B.A. Mullican Lumber & Manufacturing Company *and* United Mine Workers of America. Cases 11–CA–19451 and 11–CA–19547

July 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On November 27, 2002, Administrative Law Judge George Carson issued the attached decision. The Respondent and the Charging Party filed exceptions, supporting briefs, answering briefs, and reply briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt his recommended Order as modified.[2]

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, we shall order the Respondent to cease and desist from engaging in such conduct and to bargain with the Union in the bargaining unit described in the judge's decision, with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

The judge recommended an affirmative bargaining order to remedy the Respondent's unlawful withdrawal of recognition, but did not justify imposition of such an order as required by the United States Court of Appeals for the District of Columbia Circuit. Nevertheless, for the reasons set forth below, we agree with the judge that an affirmative bargaining order is warranted on the facts of this case.

The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996). In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics*, supra, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Supra at 738. Consistent with the court's requirement, we have examined the particular facts of this case and we find that a balancing of the three factors warrants an affirmative bargaining order.

(1) As the Board stated in *Parkwood Developmental Center, Inc.*,[3] an affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition and resulting refusal to bargain with the Union for a collective-bargaining agreement. The Respondent withdrew recognition from the Union without a showing that the Union had actually lost majority support. The Respondent's unlawful conduct demonstrated a disregard for the employees' Section 7 right to select union representation, and the Respondent's conduct would tend to unfairly undermine continuing support for the Union. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who

[1] The Charging Party 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.

We deny the Respondent's motion to strike the Charging Party's brief. We also deny the Respondent's motion to reopen the record. The latter motion seeks to introduce into evidence the Respondent's position statement to the Board's Regional Director, in which the Respondent requested information regarding how many decertification slips the decertification petitioner had filed in support of the petition. The Respondent offers no explanation for its failure to offer its position statement into evidence at the hearing. In addition to this procedural point, the substantive position taken in the statement does not aid the Respondent. In support of its motion, the Respondent cites *NLRB v. New Associates*, 35 F.3d 828 (3d Cir. 1994), where the Third Circuit, relying on the Board's failure to disclose decertification information to the employer, denied enforcement of the Board's bargaining order. However, as the judge noted, the Board has held that the concerns underlying the Third Circuit's *New Associates* decision are not applicable where, as here, the employer withdraws recognition *before*, and therefore without reference to, the employer's request for the decertification information. See *Planned Building Services,* 318 NLRB 1049 (1995).

[2] We shall modify the judge's recommended Order to provide the standard notice posting language.

[3] 347 NLRB 974, 976 (2006).

may oppose continued union representation as the order is not of indefinite duration but for a reasonable period of time sufficient to allow the good-faith bargaining that the Respondent's unlawful withdrawal of recognition cut short. It is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees' Section 7 right to union representation is vindicated. It will also give employees an opportunity to fairly assess the Union's effectiveness as a bargaining representative and determine whether continued representation by the Union is in their best interests.

(2) An affirmative bargaining order also serves the Act's policies of fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union, and it ensures that the Union will not be pressured to achieve immediate results at the bargaining table—results that might not be in the employees' best interests. It fosters industrial peace by reinstating the Union to its rightful position as the bargaining representative chosen by a majority of the employees. Also, as mentioned, providing this temporary period of insulated bargaining will afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the effects of the Respondent's unlawful withdrawal of recognition and refusal to bargain.

(3) As an alternative remedy, a cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another challenge to the Union's majority status before the employees had a reasonable time to regroup and bargain with the Respondent through their chosen representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair where the Respondent's unlawful refusal to recognize and bargain with the Union has continued since June 28, 2002, and has likely undermined employee support for continued union representation. Allowing another challenge to the Union's majority status without a reasonable period for bargaining also would be unfair in light of the fact that the litigation of the Union's charges took several years and, as a result, the Union needs to reestablish its representative status with unit employees. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.[4]

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violation in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, B.A. Mullican Lumber & Manufacturing Company, Norton, Virginia, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

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

"(c) Within 14 days after service by the Region, post at its facility in Norton, Virginia, copies of the attached notice marked "Appendix."[5] 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 28, 2002."

CHAIRMAN BATTISTA, concurring.

I join my colleagues in finding that the Respondent did not violate Section 8(a)(5) of the Act by unlawfully refusing to execute a collective-bargaining agreement and that the Respondent violated Section 8(a)(5) of the Act by unlawfully withdrawing recognition from the Union.[1]

---

[4] *Parkwood*, supra, 347 NLRB 974, 977; see also *Goya Foods of Florida*, 347 NLRB 1118, 1123 (2006); *Smoke House Restaurant*, 347 NLRB 192, 193–194 (2006).

