

**Manna Pro Partners, L.P. and American Federation of Grain Millers, Local No. 155.** Case 27–CA–11260

August 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 27, 1991, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent 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,<sup>1</sup> and conclusions as modified and to adopt the recommended Order as modified.<sup>2</sup>

The judge, citing *Bay Area Mack*, 293 NLRB 125 (1989), found that the Respondent did not have a reasonably based, good-faith doubt of the Union's majority status when it refused to bargain on March 6, 1990.<sup>3</sup> As found by the judge, at that time, Markley, the Respondent's plant manager, was aware of only a few unit employees who had expressed specific sentiments against union representation. Additionally, the employee petitions received by Markley beginning on April 26 were tainted by the Respondent's prior unfair labor practices and were not, in any event, probative of the Respondent's knowledge at the time of its refusal to bargain. We further find that the additional factors cited by the Respondent in support of its good-faith doubt, which were not discussed by the judge, are insufficient to rebut the presumption of the Union's continuing majority status.

The Respondent contends that evidence concerning an aborted 3-day strike in 1984 by the unit employees of Farmers Marketing Association (FMA), the predecessor employer, supports its good-faith doubt defense.

<sup>1</sup> In agreeing with the judge that the Respondent's evidence does not establish that when it refused to bargain the Union did not in fact enjoy majority status, we find it unnecessary to rely on his analysis of *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989), modified 923 F.2d 398 (5th Cir. 1991), or his discussion questioning the continuing validity of the in fact defense.

The Respondent excepts to the judge's refusal to permit testimony by employees relating to the Respondent's purported in fact defense. We agree with the judge that such testimony would be tainted by the unfair labor practices and therefore the Respondent would be precluded from invoking the in fact defense. We find it unnecessary to adopt the judge's further reasons for rejecting the Respondent's proffered evidence.

Member Cracraft agrees that the Respondent's exception to the judge's refusal to permit testimony is without merit. The Respondent's unfair labor practice before the refusal to bargain would have tainted the employees' attitude toward the Union. Because the Respondent is therefore precluded from invoking the in fact defense, Member Cracraft agrees that the refusal to permit the employees' testimony was not prejudicial.

<sup>2</sup> We have modified the judge's recommended Order to conform to the violations found.

<sup>3</sup> All dates are in 1990 unless otherwise indicated.

Following that strike, the employees returned to work under a new collective-bargaining agreement that provided for reductions in wages, hours, and benefits. Employee McCune testified that as a result of the strike the employees had "kind of a hopeless feeling" and that the Union began to lose the support of FMA employees. We find that employee sentiments concerning the 1984 strike are too remote in time to support a reasonably based, good-faith doubt in March 1990. Thus, the record does not establish a link between the striking employees' union views in 1984 and employee support for the Union 6 years later. In fact, although McCune left FMA for 6 months after the strike, he subsequently returned to FMA and was a member of the Union. Moreover, employee disapproval of a union's handling of a strike is not to be equated with rejection of the union as the employees' bargaining representative. See *NLRB v. Windham Community Hospital*, 577 F.2d 805, 814 (2d Cir. 1978).<sup>4</sup>

As further objective evidence in support of its reasonable doubt of the Union's majority status the Respondent asserts that "many" of the employees it hired came from the Manna Pro plant in Fort Lupton, Colorado, and were represented by the Teamsters. In considering this factor, we will assume that the Respondent is referring to the Board's doctrine that when an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation may arise, and the Board will not impose a union on the employees by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning representation. *Martin Marietta Co.*, 270 NLRB 821, 822 (1984); *Boston Gas Co.*, 221 NLRB 628 (1975). In determining whether a merger has occurred, the Board considers the extent of changes in the operation following the transfer of employees to determine whether the units have lost their separate identities. See *Martin Marietta*, above. In the instant case, the Respondent admitted in its answer to the complaint that it has continued to operate the business in basically unchanged form. The Respondent further admitted successorship status at the hearing. In view of these admissions, the record evidence pertaining to the nature of the Respondent's operations is minimal.<sup>5</sup> There is no evidence in the record regarding the respective numbers of former FMA employees, Manna Pro employees, and new hires who made up the Respondent's bargaining unit at the time of its refusal to bargain. Under the circumstances, including

<sup>4</sup> We note that there is a dispute in the record as to whether the Union supported the strike as a bargaining technique. Our finding that evidence concerning the strike is not relevant to the Respondent's good-faith doubt defense makes it unnecessary to resolve this issue.

<sup>5</sup> In this regard, Markley testified that the Respondent "put together two companies who had been very severe competitors" and brought two groups of employees together "into a working team." Markley also stated that the Respondent terminated FMA's "processing" of bird seed, and that the Respondent "processes" only livestock feed.

the lack of evidence of competing claims of representation by the Union and the Teamsters, we are unable to determine that a merger has occurred. See *Massachusetts Electric Co.*, 248 NLRB 155, 157 (1980). We therefore find that the Respondent's belated contentions concerning the composition of the bargaining unit do not support its defense.

The Respondent also contends that there is objective evidence that former Union Steward Frosh no longer desired union representation. The Respondent's representations about Frosh's union sentiments are based solely on employee McCune's hearsay testimony. In the absence of evidence that Frosh told a representative of the Respondent that he did not want to be represented by the Union, we do not rely on this factor.

Finally, the Respondent contends, in substance, that factors demonstrating that the Union has been inactive provide a sufficient evidentiary basis for inferring the antiunion sentiments of its employees. The Respondent cites the facts that no one attended a union meeting in March 1990; the Union did not receive any signed cards from the Respondent's employees; the Union's most recent contact with the Respondent was its February 20 letter requesting bargaining; FMA prevailed as to the two grievances that were filed in the 14-month period prior to the Respondent's commencement of operations, neither of which was taken to arbitration; and the Union and the employees did not meet to select a bargaining committee or to discuss bargaining issues.

