

The Henry Bierce Company and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, AFL-CIO. Cases 8-CA-21471 and 8-CA-21995

May 28, 1999

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND BRAME

On January 31, 1996, Administrative Law Judge John H. West issued the attached supplemental decision. The Respondent filed 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 supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the recommended Order.

1. Factual background

The principal issue in this case, before the Board pursuant to a remand from the Sixth Circuit Court of Appeals,² is whether the Respondent directly dealt with its employees in violation of Section 8(a)(5)³ based on a withdrawal of recognition from the Union.⁴

The facts, set forth more fully in the judge's initial and supplemental decisions, are summarized as follows. The Respondent and the Union, as the exclusive bargaining representative of the Respondent's drivers and yardmen,⁵ were parties to a series of multiemployer collective-bargaining agreements beginning in about 1974. In 1984, the Respondent withdrew from the multiemployer bargaining unit and negotiated a separate collective-bargaining agreement with the Union, effective May 1, 1984, to April 30, 1987 (the Agreement). Consistent with past practice, the Union did not present the Respondent with a written agreement for execution until more than a year after it had been negotiated. The parties then signed the Agreement, which was effective retroactively to May 1, 1984.

At the time the parties negotiated the Agreement, the Respondent's five drivers were union members and had their union dues deducted from their paychecks. The

Respondent's yardman, however, was not a union member and did not have dues deducted. David Bierce, the Respondent's general manager, testified that the Respondent did not pay the yardman the wage rate specified in the multiemployer agreement and did not include him in the Union's pension or health plans as the multiemployer agreement required.

During the term of the Agreement, the Respondent hired three drivers and one yardman, but, in violation of the Agreement's explicit provisions, did not give the Union an opportunity to provide applicants for these job openings and did not notify the Union of the new hires. Additionally, again in violation of the Agreement, the Respondent did not pay any of the four new employees the contractual wage rates, place them in the Union's pension or health plans, or make contributions on their behalf to the Union's charitable or severance funds, as called for in the Agreement. None of these employees had union dues deducted from their paychecks.

Bierce and DeStefano, who is the Union's vice president and business agent, met in 1986 and negotiated a 40 cents-per-hour-wage increase under the wage reopener provision of the Agreement. In early 1987, both the Respondent and the Union announced their intention to negotiate a new agreement, and in April 1987 Bierce and DeStefano met twice to negotiate a successor to the Agreement. DeStefano thereafter was occupied for sometime with other union matters, including, among other things, negotiating 14 other collective-bargaining agreements and conducting a strike against another employer. Consequently, DeStefano did not present Bierce with a written contract to sign until August 1988. The Respondent's attorney ultimately notified DeStefano in October 1988 that the Respondent would not sign the contract.⁶

In the meantime, the Respondent hired one new employee in the latter half of 1987 and three new employees in the first half of 1988. As with the other recently hired employees, the Respondent neither notified the Union of their hiring nor compensated the employees in accordance with the terms of the Agreement. Nor did any of these employees have union dues withheld from their paychecks. Additionally, the union steward retired in December 1987. No new steward was named.

In late September or early October 1988, within earshot of David Bierce, employee Thompson, who had been working for the Respondent for a year, stated that "[i]f we were union, we'd be—we would get uniforms." This remark prompted employee Boulton, who had been employed by the Respondent for 6 months, to reply,

¹ The Respondent has 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.

² 23 F.3d 1101 (6th Cir. 1994).

³ *Id.* at 1110.

⁴ See fn. 36, below.

⁵ The unit description is set forth in the judge's original decision. See 307 NLRB 622 fn. 2 (1992).

⁶ In his original decision, the judge dismissed the allegation that the Respondent had violated Sec. 8(a)(5) and (1) of the Act by refusing to execute the contract presented by the Union. No party has excepted to this dismissal and it is not before us.

“You go ahead and ruin a good thing between the—the relationship between the drivers and the company.”⁷

On November 4, 1988, the Respondent polled its employees regarding whether they wanted to be represented by the Union, and on November 9, the Respondent notified the Union that it no longer recognized the Union as its employees’ bargaining representative. In December, the Union filed unfair labor practice charges alleging that the Respondent had unlawfully refused to execute the successor agreement.

In March 1989, Bierce, in his office, told driver Morgan, a union member, that the Respondent was going to get out of the Union and it wanted to set up a program for Morgan under which he would receive the same benefits and retirement that the Respondent’s other employees received. Bierce further stated that the Respondent would permit Morgan to work until he was 60 years old and that Bierce wanted him to drop out of the Union. Bierce’s father, Lou Bierce, the Respondent’s president, then stated that the Respondent was going to get out of the Union as Morgan was the only employee in the Union and the Respondent was not “signing up anybody else in the Union.”⁸

2. Procedural history

In the Board’s initial decision in this proceeding, it found, in agreement with the judge, that, *inter alia*, the Respondent had violated Section 8(a)(5) and (1) of the Act by polling its employees about whether they desired continued union representation, by withdrawing recognition of the Union, and by dealing directly with Morgan concerning terms and conditions of employment. The Board ordered the Respondent, *inter alia*, to cease and desist from its unfair labor practices and to bargain with the Union.⁹

On appeal of the Board’s decision by the Respondent and a cross-petition for enforcement,¹⁰ the United States Court of Appeals for the Sixth Circuit rejected the Board’s conclusion that the Respondent’s poll of its employees was unlawful due to the absence of “substantial, objective evidence of a loss of union support”¹¹ that would justify conducting a poll. The court found that the judge’s permitting the General Counsel to amend the complaint on the last day of the hearing to allege the poll as unlawful prejudiced the Respondent because it denied the Respondent sufficient notice that the lawfulness of the poll would be at issue. The court, nevertheless, af-

firmed the Board’s conclusion that the poll was unlawful on the basis that the Respondent failed to give the Union advance notice of the poll. Thus, the court agreed with the Board that the poll “may not serve as the basis for the company’s withdrawal of union recognition and subsequent direct dealing.”¹² Characterizing the Respondent’s polling as a violation of Section 8(a)(1) alone, rather than of Section 8(a)(5) and (1) as the Board had found, however, the court declined to enforce the Board’s order that the Respondent bargain with the Union “based solely on the Section 8(a)(1) poll violation.”¹³ The court did not rule directly on the Board’s finding that the Respondent’s withdrawal of union recognition subsequent to the poll violated Section 8(a)(5) and (1).

With respect to the Board’s conclusion that the Respondent engaged in unlawful direct dealing with employee Morgan, the court remanded the case, for the principal purpose of providing the Respondent an adequate opportunity to introduce evidence regarding its defense that it had a reasonable, good-faith doubt, based on objective evidence apart from the poll results, that the Union enjoyed majority support. We in turn remanded the proceeding to the administrative law judge for a hearing and a supplemental decision.

In his supplemental decision, the judge reaffirmed the recommendations made in his initial decision, finding that the Respondent had failed to show that it possessed a reasonable, good-faith doubt, based on objective evidence apart from the poll results, that the Union possessed majority support at the time of the Respondent’s direct dealing with employee Morgan.¹⁴ The judge again

¹² 23 F.3d at 1104.

¹³ *Id.* at 1110.

