

**Brennan's Cadillac, Inc. and Local 868, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 2-CA-14135**

August 9, 1977

### DECISION AND ORDER

On December 2, 1976, Administrative Law Judge Abraham Frank issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief. Respondent filed an answering brief to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

We agree with the Administrative Law Judge that the complaint in this case should be dismissed, as we are of the opinion that a reasonable time for bargaining had elapsed before Respondent withdrew recognition from the Union.

The essential facts are not in dispute. On October 22, 1975, Respondent and the Union signed a recognition agreement based upon authorization cards obtained by the Union from Respondent's five automobile salesmen. On November 3, the Union sent Respondent a copy of a proposed contract. The first bargaining session between the parties was held on December 5, followed by seven additional meetings, the last of which was held on February 27, 1976. At the first meeting, the parties reached substantial agreement on a number of noneconomic items. The remaining meetings were devoted to an attempt to reach agreement on an economic package, with both parties presenting proposals and counter-proposals. By January 21, the items still in dispute included a mandatory retirement age for the salesmen; the continuation of house deals, and type of sale which resulted in no commission for the salesmen; and the method by which the salesmen were to be compensated, either by payment of a salary or by access to a drawing account. At this meeting, after its request to examine Respondent's books was refused, the Union informed Respondent that it would take Respondent's proposals to its members. The membership rejected Respondent's offer after being informed that such a rejection was an automatic authorization for a strike.

The parties met again on February 19, 1976, where the Union notified Respondent that a strike would be

forthcoming if Respondent made no change in its position. On February 20, Bruckner, the Union's business representative, and Drazen, Respondent's attorney, discussed the possibility of a strike. Drazen indicated that he could move on the retirement issue, but that he could not move on money. Both men agreed that a strike might get things moving. The strike commenced on February 23. At a meeting on February 27, Drazen informed Bruckner that an attorney representing some of the striking salesmen had called him with indications that three salesmen were prepared to withdraw from the Union. Drazen indicated that Respondent would cease negotiations if it were informed that these three salesmen no longer wished to be represented by the Union. By letter dated February 27, the three salesmen so informed Respondent and requested that it cease bargaining with the Union on their behalf. These three salesmen returned to work on February 28.

On March 1, Bruckner gave Respondent an unconditional offer to return to work on behalf of all five salesmen. Drazen informed Bruckner that the Union did not represent the salesmen, and that Respondent would take the remaining two salesmen back on an individual basis. On that same day, Drazen met with Bruckner and the two salesmen who did not withdraw from the Union and stated that Respondent was taking the salesmen back individually.

The General Counsel alleges that Respondent has violated Section 8(a)(5) of the Act on the grounds that the period of time in which bargaining was carried on did not constitute a reasonable period of time under applicable case law. The General Counsel argues that in cases involving voluntary recognition of a union, as in the present case, the determination as to whether a reasonable period of time has elapsed for bargaining should be given the same consideration as in cases involving Board Orders or settlement agreement.

The Administrative Law Judge finds that there was no impasse in bargaining on March 1, 1976, when Respondent withdrew the recognition it had voluntarily extended to the Union on October 22, 1975.<sup>1</sup> There is no allegation that Respondent engaged in bad-faith bargaining, or that Respondent was in any way responsible for the Union's loss of majority status. The Administrative Law Judge notes that the General Counsel's argument relies on the Board's holding in *Keller Plastics Eastern, Inc.*,<sup>2</sup> a portion of

<sup>1</sup> In his conclusions, the Administrative Law Judge incorrectly states that the date of recognition was November 3, 1975. In fact, the recognition agreement was signed on October 22, 1975.

<sup>2</sup> 157 NLRB 583 (1966).

which was taken from the Supreme Court's decision in *Frank Bros. Company v. N.L.R.B.*,<sup>3</sup> to the effect that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." The Administrative Law Judge finds himself unpersuaded by the claim that the reasonable period of continued majority status of a union is the same in cases involving voluntary recognition as it is in cases of a Board Order or settlement agreement, finding that bargaining pursuant to Board directive is not comparable to the situation in which an employer enters into a bargaining relationship without benefit of a Board-directed election.

The Administrative Law Judge finds that *Keller Plastics* did not set forth any guidelines as to what constitutes a reasonable period of time during which a union enjoys the irrebuttable presumption of continuing majority status, but concludes that that case merely stands for the proposition that such status is protected during the critical initial stages of bargaining. The Administrative Law Judge thus concludes that the period of time in which the parties herein bargained was a sufficient reasonable period within which the Union enjoyed the presumption of majority status. Accordingly, he dismissed the complaint in its entirety.

