Lee Lumber and Building Material Corp. ***and*** **Carpenter Local No. 1027, Mill-Cabinet Industrial Division, a/w the United Brotherhood of Carpenters and Joiners of America, Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO.** Cases 13–CA–29377, 13–CA–29441, 13–CA–29578, and 13–CA–29619

September 6, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On February 27, 1992, the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The Board found that the Respondent violated Section 8(a)(1) of the Act by unlawfully providing assistance to employees filing a decertification petition. The Board further found that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain in good faith with the Union as the representative of the Respondent's unit employees, by failing to provide the Union with requested information, by withdrawing recognition from the Union, and by unilaterally changing terms and conditions of employment of unit employees. As part of the remedy imposed, the Board affirmatively ordered the Respondent to recognize and bargain with the Union.

On March 26, 1992, the Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Order.[2] On May 11, 1992, the Board moved to dismiss the Respondent's petition without prejudice, so that the Board might reconsider its Order in light of the D.C. Circuit's subsequent decisions in *Williams Enterprises v. NLRB*, 956 F.2d 1226 (1992), and *Sullivan Industries v. NLRB*, 957 F.2d 890 (1992). On November 27, 1992, the court granted the Board's motion.

On March 24, 1993,[3] the Board informed the parties that it was reconsidering its earlier decision and invited them to file statements of position on the issues raised by the reconsideration. The Union and the Respondent filed statements of position.

On February 16, 1995, the Board announced that it would hear oral argument on March 13, 1995, in this case and in *Caterair International, Inc.*, 322 NLRB 64 (1996). The issues noticed for argument were:

> 1. Under what circumstances, if any, may an employer who unlawfully refuses to recognize and bargain with an incumbent union, but who later recognizes and/or bargains with the union, thereafter lawfully withdraw recognition? . . .
>
> 2. Under what circumstances is it appropriate for the Board to issue an affirmative bargaining order, with its attendant decertification bar for a "reasonable period," rather than only a cease-and-desist order, to remedy an unlawful withdrawal of recognition from an incumbent union?
>
> 3. Assuming arguendo that it is appropriate for the Board to enter an affirmative bargaining order, what are the relevant considerations for determining the "reasonable period"?

The notice also asked the parties to address what the appropriate balance should be between promoting bargaining stability and insuring employee free choice in selecting their bargaining representative. Briefs were filed by the parties in both cases and by amici curiae American Federation of Labor and Congress of Industrial Organizations, and Council on Labor Law Equality, all of whom participated in the oral argument.

The Board has carefully reviewed its previous Decision and Order in light of the entire record, the D.C. Circuit's decisions, the briefs and statements of position filed by the parties and amici, and the record made at oral argument. For the reasons set forth below, we have decided to affirm the Board's previous Decision and Order as modified below.[4]

Facts

The relevant facts are set forth in detail in the judge's decision. In brief, they are as follows. The Union was certified as the bargaining representative of the Respondent's mill shop employees in October 1988. The parties negotiated a collective-bargaining agreement effective from May 26, 1989, through May 25, 1990. On February 1,[5] the Union informed the Respondent that it intended to negotiate for a new agreement. On March 20, before bargaining could commence, the unit employees filed a decertification petition with the Board. The Board agreed with the judge that the Respondent unlawfully assisted the employees' decertification activities by allowing them to take time off from work with pay to file the petition, by reim-

[1] 306 NLRB 408.

[2] No. 92–1123.

[3] In its order granting the Board's motion, the court directed the clerk of the court not to issue the mandate until 7 days after disposition of any timely motion for rehearing. On March 8, 1993, the Board moved for issuance of the mandate, noting that the Respondent had not moved for rehearing by January 11, 1993, the expiration date of the period provided for filing such motions. By letter dated March 10, 1993, the clerk of the court transmitted to the Board a certified copy of the court's November 27, 1992 order in lieu of a formal mandate.

[4] We shall modify the Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

The Respondent argues that the Board should not have found any of its conduct to have been unlawful, and the Charging Party attempts to resurrect complaint allegations that were dismissed previously. In this Supplemental Decision and Order, we address only the issues raised by the court's decisions in *Williams Enterprises* and *Sullivan Industries*. In all other respects, we affirm the Board's earlier decision for the reasons discussed therein.

