Overnite Transportation Company *and* Thomas D. Goff, Petitioner and Teamsters Local 120, affiliated with International Brotherhood of Teamsters, AFL–CIO

Overnite Transportation Company *and* Daniel Lemanski, Petitioner and Teamsters Local 406, affiliated with International Brotherhood of Teamsters, AFL–CIO. Cases 18–RD–2302, 7–RD–3213, 7–RD–3218, 7–RD–3226, and 7–RD–3234

May 15, 2001

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered the Employer's requests for review[1] of the administrative dismissals of the above-entitled decertification petitions.[2] The Employer contends that the petitions should be reinstated and either processed or held in abeyance. We grant the Employer's requests for review and, for the reasons set forth below, we affirm the Regional Directors' administrative dismissals of the petitions.

I. BACKGROUND

The Employer operates approximately 175 service centers throughout the country. The International Brotherhood of Teamsters and its various affiliated local unions (collectively the Union) have been conducting a nationwide organizing campaign at many of the Employer's facilities. The Local Unions here have been separately certified as the collective-bargaining representatives at the Grand Rapids, Michigan and Blaine, Minnesota facilities involved in the instant cases.[3] On October 5, 1999, a unit employee filed a decertification petition (Case 18–RD–2302) seeking an election among the employees at the Employer's Blaine facility. On October 20, 1999, a unit employee filed a decertification petition (Case 7–RD–3213) seeking an election among the employees at the Employer's Grand Rapids facility.[4] The instant decertification petitions were dismissed by the Regional Directors based on several pending unfair labor practice proceedings involving alleged violations of Section 8(a)(1), (3), and (5) of the Act.

The Employer contends that the petitions should be processed because all of the unfair labor practices cited by the Regional Directors occurred in 1996 and 1997, and thus were remote in time from the filing of the instant petitions. The Employer further contends that it has remedied all of these outstanding unfair labor practices. Thus, the Employer argues, a free and fair election may be held at this time. We disagree.

As more fully set forth below, the Board recently found that the Employer has engaged in a nationwide campaign of extensive and egregious unfair labor practices, including "hallmark" violations of the Act. See *Overnite Transportation Co.*, 329 NLRB 990 (1999). The Board's decision has been enforced by the Fourth Circuit Court of Appeals. *Overnite Transportation Co. v. NLRB*, 240 F.3d 325 (4th Cir. 2001), petition for rehearing and rehearing en banc denied (April 17, 2001). As explained below, we find that the Employer's unfair labor practices caused employee disaffection on a widespread basis and that the coercive effects of the Employer's outrageous conduct had not dissipated at the time the above decertification petitions were filed. Applying the factors set forth in *Master Slack Corp*., 271 NLRB 78 (1984), we conclude that a causal connection exists between the Employer's unfair labor practices and the employees' subsequent disaffection with the Unions such that the decertification petitions are tainted and must be dismissed.[5]

II. APPLICABLE LEGAL PRINCIPLES

The Board generally will dismiss a representation petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint alleging conduct that, if proven, (1) would interfere with employee free choice in an election, and (2) is inherently inconsistent with the

[1] In accordance with Sec. 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed timely requests for review.

[2] We have consolidated the above-entitled matters for purposes of this decision only.

[3] Teamsters Local 120 filed a representation petition on December 20, 1994, seeking to represent the Employer's employees at Blaine. An election was held on January 31, 1995, and Local 120 was certified as the exclusive collective-bargaining representative for those employees on February 7, 1995. Teamsters Local 406 filed a representation petition on January 17, 1995, seeking to represent the employees at the Grand Rapids facility. An election was held on March 7, 1995, and Local 406 was certified as the exclusive collective-bargaining representative for those employees on June 7, 1995.

[4] The employee filed subsequent decertification petitions on November 24, 1999 (Case 7–RD–3218); January 20, 2000 (Case 7–RD–3226); and February 25, 2000 (Case 7–RD–3234).