We note initially that the evidence indicates that the Union was active at the time of FMA's closure. Former Steward Frosh testified that there were regularly scheduled union meetings in 1989, and there is no suggestion that the Union failed to process employee grievances. Negrete, the International union representative, testified that the Union was active in negotiating the "closing package" for FMA's unit employees. Further, union representatives telephoned employees and mailed literature to them in February and March 1990. Any subsequent lack of new membership and employee union activity following the commencement of operations by the Respondent was a foreseeable consequence of the Respondent's refusal to bargain. See *Petoskey Geriatric Village*, 295 NLRB 800 (1989) (citing *NLRB v. Fall River Dyeing Corp.*, 775 F.2d 424 (1st Cir. 1985), *affd.* 476 U.S. 1139 (1987)). Moreover, even assuming that the Respondent relied on these factors at the time of its refusal to bargain, they are insufficient to establish a reasonably based, good-faith doubt of the Union's majority status.<sup>6</sup>

Having considered the factors relied on by the Respondent to support its asserted reasonably based,

good-faith doubt of the Union's majority status, we conclude that the totality of the Respondent's evidence is insufficient to rebut the presumption of the Union's continuing majority status. Accordingly, we find, in agreement with the judge, that the Respondent's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act.

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

"4. When, during and after his March 8, 1990 speech Markley solicited employees generally and employee Barringer individually to prepare antiunion petitions or letters, the Respondent violated Section 8(a)(1) of the Act."

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Manna Pro Partners, L.P., Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(c) Telling employees that we are refusing to recognize or bargain with the Union."

2. Delete paragraph 2(c) and reletter the following paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

#### 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.

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 refuse to recognize and bargain collectively with the Union, American Federation of Grain Millers, Local No. 155, with respect to all matters affecting the wages, hours of work, and other terms and conditions of employment of our Denver

<sup>6</sup>As the Board noted in *Petoskey Geriatric Village*, above, "majority support" refers to whether a majority of unit employees support union representation, and not to whether they are union members. 295 NLRB at fn. 9.

feed mill employees working in the bargaining unit represented by that Union immediately before we took over the Denver feed mill formerly operated by Farmers Marketing Association.

WE WILL NOT tell employees that we are refusing to recognize or bargain with the Union.

WE WILL NOT solicit employees to obtain signatures on antiunion petitions.

WE WILL NOT tell job applicants that the Union will not represent them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately confer recognition on the Union as the exclusive representative of our bargaining unit employees and, on the Union's request, WE WILL meet and bargain collectively in good faith with it with respect to any and all mandatory bargaining subjects.

#### MANNA PRO PARTNERS, L.P.

*Barbara Greene, Esq.*, for the General Counsel.

*Eugene F. De Shazo, Esq.*, of Kansas City, Missouri, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this 8(a)(1) and (5) case in trial in Denver, Colorado, on August 23, 1990. (All dates below are in 1990 unless I specify otherwise.) It arose when American Federation of Grain Millers, Local No. 155 (the Union) filed an unfair labor practice charge on March 20 against the Respondent, Manna Pro Partners, L.P. After investigating, the Regional Director for Region 27 issued a complaint and notice of hearing on May 9.

The complaint alleges in substance that Respondent is a labor relations successor to Farmers Marketing Association (FMA), whose employees were represented by the Union, and that since Respondent's February 26 takeover, Respondent has owed a statutory duty to recognize and bargain collectively with the Union as the exclusive representative of its employees, and has violated Section 8(a)(5) by refusing to do so. The complaint also alleges that Respondent independently violated Section 8(a)(1) when its agents interrogated employees concerning their union sympathies and encouraged employees to "reject" or "decertify" the Union.

Respondent's original answer admits that its operations affect interstate commerce and that the Board's jurisdiction is properly invoked, and that it has refused to recognize or bargain with the Union. Respondent further admits that it took over the FMA operation and continued it in basically unchanged form and that a majority of its employees were previously employed by FMA. But Respondent denies that the Union was the majority representative of its employees once it commenced operations, or at the time shortly thereafter when it admittedly refused the Union's request to bargain

collectively.<sup>1</sup> Although Respondent did not plead affirmative defenses in its answer, Respondent subsequently contended at trial and on brief that even if the Union were entitled to a legal presumption that it continued to be the majority representative after the takeover, Respondent was entitled on two independent legal grounds to refuse the Union's request to bargain: First, that Respondent then possessed a "good faith doubt" that the Union continued to enjoy support from a majority of its employees; second, that "in fact" the Union had lost such majority support.

#### I. PRINCIPAL ISSUES

The material facts are undisputed and, as I explain in due course, the law of successorship as applied to those facts will require the presumption that the Union was the 9(a) representative of Respondent's employees at the point when Respondent resumed FMA's former operations. In these circumstances, therefore, under established precedent, Respondent's admitted refusal to recognize or bargain with the Union after takeover would violate Section 8(a)(5) unless, at that point, Respondent could make either of two showings, stated this way by the Board recently in *AMBAC International*:<sup>2</sup>

(1) By showing that on the date the employer refused to bargain the union did not *in fact* enjoy majority status; or (2) by presenting evidence of a sufficient *objective basis to support a reasonable doubt* of the Union's majority support among the employees at the time the employer withdrew recognition. [Emphasis added.]<sup>3</sup>

The *AMBAC* Board further stated, pertinently, "These principles are fully applicable to a successor employer, such as the Respondent in this case."<sup>4</sup>

As noted, Respondent maintains both defenses. I will easily conclude that Respondent's claimed basis for asserting a "reasonable" or "good-faith" doubt of the Union's majority status was legally inadequate under the cases applying that

<sup>1</sup>At trial, Respondent amended its answer to admit that the bargaining unit identified in the complaint ("all regular full-time production, maintenance, and truck driver employees employed by Respondent," with standard exclusions) described an appropriate unit for collective-bargaining purposes, and matched the description of the unit in which FMA had previously recognized and contracted with the Union.

