

**Regency House of Wallingford, Inc. and International
Chemical Union Council/UFCW, Local 560C.**
Cases 34-CA-9895, 34-CA-9915, 34-CA-10075,
and 34-CA-10101

January 31, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On November 21, 2006, Administrative Law Judge John J. McCarrick issued the attached decision.¹ The Respondent filed exceptions and a supporting brief to which the General Counsel and the Charging Party (the Union) both filed answering briefs. The General Counsel and the Union filed cross-exceptions. The Union filed a Motion to Strike Certain of the Respondent's Exceptions. The Respondent filed an answering brief and a brief in opposition to the Union's motion. The Union filed a reply brief.²

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,³ and conclusions, except as modified below, and to adopt the recommended Order as modified and set forth in full below.⁴

¹ Administrative Law Judge Howard Edelman conducted the hearing in this case on June 11 and 12, and July 9, 2002, and issued his decision on January 24, 2003. On May 31, 2006, the Board remanded the case for reassignment to a different administrative law judge to review the record and issue a new decision. 347 NLRB 173 (2006).

² Subsequently, the Union filed three citations of supplemental authority to *Fremont Medical Center*, 354 NLRB 454 (2009); *Parkwood Development Center, Inc. v. NLRB*, 521 F.3d 404 (D.C. Cir. 2008); and *B. A. Mullican Lumber & Mfg. Co.*, 350 NLRB 493 (2007), enf. denied 535 F.3d 271 (4th Cir. 2008). We have accepted the Union's submissions pursuant to *Reliant Energy*, 339 NLRB 66 (2003).

³ The Respondent has excepted to some of Judge McCarrick'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 Drywall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). Judge McCarrick, who was assigned to the case after the close of the hearing, followed Judge Edelman's credibility determinations after independently reviewing the record, where they were supported by the weight of the evidence. We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent asserts that Judge Edelman's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the entire record, we are satisfied that the Respondent's contentions are without merit.

In light of our decision here, the Union's motion to strike certain of the Respondent's exceptions is moot.

⁴ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and to conform more closely to the findings herein. We

I. OVERVIEW

We adopt the judge's finding, for the reasons he stated, that the Respondent violated Section 8(a)(1) of the Act by soliciting employees' grievances during a decertification campaign and thereby impliedly promising to remedy them.⁵ Likewise, we adopt the judge's findings, for the reasons he gave, that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) failing and refusing to furnish relevant information requested by the Union; (2) insisting, as a condition of bargaining for any successor agreement, that the Union agree to restore a wage increase found unlawful in a prior case; (3) dealing directly with unit employees over terms and conditions of em-

shall also substitute a new notice in conformity with the Order as modified.

For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

Further, the majority has imposed a broad cease-and-desist order. Member Hayes finds that, considering the totality of the circumstances, a narrow order is sufficient. Although the Respondent previously violated the Act, the Respondent has not engaged in such egregious or widespread misconduct "as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). See also *Postal Service*, 345 NLRB 409, 410 (2005) (observing that a broad order is not warranted in every instance of recidivist misconduct, and determination is based on "the totality of circumstances"), enf. as modified 477 F.3d 263 (5th Cir. 2007).

⁵ Although Human Resources Director Patricia Thomas told employees several times that she could "make no promises," those disclaimers were insufficient to negate the implied promises to remedy grievances arising from Thomas's further statements to employees that she would relay the grievances to the appropriate people and get back to them. *Hospital Shared Services*, 330 NLRB 317, 317 fn. 6 (1999) (president's "rote disclaimers" were contradicted by his offer to bring the employees' concerns to the Hospital's attention); *Heartland of Lansing Nursing Home*, 307 NLRB 152 (1992); *Raley's, Inc.*, 236 NLRB 971, 972 (1978), enf. mem. 608 F.2d 1374 (9th Cir. 1979), cert. denied 449 U.S. 871 (1980).

Additionally, we find that the judge did not abuse his discretion when he refused to admit evidence that the Respondent solicited grievances at Wallingford between 1995 and 1997 or that National Health Care Associates, which provides management services to the Respondent, did so at other facilities on behalf of other employers. The earlier solicitations occurred 4 to 6 years prior to Thomas's solicitations and are thus too remote in time to establish a valid past practice, and solicitations by other employers at other facilities are irrelevant. Cf. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 909 (1996) (employer who had removed suggestion boxes 2-1/2 years earlier did not establish past practice), enf. denied in part 123 F.3d 899 (6th Cir. 1997); *American Freightways, Inc.*, 327 NLRB 832, 832 (1999) (giving no weight to respondent's history of soliciting grievances at its other facilities).

In finding that the Respondent unlawfully solicited grievances in an effort to coerce employee choice in the election, Member Hayes does not adopt the judge's apparent finding that Thomas held her meetings during a time frame that is analogous to the critical period before an election. Rather, he relies on the fact that the meetings began one day after approximately 25 percent of unit employees signed the decertification petition and a few days before the window period for filing the petition, and on evidence that the Respondent was aware of the decertification petition when it circulated.

ployment;⁶ (4) withdrawing recognition from the Union⁷; and (5) unilaterally changing terms and conditions of employment.

As explained below, we find, contrary to the judge, that the Respondent violated Section 8(a)(1) by purposefully and unreasonably delaying rescission of a unilateral wage increase found unlawful in a prior Board case. Additionally, we adopt and further explain the judge's finding that the Respondent violated Section 8(a)(1) by denigrating the Union to bargaining-unit employees in a series of communications between April and September 2001.⁸

II. PRIOR BOARD CASE AND FACTUAL BACKGROUND

The Respondent operates a nursing home in Wallingford, Connecticut. The Union was certified in October 1997 to represent a unit of full-time and regular part-time registered nurses, licensed practical nurses, and service employees, including certified nursing assistants. Following certification, the parties entered into a 3-year contract which terminated on February 19, 2002.

On February 21, 2001,⁹ Administrative Law Judge Michael Marcionese issued his decision in Case 34-CA-9269, finding that the Respondent violated Section 8(a)(5) and (d) by unilaterally granting wage increases and bonuses to newly hired employees during the term of the collective-bargaining agreement, and by refusing to supply requested information to the Union. The judge ordered the Respondent to rescind the wage increases and bonuses upon the Union's request and to furnish the unlawfully withheld information. He additionally stated:

⁶ In finding that Manager Thomas unlawfully solicited employee grievances and implicitly promised to remedy them (see above), Member Hayes finds it unnecessary to pass on whether the same conduct also amounted to unlawful direct dealing.

⁷ In adopting this finding, we find that the employees' decertification petition was tainted not only by the unfair labor practices we find today, but also by the Respondent's unilateral wage increase for new employees, found unlawful in Case 34-CA-9269. That unlawful wage increase, which led to the Union's rescission demand, was divisive and ongoing, and the Respondent's continued failure to rescind it likely exacerbated divisions the selective wage increase caused within the unit. Under all the circumstances, we find that the Respondent's unfair labor practices caused employee disaffection with the Union. See *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), *enfd.* in relevant part 117 F.3d 1454 (D.C. Cir. 1997); *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

⁸ Member Hayes finds that the Respondent unlawfully delayed rescinding its wage increase, but observes that there may be situations in which parties can bargain in good faith over a Board-ordered rescission of an unlawfully granted benefit in lieu of further litigation.

Member Hayes does not join his colleagues in finding that the Respondent violated Sec. 8(a)(1) by denigrating the Union to bargaining-unit employees. See fn. 17 below.

⁹ All dates hereinafter refer to 2001, unless otherwise specified.

Of course, if there is evidence that the Respondent takes advantage of this order, by publicizing it in a way to cast blame on the Union for the outcome, or otherwise attempting to cause employee disaffection from the Union, that would be another unfair labor practice which can be remedied in a separate proceeding. To the extent that employees are adversely affected by the unfair labor practices found here or any remedy imposed, the blame lies solely with the Respondent for ignoring its statutory obligations to the Union.

On April 9, the Board, in the absence of exceptions, adopted Judge Marcionese's decision.

III. THE PRESENT CASE

Delay in Rescinding the Unlawful Wage Increase and Denigrating Statements¹⁰

1. Facts

On February 27, after receiving Judge Marcionese's decision but prior to the Board's adoption of it, bargaining unit members voted to request rescission of the Respondent's unlawful wage increases to junior employees. Thereafter, Local Union Vice President Lori Carver orally requested that the Respondent's administrator, William Viola, rescind the wage increases. In a letter dated March 19, Carver additionally requested that the Respondent bargain about wages for the entire unit. She proposed that those employees with over 5 years of seniority receive wage increases equal to those the Respondent unilaterally granted to newly hired employees. Carver explained that the new wages would be a "new rate base" from which the parties would bargain for any further increases, and that the Union would insist on rescission of the unlawful wage increase, effective March 26, if the Respondent failed to accept its alternative proposal by March 21.