[5] Henceforth, unless otherwise noted, all dates refer to 1990.

bursing one employee for his parking expenses, and by providing another employee with a ride to the Board's office.[6]

On April 11, relying on the pending decertification petition, the Respondent refused to bargain with the Union.[7] The Board adopted the judge's finding that the refusal to bargain violated Section 8(a)(5). On May 8, after the Union filed an unfair labor practice charge, the Respondent reversed course and agreed to bargain. The first bargaining session was held on May 23; four others were held thereafter, the last occurring on June 25.[8] Despite the Respondent's unlawful refusal to provide certain information requested by the Union, the negotiations proved productive, and the Respondent's president testified that the parties almost reached agreement on a new contract.

On July 2, however, the Respondent received a second petition, which was signed by a majority of the unit employees. This petition stated unequivocally that the employees would not be represented by any union, effective July 3, and that "we hereby decertify [the Union]." On the basis of this second petition, the Respondent refused to meet for a bargaining session that had been scheduled for July 3 and, on July 12, withdrew recognition from the Union on the same basis. The Respondent later made several unilateral changes in the unit employees' terms and conditions of employment.

The judge found that the July petition constituted objective evidence that the Union no longer enjoyed the support of a majority of the unit employees. He also found, however, that the loss of support occurred in the context of serious unremedied unfair labor practices of such a character as to affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. He therefore found that the Respondent was not privileged to rely on the petition as the basis for withdrawing recognition from the Union and that the withdrawal of recognition and the subsequent unilateral changes violated Section 8(a)(5). As part of the remedy for the withdrawal of recognition, the judge (without discussion or analysis) imposed an affirmative bargaining order. The Board adopted, without further elaboration, the judge's findings that the July petition was tainted by the Respondent's earlier unfair labor practices and that an affirmative bargaining order was an appropriate remedy.[9]

As noted above, the Respondent petitioned for review in the D.C. Circuit, which had issued its decisions in *Williams Enterprises* and *Sullivan Industries* only days after the Board issued its decision in this case. In both *Williams* and *Sullivan*, the court found that the Board had not adequately explained its conclusion that the employers' unfair labor practices tainted petitions subsequently signed by employees indicating that the unions had lost their majority status, and that the employers could not lawfully rely on the petitions in refusing to recognize the unions. The court also found in each case that the Board had failed to explain why an affirmative bargaining order, rather than simply an order to cease and desist from refusing to bargain, was an appropriate remedy. The court remanded both cases to the Board to supply the missing explanations. Because the decisions of the Board and the judge in this case also failed to explain in detail why the Respondent's unfair labor practices tainted the July petition or why an affirmative bargaining order was appropriate, the Board moved to withdraw the case from the court so that it might furnish those explanations.[10] The court granted the Board's motion.

The Refusal to Bargain and Withdrawal of Recognition

Because we find that the July petition was tainted by the Respondent's initial refusal to bargain, we reaffirm the Board's earlier finding that the Respondent violated Section 8(a)(5) by refusing to bargain on and after July 2, by withdrawing recognition from the Union on July 12 on the basis of the tainted petition, and later by making unilateral changes in the employees' terms and conditions of employment. We do so, however, pursuant to the following analysis.

A union is irrebuttably presumed to continue to enjoy the support of a majority of the unit employees for 1 year after its certification (absent unusual circumstances)[11] and, after the certification year has elapsed, while a collective-bargaining agreement is in effect.[12] After the contract expires, the union still is presumed to enjoy majority status, but the presumption is rebuttable.[13] In the latter situation, an employer may rebut the presumption and withdraw recognition if it

[6] The judge also found that certain statements by one of the Respondent's officers constituted unlawful encouragement of the decertification petition, but the Board reversed this finding.

[7] The Respondent did not know how many employees signed the petition. Also, as the judge found, the wording of the petition indicated that it was for the purpose of holding an election, and thus was not an unambiguous rejection of the Union by the employees.

[8] The judge incorrectly stated that the last meeting took place on June 23. The error is inconsequential.

[9] In agreeing with the judge that the petition was tainted, the Board relied only on the Respondent's earlier refusal to bargain for several weeks and on its unlawful assistance to the filing of the first petition. The Board adopted the judge's finding, to which no exceptions were filed, that the Respondent's refusals to provide information did not contribute to the Union's loss of majority status.

[10] In contrast with this case, both *Williams* and *Sullivan* involved successor employers. That distinction does not affect our analysis.

[11] *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).

