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Vincent/Metro Trucking, LLC and United Food and Commercial Workers Local 789. Case 18–CA–18935

July 13, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER
AND BECKER

On June 25, 2009, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions¹ and brief and has decided to affirm the judge’s rulings, findings,² and conclusions and to adopt the recommended Order as modified.

REMEDY

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent’s unlawful withdrawal of recognition. The Board has held that an affirmative bargaining order is

¹ No exceptions were filed to the judge’s recommended remedy. No exceptions were filed to the judge’s dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to execute a collective-bargaining agreement, or to the judge’s finding that the Respondent violated Sec. 8(a)(5) and (1) by violating the parties’ Board-approved settlement agreement.

² We agree with the judge’s finding that the Respondent violated Sec. 8(a)(1) of the Act by soliciting employees to sign affidavits, which the Respondent initiated, prepared, distributed, and collected, stating that the employees no longer wanted the Union to represent them. An employer may not “initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures” *Sociedad Española de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 459 (2004), quoting *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). In addition, the record shows that the Respondent ordered at least one of its employees (Xiao Dong Wang) to sign the affidavit.

Member Schaumber acknowledges that the judge’s findings in regard to the employee affidavits and the Respondent’s subsequent withdrawal of recognition from the Union are consistent with extant Board law—see e.g. *Hearst Corporation*, 281 NLRB 764 (1986), affd. mem. 837 F.2d 1088 (5th Cir. 1988). Member Schaumber applies extant law to decide this case and he joins in finding that the Respondent unlawfully withdrew recognition from the Union. In his view, however, even unfair labor practices such as those in this case might not taint a petition (or other expression of employee sentiment such as the affidavits in this case) if there was affirmative evidence that a majority of unit employees both signed the petition (or affidavit) and were unaffected by the unlawful conduct. There was no such showing in this case.

“the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.” *Id.* at 68.³ In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). Although the judge recommended an affirmative bargaining order to remedy the Respondent’s unlawful withdrawal of recognition, he did not justify imposition of such an order as required by the U.S. Court of Appeals for the District of Columbia Circuit. Thus, for the reasons stated below, we agree with the judge that an affirmative bargaining order is warranted on the facts of this case.

In *Vincent*, supra, the court summarized its requirement 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.’” *Id.* at 738.

Consistent with the court’s requirement, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) 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 withdrawal of recognition and resulting refusal to collectively bargain with 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 may oppose continued union representation, because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Because the Union was never given an opportunity to reach a successor agreement with the Respondent, it is only by restor-

³ Member Schaumber does not agree with the view expressed in *Caterair International* that an affirmative bargaining order is “the traditional, appropriate remedy” for an 8(a)(5) violation, although he recognizes that the view expressed in *Caterair International* represents extant Board law. See *Flying Foods*, 345 NLRB 101, 109 fn. 23 (2005). He agrees with 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). He further finds that imposing a bargaining order here is appropriate under that analysis.

ing the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct.

(3) 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 such challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair given that the litigation of the Union's charges took almost a year 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.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case. In order to provide employees with the opportunity to fairly assess for themselves the Union's effectiveness as a bargaining representative, the bargaining order requires the Respondent to bargain with the Union for a reasonable period of time. See, e.g., *Spectrum Health-Kent Community Campus*, 353 NLRB No. 99, slip op. at 1 (2009). In accord with the case law, we have accordingly modified the judge's recommended bargaining order so that it is not limited to a predetermined period.⁴

⁴ We have also modified the judge's recommended Order to reflect the Board's standard language for notice reading. *Homer D. Bronson Co.*, 349 NLRB 512, 515-516 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Vincent/Metro Trucking, LLC, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

“(b) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the following appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document:

Respondent's regularly scheduled full and part-time drivers excluding office clerical employees, guards, and supervisory employees as defined by the National Labor Relations Act, as amended.”

2. Insert the following as paragraph 2(d) and reletter the subsequent paragraph.

“(d) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by the Respondent's owner/manager Weizhen Lin or, at the Respondent's option, by a Board agent in Lin's presence, with translation available for Spanish-speaking and Mandarin-speaking employees.”

