Aero Alloys *and* Warehouse, Processing & Distribution Workers' Union, Local 26, International Longshoremen's & Warehousemen's Union. Case 21-CA-25207

June 30, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On November 25, 1987, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in answer to the General Counsel's exceptions.

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, and conclusions[1] and to adopt the recommended Order.

We agree with the judge that the Respondent did not violate Section 8(a)(5) of the Act by withdrawing a previously agreed-to union-security clause from the new contract proposal it submitted to the Union on January 28, 1987. The General Counsel excepts to this finding, asserting that *Dresser Industries*, 264 NLRB 1088 (1982), supports her position that the Respondent improperly relied on the filing of a decertification petition as a reason for changing its bargaining position.

The General Counsel's reliance on *Dresser Industries* is misplaced. There the Board held that "the mere filing of a decertification petition will no longer require or permit an employer to withdraw from bargaining . . . ." Id. at 1089. The Respondent did not withdraw from bargaining; it merely withdrew from a tentative agreement that it had made with the Union on one issue and, significantly, thereafter continued to engage in negotiations for a new contract. Thus, we find no merit to the General Counsel's argument in this regard.[2]

Furthermore, we find, contrary to the General Counsel's contention, that the Respondent's explanation for its change of position does not indicate a lack of good faith. The judge found that

> [t]wo significant things had happened before Respondent made the decision to withdraw from that tentative agreement. The first was the 2-month strike which the Union abandoned without having obtained a new contract. The second was the filing of the decertification petition.[3]

Because a substantial number of the Respondent's employees after the strike was over had expressed a desire not to be represented by the Union, we find that the Respondent's decision to withdrew its prestrike union-security proposal does not warrant an inference of bad-faith bargaining in the circumstances of this case. See *Olin Corp.*, 248 NLRB 1137, 1141 (1980).

The Board has held that the withdrawal from a tentative agreement is not a per se violation of the Act, but rather

> represents only one factor to be considered in determining good- or bad-faith bargaining. In ruling on an allegation that a party has failed to bargain in good faith, it is well established that we look to the totality of circumstances reflecting the party's bargaining frame of mind.

Merrell M. Williams, 279 NLRB 82 (1986). Having considered all the circumstances of this case, including the Respondent's explanation for its retraction of its prior agreement regarding union security, its willingness to continue to engage in negotiations, the absence of evidence that the Respondent sought to frustrate the bargaining process or avoid reaching agreement, and the fact that the Respondent's conduct occurred in a context free of other unfair labor practices, we agree with the judge that the complaint should be dismissed.

ORDER

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

[1] We find it unnecessary to rely on the judge's discussion of *H. K Porter Co v. NLRB*, 397 U S 99 (1970)

[2] Member Cracraft agrees that *Dresser Industries* is inapposite She does not pass on the question whether it was correctly decided

[3] On December 12, 1986, an employee gave the Respondent a list of employee signatures on a document that read, "We, the employees at Aero Alloys, do not wish to have a union in our establishment " On December 16, 1986, a formal decertification petition was filed with the Board's Regional Office.

Brian Sweeney and *Peter Tovar*, for the General Counsel.
Charles H. Goldstein and *Deborah H. Petito (Goldstein & Kennedy)*, of Los Angeles, California, for the Respondent.
James G. Varga, of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Los Angeles, California, on

June 2–4, 1987. It is based on a complaint issued by the Acting Regional Director for Region 21 of the National Labor Relations Board on March 19, 1987. The complaint is founded on charges and amended charges filed by Warehouse, Processing & Distribution Workers' Union, Local 26, International Longshoremen's & Warehousemen's Union (Union). The initial charge was filed on February 2, 1987; it was subsequently amended on February 23 and March 5. The complaint alleges that Aero Alloys (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (Act).

