DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

301 NLRB No. 19

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

JANUARY 16, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND RAUDABAUGH

On May 22, 1989, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed cross-exceptions and a brief in support of cross-exceptions and in response to the Respondent's exceptions. The Charging Party filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,\1\ and conclusions and to adopt the recommended Order as modified.\2\

\1\The Respondent, Acting General Counsel, and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings, we disavow the subjective observations made in fns. 6, 9, and 14 as well as his gratuitous comments about the educational and intellectual sophistication of the employee witnesses.

Further, in agreeing with the judge that the Respondent is a successor employer, we find it unnecessary to rely on his comments, drawn from his reading of Fall River Dyeing Corp. v. NLRB, 482 U.S. 27 (1987), that the Supreme Court there indicated (1) that ``a significant degree of liberality [is] appropriate to the operation of the [successorship] doctrine''; (2) that the Court allegedly approved ``what fairly [may] be regarded as relaxed corollary principles of when and how the [successorship] obligation may attach''; and (3) that the Court had a ``strong . . . disposition in favor; of imposing successorship obligations.'' Nor do we find it necessary, in assessing whether there is a ``substantial continuity'' between the two enterprises, to rely on the judge's comment that ``it seems logical . . . to begin with the assumption that employees who have in the past elected (or accepted) union representation in one enterprise will be inclined to prefer representation in the succeeding business.'' Rather, we are in agreement with the judge, pursuant to his findings at sec. I,A, pars. 18-19, and as elaborated in his decision, that the General Counsel established a ``substantial continuity'' between the predecessor and the Respondent.

Finally, in the last paragraph of the section of the decision entitled ``Did Respondent Violate Section 8(a)(5) by Refusing to Recognize the Union?'', the judge referred to fn. 18 of Fall River Dyeing. It is evident from his discussion that the judge meant to refer to fn. 19 of Fall River. We do not find that this misstatement has any

effect on the judge's ultimate conclusions here.

\2\The judge's recommended Order includes a provision requiring the Respondent to cease and desist from violating the Act ``in any other manner.'' We find that the Respondent's unfair labor practices do not warrant the use of such a ``broad'' order. Consequently, we shall substitute the Board's traditional narrow remedial language, requiring the Respondent to cease and desist from violating the Act ``in any like or related manner.'' See Hickmott Foods, 242 NLRB 1357 (1979).

We shall also modify the recommended Order to include affirmative bargaining language. A new notice reflecting both of the modifications discussed above will be substituted for the judge's recommended notice.

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1. The Respondent argues in its exceptions, citing Fremont Ford, 289 NLRB 1290 (1988), that the complaint is facially defective here because it alleges that the Union's demand for recognition occurred before the Respondent commenced operations at its Richmond, Virginia plant about October 1, 1987. Contrary to the Respondent, we find that the present case is factually distinguishable from Fremont. Here, the judge found that the Union made its bargaining demand ``sometime between'' July 15 and September 30, 1987. The evidence shows that on or about July 13, 1987, before the Union acted, the Respondent had executed an agreement to purchase the predecessor's assets which essentially consisted of the Richmond plant involved in this case. The Respondent immediately began accepting employment applications for the plant and all 83 of the predecessor's employees submitted the requisite forms. During a meeting on August 21, 1987, the Respondent told 44 of these employees that they were in ``the favored group being considered for potential hire'' and informed them of those working conditions they could expect. In Fremont, by contrast, the Board found that the union's first demand for recognition was premature because the successor at that time had not entered into a franchise agreement to operate the car dealership nor had it taken any other steps to divest the predecessor's control of the employing entity (id. at 1294).

In finding that the December 31, 1987 decertification petition did not provide a valid justification for terminating the Respondent's bargaining obligation to the Union, the judge relied on the Respondent's 8(a)(1) conduct of August 21. We would also rely on the fact that, as of December 31, 1987, Respondent had been unlawfully refusing to recognize the Union for 2-1/2 months.

2. The judge concluded that the Respondent violated Section 8(a)(1) of the Act when it told employees during the August 21, 1987 meeting that it ``did intend to operate the Richmond plant as a nonunion plant.'' The Respondent claims, however, that this 8(a)(1) finding is contrary to the decision in Heck's, Inc., 293 NLRB 1111 (1989), in which the Board held that a statement in a unionized employer's handbook that the company did ``not want any of our employees to be represented by a Union'' did not constitute a violation. The Respondent's statement here tends to interfere with employees' Section 7 rights because the Respondent announced to prospective employees its firm intention to remain nonunion and thus, as the judge found, implicitly conveyed the message to these individuals that ``any conduct by them which is not consistent with that ukase may jeopardize their employment possibilities or security.'' In contrast, the employer in Heck's did nothing more than inform present employees of its desire to operate nonunion.

3. Finally, we adopt the judge's findings that the Respondent violated Section 8(a)(3) of the Act by refusing to hire employees Gable Bullock Jr. and Melvin Deloatch on or about February 23 and March 7, 1988, respectively. In so doing, we reject the Respondent's argument that it was deprived of its basic right to adequate notice of the material issues to be tried and to full and fair litigation of those issues because the complaint alleges that the termination or refusal to hire both Bullock and Deloatch occurred on or about October 1, 1987. The Respondent claims that the instant case is controlled by Castaways Hotel & Casino, 284 NLRB 612 (1987), in which the Board reversed a judge's finding that a June 4, 1984 discharge violated the Act because the complaint had alleged that the unlawful discharge had occurred on May 19, 1984. We find Castaways to be inapposite to this case because the

judge there examined a completely different factual setting for the discharge in finding that it occurred on a different date than was alleged. Furthermore, the Board stressed in Castaways that the General Counsel had not put the respondent on notice that the lawfulness of its conduct on June 4 was at issue. Here, by contrast, the issue of whether the Respondent refused to hire Bullock and Deloatch was the same regardless of when the violation occurred. It is clear that the Respondent's refusal to hire them on the dates the judge specified was fully litigated because the General Counsel presented evidence comparing their qualifications with those possessed by the employees that the Respondent hired during that period.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below 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 the Order as modified.

1. Substitute the following for paragraph 1(d).

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

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

``(b) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit described above and, if an understanding is reached, embody the understanding in a signed agreement.''

3. Substitute the attached notice for that of the administrative law judge.

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.

We will not discriminate against applicants for employment because of their union activities.

We will not refuse to bargain with Local Lodge 10 of the International Association of Machinists & Aerospace Workers, AFL-CIO, CLC, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production, maintenance, and warehouse employees at the Employer's Richmond, Virginia, plant, excluding employees working in and/or engaged as office, clerical, watchmen, drafting, engineering, office janitor, guards, supervisors, erection, installation or construction work.

We will not coercively interrogate employees or applicants about

their union sympathies or the sympathies of others, or announce to applicants that we intend to operate a nonunion plant.

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 offer Gable Bullock Jr. and Melvin Deloatch immediate and full employment in their former, or equivalent jobs, and we will make them whole for any loss of earnings and other benefits resulting from our failure to hire them.

We will recognize and, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

Williams Enterprises, Inc., a Division of
Williams Industries, Inc.

Steven L. Sokolow, Esq., for the General Counsel.
Lawrence T. Zimmerman, Esq., of Washington, D.C., for the Respondent.
Stephen Spain, of Richmond, Virginia, for the Charging Party.

DECISION

Bernard Ries, Administrative Law Judge. This case was tried in Richmond, Virginia, on January 26 and 27, 1989, pursuant to a charge filed on February 4, 1988 (as amended on March 28, 1988), and a complaint issued on August 9, 1988.

The essential allegations of the complaint are (1) that Respondent is, in law, a successor employer obligated to recognize the Charging Party as the excluslve representative of its production and maintenance employees, and that having failed to honor this obligation since on or about October 1, 1987, and having unilaterally made changes in terms and conditions of employment since that date, Respondent has violated Section 8(a)(5) of the Act; (2) that Respondent, since the foregoing date, unlawfully ``terminated the employment of, and/or refused to hire''\1\ Gable Bullock Jr. and Melvin Deloatch, in violation of Section 8(a)(3); and (3) that Respondent's agent, on or about August 21, 1987, in or around December 1987, and on or about April 1 and 4, 1988, coerced or restrained employees by making various statements.

\1\As amended at the hearing.

The General Counsel and the Respondent filed briefs on or about March 19, l989. I have reviewed the entire record and the briefs. On the basis of that review, and taking into account my recollect1on of the demeanor of the witnesses, I make the following findings of fact,\2\ conclusions of law, and recommendations.

\2\Certain errors in the transcript are noted and corrected.

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i. the alleged violations related to the successor-employer issue

A. Was Respondent a Successor Employer

For several decades, a succession of firms have operated a steel fabricating business in a plant in Richmond, Virginia: first Richmond Steel, then Bristol Steel and Iron Works, Inc., from some unknown date until September 30, 1987, and since October 1, 1987, Williams Enterprises, Inc., a division of a conglomerate called Williams Industries, Inc., which bought the plant a machinery from Bristol. For years, Bristol recognized the Charging Party as the collective-bargaining agent for its production and maintenance employees, the recent bargaining agreement between them covered a 3-year period

commencing February 1, 1985.