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

Dated, Washington, D.C. July 13, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

This remedy is appropriate where the violations are sufficiently serious and widespread that reading of the notice is considered necessary to enable employees to exercise their Section 7 rights free of coercion. See *Homer D. Bronson Co.*, supra. Here, the Respondent's unfair labor practices—soliciting employees to decertify the Union; preparing, distributing, and collecting affidavits in support of decertification; and unlawfully withdrawing recognition from the Union in violation of a Board-approved settlement agreement—were serious and affected the entire bargaining unit.

Member Schaumber would not order a notice reading remedy. The judge offered no reasons for the remedy and Member Schaumber finds the unfair practices, though serious, do not warrant this extraordinary remedy. *United Rentals, Inc.*, 349 NLRB 853, 853 fn. 3 (2007); *Chinese Daily News*, 346 NLRB 906, 909 (2006).

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 fail to provide the union necessary and relevant information concerning telephone and fax numbers, work schedules, and updated employee lists with contact information.

WE WILL NOT bypass the Union and deal directly with employees by asking them if they want to be paid hourly or monthly.

WE WILL NOT prepare affidavits or solicit our employees to sign documents indicating that they no longer want the Union to represent them.

WE WILL NOT unlawfully withdraw recognition from the Union as the collective-bargaining representative of our employees or when we have entered into a settlement agreement and have agreed to bargain with the Union for a period of time and that time has not passed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the following appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document:

Respondent's regularly scheduled full and part-time drivers excluding office clerical employees, guards, and

supervisory employees as defined by the National Labor Relations Act, as amended.

WE WILL provide the Union with necessary and relevant information concerning telephone and fax numbers, employee work schedules, and updated employee lists with contact information.

VINCENT/METRO TRUCKING, LLC

Sandra C. Francis, Esq., of Minneapolis, Minnesota, for the General Counsel.

Henry To, Esq., of Edina, Minnesota, for the Respondent-Employer.

Douglas J. Mork, of Minneapolis, Minnesota, for the Charging Party-Union.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on May 7, 2009, in Minneapolis, Minnesota, pursuant to a complaint and notice of hearing (the complaint) issued on March 13, 2009, by the Acting Regional Director for Region 18 of the National Labor Relations Board (the Board). The complaint, based upon original and amended charges filed on various dates in 2008¹ and 2009 by United Food and Commercial Workers Local 789 (the Charging Party or Union), alleges that Vincent/Metro Trucking, LLC (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide necessary and relevant information to the Union, refusing to execute a written contract that was agreed upon by the parties, soliciting employees to withdraw recognition and withdrawing recognition of the Union as the exclusive collective-bargaining representative, and in a meeting with employees bypassed the Union and dealt directly with unit employees by asking employees if they wanted to be paid hourly or monthly.

On the entire record, 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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a limited liability company engaged in the delivery of food and other goods to Asian restaurants, with its principal office and place of business located in Minneapolis, Minnesota. Respondent in conducting its business transported goods valued in excess of \$50,000 from its Minneapolis, Minnesota facility directly to other enterprises located outside the

¹ All dates are in 2008 unless otherwise indicated.

State of Minnesota. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Douglas Mork, the organizing director for the Charging Party, was contacted in July 2007 by a number of Respondent's employees.²

The Union was certified on August 27, 2007, to represent Respondent's regularly scheduled full and part time drivers.

On or about April 3, the Regional Director for Region 18 approved a Board settlement agreement in Cases 18-CA-18503, 18-CA-18552 and 18-CA-18616 in which Respondent agreed to recognize and to bargain in good faith with the Union on behalf of all unit employees for at least 12 months from the date of approval of the settlement agreement unless a contract or bargaining impasse was reached during the 12 months (GC Exh. 4(a)-(g)).

At all material times Weizhen (Vincent) Lin held the position of owner/manager of Vincent Trucking while Weiyi Lin is the owner/manager of Metro Trucking.

A. The 8(a)(1) and (5) Allegations

1. The refusal to provide information

The General Counsel alleges in paragraphs 11(a) through (g) of the complaint that the Respondent refused to provide necessary and relevant information to the Union.

Facts

By e-mail dated August 7, the Union requested that the Respondent furnish it with their updated telephone and fax numbers (GC Exh. 16).

On September 5, the Union orally requested the Respondent to provide it with the work schedules for Unit employees.

By e-mail dated November 11, the Union requested the Respondent to furnish it with contact information for new drivers and an updated employee list with contact information (GC Exh. 10).

