

Charlotte Amphitheater Corporation d/b/a Blockbuster Pavilion and International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 322. Cases 11-CA-14684, 11-CA-14898, and 11-CA-14996

August 25, 2000

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On June 27, 1994, the National Labor Relations Board issued a Decision and Order¹ in this proceeding finding that the Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The Respondent's violations, which occurred during a union organizing campaign,² included informing employees that they were denied work opportunities because they engaged in union activities; threatening employees with discharge if they engage in union activity; threatening to burn its facility before allowing the Union to represent employees; interrogating employees concerning their union sentiments and the union sentiments of other employees; threatening not to give work to employees who promote the Union; denying employees work opportunities because they join or support the Union; and refusing to consider former employees for employment in order to undermine the strength and majority standing of the Union. Because of the severity of the unfair labor practices, the Board found that a bargaining order was appropriate under the test set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement. In an opinion issued on April 30, 1996,³ the court enforced the Board's unfair labor practice findings, commenting that "[w]e do not question that the Company's unfair labor practices were numerous and serious,"⁴ but the court remanded the case to the Board solely for consideration of whether other traditional remedies would be adequate to erase the effects of the unfair labor practices and for consideration of evidence bearing on the propriety of the bargaining order in light of changed circumstances.

On July 30, 1996, the Board advised the parties that it had decided to accept the court's remand and invited statements of position. Thereafter, the Union filed a statement of position, and the Respondent filed a statement of position with an affidavit in support of its con-

tentions with respect to changed circumstances. On February 4, 1997, the Board issued an order reopening record and remanding proceeding for further hearing before an administrative law judge to allow the parties to present relevant evidence in light of the court's opinion.

On September 25, 1997, Administrative Law Judge John H. West issued the attached supplemental decision recommending that the *Gissel* bargaining order be affirmed.

The Respondent filed exceptions, a supporting brief, and a motion to reopen the record.⁵

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

The Board has considered its original decision, the judge's supplemental decision, and the record in light of the court's remand, which the Board accepted as the law of the case,⁶ and the parties' statements of position, exceptions, and brief, and has decided to affirm the judge's rulings, findings,⁷ and conclusions only to the extent consistent with this Decision and Order. We reverse the judge's recommended Order, delete the bargaining order from the original Decision and Order in this proceeding, and substitute the attached Order for that of the judge.

Contrary to the judge, we find that, in light of the substantial passage of time since the *Gissel* bargaining order was originally issued in this case on June 27, 1994, a bargaining order likely would be unenforceable. The Board has recognized that an excessively long delay of proceedings at the Board may render a bargaining order unenforceable.⁸ Here, approximately 6 years have

⁵ In light of our decision reversing the judge's recommendation to affirm the *Gissel* bargaining order, the Respondent's motion to reopen the record to admit newly available evidence relating to the reinstatement of employees is denied as moot.

⁶ Although we have accepted the court's remand as the law of the case here, we note that the Board traditionally assesses the validity of a bargaining order based on an evaluation of the situation as of the time the unfair labor practices were committed. See, e.g., *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990).

⁷ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

⁸ See *Regal Recycling, Inc.*, 329 NLRB 355 (1999) (the Board reversed a *Gissel* bargaining order and directed a second election based on the "excessively long delay" of over 5 years since the administrative law judge recommended the issuance of a bargaining order). See also *Wallace International de Puerto Rico*, 328 NLRB 29 (1999) (the Board declined to issue a *Gissel* bargaining order and instead directed a second election because the unjustified delay of the case at the Board for almost 4 years had likely rendered the recommended bargaining order unenforceable).

¹ 314 NLRB 129 (1994).

² The Union twice filed petitions with the Board for a representation election. The first petition, which was filed on August 28, 1991, was withdrawn on October 4, 1991 (Case 11-RC-5796); the second petition, which was filed on October 16, 1991, is pending. (Case 11-RC-5813.)

³ *Blockbuster Pavilion v. NLRB*, 82 F.3d 1074 (D.C. Cir. 1996).

⁴ Id. at 1080.

passed since the *Gissel* bargaining order was issued. Further litigation and delay over the propriety of the bargaining order at issue would not serve the interests of the employees.⁹ An election was never held in this case. But as we noted above, a representation petition, filed on October 16, 1991, is pending.¹⁰

Although we reverse the judge's recommendation in his supplemental decision to affirm the *Gissel* bargaining order, we find that several special remedies are necessary to dissipate as much as possible any lingering effects of the Respondent's "numerous and serious"¹¹ unfair labor practices, and to ensure that, if the pending representation petition results in an election being held, the election can occur in an environment free of these effects. The delay in this case, although unfortunate, was neither the fault of the Union nor of the employees who were subjected to the Respondent's unfair labor practices. Further, the special remedies described below will afford the Union "an opportunity to participate in [the] restoration of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion."¹²

In considering whether to provide special remedies, we note that the Board has broad discretion to fashion "just" remedies to fit the circumstances of each case it confronts.¹³ Further, in its remand instructions, the court specifically instructed the Board to explain why "other remedies [besides the bargaining order] are not adequate."¹⁴

Here, while we have found that a *Gissel* bargaining order likely would be unenforceable in this case, we do find the following special remedies are essential to ensuring that employees may freely exercise their Section 7 rights. First, we shall order the Respondent to supply the Union, on its request made within 1 year of this Decision and Order, the names and addresses of its current unit employees.¹⁵ We do not agree with our dissenting col-

league's contention that this remedy "goes too far" because it provides rights beyond those afforded by the names and addresses rule set forth in *Excelsior Underwear*, 156 NLRB 1236 (1966). The latter rule, which is not designed to remedy unfair labor practices, only applies at the time that an election has been agreed to or ordered. NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11312.1 (employer must file list of the names and addresses of eligible voters "within 7 days after the approval of the election agreement or 7 days after the Regional Director or the Board has directed an election. . ."). Our remedy is not so limited for the quite practical reason that it is aimed at restoring the conditions that are a necessary prelude to a free and fair election among the Respondent's employees. The employees' prior organizational efforts were aborted by the Respondent's coercive tactics calculated to make employees afraid to associate themselves with the Union. If there is to be a free and fair election in the future, the Union must mount a new organizing campaign among the current employees, who, based on their employer's past conduct, would have reason to fear discussing unionization in the workplace. Our names and addresses remedy "will enable the Union to contact all employees outside the [workplace] and to present its message in an atmosphere relatively free of restraint and coercion." *Loray Corp.*, 184 NLRB 557, 559 (1970). In this way, our remedy removes obstacles to free choice that foreseeably result from the Respondent's violations and affords employees a full opportunity to exercise their Section 7 rights.

Unlike our colleague, we do not regard our names and addresses remedy as affording the Union an unwarranted advantage in organizing; our remedy rather attempts to level a playing field that has been tilted against the employees' organizational rights by the Respondent's numerous and serious unfair labor practices. See *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540-541 (5th Cir. 1969) (if the names and addresses remedy makes organizing easier, that result is appropriate where the employer's unfair labor practices have obstructed organizing and the remedy serves to neutralize those unfair labor practices).¹⁶

This remedy is in addition to the Union's right to have access to a list of voters and their addresses under *Excelsior Underwear*, supra, in the event of a representation election.

¹⁶ To the extent that *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886, 889 (6th Cir. 1969), relied on by our colleague, is inconsistent with our decision today, as well as the more recent Board and court decisions, cited above, we respectfully disagree with that court's decision. We find that the property and privacy interests invoked by that court and our colleague are outweighed by the need to redress a serious injury to the employees' organizational rights by ensuring that, in the event of a future organizing campaign, employees will be assured of a means of communication with the union that is "insulated from discriminatory reprisal" (*J. P. Stevens & Co. v. NLRB*, supra, 417 F.2d at 541).

⁹ The employees who sought representation are stagehands, many of whom work for a variety of employers on a seasonal basis as the need arises.

¹⁰ See fn. 2.

¹¹ *Blockbuster Pavilion v. NLRB*, supra at 1080.

¹² *Regal Recycling*, supra, (quoting *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1054 (3d Cir. 1980)).

¹³ *Maramount Corp.*, 317 NLRB 1035, 1037 (1995).

¹⁴ *Blockbuster Pavilion*, supra, 82 F.3d at 1078.

¹⁵ The Board has previously ordered this remedy in cases where it found that remedial measures in addition to the traditional remedies for unfair labor practices were appropriate. See, e.g., *Audubon Regional Medical Center*, 331 NLRB No. 42, slip op. at 5-6 (2000); *Regal Recycling, Inc.*, supra; *Comcast Cablevision of Philadelphia*, 328 NLRB 487 (1999); *Monfort of Colorado*, 298 NLRB 73, 86 (1990), enfd. in relevant part 965 F.2d 1538 (10th Cir. 1992); *Haddon House Food Products*, 242 NLRB 1057, 1060 (1979), enfd. in relevant part sub nom., *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1981), cert. denied 454 U.S. 827 (1981).