[5] In dismissing the Grand Rapids decertification petitions, the Regional Director relied in part on a complaint he issued on December 14, 1999, in Case 7–CA–42372, alleging that the Employer violated Sec. 8(a)(5) and (1) by unilaterally changing its practice of dispatching drivers at the Grand Rapids facility. We have been administratively advised that this case was informally settled and closed in compliance by the Regional Office on July 27, 2000. We find it unnecessary to rely on this case in reaching our finding that the Grand Rapids decertification petitions were tainted.

petition itself.[6] The Board considers conduct that taints the showing of interest, precludes a question concerning representation, or taints an incumbent union's subsequent loss of majority support to be inconsistent with the petition.[7]

Not every unfair labor practice will taint a union's subsequent loss of majority support or taint a decertification petition. There must be a causal connection. In cases involving a complaint alleging an 8(a)(5) refusal to recognize and bargain with an incumbent union, the causal relationship between the allegedly unlawful act or acts and any subsequent loss of majority support or employee disaffection may be presumed. See *Lee Lumber & Building Material Corp*., 322 NLRB 175, 177 (1996), affd. in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997); *Sullivan Industries*, 322 NLRB 925, 926 (1997). Where a case involves unfair labor practices other than a general refusal to recognize and bargain, a causal connection must be shown between the unfair labor practices and the subsequent employee disaffection with the union in order to find that a decertification petition is tainted, thereby requiring that it be dismissed. See *Lee Lumber*, 322 NLRB at 177; *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995).

To determine whether a causal relationship exists between unfair labor practices and the subsequent expression of employee disaffection with an incumbent union, the Board in *Master Slack Corp*., supra, identified several relevant factors. These factors include: (1) the length of time between the unfair labor practices and the withdrawal of recognition or filing of the petition; (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. *Master Slack Corp.*, 271 NLRB at 84. See *Lee Lumber*, 322 NLRB at 177 fn. 16; *Williams Enterprises*, 312 NLRB at 939.

[6] See NLRB Casehandling Manual (Part Two) Representation, Sec. 11730.1. Dismissal on this basis generally occurs when the complaint alleges an outright refusal to recognize and bargain with a union in violation of Sec. 8(a)(5) of the Act and the remedy is an affirmative bargaining order. Under such circumstances, the Board has found that the existence of a real question concerning representation would be inconsistent with the employer's statutory obligation to bargain. See *Big Three Industries*, 201 NLRB 197 (1973). In contrast, the Board has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed alleging conduct other than a general refusal to bargain and not inherently inconsistent with the petition itself, but which, if proven, would interfere with employee free choice in an election. See generally NLRB Casehandling Manual, Sec. 11730, et seq.

[7] Id. at 11730.3.

III. THE EMPLOYER'S NATIONWIDE CAMPAIGN

The parties' relationship has been acrimonious, marked by lengthy and complex litigation before the Board. Our analysis of the issue of whether the decertification petitions in these cases are tainted by the unfair labor practices committed by the Employer must begin with a chronology of those unfair labor practices.[8]

Around September 1994, the Union began an organizing campaign among employees at a number of the Employer's 175 service centers around the United States. By the end of 1994, various local unions had filed representation petitions at eight service centers, and in early 1995 the Local Unions were certified by the Board as the bargaining representatives at four service centers: West Sacramento, California; Kansas City, Kansas; Indianapolis, Indiana; and Blaine, Minnesota, one of the facilities involved in the instant cases.

Also in early 1995, the Local Unions filed representation petitions at 21 additional facilities, including Grand Rapids, Michigan, the other facility involved in the instant cases. These petitions resulted in additional certifications of the Local Unions, including the Grand Rapids certification on June 7, 1995.

From the outset of the Union's organizing campaign, the Employer mounted a nationwide campaign against the Union. As detailed in the Board's decision, 329 NLRB 990, this campaign resulted in numerous, serious "national" unfair labor practices that related to all of the Employer's facilities. In brief, in 1994 and 1995, the Employer threatened employees that they would lose their jobs and that the business would be closed if the employees selected the Union; conveyed the impression that collective bargaining would be futile and that the only way the Union could bring pressure on the Employer was by striking; threatened employees with loss of pension benefits and more onerous working conditions; and promised employees to remedy their grievances and grant them benefits. These violations of Section 8(a)(1) occurred at all of the Employer's service centers, including Blaine and Grand Rapids. Further, in violation of Section 8(a)(3) and (1), the Employer granted a March 1995 wage increase to the employees in the unrepresented facilities, including Grand Rapids, and withheld the wage increase from the employees at the represented facilities, including Blaine. As the Fourth Circuit noted,