Discussion

The Board has held that a union is entitled to requested information "if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties as the employees' exclusive bargaining representative." *Southern Nevada Builders Assn.*, 274 NLRB 350, 351, (1985). This liberal discovery-type standard nevertheless contains an impor-

² In July 2007, the majority of Respondent's 13 employees were Spanish speaking Latino drivers. The complement of the Respondent's work force has now changed dramatically with Mandarin Chinese employees now representing the majority of the 13 employees at the facility. The Respondent provides apartments at no cost for the Mandarin Chinese employees but does not do so for the Latino employees. In addition, the Mandarin Chinese employees receive their personal mail (bank statements and telephone bills) at the Respondent's business address.

tant limitation: the data must be of use in fulfilling statutory duties. The "duty to furnish . . . information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining." *Cowles Communications, Inc.*, 172 NLRB 1909 (1968).

It is long-established law that the duty to bargain in good faith embodied in Section 8(a)(5) of the Act includes the obligation of employers to provide their employees' collective-bargaining representatives with requested information which is relevant and necessary to the representative's duty to bargain on behalf of employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Such information may be needed for bargaining, for administering and policing collective-bargaining agreements, for communicating with bargaining unit members, or for preserving unit employees' work, among other reasons. The requested information at issue in this case falls into the category of communicating with bargaining unit members and representatives of the Respondent.

The record evidence confirms that the Respondent refused to provide any of the information requested by the Union as set forth in the complaint allegations. In this regard, Mork's un rebutted testimony confirms that the information was requested and the Respondent did not offer any evidence during the course of the hearing to establish that the requested information was provided to the Union.

Under these circumstances, and particularly noting that the information sought by the Union is necessary and relevant, I find that the Respondent's refusal to provide the requested information violates Section 8(a)(1) and (5) of the Act. *Wayneview Care Center*, 352 NLRB 1089, 1115 (2008) (requested information on changes to work force, current schedule for each department, and information about current employees presumptively relevant)

2. Did the parties reach agreement on a collective-bargaining contract?

The General Counsel alleges in paragraph 12 of the complaint that the Respondent and the Union reached full and complete agreement with respect to terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement, however since December 1, the Respondent has failed and refused to execute a written contract embodying the agreement.

Facts

The parties commenced discussions in January 2008 in an effort toward reaching their initial collective-bargaining agreement. Mork served as the Union's chief negotiator and one or two members of the bargaining unit attended all bargaining sessions. The Employer was represented by Vincent and his attorney.

While the parties made substantial progress and reached tentative agreement on a number of contract articles, there remained six outstanding issues when the parties met on September 5. They included seniority of employees, wages, overtime, the type of wage system to be utilized, vacations, and holidays. These issues are reflected in Mork's bargaining notes (GC Exh. 5). Initially, the Employer preferred to pay employees on an

hourly basis but during the course of negotiations proposed that employees should be able to choose whether they wanted to be paid on an hourly basis or receive a monthly salary. The Union initially proposed that employees should be paid hourly but if a monthly salary system was preferred they required that dollar figures must be included as part of the negotiation process. The Union, however, made it clear that they were not in favor of a monthly salary system at the September 5 negotiation session.

The last face-to-face negotiation session took place on September 19. According to the Union, the parties reached agreement on the subject of seniority for employees, holidays, vacation, and agreed on a bifurcated wage rate system (GC Exh. 6). They also made progress on some of the other outstanding issues. Mork requested the Employer to convey the details of their final position and the Employer agreed at the end of the meeting to provide the Union with a final contract offer.

By e-mail dated September 26, the Respondent provided the Union its final contract offer (GC Exh. 7 and 8, R. Exh. 8).

By e-mail dated December 1, Mork informed the Respondent that their last, best, and final contract offer was conditionally ratified by the unit employees on November 30. The Union apprised the Respondent that what the employee's ratified, however, was the final offer expressed at the bargaining table between the parties that was different than the hourly wage article contained in the Employer's last, best and final offer. The Union then pointed out to the Respondent that they noticed a major problem with the written contract offer that the Respondent had proposed as its last, best, and final offer. According to the Union, the Respondent neglected to add any language and details of a monthly pay option and offered to add them to the final contract offer. By return e-mail dated December 2, the Respondent offered to add the language and send it to the Union (GC Exh. 11).

By letter dated December 12, the Respondent informed the Union that they were immediately withdrawing recognition of the Union as the representative of their employees.

