JD–8–96
Akron , OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE HENRY BIERCE CO.[1]

and

Cases 8–CA–21471
8–CA–21995

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN
AND HELPERS, LOCAL UNION NO. 348, a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
WAREHOUSEMEN AND HELPERS OF AMERICA[2]

Paul C. Lund, Esq., of Cleveland, OH,
for the General Counsel.
Keith Pryatel, Esq. (Millisor & Nobil),
of Akron, OH, for the Respondent.
Mr. Robert DeStefano, of Akron, OH,
for the Charging Party.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge: In my Decision in this proceeding, issued February 6, 1991, it was concluded, as here pertinent, as follows:

> 4. By withdrawing recognition from the Union in November 1988, Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.
>
> 5. By dealing directly with an employee in derogation of the employee's bargaining representative with respect to the employee's benefits, including his retirement, and other terms and conditions of employment [Respondent violated] Section 8(a)(1) and Section 8(a)(5) and (1) of the Act.

Respondent was ordered to recognize and bargain collectively with the Union as the exclusive bargaining representative of the employees in the involved unit and, if an understanding is reached, embody such understanding in a signed agreement.

In its Decision, *Henry Bierce Co.*, 301 NLRB 622 (1992) the National Labor Relations Board (Board), as here pertinent, affirmed my rulings, findings, and conclusions and adopted the recommended Order.

Thereafter, the Respondent petitioned the United States Court of Appeals for the Sixth Circuit for review of the Board's order, and the Board cross-petitioned for enforcement. The

[1] Hereinafter referred to as Respondent.
[2] Hereinafter referred to as the Union or Charging Party.

court in *Henry Bierce Co. v. NLRB*, 23 F.3d 1101 (6th Cir. 1994), as here pertinent, concluded that Respondent did not have an adequate opportunity to adduce evidence in support of its "good-faith" doubt of the majority status of the Union defense to the direct dealing allegation. Accordingly, the court remanded the case to the Board for a determination as to whether Respondent dealt directly with its employee in violation of Section 8(a)(5).[3]

As noted in the Board's ORDER REMANDING PROCEEDING, dated June 6, 1995,

> By letter dated November 29, 1994, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position regarding the issues raised by the remand. The Respondent filed a statement of position with the Board.[4]

The Board went on to indicate at pages 5 and 6 of its Order as follows:

> . . . reaffirmance of the Board's earlier finding that the Respondent engaged in unlawful direct dealing is warranted unless the Respondent prevails in its defense that at the time of its direct dealing with Morgan [the involved employee] it was not obligated to bargain with the Union because it possessed a reasonable, good-faith belief, based on objective evidence apart from the [unlawful] poll results, that the Union lacked majority support.

And the Board, on pages 8 and 9 of its Order noted as follows:

> In the present case, . . . the direct dealing violation, if found, will, under Sixth Circuit as well as Board precedent, warrant issuance of a bargaining order to restore the status quo ante. As noted supra, the direct dealing allegation rises or falls depending on whether the Respondent lawfully withdrew recognition from the Union. Thus the Board will find the direct dealing violation if the Respondent fails to establish its defense that it possessed a reasonable, good-faith belief, based on objective evidence apart from the poll results, that the Union lacked majority support. That same determination will control the remedy: if withdrawal of recognition was not lawful, a bargaining order will be necessary to restore the status quo ante. Therefore, a remand is necessary to provide the Respondent an opportunity to present its defense. Accordingly,
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> IT IS ORDERED that the above-entitled proceeding is remanded to Administrative Law Judge John H. West to afford the Respondent an adequate opportunity to introduce evidence regarding its defense that, at the time of its direct dealing with employee Morgan, it possessed a reasonable, good-faith belief, based on objective evidence apart from the [unlawful] poll results, that the Union lacked majority support. Thereafter, the judge shall make further findings and conclusions on the direct dealing allegation, including, if necessary, credibility resolutions, and shall recommend an appropriate remedy consistent with this Order and the decision of the court of appeals.

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[3] The court specifically remanded the case for (1) further findings on the direct dealing allegation; and (2) imposition of an appropriate remedy.

