Williams Enterprises, Inc., a Division of Williams Industries, Inc. *and* Local Lodge 10 of the International Association of Machinists & Aerospace Workers, AFL–CIO, CLC. Case 5–CA–19408

September 30, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case, on remand to the Board from the United States Court of Appeals for the District of Columbia, presents several questions concerning the Respondent's refusal to recognize the Union.[1] The Board has accepted the court's remand and therefore regards the court's opinion as the law of the case. Having considered the Board's original decision in light of the court's opinion, we reaffirm the findings, as modified and explained below, that the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union, that an employee decertification petition did not excuse the Respondent's refusal to bargain, and that the traditional, appropriate remedy for such a violation is an affirmative bargaining order.

Background of Facts

On July 13, 1987,[2] the Respondent, Williams Enterprises, agreed to purchase a steel fabricating plant in Richmond, Virginia, from Bristol Steel and Iron Works, Inc. At the time, the Union had represented a unit of production, maintenance, and warehouse employees at that plant for years, apparently including the time of succession from a prior employer to Bristol. On July 14, Bristol's plant manager, John Barnes, and plant superintendent, James Johnson, met with all employees to announce the purchase agreement and plans to close the plant in transferring control to the Respondent. Barnes and Johnson invited the employees to file applications for jobs with the Respondent at the reopened plant.

After the meeting, Union Steward Gabe Bullock Jr. relayed notice of the sale to the Union's business representative, Stephen Spain. Sometime in July, after the notification of sale, Spain told Plant Manager Barnes that he ''would like Local 10 to represent the employees of the new company.'' Spain further conveyed the desire ''to have an opportunity to discuss, perhaps negotiate with'' an official of the Respondent. Barnes delivered the message to the president of the Respondent's fabrication division. The Respondent did not reply to the Union's request.

In the meantime, all 83 Bristol production unit employees applied for jobs with the Respondent. On August 21, Plant Superintendent Johnson and Plant Manager Barnes met with the 44 Bristol employees who had been selected as ''favored'' for possible employment with the Respondent. One employee asked if the Respondent's employees would be represented by the Union. Johnson replied that the Respondent ''did intend to operate the Richmond plant as a nonunion plant.''[3]

Bristol ceased operating the plant on September 30. The Respondent resumed operations on the next day. Its new work force increased until October 15, when it reached a relatively stable number of 39 employees. On that date, 35 of these employees came from the predecessor. By November 30, the Respondent had hired 36 of the 44 former Bristol employees who had attended the August 21 meeting.

On December 14, the Union filed a charge with the Board alleging, inter alia, that the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union. Subsequently, but prior to December 31, Barnes, whom the Respondent had retained as plant manager, called a meeting to read and discuss the Union's allegations. One employee expressed opposition to union representation and inquired what employees could do about it. Barnes replied ''that they could get a petition together but that it had to be a petition that they had framed themselves expressing exactly how they felt. . . . We told them it could be our defense. . . . I said we'd be glad to have the petition.''

On December 31, the Respondent received a decertification petition signed by a majority of unit employees. On January 25, 1988, the Union withdrew its unfair labor practice charges without explanation. On February 2, the Union sent the Respondent a letter which stated, in relevant part:

> [W]e demand you bargain with us in good faith to reach a new agreement and . . . we stand ready to negotiate in good faith with you for a new collective bargaining agreement at any time. A prompt reply would be appreciated.

Two days later, the Union refiled its unfair labor practice charge. On February 16, Barnes rejected the Union's request for bargaining. He asserted that a ma-

[1] On January 16, 1991, the National Labor Relations Board issued its original Decision and Order in this proceeding, finding that the Respondent was a successor employer and that it had violated Sec. 8(a)(1), (3), and (5) of the Act. 301 NLRB 167. The Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia, and the Board filed a cross-petition for enforcement of its Order. On March 3, 1992, the court enforced certain of the Board's unfair labor practice findings, reversed others, and remanded to the Board for further consideration in light of the court's opinion. *Williams Enterprises v. NLRB*, 956 F.2d 1226.

On May 21, 1992, the Board advised the parties that it had accepted the remand and invited statements of position. Thereafter, the Respondent and the General Counsel filed statements of position.

[2] All dates hereafter refer to 1987, unless otherwise indicated.

[3] Johnson was an agent of the Respondent when he made that statement.

jority of the Respondent's employees had stated that they did not wish to be represented by the Union.