<sup>2</sup>299 NLRB 505, 506 (1990), citing *Hajoca Corp.*, 291 NLRB 104 (1988), *enfd.* 872 F.2d 1169 (3d Cir. 1989); *Station KKHI*, 284 NLRB 1339 (1987), *enfd.* 891 F.2d 230 (9th Cir. 1989).

<sup>3</sup>The quoted *AMBAC* formulation is but one of many similar formulations in the recent cases. See, e.g., *Royal Vending Service*, 275 NLRB 1222 *fn.* 1 (1985) (emphasis added).

the Board permits the employer to show *either* that the union *did not* enjoy majority status at the time of the refusal to bargain or that it had a *good-faith and reasonably grounded doubt, based on objective considerations*, for believing that the union had lost its majority status when it refused to bargain. [Citing *Terrell Machine Co.*, 173 NLRB 1480 (1969); *Virginia Sportswear*, 226 NLRB 1296 (1976); and *Bennington Iron Works*, 267 NLRB 1285 (1983).]

Indeed, the *AMBAC* formulation differs slightly from the Supreme Court's own recent characterization of the employer's rebuttal burden in *NLRB v. Curtin Matheson Scientific*, 110 S.Ct. 1542 (1990):

by showing that . . . (1) the union did not *in fact* enjoy majority support, or (2) the employer had a "good faith" doubt, founded on a sufficient objective basis, of the union's majority support. [Emphasis in original.]

I apprehend no difference in substance between what the *AMBAC* Board referred to as a "reasonable doubt" and the Court's use of the term "good faith" doubt.

<sup>4</sup>*AMBAC*, *supra* at 506, citing *Harley-Davidson Co.*, 273 NLRB 1531 (1985).

standard. It is Respondent's alternative "no majority-in-fact" defense, however, which gives me pause, fundamentally because I have been unable to ascertain from the cases just what the Board may contemplate as appropriate proof of such a defense, or even whether the defense has any current vitality. As a consequence, I cannot be certain that I ruled correctly when, as I describe below, I rejected Respondent's particular proffer of "in-fact" proof. The narrow question presented is:

Was Respondent entitled to demonstrate that the Union actually lacked majority support by calling employee-witnesses to testify about their sentiments concerning union representation at the time when Respondent rejected the Union's request to bargain?

This question became pointed up during an in limine argument relating to the offer of Respondent's counsel to call to the witness stand approximately 22 employees, comprising a purported majority of Respondent's unit employees employed as of Respondent's February 26 takeover, who counsel represented would testify that they did not then want the Union to represent them.<sup>5</sup> This offer precipitated extensive legal argument and colloquy about what the Board or the courts may intend when they routinely posit that one way an employer may defend withdrawal-of-recognition cases is by demonstrating that the union had no majority "in fact." I rejected this offer for all the reasons I explained on the record.<sup>6</sup>

I have reconsidered the entire question in the light of the authorities cited by the parties on brief and my own further review of the cases, and have reached substantially the same conclusion, but for somewhat different reasons than those I articulated in my trial discussion and ruling, reasons which I will summarize in my concluding analysis.

Based on my study of the record and the posttrial briefs of the General Counsel and Respondent, my impressions of the witnesses as they testified, and my assessments of the inherent probabilities, these are my

## II. FINDINGS OF FACT AND PRELIMINARY ANALYSES

### A. Successorship

The business facility in question is a feed mill, including a warehouse and truck distribution base, in Denver, Colorado. The Denver mill was historically owned and operated by FMA, until, pursuant to a bankruptcy liquidation arrangement, FMA ceased operating it. Under the liquidation arrangement, FMA joined with Manna Pro Corporation (Manna Pro), headquartered in Los Angeles, California, to form a new partnership entity, Manna Pro Partners, L.P., the Respondent herein, to acquire and operate the mill. The arrangement contemplated that Manna Pro would become the general partner and manager, with FMA occupying a more passive status as a limited partner. Consistent with this, FMA ceased operating the Denver facility on Friday, February 23,

and the Respondent entity resumed operating on Monday, February 26.

FMA had historically recognized the Union as the exclusive collective bargaining agent for the roughly 30–40 regular full-time production, maintenance, and truck driver employees at the mill. A prior labor agreement between FMA and the Union covering that employee unit, nominally scheduled to expire on January 31, had been extended to the February 23 date when FMA ceased operations.

In the weeks before Respondent's takeover, John Markley, a Manna Pro agent who would become Respondent's general manager, had interviewed FMA employees, and some other applicants, as candidates for jobs in the new operation, in all interviewing about 50 persons. As a consequence of this process, a majority of the employees hired into the resumed operation came from the ranks of former FMA-Denver employees.

In an uncertain number of instances during these interviews, according to Markley, employees asked questions to the effect, "Is the Union still going to represent us?" Markley admittedly replied in such cases to the effect, "It's my understanding that the new group of employees will not be represented,"<sup>7</sup> but says he hastened to add in such cases that it would be up to the employees whether they wanted a union in the new operation. In an even less certain number of instances where such exchanges occurred, perhaps only two or three, employees being interviewed volunteered the opinion that they were happy that there would be no union in the new operation. Markley was unsure whether these antiunion remarks were uttered by FMA employees, or by other "outside" applicants, and was equally uncertain whether the employees who had made such remarks were actually hired in the takeover operation.