[12] *Belcon, Inc.*, 257 NLRB 1341, 1346–1347 (1981).

[13] *Guerdon Industries*, 218 NLRB 658, 659 (1975).

can show either that the union in fact no longer has the support of a majority of the unit employees, or that the employer has a reasonably based doubt, based on objective considerations, as to the union's continued majority status.[14] Any such doubt, however, must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.[15]

Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support.[16] In cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, however, the causal relationship between unlawful act and subsequent loss of majority support may be presumed.

The Board has, in fact, indicated in a number of decisions that an unlawful refusal to recognize and bargain with an incumbent union will be presumed to taint any subsequent loss of support for the union, without any particularized demonstration of a causal relationship.[17] The D.C. Circuit in *Sullivan Industries*, however, found for various reasons that in none of those cases had the Board unequivocally announced such a position (which the court thought of as a per se rule) or coherently supported it.[18] Although we are not adopting a per se rule, we do think it appropriate to apply such a presumption, which will be rebuttable only in the limited circumstances discussed below.

Long ago, in *Karp Metal Products*,[19] the Board explained that

> [e]mployees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union chosen by his employees is normally decisive of its ability to secure and retain its members.[5] Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether. . . .

[5] This fact is readily verifiable by common experience and has repeatedly been recognized by the Supreme Court. *International Association of Machinists v. NLRB*, 311 U.S. 72, 82; *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271; cf. *Texas & N.O.R. Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 568–569.

Our administrative experience in the intervening five decades has confirmed the validity of presuming that an employer's unlawful refusal to recognize and bargain with an incumbent union is likely to have a significant, continuing detrimental impact on employees, causing them to become disaffected from the union.[20] This unlawful employer action is not a mere technical infraction. It is a most serious violation that "strikes at the heart of the Union's legitimate role as representative of the employees."[21] If a union is unlawfully deprived of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanted with that union, because it apparently can do nothing for them.[22]

This latter consideration, we emphasize, does not depend on whether the employees actually know that the employer is unlawfully refusing to deal with the union. Lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Such delays consequently tend to undermine employees' confidence in the union by suggesting that any such benefits will be a long time coming, if indeed they ever arrive. Thus, delays in bargaining caused by an employer's unlawful refusal to recognize and bargain with an incumbent union foreseeably result in loss of employee support for the union, whether or not the employees know what caused the delay.[23]

[14] Id. The General Counsel and amicus AFL–CIO suggest that the Board should consider overruling the decisions that hold that an employer may lawfully withdraw recognition on the basis of a good-faith doubt that the union continues to represent a majority of unit employees. See *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny. As the parties and amici were not notified that this issue would be a subject for consideration by the Board, we decline to address it at this time.

[15] *Guerdon Industries*, 218 NLRB at 659, 661.

[16] *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995). In this regard, the Board considers several evidentiary factors: (1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

[17] See, e.g., *Manna Pro Partners*, 304 NLRB 782, 788 (1991); *Bay Area Mack*, 293 NLRB 125, 131 (1989); *Western-Davis Co.*, 236 NLRB 1224, 1227 (1978), enf. denied on other grounds 608 F.2d 397 (10th Cir. 1979).

[18] 957 F.2d at 900–902.

[19] 51 NLRB 621, 624 (1943).

[20] See also *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944).

[21] *Midway Golden Dawn*, 293 NLRB 152, 152 fn. 2 (1989).

[22] See *Caterair International*, 322 NLRB 64, 67 (1996).

[23] For this reason, we shall not allow evidence to be introduced concerning the employees' actual knowledge of employers' refusals to bargain. Nor shall we consider evidence of the actual impact of such refusals to bargain on employees' morale, organizational activities, and union membership. The Board's usual approach where a question arises concerning the effects of employers' unfair labor practices on employees is to apply an objective, rather than a subjective, test (i.e., to assess the *tendency* of the unlawful action to affect employees, rather than its *actual* effect on them). See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969) (approving Board's use of bargaining order when an employer's unfair labor practices

Continued

For the foregoing reasons, we reaffirm the Board's practice of presuming that, when an employer unlawfully fails or refuses to recognize and bargain with an incumbent union, any employee disaffection from the union that arises during the course of that failure or refusal results from the earlier unlawful conduct. In the absence of unusual circumstances,[24] we find that this presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Only such a showing of bargaining for a reasonable time will rebut the presumption.