By letter dated March 20, the Respondent, through its counsel, Richard Howard, replied that it disagreed with Judge Marcionese's decision but would abide by it. Howard indicated that the Respondent did not intend to bargain about employee compensation at that time, and requested that the Union reconsider its position on rescinding the wage increase. Howard's letter stated, in part:

¹⁰ The amended complaint alleged, and the judge found, that the Respondent denigrated the Union on six occasions, beginning in an April 25 memo. The judge evaluated these alleged unlawful acts in light of earlier conduct, between February and April 24, that occurred more than 6 months prior to the filing of the charge. In order to provide a context to these allegations, we have set forth all of the relevant communications between the parties.

The Union's position on the rescission of the hiring rate increase appears self-defeating and we urge you to reconsider. There is simply no reason to hurt the people receiving the new rate, just because the Administrative Law Judge did not rule exactly as you desired. Regency will not harm its employees; the union should not harm its members. With all due respect, you are dealing with peoples' lives; you should not cavalierly take their money away from them. Regency is not happy with the Administrative Law Judge's decision, but will abide by same. There is no reason the union cannot do likewise and avoid hurting their own members . . . It is entirely up to you whether you choose to harm your own members. In the interest of Regency's employees and residents, I hope you will reconsider.

Carver wrote to Viola on March 27, noting Judge Marcionese's admonition that the Respondent not rescind the wage increases in a way that cast blame on the Union. She added that the Union was also ready to discuss staffing problems (the purported reason for the unlawful wage increases).

In a response dated April 6, Howard denied blaming the Union. He then stated, however, "that a substantial number of employees, far more than those that allegedly voted in favor of rescission of the wage increase, do not want the Union to demand said rescission," and that the Union "has chosen as its legacy to punish its members by having their wages reduced." Also, although Howard knew the Respondent did not intend to file exceptions to Judge Marcionese's decision ordering the wage rescission, he stated that the decision was not enforceable until it received the imprimatur of the Board. The Respondent failed to rescind the wage increase at this time.

As stated, on April 9 the Board adopted Judge Marcionese's decision. By letter of April 12, the Union's International representative, John Mendolusky, demanded rescission of the wage increase effective April 16.

The Respondent did not respond for 11 days. By letter of April 23, instead of complying, the Respondent challenged Mendolusky's authority to request rescission, notwithstanding that the Union had notified the Respondent in writing of Mendolusky's official representative role more than 1 year earlier. Further, Mendolusky had been servicing the bargaining unit for more than 1 year and had repeatedly dealt with the Respondent in his representative capacity.

The next day, on April 24, Vice President Carver again demanded rescission. Again, the Respondent did not comply. On April 25 or 26, it distributed a letter to all unit employees with their paychecks, stating, in part:

"The other day your Union requested that we rescind this wage increase . . . Prior to implementing, we will discuss this further with our counsel." Attached to the letter was a copy of Carver's request for rescission.

The Respondent did not reply to Carver's April 24 rescission demand until April 30, when Viola sent a letter acknowledging that the Respondent had no legal alternative to rescinding the increases. Rather than rescinding, however, Viola proposed that the parties begin bargaining for a new contract, in return for the Union's agreement not to demand the wage rescissions. Viola stated that he would delay implementing the wage rescission "until I hear from you."

Carver promptly responded by letter of May 2, objecting to the Respondent's "delaying tactics" and its challenge to Mendolusky's authority. She nevertheless agreed to temporarily hold the rescission in abeyance and again proposed that the Respondent grant a retroactive wage increase to the senior unit employees who had not received the unlawful unilateral wage increase and reopen bargaining over wages. Carver specified that if the Respondent did not agree to this proposal and/or failed to respond by May 11, the Respondent must rescind the wage increase effective May 14.

By letter dated May 4, Viola rejected Carver's proposal and stated that "[i]f you draw such 'lines in the sand,' you will only cause your members, the employees of this facility, to suffer." Although Viola again denied fixing blame, he further wrote that "the inescapable fact is that the rescissions were neither the choice of Respondent nor the majority of the employees." Viola again proposed that the parties start bargaining over a successor contract. Despite having rejected the Union's proposal, Viola did not indicate that he would rescind the unlawful wage increase.

The Union responded in a series of three letters dated May 6. The Union again cited the Respondent's continued stalling of the wage rescission and its blaming of the Union and Carver for the rescission. The Union also objected to Viola's conditioning negotiations for a new contract on the Union withdrawing its demand for rescission. The Union repeated that the Respondent had until May 11 to agree in writing to retroactive wage increases for the more senior unit employees who had not received the unlawful increases, and that, absent such agreement, rescission was required by May 14.

In a May 10 letter to Carver, Viola agreed neither to rescission nor to the Union's proposed alternative to rescission. He accused Carver of attempting to "inflare an already tense situation." Viola also asserted that Carver's demand exceeded the scope of the Board's order and that Carver was obligated to serve the interest of

all employees, “not just the more senior employees of which you are one.” Viola added that, although the Respondent was willing to consider bargaining, it appeared that the Union was “unwilling to bargain unless we pay your ransom of giving increases and retroactive pay to senior employees.” Viola then stated that the Respondent would rescind the unlawful increase, but he proposed postponing rescission for almost 2 more months because of the “unexpected hardship” that rescission would impose on employees. He added that the Respondent would “implement the rescission forthwith” if its proposal was unacceptable to the Union. Viola also said the Respondent intended to seek reinstatement of the rescinded wages in future negotiations.

The Union responded with a letter stating there could be no more delay in rescission, and demanding that rescission take effect May 14. By letter dated May 14, the Union asked whether the Respondent had taken action to comply. The Union received no response that day, and May 14 passed with the Respondent still not having rescinded the unlawful increase.

By letter dated May 17, the Respondent again sought bargaining, without implementing the rescission as the Union requested. The Respondent also informed the Union for the first time that its proposal would include early termination of the then-current contract. Although the Respondent again acknowledged that it had no choice but to implement rescission, it did not say when implementation would occur.

On May 24, Carver again inquired about the rescission. Viola told her that the rescission would not be reflected until the May 31 paychecks. Viola testified that he did not implement the rescission effective May 14—as the Union had requested—because it would burden the payroll, as May 14 fell in the middle of a pay period. The Respondent did not discuss this issue with the Union before May 14, however. In paychecks dated May 31, the rescission became effective retroactive to May 20.

Thereafter, the Respondent continued to make critical statements to the Union and to employees about the rescission. During a July 3 contract negotiation meeting, the Respondent’s attorney, Arthur Kaufman, admitted that the Respondent had broken the law, but asserted that the Union had no right to “cast stones at the sons for the sins of the fathers.” Subsequently, in an August 14 memo to employees, the Respondent referred to a recent employee deauthorization petition, stating that the Board’s Regional Office was holding it in abeyance “pending a review of a claim by the Union that Regency House was not complying with the NLRB’s decision in the prior unfair labor practice case, in that it should have further reduced the wages of certain employees.” This

comment referred to the Union’s raising an additional rescission issue in the compliance stage of the earlier case.¹¹ Additionally, during a discussion in September, Viola told Carver that “we all know why we don’t make a lot of money at Regency House,” clearly referring to the Union.

2. Analysis

a. The Respondent’s delayed implementation of the wage rescission

Contrary to the judge, we find that the Respondent unlawfully delayed implementing the wage rescission requested by the Union. The Respondent’s delay directly contravened the Board’s Order in Case 34–CA–9269. The judge, however, dismissed the delay of 38 days¹² as a “mere passage of time,” partially attributed to the Union’s consideration of the Respondent’s proposal. We disagree.

The Union first requested rescission on February 27. Although Judge Marcionese’s February 21 decision would not be enforceable until adopted by the Board, the Respondent knew within a few days that it did not intend to file exceptions and that the decision would thus become final.¹³ Yet, despite the Union’s repeated demands for rescission, the Respondent asserted an assortment of excuses for delay and did not rescind the wage increase until May 31, more than 3 months later.

The Respondent’s most blatant and transparent delay tactic was its response to Union Representative Mendolusky’s April 12 demand for rescission. The Respondent ignored that demand for 11 days, and then responded by questioning Mendolusky’s authority, even after having worked with Mendolusky in his representative capacity for the previous year. The Respondent offered no justification for the delay or its challenge to Mendolusky’s authority, either at the time or at the hearing.

The Respondent continued to drag its feet after Carver reiterated the rescission request on April 24. Instead of rescinding, the Respondent sent a letter to all employees informing them that it would consult legal counsel regarding the Board’s Order. The Respondent’s obligation to rescind was beyond dispute at this point, however, as was its clear contravention of that Order. Nonetheless,

¹¹ The Respondent also attached a copy of the Union’s July 27 letter to the Board’s Regional Office, in which the Union contended that the Respondent had not fully rescinded the wage increases.

¹² This is the number of days between the Union’s formal demand for wage rescission on April 12 (after the Board Order issued on April 9), and May 20, the date the wage rescission became effective.

¹³ See Sec. 102.48(a) of the Board’s Rules and Regulations.

from April 25 to May 31, the Respondent continued its delay, as detailed above.¹⁴

In the absence of any legitimate explanation for the belated challenge to Mendolusky's authority, and in light of the Respondent's other repeated delays, we conclude that the Respondent was simply stalling rescission.

