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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PACIFIC COAST SUPPLY, LLC, dba ANDERSON LUMBER COMPANY, and CHAUFFEURS, TEAMSTERS, AND HELPERS LOCAL 150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS.	**Case No. 20-CA-086308**

RESPONDENT PACIFIC COAST SUPPLY, LLC
dba ANDERSON LUMBER COMPANY'S
BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Board Cases

Court Cases

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Advice Memorandum

Statutes and Rules

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I

INTRODUCTION

Respondent Pacific Coast Supply, LLC, dba Anderson Lumber Company ("the Company" or "Anderson Lumber") respectfully excepts from the June 19, 2013 Decision ("ALJD") of Administrative Law Judge Mary Miller Cracraft ("ALJ") in the instant case.

This case involves a withdrawal of recognition from Charging Party Chauffeurs, Teamsters, and Helpers Local 150, International Brotherhood of Teamsters ("the Union") based on letters that Anderson Lumber received from 8 of its 15 bargaining unit employees. As the ALJ noted, "There is no dispute that the signatures of these individuals are authentic" and "There is no claim that supervisory involvement tainted the signatures nor are there any contemporaneous, unremedied unfair labor practices at issue." ALJD, 4:7 and 5:2 – 3. Thus, the only issue here is whether Anderson Lumber satisfied its burden of proving, by a preponderance of the admissible evidence, that the Union actually lost the support of a majority of the 15 bargaining unit employees.

In Levitz Furniture Co. of the Pacific, 333 NLRB 717, 725 (2001), the Board held that an employer which withdraws recognition has the burden to prove an actual loss of majority support by a *preponderance of the evidence*. Since the preponderance of the evidence standard applies, an employer's burden is merely to show that "it is more probable than not that the employees rejected union representation." Diversicare Leasing Corp., 351 NLRB 817, 818 (2007).

But, as the Board held in Diversicare, 351 NLRB at 818, the evidence upon which an employer relies to withdraw recognition need not be "unambiguous":

> "Contrary to the dissent, Levitz does not require that the evidence proving loss of majority be "unambiguous." An employer must prove loss of majority by a preponderance of the evidence. Under Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust of Southern California, 508 U.S. 602, 622 (1993), the preponderance-of-the-evidence standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." The extent to which specific evidence is ambiguous is merely a factor to be considered in determining whether the employer has met the preponderance standard."

When confronted with an ambiguous employee statement, the Board must adopt "the more reasonable" of two possible interpretations. Diversicare, 351 NLRB at 818.

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Here, the ALJ correctly concluded that although the letters of 4 of the 8 employees – Jorge Garcia ("I do not wish to be a part of the Union now or in the future"), Luis Gonzalez ("I do not wish to be a part of the union"), Craig Hartog ("I no longer wish to be a part of the Local 150 Teamsters Union"), and Mario Ramos Pompa ("I do not wish to be a part of the Union") – were ambiguous, "the more reasonable understanding of these statements is that these four employees no longer desired to be represented by the Union." ALJD, 6:17 – 35.

However, the ALJ then found that the letters of the remaining 4 employees "are not in the least ambiguous" and "clearly state a desire to withdraw from membership in the Union." Concluding that "Statements of desire to terminate union membership do not support withdrawal of recognition" and "mean[] only that an employee does not wish to pay dues to the union," the ALJ held that Anderson Lumber could not prove an actual loss of majority support and that as a result its withdrawal of recognition violated Sections 8(a)(1) and (5).

The ALJ's ruling was error. Employee statements that they do not wish to be a Union member are inherently ambiguous because they could mean either that the employee does not want to be a Union member but still wants the Union to represent him or that the employee does not want to be a Union member because he does not support the Union. The fact that such statements are inherently ambiguous means that, in accordance with Diversicare, the ALJ should have considered evidence which helped to resolve that ambiguity; i.e., evidence which would help show which interpretation was "more reasonable." In Diversicare, 351 NLRB at 818, the Board concluded "that the more reasonable interpretation of the petition language is that the signatory employees rejected union representation. Accordingly, it is more probable than not that the employees rejected union representation."

So what did the remaining 4 letters mean? Is it more probable than not that the remaining 4 letters showed a loss of majority support, as Anderson Lumber contends, or is it more probable than not that the other 4 letters "mean only" that the employees wanted to resign their Union memberships and stop paying dues, as found by the ALJ? Resolving the ambiguity in the letters is the ultimate issue in this case.

Based on the evidence presented at the hearing, the Administrative Law Judge should have

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found that the more likely interpretation, the "more reasonable" meaning, is that the Davis, Rocha, Hernandez and Singh letters showed that they did not support the Union.

- First, the employees each testified that their letters meant that they did not support the Union and that when they wrote their letters they did not want to be represented by the Union. No contrary evidence was introduced by the General Counsel.
- Second, the Board and the Courts have held that similar employee statements in other cases was evidence of a loss of Union support.
- Third, the General Counsel's argument that the employees merely wanted to resign their Union memberships even though they still supported the Union is particularly unlikely. This was a union shop environment where failing to maintain Union membership or to pay Union dues would result in the employee's termination. It would be completely counter-intuitive, completely lacking in common sense and against all logic, to conclude that the employees wanted to resign their Union memberships and cease paying Union dues so that they could be fired. It is much more likely – more probable than not – that the employees wanted to get rid of the Union so that they would not have to worry about getting fired when they resigned their Union memberships and stopped paying Union dues. This is the more reasonable interpretation of the Davis, Rocha, Hernandez and Singh letters.
- Fourth, the General Counsel did not present any evidence which showed that any of the employees supported the Union, much less that they wanted to resign their Union memberships but still supported the Union.
- Fifth, the letters must be evaluated in the context of all of the surrounding facts, including that the employees who wrote the letters were not schooled in the niceties of legal verbiage. In fact, Hernandez did not read and write English. The wording and meaning of their letters should be evaluated with that in mind.
- Sixth, the Board should consider the evidence which was presented in offers of proof at the hearing, which clearly resolves any ambiguity in the letters once and for all – the statements that the employees made to the Region's investigators during the

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investigation of the underlying Charge, and recorded in their NLRB Affidavits, and their testimony under oath at the hearing, that their letters were meant as statements of non-support for the Union and that they did not want to be represented by the Union when they wrote the letters. This evidence was clearly relevant and admissible because it shed light on the correct interpretation of the employees' letter and showed that a majority of the employees did not, in fact, support the Union, the ultimate issue in the case.

The determination of whether Anderson Lumber met its burden of proving an actual loss of Union support must be based on a reasoned review of all of the evidence. In Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 378 – 379 (1998), the Supreme Court reminded the Board that it must consider *all* relevant evidence which may bear on an issue, per Federal Rules of Evidence Rule 401, and that it may not simply refuse to consider otherwise relevant evidence, as the General Counsel and the ALJ have done here. Specifically, the Supreme Court cautioned that the Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." 522 U.S. at 378. The Board's evaluation of evidence must be "a matter of logic and sound inference from all the circumstances, not an arbitrary rule of disregard to be extracted from prior Board decisions." 522 U.S. at 379. See also, McDonald Partners, Inc. v. NLRB, 331 F.3d 1002, 1007 – 1008 (D.C. Cir. 2003).

However, the ALJ did just that. She refused to consider the employee testimony and NLRB affidavits which explained what their letters meant and showed that they did not support the Union when they wrote their letters. She then illogically concluded, without citing any evidence in support, that the remaining 4 letters were not ambiguous and could "only mean" that the employees wanted to stop paying dues. She then refused to even consider whether, in a union shop environment, an employee would logically refuse to maintain Union membership and cease paying dues knowing that it would result in his termination, and instead fell back on a string of inapposite cases which refused to find that declining dues checkoff was evidence of loss of Union support.

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At the hearing, each of the 8 employees testified, under an offer of proof, that their letters meant that they did not support the Union and that they did not want to be represented by the Union when they wrote their letters. Further, the Company made an offer of proof that each of the employees told the NLRB investigators during the course of the Region's investigation of the underlying Charge that they wrote the letters because they did not support the Union and that they did not want to be represented by the Union. Three NLRB Affidavits offered by the Company also show that each of those three employees told the Region's investigator that they personally wrote their letters because they did not support the Union. Moreover, two of those Affidavits show that all 8 employees had discussed writing the letters in order to "get rid of the Union" and to "remove the Union." This evidence is relevant to prove both that the Union actually lost majority support, as well as to show that the Region's investigators knew when the Region issued the Complaint that the Union had lost majority support. The ALJ should have admitted this evidence into the record and considered it. Her refusal to do so was error.

Thus, the undisputed evidence presented at the hearing shows that any ambiguity in the letters should be resolved by finding that it is more likely than not that 8 out of 15 bargaining unit employees – a majority – did not support the Union when Anderson Lumber withdrew support on July 20, 2012. As a result, Anderson Lumber met its burden and the Complaint should be dismissed.

II

STATEMENT OF FACTS

The facts in this case are virtually undisputed.[1]

Anderson Lumber is a lumber supply yard located in North Highlands, California which sells lumber supplies to home builders. The Company is engaged in commerce and meets the

[1] At page 2, footnote 2 of the ALJD, the ALJ states that she made credibility resolutions and discredited testimony contrary to her findings "on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible or unworthy of belief." The ALJD does not identify any witness testimony which was in conflict with any credited testimony or any documents, or any witness testimony which was inherently incredible or unworthy of belief. Nor does the ALJD identify any witness testimony which the ALJ discredited on those grounds. Anderson Lumber objects to any such unspecified and unsupported "credibility resolutions."

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Board's jurisdictional standards. See, Complaint, par. 2(a) and (b) and 3; Answer to Complaint, par. 1.

Since about the late 1960's, Anderson Lumber recognized the Union as the exclusive Section 9(a) collective-bargaining representative of a bargaining unit of employees whose positions are listed in the Wages Section of the parties' collective bargaining agreement. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from April 1, 2011 to February 28, 2012. See, Stipulation, par. 3 – 6. There is no dispute that Anderson Lumber and the Union enjoyed a successful bargaining relationship for approximately 40 years. Tr. 29:11 – 13.