[4] In it Respondent argued that a remand hearing is unnecessary since there was no coercion there was no direct dealing, and even if there was, it would not support the issuance of a bargaining order.

The remand hearing was held in Akron, Ohio on November 2, 1995.[5] Upon the entire record thus made, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by Counsel for General Counsel and the Respondent on December 1, 1995, I make the following findings of fact and conclusions of law:

At the 90-minute remand hearing Respondent called one witness, David W. Bierce, who is the general manager of Respondent and who testified extensively at the 1990 hearing in this proceeding. In November 1995 Bierce testified that when he negotiated the May 1984 to April 1987 collective bargaining agreement with the Union, Respondent's five drivers[6] were members of the Union but Respondent's yardman, Arnold George, was not[7]; that the five drivers authorized Respondent to deduct Union dues from their paychecks and George did not; that between May 1984 and April 1987 Respondent hired four drivers or yardmen namely, Mark Noel in May 1984 as a yardman, John Walker in September 1985 to replace Willard Jordan,[8] Gerald Bond in the fall of 1986 to fill a vacancy created by the retirement of Howard Snyder in December 1985, and Bob Papoi; on April 27, 1987, as a driver; that regarding the four above-described drivers or yardman who were hired by Respondent between May 1984 and April 1987, Respondent not (1) did pay them the wage rate in the collective bargaining agreement, (2) did not place them in the Union's pension plan or health and welfare program and (3) did not make any contributions to the Union's severance fund or its Charitable, Education and Recreation Fund on their behalf; that neither the Union steward, Bauch, nor any representative of the Union ever questioned Respondent about the fact that these individuals and George were not members of the Union, had not authorized dues deductions and were not receiving the contract wage rate or the benefits under the collective bargaining agreement; that Bond and Papoi; did not authorize Respondent to deduct union dues and neither Bauch nor any Union representative questioned this; that at the time of the last hearing in January 1990 Respondent called as witnesses Stroubel, Papoi, Bolton and Wisel, all of who were either drivers or yardmen, and all of who did not receive Union benefits; that Stroubel, Bolton and Wisel, all of who were hired in 1988, did not authorize union dues deductions and there was no effort by the Union to have their union dues deducted or have them receive Union benefits; that he did not hear from the Union from April 1987 to August 1988[9]; that when Bauch voluntarily retired in

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[5] Counsel for General Counsel was not available for a conference call to set a date for the remand hearing from June 15 to June 26, 1995. When the conference call was held on June 27, 1995, he indicated that he was not be available for a hearing until October 3, 1995. At my suggestion, the remand hearing was rescheduled from October 3 to November 2, 1995, when on September 25, 1995, there was neither a continuing resolution nor a appropriations bill and the Federal government was threatened with a shutdown to begin on October 2, 1995. A subsequent continuing resolution delayed the shutdown which occurred on November 14, 1995. A second Federal government shutdown occurred on December 16, 1995 and it lasted until January 8, 1996.

[6] Henry Bauch, Howard Synder, Charles Morgan, Reese McAninch and William Jordan.

[7] The unit includes "yardmen." Bierce testified that George chose not to join the Union and therefore he did not receive the contract wage rate and he was not in the Union's pension or health plan.

[8] Bierce testified that notwithstanding Article 2, Section 2 of the collective bargaining agreement it had with the Union, Respondent did not give the Union equal opportunity with all other services to provide suitable applicants; and that no Union representative raised this issue.

[9] When it was pointed out to counsel for Respondent that this was in the record in the first hearing he indicated that he was not trying to "rehash stuff that's in the record." Subsequently

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December 1987 no successor steward was appointed; that contrary to the terms of the 1984-1987 collective bargaining agreement Respondent did not post (a) daily accumulated hours of the employees to exhibit equalization (b) the next days schedule for drivers, (c) seniority list and (d) job vacancies; that neither Bauch nor a Union representative questioned these failures to post; that no arbitrations were held and no grievances were filed from 1984 to the time of the remand hearing; that between January 1989 and March 1989 Respondent hired driver Tom Rhoden and transferred Alex Church from hardware (a non unit position) to yardman and neither of these employees authorized the deduction of union dues nor did they receive Union benefits; and that when he spoke to Morgan in March 1989 he, Bierce, was aware that Popoi, Thompson, Wisel and Stroubel had never met the Union business representative Robert DeStefano. Bierce also testified as follows with respect to why he did not believe that the Union represented the drivers or yardmen at Respondent when he dealt directly with Morgan:

