

**SFO Good-Nite Inn, LLC and UNITE HERE! Local**

2. Case 20–CA–0032754

July 19, 2011

## DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE  
AND HAYES

On March 20, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 352 NLRB 268.<sup>1</sup> Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>2</sup>

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified and set forth in full in the prior decision, to the extent and for the reasons stated in the decision reported at 352 NLRB 268 (2008), which we incorporate herein by reference with the exception of section III. As to the Respondent's withdrawal of recognition, discussed in section III of the prior decision, we adopt the judge's recommended Order only for the reasons explained below.

The judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on September 14, 2005, after committing a number of unfair labor practices directly related to encouraging its employees' decertification efforts.

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair-labor-practice and representation cases.

<sup>2</sup> Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes a member who participated in the original decision. Furthermore, under the Board's standard procedures, applicable to all cases assigned to a panel, the Board member not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

Applying the causation analysis in *Master Slack Corp.* (*Master Slack*),<sup>3</sup> he found that the Respondent's unlawful conduct tainted employee petitions disavowing support for the Union. In limited cross-exceptions, the General Counsel argues that, besides the judge's *Master Slack* causation analysis, the Respondent's misconduct per se precluded its reliance on the petitions as a valid basis for withdrawing recognition. We agree. As we explain below, the disposition of this case is properly controlled by *Hearst Corp.*,<sup>4</sup> holding that an employer may not withdraw recognition based on a petition that it unlawfully assisted, supported, or otherwise unlawfully encouraged, even absent specific proof of the misconduct's effect on employee choice.

## I.

An incumbent union enjoys a continuing presumption of majority status, which is irrebuttable during a union's first year following certification or the first 3 years of a collective-bargaining agreement.<sup>5</sup> When the presumption is rebuttable, an employer may withdraw recognition from an incumbent union upon receiving proof that an actual majority of its unionized employees no longer desire union representation.<sup>6</sup> That privilege, however, is not absolute. Rather, it is well settled that an employer may only withdraw recognition if the expression of employee desire to decertify represents "the free and uncoerced act of the employees concerned."<sup>7</sup>

Both *Master Slack* and *Hearst* apply that limitation, but in two different contexts. As the Fourth Circuit recently observed, *Master Slack* prescribes a four-part causation analysis<sup>8</sup> to determine whether there is "a causal link between decertification efforts and *other* unfair labor practices distinct from any unlawful assistance by the

<sup>3</sup> 271 NLRB 78, 78 fn. 1 (1984).

<sup>4</sup> 281 NLRB 764 (1986), enfd. mem. 837 F.3d 1088 (5th Cir. 1988).

<sup>5</sup> *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785–787 (1996); *NLRB v. Curtin-Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990).

<sup>6</sup> *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001) (*Levitz Furniture*). Because we find that the Respondent's withdrawal of recognition was based on a tainted employee petition, we do not reach the question whether an employer may lawfully withdraw recognition from a union after the third year of a contract of longer duration. See *Shaw's Supermarkets*, 350 NLRB 585 (2007).

<sup>7</sup> *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (quoting *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967)).

<sup>8</sup> The *Master Slack* factors include: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency of the unfair labor practices to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and union membership. 271 NLRB 78, 78 fn. 1, 84 (1984). Accord: *Williams Enters.*, 312 NLRB 937, 939–940 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995); *Sullivan Industries v. NLRB*, 957 F.2d 890, 899 (D.C. Cir. 1992).

employer in the actual decertification petition.”<sup>9</sup> In *Master Slack* itself, the Board considered whether the employer’s threats of plant closure and discriminatory discharges of 28 employees, among other things, that occurred almost 10 years before the withdrawal of recognition affected the employees’ rejection of the union, and concluded that they did not. In such cases, there is no straight line between the employer’s unfair labor practices and the decertification campaign, and the *Master Slack* test must be used to draw one, if it exists.<sup>10</sup>

By contrast, *Hearst* applies when an employer has engaged in unfair labor practices directly related to an employee decertification effort, such as “actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.”<sup>11</sup> In those situations, the employer’s unfair labor practices are not merely coincident with the decertification effort; rather, they directly instigate or propel it.<sup>12</sup> The Board therefore

<sup>9</sup> *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654, 664–665 (4th Cir. 2009), petition for cert. dismissed, 131 S.Ct. 59 (2010). Although the underlying Board decision in *Narricot* was a two-member decision, we find the court’s discussion of the differences between *Master Slack* and *Hearst* well-stated and compelling, and cite the opinion for its persuasive value only. In any event, the Fourth Circuit is not alone in recognizing the particular purpose of the *Master Slack* analysis. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 737–738 (D.C. Cir. 2000) (enfg. Board’s application of *Master Slack* to conclude that unlawful unilateral implementation of new working conditions and several other unremedied unfair labor practices tainted decertification petition).