¹⁴ The Respondent argues that the judge erred in failing to apply the Sixth Circuit’s “loss of support” test to the question of the lawfulness of the withdrawal of recognition. Contrary to the Respondent, we find that the test applied by the judge, as noted above, is the one required under the court’s remand order. In its decision, the court noted that the second defense the Respondent raised to the direct dealing allegation was “its reasonable good-faith doubt, based on objective evidence apart from the poll results, that the union still enjoyed *majority* support.” 23 F.3d at 1109 (emphasis added). Concluding that “the company did not have an adequate opportunity to assert its second defense, *i.e.*, “to adduce evidence in support of its alternative, ‘good-faith’ defense,” *id.* at 1104, the court remanded the direct dealing allegation to the Board to provide the Respondent that opportunity. In a footnote, the court noted that the administrative law judge had addressed the Respondent’s good-faith doubt defense “not . . . in the context of the direct dealing allegation but in determining the poll’s substantive validity.” *Id.* at 1109 fn. 3. The court observed that, in so doing, the judge had not applied the “correct standard for *determining a poll’s validity*—substantial, objective evidence of a *loss* of support for the union.” *Id.* (first emphasis added). In making this statement, the court was not signaling that the loss of support test, which the Sixth Circuit has found appropriate in such cases as *Thomas Industries* in deciding whether an employer is justified in *polling* its employees concerning union representation, was to be applied on remand to the direct dealing allegation. See discussion of Sixth Circuit precedent in *NLRB v. Hollaender Mfg. Co.*, 942 F.2d 321, 325 (6th Cir. 1991), cert. denied 112 S.Ct. 1168 (1992). Rather, the court was pointing out the judge’s error in addressing the polling issue. In any event, we note that the Supreme Court’s subsequent deci-

⁷ 307 NLRB at 625. This quotation is based on Boulton’s testimony. According to Bierce’s testimony, Boulton had stated, “[I]f you want to screw up a good thing over something as stupid as uniforms, get the union in here.” The differences between the two accounts of this exchange do not affect our result.

⁸ *Id.* at 627.

⁹ *Id.* at 622.

¹⁰ *Henry Bierce Co. v. NLRB*, 23 F.3d 1101 (1994).

¹¹ *Thomas Industries v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982), quoted in *Henry Bierce Co.*, 307 NLRB 622 fn. 3 (1992).

concluded that the Respondent had violated Section 8(a)(5) and (1) by polling its employees in November 1988 regarding union representation without giving advance notice to the Union, by withdrawing recognition from the Union the same month, and by dealing directly with employee Morgan concerning terms and conditions of employment in March 1989.¹⁵ The judge recommended, inter alia, that the Respondent cease and desist from its unfair labor practices and recognize and bargain with the Union.

3. The judge's decisions

a. *The judge's initial decision*

In his initial decision, the judge had addressed the Respondent's various grounds for its assertion of good-faith doubt, and found that the Respondent failed to show that it possessed a reasonable good-faith doubt, based on objective evidence, that the Union retained majority support.¹⁶ Rejecting the Respondent's contention, for which it cited *Thomas Industries v. NLRB*,¹⁷ that the decline in the number of its employees having union dues withheld from their paychecks demonstrated loss of union support, the judge noted that the Respondent was to some degree responsible for this decline because, contrary to its obligations under the Agreement, the Respondent had not notified the Union about the new hires. The judge further noted that, as *Thomas Industries* itself acknowledged, a low percentage of employees using dues check-off does not necessarily show a loss of union support, because checkoffs are voluntary. The judge further distinguished *Thomas Industries*, noting that, in addition to a decline in dues checkoffs, the employer there had other objective evidence of employee dissatisfaction: at least one-third of the employees had made negative comments about the union and some employees, including six union officials, had resigned from it. In contrast, the judge found that in this case there was only one negative employee comment made about the Union—Boulton's negative response to Thompson's statement that the employees would get uniforms "if we were union"—and, further, that Bierce testified that no other employee complained to him about the Union or otherwise indicated

sion in *Allentown Mack Sales and Service, Inc. v. NLRB*, 118 S.Ct. 818 (1998), upheld the Board's "good faith reasonable doubt" test and rejected the view adopted by the Sixth Circuit in *Thomas Industries* that a lower standard must be applied to polling of employees. See fn. 29 and accompanying text, below.

¹⁵ We do not adopt the judge's conclusion that the Respondent's polling of its employees concerning union representation without giving advance notice to the Union violated Sec. 8(a)(5). As noted above, the court of appeals found this conduct to violate only Sec. 8(a)(1). Accepting the court's finding as the law of the case, we find that the Respondent's polling its employees without giving advance notice to the Union violated Sec. 8(a)(1).

¹⁶ See 307 NLRB at 631–632.

¹⁷ See fn. 11, supra.

dissatisfaction with the Union.¹⁸ Even considering Bierce's testimony that the Respondent was employing several new hires, the judge concluded that these factors did not amount to additional objective evidence of employee dissatisfaction with the Union.

Regarding the various instances of union inaction cited by the Respondent, the judge further found that this evidence did not support a conclusion that the Union had abandoned its representative status. Thus, although the Union had not filed grievances or sought arbitration, the judge found that Respondent had not shown that the Union had any reason to do so, as the Respondent had not demonstrated that the Union had knowledge of the Respondent's contract breaches or its discharge of one employee, or that the discharge would, in any event, have sparked a grievance. Further, there was no evidence that any employee had sought the Union's assistance and not received it. Consequently, the judge found that the Respondent had failed to establish that it had a good-faith doubt of the Union's majority status reasonably premised on objective considerations, or that it had even met the less stringent "loss of support" test, which the Respondent maintained was applicable.

b. *The judge's supplemental decision*

In his supplemental decision, the judge noted that at the hearing on remand, the Respondent called only one witness, David Bierce, to provide evidence, other than the poll, of an objective basis for good-faith doubt, and that Bierce's testimony "was basically nothing more than a 'rehash' of evidence introduced at the [initial] hearing." The judge observed that the few new matters Bierce raised were merely additional events or conduct (such as the Respondent's breaches of the collective-bargaining agreement) of the sort found, in the initial decision, not to provide a basis for good-faith doubt of majority support. He essentially reaffirmed his conclusion that such matters were insufficient, noting that an employer may not reasonably rely on employee turnover in a non-strike situation,¹⁹ an absence of employee comments expressing support for the Union, employees' failure to authorize dues deduction, or the fact that some employees (here, as Bierce testified, four employees) have never met the Union's business agent as evidence that employees no longer desire union representation. The judge further noted that absent a showing that the Union was ignoring a substantial number of employee grievances, its failure to file grievances did not establish inactivity or indifference on the part of the Union. In general, the judge found the Respondent's reliance on union inactivity as justification for its withdrawal of recognition to be fa-

¹⁸ We also note that Thompson's statement that the employees would get uniforms "if we were union" is a prounion statement. Thus, the Respondent has adduced one prounion statement and one antiunion statement as evidence of loss of majority support.

¹⁹ We express no view here regarding the judge's apparent differentiation between turnover during a strike and in a nonstrike situation.

tally undermined by the fact that the Respondent was operating in continuous breach of the Agreement—a fact of which the union had neither actual nor constructive notice. In sum, the judge again concluded that the factors cited by the Respondent did not constitute sufficient objective considerations to warrant a good-faith doubt of the Union’s continued majority status.²⁰

4. Conclusions and rationale

In agreeing with the judge’s conclusions, we adopt and elaborate on the judge’s reasoning as follows.