The Respondent's delay is not excused by its proposal that the parties instead commence early bargaining for a successor collective-bargaining agreement. The record establishes that the Respondent engaged in delay tactics both before and after it made that proposal. More importantly, the Union repeatedly made its position clear: the Respondent was to rescind the unlawful wage increase unless it granted the increase to the more senior employees who had not received it. The Respondent did neither. It repeatedly rejected the Union's proposed alternative to rescission and continued to stall. Additionally, the Respondent did not explain to the Union until May 17 that its proposal to bargain would require termination of the current contract. Finally, the Respondent further delayed the rescission from the Union's requested date of May 14 to May 20, without discussing the issue with the Union.

Given all of those circumstances, the judge erred in characterizing the Respondent's delay as the "mere passage of time." Rather, we find that the Respondent unjustifiably stalled rescission and thereby interfered with the employees' underlying Section 7 rights. More generally, the Respondent's undue delay coerced employees by sending a message that their Section 7 rights were trivial and that the Respondent need not timely comply with a clear Board order in their favor. Consequently, we conclude that the Respondent's delay in implementing the wage rescission violated Section 8(a)(1).

b. The Respondent's denigration of the Union

We agree with the judge's finding that the Respondent violated Section 8(a)(1) by denigrating the Union in correspondence and conversations on April 25 and 30, May 4 and 10, July 3, August 14, and an unspecified date in September.¹⁵ In those communications, the Respondent

repeatedly criticized the Union's rescission demand, impugned the Union's representational abilities, and questioned the Union's good faith toward unit members. The Respondent also repeatedly conveyed that the Union, by demanding rescission, was "harming" its members and "casting stones" at them, and that it was actually the Respondent who was trying to protect employees' interests. The record establishes that unit employees read and/or learned about these communications.¹⁶

The Respondent's denigration of the Union did not occur in a vacuum, moreover, but in the context of its earlier unlawful granting of wage increases only to junior employees. Instead of accepting responsibility for its unlawful conduct and promptly remedying it, the Respondent compounded it. The Respondent put the onus on the Union for the rescission remedy and unlawfully delayed compliance with the Union's employee-approved request for rescission of the increase, acts likely to further undermine the Union in employees' eyes. In those circumstances, we agree completely with the judge that the Respondent's conduct unlawfully denigrated the Union and conveyed that continued union representation would be futile. See *Billion Oldsmobile-Toyota*, 260 NLRB 745, 754 (1982), *enfd.* 700 F.2d 454 (8th Cir. 1983).

Contrary to the Respondent's argument, its comments were not protected by Section 8(c) of the Act. That Section permits an employer to express its views and opinions only "if such expression contains no threat of reprisal or force or promise of benefit." As discussed, in the context of the unlawful delay in rescinding the unlawful wage increase, the Respondent's repeated denigration of the Union conveyed an implicit threat that employees' representation by the Union would be futile (i.e., that the Respondent would not fulfill its statutory obligations) and that employees would have to rely on the Respondent to protect their interests. While paying lip service to its obligation to rescind the unlawful wage increase, the Respondent repeatedly denigrated the Union's acceptance of the Board-ordered remedy as contrary to the interests of the employees and blamed the employees' low level of compensation on their representation by the Union. The Respondent thereby created an atmosphere

would, separate and apart from the others, violate Sec. 8(a)(1). Findings of multiple violations would be cumulative and would not materially affect the remedy.

¹⁶ Union Vice President Carver, who received the letters, is a unit employee. Moreover, she testified without contradiction that seven unit employees who served on the bargaining committee and/or as stewards learned about the communications. Additionally, Carver testified that she discussed the Respondent's April 30 letter with "a lot of people" in the unit and likewise discussed most of the Respondent's May 4 to 17 letters with an unspecified number of employees.

¹⁴ Although the amended complaint alleges that the delay commenced on April 25, earlier events, outside the 10(b) limitations period, can be considered to shed light on these allegations. See, e.g., *Machinists Local Lodge, 1424 v. NLRB*, 362 U.S. 411, 416 (1960); *Southern California Gas Co.*, 342 NLRB 613, 615 (2004). These earlier events are particularly noteworthy here because they demonstrate that the Respondent failed in the complaint period to follow through on its earlier statements that it would abide by the judge's decision. Further, the Respondent's meritless rebuff of Union Representative Mendolusky set the stage for its subsequent unlawful dilatory conduct vis-à-vis Union Vice President Carver.

¹⁵ We find a single violation based on the totality of these communications and need not address whether any particular communication

of hostility toward the Union and interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7. Particularly in the context of the Respondent's other unlawful conduct, we find that its comments were more than a simple statement of its view of the Union.¹⁷

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist from engaging in such conduct and to take certain steps to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by: (1) delaying implementation of a Board-ordered rescission of an unlawful wage increase, upon request by the Union; (2) denigrating the Union; and (3) soliciting employees' grievances during a decertification campaign and implicitly promising to remedy such grievances; and that it violated Section 8(a)(5) and (1) of the Act by: (1) dealing directly with unit employees over terms and conditions of employment; (2) insisting, as a condition of bargaining for a successor contract, upon restoration of the rescinded wage increase; (3) refusing to furnish requested information; and (4) unilaterally changing terms and conditions of employment, we shall order the Respondent to cease and desist such conduct, furnish the requested information, and, if requested by the Union, rescind the unlawful unilateral changes. Nothing in this Order, however, shall be construed to require the Respondent to withdraw any benefit previously granted unless requested by the Union. See *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

Additionally, having found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, we shall order that the Respondent cease and desist such conduct and, on request, bargain with the Union in the bargaining unit described below, with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition. We adhere to the view that an affirmative bargaining order is

"the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at 68. In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: '(1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.'" *Id.* at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.¹⁸

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's withdrawal of recognition and resulting refusal to bargain with the Union for a successor collective-bargaining agreement. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Since the Union was never given an opportunity to reach a successor agreement with the Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures

¹⁷ Member Hayes would not find that the Respondent unlawfully denigrated the Union in communications connected with the Respondent's unlawful failure to rescind the wage increase. The Respondent's criticisms of the Union were expressions of opinion about a particular issue that contained no implied threat of overall futility in union representation and were thus protected by Sec. 8(c) of the Act. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

¹⁸ Member Hayes agrees with the D.C. Circuit that a case-by-case analysis is required to determine if this remedy is appropriate. He further finds that imposing a bargaining order here is appropriate under that analysis.

that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another such challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition has dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair in light of the fact that the litigation of the Union's charges took several years and, as a result, the Union needs to reestablish its representative status with unit employees. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case. In order to provide employees with the opportunity to fairly assess for themselves the Union's effectiveness as a bargaining representative, the bargaining order requires the Respondent to bargain with the Union for a reasonable period of time. See, e.g., *Vincent/Metro Trucking, LLC*, 355 NLRB 289, 290 (2010). In accord with the case law, we have accordingly modified the judge's recommended bargaining order so that it is not limited to a predetermined period. See *id.*¹⁹

ORDER

The National Labor Relations Board orders that the Respondent, Regency House of Wallingford, Inc., Wallingford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Delaying implementation of a Board-ordered rescission of unlawful wage increases, upon request by the International Chemical Workers Union Council, UFCW, Local 560C (the Union).

¹⁹ We adopt the broad cease-and-desist order recommended by the judge for the reasons he explained, and deny the Charging Party's request for other extraordinary remedies.

(b) Denigrating the Union in a manner that impugns the Union's representational abilities and threatens that continued representation by the Union will be futile.

(c) Soliciting and impliedly promising to remedy employees' grievances in order to discourage them from supporting the Union.

(d) Bypassing the Union and dealing directly with unit employees regarding terms and conditions of employment.

(e) Failing and refusing to provide the Union with requested information that is relevant and necessary to its role as the exclusive collective-bargaining representative of the unit employees.

(f) Insisting, as a condition of bargaining with the Union for any successor bargaining agreement, that the Union agree to restore the unlawful wage increases that had been rescinded pursuant to a prior Board Order.

(g) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of the Respondent's employees in the unit described below.

(h) Unilaterally instituting a weekend bonus, increasing general wages and starting rates, restoring the rescinded wage increase, and instituting new shifts.

(i) In any other 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) Furnish the Union with the information requested on September 12 and 14, October 3 and 10, and November 4, 2001.

(b) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the following appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document:

All full-time and regular part-time registered nurses, licensed practical nurses and service and maintenance employees employed by the Respondent including certified nursing assistants, physical therapy aides, dietary aides, and housing and laundry employees; but excluding RN supervisors, office clerical employees, cooks, and guards, other professional employees and other supervisors as defined in the Act.

(c) Rescind, upon the Union's request, the unilateral changes found unlawful, including the weekend bonus, the increases in general wages and starting rates, the restoration of the previously rescinded wage increase, and the new shifts.

(d) Within 14 days after service by the Region, post at its facility in Wallingford, Connecticut, copies of the

attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 34, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent take 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT delay implementation of a Board-ordered rescission of unlawful wage increases, upon request by the International Chemical Workers Union Council, UFCW, Local 560C (the Union).

²⁰ 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."

WE WILL NOT denigrate the Union in a manner that impugns the Union's representational abilities and threatens that continued representation by the Union will be futile.

WE WILL NOT solicit and impliedly promise to remedy employees' grievances in order to discourage them from supporting the Union.