Bristols' (and later Williams') plant manager at material times has been John Barnes, who began employment with Bristol in 1970; the plant superintendent for both companies has been James Johnson, whose Bristol association dates back to 1965. These two witnesses provided virtually all the testimony relating to the nature of the work performed at the plant under Bristol, as compared to that done under the Williams' regime.

The testimony shows that Bristol was mainly engaged in the fabrication of structural steel or use in constructing buildings, while Williams has undertaken to devote itself to the construction of steel bridges. There are exceptions to both general statements. While Barnes testified Bristol performed building work ``almost exclusively'' from 1970 to 1980, it thereafter, in 1981-1982 and half of 1984, engaged in bridge work, amounting to 20-25 percent total product, at the Richmond plant (the bridge work constituted ``overflow''from another Bristol location in Virginia, which did only bridge construction). After that work, however, the Richmond location produced ``exclusively building work'' with the exception of one minor bridge job solicited by an old customer. The primary intended use of the plant by Williams is to produce bridge girders and accessories. However, out of 58 projects undertaken between October 1, 1987, and January 14, 1989, some 31,380 hours, of an overall total of 108,451 hours worked, were expended on nonbridge production (including completion by Williams of six unfinished Bristol jobs) (R. Exh. 5).

At the time that Bristol was about to cease production at the plant, there were 83 production employees. Since Williams has taken over the plant, the highest level of employment has been 62 rank-and-file employees, with the average in the range of 36-42. It is primarily this reduction in employment level which has caused the number of floor supervisors to decline from eight to two, although some portion of that decline, Barnes said, is also due to changes in the work format.

The difference in the essential character of the basic product and work techniques is substantial. Preparing construction steel for Bristol meant receiving ``many, many'' relatively small preshaped structural parts which were then processed, while bridge work principally involves receiving steel plate ``sometimes even longer than a hundred foot long and . . . in excess of a hundred inches wide.''\3\ To outfit the plant for bridge specialization, a new receiving area had to be constructed, and major changes were made in the plant to accommodate new machinery and to remove or relocate old equipment.

\3\Testimony of Plant Superintendent Johnson.

Performance of bridge construction is, according to Barnes, much simpler than readying steel for fabrication into a building.\4\ Barnes also stressed the claim that Williams, unlike Bristol, relies heavily on teamwork by the employees on its abillty to utilize their multiple skills on a variety of tasks instead of having to rigidly pigeonhole them, as under the union contract, by classification.

\4\At the same time, however, Respondent adduced evidence that bridge work is more closely scrutinized by Federal and state authorities, and that certain work must be performed to tolerances a great deal closer than those required in building construction.

This latter asserted difference is, of course, a priori, a product of the fact that Williams, having failed to extend recognition to the Union in October 1987 or thereafter, felt free to organize the plant along the lines that it wished. It appears, nonetheless, that Respondent did retain a form of classification system, as indicated not only in the testimony of Barnes and Johnson, but also in General Counsel Exhibit's 14, which is composed of lists of production employees as of January 14, 1988, and 1989 and which shows their ``primary'' assignment. In addition, certain application forms filed by Bristol employees for work at Williams have attached to them the employees' statements of various skills they possess; it would appear from the applications that these

varied skills were most likely learned while working at Bristol in classifications which normally would not encompass such functions. Johnson testified, furthermore, to having hired employees for Williams on the basis of their several abilities, but I cannot imagine any way that he could have known of these multiple capabilities unless he had witnessed them. Thus, it seems likely that many Bristol employees performed work outside of their formal classifications.

Without setting out the considerable evidence bearing on the contrast between the Bristol and the Williams operations, it seems sufficient to say that the work processes and machinery have undergone substantial change; that many of the ``new'' functions are similar to the old functions and others are actually different; that some former classifications no longer exist; and that the bridge construction work is being performed mostly by the employees who had made building steel for Bristol.

It was in NLRB v. Burns Security Services, 406 U.S. 272 (1972), that the Supreme Court first approved the basic Board doctrine relating to a successor employer's obligation to bargain with the union which had been the collective-bargaining representative of the predecessor employer's employees. The facts in Burns, however, were not the usual kind of case--the predecessor's employees had, only months before, designated a bargaining agent, and the successor, whose work force consisted of a majority of these employees, succeeded not to a plant but rather simply took over a security service contract. More recently, in Fall River Dyeing Corp. v. NLRB, 482 U.S. 27 (1987), the Supreme Court has had an opportunity to consider the sort of successorship situation which more comonly presents itself, as well as related Board-hewn principles not before the Court in Burns.

A review of Fall River suggests that the Court perceives the successor-employer concept as being capable of making a valuable contribution to labor peace. As indicated below, the Court appears to deem a significant degree of liberality appropriate to the operation of the doctrine. Speaking of the reference in Burns to the normally conclusive presumption of a union's majority status during the year following certification and the rebuttable presumption of such support thereafter, the Court found that the application to the successorship situation of the policy choices underlying these presumptions was especially justified (482 U.S. at 38-40):

> These presumptions are based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision. The overriding policy of the NLRA is ``industrial peace.'' Brooks v. NLRB, 348 U.S., at 103. The presumptions of majority support further this policy by ``promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees.'' Terrell Machine Co., 173 N.L.R.B. 1480 (1969), enf'd, 427 F.2d 1088 (CA4), cert. denied, 398 U.S. 929 (1970). . . The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace.
>
> The rationale behind the presumptions is particularly pertinent in the successorship situation and so it is understandable that the Court in Burns referred to them. During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist or its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the

> union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.
>
> The position of the employees also support the application of the presumptions in the successorship situation. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

Given this obvious inclination of the Court to view the successorship obligation as potentially offering beneficial service to national labor interests, it is not surprising that the Court went on to also approve what may fairly be regarded as relaxed corollary principles of when and how the obligation may attach. Thus, the Board was deemed justified in formulating a ``substantial and representative complement'' rule in successorship situations. In Fall River, that meant that the successor employer became liable to recognize the old union not when it commenced operations in September 1982, but rather in mid-January 1983, by which time it had hired 55 workers, 36 of whom had been employed by the predecessor employer--even though by mid-Apri1 1983 the successor had hired a ``full'' complement of 107 employees, less than half of whom had been employed by the predecessor; even though it was not until October 1984 (272 NLRB 839) that the Board decided that the phenomenon of a ``substantial and representative complement,'' and thus a bargaining obligation, had arisen in mid-January 1983 rather than later; and even though there as no evidence that the predecessor's 36 employees hired by the successor as of the January date actually favored the union as their representative.

The Court further agreed with the Board that a union demand made in October could be considered to be ``continuing'' until mid-January 1983 (a time which necessarily postdated the violation date cited in the original complaint issued in December 1982). In so doing, the Court seemed to even further confirm its belief in the value of the successorship policy as an emollient in potential labor disputes (particularly given the limited ``collateral consequences'' of any Board-found violations). Id. at 51 fn. 18.

It is against this background of what I perceive as a strong court disposition in favor of imposing successorship obligations that I examine the question of whether the Respondent should be considered a successor to Bristol. ln Fall River, the Court phrased the test in broad terms as follows: ``If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of Sec. 8(a)(5) is activated.'' Id. at 41. As to the second half of this test, there is no question raised here. Of the 94 employees hired by Williams between October l, 1987, and January 1989 just prior to the hearing in this case,\5\ a substantial majority had worked for Bristol.

\5\See G.C. Exh. 13. It appears that employees Ray A. Brown, Jessie A. George, and Norman L. Logan were hired twice by Respondent.

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lt is the first test which presents more difficulty on this record.

In Fall River, paying due respect to precedent, the Court said that the issue of whether ``a new company was indeed the successor to the old'' (id. at 43):

> . . . is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requir[ing] that the Board focus on whether the new company has ``acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'' Golden State Bottling Co. v. NLRB, 414 U.S., at 184. Hence, the focus is on whether there is ``substantial continuity'' between the enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. See Burns, 406 U.S., at 280; Aircraft Magnesium, a Division of Grico Corp., 265 N.L.R.B. 1344, 1345 (1982), enf'd, 730 F.2d 767 (CA 9 1984); Premium Foods, Inc., 260 N.L.R.B. 708, 714 (1982), enf'd, 709 F.2d 623 (CA 9 1983).

In several of the cases cited by Respondent, the Board and administrative law judges have conducted rote ``examinations'' of the foregoing factors and, having found fewer instances of ``same'' than ``not the same,'' concluded that no successorship should be found. E.g., J-P Mfg., Inc., 194 NLRB 965 (1972); Woodrich Industries, 246 NLRB 43 (1979). But it is inconceivable that each of the factors is entitled to be assigned equal weight--that the ``same working conditions'' is a consideration no more or less significant than the ``same body of customers.'' Integral to this evaluation, rather, there is a point of view which makes possible a reasoned assessment. This notion has appeared in the lower authorities (NLRB v. Albert Armato, 199 F.2d 800, 803 (7th Cir. 1952); Ranch-Way, Inc., l83 NLRB 1168, 1169 (1970); Jeffries Lithograph Co., 265 NLRB 1499, 1504 (1982), enfd. 752 F.2d 459, 464 (9th Cir. 1985)), and has been given unmistakable prominence by the Supreme Court. As the Court stated in Fall River (at 43-44):

> In conducting the analysis, the Board keeps in mind the question whether ``those employees who have been retained will understandably view their job situations as essentially unaltered.'' See Golden State Bottling Co., 414 U.S., at 184; NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (CA 9 l987). This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest. See Golden State Bottling Co., 414 U.S., at 184.