[5] 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] In light of this violation, I agree with my colleagues that an affirmative bargaining order is warranted here. However, I do not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." I agree with the United States Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Alpha Associates*, 344 NLRB 782, 787 fn. 14 (2005). I recognize, however, that the view expressed in *Caterair International*, supra, represents extant Board law. *Flying Foods*, 345 NLRB 101, 110 fn. 23 (2005). In addition, for the

I write separately to express my substantial doubts about the validity of *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), particularly as administered under current "blocking charge" rules. However, in the absence of a full-Board majority to use this case as a vehicle to overrule or modify *Levitz*, I have applied it in this case, and I have found a violation. In an appropriate case, however, where a valid RM petition is filed and supported, I would process the petition without regard to "blocking charge" rules. My view on this matter is set forth below.

Under *Levitz*, an employer who has an objective basis for uncertainty as to the union's majority status, but no objective proof of actual loss, may not lawfully withdraw recognition. Instead, the employer can file an RM petition. I agree that the best way for ascertaining employee desires regarding union representation is to have a secret ballot NLRB election. That election is superior to authorization cards where a union seeks representation, and it is superior to informal employee expressions where employees ostensibly seek to oust an incumbent union as representative. In this sense, an RM petition leading to an election is superior to an employer's unilateral withdrawal of recognition.

However, an RM petition is often met with union-filed charges and a union's request that its charges "block" the election. Even if those charges are ultimately dismissed by the Regional Director, the investigation itself will postpone the election. Further, if the Regional Director finds that the charges have prima facie merit, and that they should be a block to the election, the election will be postponed for the considerable time that it takes to litigate and adjudicate the allegations.[2] In the meantime, the union remains the de facto representative, notwithstanding a very real uncertainty as to the majority status of the union. There is instability inherent in a situation where there is uncertainty as to whether the union has majority support. In view of the above, I would be *inclined* to retain *Levitz*, subject to a requirement that an employer's RM petition would not be blocked. Under this approach, the election would be held, and appropriate objections could be filed by the losing party.

However, in the instant case, the Respondent did not file an RM petition.[3] Further, the issue of changing the "blocking charge" rule has not been raised or briefed by any party or by any amici. In these circumstances, I join the majority in applying *Levitz* and finding that the withdrawal of recognition was unlawful.

There remains one final matter. The employee decertification slips that ostensibly express rejection of the Union have been in the possession of the General Counsel. We do not know how many slips there are or what they show. The Respondent did not seek to subpoena those slips. If there had been such a subpoena, the General Counsel would have been presented with the issue of whether to consent to the disclosure of these documents.[4] In the absence of a subpoena, I do not pass on whether the General Counsel, as a matter of due process or fairness should consent or on the consequences of any refusal to consent.

Jasper C. Brown Jr., Esq., for the General Counsel.
George J. Oliver, John W. Mann, and *Beth Mabe Gianopulos, Esqs.,* on brief, for the Respondent.
Deborah J. Feliks, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Norton, Virginia, on October 7 and 8, 2002.[1] The charge in Case 11–CA–19451 was filed on April 19, and the charge in Case 11–CA–19547 was filed on July 2. A consolidated complaint issued on August 22. The complaint alleges that the Respondent violated Section 8(a)(5) of the National Labor Relations Act by failing and refusing to sign an agreed-upon contract and by withdrawing recognition from the Union. The Respondent's answer denies that it violated the Act and, in a pretrial motion, argues that it never reached an agreement with the Union. I find that there was no meeting of the minds regarding the effective date of the contract, thus the Respondent was not obligated to sign the contract. I find, under the standard established in *Levitz*, 333 NLRB 717 (2001), that the Respondent failed to establish by objective evidence that the Union had lost its majority status, thus the withdrawal of recognition from the Union was unlawful.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

---

reasons set forth by my colleagues, I agree that an affirmative bargaining order is warranted under the analysis required by the D.C. Circuit.

[2] In theory, the employer could settle the case, but he may not want to do so if he believes that he has not committed any unfair labor practices. Of course, he has a right to litigate. And, even if he settles, the remedial posting period will serve to delay the election.

[3] It would appear that an RM petition could have been processed. The May 21 employee letter to the Respondent appears to have provided an objective basis for uncertainty as to the Union's majority status.

[4] See Sec. 102.118 of the Board's Rules and Regulations.

[1] All dates are in the year 2002, unless otherwise indicated.