In its original Decision and Order, the Board affirmed the administrative law judge's findings, inter alia, that: the Respondent was a successor to Bristol; Union Agent Spain made a valid, albeit imprecise, demand for bargaining to Plant Manager Barnes in July 1987; the Respondent, through Barnes, violated Section 8(a)(1) by his August 21 declaration to employees of the Respondent's intent to operate nonunion; the Respondent, as a successor, had a legal obligation to recognize and bargain with the Union as of October 15, when it had hired a substantial and representative complement of employees; the Union's December 14 filing of unfair labor practice charges reaffirmed its demand for bargaining; Barnes did not violate Section 8(a)(1) by his discussion of a decertification petition; and the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union on and after October 15.

The Board also affirmed the judge's finding that the decertification petition was tainted, but it modified the judge's rationale to rely not only on Johnson's August violation of Section 8(a)(1) but also on the Respondent's 2-1/2-month refusal to recognize the Union. Finally, as noted in a footnote, the Board modified the judge's recommended remedy, which had only directed the Respondent to cease and desist from refusing to recognize and bargain with the Union. The Board added language to the Order which affirmatively directed the Respondent to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

In review of the Board's decision, the D.C. Circuit affirmed the Board's finding that the Respondent was a successor to Bristol and had a duty to recognize and bargain with the Union, on request, after October 15, 1987. However, the court rejected the Board's finding that Spain made a valid request for bargaining in his July 1987 conversation with Barnes. The court therefore found that the Respondent did not refuse a request to bargain *as of October 15*. The court was satisfied that the Union's February 2, 1988 letter to the Respondent could be a valid bargaining demand, but it remanded this previously unresolved issue to the Board for initial determination.

The court further stated that, even if the Union had made a valid request for bargaining on this later date, the Respondent would not have a duty to bargain with the Union if it had a good-faith doubt of the Union's majority status. The court found that the December 31, 1987 decertification petition, signed by a majority of the employees, created such a good-faith doubt unless it was tainted by a prior unfair labor practice. Having rejected the finding of an 8(a)(5) violation on October 15, the sole antecedent unfair labor practice found by the Board was Johnson's August 1987 statement about the Respondent's intent to operate as a nonunion plant. The court affirmed the unfair labor practice finding, but expressed the view that the Board had failed to engage in a causal analysis to explain why this 8(a)(1) violation, standing alone, had tainted the petition signed 4 months later.

Finally, in the event that the Board reaffirmed its finding that the Respondent violated Section 8(a)(5), the court directed the Board to explain and justify its issuance of an affirmative bargaining order. It stated that the Board had never declared that an affirmative bargaining order, with its implicit bar on decertification for a reasonable period of time, is the standard remedy in the successor context. The court distinguished the type of affirmative bargaining order in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), which can issue only in limited circumstances and carries with it a bar on decertification from ''a simple remedial order that, as a result, requires bargaining'' but does not bar decertification. *Williams Enterprises v. NLRB*, supra at 1237. Relying, inter alia, on *Peoples Gas System v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), the court stated that the Board must provide a reasoned explanation for an affirmative bargaining order because of its intrusive impact on employees' right to reject union representation.

Analysis

1. We accept as the law of the case the court's view that the July 1987 telephone conversation between Business Agent Spain and Plant Manager Barnes was not a valid request for bargaining. Prior to addressing the sufficiency of the Union's letter of February 2, 1988, as a request to bargain, however, we refer to a finding by the judge which the Board affirmed in its original decision and the court did not mention in its opinion. As previously noted, the Union filed an unfair labor practice charge on December 14, 1987. The charge alleged, inter alia, that the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union. The judge specifically found that this charge reaffirmed the Union's earlier demand for recognition.

The Board has on several occasions found that the filing of a refusal-to-bargain charge reaffirms a union's earlier request for recognition.[4] Concededly, in the instant case, there was no prior demand for recognition. However, the Board has also held that an 8(a)(5) charge, standing alone, can constitute a demand for recognition.[5] Alternatively, the 8(a)(5) charge in this

[4] E.g., *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 53 (1987); *Enterprise Products Co*., 265 NLRB 544, 563 (1982).

