

H

335 NLRB No. 35, 335 NLRB 393, 173 L.R.R.M.
(BNA) 1440, 2001-02 NLRB Dec. P 15981, 2001
WL 1018214 (N.L.R.B.)

NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)

****1 *393** FRUEHAUF TRAILER SERVICES, INC.,
A WHOLLY-OWNED SUBSIDIARY OF WA-
BASH NATIONAL CORPORATION
AND
INTERNATIONAL ASSOCIATION OF MACHIN-
ISTS AND AEROSPACE WORKERS, DISTRICT
LODGE 751, AFFILIATED WITH INTERNA-
TIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

Case 19-CA-25749

August 27, 2001

Summary

Agreeing with the administrative law judge, Members Liebman and Truesdale found that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) failing to meet and bargain with Machinists District Lodge 751 at reasonable times and intervals after the Respondent recognized the Union on April 29, 1997, as the exclusive representative of certain employees at its newly-acquired Spokane, Washington facility, and (2) withdrawing recognition from the Union on November 7, 1997 based on a petition, indicating that 5 of 10 unit employees no longer desired representation; and violated Section 8(a)(1) on August 21, 1997 by denying employee Huston's request for union representation during an investigative interview, and by telling him the reason was that the Spokane facility

was nonunion. In agreement with the judge, they found that an affirmative bargaining order is warranted as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. Chairman Hurtgen, dissenting in part, found that the Respondent did not violate Section 8(a)(5) by engaging in bad-faith bargaining and withdrawing recognition. The Respondent met with the Union only once in the 7-month period between the grant of recognition and its withdrawal of recognition on November 7, 1997. The Respondent argued that its two chosen negotiators did the best they could to deal with the substantial bargaining demands placed upon them by the Respondent's simultaneous acquisition of 23 bargaining units. Members Liebman and Truesdale held, as did the judge, that the Respondent's contentions in this regard boil down to a 'busy negotiator' defense, which the Board has consistently rejected. They found no reason to make an exception here. See [Barclay Center, Inc., 308 NLRB 1025, 1035-1037 \(1992\)](#). Members Liebman and Truesdale noted that even when the parties finally met on August 21, 1997 the Respondent showed little inclination to move the bargaining along. The Respondent neither presented a contract proposal nor offered any substantive response to the Union's initial proposal. And, while at the conclusion of the August 21 meeting the Respondent said it would contact Union Representative McClure about dates for a followup meeting, the Respondent failed to do so. The judge found, and they agreed, that the Respondent's unfair labor practices tainted the petition underlying the Respondent's withdrawal of recognition. Chairman Hurtgen found that the Respondent did not, within the 10(b) period, employ dilatory tactics; the August 21 meeting was not perfunctory; and the Respondent's proposal for a November 18 meeting did not constitute an unreasonable delay. Finding that the Respondent did not unlawfully fail to bargain in good faith with the Union, he held that the November 4 employee petition

was untainted. The Hutson incident, standing alone, was not a sufficient basis on which to conclude that the employee petition was tainted, the Chairman held. (Chairman Hurtgen and Members Liebman and Truesdale participated.) Charge filed by Machinists District Lodge 751; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Spokane on March 16, 1999. Adm. Law Judge Timothy Nelson issued his decision Aug. 5, 1999.

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On August 5, 1999, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent, Fruehauf Trailer Services, Inc., a wholly-owned subsidiary of Wabash National Corporation, filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, [\[FN1\]](#) and conclusions, and to adopt the recommended Order as modified.

The judge found the Respondent violated Section 8(a)(5) and (1) of the Act by failing to meet and bargain with International Association of Machinists and Aerospace Workers, District Lodge 751 (Union), at reasonable times and intervals after the Respondent recognized the Union on April 29, 1997, [\[FN2\]](#) as the exclusive collective-bargaining representative of certain employees at its newly-acquired Spokane, Washington facility. The judge also found the Respondent violated Section 8(a)(1) of the Act on August 21 by denying employee Huston's request for union representation during an investigative interview, [\[FN3\]](#)

and by telling him the reason was that the Spokane facility was "nonunion." We affirm the judge's findings.

Our dissenting colleague contends the Respondent did not violate its duty to meet at reasonable times by meeting with the Union only once in the 7-month period between the Respondent's grant of recognition and its withdrawal of recognition on November 7. The dissent echoes the Respondent's general argument that its two chosen negotiators, Labor Relations Manager Keith Lane and Attorney Dennis Homerin, did the best they could to deal with the substantial bargaining demands placed upon them by the Respondent's simultaneous acquisition of 23 bargaining units.

As the judge rightly concluded, however, the Respondent's contentions "in this regard boil down to a 'busy negotiator' defense," which the Board has consistently rejected. See [Barclay Caterers, 308 NLRB 1025, 1035-1037 \(1992\)](#). We find no reason to make an exception here. As found by the judge, the Respondent—by its own hand—"virtually guaranteed that some of the unions would have to wait in line indefinitely" by designating only Lane and Homerin to negotiate contracts for the 23 bargaining units and by rejecting the Union's suggestion of coordinated bargaining. [\[FN4\]](#)

As a result, it took two letters from the Union and the passage of almost 3 months before the Respondent met with the Union for an initial bargaining session on August 21. [\[FN5\]](#) More important, even when the parties finally met on August 21, the Respondent showed little inclination to move the bargaining along. The Respondent neither presented a contract proposal nor offered any substantive response to the Union's initial proposal. [\[FN6\]](#)

****2** Our dissenting colleague notes that at the conclusion of the August 21 meeting the Respondent said it

would contact Union Representative McClure about dates for a followup meeting. But he ignores that the Respondent failed to do so. See [Richard Mellow Electrical Contractors Corp.](#), 327 NLRB 1112, 1116 (1999) (employer promised to get back to union with additional meeting dates but failed to do so). Consequently, on September 25, McClure was forced to complain to the Respondent, “[i]t has been in excess of a month since the Union gave you a proposal for a new Labor Agreement ... [t]o date we have had no response ... I am requesting to schedule a meeting for collective bargaining at the very earliest mutually agreeable time.”

Furthermore, although the Respondent answered McClure's September 25 letter by offering to meet with the Union on November 18, the Respondent did little else. Thus, at the time the Respondent withdrew recognition on November 7, it still had not responded to the Union's contract proposal or offered any proposal of its own.

***394** For these reasons, as well as those fully discussed by the judge, we agree with his finding that the Respondent failed to discharge its duty to meet with the Union at reasonable times to negotiate a labor agreement for the Spokane unit. Accordingly, we affirm his finding that the Respondent violated Section 8(a)(5) and (1) of the Act.

The judge further found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on November 7. The Respondent's withdrawal of recognition was based solely on a petition it received on November 4, indicating that 5 of the 10 unit employees no longer desired representation by the Union. The judge found that the petition was fatally tainted by the Respondent's prior and contemporaneous unfair labor practices. Consequently, the judge concluded that the Respondent's withdrawal of recognition based on the tainted petition violated Section 8(a)(5) and (1). We agree. [\[FN7\]](#)

It is settled that an employer may not lawfully withdraw recognition from a union based on employee expressions of disaffection with the union where the employer's own unfair labor practices caused or meaningfully contributed to that disaffection. See [Master Slack Corp.](#), 271 NLRB 78, 84 (1984). In *Master Slack*, the Board considered the following factors in determining whether there was a causal relationship between an employer's unfair labor practices and a subsequent petition for decertification:

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

****3** Applying these factors here, we find a causal relationship between the Respondent's unfair labor practices and the November 4 petition upon which the Respondent based its withdrawal of recognition. [\[FN8\]](#)

The record shows a close temporal proximity between the Respondent's unfair labor practices and its withdrawal of recognition. Thus, the Respondent's withdrawal of recognition occurred in the midst of its continuing unlawful failure to meet and bargain with the Union at reasonable times and intervals, and little more than 2 months after the Respondent unlawfully denied Huston his *Weingarten* right to union representation on the asserted ground that the Spokane facility was “nonunion.”