Issues

There are two principal issues presented by this complaint. The first is whether an individual named Lourdes "Lulu" Martinez solicited or encouraged Respondent's employees to sign a petition to decertify the Union. Subsidiary to that question, if Martinez did solicit employees to sign such a petition, is whether her conduct is attributable to Respondent because she was either its supervisor or its agent. The second is whether Respondent violated the obligation to bargain in good faith by withdrawing from an earlier tentative agreement to include a union-shop clause in a successor collective-bargaining agreement. The withdrawal occurred after the Union had abandoned a 2-month strike and after the employees had filed a decertification petition.[1]

Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

Findings of Fact

I. RESPONDENT'S BUSINESS

The pleadings demonstrate that Respondent is a manufacturer of precision metal parts, which it sells to Government defense contractors from its plant in Compton, California. The pleadings further establish that Respondent annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside California. Based on these facts, Respondent has admitted that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits the Union is, and has been at material times, a labor organization within the meaning of Section 2(5) of the Act.

[1] The complaint alleges that the withdrawal of the union-security provision amounted to both "surface" and "bad faith" bargaining At the hearing, the General Counsel's representatives conceded that the surface bargaining allegation was too broad for they did not seek to prove that Respondent had engaged in a course of conduct demonstrating an unwillingness to reach an agreement. Accordingly, I made evidentiary rulings based on that concession. Despite that, the complaint was not actually amended to delete the phrase "surface bargaining." Nonetheless, the General Counsel's brief abandons such a theory as it specifically focuses on Respondent's single act of withdrawing from the tentative agreement to include a union shop.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Prior to December 1986 the Union had been the exclusive representative of Respondent's production and maintenance employees at the Compton plant. On September 26, 1986, the collective-bargaining agreement expired. According to a stipulation of the parties, on September 27, 1986, the Union engaged in an economic strike against the Employer because no successor agreement had been reached. Prior to the commencement of the strike, Respondent and the Union had exchanged proposals for a new collective-bargaining contract. One of the items that the parties had tentatively agreed on was the inclusion of a relatively standard union-shop clause.[2]

On October 16, 1986, approximately 2 weeks after the strike began, Respondent's collective-bargaining negotiators advised the Union by letter[3] that the offer that had been pending before the strike began was being withdrawn.

On October 31, 1986, Respondent proposed "an amendment to its last, best, and final offer" of September 26 and again included the union-shop clause. In the next to last paragraph of that letter, Respondent set a deadline of November 7, 1986, for the Union to accept the amended offer. The letter went on to say that if the offer was not accepted by that date Respondent would consider it as having been rejected. November 7 came and went without any action by the Union, and the strike continued.

It appears from a stipulation that during the course of the strike the Employer was able to continue its operations by the use of permanent replacement employees. On November 26, 1986, the Union made an unconditional offer on behalf of its striking members to return them to work. In early December Respondent began to recall strikers as openings occurred. Eventually, 56 strikers were recalled, though the record does not show how many actually accepted recall.

Furthermore, during a negotiation session, which also occurred on November 26, Respondent, at the urging of a Federal Mediation and Conciliation Service commissioner, agreed to put its October 31 offer back on the table. It did so, telling the Union it had until the close of business of December 4, 1986, to accept or reject.

It appears from the evidence that the Union neither accepted nor rejected the renewed offer, and the parties have stipulated that by letter dated December 12, 1986,

[2] The principal difference between the union-shop clause as proposed and most union-shop clauses is that this one contained a 60-day grace period rather than a 31-day grace period before new employees were required to join the Union

[3] The text of the letter is as follows.

> On September 26, 1986, you advised Aero Alloys that the union membership had rejected the company's proposal for a contract settlement Further, you stated that the union committee would not accept any concessions and rejected the company's last, best, and final offer
>
> In light of your rejection, the passage of time, and the intervening circumstances, including the strike and the changes in economic conditions, Aero Alloys' last, best, and final offer has expired and is no longer in effect Any future offers will be based upon economic conditions as they exist at the time the offer is made

Respondent formally withdrew it. In that letter Respondent's chief negotiator concluded by again saying, "Any future proposals will be based on the economic and other conditions which exist at that time."