Our dissenting colleagues disagree with the Administrative Law Judge on several grounds. Initially, they contend that his entire approach to this case is incorrect, as they are of the opinion that the decision rests upon the Administrative Law Judge's finding that by March 1, 1976, when Respondent withdrew recognition, the Union had actually ceased to be the majority representative of the employees. In this regard, we agree with our colleagues that the first issue to be addressed is whether or not a reasonable period of time for bargaining had elapsed before the employer has the right to question a union's majority status and thus withdraw the recognition once voluntarily extended. Absent a reasonable period of time for bargaining following recognition, the actual majority status of a union is immaterial.

Secondly, they disagree with the Administrative Law Judge's reasoning that a "sharp distinction" need be drawn between cases involving voluntary recognition and cases involving Board orders and settlement agreements. We also disagree with the rationale in this regard. Implicit in the Administrative Law Judge's rationale is a finding that cases involving Board orders or settlement agreements

somehow enjoy a preferred status over cases involving voluntary recognition, at least when the issue is a determination as to what is meant by a reasonable period of time. Unfortunately, the Administrative Law Judge neglected to quote another portion of *Keller Plastics*, to wit: "With respect to the present dispute which involves a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that, like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain."<sup>4</sup> Thus, the Board has long included voluntary recognition in the same category as "certifications, Board orders, and settlement agreements."<sup>5</sup> As noted by our colleagues, we recognized in *San Clemente Publishing Corporation, et al.*,<sup>6</sup> that, in each of the noted situations, "a bargaining obligation arises, whether by Board action pursuant to law, or by voluntary commitment," and that each type of bargaining obligation must be given a reasonable opportunity to function.<sup>7</sup>

Our disagreement with our dissenting colleagues thus comes down to the issue of whether, considering all the circumstances of this case, a reasonable period of time for bargaining had elapsed. As this question is the first issue which must be resolved, we answer it in the affirmative, in agreement with the Administrative Law Judge. There are no rules as to what constitutes a reasonable period of time, as each case must rest upon its own individual facts. Our colleagues are careful to point out that the actual period of time during which negotiations were carried on was only 3, and not 4, months and that the parties met a total of eight times in that period. However, we are constrained to state that reasonable time does not depend upon either the passage of time or the number of calendar days on which the parties met. Rather, the issue turns on what transpired during those meetings and what was accomplished therein.

Here the parties met on a regular basis and, significantly, arrived at substantial agreement on many items, with both sides making substantial concessions. Possibly, if the parties had met one more time before the strike, they could have arrived at a complete agreement, as evidenced by the Union's abandonment of its prior demand that the salesman be paid a salary. However, instead of proceeding to that meeting, the Union chose to test its strength by striking in an effort to force Respondent to agree to its views on the remaining issues. As subsequent events reveal, the Union did not possess

from the date of certification. Cf. *Ray Brooks v. N.L.R.B.*, 348 U.S. 96 (1954).

<sup>6</sup> 167 NLRB 6, 8 (1967).

<sup>7</sup> Cf. *Alan L. Horton, Inc. d/b/a Horton's Market*, 211 NLRB 991 (1974).

<sup>3</sup> 321 U.S. 702 (1944).

<sup>4</sup> *Keller Plastics, supra* at 587.

<sup>5</sup> Of course, it is well settled that the reasonable time to bargain following a union's certification after a Board-conducted election is ordinarily 1 year

the strength it thought it had, as a majority of the unit employees, who but a short time before had authorized the strike, signed a letter withdrawing from the Union. These three employees chose to abandon both the strike and the Union by returning to work.

Hence Respondent engaged in meaningful good-faith negotiations over a substantial period of time. There is no contention that Respondent engaged in any unfair labor practices during this time which in any manner interfered with its employees' desires for or against union representation. Nor is there any allegation that an impasse in bargaining had been reached. With matters in this posture, we are of the opinion that a reasonable period of time was afforded the Union to bargain and that the bargaining relationship it obtained by voluntary recognition was given a "fair chance to succeed." Therefore, since a reasonable period of time had elapsed, the actual majority status of the Union at the time of withdrawal of recognition becomes relevant in determining whether Respondent was entitled to question the Union's majority status. As of March 1, 1976, after the reasonable period of time for bargaining had elapsed and after its unsuccessful strike effort, the Union no longer enjoyed the support of a majority of the unit employees. Thus, the Union was no longer entitled to the continuing presumption of majority status and Respondent was entitled to withdraw recognition from and cease negotiations with the Union. Accordingly, we agree with the Administrative Law Judge's dismissal of the complaint herein.<sup>8</sup>

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

CHAIRMAN FANNING and MEMBER JENKINS, dissenting:

<sup>8</sup> A careful reading of our opinion herein would reveal to our dissenting colleagues that we did, in fact, consider those factors which they claim we ignored. The absence of impasse, the fact that the parties were negotiating for a first contract, and the fact that the parties had reached substantial agreement on a number of issues contributed to our determination that a reasonable period of time for bargaining had elapsed. Moreover, while the parties here bargained over a "relatively brief timespan," which seems to be a great concern to our colleagues, we have already stated our opinion that the issue at hand does not depend on the number of days or months spent in bargaining but, rather, what was accomplished during the time spent in bargaining.