The Respondent's unfair labor practices also clearly are of a nature that tends to have a lasting negative effect on employees and to cause disaffection from a union. The Board has long recognized that dilatory bargaining tactics such as those engaged in by the Respondent have a tendency to invite and prolong

employee unrest and disaffection from a union. See [The Westgate Corp.](#), 196 NLRB 306, 313 (1972) (when an employer delays bargaining, “unrest and suspicion are generated, the conclusion of an agreement is delayed, and the status of the bargaining representative is disparaged”); [Little Rock Downtowner, Inc.](#), 145 NLRB 1286, 1305 (1964), *enfd.* 341 F.2d 1020 (8th Cir. 1965) (delayed bargaining may invite or prolong employee discontent); [“M” System, Inc.](#), 129 NLRB 527, 548-549 (1960) (dilatatory bargaining tactics cause employee frustration at their bargaining representative’s failure to report progress).^[FN9] Respondent’s unlawful refusal to allow Huston union representation, assertedly because the Spokane facility was “nonunion,” would also likely contribute to employee disaffection. Such actions negate the very essence of the Union’s representative role and serve to undercut the Union’s standing among employees.^[FN10]

The Respondent’s unlawful conduct is also of a type that reasonably tends to have a negative effect on organizational activities and union membership. As indicated above, the Respondent failed to meet and bargain at reasonable times and intervals, refused to permit union representation at an investigative interview, and declared the facility was “nonunion.” These actions reasonably convey^{*395} the message that union activity is futile, and would clearly tend to undermine the employees’ confidence in the effectiveness of their selected collective-bargaining representative.

For all of these reasons, we agree with the judge that the Respondent’s unfair labor practices tainted the petition underlying the Respondent’s November 7 withdrawal of recognition from the Union. We therefore find that the Respondent’s withdrawal of recognition violated Section 8(a)(5) and (1) of the Act.

^{**4} Finally, we also agree with the judge, for the reasons fully set forth in [Caterair International](#), 322 NLRB 64 (1996), that an affirmative bargaining or-

der is warranted in this case as a remedy for the Respondent’s unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, 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 United States 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, Inc. v. NLRB](#), 209 F.3d 727, 734 (D.C. Cir. 2000); [Lee Lumber & Building Material Corp. v. NLRB](#), 117 F.3d 1454, 1462 (D.C. Cir. 1997); [Exxel/Atmos, Inc. v. NLRB](#), 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, the court stated that an affirmative bargaining order “must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees’ § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their collective bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.”^{209 F.3d at 738.}

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

(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 unlawful withdrawal of recognition from the Union. At the same time, an affirmative bargaining order does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because its attendant bar to raising a question concerning the Union’s continuing

majority status is temporary. [\[FN11\]](#)

Moreover, in addition to unlawfully withdrawing recognition, the Respondent unlawfully failed to meet and bargain with the Union at reasonable times and intervals, unlawfully deprived an employee of his *Weingarten* right to union representation, and unlawfully declared that the Spokane facility was “nonunion.” These actions clearly signaled to the employees the Respondent’s disregard for their collective-bargaining representative. Although several years have elapsed since they occurred, Respondent’s unfair labor practices, particularly its failure to meet and bargain at reasonable times and intervals and withdrawal of recognition, would likely have a long-lasting negative effect on employee support for the Union and for collective bargaining altogether.

****5** (2) An affirmative bargaining order also serves the important policies of the Act to foster meaningful collective bargaining and industrial peace. The temporary decertification bar inherent in this order removes the Respondent’s incentive to further delay bargaining or to engage in any other conduct that would further undercut employee support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, 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 refusal to bargain with the Union in these circumstances because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their chosen representative in an effort to reach a collective-bargaining agreement. Such a result would be

particularly unfair here, where litigation occasioned by the Respondent’s unfair labor practices took several years and, as discussed above, the unfair labor practices were likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent***396** 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 representation by the Union.

For all of the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the Respondent’s unlawful refusal to bargain with the Union in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fruehauf Trailer Services, Inc., a wholly-owned subsidiary of Wabash National Corporation, Spokane, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

“(c) Upon the Union’s request, meet and bargain in good faith with the Union through those representatives, and do so promptly and regularly, at reasonable times and intervals, for purposes of concluding a collective-bargaining agreement for the Spokane unit, or for any other lawful purpose having to do with a mandatory subject of bargaining, and if an understanding is reached, embody such understanding in a signed agreement.”

****6** 2. Substitute the attached notice for that of the administrative law judge.

[FN1](#). The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. [Standard Dry Wall Products, 91 NLRB 544 \(1950\)](#), enfd. [188 F.2d 362 \(3d Cir. 1951\)](#). We have carefully examined the record and find no basis for reversing the findings.

[FN2](#). All dates are in 1997, unless stated otherwise.

[FN3](#). See [NLRB v. J. Weingarten, Inc., 420 U.S. 251 \(1975\)](#).

[FN4](#). The Act, of course, generally does not restrict a party's right to select whom it pleases as its bargaining representative; provided, however, "that this designation does not collide with the duty under Section 8(d) 'to meet at reasonable times.'" [Caribe Staple Co., 313 NLRB 877, 893 \(1994\)](#).

[FN5](#). As the judge did, we consider these facts as background evidence shedding light on the Respondent's overall conduct.

[FN6](#). The Respondent did alert the Union to a grammatical error in its proposed dues-checkoff clause.

[FN7](#). The General Counsel specifically withdrew reliance upon the theory that the Respondent's recognition of the Union after acquiring the facility gave rise to an "irrebuttable presumption" of the Union's majority status for a "reasonable time." But see [St. Elizabeth Manor, Inc., 329 NLRB 341 \(1999\)](#); [Inn Credible Caterers, Ltd., 333 NLRB 898 \(2001\)](#).

[FN8](#). Our dissenting colleague's finding of no taint is premised on his view that the Respondent did not violate Sec. 8(a)(5) and (1) by failing to meet with the Union at reasonable times.

[FN9](#). The Union had represented employees at the Spokane facility for at least the preceding 12 years without any evidence of growing discontent with the Union during that time period. It was only after the Respondent unlawfully failed to attend to bargaining with the Union, thereby forestalling the possibility that a contract might soon be reached, that the employees expressed dissatisfaction with the Union. Absent any convincing evidence of an alternative explanation, we find it reasonable to infer that the Respondent's unlawful conduct was responsible for that discontent. See [Williams Enterprises, 312 NLRB 937, 940 \(1993\)](#), enfd. [50 F.3d 1280 \(4th Cir. 1995\)](#).

[FN10](#). With respect to the "nonunion" statement, see [Williams Enterprises](#), supra at 938 fn. 5, 940 (employer's stated intention to operate nonunion "strikes at the heart of the relationship between the employees and the [u]nion," and "would reasonably tend to cause employee[] disaffection from the [u]nion."). See also [Soltech, Inc., 306 NLRB 269, 273 \(1992\)](#); [Advanced Stretchforming International, 323 NLRB 529, 530-531 \(1997\)](#), enfd. in pertinent part [233 F.3d 1176 \(9th Cir. 2000\)](#).

[FN11](#). As found by the judge and affirmed above, the November 4 decertification petition did not reflect employee free choice under Sec. 7, but rather the effect of the Respondent's prewithdrawal unfair labor practices. This additional circumstance further supports giving greater weight to the Sec. 7 rights that were infringed by the Respondent's unlawful withdrawal of recognition.

****7** CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues, I find that the Respondent

did not violate Section 8(a)(5) of the Act. As an initial matter, I note that the judge found that the bargaining conduct outside the 10(b) limitations period (i.e., prior to Aug. 11, 1997) was admissible as background evidence. [FN1] He assumed *arguendo* that Section 10(b) barred a finding that the Respondent committed violations before August 11, 1997. Nevertheless, the judge found, substantially based on the Respondent's post-August 11 behavior, that the Respondent had bargained in bad faith. I disagree.

The judge's finding in this regard was premised in part on his characterization of the August 21, 1997 Spokane meeting between the Respondent and the Union employees as "perfunctory and inconclusive." Concededly, if one focuses solely on the meeting of August 21, it does indeed appear that little of substance was accomplished. However, the August 21 meeting must be examined in the context of prior events. The Respondent had been a nonunion company. In 1997, it acquired 23 bargaining units at one time, including the one in the instant case (Spokane). The Respondent assigned its only experienced labor negotiator, Keith Lane, to negotiate concerning its newly acquired units, and also retained outside counsel, Dennis Homerin, to assist Lane. In view of the simultaneous acquisition of 23 units, the Respondent had to establish some bargaining priorities. The Respondent reasonably decided to accord top priority to bargaining with the United Auto Workers Local that represented the employees at the largest of its newly-required plants, in Fort Madison Island, Iowa. The Respondent did not, however, neglect its obligations to the other units. With respect to the instant unit, the Respondent agreed to meet on August 21.[FN2] At the meeting of August 21, the Union presented a comprehensive written proposal for a new agreement to Homerin and Lane. They had never seen it before. The parties reviewed the document. Understandably, the Respondent did not present counterproposals on the spot. Homerin said that the Respondent would need some time to review the Union's proposal, and cited a difficult bargaining schedule with other un-

ions in other units around the country. He told Union Business Representative Craig McClure that he would contact him about future dates for a followup meeting as to the Spokane unit.