At the outset, it is important to note that the court of appeals, in reviewing the original record in this case, did not sustain the Respondent’s good-faith doubt of majority status defense. Rather, the court remanded the proceeding to provide the Respondent *an opportunity* to introduce additional evidence in order to establish this defense. Consequently, the Respondent’s complete failure to introduce any legally significant additional evidence on remand leads to the conclusion that, under the court’s view of the case, the Respondent has failed to establish this defense.

As we have seen, the Respondent’s asserted doubt of the Union’s majority status was based, in large measure, not on the unit employees’ manifestations of their views regarding the Union but rather, on the Respondent’s treatment of them, which was marked by a continuous disregard for their rights under the contract. Thus, starting in 1984, as the Respondent hired new employees, it failed to pay them the wages and benefits called for under the Agreement. This violation of their rights by the Respondent, coupled with the employees’ choice not to exercise their option to have their dues paid to the Union by means of a payroll deduction, apparently justified to the Respondent a conclusion that they were “nonunion” employees. On the other hand, the Respondent’s longer-tenured unit employees, who received contractual wages and benefits and authorized dues checkoff, the Respondent regarded as “union” employees. The Respondent expressed this categorization of employees repeatedly:

At the outset of the 1984 negotiations, five of the six employees within the unit (83%) had been checking off

²⁰ The Board’s remand Order actually framed the issue as whether, at the time of its direct dealing, the Respondent “possessed a reasonable, good-faith belief, based on objective evidence apart from the poll results, that the Union lacked majority support.” In his supplemental decision, the judge referred to both “good faith doubt” and “good faith belief.” Regardless of the difference in terminology, only a single standard was intended. In fact, in *Celanese Corp. of America*, 95 NLRB 664 (1951), the principal source of the Board’s good-faith doubt standard, the Board referred both to whether an employer “in good faith believed” that a union “no longer represented a majority of the employees” (id. at 671) and to whether an employer possessed a “good faith doubt of majority” (id. at 673, citation omitted). As explained below, we are now bound to apply the good-faith doubt standard in the manner that it has been interpreted by the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 118 S.Ct. 818 (1998).

dues and had been members of Local 348.²¹ . . . [A]s of the date of the 1986 wage reopener negotiations, Respondent had in its employ three *union* employees (Morgan, Bauch, and McAninach) and three *non-union* employees (Walker, Noel, and George).²² . . . Mr. Morgan was the *sole union employee left* at the time [Bierce] had the [March 1989] conversation with him.²³

Thus, the Respondent has made a wholly self-serving division of the bargaining unit between more senior “union employees” and newer “nonunion” employees. Each of the unit employees, regardless of when hired, was a member of the bargaining unit and thus covered by the contracts between the Respondent and the Union. Even disregarding for the moment the fact that such a division was a fundamental breach of the terms of the Agreement, this distinction contributes nothing to a showing that the Respondent had a reasonable, good-faith doubt, based on objective evidence, that the Union still enjoyed majority support. The newer employees’ passive acceptance of the terms and conditions of employment provided by the Respondent does nothing to demonstrate those employees’ own views regarding union representation. Indeed, because the Respondent failed to comply with its contractual obligation to notify the Union of vacancies and new hires, there is no reason to believe the employees knew they were entitled to be paid the contractual wages and benefits. Additionally, that some employees did not authorize the Respondent to deduct their union dues directly from their paychecks does not establish that they were not union members and is irrelevant to the issue of whether they did or did not support the Union.²⁴

With respect to the Respondent’s reliance on the number of employees it claims were not union members, it is well settled that unit employees’ nonmembership in a union does not establish that those employees do not want the Union to be their collective-bargaining representative.²⁵ Thus, even assuming that the Respondent succeeded in demonstrating that the employees hired after 1983 did not join the Union, the Respondent would still have failed to establish a sound basis for inferring that those employees did not desire to have the Union as their bargaining representative. Employees can have many reasons for desiring union representation but not to be union members. An employee’s decision to become a

²¹ R. Br. at 30.

²² Id. at 12 (emphasis added).

²³ Tr. at p. 387 (testimony of David Bierce) (emphasis added).

²⁴ See, e.g., *Gulfmont Hotel Co.*, 147 NLRB 997, 1001–1002 (1964), *enfd.* 362 F.2d 588 (5th Cir. 1966).

²⁵ See, e.g., *Washington Manor Nursing Center (North)*, 211 NLRB 324, 329 (1974), *enfd.* 519 F.2d 750 (6th Cir. 1975); *Harpeth Steel, Inc.*, 208 NLRB 595 (1974); *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969), *enfd.* 427 F.2d 1088, 1090 (4th Cir. 1970), *cert. denied* 398 U.S. 929 (1970); *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 138 (2d Cir. 1982); *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 490 (2d Cir. 1975).

union member or to refrain from doing so is protected by the Act as a private matter.²⁶

The Respondent also relies heavily on its own violations of its agreement with the Union and the Union's failure to object to these violations. Thus, the Respondent notes that, as new employees were hired into the unit, it failed to pay them the wages and benefits which it had negotiated in the Agreement, and failed to notify the Union of job openings and new hires, as the Agreement required.

We reject this reasoning as lacking in merit and contrary to the policies underlying the Act. We agree with the judge that the Respondent's violation of its own contractual obligations to notify the Union of job openings and new hires undermines rather than fortifies its position. The Union was entitled to rely on the Respondent to fulfill its contractual commitments and notify the Union about job openings and new hires. Indeed, the statutory objective of industrial peace would scarcely be attainable unless unions and employers could exercise a degree of prudent reliance on their contractual partners to abide by their word. The Respondent defaulted on its obligation to do so and its recitation of the extent to which it failed to keep its word, largely by depriving its own employees of benefits accruing to them under the Agreement, does not, and cannot, put it in a more favorable position than it would be had it abided by the contract.²⁷ Accordingly, the Union's failure to challenge the terms and conditions of employment provided to employees whose very employment the Respondent, contrary to its contractual obligation, had failed to bring to the Union's attention is not an objective good-faith basis for the Respondent's asserted doubt of the Union's majority status.

Moreover, as a matter of policy, to find that the Respondent could establish its good-faith doubt of the Union's majority status through its bad faith in failing to carry out its various contractual commitments would be antithetical to the Act's purposes of promoting industrial peace and furthering collective bargaining. A holding that lack of union opposition to an employer's failure to live up to its contractual commitments could constitute objective grounds for a good-faith doubt of the Union's continued majority support and the employer's withdrawal of recognition would provide employers with an incentive to violate their collective-bargaining agreements. In addition, as noted above, such a view would vitiate the statutory objective of industrial peace. Ac-

²⁶ The same reasoning applies to the Respondent's argument that the Union's failure to submit the successor agreement for ratification is evidence of loss of majority support. Ratification is an internal union matter.

²⁷ This would be our conclusion regardless of our view of the Union's role on this matter, i.e., whether the Respondent was taking advantage of an overworked and thinly stretched union business agent or whether DeStefano should have pursued the unit employees' interests with greater vigor.

cordingly, we find on this basis also that the Respondent's breaches of the Agreement fail to support its asserted good-faith doubt of the Union's majority status.