WE WILL NOT bypass the Union and deal directly with unit employees regarding terms and conditions of employment.

WE WILL NOT fail and refuse to provide the Union with requested information that is relevant and necessary to its role as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT insist, as a condition of bargaining with the Union for any successor bargaining agreement, that the Union agree to restore the wage increases that had been rescinded pursuant to a prior Board Order.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT unilaterally institute a weekend bonus, increase general wages and starting rates, restore the rescinded wage increase, and institute new shifts.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish the Union with the information requested on September 12 and 14, October 3 and 10, and November 4, 2001.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the following appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document:

All full-time and regular part-time registered nurses, licensed practical nurses and service and maintenance employees employed by the Respondent including certified nursing assistants, physical therapy aides, dietary aides, and housing and laundry employees; but excluding RN supervisors, office clerical employees, cooks, and guards, other professional employees and other supervisors as defined in the Act.

WE WILL rescind, upon the Union's request, the unilateral changes found unlawful, including the weekend bonus, the increases in general wages and starting rates, the restoration of the previously rescinded wage increase, and the new shifts.

REGENCY HOUSE OF WALLINGFORD, INC.

Margaret A. Lareau, Esq. and *Quesiyah S. Ali, Esq.*, for the General Counsel.
Richard M. Howard, Esq. and *David S. Greenhaus, Esq.* (*Kaufman, Schneider & Bianco, LLP*), of Jericho, New York, for the Respondent.
Randall Vehar, Esq., of Akron, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was originally tried in Hartford, Connecticut, on June 11 and 12, and July 9, 2002, before Administrative Law Judge Howard Edelman based upon the Order consolidating cases, amended consolidated complaint, and notice of hearing issued on May 17, 2002, by the Regional Director for Region 34. The amended consolidated complaint¹ alleges that Regency House of Wallingford, Inc. (Respondent), violated Section 8(a)(1) and (5) of (the Act) by numerous acts of denigrating International Chemical Workers Union Council/UFCW, Local 560C (the Union), by soliciting employee grievances, by bypassing the Union and dealing directly with employees, by refusing to furnish the Union with requested information, by withdrawing recognition of the Union, by refusing to bargain with the Union concerning a successor collective-bargaining agreement and by making numerous unilateral changes. Respondent filed a timely answer to the amended consolidated complaint denying any wrongdoing.

On January 24, 2003, Judge Edelman issued his decision. Respondent and the Charging Party filed timely exceptions. On May 31, 2006, the Board issued its Order remanding proceedings² setting aside the judge's January 24, 2003 decision and ordered that the case be remanded to the Chief Administrative Law Judge for reassignment to a different administrative law judge.³ On June 8, 2006, the Chief Administrative Law Judge issued an order reassigning case and assigned this case to me to "review the record" and issue a "reasoned decision."

FINDINGS OF FACT

Upon the entire record herein, including the original, supplemental, and reply briefs from the General Counsel,⁴ the Union and Respondent,⁵ I make the following findings of fact.

¹ At the hearing, counsel for the General Counsel made a motion to amend the complaint by adding to the complaint subpars. 12(f) and (g) that by letter dated May 4, 2001, Respondent by William Viola, blamed the Union for the rescission of wages and for failing to represent the interests of the employees in the unit; by letter dated May 10, 2001, Respondent, by Viola held out the Union and its unit vice president as a wrongdoer and as failing to represent the interests of the employees in the unit. The amendment was granted.

² 347 NLRB 173 (2006).

³ In its Order, the Board noted that the new judge was authorized to rely on Judge Edelman's demeanor based credibility decisions to the extent they were consistent with the weight of the evidence.

⁴ In her brief to Judge Edelman, counsel for the General Counsel moved to amend the transcript in accordance with attachment A to the brief. There having been no objection, the motion is granted.

⁵ In its supplemental brief, counsel for Respondent contends that there was error in Judge Edelman's ruling excluding evidence of employees' subjective reasons for dissatisfaction with the Union and that

I. JURISDICTION

Respondent admitted it is a Connecticut corporation, with facilities located in Wallingford, Connecticut, where it is engaged in the operation of a nursing home. Annually, Respondent in the course of its business operations derived gross revenues in excess of \$100,000 and purchased and received at its facility goods valued in excess of \$5000 directly from points located outside the State of Connecticut.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent operates a nursing home in Wallingford, Connecticut. National Health Care Associates/National Health provides management and human relations services for Respondent and other nursing homes in Connecticut, New York, and New Jersey. William Viola (Viola) was Respondent's administrator. Patricia (Trish) Thomas (Thomas) was human resources director for National Health and Gina Pruhenski (Pruhenski) was National Health's human resources representative. Respondent admitted that Viola, Thomas, and Pruhenski were agents of Respondent within the meaning of Section 2(13) of the Act. In addition, I find that Richard Howard (Howard) and Arthur Kaufman (Kaufman) were agents of Respondent while acting in their capacity as counsel for Respondent.

The Union was certified on October 10, 1997, as the exclusive collective-bargaining representative of Respondent's employees in the following unit:

All full-time and regular part-time registered nurses, licensed practical nurses and service and maintenance employees employed by Respondent, including certified nursing assistants, physical therapy aides, dietary aides, and housing and laundry employees; but excluding RN supervisors, office clerical employees, cooks, and guards, other professional employees and other supervisors as defined in the Act.

John Mendolusky (Mendolusky) was the Union's International representative and Lori Carver (Carver) was the Union Local 560C vice president. Respondent and the Union entered into a collective-bargaining agreement covering unit employees effective from February 19, 1999–2002.

the record should be reopened to take this evidence. Initially, I have been given no authority by the Board to reconvene the hearing in this case for any purpose other than resolving credibility. See 347 NLRB 173, bias toward Respondent in making evidentiary rulings is mooted since the case has been reassigned to another judge. As noted below, I have followed Judge Edelman's credibility findings, after an independent review of the record, where they are supported by the weight of the evidence. Moreover, for the reasons discussed below, it is unnecessary to consider subjective or objective employee sentiments concerning the Union.

1. Compliance with the Board Order

On February 21, 2001, Administrative Law Judge Michael Marchionese issued his decision in Case 34–CA–9269 finding that Respondent violated Section 8(a)(1) and (5) of the Act by granting wage increases to bargaining unit employees and ordered Respondent to rescind the wage increases upon the Union’s request.

On February 27, 2001, after receiving Judge Marchionese’s decision, bargaining unit members voted to rescind Respondent’s unlawful wage increases. Thereafter, Carver orally requested Respondent’s administrator, Viola, to rescind the wage increases. Subsequently, by letter dated March 19, 2001,⁶ Carver advised Viola that the Union wanted the wage increases rescinded by March 26, 2001, unless Respondent agreed to bargain over employee wages by March 21, 2001. In response, on March 20, 2001, Respondent’s counsel, Richard Howard (Howard), sent a letter to Carver stating that Respondent intended to comply with Judge Marchionese’s decision but that it would not bargain about employee wages.⁷ Howard stated further:

The union’s position on the rescission of the hiring rate appears self-defeating and we urge you to reconsider. There is simply no reason to hurt the people receiving the new rate, just because the Administrative Law Judge did not rule exactly as you desired. Regency will not harm its employees; the union should not harm its members. With all due respect, you are dealing with peoples’ lives; you should not cavalierly take their money away from them. Regency is not happy with the Administrative Law Judge’s decision, but will abide by the same. There is no reason the union cannot do likewise and avoid hurting their own members.

If you insist upon the rescission of the past increases, in accordance with the aforesaid decision, Regency will comply.

It is entirely up to you whether you choose to harm your own members. In the interest of Regency’s employees and residents, I hope you will reconsider.

On March 27, 2001, Carver replied by letter⁸ to Viola chastising Respondent for placing the blame on the Union for seeking rescission of the wage increases Judge Marchionese found unlawful, citing Judge Marchionese’s admonition to Respondent not to “cast blame on the Union for the outcome, or otherwise attempting to cause employee disaffection from the Union.”⁹

On April 6, 2001, Howard, on behalf of Respondent, replied to Carver.¹⁰ Howard denied that Respondent sought to blame the Union or seek employee dissatisfaction for the remedy of wage rescission. Howard then claimed the Union itself was creating employee dissatisfaction, alleging only 20 percent of the unit voted for rescission. Howard then noted he was enclosing a petition signed by 30 of Respondent’s employees

requesting no rescission of the unlawful wage increase. Howard added,

It is peculiar that while most unions pride themselves on helping the members they represent, your union has chosen as its legacy to punish its member by having their wages reduced.

On April 9, 2001, the Board issued an Order in Case 34–CA–9269 adopting Judge Marchionese’s decision.

On April 12, 2001, Mendolusky wrote¹¹ to both Howard and Viola demanding rescission of the wage increases by April 16, 2001.

On April 20, 2001, despite having recognized Mendolusky as Local 560C’s agent since 2000, Viola wrote to Mendolusky contesting his authority to seek rescission of wages on behalf of Local 560C.¹² Accordingly, on April 24, 2001, Carver wrote¹³ to Viola demanding that the unlawful wage increases be rescinded effective April 16, 2001.