Furthermore, a diligent perusal of our opinion herein would reveal to our colleagues that the timing of the strike had no effect upon our determination that a reasonable period of time for bargaining had elapsed. Upon such a

Our colleagues, in agreement with the Administrative Law Judge, conclude that the time in which bargaining took place in this case constituted a "reasonable period of time" within the meaning of the relevant Board precedent. We disagree with this conclusion and would find that the presumption in favor of the Union's continuing majority status had not been rebutted on March 1, 1976, when Respondent withdrew recognition from the Union. Accordingly, and as alleged in the complaint, Respondent violated Section 8(a)(5) by refusing to bargain with the Union on and after March 1, 1976, and Section 8(a)(3) by refusing the Union's offer on behalf of the employees to return to work on that date.

In reaching the opposite result, our colleagues concede that the Administrative Law Judge erred in concluding that any distinction should be drawn between cases like this one, where voluntary recognition has been extended to the union, and those cases in which bargaining follows a Board order or settlement agreement. This conclusion notwithstanding, our colleagues find, in agreement with the Administrative Law Judge, that the period from November 3, 1975, when recognition was extended, to March 1, 1976, when recognition was withdrawn, constituted a sufficient "reasonable period" to overcome the presumption of continuing majority status. Finally, they apparently agree with the Administrative Law Judge's analysis that, in cases like the instant case, because there is "no impediment" to the holding of an election, the Board would come "dangerously close" to infringing on employees' statutory rights were it to accord the Union a protected status beyond the "critical initial stages of bargaining."

We believe, and our colleagues apparently concur in our view, that the Administrative Law Judge's entire approach to this case was mistaken. In the first place, it is evident that the Administrative Law Judge's decision turns on his conviction that on March 1, when recognition was withdrawn, a majority of employees had ceased to regard the Union as their bargaining agent. Simply stated, this puts the cart before the horse. The first question that the Administrative Law Judge should have addressed

reading, perhaps our colleagues would not be so quick to claim that we considered the strike to be the "single factor" "sufficient to mark the expiration" of the reasonable time period. We are under the impression that our colleagues joined us in our opinion that the correct approach to this case depends initially upon an answer to the question, "Has a reasonable period of time for bargaining elapsed?" We answered that question in the affirmative based upon a consideration of the factors which our colleagues claim we have ignored. Further, we responded to that question before we even considered the effect of the strike upon any of the issues involved herein. Thus, once having reached and determined the threshold issue, it is at this juncture that we are required to resolve the question of the majority status of the Union to determine whether the Respondent was justified in withdrawing recognition from the Union. It is with respect to this issue, and this issue alone, that we appropriately examined the effects of the strike.

himself to was, "Has a reasonable period of time for bargaining elapsed?" Only if the answer to this question is "yes" does the question of actual, as opposed to presumptive, majority status become relevant.

As the Board noted in *San Clemente Publishing Corporation*, 167 NLRB 6, 8 (1967):

There is as much reason to require an employer to give [a bargaining relationship established by its voluntary recognition of a union as its employees' exclusive representative] a reasonable period in which to function without regard to a union's loss of majority status, as in the case of certifications, bargaining orders, and settlement agreements. In each, a bargaining obligation arises, whether by Board action pursuant to law, or by voluntary commitment, and it is similarly easy to visualize the obstruction to effective bargaining and denigration of statutory policy that could result if the employer in any of the given situations were permitted to repudiate his obligation solely because the union in question has lost majority status.

In foreclosing any attack on a union's majority status during the early stages of a newly established bargaining relationship, the Board seeks to impart a degree of stability to labor relations by recognizing the importance of affording the exclusive representative an opportunity to concentrate on the job of collective bargaining for a period long enough to make such bargaining reasonably effective. To accomplish that goal, the exclusive representative must be reasonably free from harassment of organizational drives, shifts of employees sentiment based on displeasure with the progress of negotiations, or other incursions upon its strength. To require the newly recognized representative to maintain its actual majority status on a day-to-day basis during negotiations for an initial agreement—subject to forfeiture of its representative status by employer withdrawal of recognition upon its knowledge of employee disaffection—necessarily takes away from the representative the freedom to negotiate an agreement reasonably accommodating the diverse interests of all concerned, including that of the public.