We also reject the Respondent's other asserted indications of the Union's inactivity—i.e., that no new steward was appointed after the steward's retirement in December 1987, that the Union failed to submit the agreement assertedly reached in 1987 for employee ratification, and that the Union did not file grievances—as support for the Respondent's good-faith doubt defense. These and similar concerns are purely internal union matters and beyond the Respondent's purview. Unit employees, if dissatisfied with the Union's performance in these or other areas, may petition for an election to oust it as their collective-bargaining representative. Thus, the Union, while answerable to employees' judgment of its performance of its duties, is not answerable to an employer's "dissatisfaction" with its efforts on the employees' behalf. This is even more self-evident when, as here, the employer itself has consistently and deliberately denied the employees the benefits of the contract. Thus, the Union's performance does not provide the Respondent with a legitimate basis for good-faith doubt of the Union's majority status. Moreover, as a matter of fact, the Union's active engagement in three sets of contract negotiations on behalf of the unit between 1984 and 1987, i.e., negotiations concerning the Agreement, the 1986 wage reopener, which resulted in a sizable wage increase, notification of intent to negotiate a new agreement with the Respondent, and negotiations toward a successor to the Agreement, belies the Respondent's contention of union inactivity.

In sum, we agree with the judge that the Respondent failed to show that it possessed a reasonable, good-faith belief, based on objective evidence apart from the poll results, that the Union lacked majority support at the time of the Respondent's direct dealing with employee Morgan. Moreover, our conclusion is not altered by the Supreme Court's decision in *Allentown Mack Sales Service, Inc. v. NLRB*,²⁸ which issued subsequent to the judge's supplemental decision. In *Allentown Mack*, the Court found that the Board's "good faith reasonable doubt" test was rational and consistent with the Act²⁹ but that the Board's finding that the employer in that case lacked such a doubt was not supported by substantial evidence

²⁸ 522 U.S. 359 (1998).

²⁹ The "good faith reasonable doubt" at issue there was asserted as the employer's justification for its polling of employees to determine their support for the incumbent union. The Court rejected the employer's contention that it was irrational for the Board to require as high a standard for permitting an employer to conduct a poll as was required for allowing an employer to withdraw recognition of the union. In the present case, it is the Respondent's withdrawal of recognition and subsequent direct dealing with employees, not the Respondent's poll, that is currently at issue. There is no contention that the Board's use of the "good faith reasonable doubt" test for the Respondent's withdrawal of union recognition is irrational.

on the record as a whole. In determining whether substantial evidence supported the Board's finding, the Court held that "doubt" meant "uncertainty" rather than "disbelief" so that the test could be phrased in terms of whether the employer "lacked a genuine, reasonable uncertainty about whether [the union] enjoyed the continuing support of a majority of unit employees."³⁰ The Court found unreasonable the Board's rejecting, as support for the employer's "reasonable doubt," statements of employees Bloch and Mohr reporting antiunion sentiments of other unit employees. The Court indicated that the Board could not flatly reject all employee reports of other employees' antipathy toward the union. Rather, the Court stated:

[While] the Board is entitled to be skeptical about the employer's claimed reliance on second-hand reports when the reporter has little basis for knowledge, or has some incentive to mislead . . . that is a matter of logic and sound inference from all the circumstances, not an arbitrary rule of disregard. . . .³¹

In finding Mohr's statement probative, the Court noted that the issue was "not whether Mohr's statement clearly establishes a majority in opposition to the union, but whether it contributes to a reasonable uncertainty whether a majority in favor of the union existed."³² The Court also held that the Board erred in disregarding, as supporting the employer's reasonable doubt, employee Marsh's statement that "he was not being represented for the \$35 he was paying."³³ The Court concluded that Bloch's and Mohr's statements indicating other employees' antiunion sentiments, coupled with Marsh's statement and the antiunion statements of seven employees that the Board acknowledged, compelled a finding that the employer had reasonable, good-faith grounds to doubt the union's majority support. Accordingly, the Court reversed the court of appeals' decision upholding the Board's finding that the employer's polling of its employees violated Section 8(a)(5) and (1) of the Act.

The present case is quite unlike *Allentown Mack*. Here we are not rejecting any employee statements asserted to show the Respondent's good-faith doubt of the Union's majority status. Indeed, the only employee statement asserted to show union disaffection was Boulton's negative response to Thompson's suggestion that the employ-

ees would get uniforms "if we were union."³⁴ Rather, as discussed above, we reject the Respondent's other asserted grounds for its good-faith doubt—largely, the Respondent's violations of its contract and the Union's inaction in opposing such violations. Moreover, we find that the Respondent's asserted basis for its withdrawal of recognition and direct dealing fails to meet the requisite test, regardless of whether that test is phrased in terms of "good faith reasonable doubt" of the Union's majority support or "genuine, reasonable uncertainty about whether the Union enjoyed the continuing support of a majority of unit employees." Accordingly, we agree that the Respondent therefore violated Section 8(a)(5) and (1) by withdrawing recognition from the Union in November 1988,³⁵ and by dealing directly with employee Morgan concerning terms and conditions of employment in March 1989.³⁶

5. The propriety of a bargaining order

We also adopt the remedy recommended by the judge, including the requirement that the Respondent recognize and, on request, bargain with the Union. We believe that this remedy is not only proper but is also ultimately consistent with the court's decision remanding the case to us. As noted above, in its decision, the court declined to enforce the Board's order requiring the Respondent to bargain with the Union "based *solely* on the Section 8(a)(1) poll violation" because "the Board made no factual findings and did not explicitly conclude that there was a causal connection between the alleged unfair labor practices, including the poll, and the probability that no fair election could be held."³⁷

We do not interpret the court's decision as precluding the issuance of a bargaining order if we were to find, as we do, that the Respondent's withdrawal of recognition

³⁴ See fns. 7 and 18, *supra*, and accompanying text.

³⁵ As noted above, the court of appeals did not expressly rule on our prior finding that the Respondent's withdrawal of recognition violated Sec. 8(a)(5), although it did conclude that the Respondent's poll "may not serve as the basis for the company's withdrawal of union recognition." 23 F.3d at 1104. We conclude that the withdrawal of recognition allegation is before us even though it was not expressly mentioned in the court's remand order. The withdrawal of recognition issue and the direct dealing issue, which the court expressly remanded, are closely linked, because both are based on the premise that the Respondent breached its obligation to bargain with the Union as the exclusive representative of the unit employees. Had the court determined that the Respondent's withdrawal of recognition from the Union in November 1988 was not unlawful, the court would have reversed our additional finding that the Respondent's direct dealing with employee Morgan in March 1989 violated Sec. 8(a)(5), rather than remanding the direct dealing issue to us, as no basis would have existed on which to base a finding that the Respondent's direct dealing violated Sec. 8(a)(5). Moreover, had the Respondent, in the hearing on remand, established its "good-faith doubt" defense, that defense, unless based on events subsequent to the Respondent's withdrawal, would have applied to both violations.

³⁶ As noted above, the court previously affirmed our conclusion that the Respondent violated Sec. 8(a)(1) by polling its employees without affording the Union advance notice of the poll.

³⁷ 23 F.3d at 1110 (emphasis added).