In opting for a "reasonable time" standard rather than a more specific period (for example, 6 months) that would apply regardless of the circumstances of the particular case, we are guided by longstanding Board and court precedent concerning situations in which an employer is required to bargain for a "reasonable time" without questioning an incumbent union's majority status.[25] Thus, when a union is first certified as the representative of an employer's employees, the employer may not challenge the union's majority status for a "reasonable period," ordinarily a year.[26] Similarly, an employer that has voluntarily recognized a union may not question the union's representative status until the parties have had a "reasonable time" to bargain.[27] Nearer to the case at hand, when an employer has violated its duty to bargain, it will be ordered to bargain in good faith and must do so for a "reasonable period" before it may withdraw recognition on a showing that the union has lost majority support.[28] Likewise, when an employer has violated its duty to bargain, it will be ordered to do so, even if the union has lost majority support before the Board's order issues.[29] And when an employer has agreed to bargain as part of a settlement of a refusal-to-bargain charge, it may not challenge the union's majority status until a "reasonable time" for bargaining has elapsed.[30] The common thread running through these decisions is that when a bargaining relationship has been initially established, or has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed before an employer may question the union's representative status.[31]

We think that the reasoning in those decisions applies in these circumstances as well. Indeed, if anything, it applies with greater force. Here, the Respondent violated Section 8(a)(5) by refusing to bargain with the Union for several weeks. When it finally agreed to bargain, it did so before the violation had been found. Thus, during the bargaining that ensued, the employees were not aware that the Respondent's conduct was unlawful. There is no indication that any notice was posted stating that the Respondent had violated the Act and that it would cease and desist from such violations and bargain in good faith with the Union.[32] There is no suggestion, on this record, that the Respondent even posted a notice, of the sort posted pursuant to Board settlements of refusal-to-bargain charges, that the Respondent had agreed to bargain.[33] All the Respondent did to remedy its unlawful action, in other words, was to comply, belatedly, with its duty to bargain. In cases such as this, where an employer has violated its duty to bargain but the employees have not yet been informed that the employer is obligated to bargain with their representative and has agreed to do so, we think it especially appropriate that the employer bargain for a reasonable time before challenging the union's representative status. In such circumstances, where the employees are not even aware that the law is on the side of the union that represents them, it is particularly important for the newly restored bargaining relationship to be given a chance to succeed before the employer may question the employees' support for the union.[34]

tend to undermine majority strength and impair the election process); *Hopkins Nursing Care Center*, 309 NLRB 958 (1992) (test for conduct warranting setting aside election results is objective one—whether party's conduct has the tendency to interfere with employees' freedom of choice; employees' subjective reaction is irrelevant).

[24] These would be comparable to the "unusual circumstances" that would permit a challenge to a newly certified union during the certification year. The Board and courts have construed those circumstances narrowly. See *Ray Brooks v. NLRB*, 348 U.S. at 98–99.

[25] While a "reasonable time" standard does not prescribe any particular amount of time, it contemplates sufficient time for actual bargaining. We therefore respectfully disagree with the court of appeals' supposition in *Sullivan Industries* (957 F.2d at 902 fn. 4) that a mere grant of recognition for a day or two would suffice.

[26] *Brooks*, 348 U.S. at 98.

[27] *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966).

[28] *Caterair International*, supra at 67–68.

[29] *Franks Bros.*, 321 U.S. at 705–706.

[30] *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952); *Stant Lithograph, Inc.*, 131 NLRB 7, 8 (1961), enfd. 297 F.2d 782 (D.C. Cir. 1961).

[31] *Franks Bros.*, 321 U.S. at 705; *Brooks*, 348 U.S. at 100; *Keller Plastics*, 157 NLRB at 587; *Poole Foundry*, 95 NLRB at 36.

[32] See *Olson Bodies, Inc.*, 206 NLRB 779 (1973).

[33] Compare *Poole Foundry*, 95 NLRB at 35.