Because Respondent now challenges the adequacy of the General Counsel's proof of the Union's presumptive status as the 9(a) representative of Respondent's employees in the resumed operation, I must digress briefly to discuss the applicable law and the state of the record on that point: Under settled principles, and contrary to Markley's "understanding" (supra, last footnote), the Union is entitled to a presumption that it continued to be the 9(a) exclusive representative of Respondent's employees if Respondent was a labor relations "successor" to FMA.<sup>8</sup> And, at least where, as here, the basic employing operation remains largely unchanged in one business entity's takeover from another of the operation, the Respondent's status as such a "successor" depends essentially on whether a majority of its posttakeover unit employee complement consisted of employees carried over from FMA's unit complement.<sup>9</sup> Pertinent to this, complaint para-

<sup>7</sup> Elsewhere, attempting to confirm my own understanding of various fragments of his testimony, I questioned Markley about the basis for his own "understanding" while interviewing employees that "the new group of employees will not be represented." Markley replied, "Absolutely" to my understanding that he didn't believe during these interviews that Respondent would have "a union to deal with once [it] opened the doors." I further asked him whether my understanding was correct that this was "based on the judgment that [Respondent was] a new operation, and [Markley] didn't think the Union followed in those circumstances?" Markley replied, "That's correct."

<sup>8</sup> *AMBAC International*, supra. See generally *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

<sup>9</sup> Although other factors may theoretically come into play in a "successorship" analysis, the presence or absence of the "majority" factor is

*Continued*

<sup>5</sup> Respondent's offer of proof is most specifically detailed at Tr. 31–33.

<sup>6</sup> I invited Respondent to take an interim appeal to the Board from my ruling precluding such proffered testimony, so that, if the Board disagreed, the record might be reopened for that purpose before I issued my decision. Respondent has not done so; instead, it has reargued the point on brief.

graph 2(a) alleges, and Respondent's answer admits, that, since February 26,

Respondent . . . has continued to operate the business of FMA in basically unchanged form, and has as a majority of its employees individuals who were previously employees of FMA.

Complaint paragraph 2(b) alleges, and Respondent's answer originally denied, however, that,

By virtue of the operations described above in paragraph (a), Respondent has continued the employing entity and is a successor of FMA.

At the trial's outset, the parties engaged in certain colloquy intended to narrow issues, particularly those associated with Respondent's denial of complaint paragraph 2(b). Respondent's counsel indicated concern only about the "continued the employing entity" phrase in that paragraph, specifically, a fear that by admitting such language, the General Counsel might rely on it to argue that Respondent was merely an "alter ego" of FMA.<sup>10</sup> The General Counsel disclaimed any such contention, whereupon the colloquy continued as to the "successor" phrase in that paragraph, most pertinently:

MR. DE SHAZO: That's correct. That is, we're not a continuing employer entity. It's an entirely new entity. But, engaged in the same type of work for successor purposes, we are willing to admit that we're a successor.

ADMINISTRATIVE LAW JUDGE NELSON: All right. And in that same regard, you will—you will admit that a majority of the employees that you employed when your entity came into existence were employees of the predecessor operation—FMA's predecessor operation. Is that correct? [Emphasis added.]

MR. DE SHAZO: That's correct, Your Honor.

ADMINISTRATIVE LAW JUDGE NELSON: All right. I'll receive that stipulation and acknowledgement, as well . . . and treat as an amendment to your Answer the admission to the paragraph in question.

MR. DE SHAZO: That's correct, Your Honor.

Respondent now contends that the General Counsel never established a threshold element in its successorship case, namely, that a majority of the *unit* employees in Respondent's takeover operation had been *unit* employees under FMA's operation. In this regard, Respondent places emphasis on the absence of the word "unit" from paragraph 2(b) of the complaint, and from the stipulative colloquy just quoted. I find that it was not fatal to the General Counsel's case that the word "unit" did not specifically appear in the stipulation nor in the original complaint, however artlessly worded either of them may have been. Indeed, in the circumstances, I find Respondent's contention here to be hypertechnical, if not simply frivolous. All the discussion surrounding this stip-

the normally dispositive one. *Stewart Granite Enterprises*, 255 NLRB 569, 573 fn. 19, and authorities cited.

<sup>10</sup>In its original charge, the Union had claimed that Respondent owed a duty to recognize and bargain based on three alternative grounds; that is, "as the same long-term Employer the Charging Party has always dealt with and/or as a successor or alter ego employer."

ulation made it plain that when the term "employees" was being used, this was in reference to the labor relations successorship issue, and that the purpose of the stipulation was to get past the need for proof on successorship elements that were not genuinely in contest. Thus, the references to "employees" would have had no relevance were it not implicit that the speakers were referring to "unit" employees.<sup>11</sup> Indeed, subsequently, Respondent's counsel himself stated his understanding that these stipulations related to "unit" employees; thus (Tr. 72:9-14),

MR. DE SHAZO: I think we entered into a Prehearing Stipulation that a majority of the employees at all times have been—of the *bargaining unit employees* have been FMA employees. [Emphasis added.]

ADMINISTRATIVE LAW JUDGE NELSON: That's my recollection, too.

I thus treat the stipulation of the parties as establishing that a majority of the employees in the new "unit" complement were employees who had worked in the same unit represented by the Union under FMA's operation. Therefore, the Union's presumptive status as the 9(a) representative of the employees in Respondent's resumed operation of the Denver facility has been established.

#### B. *Unfair Labor Practices*

##### 1. Union's demand for recognition; Respondent's refusal

On December 11, 1989, anticipating the takeover, the Union's International vice president, Michael B. Taylor, wrote to Manna Pro's vice president and general counsel, Robert W. Smith, stating pertinently,

It is my understanding that Manna Pro is about to enter into a joint venture [sic] arrangement with [FMA] which would allow Manna Pro to manage the Denver facility. Our Union is the collective bargaining agent for the hourly employees. . . . I would appreciate it if you would provide my office with a list of dates which you would be available to begin contract negotiations.