[8] The General Counsel issued complaint against the Employer in three separate proceedings. The first proceeding culminated in a formal settlement agreement in 1995 (Cases 18–CA–13481, et al.); the second in a Board decision in 1999, which was recently enforced by the Fourth Circuit Court of Appeals (329 NLRB 990 (1999), enfd. 240 F.3d 325; and the third in an informal settlement agreement in 1999 (Cases 18–CA–13869, et al.).

the Employer heralded the increase, through its announcement by the Employer's president and in the company newsletter, and emphasized the denial of the raise to the union-represented employees.[9]

The Employer continued its unlawful national campaign in 1996. It violated Section 8(a)(3) and (1) by withholding from the employees in its represented facilities, including Blaine and Grand Rapids, wage and mileage increases given to the employees in its unrepresented facilities, and violated Section 8(a)(1) by announcing and granting overtime to all employees at its unrepresented facilities. Further, the Employer violated Section 8(a)(5) and (1) by bypassing the Union at the facilities at which it had been certified, including Blaine and Grand Rapids, and dealing directly with the employees at those facilities with respect to its 1996 productivity package, and by failing to bargain with the Union with regard to its withholding of the wage and mileage increases.[10]

IV. APPLICATION OF *MASTER SLACK* FACTORS

Applying the *Master Slack* factors in the instant cases, we find a causal connection between the Employer's unfair labor practices and the employee sentiment expressed in the decertification petitions. We make this finding based on the Board's 1999 decision, which was enforced by the Fourth Circuit. In that decision the Board analyzed whether the Employer's national unfair labor practices warranted the imposition of a *Gissel*[11] bargaining order at four facilities[12] where the Local Unions had lost representation elections. That analysis examined factors similar to those in the *Master Slack* analysis, and the Board's findings there support a finding of a causal connection between the Employer's national unfair labor practices and the expressions of dissatisfaction with the Union embodied in the decertification petitions.

A. We first consider the nature of the illegal acts and the possibility of their detrimental or lasting effect on employees. The Board's prior decision makes clear that the Employer committed serious and pervasive nationwide unfair labor practices in 1995 and 1996 that would have a lasting effect on all of its employees at all of its facilities. Specifically, the Board observed that the Employer's nationwide "carrot and stick" campaign was "highly coercive" and directly affected all bargaining unit employees. The Board found that the Employer committed "hallmark" violations—such as the granting of an unprecedented wage increase, as well as threats that employees would lose their jobs and that the Employer would close if the employees selected the Union—which are highly coercive and have a lasting effect on the employees. See *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980).[13]

At the same time, the Employer withheld the wage and mileage increases from the union-represented employees, publicizing to those employees that the difference in treatment was related directly to whether or not they had voted for the Union.[14] As the Board observed, the Employer's combined actions sent the employees an "unmistakably clear" message: "they could choose to remain unrepresented and enjoy any pay increase the Employer may grant in the future, or they could vote for union representation and forego such benefits." 329 NLRB 990 at 992.

Placing the blame on the Union for the loss of the wage increase compounds the coercive effect of withholding such a benefit. See *NLRB v. Otis Hospital*, 545 F.2d 252, 254–255 (1st Cir. 1976), and cases cited therein. The Employer's repetition of this unlawful behavior in 1996 by withholding wage and mileage increases from the union-represented facilities, including Blaine and Grand Rapids, and blaming the Union for the loss reinforced the connection between union support and loss of pay and the likelihood that the Employer's conduct would have a lasting effect on employees.

In addition, the Employer committed numerous serious and pervasive unfair labor practices at each terminal, including informing employees that it would be futile to select the Union as their bargaining representative, prom-

[9] 240 F.3d 325 at 329.

[10] In 1997 the Employer again withheld the wage and mileage increases from the employees at its union-represented facilities, including Blaine and Grand Rapids. This conduct, among other alleged unfair labor practices in Cases 18–CA–13869, et al., was the subject of an informal settlement agreement approved by the Board on May 4, 1999. In the settlement agreement, the Employer agreed, in relevant part, to pay the employees at the union-represented facilities 80 percent of the backpay owed them, with the remaining 20 percent to be paid if the Board and a court of appeals found that the Employer had unlawfully withheld the 1996 wage and mileage increases from these employees. The Employer also agreed that it would not "refrain from fulfilling its obligation to continue to recognize the various certified unions whose certifications are not being contested [including Blaine and Grand Rapids] and bargain collectively and in good faith with such unions."