[34] We therefore respectfully disagree with the D.C. Circuit's suggestion in *Sullivan* that a brief period of recognition, during which no bargaining takes place, will dissipate the deleterious effects of an earlier unlawful refusal to bargain with an incumbent union to the extent that the employer may rely on subsequently arising evidence of employee disaffection from the union as a basis for withdrawing recognition. In this regard, the Supreme Court has stated:

> It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged. *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 271; *NLRB v. Falk Corp.*, 308 U.S. 453, 461. It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining. See *NLRB v. Pacific Greyhound*

In our view, the presumption we specifically affirm today best serves the Act's "overriding policy" of achieving "industrial peace." The Supreme Court has repeatedly approved the Board's use of related presumptions about a union's continued majority support to serve this statutory policy.[35] Furthermore, like the presumption of continued majority support, the presumption that an unlawful refusal to recognize and bargain taints any evidence of subsequently arising employee dissatisfaction with the union promotes stability in collective-bargaining relationships without unduly impairing employees' free choice.[36] In fact, it promotes free choice by giving effect to the uncoerced choice of the majority of employees who selected the union as their bargaining representative before the employer unlawfully refused to recognize and bargain with the union.[37] In this regard, it is worth bearing in mind that the right of free choice, including both the right to have a bargaining representative and the right to decertify, is a statutory right of employees, not of employers. Hence, as the Supreme Court recently observed, "[t]here is nothing unreasonable in giving a short leash to [the] employer as vindicator of its employees' organizational freedom."[38]

The two presumptions—that majority support continues and that a refusal to recognize and bargain taints a subsequent expression of employee disaffection—foster stability in at least two ways. They enable a union to concentrate on negotiating an acceptable agreement without worrying that it will lose majority support unless it produces immediate results; they also remove from the employer the temptation to avoid its bargaining duties in the hope that delay will undermine employees' support for the union.[39]

In our experience, the approach we announce today is rational and consistent with the Act[40] and will advance the Act's goal of promoting industrial peace without impinging excessively on the right of employees to decertify their bargaining representatives.

We must, therefore, decide whether the Respondent bargained for a reasonable time before withdrawing recognition from the Union. We find that it did not.

There are no rules concerning what constitutes a "reasonable time"; each case must rest on its own particular facts. However, a "reasonable time" does not depend on either the passage of time or on the number of meetings between the parties, but instead on what transpired and what was accomplished during the meetings. The Board considers the degree of progress made in negotiations, whether or not the parties were at impasse, and whether the parties were negotiating for an initial contract.[41]

As we have found, after the Respondent agreed on May 8 to bargain with the Union, the parties held five negotiating sessions. The first session was held on May 23, the last on June 25. The parties had agreed to meet again on July 3, but did not because the Respondent refused to bargain on the basis of the second employee petition. As the judge observed, the Respondent's president, Rick Baumgarten, testified that, as of the end of the June 25 session, the parties agreed that they had made great progress and that they were "probably not more than one or two sessions away from reaching complete agreement." There is no suggestion that the parties were at or near impasse.

We find that, under all the circumstances, the Respondent had not bargained for a reasonable time before it withdrew recognition in July. Less than 2 months elapsed between May 8, when the Respondent agreed to bargain, and July 2, when it refused to meet with the Union; and actual bargaining took place only for a little more than a month, between May 23 and June 25. During that time, the parties conducted fruitful negotiations that nearly produced a complete agreement, and they had agreed to meet again. Under similar circumstances, the Board has found that employers did not bargain for a reasonable period of time. Thus, in *I. M. Jaffe & Sons*,[42] another case involving nego-

---

Lines, 303 U.S. 272, 275. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates.

International Assn. of Machinists v. NLRB, 311 U.S. 72, 82 (1940).

[35] See *Auciello Iron Works, Inc. v. NLRB*, 116 S.Ct. 1754, 1758 (1996); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794 (1990); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 38 (1987); *Ray Brooks v. NLRB*, 348 U.S. at 103.

[36] *Curtin Matheson*, 494 U.S. at 794 (citing *Fall River*).

[37] See *Caterair International*, supra, 322 NLRB at 66, noting that an affirmative bargaining order is the appropriate remedy for an employer's unlawful withdrawal of recognition from an incumbent union in part because it protects the rights of the employee majority who have previously chosen to bargain collectively through that union. As we discussed in *Caterair*, the Supreme Court long ago rejected the argument that bargaining orders to restore the status quo ante unduly interfere with employee choice. See *Franks Bros.*, 321 U.S. at 705.

[38] *Auciello Iron Works*, 116 S.Ct. at 1760.