The Respondent further informed the Union that it had received signatures from the majority of the drivers indicating they no longer wanted to be represented by the Union (GC Exh. 13).

By letter dated December 24, the Union informed the Respondent that it does not recognize the withdrawal of recognition on numerous grounds. The Union then apprised the Employer that since they did not receive the corrected contract language as promised on December 2, it had taken the liberty of preparing a final contract for their signature. The Union noted that the contract took effect on December 1, and expected the agreement to be implemented (GC Exh. 14-15 and R. Exh. 8).

Discussion

Contrary to the General Counsel, I do not find that the parties reached a full and complete agreement on or about November 30. Therefore, for the following reasons, the Respondent did not fail and refuse to execute a written contract with the Union.

On September 26, the Respondent followed through on its commitment at the September 19 bargaining session, and sent the Union its last, best, and final offer (GC Exhs. 7, 8, and R. Exh. 8). That contract offer specifically includes in Article 15

that the Respondent will pay its employees on an hourly basis. On October 27, the Respondent sent an e-mail to the Union and inquired whether the Unit employees had decided to adopt the proposed final contract offer previously forwarded on September 26 (GC Exh. 9).

On November 11, the Union informed the Respondent that it would be voting on the contract shortly (GC Exh. 10).

On December 1, the Union informed the Respondent that the unit employees conditionally ratified the Employer's last, best, and final contract offer. However, the Union advised the Respondent that the employees did not ratify the contract offer proposed by the Employer. Rather, it ratified a final contract offer that was expressed at the bargaining table. The Union pointed out that the last, best, and final contract offer of the Respondent did not contain any language or details concerning a monthly pay system. The Union then offered to add this provision or suggested the Respondent could do so (GC Exh. 11). On December 2, the Respondent indicated it would add the monthly pay system option to its last, best, and final contract offer but it never did so (GC Exh. 11).

By letter dated December 24, since the Union did not receive the promised corrected contract language, it took the liberty of preparing a final written contract for the Respondent's signature (GC Exhs 14, 15 and R. Exh. 9).

In comparing the last, best, and final contract offer of the Respondent with the final written contract that the Union prepared and the unit employees ratified, there are a number of differences. For example, article 15 is different than the Respondent's final contract offer that proposes to pay unit employees on an hourly basis. Section 15.1 of the Union's written contract permits employees to determine whether they want to be paid on an hourly basis for all hours worked or on the current monthly salary system. Additionally, it notes that employees may switch systems with 2 weeks' notice given to the Employer. However, Lin's unrebutted testimony establishes that the parties never discussed at either the September 5 or 19 bargaining sessions the issue of switching systems with 2 weeks' notice given to the Employer nor do Mork's notes reflect discussing such an option. Section 15.2 reflects changes for collected bonus pay and section 15.3 provides a pay scale for employees to be paid on a monthly basis.

The index of the Respondent's last, best, and final contract offer is different from the index in the Union's final written contract. The effective date of the agreement, December 1, is inserted in the Union's final contract while no date appears in the Respondent's last, best, and final contract offer. Indeed, the evidence establishes that no discussions occurred during bargaining about an effective date for the agreement nor do Mork's notes confirm that discussions took place on a firm execution date.³ Lastly, article 11, Discipline and Discharge, has different section numbers in the Union's final contract offer when compared with the Respondent's last, best, and final contract offer. Contrary to the General Counsel's argument in brief that the above omissions are inadvertent I find that the inclu-

³ The lone reference to a December 1 effective date is noted in an e-mail dated December 2, wherein Mork states "Shall we put December 1 as an effective date" (GC Exh. 11).

sion by the Union of language that employees may switch systems with 2 weeks' notice to the Employer and inserting an effective date for the agreement when no such discussions on these issues occurred during bargaining, are material differences between the parties. See, *Waxie Sanitary Supply*, 337 NLRB 303, 310–311 (2001) and cases cited therein.

I also note the Union's notes for the September 5 and 19 bargaining sessions (GC Exhs. 6 and 7) do not contain any employer initials indicating that they are in agreement with a bifurcated wage system for unit employees. Moreover, no evidence was presented by the General Counsel that any of the proposals contained in the Union's notes could be implemented piecemeal without full and complete agreement on all contract articles.