On December 27, 1989, Jack G. Hall, identifying himself as "Attorney for the Company," replied on Manna Pro letterhead to Taylor. Hall confirmed that Manna Pro would "function as the operating manager for . . . the new business entity," but stated that inasmuch as the bankruptcy court had not yet "approved" a "formal agreement" between FMA and Manna Pro, it would be "untimely to consider any meeting with Manna Pro."

On February 20, the Union's International representative, Y. Pete Negrete, wrote to Hall, stating his understanding that, "effective February 26, 1990, Manna Pro will be managing operations of the feed mill . . . in Denver, Colorado." Negrete's letter then reiterated the assertion that the Union

<sup>11</sup>Cf. *Wilshire Foam Products*, 282 NLRB 1137, 1149-1150 (1987). There, no objection was made to the relevancy of a "roster" of unit employees received into evidence, but, on brief, the charging party attacked its adequacy to prove unit size as of a certain critical date. Held: absent timely relevancy objection, or other timely challenge to its admissibility, the roster should be presumed to be applicable to the critical date, despite ambiguities in the foundational testimony preceding its receipt into evidence.

was “the collective bargaining agent” and otherwise reiterated the Union’s request for “a list of dates . . . to begin contract negotiations.”

On March 6, at which point Respondent had begun operating the Denver facility, Manna Pro Attorney Hall replied in writing to Negrete’s recent letter, stating materially that,

It is the position of Manna Pro Partners . . . that it should not be required to bargain with any union. The Company has reason to believe that no union has a majority support of the employees who are starting out this new fledgling business. We genuinely feel that most if not all desire to avoid the costs of unionization found in the form of dues and initiation fees. . . .

Since the new Company has just been formed it will be stabilizing its operations over the next several months. It may yet grow in the size of the work force to be needed. Many uncertainties exist as to the costs of operation, operating procedures that may be changed, the character of the marketplace and, of course, there are many problems that need solution.<sup>12</sup>

In view of all the foregoing, the Company considers your request to bargain for a collective bargaining agreement untimely and inappropriate.

## 2. Markley’s March 8 meeting with employees; related events

On March 8, General Manager Markley called a meeting at the Denver mill attended by most or all of the employees. He made a speech, apparently scripted by Manna Pro Attorney Hall, in which, after brief prefatory remarks, he read verbatim to the employees the text of Hall’s March 6 letter to the Union. After doing this, he then continued,<sup>13</sup>

Now I agree with what Hall has written. In fact I approved it before it was sent.

Then, after stating that “Whether or not you support the Grain Millers to be a bargaining agent for you is up to you folks. . . .” Markley stated

It’s my personal feeling, though, that you don’t need a Union to represent you in this Plant. I know *some* of you have indicated you feel the same way. *If a majority of you feel that way*, then the Grain Millers[’] claim that they represent a majority is not correct, and the Company should not agree to bargain with them. [Emphasis added.]<sup>14</sup>

<sup>12</sup> Respondent does not now argue, nor has it introduced evidence that might support such an argument, that it did not, upon takeover, employ a “substantial and representative complement” of workers, within the meaning of *Fall River Dyeing Corp. v. NLRB*, supra. Neither does it contend that the character of its Denver operation has materially changed from that which existed under FMA’s operation. Indeed, both its admission of complaint par. 2(a), and the stipulative colloquy quoted earlier, preclude any such contention.

<sup>13</sup> These findings are taken from the text of the speech scripted for Markley, received into evidence as G.C. Exh. 2(b).

<sup>14</sup> I observe that in these underscored passages, Markley (and the author of the scripted speech, apparently Attorney Hall) implicitly admit what Markley elsewhere acknowledged in testimony—that only “some” of the employees (in context, plainly fewer than a “majority”) had affirmatively indicated to Respondent by that point that they did not wish union representation. Accordingly, it is reasonably obvious, and I find, that when Hall claimed in his March 6 letter to the Union that “[t]he Company has reason to believe that no union has a majority support of the employees,” he was not basing that

Continuing, Markley told the employees, “You have the ball in your court[,]” and suggested that employees could “consult” with the Board’s Denver office as to their “rights.” But Markley then stated (emphasis in scripted text):

I can tell you this: you can circulate a petition informally in the plant . . . which says something like the following: “We, the undersigned, do not want to be represented by [the Union] as our collective bargaining agent.” Or, if you wish, you can each individually write to me stating the same thing. You must sign and date your letter as well as the petition.

. . . .  
. . . whether you sign such a petition or write an individual letter is up to you. It’s all voluntary on your part. There’ll be no retaliation or ill-will against anyone who doesn’t sign or write.

“Immediately” after this meeting, according to Markley, an employee named Barringer came to Markley and stated that “he did not want to be a member of a union, and did not want to be represented by a union.” Markley says he then “reiterated” to Barringer that “if he felt that way, and if he was so inclined to give me that on a piece of paper.”

## 3. Markley follows up on April 26 and soon receives petitions

It appears that, despite Markley’s suggestions in his speech on March 8, and in his direct conversation with Barringer after the speech, no antiunion “petitions” or “letters” were circulated until April 26, after Markley again pursued the matter, all as I describe next.

On March 20, the Union had filed its original charge against Respondent alleging that it was unlawfully refusing to bargain. And, apparently during a breakfast meeting on April 26, Markley was admittedly advised by Respondent’s current attorney that it “appeared that the company was going to be required to bargain with the Union.” As a consequence, Markley admittedly “sought out” three different employees, Barringer, McCune, and Record, each of whom he had come to believe were opposed to representation by the Union. Describing his conversation with Barringer (and later appearing to say that he had similar exchanges with McCune and Record), Markley reported what his attorney had said about Respondent’s being “required to bargain with the Union.” Continuing, Markley says he “expressed” to Barringer,

that I was surprised with that; that it was the first time that I understood that that was what the situation was. And he reiterated to me, “Well, I don’t want to be represented by the Grain Millers. What can we do about it?” And I replied to him that at this juncture that it’s—as far as I understood, that we had to have evidence that the employees did not want to have or be represented by the Union, and that should be done by either letters to the Board, or letters to myself, or petitions; anything that indicated, with their valid signature,

claim on any objective indications that a majority of employees did not wish to be represented by the Union.

that that's exactly how they felt. And he, I think, came back and said, "Well, I will."