[2] I hereby receive GC Exh. 18 which was not formally moved into evidence. Plant Manager Ricky Burchfield admitted its authenticity. References to the exhibit at the hearing and in both briefs confirm that the parties assumed that the exhibit had been received.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, B.A. Mullican Lumber & Manufacturing Company (the Company), a Delaware limited partnership, is engaged in the manufacture and nonretail sale of wood flooring at its facility in Norton, Virginia, at which it annually purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Virginia. The Respondent admits, and I find and conclude, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that the United Mine Workers of America, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Contract

1. Facts

The Union was certified as the collective-bargaining representative of the Company's production employees on August 24, 2000.[3] The parties began negotiations for a collective-bargaining agreement on October 27, 2000. On November 17, 2000, the parties agreed to and signed a protocol regarding negotiations that, in pertinent part, provides that

> . . . [A]ll tentative agreements will become final only after total agreement on all sections of the labor agreement is reached . . . and after ratification by the local union and company approval. The company will prepare typed copies of completed articles to be reviewed and signed by the chief spokesman of each negotiating committee [at] sessions following those in which the tentative agreements are reached on the respective proposals.

Employees at the Company have, historically, received wage increases in September. In January 2001, the parties, anticipating that their negotiations would be concluded within a year, agreed that "future pay increases negotiated though the collective bargaining process" would "be retroactive to the date of September 1, 2000," and would be paid "within sixty (60) days following the successful conclusion of any new collective bargaining agreement."

The chief spokesman for the Company during negotiations was Management Consultant Charles Tuck. The chief spokesman for the Union was International Representative Charles Dixon. In the summer of 2001, a mediator for the Federal Mediation and Conciliation Service became involved in the negotiations.

On September 12, 2001, the parties were on the verge of agreement regarding what both believed would be a complete collective-bargaining agreement. On the afternoon of September 12, the Union accepted the Company's comprehensive economic proposal. The proposal states that "[t]he term of the New Labor Agreement will be for three (3) years commencing on September 1, 2000, and ending at midnight on August 31, 2003." It provides, "[i]n lieu of retroactive pay," for a "one-time ratification bonus of $300 to each employee currently working at the time of the execution of this agreement." The parties also agreed to five addenda, addendum A through E. Addendum E, entitled employee disciplinary action, provides that, in consideration of the payment for "lost production bonus incentive," the Union "agrees to withdraw any and all outstanding grievances filed during the negotiation of this Labor Agreement." It is undisputed that the addenda were not signed or initialed on September 12. Both parties agree that, at the close of the session, the parties needed to sign the addenda. The parties disagree regarding the status of a transition agreement regarding attendance.

The tentative collective-bargaining agreement contained a new attendance policy with point assessments for violations. The maximum number of points under the new policy was 10. The existing policy had also assessed points, but at different amounts than the new policy. Under the old policy, the maximum number of points was 30. Following the Union's acceptance of the Company's economic proposal, Company negotiator, Tuck, pointed out that it would be necessary, prior to implementing the terms of the new agreement, to agree upon how existing points would be transferred to the new system. The Union proposed that all employees start with a clean slate, that all points and discipline be erased. The Company disagreed and proposed carrying forward one third of accumulated points but with the understanding that no employee would be terminated or moved to a higher level of discipline.

The minutes of the meeting do not reflect that any memorandum of agreement was signed. Dixon testified that full agreement was reached, that a document reflecting the agreement was created, and that it was signed by the parties. Union Board Member Mike Kennedy testified that Tuck prepared the agreement. Dixon and Kennedy further testified that the Union had only one copy of this document and that it disappeared at the ratification meeting. Tuck testified that no final agreement was reached and that, when this bargaining session ended, the Union stated that it would get back to the Company with a proposed transition agreement. He testified that he did not have his computer with him and did not prepare the agreement at the meeting. The minutes reflect only that the parties agreed that no employee would be assessed more than 6 points. The minutes do not note agreement regarding discipline or which party assumed responsibility for drafting the transition agreement.

In view of the fact that the addenda to which the parties agreed were not signed in final form on September 12, I do not credit the testimony that the parties signed a document reflecting the transition agreement since this matter was not discussed until after the parties had agreed to the addenda. Whether the parties actually agreed to the transition agreement is immaterial in view of subsequent events. The critical factor for this decision is the nature of the discussion regarding the transition agreement insofar as it relates to implementation of the contractual attendance policy. The entire discussion regarding the transition agreement related to what action was going to be

[3] The appropriate unit is: All full-time and regular part-time production employees employed by Respondent at its Blackwood Industrial Park Road, Norton, Virginia facility; excluding all office clerical employees, confidential employees, temporary employees, QC technicians, lumber receiving coordinators, shipping coordinators and guards, professional employees, and supervisors as defined in the Act.

taken regarding the *current* point totals of employees. There was no discussion of retroactivity or recomputing points from some point in the past.