> At the time I spoke with Mr. Morgan in March of 1989, he was the last person at my business who was still authorizing dues deductions.
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> Prior to that conversation, I had hired six new employees, none of whom were authorizing dues deductions and none of them were expressing any support or interest for the Union.
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> Prior to that conversation with Mr. Morgan, there was a time period of 16 months that had elapsed since I had last spoken with Mr. DeStefano.
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> Even when the contract -- when there was a bona fide labor agreement in place, the '84 to '87 contract, there were terms of that contract that were never enforced by Local 348.
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> In December of '87, my union steward, Harry Bauch, retired. There was no successor appointed. That left me to deal directly with my employees from there on out.
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> The conversation between Thompson and Bolton very clearly illustrated that my employees perceived no representation by the union. That was a guy saying what -- excuse me, saying, 'If there were a union at our place,' and the other guy responding, 'If you want to screw up a good thing, try to get a union in here.' I think that clearly represented the sentiments of my employees.
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> Prior to my conversation with Mr. Morgan, there was a substantial turnover at our business. Four of our union employees had retired or left, due to illness. There had been six people replaced. Let's say I hired six new people, none of which were authorizing any dues deductions.
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> Even through there were breaches of the contract on our part, there were never any grievances filed by Local 348 against our company.
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it was pointed out to counsel for Respondent that evidence he was attempting to put in the record regarding uniforms was also covered in my prior Decision.

> Mr. Morgan was the sole union employee at the time I had the conversation with him.
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> . . . In a negotiation session with Mr. DeStefano in April of '87, I asked him what he could do with regard to relief from non-union competition. And his answer to me was that he knew that everybody at my business was not signed up for the union and he also knew that we weren't paying scale. And he said to me that as long as he didn't have somebody at my place breathing down his neck, we could pretty well do whatever we wanted to.
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> Lastly, a poll that we took in November of 1988 confirmed what I already knew, that the union did not represent my employees at that time.
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> So, to summarize, in my conversation with Mr. Morgan in March of '89, it was absolutely clear to me to me that the union did not represent a majority, or, for that matter, hardly anybody at my place of business at that time.

On cross-examination Bierce testified that since 1971 Respondent never posted accumulated hours, schedules, a seniority list or job vacancies and this practice never changed; that Respondent did not give to the union steward a copy of (1) who Respondent was deducting dues for or (2) a list of what wages Respondent was paying its involved employees; that Respondent did not tell the union steward or the Union that it was paying into a separate pension fund; that Respondent never told the Union downtown when it hired someone new; that Respondent never notified the union when Respondent began deducting the weekly rental fees from employees' paychecks for uniforms; and that Respondent did not notify the Union when it transferred Church to the yardman position, which occurred after Respondent had withdrawn recognition from the Union.

At the remand hearing herein DeStefano testified on direct that during the term of the 1984 through 1987 collective bargaining agreement he was not made aware that any employees who were in the unit covered by the contract were not receiving the Union rate; that he was never made aware by Respondent or any individual that there were employees who were working at Respondent who were not members of the Union; that he was never made aware that dues were not being deducted from employees who were in the unit; that there is a standard remittance form and this is how the Union is informed when Respondent has a new employee; and that he never said that he knew that Respondent was not paying scale and there were employees not in the Union. On cross-examination DeStefano testified that stewards only have that responsibility which is delegated by the Union and the only responsibility that he delegated to steward Bauch was to handle the vote of the employees at Respondent regarding whether they ratified the contract; that Bauch also had the right to file a grievance or to help someone who files a grievance; that it was not part of Bauch's job at Respondent to police the collective bargaining agreement; that if he, DeStefano, had knowledge of a violation of the collective bargaining agreement then he would pursue the problem; and that Bauch never told him and he had no knowledge that Respondent's involved employees were not being paid Union wages or provided Union benefits.