I may have used the word petition. I also said that what—what I said was, "We need evidence, in writing, if these people do not want to belong to the union. Just the fact that they're saying so is not good enough because I understand we need something in writing."

In Barringer's case, at least, who worked on the night shift, Markley suggested that Barringer return any petition to him by sliding it under his office door, rather than merely placing it in Markley's "In" basket. It is not as clear what he may have instructed McCune or Record to do with any petitions they might obtain. In any event, within a short time thereafter, certain "petition"-type documents were delivered to Markley.<sup>15</sup>

### III. ANALYSES; CONCLUSIONS OF LAW

#### A. Introduction

Respondent's "in fact" defense excepted, this case presents facts and issues which are materially similar to those involved in *Bay Area Mack*, 293 NLRB 125 (1989). I take that case and the Board's direct and adopted holdings therein as my primary authority for all points discussed below except those uniquely associated with Respondent's offer of proof on the "in fact" defense.

The facts clearly show that the Union was the recognized bargaining agent for the unit employees under FMA's operation of the mill, and that when Respondent resumed operations on February 26, a majority of its unit employees were carryovers from FMA's predecessor operation. Those facts trigger a legal presumption that the Union continued to be the employees' exclusive bargaining agent, and further establish a presumptive duty on Respondent's part to recognize and, on request, to bargain with the Union. As of February 26, Respondent had before it the Union's request for meeting dates to bargain a new contract, and it then owed a duty to "respond affirmatively, not to stall or equivocate." *Id.* at 133. Respondent could not lawfully refuse that outstanding request unless the Union did not in fact then enjoy majority status or Respondent had a sufficient objective basis to support a reasonable doubt of the Union's majority support.

#### B. "Good Faith Doubt"

Respondent did not show that it had any objective grounds for reasonably doubting the Union's presumptive continuing majority support at any point before it refused the Union's outstanding bargaining request in its March 6 letter. Even taking Markley's testimony in a most generous and uncritical light, Markley admittedly never heard anywhere near a majority of the employees express a specific wish not to be rep-

<sup>15</sup> Apparently there were four such documents, tendered into evidence by Respondent as R. Exhs. 3-6. I rejected all such exhibits as irrelevant, based on what I judged was unambiguous legal authority (cited in sec. III, below) holding that any evidence of employee disenchantment with an incumbent union manifested after the employer has already refused to bargain with the union is thus "tainted," and thereby may not be relied on by the employer as grounds for continuing to refuse to bargain, much less as grounds for its original refusal to bargain. These exhibits were placed in a rejected exhibit file and are thus preserved for review.

resented by the Union prior to his March 8 speech transmitting the Company's refusal to bargain to the employees and inviting them to circulate "petitions" or "letters" manifesting antiunion sentiments. Indeed, both before March 8 and for more than 6 weeks thereafter, Markley named only a few employees who had manifested distinct sentiments against union representation to him.<sup>16</sup> Despite this, Respondent had asserted in its March 6 letter refusing to bargain, "The Company has reason to believe that no union has a majority support of the employees." In the circumstances this assertion must be seen as pure bluff, unlawfully "advanced for the purpose of gaining time in which to undermine the union."<sup>17</sup>

Neither, in all of the circumstances, could Respondent justify its earlier or ongoing refusal to bargain with the Union on the "petition" documents Markley began to receive after April 26, because those petitions may be presumed to have been tainted by Respondent's previous unfair labor practices (detailed at subsec. D, below), and therefore they did not reliably show where the employees' uncoerced sympathies might lie;<sup>18</sup> much less could they be relied on as evidence of how employees felt about the Union at the time Respondent initially refused to bargain, which all cases make clear is the proper temporal focus.

#### C. No Majority "In Fact"

The Respondent's in-fact defense, more specifically its related offer of proof in support of that defense, admittedly raises unique questions for which I judge there is no controlling precedent, and very little practical guidance in the cases. My recent review of the cases has not significantly changed my previously-expressed opinion<sup>19</sup> that the "good faith doubt-objective considerations" standard has come to overshadow the field. Indeed, most of the discussions in the cases about the possible meaning of the "in-fact" defense tend to be confined to dicta uttered in exchanges between the majority and the dissenting Members in Board decisions from the early 1970s.<sup>20</sup> Those discussions are largely hypothetical and inconclusive. And, at least since those decisions, these withdrawal-of-recognition cases have been nearly universally litigated and/or decided within the framework of the "good faith doubt-objective considerations" standard, this despite the fact that the Board and the courts still routinely speak of

<sup>16</sup> I am not counting here a perhaps larger group of employees who may have told Markley that they "like" working in the new operation, or otherwise demonstrated generally "positive" feelings about the new operation. I have considered, as well, without it affecting my ultimate judgments, the affidavit (R. Exh. 2) of Respondent's plant superintendent, George Bond, concerning his own exposure to employees voicing antiunion sentiments. Even if I were to give Bond's recorded assertions more weight than I am inclined to do, his account of what he learned directly from a few named employees about their arguable disenchantment with the Union was not enough to raise reasonable doubt about the Union's majority support in the unit.

<sup>17</sup> *Terrell Machine Co.*, 173 NLRB 1480, 1480-1481 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970), a seminal case repeatedly invoked in other authorities discussed elsewhere herein.