<sup>9</sup> As noted previously, the Administrative Law Judge sought to draw a sharp distinction between cases involving a reasonable period of time for bargaining after voluntary recognition and cases where bargaining followed a Board Order or a settlement agreement. Such an approach was clearly rejected by the Board in *San Clemente Publishing Corp.*, *supra*. There an Administrative Law Judge specifically noted the strong practical and policy considerations which support the similar treatment of bargaining relationships regardless of whether the particular relationship arises by reason of certification, bargaining order, settlement agreement, or voluntary recognition.

As the Administrative Law Judge conceded, it is settled law that, in situations involving negotiations subsequent to the voluntary recognition of a bargaining agent, just as in situations involving bargaining after certification, Board order, or settlement agreement, there must be a reasonable period of time to bargain and to execute any contract resulting therefrom. And such bargaining can be expected to succeed only when the parties can rely for a reasonable period of time on the continuing representative status of the recognized labor organization. *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966).

Whether bargaining follows voluntary recognition, certification, Board order, or settlement agreement, the presumption of continuing majority status for a reasonable period of time *of necessity* protects the bargaining agent *even from* peremptory changes of allegiance on the part of employees.<sup>9</sup> Hence in the instant case the mere fact that bargaining followed voluntary recognition rather than an election, Board order, or settlement agreement of itself is no justification in law for precipitously stripping the Union of the presumption of continuing majority status for a reasonable period of time. Such an approach discourages collective bargaining, rather than encourages it as Section 1 of the Act obliges us to do.

Of course there can be no hard-and-fast rule as to what constitutes a "reasonable period of time" for bargaining in cases involving voluntary recognition, Board orders, and settlement agreements (as opposed to the 1-year rule in certification cases). Rather, what constitutes a reasonable period of time depends on the circumstances of each case. See *San Clemente Publishing Corp.*, *supra* at 8.

In the instant case, contrary to the Administrative Law Judge, the actual period of time in which negotiations took place was 3, rather than 4, months.<sup>10</sup> Thus, from December 5, 1975, until February 27, 1976, the parties met a total of eight times and, significantly, reached substantial agreement on most noneconomic issues.<sup>11</sup> In fact, the only major matters separating the parties from an overall agreement were the questions of a mandatory retirement age and of a weekly draw versus a weekly salary for salesmen. On February 19, immediately prior to the strike, there was some movement on the

<sup>10</sup> Solely for the convenience of the Employer and at its insistence, the first bargaining session was delayed for over a full month after recognition was extended.

<sup>11</sup> Among other matters, the parties had reached basic agreement on recognition and no-discrimination clauses, modified union shop, workweek and hours of work, holidays and vacations, checkoff, new employees and probationary periods, discharge and layoff, seniority, and leave-of-absence provisions.

Respondent's side with respect to the retirement age question. On February 27, after the commencement of the strike, the Union offered to give up its salary demands in return for a small increase in commissions. At this point, Respondent announced that it had received some "indications" that three salesmen were prepared to withdraw from the Union and that if this came to pass Respondent would cease negotiations.

On this record the Administrative Law Judge found, correctly in our view, that there was no impasse on March 1, 1976, when Respondent withdrew recognition from the Union.<sup>12</sup> Indeed, the record warrants the conclusion that the bargaining relationship between the parties, while not without its difficulties,<sup>13</sup> was one which, but for the events of March 1, might well have culminated in a collective-bargaining agreement.<sup>14</sup> In short, the relationship between the parties here is precisely that type of incipient bargaining relationship which the Board, in the interest of industrial stability, has sought to foster through the concept of a presumption in favor of continuing representative status.<sup>15</sup> See *Keller Plastics Eastern, Inc.*, *supra* at 586-587.