Second, we shall order the Respondent, in addition to posting copies of the attached notice marked "Appendix" at its Charlotte, North Carolina facility, to mail copies of the notice to all its present employees and to all employees on its payroll since August 24, 1991, when the Respondent began its unlawful conduct. As stated by our colleague concurring with us on this point, this remedy is particularly appropriate to the work situation of the unit employees, who work on a seasonal basis for a variety of employers. We note, in addition, that "[t]he mailing of the notice will also insure that employees who are sick, on vacation, or otherwise absent when the notice is read will have an opportunity to be adequately informed of the Respondent's intention to refrain from engaging in unfair labor practices." *Loray Corp.*, supra, 184 NLRB at 558.

Third, we shall order the Respondent to convene during working time all unit employees at its Charlotte, North Carolina facility, and have a responsible management official of the Respondent read the notice to employees, or at the Respondent's option, permit a Board agent, in the presence of a management official of the Respondent, to read the notice to the employees. We note that "[t]he public reading of a notice is an 'effective but moderate way to let in a warming wind of information and, more important, reassurance.'"¹⁷

Fourth, we shall order the Respondent, on the Union's request, to grant the Union and its representatives reasonable access to its bulletin boards and all places where notices to employees are customarily kept. This remedy will provide the employees "with reassurance that they can learn about the benefits of union representation, and can enlist the aid of union representatives, if they desire to do so, without fear of" being subjected to severe unfair labor practices.¹⁸ We do not agree with our dissenting colleague that the numerous and serious unfair labor practices committed by the Respondent did not affect the employees' ability to freely communicate with the Union. As previously discussed, the employees' prior organizational efforts were aborted by the Respondent's coercive tactics calculated to make employees afraid to

¹⁷ *United States Service Industries*, 319 NLRB 231, 232 (1995), enf. 107 F.3d 923 (D.C. Cir. 1997) (quoting in part *J. P. Stevens & Co. v. NLRB*, 417 F.2d at 540. Our dissenting colleague argues that even the option of having a Board agent read the notice in the presence of management officials is unduly demeaning to those management officials. We disagree. As a consequence of its having been found to have committed numerous and serious unfair labor practices, the Respondent is now subject to a court-enforced remedial order that imposes on its management officials the responsibility to ensure that the order's terms are honored in the workplace. Where, as here, the violations to be remedied are numerous and serious, we think that the presence of a responsible management official when a government official informs employees of the terms of that remedial order is not demeaning, but only a minimal acknowledgment of the obligations that have been imposed by law. The employees are entitled to at least that much assurance that their organizational rights will be respected in the future.

¹⁸ *United States Service Industries*, supra, 319 NLRB at 232.

associate themselves with the Union, and if there is to be a free and fair election in the future, the Union must mount a new organizing campaign among the current employees. The limited bulletin board access remedy that we order is well designed to reduce the obstacles to free union-employee communication that were created by the Respondent's prior coercive conduct. *United States Service Industries*, supra, 319 NLRB at 232; *Three Sisters Sportswear Co.*, 312 NLRB 853, 880 (1993), enf. mem. 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996). The limited bulletin board access remedy also serves to offset the Respondent's numerous and serious unfair labor practices by reassuring the employees "that the Union has a legitimate role to play in their decision whether to seek union representation."¹⁹ The bulletin board access remedy discussed above shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a free and fair election, whichever comes first.²⁰

We emphasize that our decision is limited to the specific factual circumstances presented in this case and, specifically, the narrow scope of the court's remand. Accordingly, we shall delete the *Gissel* bargaining order from our original Order, and substitute the following Order for the recommended order contained in the judge's supplemental decision and order.²¹

ORDER

The National Labor Relations Board orders that paragraph 2(b) be deleted from the Board's Decision and Order reported at 314 NLRB 129 (1994).

IT IS FURTHER ORDERED that the Respondent, Charlotte Amphitheater Corporation d/b/a Blockbuster Pavilion, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request made within 1 year of the date of this Supplemental Decision and Order, furnish the Union with the full names and addresses of its current unit employees.

(b) Immediately on request, for a period of 2 years from the date on which the notice is posted or until the Regional Director has issued an appropriate certification following a fair and full election, whichever comes first, grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where

¹⁹ *Avondale Industries*, 329 NLRB 1064, 1068 fn. 15 (1999).

²⁰ *Avondale Industries*, supra, 329 NLRB at 1068; *United States Service Industries*, supra, 319 NLRB at 232; *Three Sisters Sportswear Co.*, supra, 312 NLRB at 880.

²¹ It is not necessary to reaffirm our prior Order of June 27, 1994, because, as noted above, the court of appeals, except for the bargaining order provision, enforced it in all respects.

notices are customarily posted in its Charlotte, North Carolina facility.

(c) Within 14 days after service by the Region, post at its Charlotte, North Carolina facility copies of the attached notice marked “Appendix.”²² Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Mail copies of the notice to all its present employees and to all employees on the Respondent’s payroll since August 24, 1991, when the Respondent began its unlawful conduct.

(e) Convene all unit employees during working time at the Respondent’s Charlotte, North Carolina facility, and have a responsible management official of the Respondent read the notice to the employees or at the Respondent’s option, permit a Board agent, in the presence of a responsible management official of the Respondent, to read the notice to the employees. The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice by an official of the Respondent.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BRAME, concurring in part and dissenting in part.

I agree with my colleagues that the significant length of time—approximately 6 years—that has passed since the *Gissel* bargaining order was issued in this case warrants reversing the judge’s recommendation, in his supplemental decision, to affirm the issuance of the bargaining order.¹ I emphasize, too, that, as the court stated in its remand instructions, a bargaining order is an “extraordinary remedy,”² and “in order to ensure that a bargaining order is issued only in those exceptional circumstances that warrant it [the Board must] adequately ex-

²² 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.”

¹ My colleagues observe that the Board has traditionally assessed the validity of a bargaining order based on an evaluation of the situation as of the time the unfair labor practices were committed. Although this is an accurate statement of the Board’s traditional approach toward bargaining order cases, I find it unnecessary to pass here on its soundness.

² *Blockbuster Pavilion v. NLRB*, 82 F.3d 1074, 1077 (D.C. Cir. 1996).

plain its need in each case, taking into consideration the employees’ [S]ection 7 right to freedom of choice.”³

However, based on an independent analysis of whether special remedies are warranted here, I can only agree that one of the special remedies my colleagues impose on the Respondent is justified. Although the Board has “broad discretion”⁴ in fashioning remedies, they must be remedial and not punitive.⁵ Thus, “a proposed remedy [must] be tailored to the unfair labor practice it is intended to redress,” and “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress.”⁶

Specifically, I agree with my colleagues that the Respondent should be required to mail copies of the notice to all of its present employees and to all employees on the its payroll since August 24, 1991, when the Respondent began its unlawful conduct. The unit employees are stagehands who work on a seasonal basis for a variety of employers. Therefore, mailing the notice to these employees who—given the seasonal and generally unpredictable nature of their work may not even return to work at the Respondent’s facility—is an appropriate remedy.

The same cannot be said for the other special remedies my colleagues deem necessary to erase any lingering effects of the Respondent’s unfair labor practices committed approximately 6 years ago. Consistent with the court’s remand instruction to explain why traditional remedies would be inadequate in this case, special remedies are necessary only if it can be demonstrated that the Board’s traditional remedies will not adequately eliminate the effects of unfair labor practices and ensure a fair election. There is no such showing here. First, the special remedy requiring the Respondent to supply the Union, on request made within 1 year of the date of this Supplemental Decision and Order, with the full names and addresses of its current unit employees goes too far. In light of the fact that an election petition is pending in this case, under *Excelsior Underwear*, 156 NLRB 1236 (1966), the Respondent will be required to supply the Union with an eligibility list containing names and addresses in the event of a representation election.⁷

³ Id. at 1080.

⁴ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984).

⁵ See, e.g., *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 236 (1938).

⁶ *Sure-Tan, Inc. v. NLRB*, supra at 900 (quoting in part *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938)).

⁷ The NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11312.1 states, in pertinent part:

On approval of an election agreement . . . or on issuance of a Direction of Election . . . the employer should be requested to prepare a list of the full names and addresses of eligible voters as of the last payroll period ending before the approval of the agreement or the Direction of Election. The employer must file the eligibility list with the Regional Director within 7 days after the approval of the election agreement or 7 days after the Regional Director or the Board has directed an election.