B. *The Decertification Petition*

On December 12, 1986, bargaining unit employee Patrick Mount appeared in the office of Company Controller Gerald Parker and presented him with a list of signatures. The document is in evidence as Respondent's Exhibit 12. It states, "We, the employees at Aero Alloys, do not wish to have a union in our establishment." Beneath that statement were the signatures of some 55 employees.

Parker testified that he did not know what to do about the document, so he immediately called Respondent's labor attorney Charles H. Goldstein[4] as Mount sat in the office. While Parker described the events to Goldstein, Mount left the office, returning a few minutes later with a photocopy of the document. In the meantime, according to Parker, he had received some instructions from the attorney. On Mount's return, Parker told him that the petition was not something with which the Company could be concerned. He told Mount to see the officer of the day at the NLRB's Regional Office; he also said Mount was to handle the matter on his own time. Parker did, however, accept the copy of Respondent's Exhibit 12. Parker says the copy machine Mount used is available to anyone in the Company and that Mount did not specifically ask him for permission to use it nor was he required to do so.

On December 16, 1986, Mount filed a formal decertification petition with the Board's Regional Office. On the following day the Union filed an unfair labor practice charge that blocked the petition.[5] Between November 26, 1986, and January 28, 1987, no negotiation sessions were held. However, on December 26 the Union's chief negotiator, Luisa Gratz, wrote Company President Carl F. Nowak a letter in which she asserted that during some recent bargaining sessions, the Union had asked for, but had not received, information regarding the Employer's proposed health care changes. She made a specific demand for the details of the new program, including the cost to each employee and how often such payments would be deducted from paychecks.

Attorney Goldstein responded by letter dated January 7. Although he denied that the Company had failed to provide the information, he nonetheless transmitted to the Union material published by the administrator of the health plan, Kaiser Permanente, as well as material published by the dental plan, Confed Admin Services, Inc. In addition, Goldstein said he had asked the Company to delay implementation of the two plans in order to give the Union an opportunity to bargain with the Company regarding them.

C. *The Decision to Withdraw the Union-Shop Proposal*

Nowak testified that the reason Goldstein sent his letter explaining the health plan changes was because of a meeting that he had held with his superiors at Chromalloy-American Corporation[6] on January 5. At that meeting they had discussed the Union's letter of December 26, and had decided it deserved a response. During the meeting, however, the Company also decided that it would withdraw from the earlier tentative agreement regarding the union-shop clause. Nowak says they also discussed whether Respondent would maintain that position in the event that a contract was reached on all terms except that one. He says they determined they would be "flexible" if that occurred.

D. *Further Negotiations*

After union negotiator Gratz wrote a response to Goldstein's January 7 letter, the parties agreed to another negotiation session to be held on January 28, 1987. At that meeting, Goldstein issued a full proposal that was quite detailed, but that for the first time deleted any reference to the union-shop clause. According to Nowak, the Union's negotiators did not refer to the deletion in any way.

Two more meetings were held shortly thereafter. The first on February 2 and the second the following day, February 3. Both meetings were conducted under the auspices of the FMCS. At the beginning of the February 2 meeting, Goldstein gave another proposal to the Union. Like the January 28 proposal, it was detailed and consisted of eight pages plus an appendix. As before, it deleted the union-shop language.

Although the mediator attempted to assist the parties in resolving their differences, nothing of significance occurred on February 2. According to Nowak, on February 3 he told Mediator Phyllis Cayse that the deletion of the union-shop proposal was to reflect what the employees were doing on their own when they had filed their decertification petition in December. He says he told Cayse that the Company would nonetheless be flexible on the union-shop issue. He says Cayse then took his comment back to the Union. The parties have stipulated that eventually the Union came back with an 11-item counterproposal, one of which said that there would be "no change in union security." It is apparent, from reading the remainder of the Union's counterproposal, that the parties were still far apart on wages, maintenance of benefits, medical and dental plans, health care waiting period, holidays, vacations, leave of absence policy, no-strike and no-lockout, and sick leave.