[5] *Sterling Processing Corp*., 291 NLRB 208, 217 (1988), citing *Roberts Electric Co*., 227 NLRB 1312, 1319 (1977); *Sewanee Coal Operators Assn*., 167 NLRB 172 fn. 3 (1967).

case clarified the remarks by Spain in his telephone conversation with Barnes in July. Although these remarks were too vague to constitute a demand for recognition, there could be no doubt as to the Union's position after the filing of the 8(a)(5) charge. The charge clearly alleged that the Respondent was committing an unfair labor practice by not recognizing the Union as the exclusive bargaining representative. Indeed, it is clear from Barnes' discussion with employees about the charge and the potential ''defense'' of a decertification petition that he understood that the Union was demanding recognition and bargaining.[6]

Based on the foregoing, we find that the Respondent was obligated to recognize and bargain with the Union as of December 14, 1987. In the alternative, we find that the Union made a valid bargaining demand on February 2, 1988. As the court has acknowledged, the Union's letter to Barnes on that date ''specifically requests recognition, states that the Union was ready to negotiate at any time, and asks for a prompt reply.'' 957 F.2d at 1234. Moreover, the Respondent clearly recognized this letter as a bargaining demand in its February 16 reply letter.

Thus, the Respondent refused to bargain after December 14, 1987, or, at the latest, after February 2, 1988. This issue of whether such refusals were unlawful requires evaluation of the December 31, 1987 decertification petition.

2. From October 15, 1987, until at least December 31, 1987, the incumbent Union undisputedly enjoyed the legal presumption of continuing majority support. ''[A]n employer may rebut that presumption by showing that, at the time of the refusal to bargain, either (1) the union did not *in fact* enjoy majority support, or (2) the employer had a 'good faith' doubt, founded on a sufficient objective basis, of the union's majority support.'' *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 778 (1990) (emphasis in original). We have found that the Respondent refused the Union's bargaining demand, made clear by its December 14 unfair labor practice charge. Since the employee petition was received on December 31, it is clear that the basis for rebuttal of the majority presumption did not exist as of ''the time of the refusal to bargain,'' i.e., December 14. Thus, Respondent violated Section 8(a)(5) by refusing on and after December 14 to bargain with the Union.[7]

Assuming, arguendo, that the court disagrees with our finding that the Respondent unlawfully refused to bargain on December 14, 1987, we conclude that there was a refusal to bargain in February 1988. In our view, the decertification petition of December 31, 1987, was tainted by antecedent unlawful conduct. In this regard, we now affirm the judge's original finding in this case that Plant Superintendent Johnson's August 1987 violation of Section 8(a)(1), standing alone, tainted the decertification petition. In cases involving unfair labor practices other than a general refusal to bargain, the Board has identified several factors as relevant to determining whether a causal relationship exists between unremedied unfair labor practices and the subsequent expression of employee disaffection with an incumbent union. These factors include:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.[8]

It is true that 4 months passed between Johnson's unlawful statement, to all ''favored'' applicants from the Bristol work force, that the Respondent ''did intend to operate the Richmond plant as a nonunion plant'' and the decertification petition effort in December 1987. However, the mere passage of time would not reasonably dissipate the effects of the unfair labor practice in the circumstances of this case. The Respondent retained Barnes, who was present when Johnson made his statement, as its plant manager. In December, employees who had attended the August meeting comprised a substantial majority of the Respondent's work force. Furthermore, Barnes convened these

[6] Member Raudabaugh would find that a refusal to recognize and bargain charge, by itself, would not be sufficient to constitute a valid request for recognition, but he agrees that the charge here clarified and reaffirmed the bargaining demand that Spain had attempted to convey in July 1987.

[7] This case is therefore distinguishable from *Sullivan Industries*, 302 NLRB 144 (1991), enf. denied 957 F.2d 890 (D.C. Cir. 1992), where the successor employer initially refused unlawfully to recognize the incumbent union but thereafter recognized the union prior to withdrawing recognition based on a decertification petition signed by a majority of employees. In that case, the court agreed that the petition could not be used as post hoc justification for the initial refusal to bargain. In light of the intervening circumstance of recognition, however, the court found that the Board had failed adequately to explain why the respondent could not rely on the petition received prior to its ultimate withdrawal of recognition.

There was no comparable interlude of lawful recognition in this case. Therefore, we see no separate withdrawal of recognition issue arising after the Respondent's receipt of the decertification petition. Assuming, arguendo, that the court believes that we must still consider whether the Respondent's misconduct came to an end prior to the time it received and relied on the petition, we find it reasonable to infer that the Respondent's continuous and unremedied refusal to bargain with the Union and its unremedied 8(a)(1) conduct caused the disaffection expressed in the petition. *Sullivan Industries v. NLRB*, supra at 902 fn. 4. See also, e.g., *Fall River Dyeing Corp. v. NLRB*, supra at 49–50. *Bay Area Mack*, 293 NLRB 125, 134–135 (1989).