Second, the special remedy requiring the Respondent to convene all its unit employees during working time and have a responsible management official or a Board agent read the notice to these employees is also unnecessary. The record reflects that none of the management-level employees responsible for perpetrating the unfair labor practices continue to work for the Respondent. So, to the extent this extraordinary remedy serves to set a new “corporate tone” by having a management official present while the notice is read, we have no evidence that a new “corporate tone” does not already exist at the Respondent’s facility. Such a remedy is “unnecessarily embarrassing and humiliating”⁸ to an employer regard-

If there is an issue as to an unusual eligibility date, i.e., the use of a date other than the payroll period ending before the approval of the agreement or the Direction of the Election, because of a current labor dispute, seasonality of operations, the pending of the petition because of unfair labor practices, etc., the Board agent making the election arrangements . . . or conducting the hearing . . . should obtain the information necessary for a resolution of this issue [citations omitted].

The majority asserts that this special remedy provides information before it becomes available pursuant to the *Excelsior* list. To the extent that, as my colleagues’ argue, there is an interim period before the provision of the *Excelsior* list, I find that this special remedy is unwarranted. Contrary to my colleagues, unless the record establishes that the Union possessed such a list prior to the unfair labor practices, this remedy, instead of helping to restore the status quo, alters the status quo ante to favor the Union. By requiring the Respondent to provide the Union with the names and addresses of employees before such information would be provided under *Excelsior*, the Union is now entitled to information that “would normally have been unavailable at the outset of the organizing campaign,” thus giving the Union “a substantially greater right than it would have had originally.” *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886, 889 (6th Cir. 1969) (in light of the employer’s severe unfair labor practices, the court approved a notice-mailing remedy and access remedies, but refused to enforce a names and addresses remedy). Although this special remedy seemingly has “but one principal objective, that is, to assist the Union in its organizing campaign to unionize the employees[,] [s]uch is not an authorized function of the Board within the policy and intentment of the Act.” *J. P. Stevens & Co. v. NLRB*, 406 F.2d 1017, 1029 (4th Cir. 1968) (Judge Boreman, concurring in part and dissenting in part). Additionally, requiring the Respondent to provide the Union with the names and addresses of employees infringes on the Respondent’s property rights and right to privacy as well as employees’ “right to privacy and freedom from harassment at home.” *Decaturville Sportswear Co.*, supra, 406 F.2d at 890. Employees may find themselves exposed, as a result of the imposition of this special remedy, to the organizing efforts of “trained, professional organizers to contact them in the privacy of their homes, to annoy and harass them by repeated telephone calls, personal letters, and in other conceivable ways during a heated campaign for union support.” *J. P. Stevens & Co. v. NLRB*, supra, 406 F.2d at 1030 (Judge Boreman, concurring in part and dissenting in part). Furthermore, because the Respondent’s unfair labor practices did not interfere with the Union’s ability to communicate with employees, my colleagues have not sufficiently justified their imposition of this special remedy on the Respondent.

⁸ *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966). Cf. *Conair Corp. v. NLRB*, 721 F.2d 1355, 1401 (D.C. Cir. 1983), cert. denied 467 U.S. 1241 (1984), in which then-Judge Ginsburg, in dissenting from the majority’s decision to enforce a Board remedy requiring a named individual to read the notice, stated that “[a] forced, public confession of sins, even by an owner-president who has acted outrageously, is a humiliation this court once termed incompati-

less of the fact that a Board agent will read the notice. And, in any event, the traditional posting of the notice requirement, in conjunction with the special mailing requirement discussed above, will effectively inform employees about the Respondent’s unfair labor practices.

Finally, I find that the special remedy requiring the Respondent immediately on request to grant the Union and its representatives reasonable access to its bulletin boards and all places where notices to employees are kept is unsupported. “In granting access as a remedial measure . . . a burden lies upon the Board to substantiate its conclusion that access is necessary to offset the consequences of unlawful employer conduct.”⁹ And, “the critical inquiry is whether the employer conduct is of such a nature that access is needed to offset harmful effects that have been produced by that conduct. If union access is needed to dissipate those effects, access may be granted even though the union has alternative means of communicating with employees.”¹⁰

Although the Respondent’s unfair labor practices were “numerous and serious,”¹¹ I do not believe that my colleagues have adequately demonstrated that the extraordinary 2-year remedy granting the Union and its representatives reasonable access to the Respondent’s bulletin boards and all places where notices to employees are customarily posted is necessary in this case. Beyond summarizing the coercive effects of the Respondent’s unfair labor practices, my colleagues have not shown how the allegedly “limited” access remedy they impose will ameliorate these unfair labor practices, none of which specifically obstructed the Union’s access to employees.

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.

ble with the democratic principles of the dignity of man.” (Judge Ginsburg, dissenting in part) (internal quotation marks and citations omitted). The humiliating effects of this special remedy will not be dissipated merely because a Board agent may read the notice in the presence of a management official who must stand silently by as employees listen to the words of a notice that has already been posted in a conspicuous place for their examination and mailed to them.

⁹ *Steelworkers v. NLRB*, 646 F.2d 616, 639 (D.C. Cir. 1981).

¹⁰ *Id.* at 638.

¹¹ *Blockbuster Pavilion v. NLRB*, supra, 82 F.3d at 1080.

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 supply the Union, on request made within 1 year of the date of this Supplemental Decision and Order, the full names and addresses of current unit employees.

WE WILL, immediately on request, for a period of 2 years from the date on which the notice is posted or until the Regional Director has issued an appropriate certification following a fair and full election, whichever comes first, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted at our facility in Charlotte, North Carolina.

WE WILL mail copies of this notice to all our present employees and to all employees on our payroll since August 24, 1991.

WE WILL convene during working time all unit employees at our Charlotte, North Carolina facility, and have a responsible management official read the notice to the employees or, at our option, permit a Board agent, in the presence of a responsible management official, to read this notice to the employees. The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice by an official of the company.

CHARLOTTE AMPHITHEATER CORPORATION
D/B/A BLOCKBUSTER PAVILION

Jasper Brown, Esq., for the General Counsel.
Cheri A. Masdea and Ralph J. Zatkis, Esqs. (Fisher & Phillips),
of New Orleans, Louisiana, for the Respondent.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge. During the period October 26 to December 3, 1992, Administrative Law Judge Donald Holley held a hearing in this matter. That judge issued a decision on April 28, 1993, finding that Charlotte Amphitheater Corporation d/b/a Blockbuster Pavilion (Respondent), which owns and operates an outdoor entertainment pavilion in Charlotte, North Carolina, (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by informing employees that they were denied work opportunities because they engaged in union activities, by threatening employees with discharge if they engaged in union activity, by threatening to burn the facility before allowing the Union to represent its employees, by interrogating employees concerning their union sentiments and the union sentiments of other employees, and by threatening not to give work to employees who promoted the Union, (2) violated Section 8(a)(3) and (1) of the Act by refusing to call a named employee to work a show on September 12, 1991, by refusing a named employee work after July 16, 1991,

and by refusing to consider for employment during the 1992 season 20 named employees, and (3) violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 322 (the Union) as the exclusive representative of its employees in an appropriate unit while engaging in serious and egregious unfair labor practices. The judge ordered, among other things, a make-whole remedy for the loss of earnings the named employees suffered and he ordered Respondent at the beginning of the 1993 season to offer immediate employment as stagehands to the 20 named employees.

As here pertinent, Respondent filed exceptions and a motion to reopen the record. The National Labor Relations Board (the Board) in *Blockbuster Pavilion*, 314 NLRB 129 (1994),¹ affirmed the judge's rulings, findings, and conclusions and adopted his recommended Order, except with respect to the 1993 season in that the Board left to the compliance stage the determination of the manner in which the Respondent should make whole and offer employment to the 20 former employees it failed to consider for reemployment in 1992. The Board ordered that Respondent make whole 22 employees for the loss of earnings they suffered as a result of the discrimination against them, with interest, and offer immediate employment as stagehands to the 20 named employees. As noted above, Respondent moved to reopen the record. It wanted to introduce evidence that in 1993 it placed on its "active work roster approximately 13 of the 20 Union adherents who were identified as bona fide s'complainants" in this case and that "over sixty percent of the alleged discriminatees' are now working for the Respondent." The Board denied the motion pointing out that it continues to adhere to the view that the determination whether a *Gissel*² bargaining order is warranted in a given case should be made on an evaluation of the circumstances at the time the unfair labor practices were committed. The Board went on to indicate that even assuming the accuracy and relevance of the proffer, there was no reason for vacating the bargaining order since the violations committed by Respondent were numerous, serious, and affected a large number of employees and even if Respondent has placed a number of the discriminatees on its 1993 work roster, that will not necessarily reassure all the employees exposed to Respondent's strong expressions of anti-union animus that they would not be at risk if they supported the Union in any renewed organizing campaign. The Board went on to point out that the proffer, without making the employees who were discriminated against whole, is hardly an assurance to those employees that they can engage in protected activity without suffering adverse consequences. Finally the Board found that even assuming circumstances as represented in the Respondent's proffer, in the words of *Gissel*,³ "the possibility of erasing the effects of past practices and of assuring a fair election . . . by the use of traditional remedies . . . is slight" and the "employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order."