Union negotiator Hector Cepeda denied that the mediator ever told the Union that the Company was flexible on union security. However, he testified that mediator Cayse had said she did not know if the Company's position on union security was final. She had suggested the Union make a counterproposal to find out. It was for this reason, says Cepeda, that the Union made its proposal of February 3.

[4] Goldstein also served as Respondent's chief negotiator.

[5] This was the second charge that the Union had filed. The first was filed on October 22, but had been withdrawn on December 10. The parties have stipulated that the Regional Director processed the second charge, which was amended twice, by deferring a portion of it to arbitration. On January 30, 1987, the remainder was withdrawn.

[6] Respondent is a subsidiary of that conglomerate.

I think it is fair to say, however, that the proposal in all other respects was so different from the Company's proposal that it did not put the union-security issue to any sort of meaningful test. For example, the Company's proposal prior to the strike had been a 15-percent wage cut. The strike had ensued, but during the strike the Employer had implemented the 15-percent wage reduction. The lower wage scale was still in effect on February 3 when the Union's counterproposal asked that wages be the same as during the previous contract. With such a wide difference in wages and with Respondent's salary proposal having survived the strike, the Union's February 3 proposal is a curiosity.

If Cepeda is correct, that the mediator had suggested the Union put Respondent to a test to see if its position on a union shop was final, the February 3 proposal did not accomplish it. All it did was to furrow already plowed ground both with respect to union-security and to nearly every other proposal.

Nowak testified that after he had reviewed the February 3 counterproposal, he concluded that the parties were as far apart as ever.

The Company's proposal of February 2 had advised the Union that unless the offer was accepted by February 12, the Company would consider it rejected and the Company would implement it.

E. *The Company Responds to Rumors*

According to Nowak, within a day or two of the February 3 meeting, company officials began to hear rumors that there might be either another strike or a slowdown. As a result of that rumor, whether accurate or not, Nowak asked attorney Goldstein to prepare a notice to the employees in response. On February 5 Nowak issued a letter to employees entitled "Where We Stand." The letter adverted to the previous strike and said if the Union called another, the Company would again replace the striking employees and continue to operate. In the second paragraph Nowak observed that the employees had recently filed a decertification petition and accused the Union of filing "a number of phony unfair labor practice charges to avoid going before Aero Alloys' employees for a government secret ballot election. . . ." He asserted that the Company had successfully defended each of the unfair labor practice charges and went on to say, "To blunt the Union's attempt to prevent you from exercising your right to vote, the Company has proposed, in its recent negotiations with the Union, that no employee be forced to join the Union and pay dues in order to work at Aero Alloys. The Union has rejected this proposal but it is part of Aero Alloys' last, best, and final offer."

The letter concluded by saying the Union had until February 12 to accept or reject the offer, noting that if the employees again exercised their right to strike, it would be naive to think another strike would cause the Company to change its position.

F. *Lourdes "Lulu" Martinez*

1. Duties

Lourdes "Lulu" Martinez was hired on November 20, 1986, 7 weeks after the strike began and a week before it ended. She testified that she was hired by Accounting Supervisor Debbie Ardizzone, but was also interviewed by the controller, Parker. Martinez had been referred to Respondent by an employment agency because of her experience in working with payroll. Both she and Nowak say her job had no actual title, but she made out the payroll and served as the personnel clerk. She replaced a part-time payroll clerk who had left and also assumed some personnel duties previously performed by Ardizzone. She received an hourly wage of $6.50 per hour. In addition to Martinez' payroll and personnel duties, because she was bilingual in English and Spanish, she served as a translator for Nowak, Parker, and General Manager Carl Rezmer.