Although our colleagues apparently would not quarrel with our conclusions with respect to this bargaining relationship and although, as indicated previously, they profess agreement with the principle that cases involving Board orders or settlement agreements do not "enjoy a preferred status over cases involving voluntary recognition," they ignore here the absence of impasse, the fact that the parties were bargaining for a first contract and had already reached agreement on numerous issues, and the relatively brief timespan (when compared to that in issue in several decided cases involving Board orders and settlement agreements) in which the parties were engaged in bargaining.<sup>16</sup>

In agreeing with the Administrative Law Judge that a reasonable time for bargaining had elapsed, our colleagues point to the February 27 strike and to that alone. What our colleagues do, in the face of what they concede to be fruitful bargaining, is to allow an employer to withdraw recognition at the moment the union applies economic pressure to support its claims. We should have thought that the ongoing negotiations, their near completion, and the absence of an impasse would indicate that it is precisely at such juncture that recognition may not be withdrawn. We are at a loss to understand, and nowhere do our colleagues explain, why or how this single factor, the strike, is sufficient to mark the expiration of a reasonable period of time for bargaining in this case. The result is plainly to disrupt collective bargaining rather than to foster it as the statute requires us to do.

Accordingly, we dissent from our colleagues' decision.

<sup>12</sup> Although not determinative, the presence or absence of impasse is one of the factors to be weighed in determining whether a reasonable period of time for bargaining has passed. Cf. *I. M. Jaffe and Sons, d/b/a Lahey's of Muskegon*, 176 NLRB 537, fn. 1 (1969).

<sup>13</sup> In determining whether or not a reasonable time for bargaining has passed, the Board has considered and given weight to the fact that parties bargaining for a first contract have "no common experience to draw upon for the expeditious resolution of their differences . . ." *Blue Valley Machine & Manufacturing Company*, 180 NLRB 298, 304 (1969).

<sup>14</sup> In fact the Administrative Law Judge concedes that this was likely. See section of his Decision entitled "Conclusions."

<sup>15</sup> Compare *The Freeman Company*, 194 NLRB 595 (1971). There the majority of a Board panel concluded that, in the circumstances of the case, 4 months was a reasonable period of time for bargaining. In that case, however, the panel majority emphasized that the union had not only canceled the last scheduled meeting between the parties but thereafter for over a month failed to attempt to resume negotiations. None of these factors is present in the instant case. Indeed, here the parties met only a few days before the Respondent's withdrawal of recognition and that final meeting appeared to portend progress in their negotiations.

<sup>16</sup> See in this regard *N. J. MacDonald & Sons, Inc.*, 155 NLRB 67 (1965) (bargaining for 6 months following execution of a settlement agreement held not a reasonable period of time when the parties were negotiating for an initial contract, had met and made substantial progress, and no impasse had been reached when recognition was withdrawn), and cases cited therein at 71, fn. 4. See also *Blue Valley Machine & Manufacturing Company, supra*, where, on facts similar to those of the instant case, the Board concluded that bargaining which continued for a total of 6 months after voluntary recognition was extended did not afford a reasonable period of time for the successful conclusion of negotiations.

## DECISION

ABRAHAM FRANK, Administrative Law Judge: The charge in this case was filed on March 3, 1976, and the complaint, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, issued on March 31, 1976. The hearing was held on July 28, 1976, at New York, New York. The General Counsel and the Respondent have filed briefs which have been duly considered.

The Respondent, a New York corporation, is engaged in the business of selling and servicing new and used automobiles at 14 North Columbus Avenue in the city of Mount Vernon, New York. During the past year, a representative period, Respondent in the course and conduct of its business received gross revenues in excess of \$500,000 and purchased and caused to be transported and delivered to its place of business automobiles, parts for cars, and other goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its place of business in interstate commerce directly from States of the United States other than New York. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Local 868, affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,<sup>1</sup> is a labor organization within the meaning of the Act.

The issue in this case is whether the Respondent bargained with the Union for a reasonable period of time following voluntary recognition.

The essential facts are not in dispute. In late September 1975, Donald J. Bruckner, secretary-treasurer and business representative of the Union, signed up the Respondent's five automobile salesmen. Thereafter, on October 1, 1975, Bruckner met with the Respondent's vice president, Calvin Strader, and its secretary-comptroller, Saporito. The latter checked the cards and verified that the signatures were those of the Respondent's salesmen. Bruckner gave the Respondent's officials a recognition agreement to sign. Strader said he wanted to consult with his attorney and that he would be in touch with Bruckner. Not having heard from Strader for several days, Bruckner called and was given the name of the law firm representing the Respondent. Bruckner called the law firm and spoke to Attorney Martin Drazen, who suggested that a petition be filed with the Labor Board. Bruckner told Drazen that the cards had been verified by the Respondent. After consulting with his principal, Drazen called Bruckner and agreed to meet with him and discuss the matter of a contract. Drazen met with Bruckner the following week and on October 22, 1975, a recognition agreement was signed by the parties.

On or about November 3, 1975, Bruckner sent the Respondent a copy of a proposed contract. Shortly thereafter Drazen called Bruckner and made arrangements for a meeting on December 5, 1975. A collective-bargaining session was held on that date and additional meetings were held on December 12 and 30, 1975, and on January 6, 16, and 21, and February 19 and 27, 1976.