A determination made from the ``employees' perspective,'' from the view point of whether the changes had any ``effect on the employer-employee relationship,'' id. at 44 fn. 11, seems to translate into a test, as formulated by the Court of Appeals in Sheffield Industries v. NLRB (D.C. Cir., March 2, l989, unpublished per curiam order), of ``whether there were significant changes in those circumstances most likely to affect the attitudes of the employees'' so as to warrant a conclusion that no successorship came into being; or as stated by the Board in Derby Refining Co., 292 NLRB 1015 (1989), ``In the successorship situation, the events must be viewed from the employees' perspective, i.e., whether their job situation has so changed that they would change their attitudes about being represented.''

There is no hard and fast way to make judgments about whether the employees' ``job situation has so changed that they would change their attitude about being represented'' by a union. It seems logical,

however, to begin with the assumption that employees who have in the past elected (or accepted) union representation in one enterprise will be inclined to prefer representation in the succeeding business. When the employees continue to work in the same facility, that fact should bolster the assumption.\6\ When they perform essentially the same sort of functions, that again strengthens the assumption; it is difficult to believe that some new machines, some relocations of machines, some different work techniques, some fewer categories of workers, would convert a prounion employee to one who opposes union representation.\7\

\6\After examining the photograph of the plant shown at p. 12 of Respondent's l988 annual report, it takes an active imagination to conclude that almost any changes in machinery and processes would affect basic employee attitudes toward working in this facility.

\7\It seems most unlikely to me that if Bristol had undertaken to devote its production to bridge fabrication work which it had performed in the past, the Board would hold that a question concerning representation had arisen, even in the face of reconfiguration of the plant and operational techniques.

For at least the first 9 months of operation, Respondent basically continued to perform precisely the kind of work that Bristol had done (R. Exh. 6). Indeed, although Barnes testified that Respondent was performing new, Williams-obtained bridge work as early as October 1987, his letter to employees dated September 30, 1988, states that prior to June 1988, when ``we were really able to turn full-time to the bridge business,'' Respondent ``spent the first 2 months finishing Bristol work; then took on familiar building work for other fabricators; and in April-June, we fabricated the barge crane boom and the large truss job.'' (Emphasis added.) This suggests that Respondent might still return to building fabrication if the situation dictates.

In performing bridge construction work (which Bristol's employees had also performed), Respondent hired almost exclusively former Bristol employees who were assigned to tasks which brought into play the same kinds of skills which they had learned and exercised in working for Bristol.\8\ Given elemental facts such as these, filtered through the protective attitude toward the successorship doctrine evinced by the Supreme Court in Fall River, I conclude that the changes which occurred under Williams, while not abstractly insignificant, would not likely have affected the employees' attitude toward union representation.\9\

\8\E.g., at the hearing, Respondent presented evidence that the plant as rearranged by Williams now has 11 ``submerged arc welding stations,'' while Bristol had none. But on cross-examination, the General Counsel elicited the concession that the former Bristol welders hired to man these stations had ``performed submerged arc welding as employees of Bristol.''

\9\The record shows, as Respondent puts it on brief, that Respondent ``afforded fewer benefits'' than Bristol had. The loss of pension contributions alone was surely meaningful to the employees, both to those whose benefits had vested and to those whose benefits had not. Since Virginia is a right-to-work state, and employees did not have to pay dues to the Union, it seems fairly unlikely that they would have been willing to give up better benefits with no compulsory costs attached, or at least that any reasonable observer would have so thought.

B. Did Respondent Violate Section 8(a)(5) By Refusing to Recognize the Union

The complaint alleges that Respondent violated Section 8(a)(5) ``[s]ince on or about October 1, 1987,'' when it failed and refused to extend recognition to the Union, as requested by the Union ``[o]n or about September 30, 1987.''

The duty to bargain ``is triggered only when the union has made a bargaining demand.'' Fall River, supra at 53. There is a welter of

cloudy evidence here, and contentions are made on brief about the meaning and effect of Union Representative Stephen Spains confusing testimony\10\ and the allegations made in the various charges filed by the Union with the Region; about an apparently inaccurate assertion made by Spain in a letter written in February 1988 referring to a demand for recognition he had allegedly made on Barnes in September; and about the status of Barnes as an agent of Williams prior to October 1, 1987. I see no need to delve into all this, however, because the record reveals certain critical facts.

\10\General Counsel's characterization of Spains' testimony as ``clear'' is, to be charitable, off the mark.

One is found in Barnes' testimony that in July, Spain told Barnes that he ``would like for Local 10 to represent the employees of the new company'' and therefore requested Barnes to tell a Williams official that ``he would like to have an opportunity to discuss, perhaps negotiate with him.'' The second fact is Barnes' candid admission that sometime between July 15 and September 30 he delivered this message to Richard D. Geyer, president of the fabrications division of Williams Enterprises, who was visiting the plant weekly during that period. Thus, whether or not Barnes was considered an ``agent'' of Respondent during this time, the fact is that he did convey Spain's request to the principal responsible official of the Respondent, and Respondent's silence clearly constituted a rejection of the request.

Respondent argues that Spain's message did not constitute a ``cognizable claim for recognition,'' citing K & S Circuits, Inc., 255 NLRB 1270, 1297 (1981), and Sheboygan Sausage Co., 156 NLRB 1490, 1500-1501 (1966). While it is true that here, as in those cases, the Union did not make reference to representing a ``majority'' of the employees, that fact is logically immaterial in a context in which a demand may be deemed to ``continue'' until a majority is reached in a ``substantial and representative complement''; there are also other factors in the cited cases which are not present here. The heart of the matter is that prior to October 1 Spain communicated and Respondent received a demand for bargaining which the facts subsequently justified as a matter of law. Respondent's failure to even acknowledge the request was plainly consonant with its considered determination, as discussed infra, to operate the plant on a nonunion basis.\11\

\11\If it were necessary to consider the issue of Barnes' agency status, I would conclude that he did become Respondent's agent at some substantial time prior to the takeover date of October 1, although I cannot say when. Barnes, who had been a manager of the plant since 1970, was a pleasant and poised witness who made some admissions adverse to Respondent, and it is with regret that I find it necessary to disbelieve him on discrete issues. Nonetheless, I am unable to accept his testimony that he was not offered employment by Williams until ``[j]ust a day or two prior to'' October 1. Other evidence shows that he (as well as Plant Superintendent Johnson) participated intensely in preparing with Geyer for the takeover, in evaluating employees for future employment, and in addressing employees about such employment. In the latter connection, Barnes testified about an offer of insurance coverage to certain employees on August 21 as follows:

> [W]e didn't want to take a chance with the employees having a break in insurance coverage . . . . [W]e had selected this group of people and intended to offer them employment.'' These locutions diminish Barnes' other testimony to the effect that at the time it would have been ``they,'' not ``we,'' who were concerned. A similar usage is found in the testimony of Johnson, who told a more convoluted tale of having been offered employment ``sometime in August,'' but not having actually accepted until he turned up at the plant on the very morning of October 1. Johnson testified, in referring to the August 21 employee meeting, that he told the future Williams employees, ``In our opinion, we could not be competitive in the bridge fabrication market if we were unionized,'' and so on, in a very possessive first-person-plural

vein. In my judgment, both Barnes and Johnson gave their quite improbable testimony in an effort to avoid a claim that either one became a Williams agent prior to October 1.

I recognize the problems in Spain's murky testimony, which at one point indicates that sometime during the summer of 1987, Spain had apparently concluded that the new owner was going to change the nature of the enterprise so thoroughly that the Union could not claim bargaining rights. If Spain did go through such a thought process, it may be attributable to Respondent's silent rejection of his earlier request for bargaining. In any event, even if there was a conscious change of heart on Spain's part, it was not communicated to Respondent (except for whatever speculative inference Respondent might have drawn from Barnes' knowledge that Spain had collected authorization cards from employees at a meeting), and the filing of 8(a)(5) charges in December 1981 and again in February 1988 served to reaffirm the Union's claim to be the bargaining representative. See Fall River, supra at 53. (``The Union, however, made clear after this demand that, in its view, petitioner had a bargaining obligation: the Union filed an unfair labor practice charge in November.'')

I conclude, therefore, that Respondent became the successor employer to Bristol, required to extend to the union general bargaining rights on or about October 15, 1987, when, it appears, Respondent's work force consisted of about 39 employees, a plateau at which it thereafter hovered.\12\

\12\Although Johnson and Barnes testified that they began operation of the Williams enterprise on October 1 with the same 17 employees to which they had pared the Bristol complement by September 25 (G.C. Exhs. 13 and 14 compared with G.C. Exh. 6) show at least 3 ``production'' employees hired by Williams on October 1 who had not been previously employed by Bristol (Arthur Hansen, Grover Lawrence, and Wilbert Vineyard). On October 5, according to the exhibits, 8 former Bristol employees and 1 new employee (Edwin Anderson) were hired; on October 6, 7, 12, and 15, Respondent employed a total of 10 former employees, and then did no more hiring until one old employee was engaged on November 30. There may have been a few quits in here, according to Barnes' testimony.