Martinez said when she was first hired, her principal duty was to complete and maintain the personnel files of the individuals who had been hired as strike replacements. As the strike ended and Respondent began to recall strikers, she was asked to contact former strikers to tell them to return to work. She, Nowak, and Parker all testified that the decision to recall individual employees was made by General Manager Rezmer and Nowak. They compiled a list of strikers who wished to return and, when appropriate, would tell Martinez when to contact a specific individual. She then followed their instructions.

The parties have stipulated that between December 2, 1986, and February 18, 1987, at least 57 Western Union telegrams were sent to employees, which were signed by Martinez. Examplers of those telegrams are in evidence as General Counsel's Exhibits 2 and 3. The parties have further stipulated that of those 57 telegrams, 5 identified Martinez as the "Director of Personnel." The remainder contain only her signature without any title. Fifty-six of those telegrams were directed to strikers telling them to report to work while one informed a striker that he was no longer employed.

Nowak, Parker, and Martinez all testified that Martinez never held the title of personnel director, personnel supervisor, or personnel manager. It appears from their testimony that no one at Respondent ever held such a title. Martinez testified that she never told Western Union that she had such a title, and so far as she can determine, the title, which appears on those five telegrams, is a Western Union mistake. She surmises that Western Union may have made the mistake when she told their telephone operator to write "payroll/personnel office" or "personnel office" under her name.

She further explains that Parker had told her to sign the wires herself so that the employees who spoke only Spanish would ask for her. She could more easily converse with them than could the three managers who did not speak that language.

Martinez also remembers that when she noticed the five telegrams, which incorrectly described her position, she told her immediate supervisor Debbie Ardizzone,

who told her it was a minor mistake that could be corrected later. The correction was never made.

It also appears that Martinez had some specific safety-related duties. She maintained a supply of safety gloves and glasses. When individual supervisors ran out of those items, she was the source of resupply. She also attended safety committee meetings, apparently as a clerical or as a translator. She said that she was not actually a member of the safety committee and there is no evidence that she participated in safety meetings in a substantive way. She did prepare a bulletin board notice as required by the Occupational Safety and Health Administration that listed workdays lost to accidents. She noted at the bottom of the notice that she had prepared those figures.

2. The trim department meeting

According to Martinez, shortly before Christmas 1986 Parker instructed her to get the employees to sign the new health plan authorization forms. It will be recalled that Respondent was then in the process of implementing its last offer, which included a change in health plans. Pursuant to Parker's directive, Martinez caused those forms to be circulated throughout the plant. Many of the employees did not understand or appreciate what was occurring and did not sign them. If an employee did not sign the form, it meant that the employee would not be covered when the change was implemented. Martinez compiled a list of employees who had not signed the form and began contacting them. One group of employees who had not signed was from the trim department.

On approximately December 19, she went to the trim department, spoke to the supervisor, and managed to arrange a short meeting of about six or eight employees in a nearby exit to the parking lot. Three of those employees, Pablo Larios, Angel Estrada, and Margarito de Santiago, testified about that meeting.

Larios testified that Martinez said she needed signatures to get the Union out; the Company could then give employees benefits more freely, such as a $2 raise for de Santiago. He says she also said something to the effect that if the employees got the Union out, they would "get their 15 percent back," meaning the 15-percent salary loss would be restored. He remembers she referred somehow to a man who had been taking signatures the day before.

Estrada testified that Martinez told the gathering that the Company would return the 15-percent pay cut if the employees would "take out the Union." He says she also said the Company could give the employees raises and asserts Martinez said nothing about any fringe benefits. On cross-examination, he suffered some memory lapses in other areas and then agreed he could not remember much about the meeting. In his pretrial affidavit he had said he could not recall Martinez saying anything regarding a petition being passed around. In the same affidavit, he quotes Martinez as saying that if the employees wanted a union it was their own personal business. Unlike Larios, he never testified that Martinez asked him to sign anything.

Margarito de Santiago first said that he did not pay that much attention to Martinez during this gathering, but remembers she said something like, "The Union was not allowing her to give me the $2" and "they had signatures already." De Santiago did not see a list of signatures, but remembers Martinez said she had them. He says Martinez did not ask him to sign anything.

