Williams Energy Services *and* Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL–CIO, Local 4-227. Case 16–CA–20164

September 30, 2003

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 11, 2000, Administrative Law Judge George Carson II issued a decision, finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees, and by withdrawing recognition from the Union.

On September 28, 2001, the Board issued a Decision and Order affirming the judge's findings and conclusions.[1] The Respondent filed a petition for review of the Board's Decision and Order in the United States Court of Appeals for the Fifth Circuit, and the Board filed a cross-application for enforcement of its Order.

Thereafter, on May 16, 2002, the Board filed a motion with the Fifth Circuit to remand the case without prejudice for further consideration. On July 9, 2002, the Fifth Circuit granted the Board's motion.

On July 17, 2002, the Board issued its decision in *MV Transportation*,[2] overruling the Board's decision in *St. Elizabeth Manor, Inc.*[3] that held that challenges to a union's majority status are precluded for a reasonable period of time after a successor employer's obligation to recognize an incumbent union attaches. The Board in *MV Transportation* returned to the previous doctrine that an incumbent union in a successorship situation is entitled only to a rebuttable presumption of continuing majority status.

Following the Fifth Circuit's remand, the Board invited the parties to submit statements of position, addressing "whether *MV Transportation* [cite omitted], should be applied to this case and if so, whether the Respondent has shown, at the time of the refusal to bargain, that it had a good-faith reasonable uncertainty as to the Union's continuing majority status" [footnote omitted]. The General Counsel and the Respondent filed statements of position.[4] The Charging Party did not do so.

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

The Board has reconsidered its prior decision in light of the Board's decision of *MV Transportation.* Having done so, and having considered the record and the parties' statements of position, we dismiss the complaint for the following reasons.

The relevant facts are as follows. The Respondent took over the predecessor's operations on August 2, 1999.[5] On July 23, in anticipation of the Respondent's purchase of the facility, the Union requested the Respondent to commence bargaining. The parties held their first session on September 29, and agreed to meet again on November 5. On November 3, the Respondent was presented with a petition, signed by all of the unit employees, stating, "We the employees of Williams, elect not to have the Union (P.A.C.E.) represent us as a collective unit." At the beginning of the bargaining session on November 5, the Respondent presented the Union with a letter advising it of the Respondent's receipt of the petition. The letter also stated that it appeared that the Union no longer enjoyed majority support, and asked whether the Union wished to withdraw as bargaining representative or proceed to an election to determine the issue of representative status. No bargaining occurred at this session. Thereafter, the Union requested that the Respondent meet and bargain with it on November 18. In view of the petition from the unit employees, the Respondent refused.

Applying the then-applicable successor bar rule set forth in *St. Elizabeth Manor*, the Board found that the Respondent's withdrawal of recognition violated Section 8(a)(5) because there had not been a reasonable period of time for bargaining when the Respondent refused to meet and bargain. Thus, at the time of the refusal, the Respondent had been a successor employer for only a few months and the parties had only met twice before the Respondent withdrew recognition.

As noted above, the Board overruled *St. Elizabeth Manor* in *MV Transportation* and returned to the prior standard that a union in a successorship situation will be entitled only to a rebuttable presumption of majority status. In *MV Transportation*, the Board did not limit its new rule to a prospective application, but rather applied it retroactively to the facts therein. See also, *Aramark School Services, Inc*., 337 NLRB 1063 fn. 1 (2002). In view of the Board's retroactive application of the rule in *MV Transportation*, we find that the application of that

[1] 336 NLRB 160 (2001).
[2] 337 NLRB 770 (2002).
[3] 329 NLRB 341 (1999).
[4] In their statements of position the General Counsel and the Respondent acknowledge that the Board has decided to apply *MV Transportation* retroactively, and agree that the instant complaint should be dismissed.
[5] All dates hereafter are in 1999 unless stated otherwise.

rule in this case is appropriate, as such application would not cause manifest injustice.[6]

Applying *MV Transportation*, we find that the Union's presumption of majority status has been rebutted, and consequently the Respondent's withdrawal of recognition and refusal to bargain were lawful. The Respondent received a petition, signed by all of the unit employees, stating that they no longer desired to be represented by the Union. There is no contention that the Respondent solicited the petition from its employees, or that the petition was otherwise tainted. Thus, the petition relied on by the Respondent demonstrates that at the time of its withdrawal of recognition the Respondent had, at a minimum, a reasonable good-faith uncertainty that the Union had the support of a majority of unit employees.[7]

In sum, we find that the standard set forth in *MV Transportation* is applicable in this case and, applying that standard, the Union's presumption of continued majority status has been rebutted. Accordingly, by withdrawing recognition and refusing to bargain with the Union, the Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged. We therefore enter an order dismissing the complaint.

ORDER

The Board's prior Decision and Order in this proceeding, reported at 336 NLRB 160 (2001), is vacated and the complaint is dismissed in its entirety.

[6] Member Liebman dissented in *MV Transportation* and adheres to the views expressed in her dissent. For institutional reasons, however, Member Liebman concurs in the application of *MV Transportation* to this case, in the absence of three votes to overrule that decision.

[7] In *Levitz*, 333 NLRB 717, 725 (2001), the Board held that "an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." The Board held, however, that this new standard for employer withdrawal of recognition would be applied prospectively only. Thus, at the time the Respondent withdrew recognition, the applicable standard was the "good-faith doubt" standard, which the Supreme Court in *Allentown Mack*, 522 U.S. 359 (1998), construed to require only a good-faith reasonable uncertainty that the union has the support of a majority of the unit employees.

In view of the fact that *Levitz* is not applicable to the instant case, Chairman Battista expresses no view as to whether that case was correctly decided.