In *Blockbuster Pavilion v. NLRB*, 82 F.3d 1074, 1079-1080 (D.C. Cir. 1996), the court, in its decision of April 30, 1996, upheld the Board's unfair labor practice findings but remanded

¹ The decision was issued on June 27, 1994.

² *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

³ *Id.* at 614-615.

the remedy part of the Board's decision because, according to the court, the Board failed to provide the requisite explanation for its bargaining order. The court's decision contains the following:

Circumstances . . . may change during the interval between the occurrence of the employer's unfair labor practices and the Board's disposition of the case. There is, therefore, the obvious danger that a bargaining order that is intended to vindicate the rights of past employees will infringe upon the rights of the current ones to decide whether they wish to be represented by a union. Therefore, we have repeatedly instructed the Board to determine the appropriateness of a *Gissel* bargaining order in light of the circumstances existing at the time it is entered. [Citations omitted.]

Moreover, we have insisted, and we continue to insist, that "[b]efore we will enforce a category II order, we must find that substantial evidence supports three findings,' among them the finding that

the possibility of erasing the effects of past practices and of insuring a fair rerun election by the use of traditional remedies is slight and that employee sentiment once expressed in favor of the Union would be better protected by a bargaining order.

Avecor, [*Inc. v. N.L.R.B.*] 931 F.2d [924] at 934 [(D.C. Cir. 1991)] (quoting *St. Francis Fed'n of Nurses & Health Professionals v. NLRB*, 729 F.2d 844, 854-55 (D.C. Cir. 1984)). We have also emphasized that that finding must be supported by a reasoned explanation that will enable the reviewing court to determine from the Board's opinion (1) that it gave due consideration to the employees' section 7 rights, which are, after all, one of the fundamental purposes of the Act, (2) why it concluded that other purposes must override the rights of employees to choose their bargaining representatives and (3) why other remedies, less destructive of employees' rights, are not adequate. *Peoples Gas System*, 629 F.2d [35] at 46 [(D.C. Cir. 1980)].

We have repeatedly called the Board to task for its intransigent refusal to accept and act upon our instructions that the appropriateness of a bargaining order must be assessed as of the time it is issued. See, e.g. *Avecor*, 931 F.2d at 936-937; *Pedro's, Inc.*, 652 F.2d [1005] at 1012 (D.C. Cir. 1981)]

We do not question that the Company's unfair labor practices were numerous and serious; nor do we doubt that the mere reinstatement of the discriminatees might be insufficient to erase the effects of Blockbuster's anti-Union actions. The Board, however, has given no indication that it has taken the employees' section 7 rights into consideration. Nor has it explained why the requirement that the Company reinstate the unlawfully discharged employees with back pay, when combined with the other traditional remedies at its disposal, are not enough to mitigate the effects of Blockbuster's actions.

III. CONCLUSION

We affirm the Board's substantive conclusions and enforce the Board's remedial order insofar as it requires the Company to cease and desist all unfair labor practices, to post notices, and to make whole and offer employment to the individuals named in the Decision and Order. Nevertheless, in order to ensure that a bargaining order is issued only in those *exceptional* cases that warrant it, we *insist that the Board adequately explain its need in each case, taking into consideration the employees' section 7 right to freedom of choice.* The Board having failed in this obligation, we remand the case to the Board to consider whether the use of its traditional remedies would be adequate to ensure a fair election. Furthermore, if the Board is still inclined to issue a bargaining order, the order must be justified at the time of its issuance. *The Board is instructed to allow Blockbuster to proffer any evidence that the passage of time or a change in circumstances might mitigate the need for one.* [Emphasis added.]

By Order dated February 4, 1997, the Board indicated that it had accepted the court's remand and that the Charging Party and the Respondent had filed position statements with the Board. The Board ordered the record in this proceeding to be reopened and directed that a further hearing be held for the purpose of taking evidence in accord with the court's remand.

The remand hearing was held in Charlotte on May 15 and 16, 1997. On the second day the hearing was continued to allow counsel for the General Counsel to seek subpoena enforcement before a U.S. District Court regarding a subpoena Respondent had served on its former stage manager, Calvin Hunter. Counsel for the General Counsel filed a motion to close hearing, dated May 29, 1997, indicating that the parties agreed that the record should be closed and a date set for the receipt of briefs; and that upon being instructed to file a motion to close the hearing, counsel for Respondent advised that he had no objection to the filing of the motion. After the period for filing a reply to the motion had passed, an order was issued on June 20, 1997, which order indicates that no objections had been received, and grants the motion. On the entire record thus made, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent on July 25, 1997, I make the following.

FINDINGS OF FACT

Respondent called two witnesses on the first day of the further hearing. Robert Klaus testified that he works for Pavilion Partners; that at the time of the remand hearing here he had two titles, viz, executive director at Walnut Creek Amphitheater in Raleigh, North Carolina, and regional vice president for Pace Facilities Group in the southeastern United States; that when the Blockbuster Pavilion opened in 1991 he was not employed by it in Charlotte at the time; that he did know that in 1991 Blockbuster Pavilion in Charlotte was owned by Charlotte Amphitheater Corporation which was a subsidiary of Blockbuster Entertainment; that Charlotte Amphitheater Corporation operated Blockbuster Pavilion through the fall of 1993; that in November 1993 Pavilion Partners began operating the facility and its ownership group are subsidiaries of Pace Entertainment, Sony Music, and Viacom Entertainment; that ownership of the Blockbuster Pavilion changed in April 1994 when the facility was acquired by Pavilion Partners; that the managing partner of

the Pavilion Partners is the Pace Facilities group and as manager at the facility he reported to the Pace Facilities Group; that Pace Facilities Group managed Blockbuster Pavilion beginning in November 1993; that in November 1993 he became the general manager with Blockbuster Pavilion; that Rusty Johnson, and Jim Doyle, the former general manager and the director of marketing, respectively, of Blockbuster Pavilion were released; that Production Manager Jerry Duncan was replaced by Bob Morel in March 1994; that Shaun McKinney and Jack Painter have not worked at Blockbuster Pavilion since he started working there; that in November 1993 or in the first 6 months of 1994 people who had not worked previously at the facility were brought in to be sales director, director of marketing, director of operations, director of finance, and box office manager; that in 1994 they had two events staff managers, namely Bill Tullicy until about July 1994 and then Mary Kegley, who had previously held part-time positions as an usher and a volunteer coordinator at Blockbuster Pavilion at Charlotte; that in March 1994 Nina Pearson was hired as community affairs manager for the Blockbuster Pavilion in Charlotte; that Pearson had previously been the box office manager and the manager of ushers at Blockbuster Pavilion and in those positions she did not have any role in hiring or supervising stagehands; that Respondent's Exhibit 1 are the applications of persons interested in working in the stage crew department in 1993; that Respondent's Exhibits 2, 3, 4, 5, and 6 are the show call reports, which are listings of stagehands who worked individual productions and a tally of their hours for each production, from 1993 through the first productions of the 1997 season, respectively, at Blockbuster Pavilion; that Respondent's Exhibit 7 is a roster of stagehands from the 1991 season at the facility; that Respondent's Exhibit 8 is a summary of the 1993 applications that were in Respondent's records and it shows that 23 employees from the 1991 season presented applications for the 1993 season, 14 of the 23 had signed union authorization cards, 8 were found to be discriminatees in the underlying Board proceeding and 21 percent of the 1993 applications were from persons who worked at the facility in 1991; that Respondent's Exhibit 9 is a summary of the employees who worked as stage crew in the 1993 season and it shows that 18 of the people who worked at the facility in 1991 worked there in 1993, 6 were found to be discriminatees in the prior Board proceeding, 9 were card signers, there was a total of 84 on the stage crew and 21 percent of the 1993 stagehands worked at the facility in 1991; that 22 shows were held in 1993; that as Production Manager Morel is responsible for all elements of the production, including the supervision of stagehands through the stage manager; that Blockbuster Pavilion in 1994 hired Hunter, who he—Klaus—thought was in the Union at the time, to be stage manager; that Hunter's responsibilities were to recruit the stage crew for that years productions, assemble a roster, evaluate the experience of the stagehands, and then on an event-by-event basis call them and schedule them for work once he was directed by the production manager regarding the number of stagehands needed for an individual production; that the stagehands reported to Hunter when they came to work and Hunter prepared the show call reports; that Hunter monitored the stagehands' performance and based on input or direction from the touring group or Morel he would make assignments; that Hunter telephoned the stagehands to tell them to report to work and what they would be doing; that he told Hunter with respect to hiring that they wanted an experienced crew and to recruit in an open and fair manner with