Under the circumstances, I find that the Respondent's conduct at the August 21 meeting was entirely reasonable. I disagree with the judge's description of the meeting as "perfunctory" and with his use of the meeting as evidence of bad-faith bargaining on the part of the Respondent. [FN3]

My colleagues state that, at the August 21 meeting, the Respondent showed little inclination to move the bargaining along and neither presented a contract proposal nor offered any substantive response to the Union's initial proposal. As noted above, however, Homerin and Lane were presented with a comprehensive written proposal for a new agreement, one they had never seen before. Under the circumstances, it is not at all surprising that they did not immediately offer counterproposals. Indeed, it would have been much more surprising if they had done so. In sum, I find nothing in the conduct of Homerin and Lane at the August 21 meeting to indicate an intent on the Respondent's part to frustrate, delay, or impede bargaining.

****8** My colleagues further state that the Respondent failed to contact McClure about dates for a followup meeting. The Union did not ask for a specific time for a Respondent*397 follow up, and Respondent did not promise one. Moreover, Respondent told McClure on August 21 that the Respondent would need time to review the Union's new comprehensive proposal and that the Respondent was faced with a difficult bargaining schedule with other unions in other units around the country. The Union did not protest. Consistent with this, the Union did not write Respondent until September 25, and Lane responded quite promptly to the September 25 letter.

On October 1, Lane wrote to McClure, proposing a November 18 meeting date.[FN4] On October 21, McClure wrote back to Lane, confirming his availability for that date and asking that Lane let him know the time and place.

I disagree with the judge's finding that the Respondent's proposal for a November 18 meeting constituted an unreasonable delay. In light of the circumstances noted above, I find that the proposed date was in keeping with a good-faith effort on the Respondent's part to discharge its bargaining obligations not only as to the Spokane unit but also as to the others. [FN5]

My colleagues fault the Respondent because, at the time it withdrew recognition, it had not responded to the Union's proposal. However, it must be remembered that, on October 21, the Union agreed to meet on November 18. If a Respondent proposal had not been made on November 18, I would agree that this could be an indicium of bad faith. However, as noted, the meeting was short-circuited when, on November 4, the employees presented their petition. I perceive nothing sinister in this sequence of events.

In sum, I find that: the Respondent did not, within the 10(b) period, employ dilatory tactics; the August 21 meeting was not perfunctory; the Respondent's proposal for a November 18 meeting did not constitute an unreasonable delay. I therefore conclude that the Respondent did not violate Section 8(a)(5) by engaging in bad-faith bargaining.

On November 4, the Respondent received a petition signed by 5 of the 10 employees in the Spokane unit, stating that they no longer wanted to be represented by the Union. On November 7, Lane wrote to McClure, stating in pertinent part:

On Tuesday, November 4, 1997, we received a petition signed by employees in the bargaining unit indicating that they no longer wish to be represented by your Union. Based on this peti-

tion, it is clear that your Union no longer has majority status in the bargaining unit. Based on this petition and other objective considerations, we can no longer negotiate with you for an agreement. The meeting previously scheduled for November 18, 1997 is, therefore, canceled.

As to the alleged unlawful withdrawal of recognition, my colleagues, applying the *Master Slack*[FN6] factors, find a causal relationship between the Respondent's unfair labor practices and the November 4 petition on the basis of which the Respondent withdrew recognition. They therefore uphold the judge's finding that the Respondent's withdrawal of recognition was unlawful. I disagree.

****9** As noted supra, I do not find that the Respondent unlawfully failed to bargain in good faith with the Union. Thus, the employee petition was untainted. I recognize that there was another violation, at least under current Board law. Respondent denied employee Huston's request for union representation during an investigative interview, which denial it explained by telling him that the Spokane facility was "nonunion." [FN7] However, such conduct is much less potent as a breeder of employee disaffection than, for example, a refusal to bargain in good faith. I also note the lack of any finding by the judge as to how many employees were aware of this single incident. Finally, I note that the incident took place more than 2 months before the employee disaffection. In sum, I do not find that the Huston incident, standing alone, was a sufficient basis on which to conclude that the employee petition was tainted.

I would therefore dismiss the allegation concerning withdrawal of recognition.

[FN1](#). The charge in the instant case, alleging inter alia that the Respondent had bargained in bad faith, was filed on February 11, 1998.

[FN2](#). There can be no contention of dilatoriness between April and August 11, for that is outside the 10(b) period.

[FN3](#). There is no evidence that the Union complained, at the time, about the meeting. It did not file a charge about the matter until February 11, 1998.

[FN4](#). The judge stated incorrectly that the Respondent proposed that the next meeting be held “some four months after the first meeting.”

[FN5](#). There is no evidence that the Union complained, at the time, about the scheduling. As noted above, the charge herein was not filed until February 11, 1998.

[FN6](#). *Master Slack Corp.*, 271 NLRB 78 (1984).

[FN7](#). The facility was a unionized one at that point. Further, under current Board law, even employees at non-union facilities have a right to assistance at an investigatory interview. *Epilepsy Foundation*, [331 NLRB 950 \(2000\)](#).

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

***398** Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition from or otherwise refuse to recognize International Association of Machinists and Aerospace Workers, District Lodge 751, affiliated with International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative for collective-bargaining purposes of employees in the following-described appropriate bargaining unit (the Spokane unit):

****10** All service and maintenance employees at our Spokane, Washington Facility: EXCLUDING all clerical employees, parts room employees, guards, and supervisors as defined in the Act.

WE WILL NOT fail or refuse to meet and negotiate with the Union as such representative at reasonable times and intervals for purposes of concluding a collective-bargaining agreement for the Spokane unit or for any other lawful purpose having to do with a mandatory subject of bargaining.

WE WILL NOT refuse an employee's request for union representation during any investigative interview, which the employee reasonably believes may result in discipline.

WE WILL NOT tell employees that the Spokane facility is a nonunion shop.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL restore recognition to the Union as the

exclusive representative of employees in the Spokane unit for all collective-bargaining purposes, and we will so notify the Union in writing.

WE WILL appoint representatives who will be promptly and regularly available at reasonable times and intervals for purposes of collective bargaining with the Union for the Spokane unit.

WE WILL, upon the Union's request, meet and bargain in good faith with the Union through those representatives, and do so promptly, at reasonable times and intervals, for purposes of concluding a collective-bargaining agreement for the Spokane unit or for any other lawful purpose having to do with a mandatory subject of bargaining, and if an understanding is reached, embody such understanding in a signed agreement.

FREUEHAUF TRAILER SERVICES, INC., A WHOLLY-OWNED SUBSIDIARY OF WABASH NATIONAL CORPORATION

Peter G. Finch and Daniel Sanders, Esqs., for the General Counsel.

Dennis R. Homerin and Brian West Easley, Esqs. (Jones, Day, Reavis & Pogue), of Chicago, Illinois, for the Respondent.

Christopher T. Corson, Esq., Assoc. General Counsel, IAM, of Upper Marlboro, Maryland, and Ted Neima, Grand Lodge Representative, IAM, of Sacramento, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge.

I heard this case in trial on March 16, 1999, in Spokane, Washington, where all parties were represented by counsel. Counsel for each party also filed posttrial briefs, which I have studied. [FN1]

This is an unfair labor practice prosecution; it is brought in the name of the General Counsel of the National Labor Relations Board by the Regional Director for Region 19 against a respondent entity identified in the ultimate complaint as “Fruehauf Trailer Services, Inc.[FTSI], a wholly owned subsidiary of Wabash National Corporation [Wabash].”[FN2] (The effect of this styling, as I construe it, is to make FTSI itself the respondent party, with the reference to its status as a subsidiary of Wabash being merely descriptive.) The prosecution traces from original and amended charges filed against FTSI by International Association of Machinists and Aerospace Workers, District Lodge 751 (the Union), affiliated with International Association of Machinists and Aerospace Workers, AFL-CIO (IAM).[FN3]

****11** The case is grounded in events that began in late April 1997, when Wabash, as part of a larger acquisition of assets-in-bankruptcy from Fruehauf Trailer Corporation, acquired a trailer sales and service facility in Spokane and soon recognized the Union as the representative of a unit of service and maintenance employees at the facility. At some uncertain point, Wabash created FTSI as a subsidiary corporation, apparently to function as the entity that would own and operate the Spokane facility and like facilities around the country also acquired through the bankruptcy sale. [FN4] Some 7 months later, however, ***399** on November 7, 1997, Wabash's corporate labor relations manager, Keith Lane, advised the Union in writing that FTSI was withdrawing recognition from the Union, and was canceling a scheduled contract-bargaining meeting, all based on asserted “objective considerations” (an employee petition) indicating that the Union “no longer has majority status in the bargaining unit.”