It is clear that, on September 12, 2001, the parties anticipated a rapid ratification of the contract, followed by its execution and implementation. Although the parties discussed transition to the new attendance policy, implicitly accepting the transition as being current point totals, neither party raised the matter of whether the point totals would be the current point totals as of September 12, the point totals on the day of ratification, or the point totals on the day of signing. There was no discussion regarding the effective date of the overall collective-bargaining agreement.

On September 13, and the morning of September 14, 2001, the Company created a document titled "Tentative Agreement" that incorporated all of the substantive provisions to which the parties had agreed. At 3 p.m. on the afternoon of Friday, September 14, Personnel Manager Chris Kommes met Dixon at Pound, Virginia, and delivered this document, which the Union needed for its ratification meeting. The parties agree that Kommes also delivered addenda A, B, and C and that Dixon signed those addenda. Kommes testified that he also presented Dixon with addenda D and E but that Dixon refused to sign those addenda because neither contained signature lines. Dixon testified that addenda D and E were not presented to him. Although Kommes says he expected to receive the Union's draft of the transition agreement regarding attendance, Dixon did not present that document to him. Despite his purported anticipation of receipt of that document, Kommes said nothing to Dixon about its absence. Dixon, consistent with his testimony that the document had been drafted and signed on September 12, 2001, testified that the transition agreement was not mentioned.

On Monday, September 17, 2001, a decertification petition, Case 11–RD–626 was filed with the Regional Office for Region 11. The Company learned of this filing on that date. The Union had learned of the filing by September 19, 2001.

On September 18, the Union held a meeting that was open to all employees. The employees ratified the provisions of the tentative agreement. Dixon and Kennedy, as well as several employees, testified that the ratification purportedly included the transition agreement of which there was only one copy, and Dixon and Kennedy testified that that document could not be located after the meeting. The tentative agreement, in the first paragraph, states:

> This AGREEMENT, is effective _____, 2001 and is between Mullican . . . and the INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA. . . .

There is no separate paragraph stating the duration or expiration date for the contract. Consistent with the economic package to which the parties agreed on September 12, 2001, the document provides, under "Wages and Benefits" as follows: "Term of the New Labor Agreement will be for three (3) years commencing on September 1, 2000, and ending at midnight on August 31, 2003."

Notwithstanding its ratification September 18, the Union did not execute the Tentative Agreement. On September 19, International Representative Dixon wrote Tuck advising that the tentative agreement had been ratified and that the Union had learned that a decertification petition had been filed with the Regional Office. The letter continues as follows:

> Management's involvement in this Employee Petition For Decertification is obvious to the Union and needless to say Management's credibility is all but Non-Existent.
>
> Mullican Management needs to admit their involvement in this Employee Decert Process and execute the Parties Tentative Agreement which has been ratified.
>
> If your response to this suggestion is basically a denial and [to] suggest that the Union file it's Charges with the National Labor Relations Board; *SAVE YOUR STAMP*.

Whether the foregoing request to execute the agreement, conditioned upon an admission of involvement with the decertification petition, constituted a legally cognizable request to execute the agreement is not before me. The 10(b) date in this proceeding is October 19, 2001. The complaint alleges a failure to sign an agreed-upon contract as of April 2.

The Union filed a charge with the Board that blocked the decertification petition. This charge was, after investigation, withdrawn. The decertification petition is still pending. It has continued to be blocked by various unfair labor practice charges including, since April, the charges in this proceeding.

The record reflects no communications between the parties in the weeks following the Union's demand that the Company admit involvement with the decertification petition.

On November 28, 2001, the Company implemented the 2001 wage increase in the amount to which the parties had agreed retroactive to September 1, 2001. On November 29, 2001, Tuck advised Dixon of the Company's action. The Union did not reply in writing and no unfair labor practice charge was filed.

In December, Dixon called Tuck and, in their conversation, requested copies of the documents that he had signed on September 14. He did not receive them over the Christmas holidays and, on January 2, he called again. Tuck explained that he may have misplaced the documents. On January 2, Dixon wrote Tuck, confirming their conversation and stating that, on September 14, 2001, Koomes had informed him that, after he, Dixon, signed the documents, Tuck would sign them and return copies to the Union. The letter states that the Union had not received those copies. Dixon also requested "a copy of the agreement which was in reference to the Attendance Control Program. This was an agreement proposed by management which related as to how Employees with points under the old system would be treated under the new point system."