no restrictions; that Hunter decided the people who would be called for work with availability factored in; that Hunter was told that on his job assignments at other facilities in the Charlotte area he should tell union members that he came in contact with that Respondent had a "welcome and open invitation to Union members to come and apply"; that Respondent also organized a job fair in March 1994 to publicize the beginning of the hiring process for all seasonal positions at the facility; that Respondent's Exhibit 10 are the flyers, etc., advertising the job fair; that Respondent's Exhibit 11 is a summary he personally prepared in July 1994 to check whether the 1991 and 1992 discriminatees were part of Respondent's stage crew and to confirm that Respondent had an open and well publicized effort and that Respondent "had welcomed back all stagehands in the community including IATSE members"; that he told Morel to contact the persons listed on Respondent's Exhibit 11 and Morel discussed it with Hunter and based on Hunter's notes and discussions he had with Hunter, he—Klaus—prepared Respondent's Exhibit 11;⁴ that Respondent's Exhibit 12 are the applications and employment records from the stage crew in the 1994 season; that Respondent's Exhibit 13 is a three-page summary of the 1994 employment applications showing that 144 individuals applied, 13 were discriminatees, and 23 were on the 1991 roster for the facility; that Respondent's Exhibit 14 is a listing of all the stage crew personnel that worked in the 1994 season at the Pavilion and it shows that 131 stagehands were employed at the facility in 1994, 14 were discriminatees identified by the Board, 29 had worked at the facility in 1991 and 21 of those were card signers; that during the 1994 season Morel kept an office and regular office hours at the facility and he would start the application process for walk in applicants and send the applicants to Hunter; that to recruit stagehands in 1995 and 1996, applications were kept in the front administration lobby and the applicants were sent to Hunter; that while in 1995 and 1996 Hunter was responsible for assembling Respondent's stage crew, Respondent did not have a stage manager in 1995 and 1996; that Respondent used Hunter in 1995 and 1996 to recruit stagehands because he was providing stagehands at other facilities and Respondent believed that Hunter could assemble a more experienced and larger stage crew for the events it had coming; that in 1995 and 1996 Hunter organized the crew, set the show calls, made the telephone calls to the stage crew and he supervised the crew under the direction of Morel, who, among other things, set the hours of the stagehands; that Hunter told him and Morel at an early point in the 1995 season that he, Hunter, had a conversation with officials with IATSE Local 322 and he, Hunter, was no longer able to recruit union members to be part of Respondent's stage crew because they were being prohibited from returning for work at the Pavilion;⁵ that in 1995 some management positions were filled and only one of those chosen to occupy these positions worked at the in 1991–1993, namely Alan Barnhardt, who became assistant box office manager and previously was a ticket taker; that Respondent's Exhibit 15 is a roster of stage crew members for the 1995 season which shows that there were a total of 129 stage-

⁴ The exhibit lists 21 names and various things specified under the column heading "Status." The following appears next to the name of Bruce Grier: "Contacted but not interested, is current IATSE book-keeper."

⁵ This testimony was elicited after one of counsel for Respondent indicated "[w]e're going to present Mr. Hunter tomorrow to testify about what [the] actual conversation was about."

hands employed in 1995, 7 of those had worked at the facility in 1991, 1 was a discriminatee identified by the Board, and 4 were card signers; that in 1996 some of the management positions at the facility were restaffed; that Hunter was primarily responsible for recruiting stagehands in 1996 and he was the person who was scheduling and making the calls to stagehands to work at the Pavilion in 1996; that in 1996 Hunter recruited stagehands in that "he was very active at other facilities so he travelled in production circles and . . . I think he had an ongoing recruitment effort"; that in 1996 Respondent also continued to distribute applications from its administrative office and it would forward those people to Hunter; that Respondent's Exhibit 16 is a roster of stage crew members from the 1996 season which shows that 157 stagehands were employed by Respondent in 1996, 1 was a discriminatee identified by the Board, 10 had worked at the facility in 1991, and 4 were card signers; that in 1997 there were management changes at the facility with respect to the positions of executive director, director of marketing, box office manager, and Respondent created the position of regional director of marketing; that Respondent's Exhibit 17 is a turnover analysis among the stagehands for the 1994-1996 seasons which shows that 75, 61, and 70 percent of the stagehands, respectively, were new; that Respondent's Exhibit 18 is a turnover analysis among the seasonal or part-time event staff for the 1997 and 1996 seasons which shows that 53 and 62 percent of these, respectively, were new; that with the first event of the 1997 season Respondent entered into a service agreement with TBA which is responsible for assembling the stage crew at the Pavilion for the 1997 season and providing a stage manager, D. J. White; that White does not call the stagehands but rather Geneene Edwards calls the stagehands to see if they are available to work and she puts the roster together for individual productions; that Edwards has worked for Respondent since 1991 holding such positions as parking staff, usher, production assistant, and administrative assistant; that Edwards serves as a part-time production assistant on event days; that Respondent held a job fair in March 1997 to, as here pertinent, recruit stagehands; that Respondent's Exhibit 19 are documents which relate to the 1997 job fair and the recruitment of stagehands for the 1997 season; that Respondent recruits for all positions on an ongoing basis; that Respondent's Exhibit 20 is a list of individuals who worked as part of the stage crew for the first three productions of the 1997 season which shows that a total of 57 stagehands were employed, none were the discriminatees identified by the Board, 2 were formerly on the 1991 roster at the facility, and 2 were card signers; that Respondent's Exhibit 21 is a list of 21 discriminatees and it charts their participation in show calls from 1993 through 1997;⁶ that Respondent's Exhibit 22 is a list of card signers which shows the number of shows worked for the seasons 1993 through 1997 at the Pavilion; and that Respondent attempts to comply with the court order concerning the reinstatement of certain 1991 employees

have included on a season to season basis, having an ongoing, open application process. A process that literally continues from the beginning of the job fair through the entire season. We also have, through personal contacts such as Calvin Hunter and Bob Morel, sought to communicate to Union members in the community and, you

know, experienced stagehands in general our openness and the interest that we have in them being part of our stage crew at the Pavilion.

Klaus also testified that Blockbuster Pavilion is willing to offer reinstatement to the discriminatees in connection with the 1997 season. On cross-examination Klaus testified that in 1991 and 1992 Blockbuster Pavilion was owned by Charlotte Amphitheater which was owned by a company called Amphitheater Entertainment which was a subsidiary of Blockbuster Entertainment; that presently Pavilion Partners is the owner of the facility; that Blockbuster Entertainment was purchased by Viacom and Viacom is one of the owners of Pavilion Partners; that Blockbuster Entertainment remains a viable corporation which is owned by Viacom; that the change in ownership of the facility involved an exchange of assets between Pace Entertainment, Sony Music, and Blockbuster Entertainment in that each of the groups had an interest in Amphitheaters across the country and they combined the group to form Pavilion Partners; that none of the managers from the 1991-1992 season at the facility remain with the employer at the present time; that he did not send the Union any correspondence inviting it to attend the job fairs in 1994 through 1997; that in April 1995 Hunter told him that the Union instructed its members not to apply in 1995 and 1996; that Hunter did not tell him who in the Union told Hunter this; that he could not comment one way or the other about fact that the Respondent's records show that Carl Welsh, a union member, did apply and work for the Company in 1995 and in 1996; that after the 1994 season only one employee who was an original discriminatee actually worked for the Company; that Respondent's attempts to hire any of the other discriminatees were purely through having an open application process and a well publicized hiring event; that while Respondent stands ready to offer reinstatement to the alleged discriminatees, it has not make an official offer of reemployment through the Union or to the alleged discriminatees; and that Respondent has not made any offers of backpay. Subsequently Klaus testified that Respondent's Exhibit 21 is the best synopsis of Respondent's efforts to contact the 21 discriminatees regarding their reinstatement and he prepared that exhibit based on discussions with Hunter.