The Board recognizes that in the normal course of negotiations, there is much give and take until a final collective-bargaining agreement is reached. Frequently, agreement may be reached on some issues only to be modified as other issues come into play. Consequently, the Board has adopted the view that tentative agreements made during the course of contract negotiations are not final and binding. *Taylor Warehouse Corp.*, 314 NLRB 516, 517 (1994), *enfd.* 98 F.3d 892 (6th Cir. 1996). Absence explicit evidence, no agreement becomes final and binding until the final contract, in its entirety, is reached. *Stroehmann Bakeries, Inc.*, 289 NLRB 1523, 1524 (1988).

In summary, I find that the Union did not ratify the last, best, and final contract offer proffered by the Employer. Rather, the Union at the ratification vote, presented unit employees with wage proposals and other contract articles different than what the Employer had proposed in its last, best, and final contract offer.

Under these circumstances, I find that there was no meeting of the minds between the parties and the Respondent's refusal to execute the Union's final written contract is not violative of Section 8(a)(1) and (5) of the Act.

Therefore, I recommend that paragraph 12 of the complaint be dismissed.

3. Solicitation of employees

The General Counsel alleges in paragraph 5 of the complaint that Weiyi Lin solicited various individual unit employees to each sign a document indicating that the employee no longer wished to be represented by the Union.

Facts

Xiao Dong Wang commenced employment with the Respondent on October 1, 2007, a period after the Union was certified at the Respondent. He lives in a company apartment and pays no rent to the Respondent.

Wang testified that Lin gave him a document and asked him to sign it. The document stated in pertinent part that Wang no longer wanted the Union to represent him (GC Exh. 2 and R Exh. 1).⁴

⁴ Wang stated in his pretrial affidavit that Lin (third boss) gave him the document after he finished work and told him to sign it. The document was in Chinese and English and after he looked at it he signed it. Wang stated that he signed the document because Lin is his boss and he pays him (GC Exh. 17).

Dawei Sun also commenced work at the Respondent after the Union's certification and lives with Wang in the company apartment that is paid for by the Employer. Sun testified that he signed a document on December 12, indicating that he no longer wanted the Union to represent him (GC Exh. 3 and R Exh. 2). Sun stated that he was told by a fellow driver that Lin had left the document for him to sign.

Lin testified and admitted that he is referred to as the third boss by the employees. He noted that in December 2008 there were 13 members of the Unit of which seven were Chinese and six were Latino drivers. Lin admitted that he prepared the affidavits, gave them to, and directed the seven Chinese drivers to sign the affidavits indicating that they no longer wanted the Union to represent them (R Exhs. 1–7). He did not give the same affidavit to the six Latino employees.

Discussion

It is well settled that an employer violates Section 8(a)(1) of the Act by "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing or filing of an employee petition seeking to decertify its bargaining representative." *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998), *enf. sub nom. mem. NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000). In determining whether an employer's assistance is unlawful, the appropriate inquiry is "whether the Respondent's conduct constitutes more than ministerial aid." *Times Herald*, 253 NLRB 524 (1980). In making that inquiry, the Board considers the circumstances to determine whether "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." *Hall Industries*, 293 NLRB 785, 791 (1989), *enfd. mem.* 914 F.2d 244 (3d Cir. 1990) (employer violated Section 8(a)(1) by actively assisting a decertification effort "in the context of serious unfair labor practices").

Applying these principles here, I find that the Respondent's conduct constituted more than mere ministerial aid, and was therefore unlawful. In this regard, in reviewing the testimony of Wang and Sun and the admissions against interest by Lin, the General Counsel has conclusively established that the affidavits were prepared by the Respondent who instructed the employees to sign them. It is evident, as testified to by Wang that the Chinese employees are beholden to the Respondent who provide them free lodging and good paying jobs. Therefore, the signing of the affidavits by the employees was not a free and uncoerced act.

For all of the above reasons, I find in agreement with the General Counsel, that the Respondent violated Section 8(a)(1) of the Act when it solicited unit employees to sign the affidavits indicating they no longer wanted the Union to represent them. *Nassau Glass Corp.*, 222 NLRB 792 (1976) (shop foreman drafted, sponsored, and presented to employees for their signatures decertification petition in violation of the Act)

4. Was the withdrawal of recognition lawful?

The General Counsel alleges in paragraph 13 of the complaint that the Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the Unit.