Section 1, Union Membership, of the parties' collective bargaining agreement provided that Anderson Lumber was a union shop. See, Jt. Ex. 1A. In relevant part, Section 1 states:

> "Only members in good standing in the Union shall be retained in employment. For the purpose of this Section, "Members in good standing" shall be defined to mean employee members in the Union who tender the periodic dues and initiation fees required as a condition of acquiring or retaining membership. Non-members of the Union hired by the Employer must complete membership affiliation on or immediately following the thirty-first (31st) day of employment …. Upon written notice from the Union of the failure on the part of any individual to compete (sic) membership in the Union, as above required, or of failure to continue payment of dues to the Union, the Company shall, within seven (7) days of receipt of such notice, discharge said employee."

Anderson Lumber met with the Union to begin bargaining for a new collective bargaining agreement on March 27, 2012. Tr. 29:2 – 10. In preparation for that meeting, the Union's business agent, Michael Tobin,[2] held a "proposal" meeting of the bargaining unit employees on March 22, 2012. The sign in sheet shows, and Tobin confirmed, that only 5 out of 12 bargaining unit employees[3] attended that meeting. Tr. 39:18 – 40:19.

As of July 20, 2012, Anderson Lumber employed 15 employees in the bargaining unit, including the following eight employees: Mario Ramos Pompa, Luis Gonzalez, Jorge Garcia,

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[2] Tobin testified that he had been responsible for representing the employees in the Anderson Lumber bargaining unit since January, 1991. Tr. 28:5 – 25.

[3] Anderson Lumber hired 3 additional bargaining unit employees after the March 22, 2012 meeting, thus bringing the bargaining unit up to 15 employees. Tr. 40:8 – 18.

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Mark Rocha, Miguel Hernandez, Craig Hartog, Donald Davis and Sandeep Singh (hereinafter referred to collectively as the "8 employees"). See, Stipulation, par. 6.

Ramos, Gonzalez, Garcia and Hernandez are Spanish speakers and each testified via a translator. None of them are able to read and write English well. Tr. 47:1 – 18, 69:11 – 12, 76:18 – 19, and 97:2 – 3.

The parties stipulated that Anderson Lumber received 8 separate letters which were prepared and submitted by the 8 employees between July 16 and 19, 2012. See, Stipulation, par. 7 – 15, and Jt. Ex. B – 1 through B – 8. Ramos, Rocha, Hernandez, Davis, Hartog and Singh each testified that they wrote and signed their own letters. Tr. 48:22 – 49:3 (Ramos), 86:14 – 20 (Rocha), 97:4 – 14 (Hernandez), 100:18 -0 101:5 (Hartog), 107:7 – 18 (Davis), and 110:18 – 111:1 (Singh). Although Ramos trestified that he could only read and write English "not perfectly" and "only a little bit" (Tr. 47:15 – 18), he wrote the letters that Gonzalez and Garcia signed because of their own greater difficulty reading and writing English. Gonzalez testified that Ramos wrote his letter in English (Jt. Ex. B – 3), which said in pertinent part, "I do not wish to be part of the union", and then told Gonzalez in Spanish what he had written in English:

"Q. Did he tell you what this letter meant in Spanish?

"A. Yes.

"Q. What did he tell you about it?

"A. That it was for to say that I wasn't in agreement with, what do you call that? With the Union.

"Q. Okay. And is that what you intended when you signed this letter that you were not in agreement with having a Union?

"A. Yes." Tr. 70:6 – 13.

Garcia also testified that Ramos wrote his letter for him, which said in pertinent part, "I … do not wish to be a part of the Union now or in the future" (Jt. Ex. B – 7), and that Ramos then told him what it meant in Spanish:

"Q. … When he wrote this letter for you, did he tell you in Spanish what he was writing in English?

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"A. Yes.

"Q. What did he tell you?

"A. I can't remember – well just that I didn't want to, simply just didn't want to be with the Union. I didn't want to be with them." Tr. 77:14 – 22.

Hernandez also testified he does not read and write English (Tr. 97:2 – 4), but that he wrote his letter anyway. His letter states, "I resign from Teamsters Local # 150" (Tr. 97:10 – 14).

After receiving these 8 letters, Anderson Lumber authorized its labor consultant, Mark Ingram, to notify the Union that the Company believed that the Union had lost majority support and that as a result Anderson Lumber was withdrawing recognition from the Union.[4] See, Stipulation, par. 2.

Union business agent Tobin testified that on July 20, 2012, he received a telephone call from Ingram in which Ingram told him, "We don't think you have a (sic) majority support." Tobin then asked Ingram, "Where's your proof," and Ingram replied that he would send Tobin "some statements." Tr. 31:4 – 21. Ingram then sent Tobin the following email, dated July 20, 2012:

"Dear Michael,

"Following up on our conversation this morning, attached for your review are eight (8) individual statements from bargaining unit employees working at Anderson Lumber Company. As you can see, a majority of the employees have told the Company that they no longer wish to be represented by Teamsters Local 150.

"While we've enjoyed a good working relationship over the years, both the Union and the Company have an obligation to respect the employees' choice in this regard. Accordingly, Anderson Lumber Company must now withdraw recognition from Local 150.

"As we discussed, under the circumstances, it would not be appropriate for the parties to continue in collective bargaining negotiations.

"Please feel free to contact me if you would like to discuss this further.

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[4] The parties stipulated that, during the time period relevant to this case, Ingram was Anderson Lumber's labor consultant, that he had been authorized by Anderson Lumber to communicate with the Union regarding Anderson Lumber's withdrawal of recognition from the Union on July 20, 2012, and that, for that purpose, Ingram was an agent of Anderson Lumber within the meaning of Section 2(13) of the Act, 29 U.S.C. Section 152(13). See, Stipulation, par. 2.

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"Sincerely,

"Mark"

G.C. Ex. 2.

Ingram followed up by faxing Tobin copies of the letters which had been signed by the 8 employees. Tr. 32:5 – 14; G.C. Ex. 2. After reviewing the statements, Tobin called Ingram and said that he "didn't believe this was showing that we – these statements weren't showing that we didn't have majority support." Tobin said that Ingram reiterated the Company's opinion as previously stated in his July 20, 2012 email (i.e., that the Company believed that the statements showed that "a majority of the employees have told the Company that they no longer wish to be represented by Teamsters Local 150"), and that Ingram "said that he didn't think that we had a (sic) majority support." Tr. 33:6 – 34:21.

Tobin admits that, on or after July 20, 2012, he never provided Anderson Lumber with any evidence which showed that the Union had majority support. Tr. 42:18 – 24.

At the outset of the hearing, the General Counsel objected that Anderson Lumber intended to present testimony "concerning these eight employees' intent regarding these written statements and their desires regarding Union representation about the meaning of their letters and about whether they supported the Union" because Anderson Lumber "did not consider [that evidence] in withdrawing recognition from the Union" and that allowing the testimony would only "serve to lengthen the hearing, unnecessarily burden the record." Tr. 11:12 – 12:12. Anderson Lumber argued that the testimony was relevant and admissible (Tr. 12:25 – 18:19) and assured the ALJ that allowing the testimony would not unduly lengthen the proceedings since he only intended to ask "each employee, Was your intent when you wrote this letter that you wanted to be represented by the Union or did not want to be represented by the Union?" (Tr. 22:9 – 22).[5]

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[5] In her Decision, the ALJ commented that this question format was "leading" and that she would be "unwilling to accord the responses much weight even were there no objections to the questions." ALJD, 7:47 – 8:4. However, after Anderson Lumber's attorney advised the ALJ that he would ask each witness "Was your intent when you wrote this letter that you wanted to be represented by the Union or did not want to be represented by the Union?", the ALJ ruled that she would allow Anderson Lumber "to do a question and answer offer of proof to supplement the record on this issue." Tr. 25:25 – 26:3. Moreover, the ALJ subsequently overruled the General

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The ALJ sustained the objection, but announced that she would allow the employees to be examined regarding their intent on an offer of proof basis:

> "JUDGE CRACRAFT: My practice for all employees will be to allow the Employer to do a question and answer offer of proof to supplement the record on this issue. I will reject the offer of proof but it will be on the record so that if anyone disagrees with me down the road, we won't have to come back here for a remand.
>
> "So on this offer of proof, when you go into it, you will say I am now starting my offer of proof and you will ask the questions as to the offer of proof. But to make our record whole, the General Counsel also needs to be able to cross examine on the offer of proof.
>
> "Even though I'm rejecting it, if you believe there's something you want in the record for appellate review, you need to also cross-examine on the specific questions that were part of the offer of proof and you need to say this cross examination is limited right now to the questions asked by Respondent on their offer of proof. And then --
>
> "MR. DAVENPORT: And that will take place directly after the offer of proof? Not --
>
> "JUDGE CRACRAFT: That would be the best way to do it." Tr. 25:25 – 26:19.

As a result, Anderson Lumber examined each of the 8 employees, and offered three NLRB Affidavits, in order to establish what the employees' letters meant when they wrote their letters, whether the employees wanted to be represented by the Union when they wrote their letters, and the statements that the employees made to the NLRB investigators during the Region's investigation of this Charge showing that they did not support the Union. As will be discussed in the Argument, *infra*, Anderson Lumber believes that this evidence was relevant and that it should have been admitted.

A. Evidence Of The 8 Employees' Intent Regarding Their Letters.

The General Counsel's theory of this case is that Anderson Lumber's withdrawal of recognition was unlawful because the employees' letters, on which Anderson Lumber relied, were ambiguous about whether the employees did or did not support the Union. See, General Counsel's

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Counsel's objections that the question was leading, stating, "This is part of the offer of proof and I'll allow it as part of the offer of proof." Tr. 98:1 – 3, 108:12 – 15. In any event, the question is not leading since it offers the possibility of either one of two opposing answers, and therefore does not suggest any particular answer. See, e.g., People v. Pearson, 56 Cal. 4th 393, 428 (2013), holding that a "whether or not" question is not leading because it does not suggest a particular answer.

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opening statement, Tr. 10:24 – 11:5 and 21:15 – 18. As a result, Anderson Lumber made an offer of proof for each of the 8 employees in order to explain what they meant when they wrote their letters; i.e., to explain any ambiguity in their letters. Those offers of proof clearly show that none of the 8 employees supported the Union when they signed their letters and that their letters were intended to show that they did not support the Union.

Mario Ramos Pompa:

Ramos' letter stated, in pertinent part, "I don't want to be part of the Union." Jt. Ex. B – 5. In the offer of proof, Ramos testified that he meant exactly that: "I didn't want to be part of the – I don't want to be part of the Union." When asked to explain what he meant by stating that he did not "want to be part of the Union", he testified that "I didn't want to be represented by the Union." Tr. 53:11 – 15, 54:7 – 11.