Contentions

On brief, Respondent contends that Local 348 had utterly failed to police the prior collective bargaining agreement; that no Union steward was appointed at Respondent since December 1987; that Local 348 was not enforcing the Union security/checkoff clauses of the labor agreement; that there were no grievances or arbitrations; that there had been an eighteen month hiatus in collective bargaining negotiations; that Local 348 failed to contact bargaining unit members regarding a successor collective bargaining agreement; that there had been over a 100 percent turnover of employees between April 1984 and March 1989, and none of the "incumbents," save one, had exhibited any support whatsoever for Local 348; that the absence of employee comments, other than the Thompson/Boulton conversation, does not sound the death knell to Respondent's good-faith doubt in that there was not an influx of anti-union comments because, owing to Local 348's complete abandonment, there was simply never any need; that there is no reason why Respondent should not have thought Bauch was keeping DeStefano appraised of events at the Company; that while a bargaining order cannot issue

> [i]t is crystal clear that the NLRB has no intentions of balancing its presumptive bargaining order against competing interests of Respondent's employees, particularly given its edict that if Respondent is found to have violated the . . . [National Labor Relations Act (Act)] through 'direct dealing' with one of its employees, it must be met with a remedial bargaining order;

and that post-March 1989 evidence should have been received at the remand hearing and it should be considered.

General Counsel, on brief, argues that the burden of presenting facts sufficient to rebut the presumption of majority status rests upon the party seeking such rebuttal, *Petroleum Contractors, Inc.*, 250 NLRB 604 (1980); that in order to justify the serious step of the withdrawal of recognition without an election, the Board requires that the basis on which an employer relies be objectively established, *Pollock Mfg., Inc.,* 313NLRB 562 (1993); that in order to rebut the presumption of an incumbent union's majority status, an employer must show by a preponderance of the evidence either actual loss of majority support or objective factors sufficient to support a reasonable and good faith doubt of the union's majority status, *Laidlaw Waste Systems, Inc.,* 307 NLRB 1211 (1992); that as indicated by the Board in *United States Gypsum Company*, 157 NLRB 652, 655, which cites *Celanese Corporation of America*, 95 NLRB 664, 673 (1951):

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

that an employer's assertion of good faith doubt that the union no longer represents a majority must be based on objective considerations and the employer's mere assertion of it or proof of the employer's subjective frame of mind is insufficient, *Laystrom Mfg. Co.,* 151 NLRB 1482, 1484 (1965); that it is presumed that the union retains its majority status in the unit established by its collective bargaining agreement, even after the expiration of that agreement, *Automated Business Systems,* 205 NLRB 532 (1973); that in finding that the Respondent violated Section 8(a)(5) of the Act, the Board applied the standards governing previously established bargaining relationships rather than those relating to initial organization situations; that the reasonable basis for the Respondent's serious doubt as to the Union's continuing majority status cannot be based on evidence obtained on the day of the trial, but must have been known to the

Respondent at the time of its refusal to bargain and/or at the time it decided to withdraw recognition of the Union because of its good faith as to the Union's majority status, *United Electric Company*, 199 NLRB 603, 605; that absent any overt expressions by the employees of dissatisfaction with the Union as their bargaining representative, the fact that there were periods when employees may not have chosen to become members cannot be taken as proof that, at such times, the employees no longer favored the union representation they had selected and that the presumption of continued majority status became inoperative, *Harpeth Steel, Inc.,* 208 NLRB 595 (1974); that it is well settled that after the expiration of a collective bargaining agreement a union security clause does not survive absent a contractual provision continuing the agreement, *Trico Products Corp.*, 238 NLRB 1306 (1978); that Respondent's reliance on the lack of dues check offs cannot serve as a basis for a good faith doubt as to the union's majority status where it would have been unlawful for the Union to attempt to have Respondent comply with that provision of the contract as the contract had expired; that there would have been no way for the Respondent to have known at the time that these employees did or did not support the Union on the basis of dues check offs; that the Board indicated in *Club Cal-Neva*, 231 NLRB 22, (1977) that the failure of a Respondent to seek referrals has no bearing on the issue of whether a Union does not represent a majority of employees since that is a matter solely within the Respondent's control, and the failure to file grievances does not establish union inactivity in the absence of any showing that substantial numbers of employee grievances were being ignored; that the one employee comment noted at *Bierce, supra* at 632 is not evidence of lack of support for the Union since the Board will not find that an employer has supported its defense by a preponderance of the evidence if the employee statements and conduct are not "clear and cogent rejections of the union as a bargaining agent;" that statements must be convincing manifestations of a loss of majority support, *Laidlaw Waste*, *supra;* that Respondent has failed to establish that it had sufficient objective considerations to support a withdrawal of recognition and dealing directly with Morgan; and that accordingly, the remedy, as set forth in the Board Order Remanding Proceeding should issue.