[8] *Master Slack Corp*., 271 NLRB 78, 84 (1984). See also *Olson Bodies*, 206 NLRB 779 (1973).

employees at a meeting in December to discuss the Union's unfair labor practice charge and told them that he would ''be glad'' to have a decertification petition as a defense to the charge. Although we have found that Barnes did not violate the Act by this conduct, we find it reasonable to infer that his statements served to remind many employees of Johnson's earlier unlawful declaration of the Respondent's opposition to unionization. The decertification petition followed on the heels of this meeting.

The nature of Johnson's unlawful statement significantly enhanced the probability that it would have lasting effects on employees. He did not make a passing remark to a few employees. Instead, he was responding to a direct question in a meeting with a group of employees who faced unemployment if the Respondent did not retain them. As stated by the judge, the message that the Respondent would remain nonunion in the future ''naturally conveys to employees the notion that any conduct by them which is not consistent with that cause may jeopardize their employment possibilities or security.''[9] Obviously, such a message does not just entail some discrete aspect of unionization. It strikes at the heart of the relationship between employees and the Union. It would reasonably tend to cause employees disaffection from the Union.

Finally, in considering the effects of Johnson's unlawful statement on employee morale and union activities, we note that the Union had represented employees at the Richmond plant for years, apparently including succession from a prior employer to Bristol. There is no evidence of growing employee disaffection with the Union during this period. Yet, after the unlawful statement and the reminder of it in December, the employees sought disaffiliation from the Union. Absent any proof of a plausible alternative explanation, we find it reasonable to infer that Johnson's statement of the Respondent's intent to operate nonunion contributed to the disaffection from the Union.

Based on the foregoing, we find that a causal relationship existed between Plant Superintendent Johnson's violation of Section 8(a)(1) on August 21, 1987, and the decertification petition received by the Respondent on December 31, 1987. We also find that the Respondent is precluded from relying on the petition to assert a good-faith doubt of the Union's majority status because the Respondent's own unfair labor practice significantly contributed to the loss of majority support. Accordingly, we conclude that, even assuming no prior unlawful refusal to recognize the Union, the Respondent violated Section 8(a)(5) by refusing on and after February 16, 1988, to recognize and bargain with the Union.

3. Having found that the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union, we shall include in the Order a provision affirmatively requiring the Respondent to bargain in good faith with the Union. In accord with judicial and Board precedent discussed below, we hold that an affirmative bargaining order is the traditional appropriate remedy for restoration of the status quo after the unlawful refusal of an employer to recognize and bargain with an incumbent union which was the majority representative within the meaning of Section 9(a). This remedy applies regardless of whether the wrongdoing employer is original or a successor to the statutory obligation to bargain with the incumbent union.

Our determination of this issue involves an exercise of the remedial authority vested by Congress in the Board through Section 10(c) of the Act. It is well established that ''the remedial power of the Board is a 'broad discretionary one, subject to limited judicial review.''' *NLRB v. Rutter-Rex Mfg. Co*., 396 U.S. 258, 262–263 (1969) (quoting *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964)).

For over 50 years, an affirmative bargaining order has been the standard Board remedy for an employer's unlawful refusal to bargain with a union which, as of the date of the refusal, enjoys the status of a 9(a) collective-bargaining representative. See, e.g., *Inland Steel Co*., 9 NLRB 783, 814–816 (1938). This remedy is warranted, even if the union has lost its majority support after the unfair labor practice and even though the order will operate to preclude, for a reasonable period, an election to test majority status. In such cases, the Board's paramount concerns are to restore to the union the bargaining opportunity which it should have had in the absence of unlawful conduct and to prevent the possibility that the wrongdoing employer would ultimately escape its bargaining obligation as the result of the predictably adverse effects of its unlawful conduct on employee support for the union.

The Supreme Court has twice expressly endorsed the Board's issuance of an affirmative bargaining order when a respondent has unlawfully refused to bargain with a union which represented an employee majority at the time of the refusal. In *NLRB v. Lorillard Co*., 314 U.S. 512 (1942), the Court held, per curiam, that the Board had the discretion to issue an affirmative bargaining order. It summarily reversed the lower court of appeals' attempt to modify the order to permit an election to determine whether the incumbent union had lost its majority due to events subsequent to the unlawful refusal to bargain. Two years later, in *Franks Bros. Co. v. NLRB*, 321 U.S. 702, (1944), the Court enforced the Board's affirmative bargaining order regardless of evidence that the incumbent union had lost its majority support in the interval between the filing of the unfair labor practice charges and the complaint. The Court stated:

[9] *Williams Enterprises*, 301 NLRB at 173.

Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions. The Board's study of this problem has led it to conclude that, for these reasons, a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain. . . .

[I]n this case and in similar cases [the Board has adopted] a form of remedy which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement. See 29 U.S.C. § 160 (a) and (c).

Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See *Great Southern Trucking Co. v. NLRB*, 139 F.2d 984, 987. But, as the remedy here in question recognizes, 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. See *NLRB v. Appalachian Power Co.*, 140 F.2d 217, 220–222; *NLRB v. Botany Worsted Mills*, 133 F.2d 876, 881–882. After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationship. Id; see 29 U.S.C. § 159 (c).[10]

The same fundamental concerns for restoration of the union's bargaining opportunity and for preventing the employer from profiting from predictably adverse effects of its wrongdoing apply to the instant case involving an unlawful refusal to bargain with an incumbent union.[11]

The D.C. Circuit's opinion in this case relies heavily on the rationale of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We find that the bargaining order situation addressed in *Gissel* presents significantly different remedial considerations from the situation of an unlawful refusal to bargain with an incumbent union which enjoys presumptive majority status based on prior certification or recognition. In *Gissel* cases, a nonincumbent union seeks initial recognition as a collective-bargaining representative. An employer then engages in unfair labor practices which raise a question whether a fair and free election can be held in the foreseeable future to ascertain majority employee preferences about union representation. If the unfair labor practices are such that a fair election cannot likely be held, the Board enters a remedial bargaining order. Because such an order has the effect of making a previously nonincumbent union the bargaining representative, there is a need to make a special showing as to the impact of the unlawful conduct on the prospects for a fair election. By contrast, the instant case involves a union that was the incumbent Union under the predecessor. And, in light of well-settled successorship principles, the Union remained the incumbent under the successor and was entitled to bargaining rights on request. Where, as here, the employer refused to bargain with an incumbent, the remedy is to restore the status quo ante the refusal, i.e., to reseat the union as

[10] 321 U.S. at 704–706.

[11] We also do not infer any substantial limitation on the Board's traditional remedial practice from the comment in *Fall River Dyeing Corp. v. NLRB*, supra at 51 fn. 18, that

> [W]e assume that if the employer were to refuse to recognize a union on the basis of its reasonable good-faith belief that it had not yet hired a ''substantial and representative complement,'' the Board would likewise enter a remedial order . . . with no collateral consequences such as a decertification bar.

Without commenting on the assumption expressed in the Court's dictum, it has no apparent relevance to cases such as the present one in which the Respondent's refusal to bargain was not based on a mistaken view about whether it had hired a ''substantial and representative complement'' of employees. Indeed, the Court enforced the affirmative bargaining order in *Fall River* against the respondent employer which, ''rather than being a successor confused about when a bargaining obligation might arise . . . took an initial position—and stuck with it—that it *never* would have any bargaining obligation with the Union.'' 482 U.S. at 53–54.

the incumbent. There is no need for a special showing of *Gissel* factors.[12]

Finally, in responding to the court's concerns about the effects of an affirmative bargaining order on employee decertification efforts, we emphasize that in both the *Gissel* situation and in the ''incumbent'' situation, the bargaining order will preclude a challenge to the union's majority status only for a reasonable period of time. The Supreme Court has clearly recognized this insulated remedial bargaining period as a reasonable limitation of free choice.[13] It is true that, if the parties execute a collective-bargaining agreement during this period, the decertification bar may extend for as much as 3 years of the contract term. The same contract bar would have arisen, however, if the Respondent had bargained initially to agreement with the Union rather than engaging in unfair labor practices. We see no reason why the Union, and the employee majority which previously supported it, should be deprived of the prospect of a stable bargaining relationship during the contract term solely as the result of the Respondent's wrongdoing.[14]

Based on the foregoing, we conclude that an affirmative bargaining order is the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees. Having found that the Respondent unlawfully refused to bargain with the Union on and after December 14, 1987, or, alternatively, on and after February 16, 1988, we shall reaffirm the Board's prior Order that the Respondent recognize and, on request, bargain in good faith with the Union.