The Company also offered into evidence a copy of the Affidavit which Ramos gave to the NLRB on October 2, 2012. See, R. Ex. 2 (rejected). In relevant part, Ramos' Affidavit[6] confirms that all 8 employees wrote their letters because they wanted "to get rid of the Union."

> "The Union takes away from my check but they do not help me with anything. One day I was talking with my co-workers during our lunch regarding the union and how they do not help us. *It was then when we discussed writing a letter to get rid of the union.* There were around 8 co-workers present but I do not want to mention their names since my issue with the union is personal and I do not want to speak for them." (emphasis added)

Luis Gonzalez:

Gonzalez' letter states, in pertinent part, "I do not wish to be a part of the union." Jt. Ex. B – 3. As is stated earlier, Gonzalez testified, without objection by the General Counsel, that Ramos had written his letter in English and then told him in Spanish what he had written. Gonzalez then testified, again without objection by General Counsel, that he signed the letter because he was not "… in agreement with having a Union." Tr. 70:6 – 13.

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[6] The Gonzalez, Ramos, and Garcia NLRB Affidavits were written in Spanish. See, R. Ex. 1, 2 and 3 (rejected), respectively. Anderson Lumber attached a true and correct English translation of each of the Affidavits, along with the translator's Declaration, to its post-hearing brief as Appendix A. Although the ALJ gave the General Counsel an opportunity to object to the translations, the General Counsel did not object.

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In the offer of proof, Gonzalez also testified that when he signed the letter, "I didn't want to be represented by the Union." Tr. 71:13 – 16.

The Company also offered into evidence of copy of Gonzalez' NLRB Affidavit, which he signed on September 10, 2012. See, R. Ex. 1, (rejected). In relevant part, Gonzalez' Affidavit also shows that he wrote his letter because he wanted to "get rid of the Union." Further, he confirms that the reason that he and the other employees wrote the letters was because of their dissatisfaction with the Union:

> "I did not write the letter because I do not write English; my co-worker Mario Ramos Pompa wrote it for me but I signed it. Mario translated the letter, telling me that *by signing it I was agreeing to get rid of the Union*. I was present when Mario wrote my letter, he wrote it at the Company yard during our break. That same day, July 16, I signed the letter and Mario turned it in. I do not know to whom he gave it. (emphasis added)
>
> "I do not recall exactly who, but one of my co-workers, during a discussion regarding the Union, informed us that we could write a letter stating our dissatisfaction with the Union. That is why we wrote the letters.
>
> "Before signing the letter, there were many discussions between my co-workers regarding the Union and how difficult it was to communicate with them and that they did not support us. For example, when I began with the Company in June 2011, I attempted to speak with the Union regarding my initiation fee, but no one helped me, they kept transferring me from person to person. I tried to get them to send me a form for my initiation by mail and they never sent one. All of this has made me feel bad because I was in good standing with the Union and my co-workers have commented that if I was not current with my payments, the Union could have me fired."

Jorge Garcia:

Garcia's letter states, in pertinent part, "I … do not wish to be a part of the Union now or in the future." Jt. Ex. B – 7. Garcia testified, without objection by the General Counsel, that Ramos wrote his letter in English and then told him in Spanish what he had written. Garcia then testified, again without objection by the General Counsel, that he signed the letter because "I didn't want to, simply just didn't want to be with the Union. I didn't want to be with them." Tr. 77:14 – 22.

In the offer of proof, Garcia testified that when he wrote the letter, "I didn't want to be represented by the Union." Tr. 77:25 – 78:4.

Garcia also signed an NLRB Affidavit which the Company offered. See, R. Ex. 3

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(925) 279-3430
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(rejected). Again, Garcia's Affidavit states that he signed his letter because he "did not want to be with the Union". He goes on to state that all 8 employees had discussed submitting the letters to Anderson Lumber's management because they wanted to "remove" the Union.

> "One day, my workmates and I were at a chat about the Union and *that we wanted to remove it*. That's where the letters were spoken about. There were about five employees gathered but later *we mentioned the same thing with each of the eight who submitted letters*. This was about two or three weeks before we submitted the letters to the Company." (emphasis added)

On cross-examination by the General Counsel, Garcia confirmed that by signing his letter he meant that he did not want to be represented by the Union:

> "Q. Mr. Garcia, you previously testified that by writing your statement you meant that you did not want to be represented by the Union, correct?
>
> "A. True, I didn't want to be represented." Tr. 79:23 – 80:1.

Mark Rocha:

Rocha's letter states, "I, Mark A. Rocha, do not wish to be a Union member." Jt. Ex. B – 6. When asked in the offer of proof what he meant when he wrote his letter, he explained, "I meant I didn't want to be represented at all and have to pay the dues." Tr. 87:12 – 14. He went on to explain that he had not become a Union member because he hadn't been employed for 30 days yet, so he didn't think that the collective bargaining agreement's union shop clause requiring him to become a member in "30 days" "had kicked in yet". Tr. 87:15 – 21.

Rocha also testified that when he signed the letter, "I did not" want to be represented by the Union. Tr. 88:1 – 4.

Miguel Hernandez:

Hernandez' letter states, "I resign from Teamsters Local # 150." Jt. Ex. B – 2. In the offer of proof, when asked to explain what he meant, he testified, "I understood – I felt that I didn't need the Union for – to be with the Union" (Tr. 97:18 – 22), and that when he wrote the letter, "No, I didn't want to be represented by the Union" (Tr. 98:5 – 8).

Craig Hartog:

Hartog's letter states, "I no longer wish to be a part of the Local 150 Teamster Union." Jt.

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Ex. B – 8. When asked in the offer of proof what he meant, he testified, "I wrote I didn't want to be represented by the Union which I just – the company offered benefits and everything and I just – I didn't want to be a part of the Union is what I meant." He also testified that when he wrote the letter, "I did not want to be represented by the Union." Tr. 101:6 – 21.

Don Davis:

The letter that Davis submitted to Chris Lucchetti, Anderson Lumber's Manager, states, "Chris if it is all possible I Donald Davis would like to exit the union. This is due to the union not doing any services for the cost that they are charging." Jt. Ex. B – 4. In the offer of proof, when asked to explain what he meant by that, Davis testified as follows:

> "A. Basically, they were providing no services. I got tired of paying Union dues because of that.
>
> "Q. Okay. And when you said that you did not – that you would like to exit the Union, what did you mean by that?
>
> "A. I wanted out of the Union." Tr. 107:21 – 108:5.

When asked, "When you wrote this letter, did you want to be represented by the Union or did you not want to be represented?" Davis testified, "No." Tr. 108:8 – 11, 17 – 23.

Sandeep Singh:

Singh's letter states, "I, Sandeep Singh, employee of Anderson Lumber wish to get out of the Union." Jt. Ex. B – 1. He explained what he meant by the letter as follows: "I wished that the Union – to get out of the Union. I choose not to be in the Union." Tr. 111:6 – 10. And when asked whether or not he wanted to be represented by the Union when he wrote the letter, he also testified, "I did not want to be represented by the Union."

The General Counsel did not put on any evidence which contradicted these offers of proof, even though the ALJ admonished the General Counsel and Union to develop a "whole record," including by cross-examination, so that "we won't have to come back here for a remand." Tr. 26:3 – 16. Interestingly, the General Counsel suggested at times that the employees' NLRB Affidavits included "other factors" which explained the employees' intent when writing their letters and about whether the employees supported the Union. But when confronted with having

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to produce those Affidavits if she cross-examined the employees about statements made in the Affidavits, the General Counsel withdrew her cross-examination questions. See, e.g., Tr. 80:2 – 19; 105:1 – 24. Ultimately, the General Counsel also refused to produce the Affidavits at all. Tr. 73:2 – 9.

Thus, with the exception of Garcia, who confirmed on cross-examination that he signed his letter because he did not want to be represented by the Union (Tr. 79:23 – 80:1), the General Counsel did not cross-examine any of the employees about their reasons for writing their letters, what they meant by their letters, or whether they supported the Union when they wrote their letters. Thus, there is no evidence in the record which contradicts the offers of proof.

B. The Region Knew During Its Investigation That The Union Lost Majority Support.

During Ramos' testimony, the Company also made an offer of proof regarding what he and the other employees told the Region's investigators during their investigation of this Charge, including that the 8 employees did not support the Union when they wrote their letters. Tr. 60:21 – 65:11. In particular, the Company offered to prove that Ramos told the Region's investigators, as is reflected in his Affidavit (R. Ex. 2), that he had a lunchtime meeting with 8 employees during which they discussed "writing a letter to get rid of the Union." Tr. 64:22 – 65:1. The Company also offered to prove that when the Region's investigators drafted the Affidavits they refused to include some employee statements of non-support for the Union. Tr. 64:13 – 18. Further, Anderson Lumber offered to provide testimony from each of the 8 employees that they told the Region's investigators that they did not want to be represented by the Union when they wrote their letters. Tr. 65:5 – 9. The ALJ rejected the offer of proof (Tr. 65:14) and later confirmed that the same offer of proof was made and rejected for each of the remaining employees who testified. Tr. 71:17 – 25.

C. The NLRB Affidavits.

As is stated earlier, the Company also offered the NLRB Affidavits signed by Ramos, Gonzalez and Garcia, which the Administrative Law Judge rejected on relevance grounds. Tr. 74:15 – 25; 83:25 – 84:8; ALJD, 8:50 – 51 and ft. 14.

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These Affidavits clearly show why these three employees wrote their letters and that they did not support the Union when they did so. They also show that all 8 employees wanted to "get rid of" the Union and wanted to "remove" the Union. Finally, they show that the NLRB learned during its investigation that the 8 employees did not support the Union.

For instance, Ramos's Affidavit, R. Ex. 2, declares that he wrote his letter because the Union "never helps me" get another job when he was laid off, and that the Union overcharged him for dues and initiation fees when he returned to work. As a result, he discussed the Union with the other employees and they decided to write a letter to "get rid of the Union."

> "The Union takes away from my check but they do not help me with anything. One day I was talking with my co-workers during our lunch regarding the union and how they do not help us. It was then when we discussed writing a letter to get rid of the union. There were around 8 co-workers present but I do not want to mention their names since my issue with the union is personal and I do not want to speak for them."