³⁰ 522 U.S. at 367. The Court, nevertheless, continued, at times, to use the terminology "good faith reasonable doubt" to refer to the test. See, e.g., *id.* at 371, 379.

³¹ *Id.* at 379. The Court further stated that the "same is true of Board precedents holding that 'an employee's statements of dissatisfaction with the quality of union representation may not be treated as opposition to union representation,' and that 'an employer may not rely on an employee's anti-union sentiments, expressed during a job interview in which the employer has indicated that there will be no union.'" *Ibid.* (citations omitted.)

³² *Id.* at 371.

³³ *Id.* at 369.

from the Union and its direct dealing with employee Morgan violated Section 8(a)(5) and (1). In our view, the court discussed only whether a bargaining order should issue based on the “procedural” polling violation. At this juncture, however, a finding that the Respondent violated Section 8(a)(5) and (1) in two respects also supports our order that the Respondent bargain with the Union on request.

We note respectfully that the cases the court cited in its discussion of the propriety of the bargaining order based on a violation of Section 8(a)(1) involved *Gissel*³⁸ bargaining orders and set forth conditions for the issuance of such bargaining orders based on violations of Section 8(a)(1) and (3).³⁹ A *Gissel* bargaining order remedies the unfair practices of an employer that, unlike the Respondent, lacks a preexisting obligation to recognize and bargain with a union. In *Caterair International*,⁴⁰ the Board reaffirmed its longstanding practice of issuing bargaining orders against employers that unlawfully withdraw recognition from unions with which they have a preexisting bargaining relationship. *Caterair* also delineates the fundamental difference in intent, circumstances, and type of Board authority at issue between a *Gissel* order and an order requiring the employer to re-establish a previous bargaining relationship. A *Gissel* order establishes a new obligation of an employer to recognize and bargain with a union when, during a union organizing effort, the employer has committed “serious unfair labor practices that interfere with the election process and tend to preclude the holding of a fair election.”⁴¹ A *Gissel* bargaining order is an extraordinary remedy precisely because it does not restore the status quo that existed before the unfair labor practice occurred. It is this type of order, relating to circumstances in which a fair election cannot be held, that the court has described.

Our bargaining order based on the Respondent’s withdrawal of recognition and direct dealing here, however, is not a *Gissel* bargaining order. Rather, this type of order merely requires the Respondent to resume compliance with its preexisting bargaining obligation, which it had repudiated without a lawful basis. It does not occur in the context of a union’s attempt to establish a relationship with a stranger employer, but in the context, in this case, of a bargaining relationship of over 20 years’ duration. Thus, our order here, unlike a *Gissel* order, merely requires restoration of the status quo ante—the bargaining relationship between the Union and the Respondent—and is based on violations of Section 8(a)(5) and

(1), not solely on violations of Section 8(a)(1) and (3). Thus, as more fully explained in *Caterair*, we find an order requiring the Respondent to recognize and bargain with the Union to be the appropriate remedy for the Respondent’s unlawful withdrawal of recognition from the Union.⁴²

The Sixth Circuit expressly affirmed the propriety of a bargaining order in substantially identical circumstances to those present here in *NLRB v. Hollaender Mfg. Co.*⁴³ The court noted that, under Supreme Court precedent, the “Board must fashion an order that serves as ‘a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act.’”⁴⁴ Affirming the Board’s finding that the employer had unlawfully withdrawn recognition of the union, the Sixth Circuit enforced the Board’s bargaining order, stating:

Hollaender refused to recognize, or bargain with, the Union after unilaterally (and unlawfully) determining that the Union lacked majority support . . . [T]he Board’s directives ordering Hollaender to “cease and desist from refusing to recognize and bargain collectively” with the Union, and to “recognize and bargain with [the Union] as the exclusive representative of the employees,” restore the status quo by reestablishing the bargaining relationship between Hollaender and the Union.⁴⁵

Accordingly, for the foregoing reasons as well as those set forth in *Caterair*, we find that the Respondent’s unlawful withdrawal of recognition from the Union and its subsequent unlawful direct dealing with an employee warrant, under Sixth Circuit as well as Board precedent, issuance of a bargaining order to restore the status quo ante.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Henry Bierce Co., Akron, Ohio, its officers, agents, successors and assigns, shall take the action set forth in the Order.

MEMBER BRAME, dissenting in part.

The facts here are simple:

⁴² We therefore disagree with our dissenting colleague’s characterization of the order directing the Respondent to resume bargaining with the Union as an “extraordinary remedy.” Rather, it is the normal and appropriate remedy, required in order to reestablish a relationship that was unlawfully broken off by the employer.

⁴³ 942 F.2d 321 (6th Cir. 1991), cert. denied 112 S.Ct. 1168 (1992).

⁴⁴ Id. at 327, quoting *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969).

⁴⁵ Id. at 328; See also *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1289 (4th Cir. 1995) (“when a . . . company refuses to recognize or bargain with an incumbent union, only an affirmative bargaining order can restore the status quo ante”).

³⁸ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

³⁹ See *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1300 (6th Cir. 1988) (setting forth three conditions under which “a bargaining order is proper as a remedy for section 8(a)(1) violations”), cited in *M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883 (6th Cir. 1990), cited in *Henry Bierce Co.*, above, 23 F.3d at 1110.

⁴⁰ 322 NLRB 64 (1996).

⁴¹ 395 U.S. at 594.

In about 1974, the Respondent recognized the Union as the exclusive bargaining representative of its drivers and yardmen. Their most recent collective-bargaining agreement, effective May 1984 through April 1987, required the Respondent to pay specific wages and benefits, make payments to the Union's health and benefit plan for each employee in the unit, give the Union an opportunity to provide applicants for job openings, and notify the Union when it hired new employees.

The Respondent flagrantly violated its obligations, paying the contract wages and benefits only to drivers who had been in the unit as of the signing of the collective-bargaining agreement, negotiating individually with new hires as to the terms and conditions of their employment, and failing to notify the Union of job openings or new employees. By November 1988, when the Respondent unlawfully polled its employees to ascertain whether they desired representation by the Union, only one of the seven unit members was being paid according to the collective-bargaining agreement. Immediately after taking the poll, the Respondent withdrew recognition from the Union.

Meanwhile, the Union accepted payments for a declining number of employees, failed to check on the new employees in the employer's work force and failed to replace a departing steward. Indeed, it finally took action only after the Respondent conducted the illegal poll and withdrew recognition.

My colleagues, having found the withdrawal of recognition unlawful, apply the Board's traditional rules of decision and order the Respondent to recognize the Union as the unit employees' collective-bargaining representative and bargain with it concerning their terms and conditions of employment.

Unfortunately, over 10 years have passed since the events relevant to this case occurred. In all probability, not a single individual currently in the unit had a voice in choosing the Union as his collective-bargaining representative or is even aware of the Union's role as collective-bargaining representative. Thus, my colleagues' order imposes on these employees an obligation and a relationship that they had no part in choosing.