The complaint alleges, in substance, that FTSI violated Section 8(a)(5) of the National Labor Relations Act by failing to meet and bargain with the Union at reasonable times during the 7-month period preceding the withdrawal of recognition, and by withdrawing recognition from the Union on November 7, 1997. In addition the complaint alleges that FTSI independently violated Section 8(a)(1) of the Act in August 1997 by denying an employee's request for union representation during an investigatory interview and by telling the employee that the Spokane facility was "non-Union."

FTSI admits that it is an employer engaged in commerce within the contemplation of Section 2(6) and (7) of the Act, and that the Board's jurisdiction is properly invoked, [FN5] but denies all alleged wrongdoing, and avers that its withdrawal of recognition from the Union was legally privileged, based on the employee petition indicating that the Union no longer enjoyed majority support in the unit.

Based on the findings and reasoning set forth below, I judge ultimately that all counts in the complaint have substantial merit.

I. FACTS [FN6]

A. Background

1. Wabash acquires certain of FTC's assets-in-bankruptcy

In October 1996, Fruehauf Trailer Corporation (FTC) filed for bankruptcy. FTC was then the largest manufacturer of truck trailers in the world, and also operated a network of 29 trailer sales and service branches located throughout the United States, including one in Spokane, Washington, the situs of the current dispute. The approximately 10 service and maintenance employees at the Spokane branch were then represented by the Union and were covered by an

existing collective-bargaining agreement with FTC. Employees at about 11 other such branches were represented by various other IAM-affiliated District Lodges.

Wabash National Corporation (Wabash) was then a trailer manufacturer with headquarters in Lafayette, Indiana. In early 1997, Wabash began negotiations to acquire many of FTC's assets-in-bankruptcy, including the network of sales and service branches, the main object of Wabash's interest. On March 20, the bankruptcy court approved an asset-sale agreement between Wabash and FTC. The sale of assets was perfected on April 16. The total purchase price was about \$50 million. The acquisitions from FTC included not just the sales and service branches but also a parts distribution center and two manufacturing plants, one in Tennessee, and the other, larger one in Fort Madison Island, Iowa, where the approximately 150 workers had been represented previously by a local of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

2. Hiring and assumption of labor relations obligations

a. Generally

****12** Before these acquisitions, Wabash had been engaged solely in the manufacture of trailers, and employed about 4000 unrepresented workers. As a result of the acquisitions, however, Wabash became, "overnight," the effective employer of an additional 1000 employees at various acquired facilities around the country, all of whom had previously been employed by FTC. Wabash's hiring of former FTC employees to staff its newly-acquired facilities led, in turn, to its assumption of union recognition and bargaining obligations in many cases. Thus, following patterns similar to those described below involving the Spokane branch, the Respondent soon recognized 12 IAM-affiliated unions as the representatives of an

apparently equal number of individual bargaining units of service and maintenance employees working in the newly-acquired sales and service branches. The Respondent also recognized a number of other unions as the representatives of another 12 or so individual units of employees in other newly-acquired facilities. The most prominent of these latter was the UAW-represented unit at the Fort Madison Island plant, which would become the largest single source of new trailers and parts to be sold and serviced through the branch outlets.

Anticipating all these developments, Wabash had retained Chicago-based attorney Dennis Homerin to steer it through the hiring and union-recognition processes, and to assist in new-contract bargaining with the various newly-recognized unions. In addition, about 2 weeks before reaching agreement to buy FTC's assets, Wabash had promoted Keith D. Lane from his former position as one of three employees in its office of "Associate Relations" to the newly-created position of "Corporate Labor Relations Manager," in which position Lane would become directly responsible for all contract negotiations with the newly-recognized unions at the acquired facilities. Lane was picked for this new position because he had been a union member and officer in an earlier phase of his career, and was the only person on Wabash's staff with any background in union-management negotiations. Thereafter, Lane and Homerin (with *400 the occasional involvement of Brian Easley, another attorney in Homerin's firm) handled all negotiations with the newly-recognized unions.

b. At the Spokane branch

On April 15, 1997, [FN7] Charles Fish, Wabash's vice president for human resources, wrote to the Union's business representative, Craig McClure, advising that the sale of FTC assets to Wabash was expected to close on April 16, that FTC had already notified employees that they will be terminated on that date, and that Wabash would offer employment

to these employees under certain "initial employment terms," which were set forth in an attachment to Fish's letter to McClure. Fish also stated that while Wabash did not currently recognize the Union as the representative of any former FTC employees, and would not assume the existing collective-bargaining agreement between the Union and FTC, it was prepared to recognize and bargain in good faith with the Union "if a majority of its workforces [sic] is comprised of former [FTC] employees."

****13** On April 16, when the asset transfer was completed, Wabash hired back the 10 service and maintenance employees who had previously worked in the Spokane Branch for FTC, and these employees apparently were the only ones hired. Consequently, on April 29, Attorney Homerin, writing as Wabash's labor counsel, wrote to McClure, confirming that "Wabash [was] extending recognition to your union, covering the bargaining unit previously represented[.]"[FN8] and that "Wabash [was] prepared to meet for the purpose of negotiating a new collective bargaining agreement."Homerin added, however, that, "[b]ecause of the number of facilities recently purchased by Wabash National, there will be some delay in scheduling a bargaining meeting for the facility."

3. Wabash ignores IAM's request for bargaining for a "master agreement," and sets its own bargaining priorities

On May 6, after Wabash had similarly granted recognition to other IAM District Lodges representing employees in various former FTC sales and service branches, IAM's automotive coordinator, Merrill Frost, wrote to Attorney Homerin, requesting a meeting for the purpose of negotiating a "master agreement covering all IAM locations."Homerin did not reply, and, on May 22, Frost wrote to Wabash's newly-appointed labor relations manager, Lane, reiterating the same request. So far as this record shows, Lane did not reply in writing to this request, either. However, Lane testified generally that Wabash was

“not interested in coordinated bargaining” with IAM, and he and/or Homerin admittedly communicated this position at least once to IAM representative Frost and others during a meeting held in late August, in Seattle, to discuss contract terms for employees in the former FTC branch in Seattle.

In fact, Wabash, through Lane and Labor Counsel Homerin, had made it a priority to schedule the first negotiations with the UAW local that represented the 150 employees at its Fort Madison Island, Iowa plant. Their priorities were influenced by the fact that this plant would play a critical role in resupplying the trailers and parts needed by the sales and service branches, whose inventories had been largely depleted and not restocked during the period preceding and including FTC's bankruptcy filing. Thus it was that bargaining for the UAW-represented plant began on May 12, while other newly-recognized unions at other facilities awaited Homerin's and Lane's availability.

B. Alleged Unfair Labor Practices

1. The 8(a)(5) counts

a. Events leading to the August 21 bargaining session for the Spokane unit

On May 16, Labor Relations Manager Lane addressed another letter to the Union at its Spokane office. The letter was addressed to the attention of Harold Wilson, who recently had been acting for McClure during the latter's surgery-related disability leave. (Wilson was a business representative for an IAM District Lodge based in Seattle.) In this letter, Lane reiterated Homerin's April 29 warning to McClure that, “because of the number of facilities recently purchased by Wabash National, there will be some delay in scheduling a meeting for the [Spokane] facility.” However, Lane also stated that Wabash had “begun the negotiation process at some of the [other]

locations[.]” and that it was “progressing as quickly as possible in scheduling other meetings.” And he closed the letter by “respectfully ask[ing] for your patience and understanding during this process.”

****14** On May 29, McClure, by then back on the job, wrote in reply. He advised Lane that “the Union has drafted a proposal and is prepared to begin collective bargaining for your Spokane facility,” and he asked in closing that Lane “submit ... a list of your earliest available times to begin negotiations.” Lane did not specifically respond to this latter request, however, and this caused McClure to mail another letter to Lane on June 27, repeating the same messages.