During the first meeting the parties made substantial progress with respect to noneconomic matters. They reached agreement on a number of items such as the recognition clause, the bargaining unit, a modified union shop, a nondiscrimination clause, a probationary period for new employees, holidays, and vacations. From the outset, however, the Respondent resisted the Union's economic demands. On December 12, 1975, Bruckner made it clear that, with respect to house deals (a term referring to the sale of automobiles by principals of the Respondent, resulting in no commission for a salesman), the parties probably could not reach agreement unless that issue was resolved in a manner satisfactory to the Union. At this meeting the Respondent proposed a mandatory 65-year retirement clause. This the Union rejected on the ground that two of the five salesmen in the unit were 65 and over. The Respondent's initial economic offer to the Union on the following December 30 was a drawing account of \$125 weekly and a 20-percent commission with fringe provisions. The Respondent would make no changes in its practice of house deals. Bruckner rejected the Respondent's offer. At the January 6 meeting the Union proposed, basically, a salary of \$125 with a commission of 20 percent to 25 percent. At the January 16 meeting the

Respondent, while agreeing to the Union's proposal as to commission, insisted that there be a weekly draw of \$125 rather than a salary. The Respondent was also prepared to make a concession on house deals. Excluding employees and fleet or leasing deals that were not on the books and exports, the Respondent would eliminate house deals. As to demonstrators, the parties agreed that the salesmen would be permitted to buy them cheaply. Respondent also proposed a production quota, a mandatory 65-year retirement age, with a provision that current employees would not be affected for 2 years, and an understanding that one of the salesmen, Schwartz, would have to cease his employment at a used-car lot in the area. The Union's counterproposal was a reduction in its salary demand to \$100, elimination of the quota, elimination of the age factor with respect to the current employees, and elimination of the requirement that Schwartz give up his job at the used-car lot. At the meeting of January 21 the Respondent took the position that it could not afford to yield on house deals if the Union insisted on a salary rather than a draw. The Respondent also withdrew its offer of a draw of \$125 tied to the elimination of house deals. At this point Bruckner asked to check the Respondent's books and Drazen refused. Bruckner then said he would take the Respondent's proposal, which Bruckner considered a final offer, to the membership. The membership voted to reject the Respondent's offer after Bruckner explained to them that such a rejection was an automatic authorization for a strike.

The parties met again on February 19 at which time Bruckner informed Respondent that if there was no change in Respondent's position by the end of the week there would be a strike the following Monday morning. The next day Bruckner and Drazen discussed the possibility of a strike. Drazen said he could handle the age problem, but he could not do anything at that point on money. Bruckner and Drazen agreed that the strike might get the parties moving. The strike commenced, as scheduled, on Monday, February 23. On Friday, February 27, Bruckner met with Drazen and Mr. Procopio, a staff member of the New York State Board of Mediation, at a restaurant in White Plains. Bruckner offered to eliminate the requirement for a salary if the salesmen's commission were raised from 20 percent to 25 percent. Drazen stated that it was his personal opinion that the Respondent's final offer amounted to \$1,500 annually for each salesmen. However, at this time Drazen notified Bruckner that Drazen had received a call from an attorney representing some of the strikers with indications that they were prepared to withdraw from the Union. Drazen informed Bruckner that the Respondent would cease negotiations if it was officially advised that the three salesmen no longer wished to be represented by the Union. By letter dated February 27, 1976, three of Respondent's salesmen did, in fact, inform the Respondent that the Union no longer represented them and requested the Respondent to cease bargaining with the Union on their behalf. The three salesmen returned to work on Saturday, February 28, 1976, about 3 p.m.

<sup>1</sup> Hereinafter called the Union.

The following Monday, March 1, Bruckner approached Saporito as the latter arrived at the Respondent's premises. Bruckner handed Saporito an unconditional offer to return to work on behalf of all five salesmen. Saporito said he would get in touch with his attorney. Thereafter, Bruckner called Drazen and asked if Drazen was going to comply with the unconditional offer. Drazen replied that Bruckner did not represent the salesmen, that the Respondent would take them back on an individual basis. At or about 12 o'clock Drazen invited Bruckner and the two remaining salesmen into Strader's office. Drazen told them he wanted no disharmony among the five salesmen and that he was taking them back individually. Denying that the Union still represented the salesmen, Drazen informed Bruckner that three of them had withdrawn from the Union. At Bruckner's request, Drazen subsequently sent Bruckner a letter to that effect.