<sup>10</sup> See, e.g., *Champion Enterprises*, 350 NLRB 788, 791–793 (2007) (employer’s confiscation of union materials, threat against one employee, and 1-day unbargained layoff not shown to affect withdrawal of recognition 6 months later); *Flying Foods Group, Inc.*, 345 NLRB 101, 103 (2005) (no causal relationship between decertification petition and employer’s threatened loss of business opportunities and unlawful interrogation), enfd. 471 F.3d 178 (D.C. Cir. 2006); *M&M Automotive Group, Inc.*, 342 NLRB 1244, 1247–1248 (2004) (finding causal relationship between decertification petition and multiple unilateral raises and promotions during preceding year), enfd. sub nom. *East Bay Auto Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007); *LTD Ceramics, Inc.*, 341 NLRB 86, 88–89 (2004) (unilateral change to attendance policy 2 weeks prior to petition not shown to taint petition), enfd. sub nom. *Machinists District Lodge. 190 v. NLRB*, 185 Fed.Appx. 581 (9th Cir. 2006); *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 301–302 (1999) (causal connection established where several unremedied violations—including unilateral changes to terms of employment, coercive interrogation, and discriminatory discipline and discharge—occurred during the 9-month period preceding the petition), enfd. in relevant part 209 F.3d 727 (D.C. Cir. 2000).

<sup>11</sup> *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998), enfd. mem. sub nom. *NLRB v. R. T. Blankenship & Associates.*, 210 F.3d 375 (7th Cir. 2000).

<sup>12</sup> See *Hearst*, supra, 281 NLRB at 764 (employer tainted petition by its direct solicitation of signatures on petition, interrogation of employees about their sympathies, promise of benefits, and threats to “keep away” from the union); see also *V&S ProGalv, Inc.*, 323 NLRB 801, 808 (1997) (employer’s president tainted petition by soliciting employ-

presumes that the employer’s unlawful meddling tainted any resulting expression of employee disaffection, without specific proof of causation, and precludes the employer from relying on that expressed disaffection to overcome the union’s continuing presumption of majority support.<sup>13</sup>

## II.

Here, the Respondent unlawfully attempted to coerce three of its housekeepers to sign employee decertification petitions and threatened another employee with discipline for speaking against decertification. Specifically, the judge made the following findings:

- In late August 2005, Respondent’s general manager and banquet manager called housekeepers Christina Valencia and Maria Maldonado—whom the Respondent later unlawfully terminated for their union support—to a meeting, told them that the Union was “no good,” and unlawfully attempted to coerce them to sign a petition to “deunionize.”
- Immediately thereafter, another manager approached housekeeper Margarita Taloma, asked her to sign a decertification petition, threatened that the Union might attempt to reduce her hours, and promised that the Respondent would protect her from the Union’s efforts, if Taloma signed the petition. When Taloma demurred, the same manager later unlawfully pressured Taloma at her home.

ees to sign), enfd. 168 F.3d 270 (6th Cir. 1999); *American Linen Supply Co.*, 297 NLRB 137, 137–138 (1989) (employer tainted petition by unlawfully soliciting an employee to sign and giving withdrawal forms and access to notaries during work hours), enfd. 945 F.2d 1428 (8th Cir. 1991); *Hancock Fabrics*, 294 NLRB 189, 192 (1989) (employer tainted petition by promising at an employee meeting better benefits if employees decertified), enfd. mem. 902 F.2d 28 (4th Cir. 1990); *Manhattan Eye, Ear & Throat Hospital*, 280 NLRB 113, 115 (1986) (employer’s supervisor tainted petition by soliciting 4 of 100 employees to resign from the union and by conditioning their return to work after an economic strike on their union resignations), enfd. mem. 814 F.2d 653 (2d Cir. 1987); *Weisser Optical Co.*, 274 NLRB 961, 961–962 (1985) (petition tainted by employer’s involvement in decertification drive that amounted to more than ministerial aid), enfd. mem. 787 F.2d 596 (7th Cir. 1986); *Texaco, Inc.*, 264 NLRB 1132, 1132–1133 (1982) (employer’s explicit instructions to employees on procedures for decertifying, including dictating language of petition, typing petition, and granting employee afternoon off to distribute it, as well as supervisory involvement in collecting signatures, tainted petition), enfd. 722 F.2d 1226 (5th Cir. 1984); *Crafttool Mfg. Co.*, 229 NLRB 634, 636–638 (1977) (employer’s participation in circulation of antiunion petitions tainted its withdrawal).