The Respondent argues, however, that if, arguendo, it had a bargaining obligation, that obligation would certainly have expired as of December 31, 1987, when Barnes was presented with a petition signed by 23 employees (out of 35, according to Barnes), stating that they did not desire to be represented by the Union. General Counsel seeks to hammer Respondent's shield into a sword by including an 8(a)(1) allegation based on the manner of the petition's creation.

Barnes testified that on or about December 28, 1987, after the Union had filed an unfair labor practice charge on December 14 alleging violations of Section 8(a)(1), (3), and (5),\13\ he gathered the employees so that he might read the allegations to them and explain Respondent's position. Barnes testified without contradiction that when he had finished and asked for questions, employee Jamison indicated that he did not want to be represented by the Union and inquired what the employees could do about that. Barnes told his audience that ``they could get a petition together but that it had to be a petition that they had framed themselves expressions exactly how they felt. . . . We told them that it could be our defense . . . . I said we'd be glad to have the pet1tion.'' On December 31, Barnes was presented with a petition bearing 23 signatures and captioned ``We The Undersigned Employees of Williams Enterprises Inc., Do not want to be Represented by the Local 10 Machinist Union For the Purposes of Collective Bargaining'' [verbatim].

\13\The charge was inexplicably withdrawn on January 25, 1988, and then, for reasons which are equally impenetrable, refiled in substantially identical language on February 4, 1988.

The complaint alleges that Respondent ``encouraged a petition

seeking the revocation of the Union's representative status and authority to bargain on behalf of its employees,'' in violation of Section 8(a)(1). General Counsel cites Good'N Fresh Foods, 287 NLRB 1231 (1988), but that case found a violation where a plant manager, acting on instructions by the company president, approached an employee and asked her to circulate a petition opposing union representation. Those facts possess an intensity not present here. Respondent also cites precedents, one on which is Indiana Cabinet Co., 275 NLRB 1209, 1210 (1985), in which a Board panel majority reaffirmed the principles earlier summarized in R. L. White Co., 262 NLRB 575, 576 (1982), and applied them in a decertification petition case:

> An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation.

In the present case, the evidence is that employee Jamison first inquired about the methods available for dispatching the Union, and there is no showing that Respondent offered assistance nor made an effort to follow up on the progress of such a petition. While there may be something to General Counsel's stress on Barnes' reference to using the petition as a ``defense'' to the charges, I doubt on balance that this spontaneous comment ``creates a situation where employees would tend to feel peril in refraining from'' signing an antiunion petition. See Indiana Cabinet, supra.

However, I agree with General Counsel that the petition is ``tainted'' by virtue of other conduct asserted by the complaint to violate Section 8(a)(1) and which, I think, created ``a situation where employees would tend to feel peril in refraining from'' signing the decertification petition. The complaint contends that on August 21, 1987, Superintendent Johnson told employees ``that Respondent did not want a union and that there definitely would be no union in the plant.'' The record shows that on the date alleged, Johnson and Barnes met with a group of employees to announce that they had been selected for possible employment by Respondent (as discussed more fully, infra). Employee Eric Russell asked, at one point, whether Respondent would ``try to unionize the people,'' and, according to Russell, Johnson said Williams ``definitely'' did not want a union. Employee Gable Bullock Jr. also testified, more expansively, that Johnson said that ``Williams is not going to have a union and he don't believe in unions.''

Barnes willingly conceded that ``we also made a statement to the effect that Williams did intend to operate the Richmond plant as a nonunion plant.'' This was not pure speculation on the part of Barnes, who told us that Frank E. Fabrication Division President Geyer had ``made it very clear'' to him that they did not intend to operate with the Union and had asked him ``to convey that to the employees. The fact that the statement was made in response to a question on August 21 thus appears to be happenstance.

A statement to prospective employees that a successor employer will not have a union in the plant has been held violative of Section 8(a)(l). Kessel Food Markets, 287 NLRB 426, 430 (1987); Potter's Chalet Drug, 233 NLRB 15, 20 (1970), enfd. mem. 580 F.2d 980 (9th Cir. 1978); and Love's Barbeque Restaurant No. 62, 245 NLRB 78, 124 (1979), enfd. in pertinent part 640 F.2d 1094, 1097-1098 (9th Cir. 1981). As tbe court of appeals in the last cited case commented, ``One reasonable inference from the remark is that the Restaurant would remain nonunion in the future.'' Such an implication 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. Johnson testified that he explained the Respondent's position by saying that the company ``could not be competitive in the bridge fabrication market if we were unionized.'' In my view, however, such an unsupported ``explanation'' simply drives home to employees the utmost seriousness of the employer's

opposition to unionization.

While I have suffficient doubt about the powers of recollection and concentration of most of General Counsel's friendly witnesses as to seriously question whether they were told on August 21 that Respondent ``definitely'' did not want to deal with or ``is not going to have'' the Union, the admission by Barnes about the statement, directed by Williams and Geyer to be communicated to employees, that Respondent ``did intend to operate the Richmond plant as a nonunion plant,'' suffices, I think, to bring it within the case law cited above. Furthermore, while those cases address the situation of an employer telling employees of the intended nonunion status before they are hired, it seems obvious that the coercive effect of such a pronouncement would linger after hiring has taken place. I find that the statement not only violated Section 8(a)(1) when uttered, but also may reasonably be thought to have had an unacceptably constraining effect on employees who were thereafter asked to sign an antiunion petition about which the plant manager had effused as presenting the basis for a ``good defense'' which ``we'd be glad to have.''

I conclude, therefore, that the petition cannot be used to vitiate the bargaining obligation which arose in October. Apart from the foregoing analysis, moreover, that conclusion is seemingly compelled by the second paragraph of footnote 18 of the Fall River case, 482 U.S. at 51. Although here there is no direct evidence to ``suggest'' that the refusal to bargain undermined employee support for the Union, I do not think the Court meant to require the production of evidence of such a nexus (indeed, the suggestive evidence to which the court alludes--an employee's testimony that the petitions were ``signed out of employees' fear that the Board proceeding might delay an expected wage raise'' seems not only unusually subjective but also beyond the capacity of any single witness). See Sterling Processing Corp., 291 NLRB 280, 282 fn. 11 (1988).\14\

\14\The Board has held that an employer may rely on a petition ``apparently signed by a majority of its employees as a basis for good faith doubt even though the employer did not authenticate the signatures,'' Harley-Davidson Transportation Co., 273 NLRB 1531, 1532 (1985). Although, for the reasons given, the rule is irrelevant here, it might be argued that this doctrine opens the door to considerable mischief and unwarranted disruption of industrial stability. In the present case, for example, there is a basis for entertaining doubts about the petition. Aside from the fact that the wording (as opposed to the writing of the caption does not seem to have likely originated with any of the poorly educated workingmen of the sort who appeared before me (and who were said by Barnes to be representative of their peers the ``signature'' of ``Alva H. Mayhew'' is significantly unlike another signature sample of Mayhew which is in the file (G.C. Exh. 12(g)).

C. Did Respondent Violate Section 8(a)(5) by Unilaterally Changing Terms of Employment

The remaining 8(a)(5) allegation pertains to the unilateral changes in wages and working conditions made by Respondent when it commenced operations on October 1. Respondent concedes that it altered many such terms of employment, mostly or the worse.

The question turns upon some troublesome language in Burns Security Services, supra, and the Board's subsequent struggle to find its meaning. In generally approving the doctrine of successor employer in Burns, the Court stated (406 U.S. at 294-295):

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him consult with the employees' bargaining representative before he fixes terms.

In Spitzer Akron, Inc., 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), the Board construed the reference to retaining ``all'' employees as not really meaning ``all,'' but only a planned retention of a majority of the old employees in the new unit at the appropriate time for counting heads. But, in Spruce Up Corp., 209 NLRB 194, 195 (1974), a plurality of the Board had mused over the ``perfectly clear'' language (which it calls a ``caveat'') and reached the following conclusions:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer ``plans to retain all of the employees in the unit,'' as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present acts.
>
> . . . .
>
> We believe the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment [footnote omitted], or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

The thrust of this exegesis seems to be that if a successor employer warns employees, before he asks them to work for him, that he intends to change working conditions, then he is not bound to bargain with their union representative about such changes; but if he ``invites'' them to work for him and then, perhaps in the next day or two, tells them of his intention to alter conditions, he is bound to bargain about such alterations (despite the fact that some or all of the employees may not wish, after learning the new terms, to ``enter into an employment relationship with the new employer''). Nonetheless, ``[s]ince Spruce Up, the Board has adhered to this distinction based on when the successor employer announces its offer of different terms of employment in relation to its expression of intent to retain the predecessor's employees unless the successor has misled them.'' Fremont Ford Sales, 289 NLRB 1290, 1295 (1988).