On April 25, 2001, Viola posted a memo to all employees,¹⁴ attaching a copy of Carver’s letter of April 24, 2001, demanding wage rescission. The memo stated:

As you are aware, the National Labor Relations Board (“NLRB”) issued a decision that found Regency House had violated the National Labor Relations Act by granting wage increases to certain employees without first notifying and discussing the increases with the Union. The NLRB ordered that as the remedy, Regency House would agree not to do this again in the future, and if the Union, at its option, requested Regency House would rescind the wage increase. The other day your Union requested that we rescind this wage increase and lower the hourly rates for those employees who got the increase. Attached is the letter, which Regency House received from Lori Carver, your Union Vice President.

Prior to implementing, we will discuss this further with our counsel and keep you advised.

Again on April 30, 2001, Viola attempted to avoid complying with the remedy in the Board’s April 9, 2001 order. In his letter¹⁵ to Carver, Viola said in pertinent part:

Nevertheless, I would like to make one last attempt at resolving this matter with the Union without resorting to cutting wages and hurting the employees of Regency House.

Accordingly, I propose that we do not cut any wages, and that as an alternative; we agree to reopen our current contract and commence bargaining for a new collective bargaining agreement. Under this proposal, the Union will be free to negotiate for any changes and improvements that the Union desires including wages, benefits and other terms and conditions of employment. We would begin negotiations immediately and meet regularly to accomplish this result. In return the Union would agree not to reduce the wages of the affected employees.

⁶ GC Exh. 3.

⁷ GC Exh. 4.

⁸ GC Exh. 5.

⁹ GC Exh. 34.

¹⁰ GC Exh. 6.

¹¹ GC Exhs. 7 and 8.

¹² GC Exh. 9.

¹³ GC Exh. 10.

¹⁴ GC Exh. 11.

¹⁵ GC Exh. 12.

I hope you will accept my proposal. I will delay implementing the hourly wage reduction until I hear from you.

In response, on May 2, 2001, Carver wrote to Viola agreeing to hold the rescission of wages in abeyance in order to consider his written offer to negotiate of April 30.¹⁶ Carver set forth five conditions Respondent had to meet in order for the Union to agree to bargain.

By letter dated May 4, 2001,¹⁷ Viola rejected the Union's conditions for bargaining stating, "If you draw such 'lines in the sand' you will only cause your members, the employees of this facility, to suffer." Viola then said he was fixing no blame but said, "The inescapable fact is that the rescission of increased wage rates and bonuses is neither the choice of Regency House nor the majority of our employees."

On May 6, 2001, Mendolusky wrote to Howard and put Respondent on notice that it had until May 11, 2001, to grant wage increases the Union had demanded in its May 2, 2001 letter or to rescind the wage increases effective May 14, 2001.¹⁸ At the same time on May 6, 2001, both Mendolusky and Carver wrote a letter to Howard asking for clarification of issues related to Respondent's offer to bargain.¹⁹

On May 10, 2001, Viola responded to the Mendolusky-Carver letter of May 6, 2001, and said in part²⁰

Your attempt to inflame an already tense situation accomplishes nothing and I choose not to be involved in those tactics. . . . However, I should point out that as someone who is the representative of the Regency House employees, you have an obligation to serve the interests of *all* the employees, not just the more senior employees of which you are one As you know, the National Labor Relations Board gave the Union the right to insist that the wage increases given to the employees with less than five (5) years seniority be rescinded Accordingly, Regency will implement your request to rescind the wages of the affected employees. However, we should all be cognizant of the fact that this rescission presents an unexpected hardship for many of our employees who depend on a specific income level. Therefore, I am requesting that you agree to have the rescission announced now but effective July 1, in order to provide the affected employees adequate notice and opportunity to make necessary adjustments to their budgets Be assured that when negotiations commence Regency will make reinstatement of the wage increase, with retroactivity, a high priority.²¹

On May 11, 2001, Carver wrote to Viola and demanded that the wage increases be rescinded as of May 14, 2001.²² The wage rescission was made on May 20, 2001, and appeared in the first paychecks on May 31, 2001.

¹⁶ GC Exh. 13.

¹⁷ GC Exh. 14.

¹⁸ GC Exh. 15.

¹⁹ GC Exh. 17.

²⁰ GC Exh. 18.

²¹ Carver credibly testified without contradiction that she regularly reviewed correspondence from Respondent with bargaining unit employees who were stewards, negotiating team members, and other employees at work.

²² GC Exh. 19.

2. Bargaining for a successor collective-bargaining agreement

On May 22, 2001, Mendolusky wrote to Viola to further explore bargaining for a new collective-bargaining agreement to supplant the extant contract due to expire February 19, 2002.²³ Mendolusky noted that terminating the existing contract was not acceptable but that it would have to remain in full force and effect during early negotiations. Mendolusky requested information from Respondent for bargaining and stated that pending unfair labor practice charges and the rescission of wages would not be effected by bargaining.

It appears that in June 2001 the parties agreed to enter into early negotiations for a successor collective-bargaining agreement in exchange for the Union dropping certain compliance issues in Case 34-CA-9269. Thus, on June 7, 2001, it is uncontradicted that Carver proposed to Viola that the Union would stop demanding additional compliance issues if Respondent agreed to negotiate a new collective-bargaining agreement. The following day Viola called Carver and agreed to sit down with the Union and meet initially for guidelines and to start negotiations. Viola said he was looking forward to negotiations. Viola's testimony that he understood that the parties were meeting to set guidelines if we were going to meet for early negotiations is contradicted by his statements in later conversations with Carver in which Viola said he was looking forward to negotiations. The parties initially agreed to meet on June 18, 2001, to discuss ground rules for negotiations but the meeting was rescheduled for July 3, 2001.

The parties met on July 3, 2001. Present for the Union were Carver, Mendolusky, Union President John Flynn, and unit employee negotiating committee members Angela Lamb, Linda Cox, and Helen Huskes. Present for Respondent were its Attorney Arthur Kaufman (Kaufman), Viola, and Thompson.

The meeting commenced with Mendolusky giving a history of the parties' relationship to date as well as the Union's goals for negotiations. Kaufman then stated that Respondent's purpose for meeting with the Union was to reinstate the wages rescinded pursuant to the Board's Order and if the wages were rescinded then Respondent would possibly consider going into negotiations. Kaufman admitted Respondent was wrong in granting wage increases without bargaining but that the Union had, "no right to cast stones at the sons for the sins of the fathers." Carver interrupted and said there had been an agreement to enter negotiations for a new contract. Kaufman said he, "didn't care about going into negotiations that they were there only to get the rescinded wages back and then he told us to make him an offer." At that point, the Union broke for a caucus and prepared a proposal to give Respondent that all employees receive wage increases.

Kaufman admitted that he said, "[I]f he wanted to open up negotiations—open up the contract now and start negotiations that as a sign of good faith he should—well the Union should pull back on the—they should allow us to put back into effect the wages that were cut for the people pursuant to the NLRB's decision." Kaufman repeated that he said, "[I]f they wanted to start bargaining for a new contract before that date, then I

²³ GC Exh. 23.

would want the wages put back for the people that we took the wages away from and then we could start bargaining.

Viola admitted the purpose of the July 3 meeting was to set ground rules for early negotiations for a new collective-bargaining agreement. He also admitted that Kaufman stated that a basic ground rule for bargaining, "was that the wages had to be restored first before we could, we could, you know, move on. That was like the first step in moving forward."

Judge Edelman credited Carver's testimony of the July 3 meeting, finding it was corroborated by Cox and Medolusky. On the other hand Judge Edelman did not credit Kaufman's version of the July 3 meeting, concluding that Kaufman's testimony was evasive and that Viola corroborated not Kaufman but Carver's testimony. I will follow Judge Edelman's credibility resolution of the July 3 meeting testimony as it is supported by the weight of the evidence.

On August 14, 2001, Viola sent a memo²⁴ to all employees that noted the Labor Board notified Respondent that a deauthorization petition was being put on hold pending review of a claim by the Union that Respondent was not in compliance with the NLRB order, ". . . in that (Respondent) should have further reduced the wages of certain employees." Attached to the memo was a letter from Mendolusky to the Region stating its position concerning compliance as well as a letter from Howard to the Region giving Respondent's position.

In September 2001, during an exchange over insurance for employee Dee Hammond, Carver told Viola that employees did not make a lot of money at Regency House. Viola replied, "We all know why we don't make a lot of money at Regency House." Carver said it was not fair to blame the Union that it was not the Union who broke the law. Carver later shared this conversation with other unit employees.

On November 13, 2001, Kaufman wrote²⁵ to Mendolusky stating that Respondent was withdrawing recognition from the Union effective February 19, 2002, due to a majority of the members of the bargaining unit no longer wishing representation by the Union. Later on November 15, 2001, Viola wrote a memo to all employees stating that it was withdrawing recognition from the Union.²⁶ Respondent has refused to engage in further collective bargaining for a successor collective-bargaining agreement.