[11] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[12] Louisville, Kentucky; Lawrenceville, Georgia; Norfolk, Virginia; and Bridgeton, Missouri.

[13] The grant of the unlawful March 1995 wage increase occurred at Grand Rapids but not at Blaine, which was represented at that time by Local 406. However, in light of the Employer's emphasis to the Blaine employees that the Union was to blame for their failure to receive the raise, the Employer's conduct was highly coercive at the Blaine facility, as well as the Grand Rapids facility.

[14] The Employer withheld the 1995 wage and mileage increases from employees at Blaine but not from employees at Grand Rapids, who were not represented by the Union at that time. The Employer withheld the 1996 wage and mileage increases from employees at both facilities.

ising employees better benefits if they voted the Union out, and threatening them with loss of benefits and more onerous working conditions if they voted the Union in. These threats and promises would reasonably take on a particularly coercive meaning to employees in view of the Employer's discriminatory actions with respect to the wage increases. The coercive effect of these violations is further compounded by the involvement of the Employer's highest ranking officials, most notably its president Jim Douglas. As the Board noted in its decision, "When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten." *Consec Security*, 325 NLRB 453 (1998), enfd. mem. 185 F.3d 862 (3d Cir. 1999).

Further, in addition to these violations of Section 8(a)(1) and (3), the Employer violated Section 8(a)(5) in the union-represented facilities, including Blaine and Grand Rapids, by bypassing the Union and dealing directly with the employees regarding the 1996 productivity package and by failing to bargain with the Union over its withholding of the 1996 wage and mileage increases. It is well settled that such direct dealing and bypassing of the employees' bargaining representative is inconsistent with the Employer's statutory bargaining obligation and tends to have a lasting effect on employees. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–684 (1944); *Bridgestone/Firestone, Inc*., 332 NLRB No. 56, slip op. at 2 (2000).

B. Under *Master Slack*, the Board must consider whether the unfair labor practices had the possible tendency to cause employee disaffection from the Union. As the Board noted in its decision, "It is the objective tendency of the unfair labor practices to undermine union support that is critical, not the actual effect of the unfair labor practices." 329 NLRB 990 at 995 fn. 26.[15] Given the nature and scope of the Employer's nationwide unfair labor practices, we find that they had the tendency to cause employee disaffection from the Union.

As noted above, the Employer, by its highest officials, orchestrated a nationwide campaign, encompassing all of its facilities, to send the clear message to all of its employees that without the Union they would receive unprecedented benefits and improved working conditions and with the Union they would not. This message was made even clearer by its 1996 conduct, which withheld the wage and mileage increases from the union-represented facilities, including Blaine and Grand Rapids, and by its bypassing of the Union at those facilities and its direct dealing with those employees. The Board has found that such unfair labor practices have the tendency to cause employee dissatisfaction with the Union. See *Bridgestone/Firestone, Inc.*, supra; *Royal Motor Sales*, 329 NLRB 760, 764 (1999); *American Pine Lodge Nursing*, 325 NLRB 98 (1997); and *Pirelli Cable Corp.*, 323 NLRB 1009, 1010 (1997).[16]

C. The final *Master Slack* factor which must be considered is the length of time between the unfair labor practices and the decertification petitions. The Employer contends that the unfair labor practices found by the Board and enforced by the Fourth Circuit, having occurred almost 4 years before the filing of the decertification petitions, are too remote in time to taint the petitions. We disagree.

Most significantly, the Employer has not complied with the Board's Order, enforced by the Fourth Circuit, and thus the coercive effect of the unfair labor practices encompassed by the Order has in no way dissipated. See *Tocco, Inc.*, 326 NLRB 1279, 1284 (1998); *United Supermarkets*, 287 NLRB 119, 120 (1987). Further, as the Board observed in finding that employee turnover would not dissipate the effect of the Employer's unfair labor practices for purposes of the *Gissel*[17] remedy, the violations are "precisely the types of unfair labor practices that endure in the memories of those employed at the time and are most likely to be described as cautionary tales to later hires." 329 NLRB 990, at 994.