Respondent lays claim to having prevented the obligation to bargain over initial terms from attaching by pointing to the testimony of Barnes and Johnson concerning the employee meeting on August 21. The evidence shows that by that date all 83 Bristol employees had filed applications for employment with Williams; they had been reviewed and rated (either once (Barnes) or twice (Johnson), see infra): and about 44 workers had been classified as likely employees of the new enterprise. At one of two meetings on August 1, Barnes met briefly with the group he referred to as those who ``were not going to be to considered, in the near future, at least,'' to apprise them of their fate, and then Barnes joined Johnson, who was addressing the other 44, here called by Respondent ``the favored group being considered for potential hire.''

Johnson testified that he told the favored employees that, if hired, they would be performing multiple functions; he mentioned that under Williams, employees would not have to wear hardhats, as they had to at Bristol; he explained to them that the insurance carrier would be Allstate, that the plan would no longer be an HMO, that different deductibles would apply, and that Williams, unlike Bristol, would pay all premiums; and he spoke of vacations, differences in holidays, and the fact that there would be no midafternoon break as Bristol had allowed. Barnes and Johnson both testified that when Barnes arrived at the meeting of the favored he read to the employees a list of the Williams-provided benefits that had been supplied him by Geyer (in evidence as G.C. Exh. 2 (a)).

Of the four employee witnesses who were present at the meeting, two testified about this subject. Former employee Bullock did not ``remember Mr. Johnson'' saying anything about ``the wages and benefits'' to be afforded Williams employees, and exemployee Russell did not ``know'' and could not ``recall'' whether any mention of benefits was made during the meeting.

I did not feel that any of the employee-witnesses intended to be deceitful, but I also found their testimony to be generally unreliable--they displayed, for the most part, dreadful powers of recollection and a regrettably low level of educational background and intellectual sophistication. The testimony by Bullock and Russell on this score scarcely amounted to firm declarations that nothing was said about changes in terms of employment on August 21, and, as Respondent argues on brief, logic dictates that benefits would have been the subject of discussion in a meeting of employees likely to be hired which, Bullock recalled, lasted some 20-30 minutes. The only real problem I find with Respondent's version stems from the testimony of Johnson that one employee who was hired effective October 1 quit on the second day because of dissatisfaction with the benefits. This suggests that he had not previously been made aware of Williams' terms of employment, but it is also possible that he did not pay attention or comprehend.

Accordingly, I find no reason to discredit the testimony of Barnes and Johnson on this issue. Despite this conclusion, it strikes me as quite arguable that, on August 21, it could be considered ``perfectly clear'' that Respondent intended to staff its plant with an overwhelming majority of former Bristol employees. Respondent planned to hire somewhere around 40 employees; the group of 44 addressed by Barnes and Johnson on August 2l was the product of a careful evaluation by Respondent (according to Barnes, he had even asked several of the tentatively chosen employees, prior to August 21, if they would accept wage reductions): and it would have seemed almost beyond doubt that a majority of the initial hires by Respondent would be from the Bristol work force nonetheless, applying the language of Spruce Up, the evidence shows an announcement of ``new terms . . . simultaneously with [an] invitation to the previous work force to accept employment under those terms,'' and here there were no ``circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change'' in conditions of employment or in which the employer ``has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.''

This being so, I am unable to conclude that Respondent was obligated to bargain with the Union prior to putting the new terms and conditions of employment into effect.\15\

\15\Fremont Ford, supra, relied on by General Counsel, seems to be grounded on a whole bevy of actors which distinguish that case from this one.

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ii. the alleged unlawful discrimination

The amended complaint alleges that Respondent unlawfully ``terminated the employment of, and/or refused to hire'' Gable Bullock Jr. and Melvin Deloatch after it took possession of the Richmond plant on October 1. Bullock had worked for Bristol since 1968 and was, at the time of the takeover, a fitter leadman; he had also been a shop steward for about 7 years and the chief shop steward for 3-1/2 years. Deloatch began work in 1975 and eventually became a fitter first class; he had been by October 1987 a shop steward for about 2 years. The third steward, Willo Wilkins, had held that position since the 1970's and had been employed at the plant since 1960; unlike Bullock and Deloatch, Wilkins was hired by Williams.

Barnes and Johnson described the hiring process as follows: They were informed of the sale of the plant at a July 13 meeting at which Frank Williams Jr. and a Bristol representative were present. At that time, they were given applications for employment with Williams to hand

out to the employees, which they did at a meeting on July 14. All 83 employees turned in applications. According to Barnes and Johnson, President Geyer then gave them a computer list of the employees who had filed applications and asked Johnson to evaluate them. Johnson did so, purely on the basis of skill in their classifications, assigning each employee a grade of 1 (the worst) to 5. Barnes reviewed Johnson's list, and then they turned the evaluations over to Geyer.

At this juncture, there is a sharp divergence in the accounts of Barnes and Johnson. Barnes testified that Geyer established a figure of about 40 people that he ``thought they might need'' a ``pie in the sky type number,'' and then Johnson broke that number down into the types of skills''--``they would be needing so many fitters, so many welders, so many this, that, or the other. And then the rating system was used to fill that roster, that number.'' Elsehere, Barnes testified that the ``original selection of some 43, 44 employees'' was ``based entirely on skills,'' that he and Johnson had no other ``input'' into the selection process except for this skill rating, and that it was only after this selection that he and Johnson ``expanded'' their thinking to look at ``the whole picture'' of prospective employees at the end of October, when nearly 40 employees had been hired.

Johnson testified, however, quite differently: that after the skill ratings were made, Geyer gave him 5 criteria for selecting the 43 or 44 names: skill level, job knowledge, multiple capabilities, adaptability to change, and average cost per hour (to be kept below $9). Johnson said that he ``and Mr. Barnes'' applied these criteria in selecting 44 or so names.\16\

\16\In stating twice on brief that Barnes was not involved in the selection of Williams' employees, Respondent is implicitly discrediting this testimony of Johnson's.

Respondent probably is not interested in noting such inconsistencies between its witnesses, and on brief recites only Johnson's account. General Counsel points out this disparity, but for his own purposes, prefers Johnson's version. Although Johnson's two-step procedure seems rather awkward, I cannot think why he should have manufactured it, and I shall therefore assume that it was in fact the way that the list was reduced to 44 names.

Throughout the hearing, Barnes and Johnson took the position that the 44 employees who were selected were told that they had been only chosen ``for consideration'' for later employment. There is employee testimony, however, that the 44 were informed on August 21 that they were in fact hired. The evidence also shows that the two alleged discriminatees, Bullock and Deloatch (and, I assume, all other members of the group), were afforded coverage under Williams' group insurance plan for November. The record further discloses that, of the 44 employees, 6 others in addition to Deloatch and Bullock received letters from Respondent dated November 4, 1987 (prior to the filing of the first charge), which stated that while Respondent had previously told the addressees of ``its belief that it would be able to hire you within the first month or two'' of startup, it had come to realize that the work force would not be expanded in the coming months, and the employees should seek work elsewhere.

For reasons earlier given, I am not inclined to rely on the employee testimony that they had flatly been told that they were hired. They did not receive pay after being laid off in September, and although they were given insurance coverage, my guess is that this was done to encourage their availability. On the other hand, I suspect that the employees were led to believe that they would be hired; but since they were not actually taken onto the Williams' payroll as of August 21, I think they should not be considered ``employees'' until they were actually put to work. The question still remains whether Bullock and Deloatch were subjected to unlawful discrimination in Williams' hiring process.

The largest category of workers employed by Bristol had been ``fitters'' of various kinds: trainees, second class, first class, leadman, utility\17\ (and one classification containing one employee,

called ``Fitter 2nd class & Painter,'' according to G.C. Exh. 6, a company prepared printout about which I have some doubts; see, e.g., the confusing entries as to Michael T. Stiltner, p. 2)\18\ these 20 individuals, all of whom applied in July 1987 to work for Williams, only 4 were apparently available and not hired by March 7, 1988: Chief Union Steward and Fitter Leadman Bullock, Union Steward and fitter first class Deloatch, Fitter Leadman Eric Russell, and fitter trainee William F. Branch Jr.\19\

\17\The highest rating for a fitter.

\18\While General Counsel states on brief that Stiltner was hired (p. 52, fn. 42), I think that is one of the more unlikely possibilities available to explain G.C. Exh. 6.

\19\I exclude here five employees: Calvin McCauly, who quit on July 31, 1987; Michael Stiltner, whose data, as noted, is not consistent; Arcellious Demery, who resigned on August 29, 1987; Anthony Little, who quit on September 4; and Robert Shaw, who quit at some unidentified time. While I have included William F. Branch as ``apparently available,'' in fact the record contains no evidence as to Branch one way or the other.

Gable Bullock received the highest possible skill rating of 5 when evaluated by Johnson and Barnes, and he was also included in the list of 44 employees whom Respondent was favorably disposed to hire. Bullock testified, without controversion, that when he was first told by Barnes in July about the sale of the plant, Barnes responded to the distressed look on his face by saying that Bullock had ``nothing to worry about,'' considering his length of employment and his experience. Yet Bullock was not hired, although several other employees in the fitter category who had received considerably poorer evaluations than Bullock thereafter were hired.