Gonzalez' Affidavit tells a similar story. See, R. Ex. 1. After declaring that he signed his letter because he wanted to "get rid of the Union," Gonzalez states that the other employees also decided to write letters because of their "dissatisfaction with the Union. That is why we wrote the letters." He also explained to the Region's investigators why he and the other employees were upset with the Union. He said that he was particularly concerned about the Union's failure to provide him with the information that he needed to pay his initiation fee because he understood that the "the Union could have me fired" for not being "current with my payments":

> "Before signing the letter, there were many discussions between my co-workers regarding the Union and how difficult it was to communicate with them and that they did not support us. For example, when I began with the Company in June 2011, I attempted to speak with the Union regarding my initiation fee, but no one helped me, they kept transferring me from person to person. I tried to get them to send me a form for my initiation by mail and they never sent one. All of this has made me feel bad because I was in good standing with the Union and my co-workers have commented that if I was not current with my payments, the Union could have me fired."

Garcia's NLRB Affidavit, R. Ex. 3, also shows that he told the NLRB investigators that he signed his letter because he "did not want to be with the Union." Like Ramos' and Gonzalez's Affidavits, Garcia also told the Region's investigators that all 8 employees had discussed submitting the letters to Anderson Lumber's management because they wanted to "remove" the

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Union.

> "One day, my workmates and I were at a chat about the Union and [the fact] that we wanted to remove it. That's where the letters were spoken about. There were about five employees gathered but later we mentioned the same thing with each of the eight who submitted letters. This was about two or three weeks before we submitted the letters to the Company."

Thus, in addition to the offers of proof that all 8 employees would testify that they told the Region's investigators that they did not support the Union when they signed their letters and wrote the letters in order to get rid of the Union, the three NLRB Affidavits offered by Anderson Lumber independently show that the Region knew during its investigation, prior to issuing the Complaint, that all 8 employees wrote their letters because they wanted to "get rid of" or "remove" the Union. Moreover, these statements were made to the Region's investigators, not to Anderson Lumber in preparation for the hearing, so there is no question about their credibility of the employees' statements.

If the General Counsel believed that Anderson Lumber's offers of proof on this issue did not accurately represent what the NLRB investigators learned during their investigation, nothing prevented the General Counsel from introducing evidence to that effect. For instance, the General Counsel could have called the Region's investigators to testify about what they learned during the investigation. Or she could have simply offered the NLRB Affidavits themselves. However, she refused to do that too, and a negative inference should be drawn accordingly.

As a result, there is no evidence in the record which contradicts the Affidavits' statements that the 8 employees wrote their letters in order to "get rid of" and to "remove" the Union. Nor is there any evidence which contradicts the offer of proof that each of the 8 employees told the Region's investigators that they did not support the Union when they wrote their letters. Accordingly, the record is uncontradicted that the Region's investigation disclosed that the Union had, in fact, lost majority support.

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IV

ARGUMENT

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A. The Levitz Standard

In Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001), the Board announced a new standard for withdrawing recognition from an incumbent union:

> "We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule Celanese and its progeny insofar as they permit withdrawal on the basis of good-faith doubt. Under our new standard, an employer can defeat a post-withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status." 333 NLRB at 717.

> "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."

333 NLRB at 725.

Thus, under Levitz an employer who has withdrawn recognition must prove, as an affirmative defense at an unfair labor practice hearing and by a preponderance of the evidence, that the union has actually, in fact, lost majority support.

But, as the Board held in Diversicare Leasing Corp., 351 NLRB 817, 818 (2007), the evidence upon which an employer relies to withdraw recognition need not be "unambiguous":

> "Contrary to the dissent, Levitz does not require that the evidence proving loss of majority be "unambiguous." An employer must prove loss of majority by a preponderance of the evidence. Under Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust of Southern California, 508 U.S. 602, 622 (1993), the preponderance-of-the-evidence standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." The extent to which specific evidence is ambiguous is merely a factor to be considered in determining whether the employer has met the preponderance standard."

The Diversicare Board then rejected the administrative law judge's finding that a petition which stated that the employees "wish for a vote to remove the Union" was merely evidence that the employees wanted a vote to decide whether to remove the union. Rather, the Board held that the administrative law judge was required to apply "the more reasonable" interpretation of the petition, which was that the employees wanted to remove the union.

> "Although the judge's view of the petition language represents a possible interpretation, we find that the more reasonable reading of the petition is that the signatory employees wished "to remove" the Union as their representative. That language is not at all neutral. It does not say, for example, that the employees want a vote on the issue of union representation, or a vote on the union's status as representative; nor does it echo the official

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> ballot language of "do you wish to be represented" by the union. Rather, the language speaks of the removal of the Union as representative.
> ...
>
> "Here, to be sure, employees asked for a vote. But they also gave a clear statement as to how they would vote: "to remove the Union." We agree with the Respondent that this statement was objective proof of the employees' withdrawal of support for the Union, and that employees simply asked for a vote because they believed it was the means to their desired outcome."

351 NLRB at 817 – 818. Thus, the Board concluded that this was the "more reasonable" interpretation of the otherwise ambiguous petition. 351 NLRB at 818.

B. The Letters and Surrounding Circumstances Prove An Actual Loss Of Majority Support.

The ALJ correctly concluded that although ambiguous, "the more reasonable understanding" of the letters signed by Jorge Garcia ("I do not wish to be a part of the Union now or in the future"), Luis Gonzalez ("I do not wish to be a part of the union"), Craig Hartog ("I no longer wish to be a part of the Local 150 Teamsters Union"), and Mario Ramos Pompa ("I do not wish to be a part of the Union") was that "these four employees no longer desired to be represented by the Union." ALJD, 6:17 – 35.

Thus, this case turns on the meaning of the remaining 4 letters which were signed by Don Davis, Sandeep Singh, Miguel Hernandez and Mark Rocha.

The ALJ found that the 4 remaining letters "are not in the least ambiguous" and "clearly state a desire to withdraw from membership in the Union," and then held that employee statements of a desire to resign Union membership cannot support a withdrawal of recognition because an employee's statement that he wished to resign Union membership "mean only" that the employee does not want to pay Union dues:

> "Statements of desire to terminate union membership do not support withdrawal of recognition. Termination of membership in a union means only that an employee does not wish to pay dues to the union. It does not mean that the employee no longer wishes the union to represent employees. Thus, the statements of Davis, Hernandez, Rocha, and Singh are an insufficient basis to support unilateral withdrawal of recognition." ALJD, 5:36 – 40.

The ALJ's reasoning and conclusion is erroneous. It is not true that an employee's

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statement of a desire not to become a Union member or to resign Union membership "*means only*" that the employee does not want to pay Union dues. Nor is it true that such statements "do not mean" that the employee does not support the Union.

Obviously, it is also possible that an employee could decide not to become a Union member or decide to resign Union membership because the employee does not support the Union. Therefore, the ALJ's conclusion that there was only one possible explanation for the remaining 4 letters is simply wrong.

An employee's statement that he does not want to be a Union member is *inherently ambiguous* because it could mean either that the employee does not want to be a Union member but still wants the Union to represent him (as the ALJ assumed) or that the employee does not want to be a Union member because he does not wish to be represented by the Union at all. The fact that such statements are inherently ambiguous means that the ALJ was required to decide which of these possible meanings was the "more reasonable," Diversicare, and to do that the ALJ was required to consider all of the admissible evidence which could logically shed light on that issue, Allentown Mack.

The "more reasonable" interpretation of the 4 remaining letters is that they are statements of non-support.

Initially, the letters here must be evaluated in the context in which they were written, including that 4 of the employees had limited or no ability to read and write English, and that all of the employees are production workers, not labor relations professionals. The numerous grammatical errors in their letters are ample evidence of that fact. Therefore, the employees should not be held to the level of verbal precision that one might expect from a Board agent or a labor relations professional who understands the complexities and nuances involved in drafting an anti-union petition. The 4 remaining employees wrote their letters using simple language which they thought was sufficient to convey their lack of support for the Union, and the wording and meaning of their letters should be evaluated with that in mind.

1. Don Davis

Davis' letter states that he "would like to exit the union … due to the union not

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doing any services for the cost that they are charging." In Allentown Mack, the Supreme Court held that an employee's statement that "he was not being represented for the $35 he was paying" could just mean that he wanted better representation, but it "could also reflect the speaker's desire to save his $35 and get rid of the union." 522 U.S. 369. Davis' letter is an even clearer statement that he no longer wanted to be represented by the Union. Unlike the employee in Allentown Mack, Davis did not just state that he was upset that "the union [was] not doing any services for the cost that they are charging." He also added that he wanted to "exit the union" for that very reason. Thus, the more reasonable interpretation of Davis' statement is that he wanted to "get rid of the Union" because they were charging a lot for doing nothing. As such, it was a statement of non-support for the Union.

Davis' use of the term "exit the union" is also consistent with withdrawing support from the Union. In Perrella Gloves, 304 N.L.R.B. 489, 492 (1991), a case involving an employer's untimely withdrawal from a multi-employer bargaining unit, the Board used the terms "exit from the Association" and "withdraw from a duly established multiemployer bargaining unit" interchangeably.

This interpretation is also consistent with Davis' testimony, in which he explained that he "got tired of paying Union dues because" "they were providing no services," and that as a result that he "wanted out of the Union." He also testified that when he wrote the letter he did not want to be represented by the Union. Tr. 107:21 – 108:23.

Based on the foregoing, the "more reasonable" interpretation of Davis' letter is that he did not support the Union and did not want to be represented by the Union any longer.

2. Sandeep Singh

The same is true for Singh, whose letter states that he wanted to "get out of the Union." In Sofco, Inc., 268 N.L.R.B. 159, 159 – 160 (1983), the Board held that an employee's statement to a supervisor that "I sure hope you guys help us in getting out from under this union", was an expression of "opposition to the Union." In Landmark Intern. v NLRB, 699 F.2d 815 (6th Cir. 1983), the Court held that employee statements that they "want to get out of the Union" were properly treated as evidence of loss of support to justify the employer's subsequent letter advising

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employees how to resign union membership. Similarly, the more reasonable reading of Singh's statement that he wanted to "get out of the Union" is that he did not support the Union.