D. The Employer contends that the 1997 unfair labor practices, which were the subject of an informal settlement agreement approved by the Board in 1999, have been fully remedied and that, pursuant to the settlement agreement, it had bargained with the Union for a "reasonable period" of time at Blaine and Grand Rapids be-

[15] Thus, the fact that Local 406 won the election at Grand Rapids after some of the violations were committed does not mitigate against finding that the violations had the tendency to cause employee disaffection from the Union. In any event, as noted above, the Employer continued its violations after the Grand Rapids election, and the employees at Grand Rapids were directly affected by the Employer's 1996 violations.

[16] The *Master Slack* analysis separately considers the effect of the unlawful conduct on employee morale, organizational activities, and membership in the Union. Neither the Board's decision nor the administrative investigations in these cases contain specific evidence from which we can determine whether the Employer's unfair labor practices in fact had a detrimental effect on the morale or union activities or membership at any of the facilities, including Blaine and Grand Rapids. In light of our findings that the Employer's unfair labor practices had the tendency to cause employee disaffection from the Union and that the other *Master Slack* factors also indicate a causal connection between the unlawful conduct and the decertification petitions, we find that the lack of specific evidence regarding the actual effect of the Employer's unfair labor practices is not critical to our decision and does not require a remand for such evidence.

[17] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

fore the decertification petitions were filed. We find no merit in this contention.

Contrary to the Employer's contention, the Employer has not fully remedied the 1997 conduct. The settlement agreement provides for an additional 20 percent payment to the employees at the union-represented facilities, including Blaine and Grand Rapids, in light of the Board and court decisions finding the withholding of the 1996 wage and mileage increases to violate the Act. Further, as noted above, the serious unfair labor practices encompassed within the decisions of the Board and the Fourth Circuit have not been remedied. In the face of these unremedied unfair labor practices, any bargaining by the Employer with the Union pursuant to the 1999 settlement agreement cannot suffice to cure the taint of the decertification petitions. See *Douglas-Randall, Inc.*, 320 NLRB 431 (1995).[18]

E. Our dissenting colleague takes issue with our *Master Slack* analysis, contending that we erroneously rely on the Employer's conduct in both the formal and the informal settlement agreements, which contained nonadmissions clauses, and that, given the passage of time since the Employer's conduct, the employees should not be deprived of the right to vote on the issue of union representation. We find no merit in our colleague's contentions.

First, our *Master Slack* analysis is based solely on the unfair labor practices litigated and found by the Board and the Fourth Circuit. Our colleague seeks to minimize the extent of these adjudicated unfair labor practices—referred to by him as "the 'unsettled' conduct"—by stating that "most" of these unfair labor practices did not occur at Blaine and Grand Rapids. That simply is untrue. All of the "national" violations found by the Board and the Fourth Circuit occurred at all of the Employer's facilities, including Blaine and Grand Rapids.[19] Further, the March 1995 wage increase was unlawfully granted to the Grand Rapids employees, and the 1995 wage and mileage increases were unlawfully withheld from the Blaine employees. Finally, as our colleague concedes, the 1996 wage increases were unlawfully withheld from both the Blaine and Grand Rapids employees, and, in this regard, the Employer further violated the Act at these facilities by unlawfully bypassing the Union, dealing directly with the employees, and failing to bargain with the Union.

Contrary to our colleague's contention, we do not rely, for purposes of our *Master Slack* analysis, on the 1995 formal settlement agreement or the 1999 informal settlement agreement. As noted by the Board in its decision, the 1995 formal settlement agreement specifically reserved for resolution in that proceeding the so-called "national allegations," which related to all of the Employer's facilities. Specifically, the settlement stipulation provided, in pertinent part:

> The General Counsel reserves the right to use competent, relevant, material and otherwise admissible evidence obtained in the investigation and processing of the above-captioned cases in the litigation of alleged violations outside the scope of the Settlement Stipulation, and a judge, the Board and the Courts may make findings of fact and/or conclusions of law with respect to that evidence . . . . Sec. 6(b).

