

**DaNite Holdings, Ltd. d/b/a DaNite Sign Company
and Sheet Metal Workers International Association
Local Union No. 24 and International
Brotherhood of Electrical Workers Local Union
No. 683.** Cases 9-CA-45500, 9-CA-45501, 9-
CA-45508, 9-CA-45526, and 9-CA-45565

March 31, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On August 9, 2010, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. Additionally, the General Counsel filed limited exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, to

¹ Having adopted the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating a rule that prohibited employees from discussing their compensation, we find it unnecessary to pass on the General Counsel's exception regarding an alleged additional incident of unlawfully prohibiting employees from discussing their terms and conditions of employment not addressed by the judge. Such a violation would be cumulative and would not materially affect the remedy.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(2) and (1) by forming and operating the moving forward team (MFT). The essential facts are these: The Respondent, immediately following its unlawful withdrawal of recognition from the Union, formed the MFT to consult with the Respondent on various issues, including terms and conditions of employment. The initial employee members of the MFT were selected by the Respondent because they were "looked up to around the shop." The Respondent sought the MFT's input on merit wage increases, health insurance, and a survey to elicit employee sentiment regarding compensation. The Respondent met with the MFT on three occasions and, as indicated by its initial announcement, contemplated ongoing meetings. Given those facts, we find that the judge reasonably inferred that the Respondent intended to consider consensus employee sentiment, as expressed by the MFT, and to decide whether to accept or reject it. See *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 812-813 (3d Cir. 1986), cert. denied 481 U.S. 1069 (1987) (the Board is entitled to draw "legitimate inferences from proven facts"). Because the MFT met only three times, the record does not establish actual back-and-forth dealings between it and the Respondent. Nevertheless, we find that the MFT was unlawful because it was established, at least in part, for that purpose. See *Music Express East, Inc.*, 340 NLRB 1063, 1077-1078 (2003) (finding a "chauffeurs committee" unlawful where, even though the committee met only once and there was no direct testimony about that meeting, the record as a whole established that "the committee was set up to 'deal' with the [employer]"). For that reason, as well, we find that the MFT is more analogous to the employee committees found unlawful in *EFCO Corp.*,

modify his remedy,² and to adopt the recommended Order as modified and set forth in full below.³

327 NLRB 372, 375 (1998), enfd. 215 F.3d 1318 (4th Cir. 2000), than to the employee-suggestion committee found lawful in that case.

Member Hayes disagrees with his colleagues and the judge that the Respondent violated Sec. 8(a)(2) in operating the Moving forward team (MFT). A prerequisite to finding such a violation is that the entity involved is a labor organization as defined in Sec. 2(5) of the Act. *E. I. du Pont de Nemours & Co.*, 311 NLRB 893, 894 (1993). An employee committee is a labor organization where it exists for the purpose of "dealing with" employers concerning conditions of work. *Id.* The Board has held that "dealing with" ordinarily involves "a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by work or deed, and compromise is not required." *Id.* Here, there is no evidence that the Respondent "dealt with" the MFT because the MFT team members did not make any proposals to management. At most, the record shows that the employee team members may have edited some questions for an employee work survey that the Respondent's president never completed. See *EFCO Corp.*, 327 NLRB at 375 (the employee suggestion screening committee was not a labor organization because it did not formulate proposals or present them to management). The majority nevertheless finds it reasonable to infer that the Respondent intended that the purpose of the MFT would be to deal with the Respondent over statutory terms and conditions of employment. The Board, however, has found that a committee's purpose is shown by examining its actual function. In *Polaroid Corp.*, 329 NLRB 424 (1999), the Board, in explaining the concept of "dealing with," stated, "The issue is what the committee actually does." Similarly, in *E. I. du Pont*, 311 NLRB at 894, the Board, in defining the limits of "dealing with" emphasized that "If there are only isolated instances in which the group makes ad hoc proposals to management . . . the element of dealing is missing.") Member Hayes would therefore dismiss the 8(a)(2) allegation.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by withdrawing recognition from the Unions, Member Hayes does not express any view as to whether *Levitz Furniture Co.*, 333 NLRB 717 (2001), was correctly decided. He finds that, even under the Board's pre-*Levitz* standard, as elucidated by the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), the Respondent was not justified in withdrawing recognition from the Unions, because it has not established that it had a good-faith reasonable doubt (i.e., reasonable uncertainty) as to the Unions' majority support.