My colleagues' decision also forecloses the employees from continuing their 12-year practice of negotiating individually with the employer, bars them from selecting a new collective-bargaining representative for possibly 3 years or longer,¹ and, in the interim, requires that their

¹ Under established Board precedent, an employer that unlawfully withdraws union recognition normally is required to recognize and bargain with the union for a "reasonable period," during which period a representation petition cannot be maintained. See, e.g., *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996), affirmed in part, remanded in part 117 F.3d 1454 (D.C. Cir. 1997); *Caterair International*, 322 NLRB 64, 67-68 (1996). If bargaining results in a collective-bargaining agreement, a representation petition is further barred for the duration of the agreement, not to exceed 3 years, except for a 30-day "window" period starting 90 days before contract expiration. See

terms and conditions of employment be altered to reflect whatever agreement is reached between the Respondent and a union that they did not select.

Were we a court of law, we would refuse to enforce an order that violates the concepts of fundamental justice. Were we a court of equity, we would refuse to grant equity to a party that had rested on its rights. We are neither. We are, however, an agency whose charter is Section 7 of the Act, which provides, in pertinent part:

Employees shall have the right . . . to bargain collectively through representatives of their own choosing, and . . . shall also have the right to refrain from any or all such activities [emphasis added].

Thus, our core mandate is the protection of employee rights. As the D.C. Circuit has observed, "employee freedom of choice [is] a matter at the very center of our national labor relations policy."² Indeed,

[O]ne of the fundamental rights under the Act which the Board is charged with protecting is employees' right to choose their bargaining representative, as well as the "right to refrain" from collective bargaining.³

In this unusual case, where the duration between the conduct at issue and our entry of a remedial order is extraordinarily great, to impose a union on the Respondent's unsuspecting employees denies them their fundamental right to choose. A bargaining order is an "extraordinary" remedy, which requires an explanation of why it is appropriate "given the facts of . . . [each] particular case." *Lee Lumber Building Material Corp. v. NLRB*, supra at 1461.

The Board has not explained why the order in the case is appropriate because, under these facts, it cannot. Therefore, in faithfulness to our Congressional mandate, we should recognize the Section 7 rights of the unit employees and decline to enter an order compelling them to accept representation by a union that they have not chosen.

Paul C. Lund, Esq., for the General Counsel.

Keith Pryatel, Esq. (Millisor & Nobil), of Akron, Ohio, for the Respondent.

Robert DeStefano, of Akron, Ohio, for the Charging Party.

SUPPLEMENTAL DECISION

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

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

General Cable Corp., 139 NLRB 1123 (1962); *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 45 fn. 17 (D.C. Cir. 1980).

² *Conair Corp. v. NLRB*, 721 F.2d 1355, 1377-1378 (D.C. Cir. 1983), cert. denied 467 U.S. 1241 (1984).

³ *Peoples Gas System, Inc. v. NLRB*, 629 F.2d at 45, citing Secs. 1(b) and 7 of the Act.

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

The Respondent, The Henry Bierce Co.,¹ was ordered to recognize and bargain collectively with the Union, Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, AFL-CIO,² as the exclusive bargaining representative of the employees in the involved unit and, if an understanding is reached, embody such understanding in a signed agreement.

In its decision, *Henry Bierce Co.*, 307 NLRB 622 (1992), the National Labor Relations Board (the Board), as here pertinent, affirmed my rulings, findings, and conclusions and adopted the recommended Order.

Thereafter, the Respondent petitioned the United States Court of Appeals for the Sixth Circuit for review of the Board's order, and the Board cross-petitioned for enforcement. The court in *Henry Bierce Co. v. NLRB*, 23 F.3d 1101 (1994), as here pertinent, concluded that the Respondent did not have an adequate opportunity to adduce evidence in support of its "good-faith" doubt of the majority status of the union defense to the direct dealing allegation. Accordingly, the court remanded the case to the Board for a determination as to whether the Respondent dealt directly with its employee in violation of Section 8(a)(5).³

As noted in the Board's order remanding proceeding, dated June 6, 1995,

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

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

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

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

In the present case, . . . the direct dealing violation, if found, will, under Sixth Circuit as well as Board precedent, warrant issuance of a bargaining order to restore the status quo ante. As noted supra, the direct dealing allegation rises or falls depending on whether the Respondent

¹ Hereinafter referred to as the Respondent.

² Hereinafter referred to as the Union or the Charging Party.

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

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

lawfully withdrew recognition from the Union. Thus the Board will find the direct dealing violation if the Respondent fails to establish its defense that it possessed a reasonable, good-faith belief, based on objective evidence apart from the poll results, that the Union lacked majority support. That same determination will control the remedy: if withdrawal of recognition was not lawful, a bargaining order will be necessary to restore the status quo ante. Therefore, a remand is necessary to provide the Respondent an opportunity to present its defense. Accordingly,

IT IS ORDERED that the above-entitled proceeding is remanded to Administrative Law Judge John H. West to afford the Respondent an adequate opportunity to introduce evidence regarding its defense that, at the time of its direct dealing with employee Morgan, it possessed a reasonable, good-faith belief, based on objective evidence apart from the [unlawful] poll results, that the Union lacked majority support. Thereafter, the judge shall make further findings and conclusions on the direct dealing allegation, including, if necessary, credibility resolutions, and shall recommend an appropriate remedy consistent with this Order and the decision of the court of appeals.

The remand hearing was held in Akron, Ohio, on November 2, 1995.⁵ On the entire record thus made, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and the Respondent on December 1, 1995, I make the following findings of fact and conclusions of law.

At the 90-minute remand hearing the Respondent called one witness, David W. Bierce, who is the general manager of the Respondent and who testified extensively at the 1990 hearing in this proceeding. In November 1995 Bierce testified that when he negotiated the May 1984 to April 1987 collective-bargaining agreement with the Union, the Respondent's five drivers⁶ were members of the Union but the Respondent's yardman, Arnold George, was not;⁷ that the five drivers authorized the Respondent to deduct union dues from their paychecks and George did not; that between May 1984 and April 1987 the Respondent hired four drivers or yardmen namely, Mark Noel in May 1984 as a yardman, John Walker in September 1985 to replace Willard Jordan,⁸ Gerald Bond in the fall 1986 to fill a vacancy

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

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

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

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

created by the retirement of Howard Snyder in December 1985, and Bob Papoi; on April 27, 1987, as a driver; that regarding the four above-described drivers or yardman who were hired by the Respondent between May 1984 and April 1987, the Respondent not (1) did pay them the wage rate in the collective-bargaining agreement, (2) did not place them in the Union's pension plan or health and welfare program and (3) did not make any contributions to the Union's severance fund or its charitable, education and recreation fund on their behalf; that neither the union steward, Bauch, nor any representative of the Union ever questioned the Respondent about the fact that these individuals and George were not members of the Union, had not authorized dues deductions and were not receiving the contract wage rate or the benefits under the collective-bargaining agreement; that Bond and Papoi; did not authorize the Respondent to deduct union dues and neither Bauch nor any union representative questioned this; that at the time of the last hearing in January 1990 the Respondent called as witnesses Stroubel, Papoi, Bolton, and Wisel, all of who were either drivers or yardmen, and all of who did not receive union benefits; that Stroubel, Bolton and Wisel, all of who were hired in 1988, did not authorize union dues deductions and there was no effort by the Union to have their union dues deducted or have them receive union benefits; that he did not hear from the Union from April 1987 to August 1988,⁹ that when Bauch voluntarily retired in December 1987 no successor steward was appointed; that contrary to the terms of the 1984-1987 collective-bargaining agreement the Respondent did not post (a) daily accumulated hours of the employees to exhibit equalization, (b) the next days schedule for drivers, (c) seniority list, and (d) job vacancies; that neither Bauch nor a union representative questioned these failures to post; that no arbitrations were held and no grievances were filed from 1984 to the time of the remand hearing; that between January and March 1989 the Respondent hired driver, Tom Rhoden, and transferred Alex Church from hardware (a nonunit position) to yardman and neither of these employees authorized the deduction of union dues nor did they receive union benefits; and that when he spoke to Morgan in March 1989 he, Bierce, was aware that Popoi, Thompson, Wisel and Stroubel had never met the Union Business Representative Robert DeStefano. Bierce also testified as follows with respect to why he did not believe that the Union represented the drivers or yardmen at the Respondent when he dealt directly with Morgan:

At the time I spoke with Mr. Morgan in March of 1989, he was the last person at my business who was still authorizing dues deductions.