Other similar terminology has also been found to show a loss of support. For instance, in St. Christopher Convalescent Hospital, Case Nos. 32-CA-21470, 21611 and 21623, General Counsel Advice Memorandum (November 26, 2004), 2004 NLRB GCM LEXIS 93, *5 – *6, the General Counsel concluded, in a post-Levitz case, that an employee petition which stated that the employees wished to "dissociate" from a union was sufficient to show that they did not support the union. The General Counsel reached that conclusion by comparing "dissociated" to "similar antiunion petition language" in Dow Chemical, 216 NLRB 82, 86-7 (1975) and a prior Advice Memo where employees said that they wished to "terminate affiliation" and "dissolve our affiliation." Thus, the General Counsel concluded "that the "dissociated" language in the May 2003 antiunion petition was sufficient to indicate that the signatory employees no longer wished to be represented by the Union." Interestingly, the General Counsel recognized that the employee who drafted the petition in that Advice case should be allowed to "clarify" any ambiguity in the petition so that its true meaning could be ascertained:

> "We also note that petition circulator Reynaga clarified any possible ambiguity in the "dissociated" language. Reynaga avers without contradiction that when he circulated the petition, he expressly told employees to sign the petition if they did not want the Union."

Singh also explained any ambiguity in his letter by testifying that he wrote the letter because "I did not want to be represented by the Union." Tr. 111:18 – 121. Accordingly, the "more reasonable" interpretation of Singh's letter is that he did not support the Union.

3. Mark Rocha

Since Rocha was a new hire who had not yet joined the Union, his letter stating "I do not wish to be a Union member" also shows that he did not support the Union. In Leskovar Motors, Inc., 2011 NLRB LEXIS 484, at *23, ft. 3, (2011), the Administrative Law Judge held that a newly hired employee's letter stating "I do not see the advantages of being a member of a union" was sufficient to support the employer's withdrawal of recognition because it showed that the employee "simply had no interest in the Union." Rocha's virtually identical letter also shows his lack of support for the Union, and the Administrative Law Judge should conclude that this is

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the more reasonable reading of his letter.

Moreover, Rocha explained any ambiguity in his letter by testifying that, "I meant I didn't want to be represented at all and have to pay the dues." Tr. 87:12 – 14. He went on to explain that he had not become a Union member because he hadn't been employed for 30 days yet, so he didn't think that the collective bargaining agreement's union shop clause requiring him to become a member in "30 days" "had kicked in yet". Tr. 87:15 – 21. Rocha also testified that when he signed the letter, "I did not" want to be represented by the Union. Tr. 88:1 – 4.

Thus, based on all the evidence, the "more reasonable" interpretation of Rocha's letter is that he did not support the Union and did not want to be represented by the Union.

4. Miguel Hernandez

Hernandez' letter stated, "I resign from Teamsters Local # 150." Most particularly, this letter must be evaluated in the context in which it was written – by a laborer who did not read or write English. Tr. 97:2 – 3. As is discussed above, Hernandez' letter is inherently ambiguous because it could mean either that Hernandez did not want to be a Union member but still wanted the Union to represent him (as the ALJ assumed) or that Hernandez did not want to be a Union member because he did not support the Union. Anderson Lumber offered Hernandez' testimony in order to resolve that ambiguity, and he explained that he wrote his letter because "I felt that I didn't need the Union for – to be with the Union" and because "I didn't want to be represented by the Union." Tr. 97:18 – 22, 98:5 – 8.

C. In A Union Shop Environment, It Is More Likely That Employees Who Refuse To Become Union Members Do Not Support The Union.

The ALJ's conclusion that the 4 remaining letters could "mean only" that the employees did not want to pay Union dues must also be measured against the union shop environment in which the 4 employees were working. Anderson Lumber's collective bargaining agreement with the Union included a union shop clause, which provided that employees who were not members of the Union or failed to pay Union dues would be fired. Thus, if any of Anderson Lumber's employees failed to pay Union dues, they would have to be fired.

Under those circumstances, it is not reasonable to conclude, as the ALJ did, that Davis,

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Singh, Rocha and Hernandez still supported the Union even though they did not want to be Union members and did not want to pay dues. Refusing to maintain Union membership and pay Union dues would have resulted in their termination unless the Union was no longer in the picture. Clearly, it is not logical or reasonable to assume that the employees wanted to get themselves fired. It is much more likely – "more reasonable" – that the employees wanted to get rid of the Union so that they would not have to worry about getting fired when they resigned their Union memberships and stopped paying dues.

Of course, it is true that the Board has held on occasion that an employee's resignation from a union does not "necessarily" mean that the employee does not support the union. But these holdings are based on the rationale that an employee *in a right to work state* can *choose* not to be a member of a union even though the employee enjoys receiving the benefits of union representation. For instance, in Trans-Lux Midwest Corporation, 335 N.L.R.B. 230, 232 (2001), the Board stated:

> "Similarly, the number of members or financial supporters of an incumbent union is not *necessarily* the same as the number of employees continuing to support union representation, R.J.B. Knits, 309 NLRB 201, 205 (1992). *This is especially true in a so-called right-to-work state such as Iowa.* T.L.C. St. Petersburg, Inc., 307 NLRB 605 (1992) (the number of employees who have authorized the checkoff of union dues does not indicate – *particularly in a right-to-work state* – how many employees favor union representation, whether or not they are members of the union)." (emphasis added)

The 4th Circuit's decision in Terrell Machine Company v. NLRB, 427 F.2d 1088, 1090 (4th Cir. 1970), makes the point too, but notes that this is not really a valid point in a closed shop environment:

> "A showing that less than a majority of the employees in the bargaining unit were members of the union or paid union dues was not the equivalent of showing lack of union support. Manifestly, *in the absence of a closed shop agreement* – and during the period in question, North Carolina had a state "right to work" law – many employees are content neither to join the union nor to give it financial support but to enjoy the benefits of its representation. Nonetheless, the union may enjoy their support, and they may desire continued representation by it." (emphasis added)

But California is not a right to work state and Anderson Lumber's employees were required to join the Union and pay Union dues by the collective bargaining agreement's union

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shop clause. Logic dictates that, where Union membership and payment of Union dues is a condition of employment, an employee's resignation from the Union and concomitant refusal to pay Union dues is actually very strong evidence that the employee does not want to be represented by the Union anymore. If the Union remained in place, the employee's refusal to be a Union member and pay Union dues would result in the loss of his/her job. Given the union shop environment at Anderson Lumber, the "more reasonable," common sense conclusion is that the employees who said that they did not want to be Union members or did not want to pay Union dues were sufficiently anti-Union that they were willing to risk the loss of their jobs to get out of the Union. Therefore, "the more reasonable reading of" the employees' letters, Diversicare, 351 NLRB at 817 – 818, is that they did not want the Union at all.[7]

For all of the foregoing reasons, the Board should find that Anderson Lumber satisfied its burden of proving by a preponderance of the evidence – that it is more likely than not – that the more reasonable interpretation of the letters is that the employees did not support the Union, and that as a result Anderson Lumber proved that the Union actually lost majority support.

D. The Levitz Standard Is Based on Proof of An Actual Loss of Majority Support, Not On The Employer's State Of Mind When It Withdrew Recognition.

The ALJ erroneously rejected Anderson Lumber's offers of proof and the NLRB Affidavits. This evidence was relevant and admissible to resolve ambiguities in the employees' letters, as well as to prove that the employees did not support the Union. This evidence, which was not contradicted by any evidence presented by the General Counsel, clearly proved that the Union had actually lost majority support when Anderson Lumber withdrew recognition on July 20, 2012.

The ALJ rejected the offers of proof and Affidavits on the grounds that the evidence was "subjective" and was not known to Anderson Lumber until sometime after it withdrew recognition

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[7] Even if we adopted the General Counsel's position that all 8 employee letters were merely evidence that the employees did not want to be Union members, this decline in union membership would itself be evidence of a loss of majority support, particularly in a union shop environment. McDonald Partners, Inc. v. NLRB, 331 F.3d 1002, 1007 – 1008 (D.C. Cir. 2003); Tri-State Health Service v. NLRB, 374 F.3d 347, 354 – 355 (5th Cir. 2004).

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and therefore was irrelevant under Levitz. This is a fundamental misunderstanding of the Levitz ruling.

Prior to Levitz, an employer was allowed to withdraw recognition from a union as long as "… it has a good-faith doubt, based on objective considerations, of the union's continued majority status." Levitz, 333 NLRB at 717, citing Celanese Corp., 95 NLRB 664 (1951). Since the employer only needed to prove that it had an "reasonable uncertainty" about whether the union had majority support, the pre-Levitz test focused on the employer's state of mind – i.e., on whether, at the time of withdrawal, the employer was acting upon known evidence which caused it to be uncertain about the union's majority support. Allentown Mack, 522 U.S. at 367. Evidence which was not known to the employer at the time of the withdrawal was ruled irrelevant because it could not shed light on the employer's state of mind; i.e., on the employer's alleged uncertainty.

This led to the anomaly that an employer could withdraw recognition based on what it knew at the time, even though facts of which the employer was not aware proved hands down that the union still had majority support. See, Levitz, 333 NLRB at 721, discussing the Board's holding in Celanese, 95 NLRB at 672 – 675, that "… withdrawal of recognition was lawful if done in good faith, regardless of whether the union actually did have majority support." Thus, prior to Levitz, the Board repeatedly held that a union's attempt to prove that it still enjoyed majority support was irrelevant. 333 NLRB at 722 and ft. 30.

In Levitz, the Board contrasted the Celanese rule, which allowed employers to withdraw recognition on a good faith *but mistaken* belief that the union had lost majority support, with the rule in Section 8(a)(2) cases where "… an employer who extends recognition in the good-faith but mistaken belief that the union has majority support violates Section 8(a)(2)." Levitz cited the Supreme Court's decision in Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 738 – 739 (1961), which held that evidence of an employer's state of mind is irrelevant in Section 8(a)(2) cases because the employer must prove that the union *actually* has majority support. The Board then held that "the same reasoning should govern withdrawals of recognition." Levitz, 333 NLRB at 724.

"As the Supreme Court has explained, the employer's good faith in the 8(a)(2) context is

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irrelevant:

> "To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act – that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives .... The act made unlawful by Section 8(a)(2) is employer support of a minority union .... More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith. (footnote omitted)"

"We believe that the same reasoning should govern withdrawals of recognition. Section 8(a)(5) requires an employer to bargain with the union that represents a majority of its employees. An employer who withdraws recognition from a majority union, even in good faith, invades his employees' Section 7 rights every bit as much as an employer who unwittingly extends recognition to a minority union. Consequently, an employer who withdraws recognition from an incumbent union, in the honest but mistaken belief that the union has lost majority support should be found to violate Section 8(a)(5). *The employer's good faith should no more be a defense in the 8(a)(5) context than in the 8(a)(2) setting.*" (emphasis added)

Levitz, 333 NLRB at 724 – 725.