Facts

By letter dated December 12, the Respondent informed the Union that it was withdrawing recognition and noted that it had obtained the signatures from a majority of the employees to support its position that they no longer wanted the Union to represent them (GC Exh. 13).

Discussion

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board held that an employer must show a union's actual loss of majority support in order to lawfully withdraw recognition. That decision, however, was limited to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions. The Board went on to note that it continues to adhere to its well-established policy that employers may not withdraw recognition in a context of serious unremedied unfair labor practices tending to cause employees to become disaffected from the union nor can it rely on any expression of disaffection by its employees which is attributable to its undermining support for the Union.

Applying those principles here, I find that the Respondent prepared, initiated, and required the seven Chinese employees to sign the affidavits withdrawing recognition of the Union. Thus, the withdrawal of recognition executed by employees who were beholden to the Employer for their lodging and livelihood is not an act free from coercion. Accordingly, the affidavits signed by the employees were tainted by the Employer's unfair labor practices and consequently the resulting withdrawal of recognition violated Section 8(a)(1) and (5) of the Act.

I am also in agreement with the General Counsel's additional argument that the withdrawal of the Union's recognition violated the Board's previously approved settlement agreement executed by the Respondent in April 2008. In this regard, the Respondent agreed to recognize the Union as the exclusive collective-bargaining representative of its employees and to bargain in good faith for a period of 12 months. Since the withdrawal of recognition occurred on December 12, at a time within the 12-month period, it translates into a refusal to recognize and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

5. Did the Respondent bypass the Union?

The General Counsel alleges in paragraph 14 of the complaint that about late February 2009, in a meeting with some Unit employees held at Respondent's Minneapolis, Minnesota facility, Respondent by its Owner/Manager Weizhen Lin and by an unnamed agent, bypassed the Union and dealt directly with Unit employees by asking employees if they wanted to be paid hourly or monthly.

Facts

Wang's trial testimony and his pretrial affidavit indicate that he was instructed to attend a Sunday meeting on his day off in late February 2009 with the six other Chinese employees. The meeting was held at the facility but none of the Latino employees attended the meeting nor was any representative of the Union in attendance. Present for the Respondent was Vincent,

Third Boss Lin, and the Employer's Attorney. Vincent did the majority of the talking and he discussed the differences between receiving an hourly or monthly salary. Vincent then asked the assembled employees for their opinion about which salary they would prefer. Wang expressed his opinion that he did not want to change the present situation of being paid on a monthly basis. Vincent also informed the employees about prior contract discussions with the Union and stated that if they were to be paid on an hourly basis that new drivers would earn \$9 and current drivers would receive between \$10 and \$11 per hour.

Sun also attended the February 2009 Sunday meeting and testified similar to Wang. He confirmed that neither the Latino drivers nor any representative of the Union attended the meeting. Sun testified, that during the meeting, Vincent asked the employees whether they wanted to be paid hourly or monthly.

Vincent testified during the hearing but no questions were proffered concerning his participation in the late February 2009 meeting.

Therefore, the testimony of Wang and Sun stands un rebutted.

Discussion

Section 8(a)(5) of the Act provides that an employer commits an unfair labor practice by refusing to bargain collectively with the exclusive representative of its employees. The duty to bargain is defined in Section 8(d). The obligation to bargain in good faith requires, "at a minimum recognition that the statutory representative is the one with whom the employer must deal in conducting negotiations, and that it can no longer bargain directly or indirectly with employees." *General Electric Co.*, 150 NLRB 192, 194 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1069), *cert. denied* 397 U.S. 965 (1970). Indeed, it is not enough that the employer communicates with its employees about wages, hours or working conditions; such communication must be made with the intent to, or for the purpose of, circumventing bargaining with the union. *Emhart Industries*, 297 NLRB 215, 225 (1989).

The Board in *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), citing *Southern California Gas Co.*, 316 NLRB 979 (1965), held that in order to prove unlawful direct dealing in violation of Section 8(a)(5) of the Act the following criteria must be established:

- (1) the employer was communicating directly with union-represented employees;
- (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and
- (3) such communication was made without notice to, or to the exclusion of the union.

In *Emhart*, the Board found that an employer did not engage in direct dealing even though it conducted several mandatory employee meetings, without notice to the union, on procedures for productivity and quality control, topics that were also the subjects of ongoing negotiations with the union. Since the employer was not promising any benefits in these meetings to the exclusion of the union, the Board held that its intent was not to undermine the union and thus there was no unlawful direct dealing.