On February 19, 2002, Respondent announced²⁷ that it was restoring the wages that had been rescinded in compliance with the Board's Order dated, April 9, 2001, in Case 34-CA-9269, that it was granting other wage increases for RNs, LPNs, CNAs, housekeeping, laundry, and dietary employees and that it was implementing an adjustment for hiring rates. In addition Respondent admitted in its answer that it instituted new shifts and a weekend bonus. Respondent admitted all of these changes were made without giving notice to or bargaining with the Union.

²⁴ GC Exh. 24.

²⁵ GC Exh. 25.

²⁶ GC Exh. 26.

²⁷ GC Exh. 31.

3. The requests for information

On September 12 and October 3, 2001, the Union requested information concerning the hire date, job classification, job title as of February 14, 1991, job description as of September 12, 2001, and rates of pay as of December 2000, February 14, 2001, and September 12, 2001, of Jolanta Buczynski as well as addresses for four other employees.²⁸ On about October 3, 2001, Respondent handwrote a response to the Union's request for information providing the addresses of the four employees but only the date of hire and job classification for Buczynski.²⁹

On about September 14, 2001, Carver made a written request of Respondent for information necessary for collective bargaining.³⁰ The Union requested 34 items. On October 11, 2001, Respondent replied in writing³¹ to the Union's September 14 request for information and refused to provide information concerning turnover rates, a list of retirees with their names, ages, gender, type of retirement years of credited pension service, amount of pension, year of retirement and what options were exercised under the pension plan, the current weighted straight time hour rate for the bargaining unit, the average hourly earning, average weekly earnings and average weekly hours worked, the total compensations per hour, including straight time hourly rate and all fringe benefits exclusive of required costs, the amount of compensation to Respondent by owners of Canteen machines, the total wages paid to per diem employees annually since the date of the current collective-bargaining agreement, the cost of fringe benefits, a list of all materials and chemicals by trade or code name and generic chemical name handled by or to which employees may be exposed in their work environment, the amount of total monthly insurance premium charged for the last 3 years and a list of persons retired since the last contract with date of hire, date of retirement amount of benefits, and options exercised.

On October 10, 2001, the Union requested the Respondent provide information concerning Respondent's weekend bonus policy.³² On October 24, 2001, the Union clarified and reiterated its information request of September 14, 2001.³³ On November 4, 2001,³⁴ the Union requested Respondent provide all verbal and written warnings issued to employees in the past 2 years, including the name of the person disciplined and for what reason. None of the information requested has been provided.

4. The solicitation of grievances

On about October 19 and 20, 2001, Trish Thomas, director of human resources, and Gina Pruhenski, human resources service manager of National Healthcare, met with several groups of bargaining unit employees. In the meeting Carver attended, Thomas asked employees if they had any concerns. Employees raised issues about eyeglass prescriptions, shift differentials, and temporary employees. Thomas ended the

²⁸ GC Exh. 28.

²⁹ Id.

³⁰ GC Exh. 27.

³¹ GC Exh. 27A.

³² GC Exh. 29.

³³ GC Exh. 39.

³⁴ GC Exh. 30.

meeting by saying that she would take the employees' problems and try to do what she could with them. In the meeting attended by dietary aide Derrick Sabo (Sabo), Thomas asked employees what they would like to see happen. Sabo asked a question about vision insurance. Other employees asked about pay. In this meeting Thomas also explained the process by which employees could decertify the Union. Thomas said she would look into the issues the employees raised. LPN Linda Short (Short) attended another of the employee meetings. At this meeting Thomas said the reason for the meeting was to get employee suggestions to make Regency House a better place to work. After employees raised concerns about pay check information and staffing, Thomas said she would bring the employee concerns to the appropriate people and get back to the employees later. LPN Linda Cox was at yet another of Thomas' meetings. Thomas said she to listen to employee concerns. Employees discussed that there were too many temporary employees, too much paperwork and not enough time to get the job done. Employees raised questions about getting a raise. Thomas said she had heard what the employees had to say and would get back to them.

Thomas testified that it is her general practice at employee meetings that she cannot promise to fix anything but that she will take employee information back to management.

Pruhenski testified that she took word for word notes of the October 19 and 20, 2001 employee meetings.³⁵ However, a cursory glance at the notes reflects that they are summaries that are replete with editorial comments and assumptions by Pruhenski. Moreover, she could not recall key facts concerning the meetings.

Neither Pruhenski nor Thomas expressly denied the employees' testimony concerning the October 19 and 20, 2001 employee meetings. While Thomas stated it was her practice to tell employees she could make no promises, she did not state she did so at the October 19 or 20, 2001 meetings.

Sometime shortly after February 19, 2002, Respondent announced in a memo³⁶ to employees that as a result of the October 19, 2001, employee meetings with Trish Thomas, director of human resources, and Gina Pruhenski, human resources service manager of National Healthcare, there would be changes to vision and dental insurance, that notification of the units regarding callouts had been resolved, that favoritism in scheduling had been looked into and that overtime would be shared equally, that staffing and assignments would be distributed fairly, that reductions in paperwork for the staff would be considered, that errors in paychecks had been considered.

B. The Analysis

As a means of imposing order upon this analysis, I will discuss the unfair labor practice allegations as they appear in the complaint.

1. Subparagraphs 12(b) through (g) of the complaint

The General Counsel alleges that Respondent denigrated the Union by blaming the Union for demanding wage rescissions ordered by the Board in Case 34-CA-9269.

It is well established that a Respondent that engages in a plan of denigrating or disparaging a union with the goal of undermining employee support for the union violates Section 8(a)(1) of the Act. *Davis Electric Wallingford Corp.*, 318 NLRB 375 (1995); *Albert Einstein Medical Center*, 316 NLRB 1040 (1995); *J.L.M., Inc.*, 312 NLRB 304 (1993).

In the instant case, it is necessary to look at the totality of Respondent's conduct to evaluate if Respondent engaged in a course of conduct aimed at undermining the employee support for the Union through disparagement or denigration.

After the Board ordered Respondent to rescind wage increases given to new employees and to extant employees making less than new employees and to bargain in good faith with the Union, Respondent embarked on a campaign to discredit and undermine the Union and blame them for the effect of Respondent's unlawful conduct. After the Union demanded that Respondent rescind the unlawful wage increases, Respondent, replied in writing through its counsel, Howard, on March 20, 2001, that in demanding enforcement of the Board Order the Union was harming its members. Respondent cast itself not in the role of lawbreaker but as champion of the bargaining unit members.

After Carver admonished Respondent's counsel for blaming the Union for the wage rescission, on April 6, 2001, Howard replied in writing again blaming the Union for punishing its members by having their wages reduced. Howard added,

It is peculiar that while most unions pride themselves on helping the members they represent, your union has chosen as its legacy to punish its member by having their wages reduced.

Howard's letter was followed by an April 25, 2001 Viola memo to all employees blaming the Union for the wage rescission, attaching a copy of Carver's letter demanding compliance with the Board Order.

Again on April 30, 2001, Viola wrote to Carver and placed the responsibility for wage rescission on the Union. On May 4, 2001, Viola reiterated that it was the Union's responsibility for injuring employees stating, "If you draw such 'lines in the sand' you will only cause your members, the employees of this facility, to suffer." Viola then said he was fixing no blame but said, "The inescapable fact is that the rescission of increased wage rates and bonuses is neither the choice of Regency House nor the majority of our employees."

On May 10, 2001, Viola wrote to the Union:

Your attempt to inflame an already tense situation accomplishes nothing and I choose not to be involved in those tactics. . . . However, I should point out that as someone who is the representative of the Regency House employees, you have an obligation to serve the interests of *all* the employees, not just the more senior employees of which you are one. . . . As you know, the National Labor Relations Board gave the Union the right to insist that the wage increases given to the employees with less than five (5) years seniority be rescinded. . . . Accordingly, Regency will implement your request to rescind the wages of the affected employees. However, we should all be cognizant of the fact that this rescission presents an unexpected hardship for many of our employees who de-

³⁵ GC Exhs. 36 and 37.

³⁶ GC Exh. 32.

pend on a specific income level. Therefore, I am requesting that you agree to have the rescission announced now but effective July 1, in order to provide the affected employees adequate notice and opportunity to make necessary adjustments to their budgets Be assured that when negotiations commence Regency will make reinstatement of the wage increase, with retroactivity, a high priority.

It is apparent that Respondent again sought to lay blame for the unlawful wage increases on the Union and thereby undermine the Union's support among its members.

At the July 3, 2001 negotiation meeting, Respondent's counsel, Kaufman, admitted Respondent was wrong in granting wage increases without bargaining but consistent with Respondent's efforts to undermine the Union again blamed the Union for the wage rescission by saying that the Union had, "no right to cast stones at the sons for the sins of the fathers."

On August 14, 2001, Viola made a direct appeal to employees in the form of a memo suggesting the Union was further attempting to reduce employees' wages noting the Labor Board notified Respondent that a deauthorization petition was being put on hold pending review of a claim by the Union that Respondent was not in compliance with the NLRB order, "in that (Respondent) should have further reduced the wages of certain employees."

In September 2001, during an exchange over insurance for employee Dee Hammond, Carver told Viola that employees did not make a lot of money at Regency House. Viola replied, "We all know why we don't make a lot of money at Regency House."