Pursuant to this provision, the parties litigated the 8(a)(1) and (3) allegations that were "settled" in the formal settlement agreement, and the Board and the Fourth Circuit found the unfair labor practices, as alleged, and further found that these unfair labor practices supported the *Gissel* bargaining orders that were sought in four facilities. Under these circumstances, our colleague's refusal to consider the effect of these adjudicated unfair labor practices because they were also encompassed in a settlement agreement which contained a nonadmissions clause is clear error.[20]

Further, contrary to our colleague's contention, we do not rely, for purposes of our *Master Slack* analysis, on the Employer's conduct that was the subject of the 1999

[18] The Employer also contends that the Grand Rapids decertification petitions should be processed in light of the pending unfair labor practice charges that it has filed in Cases 7–CB-12241 et al., alleging that Local 406 and the International Union have violated Sec. 8(b)(1)(A) by "serious and persistent strike violence." The Board recently found that, accepting as true the Employer's allegations of strike-related misconduct, they were not of such a character to deprive the employees of their elected collective-bargaining representatives and withhold bargaining orders at four facilities. *Overnite Transportation Co*., 333 NLRB No. 62 (2001). For the same reasons set forth by the Board in that decision, we find that the strike-related misconduct, even assuming that it occurred as the Employer contends, does not justify the processing of decertification petitions that we have found were tainted by the Employer's unfair labor practices.

[19] As we explain below, the "national" violations were litigated even though they were also encompassed within the formal settlement agreement.

[20] Although it is not necessary for our *Master Slack* analysis to rely on the 1995 settlement agreement, we do not agree with our colleague's contention that conduct that is the subject of a settlement agreement containing a nonadmissions clause cannot be the basis of a finding under *Master Slack* that the employer's conduct tainted a subsequent decertification petition. As the Board stated in *Douglas-Randall, Inc*., supra at 432, citing from the Fourth Circuit's decision in *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740 (1951), cert. denied 342 U.S 954 (1952), a settlement agreement containing a nonadmissions clause, while not an admission of unlawful conduct, "must have definite legal effect and is quite different from a dismissal of the [unfair labor practice] charges." Our colleague's analysis, however, accords no weight to the settled conduct and treats it as having no effect.

informal settlement agreement.[21] Rather, as discussed above, it is the Employer that asks us to consider that agreement in support of its contention that the decertification petitions were not tainted.

Finally, our colleague would also rely on the passage of time from the commission of the unfair labor practices to the filing of the decertification petitions to support his conclusion that there was no causal nexus between the unfair labor practices and the filing of the decertification petitions. As we have explained above, serious unfair labor practices remain unremedied, and thus the passage of time, in and of itself, is not likely to dissipate their coercive effect.[22]

In sum, we have found under *Master Slack* that the Employer's nationwide campaign of unfair labor practices, which directly affected the employees at its Blaine and Grand Rapids facilities, tainted the decertification petitions filed for those locations. Accordingly, we affirm the Regional Directors' dismissals of the petitions.

ORDER

The petitions are dismissed.

MEMBER HURTGEN, dissenting.

My colleagues have dismissed decertification petitions filed by employees at two separate facilities: Grand Rapids, Michigan; and Blaine, Minnesota. My colleagues have thereby denied the employees their fundamental statutory right to decide for themselves whether to continue representation by the Union. I would accord that right to the employees. Accordingly, I dissent.

The majority concludes that Respondent's unlawful conduct caused the decertification petition. The conclusion rests on two premises: (1) the Respondent committed unlawful conduct and (2) the conduct caused the decertification petition.

As to the issue of Respondent's allegedly unlawful conduct, my colleagues rely on: (a) conduct that was the subject of a l999 informal settlement; (b) conduct that was the subject of a 1995 formal settlement; (c) conduct that was adjudicated as unlawful by the Board and circuit court.[1]

The Informal Settlement

As to the 1999 informal settlement, my colleagues say at one point that they do not rely on alleged conduct underlying this settlement. However, they nonetheless recite this conduct, albeit in a footnote rather than in text. In any event, it is clear that there can be no such reliance. There is no finding or adjudication that the conduct was unlawful. The parties settled these matters and expressly agreed to a nonadmission clause. It is therefore clear that no unfair labor practices in this connection have been established.

The Formal Settlement

The formal settlement of 1995 remedied the following: virtually all of the 8(a)(1) conduct; 8(a)(3) conduct that did not require a monetary remedy (the March 1995 wage increase at nonunion facilities); and 8(a)(3) conduct that did require a monetary remedy (the March 1995 denial of a wage increase at four locations where the Union had been certified). The settlement contained a nonadmission clause, and thus the settlement is not itself proof of any violations.