Prior to that conversation, I had hired six new employees, none of whom were authorizing dues deductions and none of them were expressing any support or interest for the Union.

Prior to that conversation with Mr. Morgan, there was a time period of 16 months that had elapsed since I had last spoken with Mr. DeStefano.

Even when the contract—when there was a bona fide labor agreement in place, the '84 to '87 contract, there

⁹ When it was pointed out to counsel for the Respondent that this was in the record in the first hearing he indicated that he was not trying to "rehash stuff that's in the record." Subsequently it was pointed out to counsel for the Respondent that evidence he was attempting to put in the record regarding uniforms was also covered in my prior decision.

were terms of that contract that were never enforced by Local 348.

In December of '87, my union steward, Harry Bauch, retired. There was no successor appointed. That left me to deal directly with my employees from there on out.

The conversation between Thompson and Bolton very clearly illustrated that my employees perceived no representation by the union. That was a guy saying what—excuse me, saying, "If there were a union at our place," and the other guy responding, "If you want to screw up a good thing, try to get a union in here." I think that clearly represented the sentiments of my employees.

....

Prior to my conversation with Mr. Morgan, there was a substantial turnover at our business. Four of our union employees had retired or left, due to illness. There had been six people replaced. Let's say I hired six new people, none of which were authorizing any dues deductions.

Even through there were breaches of the contract on our part, there were never any grievances filed by Local 348 against our company.

....

Mr. Morgan was the sole union employee at the time I had the conversation with him.

....

In a negotiation session with Mr. DeStefano in April of '87, I asked him what he could do with regard to relief from non-union competition. And his answer to me was that he knew that everybody at my business was not signed up for the union and he also knew that we weren't paying scale. And he said to me that as long as he didn't have somebody at my place breathing down his neck, we could pretty well do whatever we wanted to.

Lastly, a poll that we took in November of 1988 confirmed what I already knew, that the union did not represent my employees at that time.

So, to summarize, in my conversation with Mr. Morgan in March of '89, it was absolutely clear to me to me that the union did not represent a majority, or, for that matter, hardly anybody at my place of business at that time.

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

At the remand hearing DeStefano testified on direct that during the term of the 1984 through 1987 collective-bargaining agreement he was not made aware that any employees who were in the unit covered by the contract were not receiving the union rate; that he was never made aware by the Respondent or any individual that there were employees who were working at the Respondent who were not members of the Union; that he

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

Contentions

On brief, the Respondent contends that Local 348 had utterly failed to police the prior collective-bargaining agreement; that no union steward was appointed at the Respondent since December 1987; that Local 348 was not enforcing the union-security/checkoff clauses of the labor agreement; that there were no grievances or arbitrations; that there had been an 18-month hiatus in collective-bargaining negotiations; that Local 348 failed to contact bargaining unit members regarding a successor collective-bargaining agreement; that there had been over a 100-percent turnover of employees between April 1984 and March 1989, and none of the "incumbents," save one, had exhibited any support whatsoever for Local 348; that the absence of employee comments, other than the Thompson/Boulton conversation, does not sound the death knell to the Respondent's good-faith doubt in that there was not an influx of antiunion comments because, owing to Local 348's complete abandonment, there was simply never any need; that there is no reason why the Respondent should not have thought Bauch was keeping DeStefano apprised of events at the Company; that while a bargaining order cannot issue

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

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

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

United States Gypsum Co., 157 NLRB 652, 655 (1966), which cites *Celanese Corp. of America*, 95 NLRB 664, 673 (1951):

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

that an employer's assertion of good-faith doubt that the union no longer represents a majority must be based on objective considerations and the employer's mere assertion of it or proof of the employer's subjective frame of mind is insufficient, *Laystrom Mfg. Co.*, 151 NLRB 1482, 1484 (1965); that it is presumed that the union retains its majority status in the unit established by its collective-bargaining agreement, even after the expiration of that agreement, *Automated Business Systems*, 205 NLRB 532 (1973); that in finding that the Respondent violated Section 8(a)(5) of the Act, the Board applied the standards governing previously established bargaining relationships rather than those relating to initial organization situations; that the reasonable basis for the Respondent's serious doubt as to the Union's continuing majority status cannot be based on evidence obtained on the day of the trial, but must have been known to the Respondent at the time of its refusal to bargain and/or at the time it decided to withdraw recognition of the Union because of its good faith as to the Union's majority status, *United Electric Co.*, 199 NLRB 603, 605 (1972); that absent any overt expressions by the employees of dissatisfaction with the Union as their bargaining representative, the fact that there were periods when employees may not have chosen to become members cannot be taken as proof that, at such times, the employees no longer favored the union representation they had selected and that the presumption of continued majority status became inoperative, *Harpeth Steel, Inc.*, 208 NLRB 595 (1974); that it is well settled that after the expiration of a collective-bargaining agreement a union-security clause does not survive absent a contractual provision continuing the agreement, *Trico Products Corp.*, 238 NLRB 1306 (1978); that the Respondent's reliance on the lack of dues checkoffs cannot serve as a basis for a good-faith doubt as to the union's majority status where it would have been unlawful for the Union to attempt to have the Respondent comply with that provision of the contract as the contract had expired; that there would have been no way for the Respondent to have known at the time that these employees did or did not support the Union on the basis of dues checkoffs; that the Board indicated in *Club Cal-Neva*, 231 NLRB 22, (1977), that the failure of a respondent to seek referrals has no bearing on the issue of whether a union does not represent a majority of employees since that is a matter solely within the respondent's control, and the failure to file grievances does not establish union inactivity in the absence of any showing that substantial numbers of employee grievances were being ignored; that the one employee comment noted at *Bierce*, supra at 632, is not evidence of lack of support for the Union since the Board will not find that an employer has supported its defense by a preponderance of the evidence if the employee statements and conduct are not "clear and cogent rejections of the union as a bargaining agent;" that statements must be convincing manifestations of a loss of majority support, *Laidlaw Waste*, supra;

that the Respondent has failed to establish that it had sufficient objective considerations to support a withdrawal of recognition and dealing directly with Morgan; and that accordingly, the remedy, as set forth in the Board order remanding proceeding should issue.