Member Hayes finds it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(5) by directly dealing with employee Kim Smith, inasmuch as he believes that such a finding would be cumulative, and would not materially affect the remedy. Finally, in agreeing with his colleagues that the Respondent failed to cure its unlawful promulgation of a rule that prohibited employees from discussing their compensation, Member Hayes finds it unnecessary to rely on *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In his view, the Respondent's rescission of the rule, without more, was insufficient to cure the violation.

² Backpay owing shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, having adopted the judge's finding that the Respondent unlawfully failed to remit contributions to the IBEW pension fund, the Respondent's make-whole obligations shall include making all such delinquent fund contributions on employees' behalf, including any

AMENDED CONCLUSIONS OF LAW

Append the following to the judge's Conclusions of Law.

"Respondent violated Section 8(a)(1) by promulgating a rule that prohibited employees from discussing their compensation."

ORDER

The National Labor Relations Board orders that the Respondent, DaNite Holdings, Ltd. d/b/a DaNite Sign Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall take the following action

1. Cease and desist from

(a) Withdrawing recognition from, and failing and refusing to bargain with, Sheet Metal Workers International Association Local Union No. 24 and International Brotherhood of Electrical Workers Local Union No. 683 (the Unions), as the exclusive representative of the Respondent's production employees.

(b) Changing the terms and conditions of employment of any bargaining unit employee without providing the Unions notice and an opportunity to bargain.

(c) Bypassing the Unions and dealing directly with any unit employee or group of unit employees concerning their terms and conditions of employment.

(d) Forming, recognizing, and operating the Moving Forward Team, or any other dominated successor thereof, for the purpose of dealing with the Respondent over employees' wages, hours, or other terms and conditions of employment.

(e) Promulgating or maintaining any rule that prohibits employees from discussing wages, hours, or other terms and conditions of employment.

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

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

(a) Recognize and, on request, bargain with the Unions as the exclusive representative of the Respondent's production employees concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

(b) Upon request of the Unions, rescind any or all changes to unit employees' wages, hours, or other terms and conditions of employment that were made without providing the Unions notice and an opportunity to bargain.

(c) Make unit employees, including Kim Smith, whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral changes to their wages, hours, or other terms and conditions of employment, with interest.

(d) Immediately disband the Moving Forward Team.

(e) Rescind the rule that prohibits employees from discussing wages, hours, or other terms and conditions of their employment.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Columbus, Ohio facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own

additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondent's remedial obligation shall also include reimbursing unit employees for any contributions they themselves may have made for the maintenance of that pension fund, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts, with interest, to be computed in the manner set forth in the paragraph above.

³ We shall modify the judge's conclusions of law and substitute a new Order and notice to conform to the violations found. Our Order shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 5, 2010.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully withdraw recognition from, or fail and refuse to bargain with, Sheet Metal Workers International Association Local Union No. 24 and International Brotherhood of Electrical Workers Local Union No. 683 (the Unions), as the exclusive representative of our production employees.

WE WILL NOT change the terms and conditions of employment of any bargaining unit employee without providing the Unions notice and an opportunity to bargain.

WE WILL NOT bypass the Unions and deal directly with our employees regarding wages, hours, and other terms and conditions of their employment.

WE WILL NOT form, recognize, or operate the Moving Forward Team, or any other dominated successor thereof, for the purpose of dealing with us over employees' wages, hours, or other terms and conditions of employment.

WE WILL NOT promulgate any rule that prohibits you from discussing your wages, hours, or other terms and conditions of your employment.

