shall recommend the dismissal of these allegations.

#### 3 The alleged refusal to sign an agreed-upon contract

The complaint in Case 20-CA-17830 alleges in essence that since April 13, 1983, Respondent, in violation of Section 8(a)(5) and (1) of the Act, has refused the Union's request of March 23, 1983, to execute a contract containing all of the provisions agreed on by Respondent and Union in collective-bargaining negotiations. I am of the opinion, for the reasons set forth below, that this allegation is without merit.

The record reveals that the parties did not reach agreement on all of the terms of a collective-bargaining agreement because there was no meeting of the minds over Respondent's proposed condition precedent to the execution of the agreement, which was an integral part of Respondent's bargaining proposals. As described in detail, supra, Respondent from the very start of the contract negotiations and continuously thereafter during the time material herein conditioned its offer of a contract upon the Union's promise to defer the effective date of the contract until the decertification proceeding in Case 20-RD-1761 pending before the Board was resolved.[10] I recognize that Respondent was not privileged under the Act to refuse to execute an agreed-upon contract because a decertification proceeding involving the employees represented by the Union was pending before the Board. *Dresser Industries*, 264 NLRB 1088 (1982). However, it is not repugnant to the policies of the Act for the parties to collective-bargaining negotiations to agree that the execution of a contract will be contingent upon the Union's

[9] This is the first time that Respondent proposed that the contract's effective date be retroactive Previously Respondent's position was that the contract's effective date would be synonymous with its date of execution

[10] As I have found, supra, the decertification proceeding in Case 21-RD-1761, which was initiated by employee Grates' petition, was not the product of Respondent's unfair labor practices

success in a pending decertification proceeding. Thus, Respondent's proposal conditioning the signing of a contract upon decertification proceeding in Case 20-RD-1761 being resolved in favor of the Union was a permissible or nonmandatory subject of bargaining which the Union could have forced Respondent to remove form the bargaining table by simply objecting to it. The Union, however, did not object to this proposal and at one point in the negotiations, on November 4, 1982, engaged in conduct calculated to lead Respondent to believe that the Union had accepted this proposal.[11] Thereafter, the Union, without informing Respondent that it objected to Respondent's proposals that the execution of the parties' contract be contingent upon the outcome of the pending decertification proceeding, transmitted copies of the parties' agreed-upon contract to Respondent for its signature even though the decertification proceeding was still pending But, since Respondent's proposal that the exception of a contract would be contingent upon the outcome of the decertification proceeding in Case 20-RD-1761 was proposed as an integral part of Respondent's contract proposals, the Union, despite the fact that this proposal was a nonmandatory subject of bargaining, was not entitled to ignore it, and then remove it from the rest of Respondent's contract package and demand that Respondent sign a contract containing the remainder of the package See generally, *Good GMC, Inc*, 267 NLRB 583 (1983), and cases cited therein Therefore, because no agreement was reached on Respondent's proposal that no agreement be executed until the Union was successful in the decertification proceeding, I conclude that there was no agreed-upon contract here and that Respondent's refusal of the Union's March 23, 1983 request to execute the proposed collective-bargaining agreement was not violative of the Act This result makes especially good sense because of the Union's failure to object to Respondent's proposal that the execution of the parties' agreement be contingent upon the outcome of the pending decertification proceeding.[12] This proposal which the Union must have known was an integral part of Respondent's other contract proposals was not illegal per se, but was a perfectly permissible proposal for Respondent to place on the bargaining table. Its inclusion among Respondent's other proposals would have been illegal only "if in the face of a clear and express refusal by the Union to bargain about the [nonmandatory subject]" Respondent insisted upon its acceptance *Union Carbide Corp*, 165 NLRB 254, 255 (1967), enfd. 405 F.2d 1111 (D.C. Cir 1968), about the Respondent's proposal that the execution of the parties' agreement be made contingent upon the outcome of the decertification proceeding. Quite the opposite, the Union remained silent about this proposal and at one point in the negotiations engaged in conduct which was calculated to lead Respondent to believe that the Union had accepted this proposal. If the Union had alerted the Respondent that it was opposed to this proposal it is highly probable that Respondent, rather than commit an unfair labor practice by continuing to insist on its acceptance, would instead have reevaluated its bargaining position Under the circumstances to hold that Section 8(a)(5) of the Act required Respondent to accept a contract embodying all of its contract proposals except for the nonmandatory proposal which was an integral part of Respondent's contract package, even though the Union never put Respondent on notice that it objected to this nonmandatory proposal, would lead to an inequitable result It is for all of the foregoing reasons that I shall recommend the dismissal of the allegation that Respondent violated the Act by refusing to sign an agreed-upon contract

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

## ORDER

The complaints in Cases 20-CA-17663 and 20-CA-17830 are dismissed in their entirety

[11] As described in detail supra, the Union on November 4, 1982, by telegram informed Respondent that it accepted Respondent's September 16, 1982 proposal as amended by Respondent's October 26, 1982 modifications

[12] There is no support in the record for the General Counsel's contention that the Respondent's disputed proposal herein was proposed as a condition subsequent, rather than as a condition precedent, to the signing of the parties' contract

[13] 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