Analysis

Has the Respondent introduced evidence that “at the time of its direct dealing with Morgan it was not obligated to bargain with the Union because it possessed a reasonable, good-faith belief, based on objective evidence, apart from the poll results, that the Union lacked majority support?”¹⁰ In my opinion it has not. It did not introduce such evidence at the January 1990 hearing herein.¹¹ Obviously if it had, there would have been no need for this remand to me. The evidence the Respondent introduced at the very short remand hearing herein, contrary to the assertions of counsel for the Respondent, was basically nothing more than a “rehash” of evidence introduced at the January 1990 hearing herein. Although given another opportunity to call additional witnesses and introduce additional evidence on this matter. The Respondent did neither. Bierce, in testifying a second time, did little more than reiterate evidence placed in the record at the January 1990 hearing herein.¹² More

¹⁰ At p. 6 of the Board’s order remanding proceeding. In fn. 5 of this order the Board indicates as follows:

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

The Respondent withdrew recognition from the Union in November 1988.

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

None of the asserted basis indicating the Union’s asserted inactivity suffice to raise a reasonable good-faith doubt. Indeed, in my opinion, when the record is considered as a whole, they would not even meet the less stringent “loss of support” standard [set forth by the Court in *Thomas Industries v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982)]. In my opinion, Respondent has failed to establish that it had a good-faith doubt of the Union’s majority status reasonably premised upon objective considerations.

And the Board in its footnote 3 at page 622 of that decision concluded as follows:

[n]o . . . factors indicating a change in employee sentiments, supports the Respondent’s contentions that it had substantial, objective evidence of a loss of support here. Indeed, the Respondent mustered only one negative employee comment as evidence that employee attitudes toward the Union had changed.

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

¹² His testimony on direct took about 45 minutes. The few matters he covered for the first time at the remand hearing fall into one of the categories covered in my first decision herein. For example, the Respondent’s failure to give the Union equal opportunity with all other sources to provide suitable applicants falls into one of the categories already treated, namely, breaches of the collective-bargaining agreement by the Respondent. Bierce’s most recent testimony would not change my conclusions with respect to whether the breaches are objective evidence that the Union lacked majority support. Additionally, as pointed out by counsel for General Counsel, Board in *Club Cal-Neva*,

than once it had to be pointed out to counsel for the Respondent at the remand hearing that testimony he was eliciting from Bierce covered evidence which was already placed in the record in January 1990 and treated in my prior decision herein.

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

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

The underlying legal principles to be applied in situations where an employer seeks to withdraw recognition from an established bargaining representative are well summarized in *Terrell Machine Company*, 173 NLRB 1480, 1480-81 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), where the Board stated:

It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues.¹ This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees.² Accordingly, once the presumption is shown to be operative, a prima facie case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The prima facie case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status,³ or (2) that the employer’s refusal was predicated on a good-faith and reasonably grounded doubt of the union’s continued majority status. As to the second of these, i.e., “good faith doubt,” two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations⁴ and it must not have been advanced for the purpose of gaining time in which to undermine the union.⁵ [This second point means, in effect, the assertion of doubt must be raised “in a context free of unfair labor practices.” See *Nu-Southern Dyeing & Finishing, Inc.*, 179 NLRB 573, fn. 1 (1969), enfd. in part 444 F.2d 11 (C.A. 4, 1971).]

¹ Celanese Corporation of America, 95 NLRB 664, 671–672.

² Id.

³ ‘Majority representative status’ means that a majority of employees in the unit wish to have the union as their representative for collective-bargaining purposes. Id.

supra, concluded that the failure of the Respondent to seek referrals from the Union has no bearing on the issue at hand here since that is a matter solely within the Respondent’s control. This conclusion is not negated by the fact that in that case there was no provision in the contract calling for such referrals.

⁴ See *Laystrom Manufacturing Company*, 151 NLRB 1482, 1484, enforcement denied on other grounds (sufficiency of evidence) 359 F.2d 799 (C.A. 7, 1966); *United Aircraft Corporation*, 168 NLRB No. 66 (TXD); *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588 (C.A. 5, 1966), enfg. 147 NLRB 977. And cf. *United States Gypsum Company*, 157 NLRB 652.

⁵ *C & C Plywood Corporation*, 163 NLRB No. 136; *Bally Case and Cooler, Inc.* 172 NLRB No. 106.

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

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

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

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

Bierce's testimony regarding why he did not believe that the Union represented the drivers and yardmen at the Respondent when he dealt directly with Morgan is quoted above. As noted above, these matters have already been treated in my first decision herein. Nonetheless, some of Bierce's remand testimony warrants comment herein. Contrary to Bierce's position, there is no requirement that employees "express" support or interest in the Union. And certainly, the lack of such expressions cannot be construed as a convincing manifestation of a loss of majority support. The retirement of steward Bauch did not, as Bierce testifies, leave him to deal directly with the Respondent's unit employees regarding matters which he should have resolved with DeStefano. Turnovers in a nonstrike situation and the fact that employees hired before April 30, 1987, did not authorize dues deductions cannot serve as a basis for a good-faith doubt. *Triplett Corp.*, 234 NLRB 985 (1978), and *United Electric Co.*, 199 NLRB 603 (1972). And after the 1984–1987 collective-bargaining agreement expired the union-security provision was no longer effective and there was not even an obligation to deduct dues. As indicated by the Board in *Club Cal Neva*, 231 NLRB 22, 24 (1977), "[t]he failure to file grievances does not establish union inactivity in the absence of any showing that substantial numbers of employee grievances were being ignored." And the fact that Bierce now testifies that when he dealt directly with Morgan he, Bierce, was aware that four specified employees had never met DeStefano does not, either standing alone or considered in conjunction with other evidence of record, warrant a finding that the Respondent had a reasonable good-faith belief based on objective evidence that the Union lacked majority support. It is noted that Bierce is not now testifying that he had this knowledge when the Respondent

withdrew recognition from the Union in November 1988. The fact that Bierce did not give the Union notice that the Respondent was breaching the collective-bargaining agreement undermines its position regarding the inactivity of the Union.¹³ For the reasons set forth (1) in my prior decision herein, (2) above, and (3) in the General Counsel's brief on remand as described above, the Respondent has not met in a burden of proof. The factors cited by the Respondent, whether considered individually or collectively, do not constitute sufficient objective considerations to warrant a good-faith doubt of the Union's continued majority support. Therefore, the Respondent's withdrawal of recognition and direct dealing with Morgan violated the Act as alleged.

CONCLUSIONS OF LAW

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

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

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

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

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

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

THE REMEDY

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

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER ON REMAND

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

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive bargaining representative of all of the employees in the unit described below by failing to provide the Union with reasonable advance notice of the time and place of the poll of unit employees taken for the purpose of determining their desire for continued representation by the Union; by conducting an unlawful poll for such purpose; by unlawfully withdrawing recognition from the Union; and by dealing directly with an employee over benefits, including his retirement, and other terms and conditions of employment.

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

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

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

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

(b) Post at its Akron, Ohio facility copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

that the notices are not altered, defaced, or covered by any other material.

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

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 refuse to bargain with the Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of all of the employees in the unit described below by failing to provide the Union with reasonable advance notice of the time and place of the poll of unit employees taken for the purpose of determining their desire for continued representation by the Union; by conducting an unlawful poll for such purpose; by unlawfully withdrawing recognition from the Union; and by dealing directly with an employee over benefits, including his retirement, and other terms and conditions of employment.

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

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

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

THE HENRY BIERCE COMPANY