Thus, Dean Glover, a fitter trainee who received a 4-rating but was conceded by Barnes to be ``one of the least experienced and least qualified fitters'' employed by Bristol, was hired on October l; Roosevelt Peoples, a first-class fitter rated as a 3 and not included in the select group of 44 was nonetheless hired on February 8, 1988; Linwood Burchette, a second-class fitter rated as a 2, who did not survive the cut to 44, was hired on February 23, 1988; William Johnson, rated as only a 1 in the fitter first-class category and not deemed eligible for favorable consideration was hired anyway on March 7, 1988; and that same day also saw the employment of Raymond Seward, who was rated only l as a ``fitter second class & painter'' and who was excluded from the selection of the 44 eligibles. On the face of this competition, Gable Bullock, a fitter at the plant or 20 years, should have seemed a shoo-in. But months after a charge had been filed alleging the failure to hire Bullock and others as discriminatory, Respondent was, as shown above, hiring former fitter employees rated as low as 1 and 2 and 3 and who were not in August even deemed worthy of further favorable consideration, while ignoring Bullock.

How does Respondent explain this treatment of the experienced former leadman Bullock. Not very well, it seemed to me. At the beginning, Barnes and Johnson seemed to dig somewhat of a hole for themselves. When called on the first day of hearing as adverse witnesses and asked why Bullock was not hired, Barnes and Johnson said, respectively, ``We didn't need him'' ``No other reason,'' and ``We didn't need his services at the time'' ``No other reasons.''

On the following day, when testifying for Respondent, Johnson was asked on direct why Bullock has not been hired by Respondent and replied consistently, ``I don't need him.'' This time, he was asked what he meant by that response, and his reply resonated of ``I don't need him like I don't need a toothache.'' Johnson said, ``Well, his not being a team player. He'd not been adaptive to change, and we have changed this plant . . . . He won't work with other people when you give him people in his position as a leadmen . . . . He's still very resentful that the company is trying to get down on him . . . . It is my firm belief that neither Johnson nor Barnes (who were present for each other's testimony) would normally have used the phrase ``I don't need him'' in this

particular querulous sense, and that there was a clear shift of explanation from the first to the second day.

Johnson's complaint about Bullock's not being ``adaptive to change'' is not, wholly inconsistent with his earlier testimony that one of the qualification factors he and Barnes used for the final screening to 44 was ``adaptability to change,'' but it would seem that since Bullock was included in the final group, either his adaptiveness was not thought a serious problem or he was outstanding in one or more of the other areas.

Bullock's demotion from fitter supervisor, a job he had held in the early 1980s or about 2 years, to fitter leadman was stressed by Johnson. Bullock testified that the demotion was simply a reorganizational move, but Johnson said it was disciplinary, based primarily on Bullock's refusal to perform light duty while recovering from a back injury. The question is close, but I tend to consider that Johnson's story is more likely a fabrication than Bullock's. Johnson's version amounts to nothing less than outright insubordination on Bullock's part, which presumably would have called for more rigorous discipline by Respondent than mere demotion. Bullock's story--that he was promoted to supervisor when another named supervisor was assigned to a special job, then demoted when the job ended and the supervisor returned--seemed capable of documentary or testimonial rebuttal, but Respondent offered none.

However, even if I err on this resolution, which is hardly beyond the realm of possibility, the act remains that Bullock was still listed as a skill level and included on the list of 44 while 4 others in the fitter category who were later hired had skill levels as low as 1 and did not otherwise in some manner counterbalance those low ratings so as to gain admission to the favored list in August.

Respondent's witnesses offered reasons why they hired the former employees who, on paper, do not appear to come close to replicating the wealth of skill and experience accumulated by Bullock. Dean Glover, a fitter trainee who had worked for Bristol only since January 1986, rated as a 4 and put on the list of 44, was, as noted above, conceded by Barnes to be ``one of the least experienced and least qualified fitters.'' He was thought by Johnson, however, to be a ``young bright kid that had a lot of potential,'' and Johnson emphasized that he could ``keep good records. His handwriting was legible and, you know, I could--when he brought the shipping list in to me, I could read what he was putting down, you know, for a change.''\20\ Since the work which Johnson had assertedly wanted Bullock to perform while recovering from his back injury in the early 1980's was to ``keep the paperwork, keep the timecards and stuff,'' it would seem that Bullock's clerical qualifications were also adequate. Johnson noted that Glover's salary was only $7.79 per hour, which may be compared to Bullock's $9.55. If the $70.40 difference per 40-hour workweek was really important to Respondent, it may be pointed out that no offer of a job at a lower rate was made to 20-year veteran Bullock, although he and other employees had been asked to take a wage decrease.\21\

\20\Johnson testified that Glover, even though classified as a fitter trainee, was instead ``working in our finish department, loading out steel, finishing up Bristol Steel contracts.'' He presumably referred to Glover's assignment right at the end of September 1987.

\21\Respondent's brief states that Johnson asked certain employees, including Bullock, to agree to a wage reduction prior to August 21, and that only three of those, not including Bullock, ``agreed to the reduction.'' In fact, Johnson testified that he recalled asking ``some'' employees, naming Bullock, Mayhew, Jamison, Wriston, and Russell (the ones who then came to mind) if they would take a pay cut. Johnson did not testify to their replies; he only stated that he could think of three--Mayhew, Jamison, and Hill--who did, after Williams took over, have their Bristol wage reduced. Thus, it is an error to state that the record shows that Bullock refused to consider a reduction.

As to the 4 low-rated, non-44 exfitters hired by Respondent beginning February 8, l988, Johnson advanced reasons for preferring each to Bullock. Roosevelt Peoples, ranked a 3 in his classification as a

first-class fitter, was, Johnson said, not hired for his fitting ability: he was a ``good crane operator'' and takes over when one of the regular crane operators is out. When he is not so substituting, Peoples operates a drill and helps put the laydown together. But according to a document produced by Respondent--a ``List of Production Employees As Of 1/14/89'' (G.C. Exh. 14, p. 2)--Peoples' ``Primary'' classification is ``Fitter 1/c.''\22\

\22\Johnson testified that a number of former Bristol classifications have either disappeared entirely or been reduced in number. However, while he said that there was no longer a ``Material Controller'' as of January 28, 1989 (the date of his testimony), the exhibit referred to above shows that Stuart Hill was classified as ``Matl Control'' as of January 14, 1989. Despite this, Johnson testified that Hill was hired (on November 30, 1987, according to G.C. Exhs. 13 and 14) ``as a fitter''; while Johnson testified that Hill's pay as a fitter was ``down $3 to $4'' from the $10.15 per hour he received as a material controller, G.C. Exh. 14 shows Hill earning $9.34 per hour as of January 14, 1988. No reason was proffered as to why the former material controller was preferred as a fitter (taking Johnson's testimony as accurate) over Bullock.

Johnson's explanation of the reason for hiring Peoples is not controverted, and it is quite possible that a substitute crane operator was thought to be imperative.\23\ But one must wonder why Respondent waited until February 8, 1988, to fill this need. More puzzling than Peoples, however, were the hires of 2-rated Linwood Burchette on February 23, l-ranked William Johnson on March 1, and 1-ranked Raymond Seward on the same day. Like Peoples, none of these 3 had made the list of 44.

\23\Peoples' application shows that he worked for almost 2 years as a crane operator for Bristol before leaving in 1979 (and then returning as a fitter in 1985).

Johnson's rationale for Burchette's hire was less than convincing. Despite Burchette's rating of 2 and his exclusion from the favored list, Johnson called him ``a good employee.'' But his other testimony made clear that Burchette was a rather limited worker. As a Williams' employee, Burchette was assigned to a jig which had control points ``so you didn't have to do a lot of measuring and a lot of dimensioning''--``all he had to do was take a piece, like putting a puzzle together, and everything was controlled, and he could do that well.'' William Johnson, ranked as a skill level 1, and not even worth considering at first, became at the hearing a ``good team player'' who ``in a controlled atmosphere working with somebody else'' is ``a great fitter.'' Seward, however, was not ``hired for his fitting abilities'' but was employed to ``fill in in case my painter doesn't show up.'' Since filling in on days that the painter fails to arrive is not a full-time occupation, and since Seward is not classified as ``Fitter 2/c & Painter'' (G.C. Exh. 14, p. 2), I assume that his regular duties encompass fitting.\24\

\24\Barnes testified that ``right now'' Seward is doing a helper's job involving grinding (``very nasty and dirty''), which is work that ``all fitters'' and ``everybody in the shop'' do.

Thus, there are 4 fitters who were considered unworthy in August 1987 of even being given a chance but who somehow wound up on Williams' payroll (and one former Bristol material controller who, according to Johnson, is now a Williams fitter), while Bullock, who was rated as possessing top-grade skill and who was assigned to the top 44 after assessment under the second set of standards, has never been offered a job. The reasons given for preferring the others to Bullock, while perhaps in the case of Peoples and Seward not without some weight, do not generally impress. It does not say much to explain that Burchette and Johnson were capable of working in a ``controlled'' environment; surely Bullock could do that and more\25\ (we have no explanation of the

preference for former material handler Hill over Bullock).

\25\Johnson testified that a fitter ``must be well versed in a lot of different aspects of different jobs.''