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

WE WILL recognize and, on request, bargain with the Unions as the exclusive representative of our production

employees concerning terms and conditions of employment, and, if an understanding is reached, embody that understanding in a signed agreement.

WE WILL, upon request of the Unions, rescind any or all unilateral changes to unit employees' wages, hours, or other terms and conditions of employment that were made without providing the Unions notice and an opportunity to bargain.

WE WILL make unit employees, including Kim Smith, whole for any loss of earnings and other benefits suffered as a result of our unilateral changes to their wages, hours, and other terms and conditions of employment, with interest.

WE WILL immediately disband the Moving Forward Team.

WE WILL rescind the rule prohibiting employees from discussing their compensation.

DANITE HOLDINGS, LTD. D/B/A DANITE SIGN COMPANY

Eric A. Taylor, Esq., for the General Counsel.

J. Miles Gibson, Esq. (Wiles, Boyle, Burkholder & Bringardner Co., LPA), of Columbus, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Columbus, Ohio, on June 28–29, 2010. The charges were filed between March 16, and April 14, 2010. The General Counsel issued his complaint on May 5, 2010.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,¹ I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability corporation, manufactures, installs, and services commercial signs from its production shop in Columbus, Ohio. It annually purchases and receives goods worth in excess of \$50,000 directly from points outside the State of Ohio. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

DaNite Sign Company has been in business for at least 32 years. Tim McCord, president and owner of DaNite Holdings, Ltd. purchased the assets of DaNite Sign Company from its

¹ I have given no weight to the affidavits of Respondent's managers which are cited as evidence in lieu of oral testimony in support of Respondent's case, or to the General Counsel's citation to the complaint as substantive evidence.

previous owner, Cal Lutz, in July 2007. He leases the building in which Respondent's shop is located from Lutz.

The charging parties have represented DaNite's production employees for decades. The bargaining unit includes shop personnel who manufacture and repair signs at Respondent's facility and outside crew members who install and service Respondent's signs at customers' locations.

McCord hired virtually all DaNite's employees and continued to employ them pursuant to a June 1, 2004—May 31, 2009 collective-bargaining agreement with the charging parties. That agreement states that DaNite recognizes the Unions as the sole and exclusive bargaining agents *for its Sheet Metal #287 and IBEW #683 members covered by the agreement*, GC Exh. 9, p. 2. (Emphasis added.)² Respondent's July 2007 production operations handbook, GC Exh. 19, contains identical recognition language.

The recognition clause in the immediately previous agreement between Respondent and the Unions, for the period June 2000—May 2004, contained identical recognition language, GC Exh. 20. However, the 2000–2004 agreement contained a union-security clause which required all production employees to become members in good standing of the Unions within 90 days of the start of their employment. The 2004–2009 agreement did not have a union security clause and only a minority of unit members was members of either Union when DaNite Holdings purchased DaNite Sign's assets.

Neither Lutz nor McCord signed the 2004–2009 agreement.³ Nevertheless, both complied with most or all of the provisions of the 2004–2009 agreement *with respect to all DaNite's production employees*, Tr. 14, 72–73. Both Lutz and McCord contributed to an IBEW pension fund for those DaNite employees who were members of the IBEW.

On February 25, 2009, Sheet Metal Workers Local Union No. 24 informed Respondent that it wished to reopen the collective-bargaining agreement to negotiate a new contract. McCord and his Production Manager Bruce Tokar met with Rob Durham, a business representative from Local 24, and Dennis Mullen, a business representative from Local 683 of the IBEW, on six occasions between May and November 2009.

On May 20, 2009, the Unions presented a proposed collective-bargaining agreement to Respondent. It included a provision requiring employees to join the Union (or pay agency fees) within 31 days of the effective date, or after 90 days for newly hired employees. In July 2009, Respondent filed an RM petition with the Board, seeking a determination whether the Unions represented its employees. The Board rejected this petition.