On July 9, Lane mailed another letter to the Union (mis)addressed to Wilson's attention, stating that he would be available to meet in Spokane “on the morning of Thursday, August 21[.]”[FN9]

McClure replied on July 21, confirming the proposed date, offering the Union's offices as a meeting site, and asking Lane to contact him confirming the time and place. On August 1, after Lane had failed to reply, McClure wrote again to Lane, in a letter captioned “Second Request,” asking Lane to “confirm the time and place of the August 21 meeting scheduled in Spokane.” Lane replied by letter dated August 11 (again misaddressed to Wilson's attention), confirming that the meeting would take place at 1:00 p.m., at the Ramada Inn at the Spokane*401 Airport, and expressing his thanks for [“Wilson's”] patience and understanding during this process.”

On August 20, Lane and Homerin met with IAM representatives in Seattle, to conduct bargaining for the Seattle branch unit represented by a District Lodge. (The company representatives were then on what Lane described as a “West Coast swing,” during which it had scheduled bargaining for various IAM units in California, Oregon, and Washington.) The IAM attendees included, in addition to representa-

tives of the Seattle District Lodge, IAM Automotive Coordinator Frost, IAM's Western Region Representative, Frank Santos, as well as the Union's Business Representative, McClure, who functioned solely as an "observer." While the company representatives did not object to the presence of these "outsiders," they reiterated that they were not interested in "coordinated bargaining," and that they were present solely for the purpose of negotiating for the Seattle unit.

b. August 21 meeting

On August 21, Homerin and Lane met at the Ramada Inn at the Spokane airport with the Union's McClure, who was joined by a Local Bargaining Unit Member and Shop Steward, Marty Harris, and by IAM representatives Frost, Santos and others. There, McClure presented to the company team the Union's comprehensive written proposal for a new agreement. The parties took an uncertain amount of time reviewing this document, but engaged in little or no substantive discussion of any of its provisions. [FN10] When the review was complete, the meeting effectively ended. The company representatives presented no counter-proposals. McClure asked Homerin about future meeting dates; Homerin promised to "get back" to McClure on the subject. McClure stressed that it should not take "another five or six months" to hold the next meeting. Homerin stated that it would take some time for the company to review the Union's proposal, and cited a difficult bargaining schedule with other unions around the country, but again promised to get back to McClure about future dates for a follow up meeting regarding the Spokane unit.

c. Further scheduling developments; the withdrawal of recognition

****15** Homerin did not get back to McClure during the following month. On September 25, McClure wrote to Homerin, in material part as follows:

It has been in excess of a month since the Union

gave you a proposal for a new Labor Agreement at the Spokane facility. To date we have had no response. While I am aware you have many areas to bargain, it does not relieve the Employer of their obligation to bargain the Spokane location. Therefore, I am requesting to schedule a meeting for collective bargaining at the very earliest mutually agreeable time.

On October 1, Lane replied to McClure's letter to Homerin, proposing that "we meet again the evening of November 18, 1997, to continue our discussions on the FTS Spokane facility." Although this letter was received by the Union in due course, McClure was not personally aware of this; therefore, on October 9, he had written a "second request" to Homerin similar to his September 25 letter.[FN11] When this second request came to Lane's attention, Lane wrote a "second reply," enclosing a copy of his October 1 reply and reiterating a willingness to meet on the evening of November 18. On October 21, after receiving this second reply, McClure wrote back to Lane, confirming his availability to meet on that evening, and requesting that Lane let him know the time and place.

The November 18 meeting never took place. In the meantime, on or about November 4, under uncertain particular circumstances, an unknown agent of FTSI received a petition, apparently signed by five employees in the 10-person Spokane bargaining unit, stating, "We no longer wish to be represented by Machinists Union Lodge 751 Local 86." This caused Lane to write to McClure on November 7, stating in material part as follows:

On Tuesday, November 4, 1997, we received a petition signed by employees in the bargaining unit indicating that they no longer wish to be represented by your Union. Based on this petition, it is clear that your Union no longer has majority status in the bargaining unit. Based on this petition and other objective considerations, we can no longer negotiate with you for an agreement. The meeting previously scheduled for No-

vember 18, 1997 is, therefore, canceled.

2. The 8(a)(1) counts

The alleged violations of Section 8(a)(1) involve two related claims—first that FTSI's agents in Spokane (General Manager Jerry Olson and Service Manager Craig Stelling) unlawfully denied Spokane unit employee Gary Huston the statutory right, confirmed by the Supreme Court in *Weingarten*,^[FN12] to union representation during an investigative interview on August 21 that led to his 1-day disciplinary suspension on August 22; second, that in explaining why he was being denied this right, Stelling coercively told Huston that the Spokane facility was a “nonunion shop.”

This is a brief background and overview: The alleged violations occurred in the context of a company investigation into a dispute between two employees in the bargaining unit, Huston (an apparent supporter of the Union) and Gary Bogle (whose purported signature appears on the November 4 petition opposing union representation, but who did not appear as a witness). The company's investigation into the August 21 incident, *infra*, took place on the same day, and was followed the next day by General Manager Olson's decision to impose a 1-day disciplinary suspension on both Huston and Bogle. (Later, as elaborated below, a decision was made by FTSI's human resource *402 director to rescind the discipline imposed on both Huston and Bogle, and to pay them each backpay for the day's pay each lost due to the suspensions.)

****16** Huston and Stelling were the only witnesses called to testify about the underlying transactions, and their testimony is in conflict about critical details. Thus, while Stelling admits that he did tell Huston at one point that he could not have union representation, Stelling insists, contrary to Huston, that this only occurred at the point when the disciplinary decision

was imparted to Huston on August 22. For reasons further noted below, I found Huston's testimony about material events to be more plausible and credible than Stelling's, and thus I adopt Huston's account, as follows:

On August 21, Bogle approached him from behind and “body-slammed” him.^[FN13] Huston then left his work station and complained about the attack to Stelling, his and Bogle's immediate supervisor. Less than an hour later, Stelling came to Huston's work station, told him to remove his coveralls and to follow him to a meeting with General Manager Olson. Huston said he wanted “union representation.” Stelling replied, “No, this is a nonunion shop.” Huston removed his coveralls and followed Stelling, saying again that he wanted union representation, but receiving no reply from Stelling. They picked up Bogle on the way and eventually found Olson in the parts department, and the group then retired to Olson's office. Once in the office, Huston again asked for union representation. Olson looked at Stelling and Stelling again said “No.” Olson then asked what had happened and Bogle and Huston each competed to tell his own version. Olson then said that he and Stelling would look into the matter further and would decide whether discipline was appropriate. ^[FN14] Later on August 21, and again on August 22, Stelling and Olson talked to several other employees, including the shop steward, Harris. After this was done they decided on a 1-day suspension for each of the disputants and so advised them in another meeting held on August 22.

Sometime around mid-September, Huston filled out an in-house “Associate Complaint Form,” protesting that Stelling and Olson had denied his “rights to have representation on my behalf during interrogation and discipline actions.” Olson wrote a response on the form on September 26. He stated: “Wabash National Corporation Policies do not require representation during disciplinary or suspension proceedings.”

On or about October 2, Huston filed an in-house appeal to FTSI's Human Resources Director, Pat Quick. On October 13, Quick responded in writing, stating, initially, that "there has been a misunderstanding surrounding Fruehauf Trailer Service's policy. Simply put, the initial responses [by Olson, on September 26] to our associate's [Huston's] complaint are inaccurate when applied to this particular situation." Quick went on to state, in pertinent part, as follows (my emphasis):

While Management is correct that we do not have a policy that *requires* representation, we do not have a policy to deny or refuse representation *when properly requested in appropriate situations*.

****17** This case indicates that some confusion has arisen over the rights of employees, represented by IAM District Lodge 751, to request union representation *in the event of an investigation of potential disciplinary action*. FTS will follow the law with regard to these situations:

1. The right (to request union representation) arises only in situations where the employee requests representation.
2. The employee's right to request representation as a condition to participate in the interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.

Because of the confusion and in a good faith attempt to treat our Associates fairly, the disciplinary suspensions issued Gary Bogle and Gary Huston are rescinded and FTS will pay said employees for their loss of wages.