By letter dated January 18, Tuck informed Dixon that he had not signed addenda D or E or the attendance transition agreement. He enclosed those addenda and a transition agreement, but did not comment that he had drafted the transition agreement although, according to his testimony, the Union had agreed to draft it on September 12, 2001, but had not done so. The letter concludes stating that, upon execution by the Union, the Company is prepared to sign the documents and return copies to the Union.

The Union did not respond to this letter but did file an unfair labor practice charge alleging failure to sign an agreed-upon contract. This charge was later withdrawn.

On March 19, Union Board Member Kennedy wrote Plant Manager Ricky Burchfield requesting a third-step grievance meeting "[u]nder the contract" regarding the suspension of an employee. On March 25, Burchfield wrote Kennedy and confirmed that, in a telephone conversation on March 19, he had explained that the Company did not have an agreement with the Union, that the Company was maintaining the status quo and operating under the interim grievance procedure to which the parties had agreed "during collective bargaining."

On April 2, the Union sent to the Company copies of addenda D and E as well as the transition agreement, all signed by Dixon. Rather than sign the actual documents that Tuck had sent him in January, Dixon scanned the documents onto his computer and, at the top of each document, added the following language: "Tentatively Agreed to 9/12/01." Dixon did not sign and tender the tentative agreement that had been given to him on September 14, 2001. Dixon requested that Tuck contact him within 5 days in order "to meet and execute the final version of the collective-bargaining agreement." Tuck was on vacation and did not reply until April 17. On April 19, prior to receiving Tuck's reply, the Union filed the charge in Case 11–CA–19451.

On April 17, Tuck wrote Dixon noting various matters including Dixon's purported failure to execute addenda D and E on September 14, 2001, and the failure of the Union to have drafted the attendance transition agreement. Tuck then refers to Dixon's alteration of the documents that he had sent on January 18:

> It is noted that the Union has added the language "Tentatively Agreed to 9/12/01" to each of the Addendums presented to you on January 18, 2002. The company considers this to be a modification of the documents, in that the Union is attempting to make the Addendums retroactive to September 12, 2001."
>
> The company considers retroactivity to be a subject for further collective bargaining. . . .
>
> Further, the Union's modification of proposed Addendums D and E and the Transition from the Old Attendance Policy to new Attendance Policy appears to reopen the bargaining process on these items. . . .
>
> . . . Therefore, the company requests that the Union meet and bargain with it over these issues. Please contact me at your convenience to discuss a mutually convenient date for us to meet and bargain over these issues.

The Union, having already filed the charge in Case 11–CA–19451, did not formally respond to Tuck's letter. On July 3, Dixon and Tuck met concerning a different matter. In their conversation, Tuck asked Dixon whether the Union was contending that the contract would be retroactive to September. Dixon replied that was indeed the Union's position. Tuck sought to explain that retroactivity presented significant problems including transition to the new attendance policy, since the Company had continued to operate under the old attendance policy, and the handling of grievances that had been filed since September. Dixon, called in rebuttal, testified that Tuck did state that the Company "could have a problem with retroactivity," and asked what was the position of the Union regarding the effective date of the agreement. Dixon testified that he replied that the effective date "is what the contract states the effective date to be." If that were his reply, it was meaningless since, as noted above, the effective date in the tentative agreement is blank. I credit Tuck and find that Dixon replied that it was the Union's position that the contract was retroactive to September, the same position he stated in his testimony. Although Dixon initially testified that it was not his intent to raise the issue of retroactivity by modifying the documents sent to him by Tuck, upon further questioning he testified that the ground rules to which the parties agreed provided for ratification and that it was his "position and understanding that the contract would be effective when the contract was ratified by the employees." The ground rules do state that both ratification by the local union and company approval are prerequisites to a binding agreement. The ground rules to not address retroactivity or the effective date of the agreement.

2. Analysis and concluding findings

The complaint alleges that the Respondent, since April 2, has failed and refused to sign an agreed-upon contract. The General Counsel argues that the parties agreed upon all terms of the collective-bargaining agreement on September 12, including the transition agreement. I have found that the transition agreement was not reduced to writing on September 12, 2001. Even if it was, I find that there was no meeting of the minds regarding a substantive term of the collective-bargaining agreement, that being the effective date of the agreement.