Martinez specifically denies everything these three employees said. She denies saying the meeting was called to gather names to get the Union out. She said she never told anyone that the Company needed more signatures to get rid of the Union; neither did she refer to raises or say that the Union would not let her give an employee a raise. Contrary to Estrada, she said she never told him the Company would give back the 15 percent if there was no Union, never said there would be more benefits without the Union, and never said the Company could not give raises because the Union would not allow it.

She did testify that during the trim department meeting Larios said that the employees did not wish to fill out her paperwork, that they had been told not to fill it out, and that they were afraid to do so. She remembers him saying their decision had something to do with the Union. She testified, "And I kept explaining to them over and over again that I had nothing to do with the Union, that I was just doing my job to see to it that they filled out the health enrollment cards, so they could have insurance for the year 1987." Despite her explanations, Larios responded, "Well, I am for the Union." She says she replied, "It is your opinion. You decide whose side you're on. I am not going to be against nor with you." Later she testified she told them "personally" she was "not for the Union." Nonetheless, she concluded by telling them she was "out of it."

De Santiago also testified that about 3 days before Christmas, in a private meeting with Martinez at the foreman's desk, and in the presence of his brother, Manuel, Martinez offered to get him a raise after the new year. Almost immediately he backed away from that version claiming she said she would "try" to get him a raise. Curiously, de Santiago does not connect this wage discussion with the Union in any fashion. In any event, Martinez denies having such a conversation, adding that she would not have said it because she had no such power.

IV. ANALYSIS AND CONCLUSIONS

I think it is apparent from the evidence that both issues presented by the complaint seem to be connected. The General Counsel contends that the Respondent sponsored the decertification petition and subsequently used it as the justification for engaging in an act of bad-faith bargaining, i.e., withdrawing from the tentative agreement to include a union-security clause in the new collective-bargaining contract. I conclude, however, that the evidence does not show the connection to be real. The General Counsel has failed to prove that Lulu Martinez engaged in any activity relating to the decertification petition. Even if she had, the General Counsel has also failed to prove that she was either a supervisor, agent, or apparent agent of Respondent in that endeavor. The evidence shows her to be only an office clerical employee. Second, I conclude that the mere act of withdrawing a proposal from a tentative agreement, after a

strike and when the circumstances have dramatically changed, does not constitute a breach of the good-faith bargaining obligation.

A. *Martinez' Conduct*

The evidence demonstrates that Martinez was an ordinary employee, albeit employed outside the bargaining unit, who functioned as a clerical and as a translator. She was an hourly employee who operated solely under the direction of the Company's managers and supervisors. The only reason she was even involved in the striker recall process was because she was bilingual and had personnel functions. She is an able, articulate person and an excellent choice for the duty of being a conduit of management. She did not have any authority to use independent judgment, but operated in a routine and clerical way. Clearly she was not a supervisor as defined by Section 2(11) of the Act.

Second, being a conduit for management does not necessarily make her an agent either. There is absolutely no evidence that she was given any general authority to speak of on behalf of management. However, because the evidence does not show that she engaged in the conduct complained of, the ultimate question of her agency need not be reached. Even so, I think it is clear that she is not, and could not reasonably be perceived as, an agent. I note that the only time she ever discussed the Union was during the meeting near the doorway in December. At that time she told the employees that although she was personally against the Union, the choice of belonging to the Union belonged to them and she was "out of it." During that meeting, Larios had pressed her for an answer about her personal view, and she gave it together with an appropriate disclaimer.