<sup>18</sup> *Bay Area Mack*, supra at 131:

A successor-employer's refusal to honor a proper union recognition demand will be deemed, in itself, an unlawful act which fatally taints a later antiunion petition from employees which might otherwise support a claim of good faith doubt about the union's majority status.

<sup>19</sup> See, e.g., discussion in *Wilshire Foam Products*, 282 NLRB 1137, 1150-1151 fn. 35, and cases cited.

<sup>20</sup> E.g., *Automated Business Systems*, 205 NLRB 532, 537-538 (1973); *Orion Corp.*, 210 NLRB 633-637 (1974); *Bartenders Assn. of Pocatello*, 213 NLRB 651, 651-654, 656-667 (1974); *Guerdon Industries*, 218 NLRB 658, 664 (1975).

the availability of the “in-fact” defense. This dearth of pertinent cases alone makes it difficult to envision what might be an appropriate “in-fact” showing.

It is true, as Respondent points out on brief, that in *Orion Corp.* (fn. 20, supra), the Board said (emphasis added):

An employer may lawfully refuse to bargain with a[n incumbent] union if it affirmatively establishes that, at the time of the refusal, the union no longer commanded a majority or that the employer’s refusal was predicated on a reasonably based doubt as to the continuing majority. *With respect to the former there must be affirmative proof that the majority of unit employees no longer wanted the union to represent them.*

But that case only speaks of “affirmative proof”; it does not in any way identify what *form* of proof might satisfy this latter standard. It only holds, contrary to the dissent, that the ratio of “union members” to nonmember employees in the bargaining unit is not a valid “in-fact” showing because “there is no necessary correlation between membership and the number of employees who continue to desire representation.”<sup>21</sup> Respondent cites no case—and I have not independently discovered any—in which the Board has found that an employer successfully furnished the requisite “affirmative proof” of no majority in fact. In *Bartenders Assn. of Pocatello*, dissenting Member Kennedy stated that it is an “impossible task” (213 NLRB at 656) for an employer affirmatively to make out an in-fact defense. This may well be the case.

In dealing with Respondent’s offer of proof on the in-fact defense at trial, I expressed doubts not only about the practical meaning of that defense, but whether it really retains any vitality, despite the fact that it is regularly repeated in the current cases. I now think it is for the Board, in the first instance, to decide whether those questions require a more explicit answer, and I will speculate about them no further. Even if the Board’s continuing references to the in-fact defense are not merely anachronistic or illusory,<sup>22</sup> I now judge based on both practical and policy considerations that, whatever the Board may mean when it refers to the “in-fact” defense, the Board could not contemplate that proof of such actual lack of majority could be furnished in the manner proposed by Respondent, i.e., by the employer’s calling its employees to testify in a Board hearing about their subjective union sentiments at some previous historical moment—particularly when those employees had never communicated those sentiments to the employer at the time it withheld recognition from the incumbent union for an evidently different purpose, to “gain time in which to undermine the union.”

Respondent’s proffer, if accepted, would appear to be inharmonious with prevailing law, and would lead to anomalies. For example, it is settled, as previously discussed, that

<sup>21</sup> E.g., *Orion Corp.*, supra, where the Board said (210 NLRB at 633), a showing as to employee membership in, or actual financial support of, an incumbent union is not the equivalent of establishing the number of employees who continue to desire representation by that union. There is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor bargaining do not become or remain members thereof.

See also *Bartenders Assn. of Pocatello*, supra, 213 NLRB at 652–653.

<sup>22</sup> See my comments, in part concerning Member Kennedy’s *Pocatello Bartenders* and *Guerdon Industries* dissents, at Tr. 30–32; 37–38.

an antiunion petition that arises after an employer has already unlawfully declined to recognize or bargain with an incumbent union may not be invoked as grounds for doubting the union’s majority. Seemingly, such petitions are conclusively treated by the Board as having been tainted by such unfair labor practices, or by any other types of unfair labor practices having a “meaningful impact” on employee attitudes or having some “causal relationship” to the evidence of employee disaffection with the union.<sup>23</sup> If similar reasoning were applied here, any present testimony by employees concerning how they felt about union representation as of the takeover date of February 26, or the March 6 date when Respondent expressly refused the Union’s outstanding request to bargain, could not escape the same charge of taint resulting from Respondent’s unlawful failure from the start to honor the Union’s outstanding request to bargain.

I believe that Respondent’s counsel is technically correct when he argues that claims of “taint” normally should only be considered as affecting the “weight,” not the “admissibility” of the proffered testimony or documentary evidence. But when subjective employee sentiments about union representation at a remote point in time are the subjects of the proffer, the proffer deserves special scrutiny, for it necessarily invites much collateral inquiry into an employee’s activities and beliefs at the same remote point in time, not only immeasurably lengthening litigation, but imperiling, as well, a recognized zone of employee privacy. For these reasons alone, I deem it wiser to be guided more by the Board’s own judgment that antiunion sentiments voiced by employees after an employer has committed unfair labor practices tending to create union “disaffection” among the employees are inherently unreliable as evidence that the union did not enjoy majority status prior to the commission of those unfair labor practices.

I further agree with the General Counsel that Respondent’s proffer would be hard to square with the Board’s recent holding in *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989). There, the Board declared that “There is no compelling need for an employer with doubts concerning . . . majority status . . . to test the actual extent of support for the representative” by conducting polls or other direct inquiries into employee’s sentiments,<sup>24</sup> and, therefore, that the employer’s poll violated Section 8(a)(5) and (1), as did the employer’s withdrawal of recognition based on the poll’s results.<sup>25</sup> Here, Respondent’s counsel specifically represented as part of his offer of proof that he had personally spoken with each of his proffered employee witnesses<sup>26</sup> and could thus conscientiously represent what they would say about their union sympathies at the point Respondent withdrew recognition. Although I will not pursue it as an admission of unlawful conduct, it is apparent that counsel conducted some form of poll before coming to trial. And, even if those polls were presumed to have been done in an otherwise “noncoercive” manner, they would seemingly be treated by the *Texas Petrochemicals* Board as unrelated to any “com-

<sup>23</sup> E.g., *Wilshire Foam Products*, supra, 282 NLRB at 1138 fn. 3, and cases cited.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Tr. 32:2–10.

elling need” of this Respondent, and therefore inherently coercive.