The economic proposal to which the Union agreed reflects a 3-year term to the agreement which expires on August 31, 2003. Although not set out in a separate article, that language appears in the wages and benefits article of the tentative agreement that the Company tendered to the Union on September 14. The foregoing suggests that the parties, in September, assumed that the contract would expire in slightly less than 2 years, on August 31, 2003, but there is no evidence that this was specifically discussed.

The General Counsel, citing the testimony of Dixon, argues that "the parties agreed that the effective date of the contract would be the date when the agreement was ratified." Counsel does not cite Dixon's further testimony in which he acknowledged that the foregoing testimony reflected his "position and understanding," not a specific agreement of the parties.

Contrary to the foregoing argument, there is no probative evidence that there was any agreement that the effective date of the contract would be the date of ratification. If the Company had agreed, in anticipation of ratification and immediate signing, that the date of ratification would be the effective date of the contract, there would at least be a colorable claim that the Company was bound in April by the bargain it struck in September, notwithstanding the passage of more than 6 months. But there was no discussion or agreement relating to the effective date of the contract. The Union did not assert that it considered the agreement to be effective upon ratification until July. Its letter of April 2 did not affirmatively state that it considered the contract to be effective upon ratification. Although

the Company suspected that Dixon's modification of the documents portended a contention of retroactivity, Dixon did not confirm that suspicion until July 3. The Union never stated in September 2001 that it believed that the Company's obligations attached upon ratification. Even if the Union's position was taken in good faith, despite the clear language relating to payment of the ratification bonus after execution, the Union did not communicate its belief that the obligations set out in the contract attached upon ratification rather than execution of the agreement.

There is no evidence that there was any discussion regarding the retroactivity of noneconomic items. Although the economic proposal and tentative agreement provide for a 3-year agreement "commencing on September 1, 2000," the parties did not discuss retroactivity except with regard to economic items. Addendum E provides that the Union "agrees to withdraw any and all outstanding grievances filed during the negotiation of this Labor Agreement." The Union's agreement to that addendum made any discussion regarding the viability of grievances filed during negotiations unnecessary. The discussion on September 12, 2001, regarding attendance points related to assigning points based upon the then current point totals under the existing policy. The effective date in the tentative agreement document, although reflecting the year 2001, is left blank. It is clear that the Company understood that its obligations under the contract would attach upon the date of execution since the "ratification bonus" was to be paid to "each employee working at the time of the execution of this agreement."

The Company believed that its obligations under the contract, the economic provisions of which were retroactive to September 1, 2000, would be prospective upon execution of the agreement. The Union's alteration of addenda D and E and the attendance transition agreement as tendered by the Company, by adding "Tentatively Agreed to 9/12/02," raised in the Company's mind the issue of retroactivity. Thus, Tuck wrote Dixon, noted the modification of the documents and stated that it interpreted the Union's action as an attempt to make the addenda "retroactive to September 12, 2001." Tuck advised Dixon that the Company considered " retroactivity to be a subject for further collective bargaining," that the modification appeared to reopen bargaining regarding the items to which Dixon had added the "tentatively agreed to" language, and that the Company was requesting that "the Union meet and bargain with it over these issues." He requested that Dixon contact him to discuss a mutually convenient time to meet and bargain.

The Union filed the charge herein. Dixon did not contact Tuck. The General Counsel, citing Dixon's denial that he was not attempting to raise the issue of retroactivity by adding the "tentatively agreed to" language to the documents, argues that the Company's claim that the Union intended to make the agreement retroactive was an "attempt to obfuscate and frustrate the collective bargaining process." The foregoing argument completely ignores Dixon's testimony that the Union does contend that the agreement should be effective as of the date of ratification, the same contention that Dixon stated to Tuck on July 3. If, as argued by the General Counsel, Dixon had not intended to raise the issue of retroactivity by altering the documents, he could have called or written Tuck and stated that Tuck's interpretation was wrong, that there was no issue of retroactivity. He did not do so.

The Respondent argues that there was no meeting of the minds regarding retroactivity. I agree. There was no discussion in or prior to September 2001 regarding the effective date of the agreement. If matters herein had proceeded neatly, there would have been no issues regarding either effective date or retroactivity since the parties would have signed the agreement, as contemplated, in September 2001. But the parties did not sign the agreement in September. The Union, upon learning of the decertification petition, sent the "save your stamp" letter demanding that the Company admit involvement with the decertification petition. The Company did not do so. Regardless of the respective of merits of the parties' positions in September regarding what had been or had not been signed and whether the letter of September 19, 2001, constituted an unconditional demand that the Company sign the tentative agreement, those matters are not relevant since the complaint allegation before me is an alleged refusal to sign an agreed-upon contract as of April 2.