Analysis

Has the Respondent introduced evidence that "at the time of its direct dealing with Morgan it was not obligated to bargain with the Union because it possessed a reasonable, good-faith belief, based on objective evidence, apart from the poll results, that the Union lacked majority support?"[10] In my opinion it has not. It did not introduce such evidence at the January 1990 hearing herein.[11] Obviously if it had, there would have been no need for this remand to

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[10] Page 6 of the Board's ORDER REMANDING PRCOEEDING. In note 5 of this ORDER the Board indicates as follows:

> The allegation of direct dealing is part and parcel of the allegation of withdrawal of recognition. That is, the direct dealing would be unlawful only if the Respondent owed a bargaining obligation at the time of the direct dealing, i.e., only if the withdrawal of recognition were unlawful. Thus, the Respondent's defense to both allegations is the same, viz., it had a good-faith doubt of majority status.

Respondent withdrew recognition from the Union in November 1988.

[11] The following conclusions were reached by me at page 632 of *Henry Bierce Co.*, supra:

> None of the asserted basis indicating the Union's asserted inactivity suffice to raise a reasonable good-faith doubt. Indeed, in my opinion, when the record is

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me. The evidence Respondent introduced at the very short remand hearing herein, contrary to the assertions of counsel for Respondent, was basically nothing more than a "rehash" of evidence introduced at the January 1990 hearing herein. Although given another opportunity to call additional witnesses and introduce additional evidence on this matter. Respondent did neither. Bierce, in testifying a second time, did little more than reiterate evidence placed in the record at the January 1990 hearing herein.[12] More than once it had to be pointed out to counsel for Respondent at the remand hearing that testimony he was eliciting from Bierce covered evidence which was already placed in the record in January 1990 and treated in my prior Decision herein.

On brief, Respondent takes the position that once sufficient evidence is presented to cast doubt on the Union's majority status, the burden of proof shifts to the General Counsel to prove that, on the critical date, the Union in fact represented a majority of the involved employees. This does not accurately reflect the Board's position which was clearly set forth in *Automated Business Systems*, 205 NLRB 532 (1973). There the Board in note 18 pointed out that the Court of Appeals for the Sixth Circuit in *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328 (1973) applied existing law when the court concluded "[a] good-faith doubt exculpates the employer even if the Union in fact represented a majority of the employees. . . . "

In *Bartenders Association of Pocatello*, 213 NLRB 651, 651-652 (1974) the Board set forth the legal principals involved herein as follows:

> The underlying legal principles to be applied in situations where an employer seeks to withdrawn recognition from an established bargaining representative

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considered as a whole, they would not even meet the less stringent 'loss of support' standard [set forth by the Court in *Thomas Industries v. NLRB,* 687 F.2d 863, 868 (6th Cir. 1982)]. In my opinion, Respondent has failed to establish that it had a good-faith doubt of the Union's majority status reasonably premised upon objective considerations.

And the Board in its note 3 at page 622 of that Decision concluded as follows:

> . . . . no. . . factors indicating a change in employee sentiments, supports the Respondent's contentions that it had substantial, objective evidence of a loss of support here. Indeed, the Respondent mustered only one negative employee comment as evidence that employee attitudes toward the Union had changed.