Morel testified that he was hired by Klaus in spring 1994 as seasonal production manager and held that position when he testified here; that prior to 1994 he was an independent production manager for several major promoters around the southeast and he had no prior relationship with Blockbuster Pavilion or Charlotte Amphitheater; that he received numerous stage hand applications after the 1994 job fair and the application process goes on year round; that he saw members of IATSE Local 322 at other auditoriums in 1994-1996 and he told them to come out to the Blockbuster Pavilion because he could always use good experienced help, "come on out an apply for a job and we'll put you on"; that with respect to hiring members of Local 322, he told Hunter to get them to come out and work for us we could use all the good help we could get; that on average 18 to 20 stagehands work a show; that applications for stagehands were solicited at a 1997 job fair at Blockbuster Pavilion; that applications for stagehand jobs were accepted after the job fair; and that Respondent's Exhibit 23 is a roster of the 1997 stagehands which Edwards and White, who makes some calls, use to make calls when they pick out people to come to work and it shows that five of the people were also on the 1991 roster, three

⁶ The evidence shows 6 discriminatees worked shows in 1993, 14 worked shows in 1994, 1 worked shows in 1995 and 1996, and none worked shows in 1997.

signed cards and none of the discriminatees identified by the Board are on the list. On cross-examination Morel testified that he could not remember any particular person that he spoke with at other auditoriums about applying at Blockbuster Pavilion, he spoke “just in general to everybody”; that he did not send a letter to the Union about the job fair; and that he believed that the average show in 1991–1992 would use about 20 stagehands.

On the second day of the hearing Respondent called Klaus to testify about the matter of subpoenaing Hunter, Respondent’s Exhibits 24 and 25. Respondent also called the business agent for Local 322, Bruce Grier, who testified that Hunter was expelled from the Union because he supplied crews at the Charlotte Convention Center where the Union supplies crews, without the Union’s knowledge and “behind . . . [its] back”; that a charge was filed against Hunter in April 1995; that he has been a member of the Union for 7 years and he worked at Blockbuster Pavilion in 1991 but not after that; that he encouraged members to work for Blockbuster Pavilion during the period 1993–1997; that neither he nor any other officer or member of Local 322 spoke with members of Local 322 to discourage them from working at Blockbuster Pavilion; that there was a membership discussion about working or not working at Blockbuster Pavilion during the period 1993–1997; that when this topic was discussed in 1994 under general business he was present and the understanding was that union members would go out to Blockbuster Pavilion and seek employment; that he was aware of the 1994 job fair at Blockbuster Pavilion; that he was aware that there was a change in ownership of Blockbuster Pavilion in 1994 and Pace Management has been operating the facility since 1994; and that in July 1994 he wrote Klaus, General Counsel’s Exhibit 3, seeking full compliance with the Board’s Order in this proceeding but there has no compliance. On cross-examination Grier testified the Union was not notified by Respondent about the job fairs; that he was not requested to attend these job fairs; that with respect to Respondent’s Exhibit 11, which purports to be a status sheet on the 21 discriminatees, while, as indicated above, the sheet indicates “Bruce Grier Contacted but not interested, is current IATSE bookkeeper,” he never told anyone from the Respondent that he was not interested and he was never called for a specific job since 1991; that neither he nor any other union official ever told Hunter or made a statement to the effect that the union members were not allowed to apply with Blockbuster Pavilion; and that most of the discriminatees are still in the Charlotte area and are available for work.

Contentions

On brief Respondent contends that the General Counsel has not produced any evidence as to what effects, if any, remain from Respondent’s past practices so as to render the possibility of ensuring a “fair rerun election” to be only slight,⁷ that the General Counsel has given no explanation as to why, in light of the new ownership, management, and work force, traditional remedies are not adequate to ensure that a “fair rerun election” may be held; that present conditions at the Pavilion ensure the possibility of a “fair rerun election” and do not justify an infringement on the self-determination rights of the present work force; that traditional remedies are adequate to ensure a “fair rerun election” under present conditions at the Pavilion; that a

substantial time has elapsed since the unfair labor practices were committed; that Charlotte Amphitheater no longer has any ownership in the Pavilion; that the managers employed at the time the unfair labor practices occurred are no longer employed at the Pavilion; that the stagehands employed when the unfair labor practices were allegedly committed are no longer working at the Pavilion; and that a bargaining order will unnecessarily disenfranchise the current work force and impinge on its right of self-determination.

The General Counsel, on brief, argues that the statement that Klaus attributes to Hunter as a reason for Respondent’s failure to hire union members is implausible for several reasons, namely Klaus could not identify which union official made the statement, Klaus did not attempt to verify the statement with the Union, Grier denied that he or any other union official ever made the statement or that the Union discouraged its members from working for the Respondent, Morel did not corroborate Klaus and Respondent failed to produce Hunter to testify; that in these circumstances a finding is required that if Hunter had been called to testify by Respondent his testimony would have been adverse to its case; that Respondent’s failure to produce Hunter and the failure of Morel to corroborate Klaus on this crucial issue warrants a finding that Klaus’ testimony is unreliable and, therefore, not credible; that Klaus’ assertion that he attempted to comply with the court’s order is further called into question by his admission that Respondent failed to notify the Union concerning its job fairs and it has failed to offer reinstatement or backpay to the Union or any of the discriminatees; that Respondent has made no affirmative effort to comply with the Board or court orders in this matter; that with respect to changes in management, the evidence reflects that with the hiring of Hunter as stage manager, Respondent has continued with the same course of conduct as it did during the 1991 and 1992 seasons; that we have Klaus testifying about a status sheet regarding the discriminatees, indicating that he was relying on what he was told by Hunter, when the status sheet indicates one thing about Grier and Grier testifies the entry is not true; that while the unit has expanded some, the evidence reflects that the expansion is due to the increase of the number of shows per season and Respondent continues to hire the same number of stagehands per show as it did in 1991 and 1992; that the passage of time in this case, to a large extent, can be attributed to the normal course of litigation and thus should not result in a benefit to the Respondent which is the wrongdoer; that moreover, the Board has long held that the mere passage of time does not negate the need for a bargaining order, where the employer has engaged in numerous and serious misconduct which has affected a large number of employees as has been found here, *Highland Plastics*, 256 NLRB 146 (1981); that with respect to changes in the composition of the bargaining unit, the evidence indicates that in 1995 and 1996 Respondent hired only 1 discriminatee each year, in 1997 Respondent has failed to hire a single discriminatee and, therefore, the evidence shows that Respondent has continued the same pattern of unlawful conduct it engaged in during 1991 and 1992; that the Board in its Decision indicated “the asserted fact that the Respondent offered employment in 1993 to employees who were discriminated against in 1992, without making them whole for the period of discrimination, is hardly an assurance to those employees that they can engage in protected activity without suffering adverse consequences”; that Respondent admits that it has not even offered to make any of the discriminatees whole for its unfair

⁷ R. Br. 10.

labor practice violations; that the concern expressed by the court regarding the possibility that disapproval of the Union by the one who calls the stagehands listed on the roster would stifle union activities and interfere with a fair election were realized with Respondent hiring only 1 discriminatee during the past two and one-half seasons and its admitted failure to make whole the 20 discriminatees; that with respect to employee turnover, it should be noted that the turnover has been caused by the unfair labor practices that are sought to be remedied herein; that Respondent cannot rely on vacancies created by its own refusal to recall 20 discriminatees; that as pointed out by Judge Holley Respondent “replaced the 1991 stagehand crew lock, stock and barrel in 1992” and it now seeks to benefit from its past misconduct; and that it would defy reason to permit an employer to deflect a *Gissel* bargaining order on the grounds of employee turnover when the turnover has resulted from the Employer’s unlawful discharges and its unlawful refusal to recall a substantial portion of the unit.

Analysis

In my opinion a bargaining order should issue in this case.

The first area of concern expressed by the court in this proceeding is summarized by it in *Blockbuster Pavilion v. NLRB*, 82 F.3d 1074 at 1078 of its opinion where it indicates:

There is, therefore, the obvious danger that a bargaining order that is intended to vindicate the rights of past employees will infringe upon the rights of current ones to decide whether they wish to be represented by a union.

Id. at 1077 and 1078 the court indicates:

While a bargaining order may be imposed in order to deter employer misconduct, the Court [in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)] emphasized that in a category II case, “effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.” Id. at 614, 89 S.Ct. at 1940.

The full sentence in *Gissel*, supra at 614, from which this language is quoted reads:

The Board’s authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.

The “ascertainable employee free choice” the Court was referring to in this language in *Gissel*, supra, was the showing that at one point the union had a majority. In *Gissel*, supra at 611, 612, and 613 the following appears:

The employers argue that . . . the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees’ section 7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage³² as it is to deter future misconduct. If an employer has succeeded in undermining a union’s strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate

employee rights is to re-establish the conditions as they existed before the employer’s unlawful campaign.³³ There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer’s acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition.

³² The employers argue that the Fourth Circuit correctly observed that, “in the great majority of cases, a cease-and-desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity” *NLRB v. Logan Packing Co.*, 386 F.2d at 570. It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under broad provisions of section 10(c) of the Act (29 U.S.C. section 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). “[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency.” *Consolo v. FMC*, 383 U.S. 607, 621 (1966).