#### CONCLUSIONS

I find, in agreement with the General Counsel, that there was no impasse in bargaining on March 1, 1976, when the Respondent withdrew recognition. By that time the strike had failed and the Union, having lost its economic power, may well have yielded to the Respondent's terms.

The complaint does not allege and the General Counsel does not argue that the Respondent bargained other than in good faith from November 3, 1975, the date of voluntary recognition, to March 1, 1976, the date the Respondent refused to negotiate further with the Union. Nor does the General Counsel contend that the Union's loss of majority on March 1 was in any way attributable to the Respondent or that the Respondent was unjustified in concluding that such a loss had, in fact, occurred on that date. It is the position of the General Counsel that Respondent violated Section 8(a)(5) of the Act solely on the ground that a period of 4 months, covering eight bargaining sessions, is not a reasonable period of time for mandatory bargaining following the Respondent's recognition of the Union's majority status on the basis of authorization cards.<sup>2</sup>

The theory of the General Counsel finds its origin in the Board's decision in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). There a rival union charged that the employer was in violation of Section 8(a)(1), (2), and (3) of the Act by executing a contract with the incumbent union at a time when the latter did not represent a majority of the employees in the appropriate unit. Admittedly, the union had obtained majority status at the time of recognition. However, unbeknownst to the employer, the union had lost majority support when the contract was executed within a month following such recognition. Distinguishing *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard-Altmann, Texas Corp.] v. N.L.R.B.*, 377 U.S. 731 (1961), the Board pointed out that recognition had been validly granted to the incumbent union and that, under

established law (citing *Franks Bros. Company v. N.L.R.B.*, 321 U.S. 702, 705 (1944), and other cases), "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." Accordingly, the Board concluded: "Under the circumstances herein, we find to be reasonable the 3-week period from February 16, the date recognition was lawfully accorded, until March 10, the date the contract was executed." *Keller Plastics Eastern, Inc.*, *supra* at 587.

*Keller Plastics* was quickly followed by *Universal Gear Service Corporation*, 157 NLRB 1169 (1966), *enfd.* 394 F.2d 396 (C.A. 6, 1968). There the employer had voluntarily recognized the union, but withdrew recognition twice within the next 2 months on the ground that decertification petitions had been filed. The Board directed a resumption of bargaining, holding that the union had not enjoyed the reasonable period of bargaining to which it was entitled. A similar result was reached where the employer withdrew from bargaining after only 3 days.<sup>3</sup>

In his brief the General Counsel urges that, in determining whether a reasonable period of time has elapsed, cases involving voluntary recognition should be given the same consideration as cases involving Board orders and settlement agreements. To do otherwise, he contends, is to say that one basis for establishing majority status is more equal than another. The illogic of this statement is more apparent than real. The Board and the courts do, indeed, subscribe to a doctrine that a union may establish its majority position by several means, but that of these one is preferable to another.<sup>4</sup> Historically, the Board has accorded a particular importance and solemnity to its election procedures where, under laboratory conditions, employees decide for or against collective bargaining.<sup>5</sup> The 1-year certification rule has been in effect from the Board's very earliest days. During this insulated period the certified union's right to exclusive bargaining status is protected against all challengers, including the employer, rival unions, and the represented employees. The amendments to the Act, providing that only one valid election may be held in a year, have given additional meaning and significance to this rule. The rule has been affirmed and approved by the courts, despite the statutory right of employees to freedom of choice. *Ray Brooks v. N.L.R.B.*, 347 U.S. 96 (1954). There the Court said: "Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence." *Ibid* at 103. The objective of industrial stability is also the basis for the Board's contract-bar rules. Originally insulating the con-

<sup>2</sup> The complaint also alleges that Respondent's refusal to accept the unconditional return to work offer of Bruckner with respect to the two salesmen remaining on strike was violative of Sec. 8(a)(1) and (3) of the Act.

<sup>3</sup> *Montgomery Ward & Company, Inc.* 162 NLRB 294 (1966), *enfd.* 399 F.2d 409 (C.A. 7, 1968); See also *Toltec Metals, Inc.*, 201 NLRB 952 (1973), *enfd.* 490 F.2d 1122 (C.A. 3, 1974) (one week of bargaining and one bargaining session); *Cayuga Crushed Stone, Inc.*, 195 NLRB 543 (1972);

*enfd.* 474 F.2d 1380 (C.A. 2, 1973) (less than 2 months and no objective evidence of union's loss of majority). *Broad Street Hospital and Medical Center*, 182 NLRB 302 (1970), *enfd.* 452 F.2d 302 (C.A. 3, 1971) (3 weeks of bargaining).