<sup>13</sup> See *Tyson Foods, Inc.*, 311 NLRB 552, 556 (1993); see also *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 281–282 (6th Cir. 1999); *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 442 (7th Cir. 1993).

- As the decertification campaign picked up in early September 2005, Respondent's general manager and one of its owners unlawfully threatened room inspectress and union negotiating committee member Consuelo Contreras with discharge for urging her coworkers not to sign the decertification petition, despite the absence of any rule against such solicitation during work hours.

The judge found that all of those acts violated Section 8(a)(1), and we agree.

After committing these violations, the Respondent withdrew recognition on September 14, 2005, based on petitions signed by 14 of the 24 unit employees. The Respondent's unfair labor practices were obviously directly related to furthering the employees' decertification campaign. Consequently, we agree with the General Counsel that the judge should have applied *Hearst*, rather than a *Master Slack* analysis. Doing so, we find that the Respondent's violations tainted the resulting employee petitions and rendered them an unreliable indicator of employee choice. The Respondent's withdrawal of recognition based on those petitions therefore violated Section 8(a)(5) and (1) of the Act.

### III.

Despite its unlawful attempts to coerce employees to sign decertification petitions and its threat to discipline an employee for opposing decertification, the Respondent argues that its withdrawal of recognition from the Union was lawful because neither Valencia, Maldonado, nor Taloma actually succumbed to its coercion, and there was no evidence that any of the 14 employees who did add his name to the decertification petitions knew about the Respondent's coercive acts. The Board's decision in *Hearst* forecloses that argument, however.

In *Hearst*, the Board rejected an employer's attempt to resuscitate the reliability of a decertification petition by proving that a majority of petition signers were unaware of its unfair labor practices.<sup>14</sup> There, the employer's violations were similar to the Respondent's here—promising better benefits if employees rejected the union, interrogating employees about their union sympathies, explicitly soliciting union repudiation, and threatening employees to keep away from union representatives, among other things.<sup>15</sup> The employer pointed to testimony from 19 employees (out of a unit of 56) that they were unaware of the unfair labor practices, suggesting that the

decertification petition signers expressed an untainted desire to repudiate the union.<sup>16</sup>

The Board rejected counting the number of petition signers the unfair labor practices affected. The Board made clear that, where “an employer engages in unlawful activity aimed specifically at causing employee disaffection with their union, its misconduct . . . will bar any reliance on an expression of disaffection by its employees, notwithstanding that some employees may profess ignorance of their employer's misconduct.”<sup>17</sup> Justifying the rule, the Board explained that, when an employer unlawfully foists itself into an employee decertification campaign, it “cannot expect to take advantage of the chance occurrence that some of its employees may be unaware of its actions,” but rather “must be held responsible for the foreseeable consequence of its conduct.”<sup>18</sup>

*Hearst* thus creates a conclusive presumption that an employer's commission of unfair labor practices assisting, supporting, encouraging, or otherwise directly advancing an employee decertification effort taints a resulting petition. As described, this presumption is based on the predictable result of an employer's unlawful, direct participation in an employee decertification effort—a petition plagued with uncertainty because of the very nature of the employer's unfair labor practices, which is per se insufficient to rebut the presumption of continuing majority status.<sup>19</sup> We reaffirm the *Hearst* presumption today for the reasons given in *Hearst* itself, described above, and for those that follow.

Initially, we emphasize the narrow role the *Hearst* presumption plays in the mechanics of how and when a bargaining relationship may be ended. As the Supreme Court explained in *Brooks v. NLRB*, “[i]f employees are dissatisfied with their chosen union, they may submit their own grievance to the Board.”<sup>20</sup> Thus, at appropriate times employees may present their untainted petition to the Board—with only a 30-percent showing of employee support, much lower than the necessary 50-percent-plus-one to justify a unilateral withdrawal of recognition<sup>21</sup>—and the Board will conduct a decertification election to

<sup>16</sup> *Id.* at 765 fn. 9.

<sup>17</sup> *Id.* at 765.

<sup>18</sup> *Id.*

<sup>19</sup> See *TNT USA, Inc. v. NLRB*, 208 F.3d 362, 368 fn. 3 (2d Cir. 2002) (“The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”) (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946)).

<sup>20</sup> 348 U.S. 96, 103 (1954).

<sup>21</sup> See *Levitz Furniture*, supra, 333 NLRB at 727–728 (requiring proof of an actual loss of majority support to justify a withdrawal of recognition).

<sup>14</sup> 281 NLRB at 765.