As earlier noted, of the 15 individuals in the fitter category who did not quit (or whose record, Michael Stiltner is unclear) only Bullock, Deloatch, Fitter Leadman Eric Russell, and fitter trainee Branch did not come to work for Williams. Branch had apparently been hired in September 1986 (see G.C. Exh. 12 (p)), was rated a 3, and did not make the select group of 44. Russell, however, was graded as a 5 and was included in the group, and the question of why Russell was not hired is a good one for Respondent to pose.

Johnson gave as the reason that Russell was ``a troublemaker, more or less'' who had once been terminated for fighting and was ``very abusive in talking to other employees.'' It seems odd, if this were true, that Russell was allowed to work for Bristol as a leadman until he was terminated, and, just as odd, that this known history did not cause him to be excluded from the 44-man list. While Russell is not named as a discriminatee in this complaint, I cannot help but notice that he was the employee who inquired at the August 21 meeting if there could be a union under the Williams regime. Although Barnes testified that he could not recall who asked this question, it is not unreasonable to think that such an inquiry would weigh against Russell's chances of employment by an employer which wanted it made ``very clear'' that it intended to operate without a union.

I further note Russell's testimony on cross-examination that Johnson spoke to him before October 1 about lowering his pay rate from $9.55 to $8.35 in order to work for Williams. Russell protested, saying that such a decrease would be ``unfair.'' Later, Johnson told Russell that his rate would not be cut. It could be that, in not hiring Russell, the pay problem and Russell's perceived discontent about a lower wage was dispositive.

Respondent also points out that it did hire Willo Wilkins, the third union steward. General Counsel points out in return that Wilkins was the only operator of the Linde burner. I might add that although the Linde burner is now less than one-third its former size, Wilkins still spends perhaps 90 percent of his time operating it, and before Respondent turned more fully toward bridge construction in June 1988, Wilkins likely was wholly occupied with the Linde.

Taking into account Respondent's seriously strong desire to avoid unionization,\26\ the conflict between Barnes and Johnson on as seemingly straightforward a matter as the creation of the list of 44 employees, the questionable explanation of how some low rated and initially rejected employees came to work or Respondent while the high rated and initially accepted Bullock never did, the assurance given to Bullock by Barnes on July 14 that he had nothing to worry about with respect to employment by Williams, and the other circumstances discussed above, I am persuaded that the failure to hire Bullock as grounded in his status as a union leader.\27\

\26\As exemplified by the deliberate conveyance to the employees of Williams' intention not to operate a union shop, as well as the keen interest displayed in the union sympathies of prospective employee Wilbert Wall, discussed infra.

\27\General Counsel uses, but does not come to grips with the implications of, the inconsistency in the facts that Barnes and Johnson gave good marks to Bullock, but then never hired him. I can only think that their evaluations in July and August were honest, but that they were thereafter directed by their new Williams supervisors to weed out, to the extent possible, potential union activists.

It might be said to follow, as General Counsel urges, that the failure to hire Steward Melvin Deloatch requires the same conclusion. Deloatch's case, however, presents factual distinctions.

Deloatch, as earlier noted, commenced employment at the plant in 1975 and eventually became a first-class fitter. He had been a shop

steward for 2 years when Bristol closed down in September 1987. Deloatch's tenure at Bristol had been less than placid. He was repeatedly warned and suspended for absenteeism and finally terminated in November 1980, but was rehired a week later (with loss of seniority). Then, after continuing his delinquent ways, he was eventually terminated again in 1984, but, after a grievance was filed, he was reinstated with a loss of pay. Deloatch's absenteeism did not abate, however, and he was warned in June 1986 that he was in peril of receiving a third warning notice. It does not appear that any further discipline was imposed on Deloatch between that time and his termination in September 1987.\28\

\28\While Johnson testified that Deloatch had been discharged three times, I can find evidence of only two discharges in R. Exh. 7, the documentation of Deloatch's disciplinary record.

In preparing the skill ratings, Johnson and Barnes rated Deloatch as a 4, but he was not initially included in the group of 44 favored employees. A few days after attending the meeting of the disfavored employees on August 21, Deloatch approached Johnson and Supervisor Stiltner to complain about having been so disqualiied. According to Deloatch, ``[a]bout the next day'' Johnson asked him if he had found a job yet. Deloatch said no, and Johnson said, ``You got a job with Williams then,'' adding that his pay would stay the same and the insurance would be similar to Bristol's. At that point, Deloatch testified, Supervisor Stiltner came up and asked if Johnson wanted Stiltner to ``sign [Deloatch] in,'' but Johnson said he would take care of it.

Johnson testified that when Deloatch approached him, Johnson told him he would see what he could do, and then spoke to some of the supervisors. He asked them to say, given a choice of Deloatch or another individual (whom Johnson could not identify at the hearing), which person they would rather have ``for what they can do and the abilities that they have.'' Stiltner said he would ``just as soon have'' Deloatch, and Johnson thereupon told Deloatch that he was putting his name on the list of ``possible hires'' but with no guarantees.

Johnson testified that ``a major reason'' for not thereafter hiring Deloatch was his disciplinary record, and also said that ``one reason'' was his rating of less than 5. He testified that after the initial Williams team was put in place, he reviewed the status of operations and was ``pleased'' with the members of the team, their cooperation, and their lack of disciplinary problems. In judging unhired exemployees to see if they would ``fit in with the team,'' he thought Deloatch's record made him not ``desirable to play on this team.''

Although I had my doubts about parts of Johnson's testimony,\29\ I also had no strong feeling about Deloatch's reliability, and I therefore have some questions whether Johnson told him in August that he ``[had] a job with Williams,'' or that anything was said about ``signing in'' at that stage of the game, which seems implausible if, as Deloatch thought, the reference was to being hired.

\29\I have already noted Johnson's unlikely claim that he did not accept the Respondent's offer of employment until he showed up for work on October 1. I also thought that Johnson patently dissembled when, after testifying that he had told the favored group on August 21 that Williams ``deserved a chance to show what kind of company the employees would be working for,'' he said that this statement bore no relationship to his pronouncement that Respondent ``intended to work as a nonunion shop.'' I find it very hard to conceive that Johnson believed that employees who would presumably be thought anxious about the continuity of their employment would also abstractly need to be urged that their potential new employer ``deserved a chance to show what kind of company'' it would be; the only referent which makes sense of this statement is the factor of unionization. This conclusion is pointed up by Bullock's testimony that what Johnson asked was for the employees to give Williams ``a year,'' and by Willo Wilkins' unrebutted testimony that at a meeting held after October 1, President Geyer said that the Respondent ``would prove to us that we didn't need the Union.''

While Deloatch's rating of 4--high, but not the highest--and his initial exclusion from the list of 44 argues in Respondent's favor here, the fact is that Deloatch did prevail on Johnson (with the approval of Supervisor Stiltner) to reverse that exclusion decision and to afford Deloatch active consideration as an employee, at a time when Johnson knew, quite as well as he knew a few months later, that Deloatch's absenteeism record had not been good in the past.\30\ Johnson had time to reflect on this record, he spoke to supervisors about the issue, he concluded that it would be appropriate to hire Deloatch (instead of a certain other employee), and he told him so. Despite this consideration, this 12-year veteran was, as in Bullock's case, ignored in favor of fitters with low ratings who had never made the list of eligibles.

\30\As indicated, however, Deloatch's last threat of a warning notice had been received over a year before. His performance had evidently improved since June 1986.

In my opinion, counsel for General Counsel has made a sufficient showing, on the record as a whole, that a ``motivating factor'' in the decision not to employ both Bullock and Deloatch\31\ was their known connection with the Union, and that the Respondent has failed to demonstrate that the same actions would have been taken in the absence of this protected conduct. Wright Line, 251 NLRB 1083, 1089 (1980), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). I would not say that this is the strongest case of an 8(a)(3) discrimination in the annals of Board law. The ultimate standard, however, is whether the Government has proved its case by ``a preponderance of the testimony taken.'' Section 10(c). The Court of Appeals for the Sixth Circuit, in Jim Causley Pontiac v. NLRB, 675 F.2d 125, 127 (1982), defined this standard as meaning ``more likely so than not so.'' That test, I think, has been comfortably met here.

\31\Respondent's brief asserts that nine employees, including Bullock and Deloatch, received rejection letters in November even though they had been placed on the favored list in August, and argues that there is ``no basis for assuming that seven of the nine were rejected through a legitimate exercise of management discretion, but that the other two--Deloatch and Bullock--were rejected for a different reason.'' I am engaging in no particular assumptions about the legitimacy vel non of the initial rejection of the other employees (who actually numbered, in spite of testimony to the contrary, six rather than seven; see G.C. Exh. 6). It may be noted that of the remaining six, one as Wilbert Wall, who, Respondent claims had been included on the favored list ``by mistake,'' see G.C. Exh. 6, p. 1 (but was, as discussed hereafter, nonetheless subsequently invited to work); another was Michael Stiltner, who, as earlier described, apparently quit before October 1, although his situation is less than clear; a third is Milton Burchette Jr., who was subsequently hired in March 1988; the fourth was Maryland Wiggins, hired February 22, 1988; the fifth was Eric Russell, already discussed; and the last was Claude K. White, about whom we know only that he was a welder first class who received a rating of 5.