And even if, as I do not assume, Respondent’s proffer of employee testimony was not based on any polling, but was based on nothing more than an educated guess (or even wishful thinking) about how employees would testify, if called, it is apparent that my allowing such testimony would have turned this Board forum itself into such a “polling” venue, something which I doubt that the Board wishes to countenance. In this regard, Respondent’s proffer would appear to collide with the concern expressed in a slightly different context by the majority in *Orion Corp.*, supra. There, addressing Member Kennedy’s dissent, the majority stated (210 NLRB at 634, emphasis added):

[Member Kennedy’s] rationale would permit an employer at its whim to withdraw recognition *in the hope that subsequent litigation would reveal* what would be grounds for reasonable doubt had the employer based its withdrawal on that evidence. This is contrary to the well-established principle that if an employer does not establish that it had a reasonable doubt when it ceased bargaining, it can defend . . . only by showing actual loss of majority as of the date of withdrawal of recognition.

Seemingly, the *Orion* majority contemplated that an employer could neither make out a “good faith doubt” nor an “actual loss” showing by relying on the fruits of “subsequent litigation,” which is precisely what could result if Respondent had been allowed to make good on its proffer of employee testimony.

Accordingly, on reconsideration, I adhere to my trial ruling rejecting Respondent’s proffer of employee testimony in support of an in-fact defense and I find that Respondent has violated the Act substantially as alleged.

#### D. Conclusions as to Specific Violations

I now identify more specifically the violations I find Respondent has committed:

1. When, during the interview process preceding Respondent’s takeover, Markley told prospective employees that they would not be represented by the Union in the new operation, Respondent violated Section 8(a)(1) of the Act. Id. slip op. at 2, citing *Kessel Food Markets*, 287 NLRB 426, 428–429 (1987).<sup>27</sup>

2. When, on March 6, Respondent refused the Union’s request to meet and bargain for a new contract, under circumstances where Respondent then had no good-faith doubt based on objective considerations that a majority of its em-

ployees did not wish to be represented by the Union, Respondent violated Section 8(a)(5) and (1) of the Act. Id. at 426 and 439 and authorities cited.

3. When, during the March 8 speech to employees, Markley communicated to assembled employees its unlawful refusal to recognize or bargain with the Union, Respondent violated Section 8(a)(1). Id. JD at section III,B,2.

4. When, during and after his March 8 speech Pinto solicited employees generally, and employee Barringer individually, to prepare antiunion petitions or letters, Respondent violated Section 8(a)(1). Id. JD at section III,B,3, and cases cited.<sup>28</sup>

5. When, on April 26, Markley “sought out” three employees and again solicited them to furnish Respondent with petitions and letters evidencing disaffection for the Union, Respondent again violated Section 8(a)(1). Ibid.

On these findings of fact and foregoing reasoning, and relying principally on the remedial order entered in *Bay Area Mack*, supra, I issue the following recommended<sup>29</sup>

#### ORDER

The Respondent, Manna Pro Partners, L.P., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling job applicants that the Union, American Federation of Grain Millers, Local No. 155, will not represent its employees in the stipulated bargaining unit.

(b) Refusing to recognize or bargain collectively in good faith with the Union as the exclusive collective-bargaining agency for all its employees working in that bargaining unit.

(c) Refusing to notify the Union and, at its request, to bargain collectively with it before taking actions to change the wages, hours of work, or other terms and conditions of employment in the bargaining unit from those which were initially established by Respondent as starting terms and conditions of employment as of February 26, 1990.

(d) Soliciting employees to sign or obtain other employees’ signatures on antiunion petitions.

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

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

(a) Confer recognition on the Union as the exclusive collective-bargaining agency for its employees working in the stipulated bargaining unit.

(b) Retroactive to February 26, 1990, bargain collectively in good faith with the Union with respect to the wages, hours of work, and other terms or conditions of employment of its unit employees.

(c) On the Union’s demand, rescind any changes implemented since February 26, 1990, affecting the unit employees’ wages, hours, or other terms and conditions of employment, and make whole employees for any losses they may have incurred because of any unlawful unilateral changes.

<sup>27</sup>The complaint did not allege Markley’s admitted statements in this regard as a violation of the Act, but there is no dispute in light of Markley’s admissions concerning the relevant facts, and I therefore find that Respondent was not prejudiced by the absence of a corresponding count in the complaint. See, e.g., *Quality C.A.T.V.*, 278 NLRB 1282 fn. 4 (1986), where the Board stated: It is well established that a “variance between complaint and findings will not defeat a Board determination when the issue upon which the findings were based was fully litigated.” *Rea Trucking Co. v. NLRB*, 439 F.2d 1065, 1066 (9th Cir. 1971). Indeed, the courts have gone further and held that “a material issue which has been fairly tried by the parties should be decided by the Board regardless of whether it has been specifically pleaded.” *American Boiler Mfrs. Assn. v. NLRB*, 366 F.2d 815, 821 (8th Cir. 1966). Here any variance between the complaint and the proof was not prejudicial because it was fully litigated.

<sup>28</sup>See also *Bemington Iron Works*, supra, 267 NLRB at 1286: “It is a settled principle that the Act proscribes an employer or its agents from soliciting employee support for an antiunion petition.”

<sup>29</sup>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.

(d) Post at its Denver, Colorado feed mill facility copies of the attached notice marked "Appendix."<sup>30</sup> Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized

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<sup>30</sup>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."

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.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.