³³ It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. See *Lesnick*, [*Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 861–862 (1967)] supra, n. 17, at 862. Any effect will be minimal at best, however, for there “is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed.” *Bok*, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 Harv. L. Rev. 38, 135 (1964).

In *Intersweet, Inc.*, 321 NLRB 1 (1996), the Board indicated.

The Respondent contends the changed circumstances since the time of the events at issue render a bargaining order inappropriate. We disagree. Our well-established rule is that the validity of a bargaining order depends on an evaluation of the circumstances as of the time the unfair labor practices were committed. *Yerger Trucking*, 307 NLRB 567 (1992). The Board adheres to this position largely on the grounds that consideration of changed circumstances after the unfair labor practices were committed would reward, rather than deter, an employer who engaged in unlawful conduct during an organizational campaign. *Highland Plastics*, 256 NLRB 146, 147 (1981). This rationale is particularly applicable here, where the Respondent reacted to the first hint of a union campaign by terminating the entire bargaining unit and failing to recall most of the union supporters. In addition, regardless of changed circumstances, *a bargaining order in reality has a minimal effect on employee free choice, because employees are free to reject continued union representation after a reasonable period has elapsed even if a bargaining order has been imposed.* [So the United States Supreme Court and the Board appreciate this fact.] See *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951), enf. 192 F.2d 740,

742 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952). [Emphasis added.]⁸

Anyone reviewing the facts of a case such as this one should be careful in giving too much weight to turnover because it is very easy for the employer to manipulate. Here the Employer practically replaces the crew lock, stock, and barrel, and refuses to reinstate employees notwithstanding a court order directing it to do. Expressions of a willingness to do something but not doing it although directed to amount, in my opinion, not just to a failure but a refusal. Hunter did not testify so Grier's testimony is not challenged. Grier was not contacted.⁹ And Klaus' testimony about what Hunter told him about what the Union told Hunter is not credited since contrary to what Respondent stated at the hearing here, it did not take those actions which would have had Hunter testify here. Also Morel did not corroborate Klaus, Grier, a credible witness, denied this assertion, and a union member did work for Respondent during the time in question. So with respect to the rights of employees to decide whether they wish to be represented, we have the United States Supreme Court entertaining this argument, made there by employers, and concluding that this is nothing to be concerned about because the practicalities of the situation will themselves resolve that matter. In *Gissel*, supra, the Court was concerned with whether the union had a majority. Here no one contests that the Union had a majority. Here we have Respondent manipulating turnover and it is now arguing that the turnover (which it manipulated) should be relied on to grant it the relief it seeks both in terms of the Section 7 rights of the current employees and in terms of an alleged lack of awareness on the part of the current employees regarding the numerous and serious unfair labor practices. In view of *Gissel* and in view of Respondent's manipulation of the turnover, I could not and I would not rely on such an argument. There is no infringement on the rights of current employees many of whom would not be current employees if Respondent had acted lawfully and if Respondent had not manipulated turnover.

The next area of concern expressed by the court in *Blockbuster Pavilion v. NLRB*, 82 F.3d 1074 at 1080, of its opinion here is whether substantial evidence supports a finding that

the possibility of erasing the effects of past practices and of insuring a fair rerun election by the use of traditional remedies is slight and that employee sentiment once expressed in favor of the Union would be better protected by a bargaining order.

Avecor, [Inc. v. N.L.R.B.] 931 F.2d [924] at 934 [(D.C. Cir. 1991)] (quoting *St. Francis Fed'n of Nurses & Health Professionals v. NLRB*, 729 F.2d 844, 854–855 (D.C. Cir. 1984)).

To a degree, the court itself supplies an answer to this concern when id. at 1080 it indicates:

We do not question that the Company's unfair labor practices were numerous and serious; nor do we doubt that

⁸ In the instant proceeding Respondent did not terminate the entire bargaining unit but as indicated by Judge Holley, Respondent practically replaced the 1991 stagehand crew lock, stock, and barrel in 1992.

⁹ R. Exh. 11 allegedly was based on what Hunter told Klaus. Hunter did not testify. Grier's testimony is credited. Grier impressed me as being a credible witness. R. Exh. 11, except to the extent that it is supported by other reliable evidence of record, i.e., the show call reports, will not be given any weight.

the mere reinstatement of the discriminatees might be insufficient to erase the effects of Blockbuster's antiunion actions. The Board, however, has given no indication that it has taken the employees' section 7 rights into consideration. Nor has it explained why the requirement that the Company reinstate the unlawfully discharged employees with back pay, when combined with the other traditional remedies at its disposal, are not enough to mitigate the effects of Blockbuster's actions.

The employees' Section 7 rights have been considered above. Since the Respondent refuses to reinstate the discriminatees and since the Respondent refuses to give the discriminatees the backpay they are owed, this requirement by both the Board and the court here has, until contempt proceedings are initiated, become meaningless, except for the message Respondent is sending to the current employees, viz, that it will "thumb its nose" at both the Board and the courts, that it will refuse to comply with their lawful orders—unless and until it is forced to—to keep active union supporters from being reinstated and receiving the backpay to which they are entitled. This is a strong message and Respondent, in my opinion, fully appreciates this.

Also as indicated in *Gissel*, supra at 614 and 615:

If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue [see fn. 32, supra].

Footnote 32 is set forth above. In the circumstances extant here it bears repeating. It reads as follows:

³² The employers argue that the Fourth Circuit correctly observed that, "in the great majority of cases, a cease and desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity." *NLRB v. Logan Packing Co.*, 386 F.2d at 570. It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under broad provisions of section 10(c) of the Act (29 U.S.C. section 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." *Consolo v. FMC*, 383 U.S. 607, 621 (1966).

The next concern expressed by the court here, *Blockbuster Pavilion*, supra at 1078, is as follows:

We have also emphasized that that finding [that the possibility of erasing the effects of past practices and of insuring a fair . . . election by the use of traditional remedies is slight and that employee sentiment once expressed in favor of the Union would be better protected by a bargaining order] must be supported by a reasoned explanation that will enable the reviewing court

to determine from the Board's opinion (1) that it gave due consideration to the employees' section 7 rights, which are, after all, one of the fundamental purposes of the Act, (2) why it concluded that other purposes must override the rights of employees to choose their bar-

gaining representatives and (3) why other remedies, less destructive of employees' rights, are not adequate.

As noted above, the employees' Section 7 rights have been duly considered. The Court in *Gissel*, supra, spoke to the concern of the court here as set forth in "(2)" in the immediately preceding paragraph when it stated at 395 U.S. 612 and 613, as set forth above:

The employers argue that . . . the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' section 7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage³² as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.³³ There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition.

³² The employers argue that the Fourth Circuit correctly observed that, "in the great majority of cases, a cease-and-desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity" *NLRB v. Logan Packing Co.*, 386 F.2d at 570. It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under broad provisions of section 10(c) of the Act (29 U.S.C. section 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." *Consolo v. FMC*, 383 U.S. 607, 621 (1966).

³³ It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. See *Lesnick*, [*Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 861-862 (1967)] supra, n. 17, at 862. Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." *Bok*, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 Harv. L. Rev. 38, 135 (1964).

As pointed out by the Court in *Gissel*, supra, the other purposes are not overriding the rights of the employees to choose their bargaining representatives. Those rights remain. For those of a mind to, they can be exercised in terms of decertification. Additionally, as noted above, the union had a majority. But for Respondent's unlawful "cleaning of its house," its refusal to reinstate and its manipulation of the turnover there would most

likely be no question as to which employees rights we should be concerned with. One must ask should we be concerned with the rights of the employees who would still be there if Respondent had acted lawfully. Or should we be concerned with the rights of the employees who are there because the Respondent has engaged in unlawful conduct? Are the rights of one such group mutually exclusive of the rights of the other group? The Court in *Gissel*, supra, has already resolved this. No rights are being lost or overridden. At most, with respect to those who do not want to be represented, they are being delayed. And until the employee situation is sorted out those who were unquestionably in the majority should be given the benefit of any doubt. To do otherwise would be to reward the benefit of any doubt to the party who, through its unlawful conduct, created the situation in the first place. Regarding the court's concern as expressed in "(3)" as set forth above, the bargaining order, for the reasons set forth above, is not destroying employees' rights. It has become obvious that the Respondent, for its own purposes, is refusing to make the discriminatees whole and, in my opinion, it is refusing for the time being, to reinstate the discriminatees.¹⁰ Other remedies are not adequate.