ORDER

The National Labor Relations Board reaffirms its original Order, reported at 301 NLRB 167 (1991), and orders that the Respondent, Williams Enterprises, Inc., a Division of Williams Industries, Inc., Richmond, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

CHAIRMAN STEPHENS, concurring.

I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and that a bargaining order is the proper remedy. I premise my finding of a violation on the following considerations.

I accept, of course, as law of the case the court's conclusion that Union Representative Spain's diffident expression in July 1987 of his desire for the Union to represent the Respondent's employees did not rise to the level of a demand for bargaining. I would find, however, that when the Union filed and served its refusal-to-bargain charge on December 14, the Respondent had before it an effective demand for bargaining. The Respondent's failure to recognize and agree to bargain with the Union at that point violated Section 8(a)(5) and (1) of the Act.

Rather than comply with its statutory obligation, the Respondent chose to call a meeting of its employees to discuss, without the presence of any union representative, the Union as the instigator of legal charges against the employer.[1] Plant Manager Barnes read to the employees both the refusal-to-bargain allegations and the allegations that the Respondent had unlawfully refused to hire former union stewards Bullock and Deloatch. After he made clear the Respondent's view that it had no obligation to bargain with the Union or to bring the stewards back to the plant, one employee asked Barnes what could be done to get rid of the Union. Barnes helpfully suggested that an employee petition ''could be our defense,'' and such a petition duly appeared a few days later.

I would not allow the Respondent to rely on that petition as a manifestation of loss of union majority. In reaching this conclusion, I do not rely on the unlawful statements made by Plant Superintendent Johnson on August 21. If the Respondent had complied with its bargaining obligation when it arose and was subsequently presented with a union-repudiation petition signed by a majority of the employees, I would not find the petition to be tainted, because, in my view the August remarks were too remote to constitute a taint.[2]

[12] *Peoples Gas Systems v. NLRB*, supra, is distinguishable. As subsequently described by the court in *NLRB v. Creative Food Design*, 852 F.2d 1295, 1303 (D.C. Cir. 1988),

> *Peoples Gas* addressed a singular factual situation. . . . In that case, following the employer's unlawful withdrawal of recognition, the union requested, conducted, and lost an election. To put the matter simply, the ordinary presumption of continuing majority support was rebutted by an explicit and definitive expression of employee preference.

By contrast, in the present case, there was no intervening Board election. There is not even evidence of a valid decertification petition having been filed with the Board. As previously stated, the petition received by the Respondent on December 31, 1987, was fatally tainted by its unfair labor practices.

[13] *Franks Bros. Co. v. NLRB*, supra at 705–706; *Gissel Packing Co.*, supra at 613.

[14] Moreover, ''there 'is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after [a reasonable period of bargaining] has passed.''' *NLRB v. Gissel Packing Co.*, supra at 612 fn. 33, quoting Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 135 (1964).

[1] There was no union representative present not only because the Respondent had failed to promptly comply with its statutory obligation to recognize the Union, but also because the two employees who had been union stewards in the predecessor's operation—Gable Bullock and Melvin Deloatch—had been discriminatorily denied jobs with the Respondent.

[2] An employer may rely on such a petition if it is received ''following recognition,'' i.e., is not tainted by the employer's refusal to recognize the union when the obligation arose. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 at 41 fn. 4 (1987), citing *Harley-Davidson Co.*, 273 NLRB 1531 (1985).

But, as noted above, instead of complying with its bargaining obligation, the Respondent sent its manager out to make clear to the employees its view that it was not obligated to comply. Because this refusal to bargain preceded the petition, the following reasoning, which has been expressly approved by the Supreme Court, applies:

> [N]o useful purpose is served by permitting [an] employer to defend the propriety of an earlier refusal to bargain by relying on subsequent events that have nothing to do with the refusal. Furthermore, once it has been determined that an employer has unlawfully withheld recognition of an employees' bargaining representative, the employer cannot defend against a remedial bargaining [order] by pointing to an intervening loss of employee support for the union when such loss of support is a foreseeable consequence of the employer's unfair labor practice.[3]

Accordingly, I join my colleagues in finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and I agree, for reasons stated in the opinion for the majority, that we should remedy that violation by issuing a bargaining order.

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[3] *NLRB v. Fall River Dyeing Corp.*, 775 F.2d 425, 433 (1st Cir. 1985) (footnotes omitted), affd. in *Fall River Dyeing Corp. v. NLRB*, supra, 482 U.S. at 51 fn. 18.