The evidence in the subject case is unlike what occurred in *Emhart*. Rather, the Respondent directed its Chinese employees to attend a mandatory meeting on their day-off and excluded its Latino employees as well as any Union representatives. Since the employees were requested to give their opinions as to which salary structure they preferred, the subject of the meeting directly impacted wages and other terms and conditions of employment. In addition, Respondent referenced prior contract discussions with the Union and informed employees that if they were paid by the hour that new employees would earn \$9 while current employees would receive between \$10 and \$11 per hour.

Based on the forgoing, the evidence establishes that Vincent directly communicated with union represented employees and such communication was made without notice to the Union. The meeting was held with only a portion of the unit employees and those in attendance were directed to attend on their day off. The evidence also confirms that Vincent discussed the Union and asked the employees their opinion whether they wanted to be paid on an hourly or monthly basis. I also note that Vincent is a principal member of the Respondent's bargaining team and is responsible for developing collective-bargaining proposals. He also possesses sole authority for making any changes to terms and conditions of employment.

For all of the above reasons, I find that the Respondent violated Section 8(a)(1) and (5) of the Act when it held the late February 2009 meeting with unit employees, and directly bypassed the Union by asking employees if they wanted to be paid on an hourly or monthly basis.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to provide necessary and relevant information to the Union, by bypassing the Union and dealing directly with unit employees, by preparing affidavits soliciting employees to withdraw recognition of the Union and thereafter withdrawing recognition of the Union as the employees collective-bargaining representative, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. The Respondent did not violate Section 8(a)(1) and (5) of the Act when it refused to execute a written contract after negotiations with the Union.

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.

The Respondent must convene a meeting for all Unit employees during working time at its facility and Owner/Manager Weizhen Lin must read aloud the notice to employees to the assembled employees, as well as to a Board Agent whom the Respondent permits to be present at the meeting. Further, the Respondent must provide at its own expense, Mandarin Chi-

nese and Spanish language interpreters, who shall translate aloud for the assembled unit employees the language of the notice. The Notice must be posted in conspicuous places and versions of the Notice must contain Mandarin Chinese and the Spanish language in addition to a copy of the notice in the English language.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Vincent/Metro Trucking, LLC, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to provide necessary and relevant information to the Union.

(b) Distributing to employees affidavits that solicit and encourage them to withdraw recognition of the Union as their collective-bargaining representative.

(c) Withdrawing recognition from the Union and refusing to meet and bargain in good faith with the Union.

(d) Bypassing the Union and dealing directly with unit employees by asking them if they want to be paid hourly or monthly.

(e) 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) Provide the Union with updated telephone and fax numbers, the work schedules of unit employees and the contact information for new and current employees along with an updated employee list.

(b) Immediately recognize the Union as the exclusive collective-bargaining representative of the unit employees and negotiate with the Union for a period of at least 4 months toward an initial collective-bargaining agreement or until a good faith impasse is reached due to its failure to abide with a prior settlement agreement approved by the Board.

(c) Within 14 days after service by the Region, post at its facility in Minneapolis, Minnesota, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 18, 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

⁵ 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.

⁶ 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."

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 April 3, 2008.

(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.

Dated, Washington, D.C. June 25, 2009

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 obey this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to provide the Union necessary and relevant information concerning telephone and fax numbers, work schedules and updated employee lists with contact information.

WE WILL NOT bypass the Union and deal directly with employees by asking them if they want to be paid hourly or monthly.

WE WILL NOT prepare affidavits or solicit our employees to sign documents indicating that they no longer want the Union to represent them.

WE WILL NOT unlawfully withdraw recognition of the Union as the collective-bargaining representative of our employees or when we have entered into a settlement agreement and have agreed to bargain with the Union for a period of time and that time has not passed.

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 recognize the Union as the exclusive collective-bargaining representative of our employees employed as regularly scheduled full and part-time drivers.

WE WILL, on request, bargain with the Union for a period of 4 months toward an initial collective-bargaining agreement or until a good faith impasse is reached due to our failure to abide with a prior settlement agreement approved by the Board.

WE WILL, provide the Union with necessary and relevant information concerning telephone and fax numbers, employee work schedules, and updated employee lists with contact information.

VINCENT/METRO TRUCKING, LLC