Repeated attempts to blame the Union for employees' loss of money has been held to be denigration in violation of Section 8(a)(1) of the Act. *Billion Dollar Oldsmobile-Toyota*, 260 NLRB 745, 754 (1982). Each of the letters and oral statements detailed above was directed to bargaining unit employees. Contrary to its assertion,³⁷ Respondent's oral statements, letters, and memos had widespread circulation among bargaining unit employees with the intended effect of creating heightened animosity, dissatisfaction, and hostility towards and discouraging support for and causing disaffection from the Union and violated Section 8(a)(1) of the Act as alleged in subparagraphs 12(b) through (g) of the complaint. *Parkview Furniture Mfg. Co.*, 284 NLRB 947 (1987).

2. In subparagraph 12(a) of the complaint

Counsel for the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by denigrating the Union by delaying implementation of the Union's request to rescind the wage increases as required by the Board Order from April 25, 2001, until mid May 2001.

On April 9, 2001, the Board issued its Order in Case 34-CA-9269 adopting the February 21, 2001 decision of Administrative Law Judge Michael Marchionese finding that Respondent violated Section 8(a)(1) and (5) of the Act by granting wage

increases to bargaining unit employees and ordered Respondent to rescind the wage increases upon the Union's request.

On April 12, 2001, the Union formally demanded that Respondent rescind the wage increases unlawfully granted. On May 20, 2001, Respondent implemented the wage rescission after a period of negotiation between Respondent and the Union over whether to hold the wage rescission in abeyance in exchange for early bargaining for a new collective-bargaining agreement.

Counsel for the General Counsel contends that by seeking delay of the wage rescission, Respondent denigrated the Union by making it look weak in the eyes of bargaining unit employees.

The alleged delay covered a period of 38 days. I am not persuaded that the mere passage of 5 weeks, that included delay attributed to the Union's consideration of Respondent's proposal to bargain, to be the essence of Respondent's denigration of the Union. As discussed above, Respondent's effort to make the Union the scapegoat for the bargaining unit employees' loss of wages pursuant to Respondent's unlawful conduct as found by the Board was the conduct calculated to diminish the Union in the employees' eyes. It is not the mere passage of time that made the Union appear impotent in the eyes of bargaining unit employees but rather it was Respondent's campaign of shifting responsibility for the wage rescission from itself to the Union. Moreover, I find no case law on point that establishes the mere passage of 38 days in implementing a Board Order constitutes denigration of a union. I will recommend dismissal of this portion of the complaint.

3. Paragraph 13 of the complaint

The General Counsel alleges that on or about July 3, 2001, Respondent insisted, as a condition of bargaining with the Union for a successor collective-bargaining agreement, that the Union agree to restore the wage increases that had been rescinded effective May 14, 2001, pursuant to the Board Order.

Section 8(d) of the Act imposes upon employers and unions the mutual obligation to:

Meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement Provided, That where there is in effect a collective bargaining agreement . . . no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof. . . .

The Board has held that there is nothing to prevent the parties from mutually agreeing to reopen a contract to start early negotiations and, "If they do agree on an early reopening, they are subject to the same standards of good-faith bargaining as if the contract expressly provided for such opening." *General Electric Co.*, 173 NLRB 253, 256 (1968); *enfd.* as modified *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969); *Detroit Newspaper Agency*, 326 NLRB 700 fn. 8 (1998),

³⁷ There is no evidence that the denigrating documents and comments were not communicated to the petition signers. In fact two denigrating memos issued by Viola were sent to all employees.

revd. on other grounds *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000).

While Respondent was under no obligation to enter into early negotiations for a successor collective-bargaining agreement, the record is clear that it expressly agreed to do so in exchange for the Union's concession that it would not pursue further rescission remedies in compliance with the Board's Order in Case 34-CA-9268. Having so committed itself to early negotiations, Kaufman's insistence that the Union had to agree to restore the wages rescinded pursuant to the Board's Order before bargaining could commence, evidenced bad faith and a violation of Section 8(a)(5) and (d) of the Act as a party may not unilaterally impose conditions upon bargaining. *Caribe Stable Co.*, 313 NLRB 877, 888-890 (1994); *Laredo Packing Co.*, 254 NLRB 1, 18-19 (1981).

4. Paragraph 14 of the complaint

The General Counsel alleges that Respondent, by Thomas, violated the Act on or about October 19, 2001, at its facility by:

a. Soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they rejected the Union as their bargaining representative

The Board has held that in cases involving the solicitation of grievances by an employer in the context of a union organizing campaign that it is not so much the solicitation of the grievances that constitutes the coercive conduct but rather the implicit promise to remedy them. *Sacramento Recycling & Transfer Station*, 345 NLRB 564 (2005); *Doane Pet Care, DPC*, 342 NLRB 1116 fn. 2 (2004).

Morover, the Board adheres to the proposition that granting or promising benefits during an organizing campaign are meant to improperly influence employees' choice in the selection of a representative. In order to validate the promise of benefits an employer must demonstrate a legitimate business reason for the timing of a promise or grant of benefits during an organizing campaign. *KOFY TV-20*, 332 NLRB 771 (2000). See also *McAllister Towing & Transportation Co.*, 341 NLRB 394 (2004).

The window period for filing a decertification petition among Respondent's bargaining unit employees was October 23-November 21, 2001. Counsel for the General Counsel contends that since the petition³⁸ to decertify the Union was being circulated among bargaining unit employees between October 18 and November 6, 2001, the circumstances were analogous to an organizing campaign where the Board prohibits an employer from improperly influencing employees' choice in the selection of a representative. The evidence reflects that Respondent was aware of the decertification petition and encouraged it. Thus, at the October 19, 2001 meeting with employees Thomas explained to employees the process of decertification. In addition, Thomas explained the decertification process to supervisors at about the same time. It is apparent from Viola's testimony that as early as May 2001 he was aware that bargaining

unit employees were dissatisfied with the Union and wanted to get rid of it and said in testimony that:

But there is only, there is only about 80 or 85 people in the bargaining unit. I had 38 on the list. That means I only needed six more that I knew of, that weren't on the list that would have put me over.

Viola's testimony unmistakably establishes that he knew in May 2001 that he needed only six more employees for a decertification petition to be filed. Thus, Thomas' October 2001 meetings with employees, the timing of the meeting immediately before the window period for filing a decertification petition, her solicitation of grievances and her explanation of the decertification process to both employees and management, reflect that Respondent was well aware that it could influence bargaining unit employees selection of a representative.³⁹ I find there was no past practice of soliciting employee grievances by Respondent nor was there a legitimate business purpose in soliciting employee complaints about their working conditions. I find that Thomas solicitation of grievances at the October 19 and 20, 2001 employee meetings violated Section 8(a)(1) of the Act.

b. Bypassing the Union and dealt directly with its employees in the unit concerning wages, hours, and terms and conditions of employment

The duty to bargain compels an employer to recognize, "that the statutory representative is the one with whom [the employer] must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees." *General Electric Co.*, 150 NLRB 192, 194 (1964). See also *Dayton Newspapers* 339 NLRB 650 (2003). The Board has held that solicitation of grievances and direct dealing with employees over working conditions erodes the position of the designated bargaining representative and violates Section 8(a)(1) and (5) of the Act. *Allied Signal, Inc.*, 307 NLRB 752, 753 (1992).

Thomas October 19-20, 2001 meetings with employees where she solicited grievances and implied that they would be remedied was direct dealing with bargaining unit employees concerning terms and conditions of employment and violated Section 8(a)(1) and (5) of the Act.

5. Paragraph 15 of the complaint

It is alleged that the Union made the following requests for information:

³⁹ That the purpose of Thomas' October 19-20, 2001 meetings with employees was for the purpose of soliciting and remedying grievances concerning terms and conditions of employment is confirmed in Viola's February 19, 2002 memo to employees that said as a result of the October 19, 2001 employee meetings with Trish Thomas, director of human resources, and Gina Pruhenski, human resources service manager of National Healthcare, there would be changes to vision and dental insurance, that notification of the units regarding callouts had been resolved, that favoritism in scheduling had been looked into and that overtime would be shared equally, that staffing and assignments would be distributed fairly, that reductions in paperwork for the staff would be considered, that errors in paychecks had been considered.

³⁸ R. Exh. 1. A decertification petition was filed on November 13, 2001, in Case 34-RD-289.

a. The September 14, 2001 request for information necessary for collective bargaining.

The Supreme Court has held that employers have a duty to furnish relevant information to a union representative during contract negotiations. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). This obligation extends beyond contract negotiations and applies to administration of the contract, including grievance processing. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Ormet Aluminum Mill Products*, 335 NLRB 788, 790 (2001). In order for the obligation to furnish information to attach there must be a request made and the information requested must be relevant to the union's collective-bargaining need. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). An ambiguous request may not be denied by an employer rather the employer is under an obligation to seek clarification. *International Protective Services, Inc.*, 339 NLRB 701 (2003).