II. ANALYSES AND CONCLUSIONS OF LAW

A. The 8(a)(1) Counts

As noted, the complaint alleges that agents of FTSI (notably, Service Manager Stelling) unlawfully de-

nied Huston's repeated requests for union representation, both before and during the August 21 meeting where General Manager Olson interviewed both Huston and Bogle about what had happened between them. Everyone agrees that this interview was "investigative" in character, and, therefore, that Huston had a "*Weingarten* right" to request and be granted union representation as a condition of going forward with such an interview. (Indeed, Quick's October 13 memorandum, *supra*, acknowledges the point of law.) The only disagreement is about whether Huston asked for union representation before, or during the August 21 interview in Olson's office. I have credited Huston's account to find that he made such timely requests both before and during the interview, and that Stelling (and Olson, by default) denied this request. Accordingly, it follows as a matter of law that the ***403** refusals of Stelling and Olson to permit Huston to have union representation during the August 21 interview violated Section 8(a)(1) of the Act.

I have also credited Huston to find that Stelling explained the refusal to permit union representation on the basis that "this is a nonunion shop." Of course, this was legally inaccurate, for the Union was then not only entitled, under successorship principles, to recognition as the representative of the Spokane service and maintenance employees, but, in fact, Wabash/FTSI had already conferred such recognition on the Union. Nevertheless, Stelling's explanation clearly implied that the company would not permit the Union to play a representative role on Huston's behalf *because* FTSI did not recognize the Union's representative status. Thus, the explanation compounded the statutory *Weingarten* violation by implying that employees were not entitled to the Union's representative services for *any* purpose. Accordingly, I conclude as a matter of law that Stelling's statement, "this is a nonunion shop," was an independently unlawful act of "coercion" within the contemplation of Section 8(a)(1). [\[FN15\]](#)

B. The 8(a)(5) Counts

1. Refusal to meet and bargain at reasonable times

****18** FTSI, having appropriately recognized the Union as the representative of the employees in the Spokane unit, operated under a general statutory obligation to bargain collectively in good faith with the Union as the exclusive representative of those employees. Under Section 8(d) of the Act, the discharge of this obligation required FTSI, *inter alia*, to “meet at reasonable times and confer” with the Union for such purposes as “the negotiation of an agreement” to cover the Spokane employees. The Board has long construed these obligations as imposing on the employer an “affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring.”[\[FN16\]](#) Indeed, using language that is especially pertinent to ultimate issues in this case, the Board has held that an employer is required to show the same “great degree of diligence and promptness in the discharge of [its] bargaining obligations as [it] display[s] in other business affairs of importance,” for “[a]greement is stifled at its source if opportunity is not accorded for discussion, or so delayed as to invite or prolong unrest or suspicion.”[\[FN17\]](#)

The General Counsel contends centrally in this regard that it was unreasonable for FTSI to have met with the Union only once during the 7-month period bracketed by its initial recognition and ultimate withdrawal of recognition. The General Counsel further argues that the unreasonableness of FTSI's failure to meet more than once during this extended period is made more palpable by additional factors. These include the “perfunctory” character of the single meeting on August 21, in which company agents merely “reviewed” the Union's initial proposal, and offered no counterproposals nor a proposed schedule for future meetings, and then departed Spokane to continue their West Coast swing. In addition, the General Counsel cites the failure of Homerin or Lane thereafter to “get back” to the Union even about future meeting dates, until prompted more than a month

later by McClure's September 25 letter to propose that a second meeting be held on November 17, nearly 4 months after the first meeting had been held. Finally, the General Counsel emphasizes that during the months between the August 21 meeting and the eventual withdrawal of recognition, FTSI never presented the Union even with a counterproposal to the terms presented by the Union during the August 21 meeting.

The General Counsel's arguments are facially meritorious. One perfunctory and wholly inconclusive meeting in 7 months was clearly not enough to discharge FTSI's statutory obligation to meet and confer with the Union at “reasonable” times for the purposes of negotiating a labor agreement for the Spokane unit. Accordingly, unless FTSI could show either that the Union shared substantially in the blame for the failure to meet and bargain more frequently, or that there existed truly extraordinary independent circumstances that would have made it “unreasonable” for FTSI to have tried to move the Spokane bargaining process along more quickly than it did, it follows as a matter of law that FTSI violated its statutory bargaining obligations. FTSI makes a variety of arguments apparently aimed at making one or both such defensive showings; however, for reasons discussed below, I remain unpersuaded.

****19** FTSI argues centrally that Wabash's “overnight” acquisition of the former FTC facilities and the 1000 employees working in them, together with its acquisition of bargaining obligations to upwards of 25 different unions for a like number of individual bargaining units, created a virtually insuperable obstacle to Wabash's and/or FTSI's ability to discharge all of its newly-inherited bargaining obligations simultaneously. These arguments rely on the fact that Wabash had deputized Lane and Labor Counsel Homerin as the individuals jointly responsible for all such new-bargaining matters, and on the (unexceptionable) supposition that these two individuals could hardly be expected to be in more than one place at a

time, i.e., to negotiate simultaneously with 25 different unions for 25 different units around the country. Thus, according to FTSI's argument, Lane and Homerin were necessarily required to establish bargaining priorities, and, not unreasonably, they decided that first priority should be given to bargaining with the UAW local for the employees at the largest of the newly-acquired manufacturing plants.

This argument is only as good as its unstated premise—that it was “reasonable” in the first instance for Wabash to have made Lane and Homerin personally and *exclusively* responsible for the handling of all the bargaining obligations to which Wabash and/or FTSI became bound as a consequence of the acquisitions. And it is the premise itself that is unpersuasive. When Wabash/FTSI invested a team of only two individuals with the personal responsibility for conducting negotiations for the 25 or ***404** so newly-acquired, union-represented bargaining units spread around the country, it virtually guaranteed that some of the unions would have to wait in line indefinitely, until Lane and Homerin might find time to begin bargaining for the units they represented. Indeed, Wabash recognized this from the outset: In the same letter of April 29 in which Homerin, speaking for Wabash, conferred recognition on the Union, Homerin also declared that, “[b]ecause of the number of facilities recently purchased by

Wabash National, there will be some delay in scheduling a bargaining meeting for the facility.” Moreover, Homerin’s reference to “some delay” was clearly an understatement, for it took the better part of the next 4 months—and two insistent letters from the Union’s McClure—before Lane and Homerin broke free to begin bargaining for the Spokane unit, and it took the better part of another 4 months—and another written demand from McClure—before they would again become available for a second meeting.

The General Counsel correctly notes that FTSI’s arguments in this regard boil down to a “busy negotia-

tor” defense, and that the Board has consistently given short shrift to this defense when raised in analogous contexts. See, e.g., [Caribe Staple Co., 313 NLRB 877, 893 \(1994\)](#): “Considerations of personal convenience, including geographical or professional conflicts, do not take precedence over the statutory demand that the bargaining process take place with expedition and regularity. An employer acts at its peril when it selects an agent incapacitated by these or any other conflicts.”^[FN18] The same rationale applies here. While Wabash/FTSI was free to designate agents of its own choosing to aid it in discharging its statutory bargaining obligations, it cannot now rely on the (inevitable and foreseeable) “scheduling conflicts” of its chosen deputies to excuse its unavailability to meet with the Union more than once during the 7-month period preceding its withdrawal of recognition.

****20** FTSI is just as unpersuasive when it suggests that the Union was quite content with—indeed, that it “agreed to”—the “meeting schedule,” such as it was. Thus, FTSI states on brief (pp. 16-17):

Significantly, the Union agreed to the Spokane meeting schedule, never protested the frequency of meetings, never filed any unfair labor practice charges prior to the employees’ submission of a petition seeking to decertify [sic] the Union, and failed to file any charge until six (6) months after the withdrawal of recognition. Under such circumstances, and clearly in light of the Union’s consent and participation in the timing of the bargaining process in Spokane, the Company clearly did not violate the Act.