<sup>15</sup> *Id.* at 764.

determine their choice by secret ballot.<sup>22</sup> For an employer that has not unlawfully interfered in a decertification campaign, it too may petition at appropriate times for an election if it has a good-faith uncertainty as to the union's continuing majority status, again a lower standard than proof of actual loss of majority support.<sup>23</sup> Further, as indicated, *Levitz* permits an employer that has been timely presented with untainted evidence establishing that an actual majority of its employees no longer desire union representation to end the bargaining relationship without resort to the Board's election procedures at all. The *Hearst* presumption does not apply in any of those circumstances.

We are thus dealing only with the narrow circumstance where an employer unlawfully instigates or propels a decertification campaign, and then invokes the results of that campaign to justify its unilateral withdrawal of recognition from its employees' representative. In that circumstance, it is particularly appropriate, as the Court stated in *Auciello Iron Works v. NLRB*, to give a "short leash to the employer as vindicator of its employees' organizational freedom."<sup>24</sup> Thus, as the Court further observed in *Auciello*, "[t]he Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one."<sup>25</sup>

Nevertheless, the *Hearst* presumption is not the product of mere suspicion. Rather, it is grounded in the Board's approach, in all cases, of objectively assessing whether an employer's unlawful interference with employee rights likely undermined the reliability of an expression of employee choice.<sup>26</sup> Unlike a *Master Slack*

situation, however, when an employer unlawfully thrusts itself into its employees' decertification debate there is little need for extended analysis of the likely impact of the employer's misconduct. As recognized in *Hearst* and in other cases, the objective "foreseeable consequence"<sup>27</sup> of such misconduct—and frequently its purpose—is "an inherent tendency to contribute to the union's loss of majority status."<sup>28</sup> Thus, no direct proof of the unfair labor practices' effect on petition signers is necessary to conclude that the violations likely interfered with their choice.<sup>29</sup>

Further, as a matter of policy, to the extent *Hearst* broadly prohibits employers from withdrawing recognition based on decertification petitions that they themselves unlawfully assisted, it provides a strong incentive to employers to steer clear of potentially unlawful conduct. Any other rule would condone the employer's unlawful acts, allowing it to take advantage of its coercion so long as its victims remained silent. As the Board stated in *Hearst*, "we are unwilling to allow [the employer] to enjoy the fruits of its violations by asserting that certain of its employees did not know of its unlawful behavior."<sup>30</sup>

The likelihood that employees would remain silent about their employer's unlawful conduct and/or its im-

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the likelihood that causation exists. See *Saint Gobain Abrasives, Inc.*, 342 NLRB 434, 434 fn. 2 (2004) ("The *Master Slack* test is an objective one . . . [t]he relevant inquiry at the hearing does not ask employees why they chose to reject the Union.").

<sup>27</sup> *Hearst Corp.*, supra, 281 NLRB at 765.

<sup>28</sup> *Caterair International*, 309 NLRB 869, 880 (1992), enfd. in relevant part 22 F.3d 1114 (D. C. Cir. 1994).

<sup>29</sup> Nonetheless, we observe that the likelihood of such interference is actually reflected in the facts of this case. Although none of the 14 petition signers here testified that he was aware of, or affected by, the Respondent's unfair labor practices (only 1 testified at all), the record shows that the victims told coworkers about the Respondent's coercive acts. In our experience, these conversations are not unique, and proving they occurred is not necessary to conclude that an employer's coercive participation in a decertification effort undermines the reliability of a resulting petition. As the Board observed in *Caterair International*, supra, "it may be presumed that employees who signed the petition on the solicitation of other unit employees were aware of the Respondent's [unlawful acts], and such knowledge is likely to have influenced their decision." 309 NLRB at 880. Accord: *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944) (accepting the Board's established view that an employer's refusal to bargain with its employees' representative disrupts their morale, deters their organizational activities, and discourages their membership in the union).

<sup>30</sup> 281 NLRB at 765. The Board's and the courts' reluctance to permit parties to profit from their own wrongdoing is well established. See, e.g., *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704–705 (1944) (endorsing the Board's view that, where an employer unlawfully refuses to bargain with its employees' union, and the union subsequently loses majority status, a remedy requiring the employer to bargain with the union is nonetheless appropriate to avoid the employer profiting from its refusal to abide by the law).

<sup>22</sup> It is true that, under the Board's "blocking charge" policy, the Board would hold in abeyance an employee petition seeking a decertification election if charges were filed alleging that the employer unlawfully participated in, or supported, the decertification campaign. See *U.S. Coal Co.*, 3 NLRB 398, 398 (1937) (establishing policy of refusing to process representation petitions when related unfair labor practice charges are pending). If the charges are found meritless, the Board will conduct the election based on the 30 percent showing of interest. Even if the Board dismisses the employees' petition as tainted, however, the burden on employee choice, while regrettable, is temporary. After the employer remedies its unlawful acts—which it has an incentive to do quickly—employees will be able to submit a new decertification petition, if they desire, collected in a coercion-free environment.