While these conclusions refer to the poll, it was taken in the same month and just before Respondent withdrew recognition of the Union.

[12] His testimony on direct took about 45 minutes. The few matters he covered for the first time at the remand hearing fall into one of the categories covered in my first Decision herein. For example, Respondent's failure to give the Union equal opportunity with all other sources to provide suitable applicants falls into one of the categories already treated, namely, breaches of the collective bargaining agreement by Respondent. Bierce's most recent testimony would not change my conclusions with respect to whether the breaches are objective evidence that the Union lacked majority support. Additionally, as pointed out by Counsel for General Counsel, Board in *Club Cal-Neva,* 231 NLRB 22 (1977) concluded that the failure of Respondent to seek referrals from the Union has no bearing on the issue at hand here since that is a matter solely within the Respondent's control. This conclusion is not negated by the fact that in that case there was no provision in the contract calling for such referrals.

are well summarized in *Terrell Machine Company*, 173 NLRB 1480, 1480-81 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), where the Board stated:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues.1 This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees.2 Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status;3 or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status. As to the second of these, i.e., 'good faith doubt,' two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations4 and it must not have been advanced for the purpose of gaining time in which to undermine the union.5 [This second point means, in effect, the assertion of doubt must be raised 'in a context free of unfair labor practices.' See *Nu-Southern Dyeing & Finishing, Inc.,* 179 NLRB 573, fn. 1 (1969), enfd. in part 444 F.2d 11 (C.A. 4, 1971).]
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> 1 *Celanese Corporation of America,* 95 NLRB 664, 671-672.
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> 2 Id.
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> 3 'Majority representative status' means that a majority of employees in the unit wish to have the union as their representative for collective-bargaining purposes. *Id.*
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> 4 See *Laystrom Manufacturing Company,* 151 NLRB 1482, 1484, enforcement denied on other grounds (sufficiency of evidence) 359 F.2d 799 (C.A. 7, 1966); *United Aircraft Corporation*, 168 NLRB No. 66 (TXD); *N.L.R.B. v. Gulfmont Hotel Company,* 362 F.2d 588 (C.A. 5, 1966), enfg. 147 NLRB 977. And cf. *United States Gypsum Company*, 157 NLRB 652.
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> 5 *C & C Plywood Corporation,* 163 NLRB No. 136; *Bally Case and Cooler, Inc.* 172 NLRB No. 106.

The above principles set out in *Terrell* are equally applicable whether the union has been certified by the Board, or, as here, recognized as the bargaining representative of the employees by Respondent without Board certification.3 In the latter situation, the existence of a prior contract, lawful on its face, raises a dual presumption of majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.4 Following the expiration of the contract, as here, the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so,5 here Respondent.

3 See *Emerson Manufacturing Company, Inc.,* 200 NLRB 148 (1972); *Cantor, Bros., Inc.,* 203 NLRB 774 (1973).

4 *Shamrock Dairy, Inc., et al.,* 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

5 *Barrington Plaza and Tragniew, Inc.,* 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom. N.L.R.B. v. Tragniew, Inc., and Consolidated Hotels of California*, 470 F.2d 669 (C.A. 9, 1972).