Respondent argues, however, that any decision regarding Bullock and Deloatch which is based on evidence relating to hires in the first few months of 1988 cannot be squared with a complaint alleging a discrimination date of ``on or about October 1.'' The foregoing analysis does, concededly, substantially rely on hiring in 1988. But drawing an inference from that hiring does not necessarily mean that the discrimination did not take place until February or March; it says no more than that the 1988 hiring constitutes some of the proof tending to show that a discriminatory motivation was at work.

At the hearing, Respondent objected to the admission of a certain list of hired employees (G.C. Exh. 13). But reference is made here only to hires on that list about whom Johnson and Barnes specifically testified. There is no prejudice to Respondent from this procedure; the point General Counsel was attempting to make was quite clear, and

Respondent had the opportunity to answer it fully.\32\

\32\Respondent argues on brief that ``Johnson credibly explained the business reasons'' for the 1988 hires spotlighted at the hearing.

This case presents, inter alia, a question of when, during a continuing series of employments, alleged discriminatees probably would have been hired; that issue raises problems not presented by a clear cut case of discriminatory discharge of an existing employee. I cannot say precisely when the discrimination against Bullock and Deloatch occurred. The discriminatory failure to hire one or the other, or both, might have been on October 5 or 6 or 7 or 12, etc. Since Deloatch was rated as a 4, his earliest potential date of hiring raises an additional question.

Because these dates of discrimination cannot, in the nature of things, be precisely ascertained does not mean that the system must be frustrated. The discrimination became most obvious when Burchette and Johnson were hired on February 23 and March 7, 1988. I shall recommend, therefore, that the discrimination with respect to Bullock and Deloatch be held to have commenced, respectively, on those dates.

iii. the remaining 8(a)(1) allegations

The complaint alleges that on April 1, 1988, acting through Johnson, Respondent unlawfully ``interrogated its employees regarding the union membership, activities and sympathies of their fellow employees''; and, on April 4, ``interrogated its employees regarding their union membership, activities and sympathies,'' ``solicited grievances from its employees,'' and ``told employees they were not going to have a union.''

Former Union Steward Willo Wilkins testified that in April or May, Superintendent Johnson asked him where former crane operator Wilbert Wall Sr. was working, whether he thought Wall wanted to return to work for Williams, and ``did Wilbert want a union.'' Wilkins said he could not answer the questions. Wall testified that he went to see Johnson around April 4 after receiving messages about returning to work. Johnson assertedly asked ``what [Wall] thought of the union'' and told Wall that the men had ``signed a petition that they didn't want a union.'' Wall replied that he had not ``seen nobody from the union since I was there.'' At some point, Johnson told Wall that ``they didn't have the union in there and didn't want no fence between us. If I have any problem, come to him.'' Johnson offered Wall a job performing part-time crane operating and other functions, but Wall said he was not interested in working at that time.

Johnson testified that he did speak to Wilkins about hiring Wall, but denied that union activity was mentioned. As for his conversation with Wall on or about April 4, Johnson said that the subject of a union came up only in two contexts: when he was explaining the benefits, which included his standard reference used in all employment interviews to the fact that the Respondent ``intends to operate this plant as a nonunion plant''; and when Wall ``brought the thing up about the [Bristol] pension plan,'' as to which Johnson referred him to the union business agent.

Neither Wilkins nor Wall gave overwhelming evidence of a penetrating intelligence or a steeltrap memory, but they both seemed to try as best they could.\33\ Although Wilkins at first testified that Johnson asked him if ``we were talking about a union'' and then ``was Wilbert talking about a union,'' he finally corrected himself to say that the question was, ``Did Wilbert want a union?'' I am inclined to think that Wilkins' mistakes were simply that (perhaps caused by the formal environment, including the impressive hearing room). I have also taken into account that Wilkins had been a union steward, but that probable bias may be more than offset by his current employee status. Taking further into consideration that Wilkins' version harmonizes with that given by Wall, whom I credit, I conclude that Johnson did inquire of Wilkins on April 1 whether Wall wanted a union. Since this was uttered in a conversation in which Johnson was speaking of employing Wall, linkage of union support and potential employment undoubtedly had a reasonable tendency to coerce Wilkins in the exercise of Section 7 rights.

\33\Wall appeared to be a rather elderly man; he started work at the plant in 1951.

The remaining allegations, based on Walls' April 4 conversation with Johnson, refer to Wall as an ``employee,'' which he obviously was not. Statements addressed to potential employees can, of course, violate the Act, Wyman-Gordon Co. v. NLRB, 654 F.2d 134, 143-144, 146 (1st Cir. 1981), and cases cited, but nonemployee status can make a difference in some contexts, W. W. Grainger, Inc., 255 NLRB 1106, 1116 (1981) (Maretick). Here, Wall exhibited sufficient interest in employment to come to the plant when invited, and thus may be considered a potential applicant.

I found Wall's testimony to be persuasive, particularly in the authenticating detail of Johnson having mentioned the petition. I accept that Johnson asked Wall what he ``thought of the union,'' and, in a setting in which employment is being discussed, the reasonable tendency to coerce is manifest. Although Wall did not testify that, as the complaint alleges, Johnson told him ``they were not going to have a union'' (Wall instead attributed to Johnson the statement ``they didn't have the union in there''), Johnson testified that he told all, as indeed he ``always did and still do'' in explaining benefits to potential employees, that Respondent ``intends to operate this plant as a nonunion plant.'' As earlier discussed, that kind of statement has been held to violate Section 8(a)(1).

I think, in agreement with Respondent, that it stretches the statute to the breaking point to say that Johnson's remarks about not having a ``fence between us,'' and Wall could ``come to him'' with any problems, constitute a solicitation of grievances, as alleged. Solicitation of grievances is not, alone, violative of Section 8(a)(1); such conduct must be accompanied by an express or implied promise of imminent benefits which might affect an employee's decision regarding unions. El Rancho Market, 235 NLRB 468, 472 (1978). But it seems rather clear that Johnson was not promising benefits to Wall; he was, rather, explaining how things work when there is no union. The Board has held that there ``is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before.'' Tri-Cast, Inc., 274 NLRB 377 (1985). The same rationale would seem to apply to any claimed implied promises by virtue of solicitation of grievances. Accordingly, I shall recommend that this allegation be dismissed.

Conclusions of Law

1. Williams Enterprises, Inc., a Division of Williams Industries, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Lodge 10 of the International Association of Machinists and Aerospace Workers, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing, on and after October l5, 1987, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described below, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The appropriate bargaining unit consists of:

> All production, maintenance, and warehouse employees at Respondent's Richmond, Virginia, plant, excluding employees working in and/or engaged as office, clerical, watchmen, drafting, engineering, office janitor, guards, supervisors, erection, installation or construction work.

5. By, on August 21, 1987, and April 4, 1988, announcing to applicants for employment that it intended to operate as a nonunion plant; and by, on or about April 1 and 4, 1988, coercively interrogating an employee and a potential employee about the union sympathies of the

latter, Respondent violated Section 8(a)(l) of the Act.

6. By refusing to hire Gable Bullock Jr. and Melvin Deloatch on or about, respectively, February 23 and March 7, 1988, because of their protected Section 7 activity, Respondent violated Section 8(a)(3) and (1) of the Act.

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

8. The Respondent has not violated the Act in any other respect alleged in the complaint.

The Remedy

The customary cease-and-desist order should be entered and the traditional notices should be posted.

Having found that Respondent unlawfully refused to employ Gable Bullock Jr. and Melvin Deloatch on, respectively, February 23 and March 7, 1988, I shall recommend that it be ordered to offer them immediate and full employment in their former jobs, without prejudice to their seniority and other rights and privileges or, if no such jobs exist, to similar jobs, and to make them whole for any loss of earnings they may have have suffered from the above dates to the dates of Respondent's offers of employment, with interest, in accordance with F. W. Woolworth Co., 90 NLRB 289 (1950), and New Horizons for the Retarded, 283 NLRB 1173 (1987).\34\

\34\See generally Isis Plumbing Co., 138 NLRB 716 (1962).

On these findings of facts and conclusions of law and the entire record, I issue the following recommended\35\

\35\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.

ORDER

The Respondent, Williams Enterprises, Inc., a Division of Williams Industries, Inc., Falls Church, Virginia, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Local Lodge 10 of the International Association of Machinists & Aerospace Workers, AFL-CIO, CLC, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All production, maintenance, and warehouse employees at Respondent's Richmond, Virginia, plant, excluding employees working in and/or engaged as office, clerical, watchmen, drafting, engineering, office janitor, guards, supervisors, erection, installation or construction work.

(b) Announcing to applicants that it intends to operate as a nonunion plant, and coercively interrogating employees and potential employees about their union sympathies or the sympathies of others.

(c) Discriminating against applicants for employment in circumstances which tend to cause discouragement of union membership.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Act.

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

(a) Offer to Gable Bullock Jr. and Melvin Deloatch immediate andsa full employment in their former, or similar, jobs, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its

agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due.

(c) Post at its place of business in Richmond, Virginia, copies of the attached notice marked ``Appendix.''\36\ Copies of the notice, on forms provided by the Regional Director for Region 5, 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.

\36\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.''

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

It is further ordered that all violations alleged in the complaint but not found above are dismissed.