Although the parties, without specific discussion, appear to have agreed on September 12, 2001, that they would have a 3-year contract retroactive to September 1, 2000, and expiring on August 31, 2003, the Company believed that its obligations would attach when the agreement was executed. It was not obligated to pay the $300 "ratification bonus" to anyone other than employees "currently working at the time of the execution" of the agreement. It had, in addendum E, assured that the Union was obligated to "withdraw any and all outstanding grievances filed during the negotiation of this Labor Agreement." The bargaining regarding the transition to the new attendance policy assumed the current point totals under the then existing policy. There was no discussion of retroactivity or reassessing points accumulated since September 2000. The foregoing agreements confirm that the Company, with good reason, understood and believed that the contract would be effective upon execution. The tentative agreement leaves the effective date blank, stating that it is "effective _____, 2001."

The Union's modification of the addenda and transition agreement raised in the Company's mind the issue of retroactivity of the noneconomic provisions of the agreement. The Company, in its letter of April 17, advised the Union that it considered the issue of retroactivity to be subject to bargaining and that the Union's modification [of the documents] appears to reopen the bargaining process on these items. In July, Dixon confirmed that the Union was contending that the contract was retroactive to September.

There was no meeting of the minds regarding the effective date of the agreement. The parties, in September, anticipated a virtually contemporaneous ratification and signing of the contract, but they had no discussion regarding the effective date. At the point the Union demanded that the Company sign the contract, April 2, the anticipated signing had not occurred in September. This situation is similar to that in *Raytown United Super*, 287 NLRB 1155 (1988), where the parties had actually agreed upon an effective date but, by the time they reached full agreement on all the terms of the contract, that date "had come

and gone." The facts in the instant case are even more compelling than the situation in *Raytown* where the parties had tentatively agreed upon an effective date that had passed. The Board held that the parties' "agreement was essentially cancelled out by their inability to reach agreement . . . before the agreed-on effective date . . . and by the Respondent's proposal of a new effective date. . . ." Ibid. In the instant case, although both parties anticipated ratification and signing in September 2001, there was never any discussion of, much less agreement upon, the effective date of the contract. See also *Transit Service Corp.*, 312 NLRB 477, 482–483 (1993). In this case, as in *Century Papers, Inc.*, 284 NLRB 1151, 1157 (1987), "there was no 'meeting of the minds' concerning a substantive term (the commencement date) of the proposed collective-bargaining agreement." In view of the foregoing, the Respondent's failure to sign the contract, accompanied by its request that the Union meet and bargain regarding the issue of retroactivity thereby signifying its willingness to bargain, did not violate the Act. I shall recommend that the allegation relating to failure to sign an agreed-upon contract be dismissed.

B. The Withdrawal of Recognition

On May 21, the Company received a letter signed by employee James D. (Doug) Carroll, the employee who had filed the decertification petition in Case 11–RD–626 on September 17, 2001, stating that "114 out of 220 employees have signed decertification slips noting they no longer want to be represented by the United Mine Workers of America. These 114 signatures have been filed with the National Labor Relations Board."

On June 28, the Company wrote the Union stating that it had received "written notification . . . that 114 out of 220 employees have signed for decertification and . . . based upon this objective evidence . . . we withdraw recognition of the UMWA . . . ." Plant Manager Burchfield testified that Carroll and other employees, three of whose names he recalled, had stated to him that a majority of employees no longer wished to be represented by the Union. Burchfield testified that there was "feedback" that only four or five employees were attending union meetings and that there had been no election for several months after the president ceased to be an employee. Burchfield admitted that he never saw the slips to which Carroll's letter refers nor did he ask Carroll to provide him with copies of the slips.

In *Levitz*, 333 NLRB 717 (2001), the Board held that an employer must objectively establish that a union has lost majority status before withdrawing recognition:

> . . . [W]e hold 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. We overrule *Celanese* and its progeny insofar as they hold that an employer may lawfully withdraw recognition on the basis of a good-faith doubt (uncertainty or disbelief) as to the union's continued majority status.
>
> We emphasize that an employer with objective evidence that the union has lost majority support-for example, a petition signed by a majority of the employees in the bargaining unit-withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5). Id at slip op. 8. [Footnotes omitted.]