<sup>4</sup> *N.L.R.B. v. Gissel Packing Co., Inc.* 395 U.S. 575, 596 (1969), citing *Aaron Brothers Company of California*, 158 NLRB 1077 (1966).

<sup>5</sup> *General Shoe Corporation*, 77 NLRB 124 (1948).

tracting parties for a period of 1 year, the rules have been revised to extend the period to 2 and finally 3 years.<sup>6</sup> In these cases the Board in its administrative expertise has said that industrial growth and stability are best served when an employer and a union are permitted to continue an established bargaining relationship. The employees, of course, have a right to change their representative or to reject collective-bargaining entirely, but this right cannot be absolute and must be exercised in a timely manner with as little disruption to the economy as possible.

Board orders, directing bargaining to remedy an unfair labor practice or to settle a complaint, adverted to above, is another area in which the Board and the courts have held that a union's status as the exclusive representative of the employees is an irrebuttable presumption for a "reasonable period of time." Unlike the certification or contract-bar rules, the presumption of continued majority status pursuant to a bargaining order is related not so much to the objective of maintaining industrial stability as it is to the necessity of remedial action, that is, putting the employees in the position they would have enjoyed but for the employer's unfair labor practices. This is so, courts have held, because otherwise an employer would be in the position of profiting from his wrongful refusal to bargain.<sup>7</sup> With respect to settlement agreements, the Board has held "a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time in which to conclude a contract." *Poole Foundry and Machine Company*, 95 NLRB 34, 36 (1951), *enfd.* 192 F.2d 740 (C.A. 4, 1951), *cert. denied* 342 U.S. 954 (1952).

I am not persuaded by the General Counsel's argument that the "reasonable period" of continued majority status attached to an employer's voluntary recognition of a union should be the same as that resulting from a Board order remedying an employer's unfair or alleged unfair labor practices. Bargaining by a recalcitrant employer, who has been dragged willy-nilly to the bargaining table, has a character all its own. Having directed the employer to bargain to effectuate the policies of the Act, the Board has an overriding responsibility to make sure that the bargaining is functional and responsive to its order. Bargaining of this nature is not comparable to the situation where an employer has waived the necessity for a Board election and the relationship between union and employer has been one of good faith from beginning to end.

The General Counsel does not contend, and I do not find, that the status of a union voluntarily recognized is

<sup>6</sup> *General Cable Corporation*, 139 NLRB 1123 (1962), and cases cited therein.

<sup>7</sup> *Franks Bros. Company v. N.L.R.B.*, 321 U.S. 702 (1944); *N.L.R.B. v. Tower Hosiery Mills, Inc.*, 180 F.2d 701, 706 (C.A. 4, 1950).

<sup>8</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the

equivalent to the bargaining status of a union certified by the Board.

In *Keller Plastics, supra*, the Board, while relying on the general proposition that a bargaining relationship once rightfully established must be permitted to exist for a reasonable period of time, refrained from establishing guidelines to delineate the reasonable period for a continued irrebuttable presumption of majority status where an employer had extended recognition without the compulsion of law. It is clear from that case and other cases cited above that the bargaining status of a voluntarily recognized union is protected from a peremptory change of heart by the employer or the employees and from the intrusion of a rival union during the critical initial stages of bargaining. It does not seem to me that the cases stand for much more than that. To go further, in my opinion, would come dangerously close to upsetting the delicate balance between the conflicting objectives of encouraging the collective-bargaining process and preserving the employees' statutory right to freedom of choice. As the court has held, this is an area where the Board necessarily must exercise its administrative prudence. In the instant case the Respondent engaged in a substantial period of good-faith collective-bargaining, scrupulously avoided interfering with its employees' desires for or against the Union, and withdrew recognition only when officially informed that a majority of the employees no longer wished to be represented by the Union. No impediment exists at this time for the holding of a Board election so that the employees may vote in secret for or against the Union. It seems to me this Union has been given a reasonable and fair opportunity to function as the voluntarily recognized representative of these employees. If, so far as the majority of the employees are concerned, the Union has failed them, then, in my view, it should not be accorded a further period of protected status without the formality of established Board procedures.

I find that the period from November 3, 1975, to March 1, 1976, is a sufficient "reasonable period" to satisfy the irrebuttable presumption of majority status under the rule of *Keller Plastics, supra*, and that the direction of a further period of mandatory bargaining is unwarranted in these circumstances.

Accordingly, I shall recommend that this complaint be dismissed. I hereby issue the following recommended:

#### ORDER<sup>8</sup>

It is ordered that the complaint in the instant case be, and it hereby is, dismissed in its entirety.

Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.