<sup>23</sup> See *Levitz Furniture*, supra, 333 NLRB at 727–728.

<sup>24</sup> 517 U.S. 781, 790 (1986) (holding that an employer violates Sec. 8(a)(5) by disavowing a newly executed collective-bargaining agreement and withdrawing recognition from the union based on alleged evidence of employee disaffection that was known to the employer before the contract was consummated).

<sup>25</sup> *Id.*

<sup>26</sup> Even the *Master Slack* test, supra, which assesses whether employer unfair labor practices not directly related to a decertification campaign tainted employee choice, is an *objective* test, assessing only

fact on their choice is quite real, moreover. To the extent that an employer seeks to elicit employee testimony about their reasons for signing documents supporting or rejecting a union, the Board and the courts have long recognized the inherent unreliability of such testimony. As the Supreme Court observed in upholding the Board's rule prohibiting employers from demanding employee testimony explaining why they signed authorization cards, "employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)(1)."<sup>31</sup> Consequently, in logic that applies equally here, the Court explained that questioning employees about the subjective motives for their representation preferences would result in "endless and unreliable inquiry."<sup>32</sup> For those reasons, as well, we are unwilling to subject petition signers to *ex post facto* examination about their reasons for supporting decertification.

#### IV.

For all of the foregoing reasons, we find that the *Hearst* presumption advances important statutory and salutary policy goals of the Act, and we reaffirm it today.<sup>33</sup> Applying it here, we affirm the judge's conclusion that the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1).

MEMBER HAYES, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent's unlawful involvement with the employees' petition tainted its reliability as an indicator of disaffection with the Union. However, I believe that the *Hearst*<sup>1</sup> presumption of taint should be rebuttable rather than irrebuttable, thereby raising the possibility in future cases that the representational desires of a majority of employees unaffected by, or possibly even unaware of, unlawful employer involvement can be honored.<sup>2</sup>

<sup>31</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969).

<sup>32</sup> *Id.*; see also *Ladies Garment Workers Local 153 v. NLRB*, 443 F.2d 667, 668–669 (D.C. Cir. 1970).

<sup>33</sup> To the extent prior cases may have applied *Master Slack* to determine whether unfair labor practices directly related to a decertification effort caused employee disaffection, we clarify them in accordance with this decision.

<sup>1</sup> *Hearst Corp.*, 281 NLRB 764 (1986).

<sup>2</sup> Under extant Board law, the showing of an actual loss of majority support is a defense to the withdrawal of recognition of an incumbent

union. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723–727 (2001).

In my view, the evidentiary issue of whether an employer's unlawful involvement in decertification taints a petition stands at midpoint between *Master Slack*, 271 NLRB 78 (1984), where the General Counsel bears the burden of proving that unfair labor practices caused employee disaffection, and *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (*Lee Lumber II*), *enfd.* in relevant part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997), where the presumption of taint in a showing of disaffection after an unlawful withdrawal of recognition is irrebuttable. In the former instance, there is no warrant for presuming that *any* unfair labor practice, no matter how remote in time from the employee petition or limited in degree or scope, has an impact on employee free choice. In the latter instance, there are sound policy reasons for denying an employer from even attempting to prove that its unlawful withdrawal of recognition, which necessarily impacts the entire bargaining unit, had no impact on a subsequent showing of disaffection.

There are, as well, valid policy reasons for discouraging material employer involvement in employee decertification efforts. Those reasons support a presumption of taint arising from unlawful involvement, shifting the evidentiary burden to the wrongdoing employer to present objective proof that its misconduct did not cause or further disaffection with an incumbent bargaining representative. However, unlike in refusal to recognize and bargain situations, the employer's unlawful conduct does not necessarily impact all bargaining unit employees. It remains possible, even if not likely, that subsequent evidence of disaffection by an employee majority is an accurate and reliable expression of free choice on the issue of continued collective-bargaining representation. I therefore disagree with my colleagues that in such circumstances employee free choice must be denied or deferred as the result of an irrebuttable presumption of taint.

The difference between a rebuttable presumption and an irrebuttable presumption is of no significance in the present case, where the Respondent has failed to show that its misconduct could not have tainted the employees' petition. I therefore agree that its withdrawal of recognition based on this petition violated Section 8(a)(5) and (1) of the Act.