The unverified anonymous "feedback" to which Burchfield referred regarding attendance at union meetings and internal elections does not constitute objective evidence of loss of majority status. The statements of four named employees, none of whom were shown to have personal knowledge of their reports regarding the union sentiments of a majority of employees in a unit of over 200 employees, are hearsay. Although Carroll's letter states that 114 of 220 employees had signed decertification slips, there is no probative evidence that each of those 114 employees was in the unit or employed on June 28, when the Respondent withdrew recognition. No representative of the Respondent ever saw, or requested to see, the "decertification slips" to which Carroll referred in his letter. There is no evidence that the Respondent identified the employees who had purportedly signed decertification slips, determined that each employee was in the unit, or sought to authenticate their signatures.

The Respondent cites *NLRB v. New Associates*, 35 F.3d 828 (3d Cir. 1994), in which the Court of Appeals held that it would not enforce a Board Order to bargain during the pendency of a decertification petition unless the Board disclosed the number of employees who supported the petition and that number was less than a majority. The Respondent argues that I should apply the rationale of that decision and find that it was incumbent upon the General Counsel "to rebut Mullican's assertion that 114 out of 220 bargaining unit employees signed the decertification petition." This argument is flawed in three separate respects. First, the assertion is Carroll's assertion, not Mullican's. With regard to Mullican, Carroll's assertion is hearsay and does not constitute objective evidence. Second, the Respondent made no effort to verify the statements in Carroll's letter. In *Planned Building Services*, 318 NLRB 1049 (1995), where the respondent also raised the decision of the Court of Appeals in *NLRB v. New Associates*, supra, the Board pointed out that, in *New Associates*, "the Third Circuit held that it would not follow the Board's decision in *Dresser* in those cases where the Board refuses to disclose to the employer, at the employer's request, the percentage of employees supporting the decertification petition. In this case, there is no evidence that the Respondent, prior to refusing and failing to recognize and bargain with [the union], requested, and was refused, information regarding the percentage of employees supporting the decertification petition. . . ." Id at fn. 5. As in *Planned Building Services*, supra, there is no evidence in this case that the Respondent ever sought any information from the Region regarding the decertification slips. Third, even if it be assumed that 114 unit employees signed decertification slips, the Respondent has not established that this constituted a majority of the unit.

No payroll was placed into evidence establishing that, in fact, the unit numbered 220 rather than 229 when recognition was withdrawn, in which case 114 would not constitute a majority. The Respondent has not established by objective evidence that a majority of its unit employees had ceased to support the Union. By withdrawing recognition from the Union the Respondent violated Section 8(a)(5) of the Act.

CONCLUSION OF LAW

By withdrawing recognition from the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unlawfully withdrawn recognition from the Union, it shall be ordered to recognize the Union and notify the Union, in writing, that it rescinds its letter dated June 28, 2002, recognizes the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit, and will meet and bargain with the Union upon request. *Century Papers*, 284 NLRB 1151, 1158 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, B.A. Mullican Lumber & Manufacturing Company, Norton, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and unlawfully withdrawing recognition from the United Mine Workers of America, the Union, as the exclusive bargaining representative of its employees in the appropriate bargaining unit set forth below.

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

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

(a) Notify the Union, in writing, that it rescinds its letter withdrawing recognition from the Union dated June 28, 2002, recognizes the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit, and will meet and bargain with the Union upon request.

(b) On request, recognize, meet and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit described below, regarding wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody it in a signed contract. The appropriate unit is:

> All full-time and regular part-time production employees employed by Respondent at its Blackwood Industrial Park Road, Norton, Virginia facility; excluding all office clerical employees, confidential employees, temporary employees, QC technicians, lumber receiving coordinators, shipping coordinators and guards, professional employees, and supervisors as defined in the Act.

(c) Within 14 days after service by the Region, post at its facilities in Norton, Virginia, copies of the attached notice marked "Appendix."[5] 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 immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 28, 2002.

(d) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize or unlawfully withdraw recognition from the United Mine Workers of America, the Union, as your exclusive bargaining representative.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] 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."

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

WE WILL notify the Union, in writing, that we rescind our letter withdrawing recognition from the Union dated June 28, 2002, that we recognize the Union as your exclusive collective-bargaining representative, and that we will meet and bargain with the Union upon request.

WE WILL, on request, recognize, meet and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of our employees in the unit described below, regarding wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody it in a signed contract. The appropriate unit is:

> All full-time and regular part-time production employees employed by Respondent at its Blackwood Industrial Park Road, Norton, Virginia facility; excluding all office clerical employees, confidential employees, temporary employees, QC technicians, lumber receiving coordinators, shipping coordinators and guards, professional employees, and supervisors as defined in the Act.

B.A. MULLICAN LUMBER & MANUFACTURING COMPANY