It is, I suppose, true that the five telegrams in which Western Union mistakenly gave her the title of personnel director could have been repudiated. Yet, even the employees who testified about her authority seemed to know what her job was. They knew she worked in a cubical alongside other clericals and knew she prepared paychecks and had the power only to make mathematical corrections. The other tasks she performed were only at the specific direction of higher management or when she acted as a translator for them. The OSHA notice is clearly evidence of a clerical duty, not evidence of either agency or supervisory authority.[7]

Aside from Martinez' authority or apparent authority, however, it is clear that the General Counsel has failed to prove by credible evidence that Martinez ever solicited employees to sign any paper relating to the decertification. The decertification petition was circulated by bargaining unit employee Patrick Mount. He had obtained 55 signatures by December 12 and the General Counsel has not demonstrated that the 55 were insufficient to constitute the required 30-percent showing of interest to warrant the processing of the petition. Certainly the General Counsel has not shown that the Regional Director had asked for more before December 19. If Mount had obtained the required 30 percent, or if the Director had not yet made a determination that more were needed, there would have been no impetus for Martinez or anyone else to be soliciting additional signatures on December 19.

Moreover, the witnesses that the General Counsel presented regarding what was said at the doorway meeting cannot be credited. Larios, for example, took inconsistent positions regarding Martinez' job. At first on cross-examination, he claimed he did not know what position Martinez held; later, he said he knew she was an office employee. He also knew she did some translation. Finally, he said he had never seen anything describing Martinez as the personnel director. Clearly Larios knew Martinez was a clerical employee and had no managerial authority, yet he did not wish to reveal his knowledge. Similarly, Estrada did not present himself well. On one occasion he had an unexplained memory loss and he often let his voice fall. He even undercut his already weak testimony by saying he was not paying attention during the meeting. His pretrial affidavit was somewhat inconsistent with his testimony and he was generally an unimpressive witness. Last, Margarito de Santiago admitted that he was not paying that much attention. Both he and Estrada say Martinez did not ask them to sign anything. If they are to be believed, she did not ask them to sign either a health plan authorization card or a decertification petition.

Frankly, these three witnesses suffer from several and varied shortcomings. These include demeanor matters, testimonial inconsistencies, and confusion. All appear disgruntled over the wage loss. In these circumstances I believe much of their testimony on critical issues is the product of either confusion or dissemblance. Before Respondent even began to present its case, the testimony of these three gave me pause.

On hearing Martinez, however, it became quite apparent that she had a good understanding of what she was saying and why she was saying it. Her testimony that Larios responded to her request that he sign the health authorization card by bringing up the Union and her characterization of him as confused and mistrustful seems quite credible. I have no difficulty in finding that she called the meeting for the purpose of obtaining the health authorizations and had no other purpose. The slip of paper that she had in her hand contained the names of those individuals who had not signed the health plan forms. They were not signatures on a decertification petition.[8]

Furthermore, that she was a new employee unlikely to have authority to grant wage increases or recommend them seems clear on the record. That being the case, and

[7] On February 13, 1987, Martinez did issue, in English and Spanish, a memo to employees announcing that new dental and health coverage were being implemented on that date. She did not sign it with any title and says she was directed to issue the memo by Nowak because Parker, who normally would have handled the matter had just left the Company. Even assuming that this memo would elevate her in the eyes of employees from clerical employee to a quasi-management job, the memo was not issued until well after the transactions complained of in the complaint It does not prove anything regarding her authority or apparent authority the previous December

[8] Presumably, Mount had already submitted his signature list to the Regional Office on December 16 The General Counsel has not shown that a supplemental list of signatures ever existed, much less was needed.

considering Respondent had successfully endured a 60-day strike to obtain a 15-percent wage reduction, it seems improbable that she or anyone in management would be offering wage increases in December, for insufficient time had passed to determine whether the wage reduction had put the plant in an acceptable financial position. Finally, if Respondent were to offer wage increases to dissuade employees from the Union, she would not have been the appropriate spokesperson for that purpose. Such promises would have been made by someone far more authoritative than she. Accordingly, I conclude that Martinez' testimony is the more credible of the two versions. Under those circumstances I find the General Counsel has not proven that Martinez committed the acts alleged in the complaint or that Respondent provided any assistance to those employees who were engaged in soliciting signatures to support the decertification petition.