This string of claims, apparently intended to suggest in the end that the Union waived its statutory right to meet and confer at reasonable times, obviously depend in large part on a distortion of the undisputed facts: Thus, while the record shows that the Union “agreed” to both the August 21 and November 18 dates proposed by the company’s negotiators, it is a distortion of the record to suggest that the Union “agreed” to the “meeting schedule.” McClure’s May

29 letter to Lane plainly shows that the Union was prepared as of that date to begin negotiations for the Spokane unit, and sought from Lane “a list of your earliest available times to begin negotiations.” Indeed, when another month passed without a reply, McClure again demonstrated a wish promptly to begin negotiations by writing again to Lane on June 27, reiterating the same request. Clearly, therefore, the Union cannot be said to have “agreed” to a “schedule” under which the first meeting would not take place until August 21; rather, presented by Lane with no earlier meeting date, the Union simply “accepted” the best the company was prepared to offer, a meeting on August 21. (An identical analysis holds for the company’s claim that the Union thereafter “agreed” to a “schedule” according to which the next meeting would not take place for another 4 months, i.e., until November 18.) Moreover, FTSI’s assertion that the Union “never protested the frequency of meetings” is essentially false: Such a protest was explicit in McClure’s admonition to Homerin at the conclusion of the perfunctory meeting on August 21 that it should not take “another five or six months” to hold the next meeting. And it was just as explicit in McClure’s September 25 letter to Homerin, complaining, in language worth repeating in full, as follows:

It has been in excess of a month since the Union gave you a proposal for a new Labor Agreement at the Spokane facility. To date we have had no response. While I am aware you have many areas to bargain, it does not relieve the Employer of their obligation to bargain the Spokane location. Therefore, I am requesting to schedule a meeting for collective bargaining at the very earliest mutually agreeable time.

****21** Finally, FTSI’s emphasis on the Union’s failure to file an unfair labor practice charge against the company during the period preceding the withdrawal of recognition is wholly unpersuasive insofar as it is urged as a factor indicating that the Union had “agreed” to the “meeting schedule” that it was ultimately compelled to settle for: A union may have practical reasons—other than “agreement” with an

employer’s conduct—for not filing an unfair labor practice charge at the first moment it suspects bad faith stalling on the employer’s part. For example, a charge alleging a course of failing to meet at reasonable times may be vulnerable to attack as premature if made before bargaining events have fully unfolded. Moreover, even if the union might otherwise be disposed to file such a charge, it may deem it inadvisable to do so when the employer is still holding out the prospect of an eventual agreement. Thus, the Union’s “failure” in this instance to file a charge until after FTSI had forestalled the possibility of agreement by withdrawing recognition can hardly be taken as betokening the Union’s prior “agreement” with the conduct challenged by its charge.

In what I discern to be the only other distinct defense advanced in FTSI’s brief, the company argues (p. 17) that “[t]he General Counsel’s claim that the company unlawfully delayed the first bargaining meeting in Spokane is untimely, and is barred by Section 10(b) of the Act.” This argument notes that ***405** the Union’s original charge was not filed until February 11, 1998, and that the events underlying the scheduling of the August 21 meeting occurred more than 6 months prior to the charge. (In fact, a charge filed on February 11, 1998 would be timely under Sec. 10(b) as to any conduct occurring on or after August 11, 1997.)

As I see it, however, this argument jousts with a straw man: The complaint nowhere charges FTSI simply with having unlawfully delayed the scheduling of the first meeting, nor is it obvious that such a delay would alone have triggered a complaint charging FTSI with a course of bad-faith bargaining. Rather, the complaint contains (in par. 7 and its subpars.) an essentially accurate historical recapitulation of the Union’s attempts over the course of nearly 7 months to bring FTSI to the bargaining table, and of FTSI’s responses (or failures to respond) to the Union’s successive initiatives in this regard. To be sure, this recapitulation refers to the events preceding and

including the August 21 meeting, just as it refers to similar developments occurring after that meeting. However, the ultimate “claim” made by the General Counsel is to be found in paragraph 9 of the complaint, which states in pertinent part as follows (my emphasis): “By its *overall* acts and conduct, *including* its bargaining conduct alleged above in paragraphs 7(b), (c), (e), and (f) ... Respondent has engaged in bad faith bargaining.” In short, FTSI is charged with an overall course of bad-faith conduct, evidenced not simply by its behavior outside the 10(b) period (unreasonable delays in scheduling the first meeting), but by its continuation of similar conduct within the 10(b) period (perfunctory meeting on August 21, plus further unreasonable delays in advancing negotiations after the conclusion of the initial meeting).

****22** I assume, *arguendo*, that Section 10(b) bars a finding that FTSI committed violations prior to August 11, the limitations cut-off date, and likewise precludes any Board remedy for any discrete violations it may have committed before that date. However, it is well settled that where, as here, the complaint attacks an overall course of bad-faith conduct alleged to have persisted within the 10(b) period, and the proof includes substantial examples occurring within that period, the complaint is not barred by Section 10(b), and the evidence of conduct outside the 10(b) period may properly be received as background, and considered as part of the analysis of the legality of the conduct within the 10(b) period. [\[FN19\]](#) Here, I have taken into account that the meeting of August 21—the first notable event within the 10(b) period— occurred only after a 4-month delay that was itself occasioned by the company's negotiators' prior unavailability. Moreover, I have taken into account the perfunctory character of the August 21 meeting itself, where FTSI representatives merely reviewed the Union's proposal, made no counterproposal of their own, and made only what proved to be an empty promise to the Union to “get back” about the scheduling of future meetings. I have also taken

into account that, despite the Union's further initiatives and protests about delays and lack of progress to date, FTSI's representatives eventually proposed only that the next meeting be held some 4 months after the first meeting, itself an unreasonable delay in all the circumstances. Accordingly, my ultimate conclusion that FTSI unlawfully failed to discharge its statutory obligations is substantially based on its post-August 11 behavior, viewed against the background of its similar failures prior to that date.

2. Withdrawal of recognition

My previous judgments that FTSI violated Section 8(a)(1) and (5) in the months preceding its receipt of the employee petition on which it relied for its November 7 withdrawal of recognition virtually dictates the conclusion that FTSI acted unlawfully by withdrawing recognition. Under well-settled principles, the Union at all times enjoyed the legal presumption that it was supported by a majority of the unit employees; and while FTSI may have been free in the abstract to rely on such an employee petition as effectively rebutting that presumption as of November 7, an indispensable precondition to its exercise of that right is that the petition must have arisen in an atmosphere free of any unfair labor practices which might tend to cause “disaffection” among the unit employees with the incumbent union. [\[FN12\]](#) Here, without deeming it necessary to further explicate the point, I am satisfied that *each* of the unfair labor practices I have found had its own distinct tendency to undermine the Union's proper representative role, and, in turn, to cause unit employees in Spokane to become disaffected with it as a bargaining agent. Necessarily, therefore, these unfair labor practices, taken in combination, would have an even stronger tendency to cause such disaffection. In short, as the General Counsel maintains, FTSI's prior unfair labor practices fatally tainted the showing it relied on as a basis for the withdrawal of recognition. [\[FN13\]](#)

[FN12. *Master Slack Corp.*, 271 NLRB 78, 84 \(1984\).](#)

See, e.g., [Wilshire Foam Products](#), 282 NLRB 1137, 1138 (1987).

[FN13](#). In opening statement at the trial regarding the withdrawal of recognition, counsel for the General Counsel articulated two, independent theories of violation: (1) FTSI's prior unfair labor practices (failure to meet with the Union at reasonable times, plus independent 8(a)(1) violations) "tainted" the employee petition and thus barred FTSI from relying on the petition as a basis for the withdrawal of recognition; (2) FTSI's recognition of the Union gave rise to an "irrebuttable presumption" of the Union's majority status for a "reasonable time," to permit bargaining to succeed, and the lapse of time prior to the withdrawal of recognition did not amount to a reasonable time. However, by letter to me and all parties dated March 18, 1999 (the day after the trial closed), counsel for the General Counsel effectively disclaimed the latter theory, candidly acknowledging that, under [Harley-Davidson](#), 273 NLRB 1531, 1532 (1985), that theory is "not applicable in cases of successorship."

End of Footnote(s). **23 Accordingly, I conclude as a matter of law that FTSI independently violated Section 8(a)(5) when FTSI withdrew recognition from the Union based simply on the manifestations of employee disaffection presumably evidenced by the employee petition.

*406 III. REMEDY

Because FTSI, the nominal Respondent, committed unfair labor practices, it must be ordered to cease and desist from such violations and to take affirmative action to remedy its unlawful acts and to restore, as nearly as possible, the *status quo ante*. In addition to a conventional notice-posting requirement, my affirmative remedial order requires FTSI to restore recognition to the Union (and to so notify it in writing) as the exclusive collective-bargaining representative of employees in the Spokane unit, and, upon the Union's

request, to meet at reasonable times and intervals with the Union, and to bargain collectively in good faith with the Union for the purpose of negotiating a collective-bargaining agreement to cover the employees in the Spokane unit, or for any other lawful purpose having to do with a mandatory bargaining subject. [FN19]

[FN19](#). In his list on brief of proposed remedial provisions, counsel for the General Counsel has not suggested any "make-whole" remedy for the wages lost by Huston as a consequence of his August 22 disciplinary suspension, nor any associated "purgation-of-files" remedy. I assume this is because FTSI has already fulfilled its promise to rescind the disciplinary action and to pay Huston the wages he lost. Accordingly, my remedial order contains no such provisions.