The next concern expressed by the court here in *Blockbuster*, supra at 1079 reads as follows:

We have repeatedly called the Board to task for its intransigent refusal to accept and act upon our instructions that the appropriateness of a bargaining order must be assessed as of the time it is issued. See, e.g. *Avecor*, 931 F.2d at 936-937; *Pedro's, Inc.*, 652 F.2d [1005] at 1012 (D.C. Cir 1981)]

Pursuant to the court's instructions the bargaining order in this proceeding is assessed at the time it is issued. With respect to the "intransigent refusal" language used by the court, this is a matter between the Board and the court.¹¹

¹⁰ If the Board in this case is required to assess the bargaining order and justify it at the time of its issuance, then surely it can consider conduct by Respondent which occurs up to the time of the issuance of the bargaining order. That being the case, one must wonder whether conduct engaged in by Respondent between the time of the Board's original decision and the remand hearing, if it is indeed possible, can convert a category II situation into a category I situation.

¹¹ However, from the perspective of an administrative law judge who occasionally hears a case in the jurisdiction of a United States court of appeals which does not agree with the Board law which is applied in the matter, I can only note that I am required to apply only established Board and Supreme Court precedents as opposed to precedents of that circuit court of appeals, *Ford Motor Co.*, 230 NLRB 716, 718 fn. 12 (1977), enf'd. 571 F.2d 993, 996-1002 (7th Cir. 1978), aff'd. 441 U.S. 488, 493 fn. 6 (1979). Also it should be noted that Sec. 10(f) of the Act, 29 U.S.C. § 160(f), provides that

any person aggrieved by a final order of the Board may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia

And Sec. 10(e) of the Act, 29 U.S.C. § 160(e), provides, as here pertinent,

[u]pon the filing of the record with it [the circuit court of appeals] the jurisdiction of the court shall be exclusive and its judgement and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States.

The Board, unlike a district judge, does not know which circuit court of appeals will review its decision and, as noted above, the Board's decisions are not appealable to one court of appeals alone. Also one circuit has held that if an agency adopts the law of another circuit as its na-

And finally the court here concludes, as here pertinent, as follows:

Nevertheless, in order to ensure that a bargaining order is issued only in those *exceptional* cases that warrant it, we insist that the Board adequately explain its need in each case, taking into consideration the employees' section 7 right to freedom of choice. The Board having failed in this obligation, we remand the case to the Board to consider whether the use of its traditional remedies would be adequate to ensure a fair election. Furthermore, if the Board is still inclined to issue a bargaining order, the order must be justified at the time of its issuance. *The Board is instructed to allow Blockbuster to proffer any evidence that the passage of time or a change in circumstances might mitigate the need for one.* [Emphasis added.]

The Board has accepted the remand in this case and, therefore, the court's decision as the law of this case. Obviously such acceptance does not constitute acquiescence in the court's insistence that the Board in each case take into consideration the employees' Section 7 right to freedom of choice, except as required by the Court in *Gissel*, supra. We all are dealing with this one case. For the reasons given above, here traditional remedies are not adequate to ensure a fair election. Also as noted above, the bargaining order will, in this proceeding, in which the Board has accepted remand be justified as of the time of its issuance. Respondent has been allowed to proffer any evidence that the passage of time or a change in circumstances might mitigate the need for a bargaining order.

With respect to the passage of time it is noted that the Board's decision issued June 1994 or about 18 months after the hearing on the unfair labor practices had concluded.¹² Since then what has occurred occurred because of Respondent's arguments which were made while it still engaged in machinations. Any delay after June 1994 must be laid squarely at Respondent's doorstep and no one else's. While as noted above, a respondent has the right to seek judicial review of a final Board order, surely the court, in view of its position on the requirement that a bargaining order be justified as of the time of its issuance, would not preclude the consideration of the conduct of the respondent while it is seeking judicial relief. In other words one who does not keep his hands clean while delaying the finality of an order should not receive the benefit of that delay. Under the circumstances of this case, the passage of 18 months is reasonable and in my opinion the passage of time in this proceeding does not mitigate the need for a bargaining order. Even if this approach is not taken, as pointed out by the General Counsel on brief (1) the passage of time in this case, to a large extent can be attributed to the normal course of litigation, and thus should not result in a benefit to the Respondent, which is the wrongdoer, and (2) the Board has long held that

tionwide policy solely on the grounds of acquiescence in that circuit's law, the agency loses any claim that it might otherwise have had to another circuit's deferring to an experienced agency's construction of its own governing statute. *Atchison, Topeka & Santa Fe RR v. Pena*, 44 F.3d 437, 442-443, 445-447 (7th Cir. 1994) (en banc), aff'd. 116 S. Ct. 595 (1996). *NLRB v. Gas Utility District*, 402 U.S. 600, 603-604 (1971), the Act is Federal legislation, administered by a national agency, intended to solve a national problem on a national scale. In these circumstances, it appears that the Board's course of action is the proper one.

¹² The unfair labor practices were committed in 1991 and 1992.

the mere passage of time does not negate the need for a bargaining order, where the employer has engaged in numerous and serious misconduct which has affected a large number of employees as has been found here.

With respect to change in circumstances, Respondent cites the above-described change in ownership, the turnover in management personnel and the turnover in the stagehand work force. The last factor is treated above. Regarding the fact that each of the managers who was the subject of an unfair labor practice has not been employed at the Pavilion since the completion of the 1993 season, as pointed out by the General Counsel, the evidence of record reflects that with the hiring of Hunter as stage manager, Respondent continued with the same course of conduct as it did during the 1991 and 1992 seasons. Grier testified that Hunter never asked him about the recruitment of union members for work at the Pavilion nor was he, Grier, ever personally contacted for work despite having previously worked for Respondent in 1991. Hunter did not testify although he was subpoenaed by Respondent and so Grier's testimony is not challenged. Grier impressed me as being a credible witness. His testimony is credited. Klaus is not, in my opinion, a credible witness. His credibility was placed into question when Grier testified that the Union did not tell union members that they should not work at Blockbuster Pavilion. Morel did not corroborate Klaus on this point and at least one union member worked at the Pavilion in 1995 and 1996. Respondent did not pursue subpoena enforcement with respect to Hunter. Respondent had to appreciate the fact that Klaus' credibility was in question. One must wonder whether Respondent really intended to call Hunter to the stand in that while on the first day of the hearing Respondent said Hunter was going to testify, Respondent had Klaus give an in depth account of Hunter's job duties etc, testimony that one would normally expect to come from the person himself if he was in fact going to testify.

As pointed out by Judge Holley, in October 1991, Respondent's corporate attorney, Joel Arnold, told union representatives that there was no way Blockbuster would ever sign a collective-bargaining agreement; they would not be the first shed in the country to sign one. Amazingly even after the credibility of Klaus' testimony was placed into question, Respondent was willing to rely on his testimony¹³ to establish that a change in ownership occurred; none of the documentation which brought about this change in ownership was introduced here. Respondent had the burden of proof with respect to this aspect of the case. The court instructed the Board to allow Blockbuster to proffer any evidence that a change in circumstances might mitigate the need for a bargaining order. Respondent did not even call a representative of the seller to testify about who actually owned Blockbuster Pavilion at the time of the sale, the terms of the sale as far as the seller was concerned and what role, if any, the seller might continue to play regarding Blockbuster Pavilion. Klaus was not even on the scene in 1991 and 1992. And so one is not given the opportunity to see the written terms of the change of ownership and one can not determine if it was an arm's-length transaction and what role Blockbuster Entertainment actually continues to play. Interestingly, although he has changed law firms, Respondent presently has the same attorney in this proceeding as Respondent had in 1992

¹³ What Grier understood carries no weight since it was not shown he was privy to any change.

before Judge Holley. The sum and substance of Klaus' testimony about the asserted change in ownership is set forth above. If one were willing to accept Klaus' testimony at face value regarding the change of ownership—and I could not, I would not and I do not—Blockbuster Entertainment was involved in an exchange of assets with respect to the change of ownership, and Blockbuster Entertainment's owner, Viacom, now has an interest in Blockbuster Pavilion.¹⁴ This is hardly the kind of

¹⁴ Does Viacom hold an equal interest with its two partners or does Viacom hold a 90-percent interest with Pace Entertainment holding 5 percent and Sony Music holding 5 percent? Even if one were willing to accept Klaus' understanding of the change in ownership, it is just that. Even a validly held understanding can, in fact, be a misunderstanding.

evidence of a change in ownership which would engender confidence in a reasonable person that someone else is now involved and the same things will not continue to happen. As the General Counsel points out, the same things have been happening.

The bargaining order entered in the Board's original Decision and Order is an appropriate remedy. It was appropriate then. It is appropriate now.

[Recommended Order omitted from publication.]

Is there some reason why Respondent failed to introduce the documentation? Respondent has the burden of proof on this issue. It has not met its burden of proof.