Thus, in Levitz the Board specifically held that the employer's state of mind – what it knew or believed at the time of withdrawal – was irrelevant to whether a union had "actually" lost majority support:

> "In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition unless it can *prove* that an incumbent union has, *in fact*, lost majority support." (emphasis added) 333 NLRB at 723.

> "Indeed, nothing in the Act indicates that an employer's uncertainties or beliefs concerning majority status – whether or not held in good faith – have *any relevance* to its bargaining obligation under Sections 8(a)(5) and 9(a) of the Act." (emphasis added) 333 NLRB at 724.

> "For all of these reasons, we 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." (emphasis added) 333 NLRB at 725.

In short, Levitz rejected the Celanese test which was based on what the employer knew

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when it withdrew recognition (i.e., did it have a "good faith doubt") and replaced it with a test which is based on whether the employer can "prove" that a loss of majority supply "actually" occurred "in fact," and that this fact based inquiry does not depend on what the employer knew or believed:

> "After careful consideration, we have concluded that there are compelling legal and policy reasons why *employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning unions' majority status*. We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule Celanese and its progeny insofar as they permit withdrawal on the basis of good-faith doubt. *Under our new standard, an employer can defeat a post-withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.*" (emphasis added)

333 NLRB at 717.

Levitz then explained the employer's burden in terms of an "*affirmative defense*" which requires it to "*show*" or "*prove*" at an "*unfair labor practice proceeding*" that the union has "*in fact*" lost majority support:

> "For all of these reasons, we 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. …
>
> "… 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). (footnote omitted)"

333 NLRB at 725.

Levitz also emphasized that this determination would ultimately be based on "a preponderance of *all* the evidence" presented at an unfair labor practice hearing:

> "An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in on 8(a)(5) case *if the General Counsel does not come forward with evidence rebutting the employer's evidence*. If the General Counsel does present such evidence, then the burden remains on the employer to establish loss of majority support *by a preponderance of all the evidence*." (emphasis added)

333 NLRB at 725, ft. 49.

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The ALJ and the General Counsel rely on Highland Hospital Corp., Inc., 347 NLRB 1404, 1407, ft. 17 (2006), to conclude that only evidence that was known to and relied upon by Anderson Lumber when it withdrew recognition is relevant and admissible to demonstrate whether the Union lost majority support:

> "We need not address the sufficiency of the hearing testimony regarding employees' bare recollections of their sentiments for or against union representation as of April 12, because this evidence was not before the Respondent when it withdrew recognition. As the judge explained, Levitz makes clear that an employer may withdraw recognition from a union that represents its employees only when it acts on objective evidence showing that the union lacks the support of a majority of bargaining-unit members. Levitz, 333 NLRB at 723 – 726. Accordingly, the judge correctly deemed the foregoing employee testimony irrelevant."

But as the foregoing demonstrates, Levitz did not "make clear" that the employer's proof of a loss of majority support is limited to what the employer knew at the time. To the contrary, Levitz expressly states that the employer's state of mind – what it knew and believed at the time – does not have "any relevance" at all.

Nor does Levitz hold that an employer's loss of majority support must be based on "objective" evidence. Rather, it repeatedly states that the employer's burden is to prove that the Union "actually" lost majority support, or that the Union "in fact" lost majority support, without ever commenting on what kind of evidence may be used to do so. In fact, Levitz' only reference to using "objective" evidence was in a hypothetical which warned that even when an employer withdraws recognition based on "objective" evidence, it does so at its own peril because if challenged the employer will have to prove an "actual" loss of majority support at an unfair labor practice hearing. 333 NLRB at 725. In other words, even "objective" evidence may not be enough.

On the other hand, the Board specifically held that, for purposes of requesting an RM election, an employer's good faith doubt must be based on "objective" evidence:

> "In RM cases, then, the regional offices should determine whether good faith uncertainty exists on the basis of evidence that is *objective* and that reliably indicates employee opposition to incumbent unions – i.e., *evidence that is not merely speculative*. The specific types of evidence that are probative of such uncertainty, and the weight to be afforded each type under the circumstances, will be decided on a case-by-case basis."

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333 NLRB at 729.

According to the ALJ and the General Counsel, employers should be required to prove not just that the union actually lost majority support, but also that the employer *knew*, at the time of withdrawing support, *based solely on objective (i.e., non-speculative) evidence*, that the union had, in fact, lost majority support. This is not the same standard that was announced by Levitz, as is easily seen in practice: an employer who proves at a hearing that the union had, in fact, lost majority support could not sustain its affirmative defense unless it also proved that it was knew about all of the evidence which proved the loss of majority support when it withdrew recognition and that all of this evidence was "objective."

As a matter of simple logic, allowing only evidence which was known to the employer at the time of withdrawal, or only evidence which was "objective," does not show whether the union "actually" lost majority support. It only shows what the employer knew. It bears repeating – Levitz specifically held that evidence of the employer's state of mind – what it knew or didn't know – does not have "any relevance to its bargaining obligations" and that in the withdrawal of recognition context evidence of the employer's state of mind was "irrelevant" to the issue of whether the union *actually* lost majority support, just as it is in the Section 8(a)(2) context. Levitz, 333 NLRB at 724 – 725.

In Allentown Mack, 522 U.S. at 379, the Supreme Court cautioned the Board that it has a statutory obligation under Section 10(b) of the Act, 29 U.S.C. Section 160(b), to consider *all* evidence which is relevant to an issue in a case, and that the Board's evaluation of evidence should be "a matter of logic and sound inference from all the circumstances, not an arbitrary rule of disregard to be extracted from prior Board decisions." There, the Board argued that although its pre-Levitz decisions stated that the employer must have a "good faith doubt" of majority support, the employer actually had to prove that it did not "believe" that the union had majority support. The Board also argued that although its cases held that the employer must prove this good faith doubt by a preponderance of the evidence, employers must actually prove their good faith doubt with "clear, cogent and convincing" evidence.

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The Supreme Court described the Board's position as "nonsensical," holding instead that the Board was required to engage in "reasoned decisionmaking," which required that when deciding cases the Board must *apply* the same legal standards and rules which have been *announced* in its decisions:

> "But adjudication is subject to the requirement of reasoned decisionmaking as well. *It is hard to imagine a more violent breach of that requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced.* And the consistent repetition of that breach can hardly mend it. (emphasis added)
>
> "Reasoned decisionmaking, in which the rule announced is the rule applied, promotes sound results, and unreasoned decisionmaking the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably administrative law judges), and effective review of the law by the courts. …" 522 U.S. at 374 – 375.
>
> …
>
> "Because reasoned decisionmaking demands it, and because the systemic consequences of any other approach are unacceptable, *the Board must be required to apply in fact the clearly understood legal standards that it enunciates in principle, such as good-faith reasonable doubt and preponderance of the evidence. Reviewing courts are entitled to take those standards to mean what they say, and to conduct substantial-evidence review on that basis.* Even the most consistent and hence predictable Board departure from proper application of those standards will not alter the legal rule by which the agency's factfinding is to be judged." (emphasis added) 522 U.S. at 376 – 377.

That is precisely the problem here. The General Counsel's argument changes the standard announced in Levitz so that instead of just being required to prove that the union had actually lost majority support, Anderson Lumber must also prove that *it knew, at the time of withdrawing support, based solely on objective (i.e., non-subjective) evidence,* that the union had, in fact, lost majority support. Under this changed test, it doesn't matter whether the Union "actually" or "in fact" lost majority, as stated in Levitz. The lawfulness of a withdrawal of recognition would be based on what the employer knew. In other words, we would be right back to the pre-Levitz rule, judging loss of support on what the employer did or did not believe to be the facts.

Applying a different standard than that which was announced in Levitz violates Allentown Mack's requirement that the Board engage in "reasoned decisionmaking" by applying the same

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standards and rules which are announced in its decisions. This is no different that what happened in Allentown Mack, which held that the Board could *not* apply the "good faith doubt" standard in such a way that, in practice, employers were required to prove that they did not "believe" that the union had majority support, and that the Board could *not* apply the preponderance of the evidence standard in such a way that, in practice, employers were required to prove a loss of majority support with "clear, cogent and convincing" evidence. Here, the Board cannot apply the "proof of actual loss" standard in such a way that, in practice, employers must prove not only an actual loss, but also that they knew about the evidence of majority loss and that this evidence is "objective."

In NLRB v. B.A. Mullican Lumber and Manufacturing Company, 535 F.3d 271, 282 – 283 (4th Cir. 2008), the 4th Circuit specifically held that Levitz made the employer's state of mind, and what the employer knew when it withdrew recognition, irrelevant. The Court held that instead of delving into the employer's state of mind or knowledge, Levitz substituted a "truth-seeking test" to determine whether the Union had "in fact" lost majority support:

> "Prior to Levitz, an employer could withdraw recognition of a union if it had a "good-faith doubt" about the union's majority support. See Celanese Corp. of Am., 95 N.L.R.B. 664, 672 (1951). But under Levitz, the Board moved to an objective test to discover whether the union actually lost majority support; *it thus became irrelevant to inquire into the employer's state of mind*. The Levitz standard focuses on the Act's policy of promoting employee choice by determining actual employee desires, rather than employers' beliefs about employee desires, by asking whether there was in fact majority support for the union at the time the employer withdrew recognition, *regardless of what the employer believed. The* Levitz *standard therefore introduced a truth-seeking test*." (emphasis added)

As a result, Mullican rejected the General Counsel's argument there (the very same argument that the General Counsel advances and the ALJ adopted here) that only evidence which is known to the employer at the time of withdrawal is relevant to determine whether there has been an actual loss of majority support:

> "Thus, "[i]f a majority of the unit employees present evidence that they no longer support their union, their employer may lawfully withdraw recognition," *and this is so regardless of what the employer knew at the time*. Levitz, 333 N.L.R.B. at 724. Accordingly, the General Counsel's argument in this case – that the evidence contained in the decertification slips he possessed was irrelevant to what the employer knew when it withdrew recognition – is simply obsolete in light of Levitz. Levitz stated the principles on an objective basis, focusing on the actual choice of employees. Thus the Board in Levitz stated, "if a union actually has lost majority support, the employer must cease recognizing it, both to give

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> effect to the employees' free choice and to avoid violating Section 8(a)(2) by continuing to recognize a minority union." Id. at 724." (emphasis added) 535 F.3d at 283.