[39] *Curtin Matheson*, 494 U.S. at 794 (citing *Fall River* and *Brooks*). See also *Poole Foundry*, 95 NLRB at 36 (where the Board has found that an employer has violated its duty to bargain and orders it to bargain, or where the employer has settled a refusal-to-bargain charge by promising to bargain, the parties must be given a reasonable time for bargaining in which to conclude a contract; the employer may not question the union's majority standing during that period).

[40] *Curtin Matheson*, 494 U.S. at 787 (citing *Fall River*).

[41] See *King Soopers, Inc.*, 295 NLRB 35, 37 (1989); *Shangri-La Health Care Center*, 288 NLRB 334, 336, 338 (1988); *N. J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71 (1965). See also *Caterair International*, supra at 67–68, reaffirming the Board's longstanding position that the appropriate remedy for an unlawful refusal to recognize or bargain with an incumbent union is an affirmative order to bargain for a "reasonable period," as assessed with reference to the same factors.

[42] 176 NLRB 537 (1969).

tiations for a successor agreement, the parties held four bargaining sessions over a period of more than 2 months after they entered into a settlement agreement disposing of a refusal-to-bargain charge. At the time the employer refused to bargain the second time, the parties were not at impasse, and had scheduled another bargaining session. The Board found that a reasonable period for bargaining had not elapsed before the employer's second refusal to bargain. In *Shangri-La Health Care Center*, the parties met five times in initial bargaining over a period of more than 2 months after the union withdrew a refusal to bargain charge in return for the employer's promise to bargain. They reached agreement on many issues, did not reach impasse, and agreed to meet again. The Board found that a reasonable time for bargaining had not elapsed when the employer withdrew recognition.[43] And in *N. J. MacDonald & Sons*, the parties held nine bargaining sessions over a period of more than 4 months, made considerable progress toward an initial contract without reaching impasse, and scheduled another meeting; the Board found that the employer had not negotiated for a reasonable time before it refused to bargain on the basis of an employee petition.[44] In light of these precedents, we find that a reasonable time for bargaining had not elapsed when the Respondent refused to bargain and withdrew recognition from the Union in July.[45] We therefore find that the Respondent has not rebutted the presumption that its earlier refusal to bargain tainted the July employee petition. Consequently, we reaffirm our previous finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain and withdrawing recognition on the basis of the tainted petition and later by unilaterally changing the unit employees' terms and conditions of employment.

[43] 288 NLRB at 334 fn. 2, 335, 336–338. Indeed, the Board adopted without comment the administrative law judge's finding that "[a] more clear case to support the view that the parties had not yet bargained for a reasonable period of time when the employer pulled the plug on negotiations can hardly be imagined." Id. at 337.

When parties are negotiating for an initial contract, the "reasonable time" for bargaining is longer because of difficulties often encountered in hammering out fundamental procedures, rights, wage scales, and benefit plans in the absence of previously established practices. Id. at 338.

[44] 155 NLRB at 69–72.

[45] To the extent the Board's decisions in *Brennan's Cadillac*, 231 NLRB 225 (1977), and *Tajon, Inc.*, 269 NLRB 327 (1984), indicate that progress toward reaching agreement and absence of impasse are factors indicating that a reasonable time for bargaining has elapsed, they are overruled. Compare *Daily Press, Inc.*, 112 NLRB 1434, 1441–1442 (1955), overruled on other grounds *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), in which the Board, in finding that a reasonable time for bargaining had elapsed, relied in part on the fact that the parties had bargained to impasse. Cf. *I. M. Jaffe & Sons*, 176 NLRB at 537 fn. 1 (presence or absence of impasse not given controlling weight in determining whether reasonable time for bargaining has elapsed; all relevant facts surrounding the postsettlement bargaining are considered).

THE REMEDY

We also reaffirm our finding that an affirmative bargaining order is the appropriate remedy for the Respondent's unlawful refusal to bargain, withdrawal of recognition, and subsequent unilateral changes. The basis for this finding is fully discussed in the Board's decision on remand in *Williams Enterprises*, 312 NLRB 937, 940 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995), and *Caterair International*, 322 NLRB 64 (1996).

ORDER

The National Labor Relations Board reaffirms its original Order, reported at 306 NLRB 408 (1992), as modified below, and orders that the Respondent, Lee Lumber and Building Material Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in that Order as modified.

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

"(d) Within 14 days after service by the Region, post at its facilities in Chicago, Illinois, copies of the attached notice marked 'Appendix.'[17] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 29, 1990."

2. Substitute the following for paragraph 2(e).

"(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."