B. *Withdrawing from the Tentative Agreement on Union Security*

The General Counsel does not complain that Respondent has engaged in a course of conduct of bad-faith bargaining. Instead, her representatives maintain that, in late January, Respondent withdrew from one tentative agreement, which it had made with the Union before the strike, that the new contract would contain a union-shop clause. Two significant things had happened before Respondent made the decision to withdraw from that tentative agreement. The first was the 2-month strike that the Union abandoned without having obtained a new contract. The second was the filing of the decertification petition. According to Nowak, the Company's decision to withdraw from the tentative agreement was actually made in early January. It did not manifest itself, however, until the company proposal of January 28. At that point the Union had filed an unfair labor practice charge that had effectively blocked the processing of the decertification petition.

Despite the issues that the petition and the charge raised, Respondent nonetheless proceeded to engage in three collective-bargaining sessions thereafter. Not until two of those had passed did the Union even express a concern about the proposed loss of the union-security clause. When it finally did so, the credible evidence is that Nowak told the mediator that the Company would be flexible on that issue if agreement could be reached on other matters. It appears from inferences drawn from Cepeda's testimony that the mediator did in fact transmit Nowak's message to the union negotiators, but they were far more interested in testing the Company's resolve in other areas. It is true that the Union's counterproposal called for reinstatement of the union-shop clause but, ignoring the lost strike, proposed a general return to the prior contract. It is fair to say in that situation that neither the presence nor the absence of a union-security clause had anything to do with the status of negotiations at that stage. The topic was not considered to be a critical issue. If it had been, the Union would have compromised other areas of its proposal and an appropriate test would have been made to determine whether the union-security clause was truly a stumbling block. It chose instead to try to salvage the lost wages and other money matters, thereby demonstrating that those were the main issues, not union security.

In any event, it is quite clear that the withdrawal of a single provision of a tentative agreement is not an act of bad-faith bargaining. *American Thread Co.*, 274 NLRB 1112 (1985); *O'Malley Lumber Co.*, 234 NLRB 1171, 1179–1180 (1980); cf. *Reliable Tool Co.*, 268 NLRB 101 (1983). Moreover, when circumstances have changed, as they did here, due to the lost strike, modification of bargaining positions is permissible. *Valley Oil Co.*, 210 NLRB 370, 385 (1974).

The Supreme Court has held it is not for the Board to determine whether a contract should contain a specific clause. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). If I were to conclude that the withdrawal of this provision in circumstances that would not frustrate bargaining elsewhere was an unfair labor practice, I would necessarily be deciding that this collective-bargaining contract must contain a union-security clause. Under the *Porter* doctrine, the Board may not issue such an order. Because there is no evidence that Respondent was using this issue as a device to frustrate bargaining, it would be inappropriate under *Porter* to find that Respondent committed an unfair labor practice by withdrawing from the tentative agreement.[9]

I conclude, therefore, that the General Counsel has failed to prove any violations of the Act as alleged, and I will recommend that the complaint be dismissed in its entirety.

Based on these findings of fact and legal analysis, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Aero Alloys, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Warehouse, Processing & Distribution Workers' Union, Local 26, International Longshoremen's & Warehousemen's Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove the allegations in the complaint alleging that Respondent had violated Section 8(a)(1) and (5) of the Act.

[9] Although the parties wish to litigate the meaning of the "Where We Stand" letter recited in sec. III,E, a definitive analysis would serve no purpose. If I were to agree with the General Counsel that the letter, as well as Nowak's statement that Respondent was recognizing the decertification petition by withdrawing the union-shop proposal, evidenced a desire to beard the Union, it would not follow that such a desire would also be evidence of bad-faith bargaining. When that letter was issued and when Nowak made his statement, Respondent had already made its proposal based on its perception of changed circumstances and the proposal was perfectly lawful. If it used the letter as an opportunity to take advantage of the Union's now demonstrated weakness, it was simply doing what economic circumstances permitted. *American Thread*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed in its entirety.

[10] 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.