Bierce's testimony regarding whey he did not believe that the Union represented the drivers and yardmen at Respondent when he dealt directly with Morgan is quoted above. As noted above, these matters have already been treated in my first Decision herein. Nonetheless, some of Bierce's remand testimony warrants comment herein. Contrary to Bierce's position, there is no requirement that employees "express" support or interest in the Union. And certainly, the lack of such expressions cannot be construed as a convincing manifestation of a loss of majority support. The retirement of steward Bauch did not, as Bierce testifies, leave him to deal directly with Respondent's unit employees regarding matters whcih he should have resolved with DeStefano. Turnovers in a non-strike situation and the fact that employees hired before April 30, 1987, did not authorize dues deductions cannot serve as a basis for a good faith doubt. *Triplett Corporation*, 234 NLRB 985 (1978) and *United Electric Company*, 199 NLRB 603 (1972). And after the 1984-1987 collective bargaining agreement expired the union security provision was no longer effective and there was not even an obligation to deduct dues. As indicated by the Board in *Club Cal Neva*, 231 NLRB 22, 24 (1977) "[t]he failure to file grievances does not establish union inactivity in the absence of any showing that substantial numbers of employee grievances were being ignored." And the fact that Bierce now testifies that when he dealt directly with Morgan he, Bierce, was aware that four specified employees had never met DeStefano does not, either standing alone or considered in conjunction with other evidence of record, warrant a finding that Respondent had a reasonable good faith belief based on objective evidence that the Union lacked majority support. It is noted that Bierce is not now testifying that he had this knowledge when Respondent withdrew recognition from the Union in November 1988. The fact that Bierce did not give the Union notice that Respondent was breaching the collective bargaining agreement undermines its position regarding the inactivity of the Union.[13] For the reasons set forth (1) in my prior Decision herein, (2) above, and (3) in General Counsel's brief on remand as described above, Respondent has not met in burden of proof. The factors cited by Respondent, whether considered individually or collectively, do not constitute sufficient objective considerations to warrant a good-faith doubt of the Union's continued majority support. Therefore, the Respondent's withdrawal of recognition and direct dealing with Morgan violated the Act as alleged.

Conclusions of Law

[13] DeStefano's above-described direct testimony on remand regarding what he was not made aware of and what he did not say is credited. Bierce admitted that Respondent did not give the Union or the steward actual notice of the fact that Respondent was breaching the collective bargaining agreement. And other than referring to its long standing policy of not posting certain items, Respondent did not even attempt to show how the Union would have obtained constructive notice.

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act, and has at all times since about 1974 been the representative for purposes of collective bargaining of a majority of the employees in the appropriate unit consisting of all mixer drivers (agitator and nonagitator), building supply drivers (single axle and multiple axle), warehousemen, yardmen, batchmen (manual control) and owner operators, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

3. By conducting a poll among its employees in November 1988 concerning whether they desired to be represented by the Union without giving advance notice to the Union of the time and place the poll was conducted, Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

4. By withdrawing recognition from the Union in November 1988, Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

5. By dealing directly with an employee in derogation of the employee's bargaining representative with respect to the employee's benefits, including his retirement, and other terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act.

The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has committed unfair labor practices, I shall order it to cease and to take affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be ordered to recognize and, on request, bargain with the Union as the bargaining representative of the employees in the appropriate unit and put in writing and sign any agreement reached on terms and conditions of employment and to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Supplemental Decision[14]

ORDER ON REMAND

The Respondent, The Henry Bierce Co., Akron, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive bargaining representative of all of the employees in the unit described below by failing to provide the Union with reasonable

[14] 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.

advance notice of the time and place of the poll of unit employees taken for the purpose of determining their desire for continued representation by the Union; by conducting an unlawful poll for such purpose; by unlawfully withdrawing recognition from the Union; and by dealing directly with an employee over benefits, including his retirement, and other terms and conditions of employment

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union. No. 348 a/w International Brotherhood of Teamsters, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody such understanding in a signed agreement:

> [A]ll mixer drivers (agitator and nonagitator), building supply drivers (single axle and multiple axle), warehousemen, yardmen, batchman (manual control) and owner operators, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its Akron, Ohio facility, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C. January 31, 1996

John H. West
Administrative Law Judge

[15] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WILL NOT refuse to bargain with the Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, Warehousemen and Helpers of America as the exclusive bargaining representative of all of the employees in the unit described below by failing to provide the Union with reasonable advance notice of the time and place of the poll of unit employees taken for the purpose of determining their desire for continued representation by the Union; by conducting an unlawful poll for such purpose; by unlawfully withdrawing recognition from the Union; and by dealing directly with an employee over benefits, including his retirement, and other terms and conditions of employment.

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

WE WILL recognize and, on request, bargain collectively with Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody such understanding in a signed agreement:

> [A]ll mixer drivers (agitator and nonagitator), building supply drivers (single axle and multiple axle), warehousemen, yardmen, batchman (manual control) and owner operators, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

THE HENRY BIERCE COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199–2086, Telephone 216–522–3729.