In Tri-State Health Services, Inc. v. NLRB, 374 F.3d 347, 355, ft. 9 (5th Cir. 2004), the 5th Circuit found that the Board erred when it refused to consider whether a decline in dues checkoffs was evidence of a loss of majority support, instead citing a "string" of prior decisions which disregarded such evidence"

> "[I]n Allentown Mack, 522 U.S. at 379, the Court stressed that the issue of assessing good faith doubt "is a matter of logic and sound inference from all the circumstances, not an arbitrary rule of disregard to be extracted from prior board decisions." When reason counsels that a category of evidence has a logical connection to the matter in dispute, it is not enough for the Board merely to string-cite a list of cases in which similar evidence was found to have no bearing on a dispute involving different parties and a different set of operative facts. Rather, the Board is justified in dismissing evidence outright only if it can show that it is – as a matter of logic and reason – unhelpful to the position in support of which it is proffered. The Board has not done that here."

Now, the General Counsel seeks to apply just such "an arbitrary rule of disregard to be extracted from prior Board decisions." The employees' testimony about what their ambiguous letters meant and their testimony that they did not want to be represented by the Union when they signed their letters, is clearly relevant to resolving any ambiguity in their letters. It is also clearly relevant to determine whether they, in fact, supported the Union. The same is true of the evidence provided and Affidavits taken during the Region's investigation; i.e., that all 8 employees had the same goal, to "get rid of the Union" and to "remove the Union." But the ALJ refuses to consider this clearly relevant evidence based on "an arbitrary rule of disregard to be extracted from prior Board decisions." This violates the rule announced by the Supreme Court in Allentown Mack and deprives Anderson Lumber of an opportunity to prove the affirmative defense which it is required to prove under Levitz.

E. The General Counsel's Reliance On Highland Hospital Is Misplaced.

The ALJ reliance on Highland Hospital is also misplaced for several reasons. The petition there stated that it was a "showing of interest for decertification" of the Union. Interestingly, the employee who drafted this admittedly ambiguous petition was allowed to testify about why she used those words in the petition, and she explained that she "… chose that language based on her

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conversation with a Board agent in the regional office about obtaining a decertification election." She also testified that she told employees before signing the petition that it was only intended to "obtain a vote" to determine whether to decertify the union. The Board also considered testimony from employees who signed the petition that they signed the petition thinking that they were only asking for an election and that they were upset when the employer used the petition to withdraw recognition. Moreover, after adjusting for several signers who were no longer employed when the employer withdrew recognition and for at least one employee who the employer knew to be a union supporter, the Board held that the petition was not even signed by a majority of the bargaining unit employees. 347 NLRB at 1406 – 1407.

Interestingly, in Diversicare, 351 NLRB at 818 and ft. 6, the Board distinguished Highland Hospital on these very grounds:

> "The dissent also relies on Highlands Regional Medical Center, 347 NLRB No. 120 (2006), where the employer withdrew recognition based on a petition captioned "Highlands Regional Medical Center Showing of Interest for Decertification of SEIU Registered Nurses." The Board found that the employer did not meet its Levitz burden of proving that the union had actually lost majority support.
>
> "The Highlands petition was denominated "a showing of interest for decertification"—*language suggested by a Board regional office in response to an employee's inquiry about how to obtain an election – and was filed for this precise purpose*. Unlike the present petition, the Highlands petition made no reference to the removal of the union. *Moreover, there was extrinsic evidence (including the testimony of the employee who drafted the petition and of employees who signed the petition) that several signatory employees believed the purpose of the petition was solely to obtain an election.* There is no such evidence in the instant case. n6 Consequently, the Respondent here may rely upon the more reasonable interpretation of the petition's express reference to removal of the Union – that is, that a majority of the employees had already rejected the Union. Under these circumstances, the Respondent met its burden of proof under Levitz. (footnote omitted) (emphasis added)
>
> > "n6 Highlands is also distinguishable from the instant case on the basis that, in Highlands, at least *one petition-signer reaffirmed her support for the Union prior to the employer's withdrawal of recognition and that, without that employee's signature, the petition was not supported by a majority of the unit employees*."

Moreover, Highland Hospital is distinguishable from this case because the employee testimony there was offered for a completely different purpose than the employee testimony here. In Highland Hospital, the essentially undisputed evidence showed that the petition was only

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intended to obtain an election, not to show that the signers did not support the union. So the employer offered *entirely new evidence which had no connection to the petition* in order to prove that that a majority of the employees did not support the union when the employer withdrew recognition – the testimony of 35 employees, including 5 employees who did not even sign the petition.

The letters here were not after acquired evidence, and the employees' testimony was offered only to clear up the ambiguities in the employees' letters and to establish that they did not support the Union when they wrote their letters.; i.e., to explain the evidence on which Anderson Lumber relied when it withdrew recognition, not to introduce an entirely new rationale for withdrawing recognition as in Highland Hospital.

It is also important to note that in Highland Hospital the employees were allowed to testify about what they intended when they drafted and signed the petition. In fact, the Board relied on their testimony to conclude that the petition was only intended to obtain a vote, not to remove the union. 347 NLRB at 1406 - 1407. Thus, Highland Hospital cannot stand for the proposition that all employee testimony is irrelevant just because the employer did not know of it when it withdrew recognition, or that all employee testimony which is offered to explain an ambiguity is "not objective" and irrelevant.

Given the Highland Hospital Board's reliance on evidence of employee intent about drafting and signing the petition, it is no small irony that the ALJ relied on Highland Hospital to hold that the 8 employees here should not be allowed to testify in order to clear up any ambiguities in their letters. In fact, in General Counsel Advice Memo, St. Christopher Convalescent Hospital, Case Nos. 32-CA-21470, 21611 and 21623 (November 26, 2004), 2004 NLRB GCM LEXIS 93, *5 – *6, the General Counsel reached the opposite conclusion – that a petition drafter's testimony should be considered to clear up ambiguous petition language:

> "We also note that petition circulator Reynaga clarified any possible ambiguity in the "dissociated" language. Reynaga avers without contradiction that when he circulated the petition, he expressly told employees to sign the petition if they did not want the Union."

The General Counsel has also confused the requirement prior to Levitz that an employer's good faith doubt must be based on some objective evidence that a union has lost majority support,

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see, discussion in Levitz, 333 NLRB at 723, citing Pennex Aluminum Corp., 288 NLRB 439, 441 (1988), enfd. 869 F.2d 590 (3d Cir. 1989), with the need to resolve an ambiguity in the evidence offered in support of the employer's duty under Levitz to prove an actual loss of majority support. In any event, as the Supreme Court explained in Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 368, ft. 2 (1998), the "objective" evidence requirement in the pre-Levitz cases merely referred to evidence which was "external to the employer's own (subjective) impressions." Of course, the *employees' testimony* about what they meant when they wrote their letters, and their testimony that they did not support the Union when they wrote the letters, is "external to the *employer's* own (subjective) impressions." Thus, their testimony is "objective" evidence. The General Counsel cannot argue that employee testimony about their own intent violates an "objective" evidence standard, if one still exists.

The Board considers extrinsic evidence regarding intent in order to resolve ambiguities in many circumstances. For instance, in Madison Industries, 349 NLRB 1306, 1308 (2007), the Board held that it will consider extrinsic evidence of the drafter's intent where a voluntary recognition agreements is ambiguous:

> "Thus, in determining whether the presumption of 8(f) status has been rebutted, the Board first considers whether the agreement, examined in its entirety, "conclusively notifies the parties that a 9(a) relationship is intended." Oklahoma Installation, *supra*, 219 F.3d at 1165. Where it does so, the presumption of 8(f) status has been rebutted, Staunton Fuel, *supra*, 335 NLRB at 720. Where the parties' agreement does not do so, the Board considers any relevant extrinsic evidence bearing on the parties' intent as to the nature of their relationship. Id., fn. 15."

See also, Austin Fire Equipment, LLC, 2011 NLRB LEXIS 657 (2011), following Madison Industries. The employees' testimony and NLRB Affidavits here is also extrinsic evidence of intent offered to explain allegedly ambiguous letters, and it should be admitted.

Finally, the Highland Hospital decision is simply wrong. The Administrative Law Judge there ruled that employee testimony about their lack of support for the union was "irrelevant" since this evidence was not known to the employer at the time of withdrawal. He reached that decision because he believed that an employer who did not have sufficient proof of a loss of majority support to "simply withdraw recognition" should not be given a chance "months later" at

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trial to prove that the union actually lost majority support because doing so would "undermine the essence and purpose of the Levitz decision." As a result, he concluded that evidence which otherwise proved that a majority of employees did not support the union was "irrelevant in making a showing of actual loss of majority support." 347 NLRB at 1414. This is tautological and nonsensical.

It is also incorrect as a matter of law. As is discussed above, Levitz makes clear that the principle to be protected is the employees' right under Section 7 of the Act to freely choose their representatives, and in Levitz the Board concluded that it could only protect employee rights to choose their representatives if it adopted a test which required employers to prove at an unfair labor practice hearing that the union had actually lost majority support. Levitz, 333 NLRB at 724 – 725. If an employer proves at trial that the union did not have majority support, whether it does so with evidence that it knew about when it withdrew support or evidence which it learned later, the fact remains that it has been proved that the union lost majority support. In either event, the employees representational desires have been protected. Thus, allowing employers to introduce evidence that they did not know about when they withdrew representation does not harm employee Section 7 rights and it does not "undermine" Levitz' "actual loss of majority support" requirement.

The 4th Circuit agreed in Mullican Lumber, 535 F.3d at 282 – 283, where the Court specifically held that the Levitz standard does not turn on what the employer knew when it withdrew recognition, but rather on whether the employer can prove at trial that the Union actually lost majority support:

> "But under Levitz, the Board moved to an objective test to discover whether the union actually lost majority support; it thus became irrelevant to inquire into the employer's state of mind. The Levitz standard focuses on the Act's policy of promoting employee choice by determining actual employee desires, rather than employers' beliefs about employee desires, by asking whether there was in fact majority support for the union at the time the employer withdrew recognition, regardless of what the employer believed. The Levitz standard therefore introduced a truth-seeking test.
>
> 'Thus, "[i]f a majority of the unit employees present evidence that they no longer support their union, their employer may lawfully withdraw recognition," and this is so regardless of what the employer knew at the time. Levitz, 333 N.L.R.B. at 724. Accordingly, the General Counsel's argument in this case – that the evidence contained in the decertification

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slips he possessed was irrelevant to what the employer knew when it withdrew recognition – is simply obsolete in light of Levitz."