With respect to this request for information, it is clear that the information sought was clearly relevant to the conduct of collective bargaining for a new contract. Despite its October 11, 2001 response to provide limited information, no information was provided to the Union.

b. The September 12 and October 3, 2001 requests for information regarding Jolanta Buczynski

Other than her job title and hire date, Respondent provided none of the other information requested. The information was plainly relevant in the Union's responsibility for contract administration.

c. The October 10, 2001 request for information concerning bonus policy when employees work four consecutive weekends

None of the information was provided to the Union. The information was relevant to the Union's obligation in contract administration.

The November 4, 2001 request for all verbal and written warnings for the last 2 years, with employees' names and the offense for which the warning was given.

No information was supplied concerning this request relevant to administration of the extant contract.

All of the information requested above was relevant to collective bargaining or contract administration. Respondent's contention that it was precluded from providing the requested information due to the petition it received from employees indicating they no longer wished representation by the Union is misplaced. Despite the petition, the Union had an ongoing obligation to represent unit employees and to administer the extant collective-bargaining agreement. Moreover, Respondent had ample time to respond to the request for information of September 14, 2001, for the purpose of entering into collective bargaining for a successor contract. Its refusal to provide the information requested in complaint subparagraphs 15(a) through (d) violated Section 8(a)(1) and (5) of the Act as alleged.

6. Paragraphs 18 and 19 of the complaint

It is alleged that on or about November 13, 2001, Respondent withdrew recognition of the Union as the exclusive bargain-

ing representative of the unit employees effective February 19, 2002, and since November 14, 2001, has refused to bargain with the Union concerning the terms of a collective-bargaining agreement to succeed the agreement expiring on February 19, 2002.⁴⁰

In *Levitz Furniture*, 333 NLRB 717 (2001), the Board established rules for determining when an employer may lawfully withdraw recognition from a union. The Board held that an employer may "unilaterally withdraw recognition only by a showing that the union has, in fact, lost support of a majority of the employees in the bargaining unit."⁴¹ An employer may lawfully withdraw recognition from a union only when it has not committed unfair labor practices that tend to undermine the employees' support for the union.⁴²

In the instant case, I have found that Respondent committed numerous unfair labor practices including denigration of the Union, direct dealing with employees, solicitation of grievances, and refusal to bargain. These kinds of unfair labor practices have been found by the Board to have the tendency to undermine bargaining unit employees' support for the union and meet the four part test of *Master Slack Corp.*, 271 NLRB 78 (1984). *Kentucky Fried Chicken*, 341 NLRB 69 (2004); *Quazite Corp.*, 315 NLRB 1068 (1994), enf. denied 87 F.3d 493 (D.C. Cir. 1996); *Detroit Edison Co.*, 310 NLRB 564 (1993); *Suzy Curtains, Inc.*, 309 NLRB 1287 (1992), remanded 19 F.3d 11 (4th Cir. 1994), decision supplemented 318 NLRB 391 (1995), enf. 106 F.3d 391 (4th Cir. 1997).

In *Master Slack*, supra at 84, in determining if employer unfair labor practices tended to undermine bargaining unit support for the union, the Board has said it will look at the length of time between the unfair labor practices and the withdrawal of recognition, the nature of the violation, the tendency of the violation to cause employee disaffection and the effect of the unlawful conduct on employee morale, organizational activity, and membership in the union.

Here, the unfair labor practices involving disparagement of the Union occurred on a continuing basis from March 2001 through September 2001. The disparagement was followed, while the petition to remove the Union was being circulated, with direct dealing and solicitation of grievance unfair labor practices in October 2001. These unfair labor practices formed a continuum up to the signing of the petition to remove the Union and cannot be viewed in isolation.

The nature of the unfair labor practices is such that it goes to the heart of the relationship between the Union and its members. Respondent embarked on a clear course designed to create conflict between bargaining unit employees and the Union by assigning blame for the unlawful wage increases to the Union rather than Respondent. The solicitation of grievances and direct dealing likewise were designed to demonstrate the inef-

⁴⁰ In its supplemental posthearing brief dated September 29, 2006, the Charging Party contends that the signatures on the decertification petition presented to Respondent in November 2001 was never properly authenticated by Respondent. In finding that the petition was tainted by Respondent's unfair labor practices, the authentication of the signatures is rendered moot.

⁴¹ *Levitz*, supra at 729.

⁴² *Id.* at fn. 1.

fectiveness of the Union and create discord among unit employees.

The unfair labor practices, described above, were designed to and did in fact create employee dissatisfaction and discord. Thus, the tendency of these unfair labor practices by their nature caused employee dissatisfaction, resulting in the petition seeking the Union's removal as bargaining representative. All four *Master Slack* requirements are thus satisfied.

In view of Respondent's unremedied unfair labor practices which have undermined bargaining unit members' support for the Union, I find Respondent could not lawfully withdraw recognition from the Union on November 13, 2001, effective February 19, 2002. By doing so, Respondent has violated Section 8(a)(1) and (5) of the Act as alleged. Moreover, by refusing to bargain with the Union over a successor collective-bargaining agreement, Respondent has further violated Section 8(a)(1) and (5) of the Act.

7. Paragraph 20 of the complaint

The General Counsel alleges that since on or about February 19, 2002, Respondent has implemented the following changes in the terms and conditions of employment of unit employees:

- (a) instituted a weekend bonus;
- (b) increased general wages and starting rates;
- (c) restored wage increases which had been rescinded in compliance with the Board's Order in Case No. 34-CA-9269; and
- (d) instituted new shifts.

After Respondent unlawfully withdrew recognition from the Union on November 13, 2001, effective February 19, 2002, it implemented changes to bargaining unit terms and conditions of employment including institution of a weekend bonus, increased wages, restoration of the wages increases rescinded in compliance with the Board Order in Case 34-CA-9269 and new shifts. These changes were admitted or stipulated to by Respondent. I find that these unilateral changes were made without affording the Union notice or opportunity to bargain and violate Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act by denigrating the Union, by soliciting grievances from bargaining unit employees, by bypassing the Union and dealing directly with bargaining unit employees concerning terms and conditions of employment, by withdrawing recognition from the Union, by refusing to bargain with the Union concerning a successor contract, by making unilateral changes to employees' terms and conditions of employment and by refusing to provide information to the Union.

2. The above are unfair labor practices affecting commerce within the meaning of Sections 2(6), (7), and (8) of the Act.

REMEDY

In its posthearing briefs, the Charging Party requests a broad order, costs, and fees and an extended period of no less than 1 year of bargaining before the Union's majority status may be challenged.

Where an employer has unlawfully withdrawn recognition from an incumbent union, the Board requires the employer to resume bargaining for a reasonable period of time before the union's majority status can be challenged. In *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), the Board found that a period of no less than 6 months nor more than 12 months would be a reasonable period of time.

In *Lee Lumber*, supra at 399, the Board stated that:

Whether a "reasonable period of time" is only 6 months, or some longer period up to 1 year, will depend on a multifactor analysis. Under that analysis, we shall consider whether the parties are bargaining for an initial agreement, the complexity of the issues being negotiated and the parties' bargaining procedures, the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions, the amount of progress made in negotiations and how near the parties are to agreement, and the presence or absence of a bargaining impasse.

The ultimate issue in deciding what constitutes a "reasonable period of time" is "whether the union has had enough time to prove its mettle in negotiations, so that when its representative status is questioned, the employees can make an informed choice, without the taint of the employer's prior unlawful conduct."⁴³

In the instant case the parties are not bargaining for an initial contract, there has been no bargaining and no impasse, and there is no evidence that the issues are particularly difficult or complex. The fact that an inordinate period of time has elapsed since Respondent withdrew recognition and refused to bargain with the Union, under the circumstances of this case, is not entirely Respondent's fault. Accordingly, I recommend that Respondent recognize and bargain with the Union for a period of no less than 6 months, during which time the Union's majority status may not be challenged.

While the Board has authority to assess Respondent with litigation costs and union expenses, it will do so only where the Respondent's defenses are frivolous. *Pratt Towers, Inc.*, 338 NLRB 61 (2002). Like the judge in *Pratt Towers*, I am not persuaded that Respondent's defenses were frivolous. As long as the defenses raised by the Respondent are debatable and not frivolous, the remedy of litigation costs and union expenses is inappropriate. Under this standard, I find that extraordinary remedies in this case are unwarranted.

The Union also seeks a broad Order herein requiring the Respondent to cease and desist from violating the Act in "any other manner." The Board in *Hickmott Foods*, 242 NLRB 1357 (1979), stated that an order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

In Case 34-CA-9269, the Board found that Respondent unilaterally changed terms and conditions of employment by granting wage increases. In this case, the Respondent again made unilateral changes to employees' terms and conditions of

⁴³ *Lee Lumber*, supra at 405.

employment, including restoring the wage increases the Board had ordered rescinded, bargained in bad faith, disparaged the Union, solicited grievances dealt directly with employees, unlawfully withdrew recognition from the Union, made unilateral changes to employees' terms and conditions of employment, and refused to provide information. I find that Respondent has demonstrated a proclivity to violate the Act by repeatedly making changes in employees' terms and conditions of employment thus undermining the Union's support among the bargaining unit and thus meets the standard under *Hickmott* warranting a broad order. Therefore, because of the nature of the unfair

labor practices found here, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any other manner abridging any of the rights guaranteed employees by Section 7 of the Act.

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

[Recommended Order omitted from publication.]