In light of this fact, the General Counsel reserved the right to introduce the underlying evidence into the *Gissel* proceedings that were left for litigation. And, indeed, the General Counsel did introduce the evidence and proved many of the settled violations in connection with his *Gissel* case. The Board and Court entered *Gissel* orders at the four locations.

However, neither the General Counsel nor the Union reserved the right to introduce and rely on this evidence to establish that representation cases and petitions (present or prospective) would be affected or tainted. Indeed representation cases and petitions were expressly "unblocked" by the settlement. Inasmuch as the General Counsel and Union did not reserve the right to present and rely on such evidence in any representation proceedings, it is clear that the evidence is not cognizable to show a taint in regard to the instant representation petitions filed in 1999.

My colleagues say that they do not rely on the 1995 formal settlement. The contention is erroneous. My colleagues expressly rely on the reservation clauses of that settlement, for that is the provision which assertedly permits them to rely on the conduct that underlies that settlement. In addition, my colleagues rely on the settlement in another respect. They assert that the settlement has an impact under *Douglas-Randall*, 320 NLRB 431 (1995). Even assuming arguendo that *Douglas-Randall* was correctly decided, that case has no relevance

[21] We again stress that we find it unnecessary to rely on this conduct, not that we agree with our colleague that such conduct could not be used in such analysis.

[22] Our colleague's criticism that there is no "substantive evidence" that the Employer's conduct caused employees to seek decertification misses the mark. Except for the fourth factor, the *Master Slack* analysis weighs the objective tendency of the unfair labor practices to undermine union support, and evidence of the actual impact of the Employer's unfair labor practices is not required.

[1] *Overnite Transportation Co*., 329 NLRB 990 (1999), enfd. 240 F.3d 325 (4th Cir. 2001).

here.[2] Under *Douglas-Randall*, an employer who settles a case by agreeing to recognize and bargain with the union must do so for a reasonable period of time, i.e, a question concerning representation cannot be raised for that period. In the instant cases, there is no evidence concerning the reasonable period, i.e., the bargaining (or lack thereof) between the time of settlement (May 1999) and the time of the instant petitions (October 1999). Thus, reliance on *Douglas-Randall* is misplaced.

The "Unsettled" Conduct

As noted, there was also "unsettled" conduct that was litigated and found unlawful in 329 NLRB 990. However, most of this conduct occurred at the individual plants where Gissel relief was sought.[3] With one exception, the conduct did not occur at the two facilities involved here.[4]

Absence of Causal Nexus

My colleagues say that the *Gissel* analysis in 329 NLRB 990 is "similar to" a *Master Slack* analysis. That is not correct. A *Gissel* analysis focuses on whether a fair election can be held. A *Master Slack* analysis focuses on whether unlawful conduct has a causal nexus (and thereby taints) a decertification petition.

I now apply the "causal nexus" test.

Even assuming arguendo that the conduct of 1995 and 1996 is cognizable here and is unlawful, there is no showing that it caused the employees to file the decertification petition in 1999.[5] More than 3 years elapsed in that time interval. Further, during that time, the conduct of 1995 was remedied by the formal settlement of that year. The only unremedied conduct was the "unsettled" conduct that was litigated in 329 NLRB 990. With one exception, that conduct did not occur at Blaine and Grand Rapids. And, in any event, all of the conduct occurred in 1995 and 1996. We are asked to believe that this conduct lingered in the minds of the employees for many years, and caused them to seek decertification. There is no substantive evidence to support this belief. In these circumstances, I would not deprive these employees of their statutory right to vote on the issue of union representation. The wrongs of the parent should not be visited on the children, and the violations of Overnite should not be visited on these employees.

[2] My dissent thereto is set forth in *Supershuttle of Orange County*, 330 NLRB No. 138 (2000).

[3] The exception was the 1996 wage and mileage increase that was withheld from represented facilities, including Blaine and Grand Rapids.

[4] My colleagues say that this sentence is "untrue." I think it clear that the sentence refers to the "unsettled conduct," and is true. I have acknowledged above that other conduct ("settled" conduct) was reserved for litigation and was adjudicated in 329 NLRB 990. However, as discussed above, the reservation did not extend to the instant representation cases.

[5] As noted above, it is clear that the alleged violations of *1997,* informally settled, have never been established.