The Highland Hospital decision also violates the Supreme Court's decision in Allentown Mack, which held that the Board must apply the Federal Rules of Evidence "so far as practicable," and that it "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." 522 U.S. at 378. The Supreme Court held that the Board's evaluation of evidence must be "a matter of logic and sound inference from all the circumstances, not an arbitrary rule of disregard to be extracted from prior Board decisions." 522 U.S. at 379. Rule 401 of the Federal Rules of Evidence states that "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

Clearly, under those standards, employee testimony that they did not support the union when the employer withdrew support has a "tendency" to make it more probable that the Union actually lost majority support. Therefore, the employee testimony is relevant and admissible.

Accordingly, the Board should hold that ALJ erred when she rejected the Anderson Lumber's offers of proof and the NLRB Affidavits. If admitted, the employees' testimony and the NLRB Affidavits clearly proves that the Union actually lost majority support when Anderson Lumber withdrew recognition on July 20, 2012.

F. An Affirmative Bargaining Order Is Inappropriate.

The ALJ's remedy and Order includes an affirmative bargaining order. This remedy is wholly inappropriate given the evidence showing that the Region's investigation established that 8 out of 15 bargaining unit members do not support the Union and do not wish to be represented by the Union. As the Court held in Mullican Lumber, 535 F.3d at 283 – 284, the Board's duty to protect employees' Section 7 rights imposes "additional ethical and statutory duties" on the Board to avoid seeking remedies which would infringe on those rights. Thus, if the Board learns during its investigation that a majority of employees do not support the Union, the Board has a duty not to issue a Complaint or to seek a remedy with would impose minority representation on the employees.

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"While the new standard of Levitz does not relieve the employer of presenting objective evidence as to the actual loss of majority support, it does impose on the General Counsel additional duties, ethical and statutory, when the issue is presented to the Board and the courts. *It would be improper for the General Counsel, if he had in his possession evidence that a union no longer had majority support, to urge a court of appeals to enforce a bargaining order against the employer requiring the employer to bargain with a union representing only a minority of the employees. In doing so, he would be seeking unlawful relief that would not only erode the fundamental policies of the Act but would also violate his duties under the Act.* (emphasis added) The Supreme Court has noted that the Board's principal duty is to advance the congressional policy for industrial peace accomplished by "promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees." Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987) (emphasis added) (internal quotation marks omitted) (citing Terrell Machine Co., 173 N.L.R.B. 1480 (1969), enf'd, 427 F.2d 1088 (4th Cir. 1970), cert. denied, 398 U.S. 929, 90 S. Ct. 1821, 26 L. Ed. 2d 91 (1970); accord Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 785-86, 790, 116 S. Ct. 1754, 135 L. Ed. 2d 64 (1996). Thus, the Board's duty to enforce the Act translates into a duty to act in good faith in promoting the will of employees – who, explicitly, "shall also have the right to refrain from any or all of such [labor organization or union] activities." 29 U.S.C. § 157.

"*It follows that if the Board has evidence from which it knows that a majority of the employees do not want union representation, it must either disclose the information to the employer or limit its conduct in seeking enforcement from the courts*. (emphasis added) Thus, if the Board chooses not to disclose the information, regardless of the quality of the employer's case, it may not seek orders from courts of appeals that it knows would violate the Act. In this case, the General Counsel would not be free to seek enforcement of an order requiring Mullican Lumber to bargain with the Union if it knows that the Union has only minority support. *Stated otherwise, under the objective standard for determining the free choice of employees, the Board is not free to rely on deficiencies in the employer's evidence to enter a bargaining order when it has the evidence exclusively within its possession that a majority of the employees, in fact, have chosen not to be represented by the Union*. (emphasis added)"

Counsel for the General Counsel conceded at the hearing that it is the Board's policy not to issue a complaint where the Board's investigation uncovers evidence that a majority of employees do not support the Union at the time of the withdrawal of recognition. Tr. 20:6 – 12.

MR. PETERSON: No, so I mean Respondent's counsel brings up a couple of different points and one is the policy considerations that the NLRB has not to bring cases when we have actual evidence of loss of majority support regardless of where we got it. And I agree, you know, and the General Counsel will agree that's, you know, that's a policy, that's one we follow."

In General Counsel Advice Memorandum, Case No. 21-CA-37667 (September 21, 2007),

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2007 NLRB GCM LEXIS 28, the General Counsel confirmed that it is Board policy not to issue complaints in such circumstances because issuing a "complaint to impose a collective-bargaining representative on employees against their stated will would run directly afoul of the policies of the Act."

> "This Levitz (footnote omitted) case was submitted for advice on whether the Employer was privileged to withdraw recognition from the Union based upon a petition that arguably did not unambiguously demonstrate a loss of majority employee support, where the Region has obtained evidence demonstrating that the Union actually has lost employee majority support.
>
> "In agreement with the Region, we conclude that complaint is inappropriate where the investigatory evidence establishes an actual loss of employee support for the Union.
> …
>
> "The expression of employee sentiment is apparent from the description provided by the single employee who solicited the signatures. He describes that when he solicited each person who signed the first petition he told them the same thing, "that we no longer wanted the Union," and "that the petition was to no longer belong to the Union, that we wanted nothing at all to do with the Union." Thus, his testimony clarifies that regardless of any ambiguity in the language, employees understood they were expressing a desire not to be represented when they signed the petition. Although the solicitor was not as specific as to whom he approached regarding the second petition, nothing in his testimony negates the sentiments originally expressed. He describes speaking "to most everyone" about the second document; that he "spoke to each person on the list, with a few exceptions." He told each person that he "had to draft a new letter because we were not clear that we wanted to get rid of the Union in the first letter," and that "every person I spoke to said that they were still in agreement with getting rid of the Union."
>
> "*It has long been the practice of successive General Counsels that if the General Counsel possesses evidence establishing that a union has actually lost its majority status, there is no basis to issue complaint alleging an unlawful withdrawal of recognition.* (footnote omitted) This long-standing policy recognizes that issuance of complaint to impose a collective-bargaining representative on employees against their stated will would run directly afoul of the policies of the Act. Since the evidence here establishes that the Union suffered an actual loss of its majority support, it would not effectuate the purposes of the Act to issue a bargaining order when it is clear that the Union is no longer the majority representative." (emphasis added)

However, the evidence introduced in Anderson Lumber's offer of proof clearly showed that all 8 employees told the Region's investigators that they did not support the Union when they submitted their letters to the Company. Further, the Ramos, Gonzalez and Garcia Affidavits show that all 8 employees wrote their letters in order to "get rid of the Union" and to "remove the

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Union." The General Counsel did not present any contrary evidence, even though it was within her power to call the Region's investigators as witnesses or to introduce the remaining Affidavits if she believed that the Region's investigation did not establish that the Union actually lost majority support.

Thus, assuming arguendo that the Board concludes that Anderson Lumber did not satisfy its burden of proving an actual loss of majority support, the Board should nonetheless refuse to impose an affirmative bargaining order because the Board's investigation established that the Union actually lost majority support. Mullican, 535 F.3d at 283 – 284.

G. The Board Lacks A Quorum, And As A Result Does Not Have Jurisdiction To Hear Or Determine This Case.

Anderson Lumber objects to the putative Board's jurisdiction and authority to hear or determine this matter because it lacks a quorum of at least three validly appointed members, as required by 29 U.S.C. § 153(a) and (b). NLRB v. New Vista Nursing and Rehabilitation, ___ F.3d ___, 2013 U.S. App. LEXIS 9860 (3rd Cir. May 16, 2013); Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013). Accordingly, Anderson Lumber requests that the Board decline to exercise jurisdiction and instead dismiss this case.

V

SUMMARY

For the foregoing reasons, Respondent Pacific Coast Supply, LLC, dba Anderson Lumber Company respectfully requests that the Board decline to exercise jurisdiction and dismiss this case.

Assuming *arguendo* that the Board does not dismiss the case for lack of jurisdiction, the Board should find that the more reasonable meaning of the employees' letters is that the employees did not support the Union, and that as a result Anderson Lumber satisfied its burden of proving by the preponderance of the evidence that the Union actually lost majority support. As a result, the exceptions to the Administrative Law Judge's Decision should be granted and the

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Complaint should be dismissed.

Dated: July 17, 2013.

DAVENPORT GERSTNER & McCLURE

/s/

Stephen Thomas Davenport, Jr.
Attorneys for Respondent Pacific Coast Supply, LLC,
dba Anderson Lumber Company

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PROOF OF SERVICE

I declare that I am employed in Contra Costa County, California, I am over eighteen years old, and I am not a party to the within action and that my business address is 2540 Camino Diablo, Suite 200, Walnut Creek, California 94597. On this date, I served true copies of the following document(s) on the person(s) listed below at the address(es) shown below by the means of service marked below:

RESPONDENT PACIFIC COAST SUPPLY, LLC, dba ANDERSON LUMBER COMPANY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

[ ] By First Class Mail – I deposited the document(s), in an a sealed envelope addressed to the person(s) to be served, with the United States Postal Service in Walnut Creek, California with first-class postage fully prepaid thereon.

[ ] By Personal Service – I caused the document(s) to be given to a messenger for personal delivery to the person(s) to be served.

[ ] By Overnight Courier – I caused each such envelope to be given to an overnight mail service at Walnut Creek, California, for delivery to the person(s) to be served the next day.

[ ] By Fax – I transmitted the document(s) from a fax machine with telephone number (925) 932-1961, before 5:00 p.m., to the person(s) and fax number(s) listed below. I declare that the transmitting fax machine reported that the transmission was complete and without error and properly issued a transmission report, a copy of which is attached hereto.

[X] By Electronic Service – I caused the document(s) to be transmitted electronically from my email address to the person(s) and email address(es) set forth below on the date and time listed below. My email address is: alice@laborcounsel.com

Person(s) and address(es) to be served:

Elvira Pereda – Elvira.Pereda@nlrb.gov

Costa Kerestenzis – Ckerestenzis@beesontayer.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Walnut Creek, California.

Dated: July 17, 2013.

Alice Garcia

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