End of Footnote(s). On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [\[FN20\]](#)

ORDER

The Respondent, Fruehauf Trailer Services, Inc., a wholly owned subsidiary of Wabash National Corporation, Spokane, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from or otherwise refusing to recognize International Association of Machinists and Aerospace Workers, District Lodge 751 (the Union), affiliated with International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative for collective-bargaining purposes of employees in the following-described appropriate bargaining unit (the Spokane unit):

All service and maintenance employees at Respondent's Spokane, Washington Facility: EXCLUDING all clerical employees, parts room

employees, guards, and supervisors as defined in the Act.

(b) Failing or refusing to meet and negotiate with the Union as such representative at reasonable times and intervals for purposes of concluding a collective-bargaining agreement for the Spokane unit or for any other lawful purpose having to do with a mandatory subject of bargaining.

(c) Refusing an employee's request for union representation during any investigatory interview which the employee reasonably believes may result in discipline.

****24** (d) Telling employees that the Spokane facility is a nonunion shop.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act.

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

(a) Within 14 days from the date of this Order, restore recognition to the Union as the exclusive representative of employees in the Spokane unit for all collective-bargaining purposes, and so notify the Union in writing.

(b) Within 14 days from the date of this Order, appoint representatives who will be promptly and regularly available at reasonable times and intervals for purposes of collective bargaining with the Union for the Spokane unit.

(c) Upon the Union's request, meet and bargain in good faith with the Union through those representatives, and do so promptly and regularly, at reasonable times and intervals, for purposes of concluding a col-

lective-bargaining agreement for the Spokane unit, or for any other lawful purpose having to do with a mandatory subject of bargaining.

(d) Within 14 days after service by the Region, post at its Spokane, Washington sales and service facility copies of the attached notice marked "Appendix." [\[FN21\]](#) Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency 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 August 11, 1997.

(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 has taken to comply.

[FN1.](#) The due date for receipt of briefs was extended to May 5, 1999, on the request of counsel for the Respondent, based on delay in receiving the transcript.

[FN2.](#) The caption of this proceeding and the entity identified as the respondent party appear as they are set forth in the first amended complaint and notice of hearing (the complaint), issued by the Regional Director on March 12, 1999, which superseded an original complaint issued on September 29, 1998.

[FN3.](#) The original charge was filed on February 11,

1998. The first and second amended charges were filed, respectively, on February 19, and April 30, 1998.

[FN4](#). The timing of FTSI's origins, and its precise function within Wabash's operations, are largely obscure on this record. Indeed, the only thing the record shows with clarity is that Wabash, acting through its manager of labor relations, Keith Lane, and its Labor Counsel, Dennis Homerin, bears ultimate responsibility for the course of conduct alleged to have violated Sec. 8(a)(5).

[FN5](#). The amended pleadings establish, and I find, that the Respondent, a Delaware corporation with headquarters in Lafayette, Indiana, owns and operates, inter alia, the Spokane trailer sales and service facility, and, during the 12 months preceding the issuance of the complaint, (a) sold or provided more than \$50,000 worth of goods or services outside Indiana, and (b) purchased and caused to be transferred and delivered to its Washington facilities more than \$50,000 worth of goods and materials directly from sources outside Washington, or from suppliers with Washington which, in turn, obtained them from sources outside Washington.

[FN6](#). All findings below concerning the background, the recognition of the Union at the Spokane branch, and the bargaining history preceding the admitted withdrawal of recognition on November 7, 1997, are based on undisputed testimony or exhibits of record. The only contested facts are those associated with transactions at the Spokane branch in late August 1997, surrounding the alleged violations of Sec. 8(a)(1).

[FN7](#). All dates below are in 1997 unless I specify otherwise.

[FN8](#). The complaint alleges, and FTSI's answer admits, that the recognized unit is an appropriate unit

within the contemplation of Sec. 9(b) of the Act, and is described as follows:

All service and maintenance employees at Respondent's Spokane, Washington Facility: EXCLUDING all clerical employees, parts room employees, guards, and supervisors as defined in the Act.

[FN9](#). Lane's July 9 letter was not only mistakenly addressed to Wilson's attention, but it did not acknowledge either of McClure's prior letters, and did not present a "list" of available meeting dates, only one date, August 21.

[FN10](#). McClure, whose undisputed testimony is the basis for these findings, specifically recalled only one item in his written proposal that received comment from a company representative. Thus, McClure recalled that when the parties were reviewing the Union's proposal for a dues-checkoff procedure, Homerin noted that the proposal contained a confusing double-negative when it stated, "Such written assignments *shall not be irrevocable* for a period of more than one (1) year."

[FN11](#). The "second request" is not on record.

[FN12](#). *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975). See e.g., *Consolidated Edison Co. of New York*, 323 NLRB 910 (1997).

[FN13](#). Huston was not invited to testify about any antecedents to Bogle's attack, and the matter is irrelevant to the statutory issues in any case. However, for the merely curious, I note that Stelling testified that, shortly before the incident, Bogle had complained to Stelling that Huston had been calling him a "scab," and that Stelling should intervene before Bogle took action on his own.

[FN14](#). Stelling testified that the first and only time that Huston ever asked for union representation was

on August 22, at the time that the disciplinary suspension was communicated to him. (If true, Huston would have no rights to union representation at such a session. [Baton Rouge Water Works](#), 246 NLRB 995, 997 (1979). Stelling admits that on this occasion he denied the request, saying that there was “no union contract” in effect at the shop. (He denies saying at any time that “this is a nonunion shop.”) Stelling’s version of these events was rather summary in character, and the precise circumstances under which he admittedly made the latter remarks remain uncertain. Moreover, his recollections—especially that Huston did not invoke *Weingarten* rights to union representation until a point when those rights no longer existed—struck me in the end as shaped and tailored to suit the company’s current legal position. In addition, Stelling’s account does not fit well with the written explanation for the denial of union representation given by Olson when, on September 26, Olson responded to Huston’s in-house complaint, *infra*. Nor does it fit with the ultimate, October 13 response of FTSI’s Human Resources Director, Quick, *infra*. (Neither of the latter responses claims, as did Stelling, that Huston’s only request for union representation occurred after the “investigative” stage had passed.) Accordingly, I adopt Huston’s more detailed and plausible version.

[FN15](#). By way of analogy, see [Kessel Food Markets](#), 287 NLRB 426, 428-429 (1987), holding that statements by a successor employer during the hiring process that the new facility will be “nonunion” are “coercive and violate Section 8(a)(1).” See also, e.g., [D&K Frozen Foods](#), 293 NLRB 859, 873-874 (1989).

[FN16](#). [J.H. Rutter-Rex Mfg. Co.](#), 86 NLRB 470, 506 (1949), cited in [Storer Communications](#), 294 NLRB 1056, 1095 (1989).

[FN17](#). [Little Rock Downtowner, Inc.](#) 145 NLRB 1286, 1305, and authorities cited (1964), *enfd.* 341 F.2d 1020 (8th Cir. 1965).

[FN18](#). The General Counsel has appropriately cited in this regard the following additional cases that have consistently hewed to the same rationale: [J. H. Rutter-Rex](#), *supra*; [Little Rock Downtowner](#), *supra*; [Hudson Chemical Co.](#), 258 NLRB 152, 157 (1981); [Bryant & Stratton Business Institute](#), 321 NLRB 1007 (1996); [Calex Corp.](#), 322 NLRB 977 (1997); and [People Care, Inc.](#), 327 NLRB 814 (1999). See, e.g., [Nursing Center at Vineland](#), 318 NLRB 901, 905 (1995).

[FN19](#). [Bryan Mfg. Co. v. NLRB](#), 362 U.S. 411, 417 (1960). Moreover, unlike the conduct which the *Bryan* Court found was beyond the reach of prosecution under Sec. 10(b), it cannot be said here either that the complaint relies on evidence outside the limitations period “to cloak with illegality that which was otherwise lawful” (*ibid*) or that the alleged violation is “inescapably grounded in events predating the limitations period.” [Id.](#) at 422.

[FN20](#). If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[FN21](#). 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.”

335 NLRB No. 35, 335 NLRB 393, 173 L.R.R.M. (BNA) 1440, 2001-02 NLRB Dec. P 15981, 2001 WL 1018214 (N.L.R.B.)

END OF DOCUMENT