In negotiations with the Unions, Tim McCord proposed that his employee handbook and production and outside crew handbook be incorporated into the collective-bargaining agreement. The Unions presented a proposal to Respondent in November 2009, which incorporated the handbook, but retained the proposed union-security clause. At the bargaining table, union

representatives told Respondent that union security was non-negotiable.

On February 18, 2010, the Unions mailed Respondent another proposal. It contained a union-security clause but gave current employees 90 days, rather than 30 to join the Unions or pay agency fees. Respondent did not respond to this proposal.

At the start of the workday, on March 5, 2010, Tim McCord notified the two union stewards, Kim Smith, for IBEW Local 683, and Ron Pollard for Sheet Metal Workers Local Union 24, that he was about to convene a meeting for all employees during which he was going to announce that he was withdrawing recognition of the Unions. This meeting started a few minutes later. All production employees who were at work that day attended, as well as a few office employees. McCord announced that he was withdrawing recognition from the Unions, that he would no longer deduct union dues from the pay of employees who were members of either union and would no longer contribute to the IBEW pension plan. He also passed out a new production and outside crew handbook.

In this handbook, General Counsel Exhibit 3, was a provision regarding wage increases which stated:

Employee wages are based on agreement between the Employer and the Employee. Wages are always to be kept confidential and failure to keep wages confidential can lead to disciplinary action up to and including termination of employment.

Several weeks later, McCord distributed a revised version of Respondent's production and outside crew handbook which deleted this provision.

At the March 5, 2010 meeting, McCord also announced that he was forming a new "Moving Forward Team" for consultation on a variety of issues. Among the topics within the purview of the new Moving Forward Team were benefit options and ways to improve employees' work environment (R Exh. 3).

A group also named the Moving Forward Team had met in late 2007 and early 2008, but had been moribund for over a year by March 5, 2010. However, there is no indication that the earlier group concerned itself with the terms and conditions of employees' employment.

Tim McCord selected four employees: Ron Pollard, Bob Chaffin, Ray McDonnell, and Ray Tigner to be on the initial Moving Forward Team in March 2010. At the first Moving Forward Team meeting on March 12, McCord told the four that he selected them because they were looked up to around the shop. He also told them that he planned to rotate membership by having the incumbent members select their successors.

The Moving Forward Team met on March 12 and 19, and April 2, 2010, at Respondent's shop on company time. DaNite paid team members for the time spent at these meetings. Respondent contemplated additional sessions but did not conduct more meetings apparently due in part to the sudden death of one of its managers.

McCord asked for input from Moving Forward Team members as to what factors he should take into account in implementing a merit-based wage increase program. He also asked team members for input on issues of health insurance and de-

² Sheet Metal Workers Local 287 merged with Local 24.

³ The 2000–2004 collective-bargaining agreement was signed by Lutz in June 2001, GC Exh. 20.

vising a survey to be given to all employees regarding compensation.

After the March 5 general meeting at which McCord announced that he was withdrawing recognition from the Unions, he held one-on-one meetings with almost all his employees. In the afternoon of March 5, McCord notified the Sheet Metal Workers and IBEW business representatives that he had withdrawn recognition of their unions as the joint collective-bargaining representatives of his production employees.

Changes to the Terms and Conditions of the Employment of Kim Smith

Kim Smith, who was the IBEW's steward, has worked for DaNite for 25 years. At least in recent years, his principal responsibility has been the manufacture and repair of neon signs. Use of neon in the sign industry has diminished markedly in the last several years due to the advent of LED lighting.

On March 17, 2010, McCord gave a memorandum to Smith. In the memo, he offered Smith three options: work as a part-time employee, work as an independent contractor or resignation. A few days later, Smith returned the memo with a notation that he wanted to maintain the status quo. On March 26, McCord informed Smith that he would be a regular part-time employee effective March 29. His initial schedule was Tuesday, Thursday, and Friday with a minimum of 4 hours a day. Smith's hourly rate was increased from \$17.88 to \$19 per hour until June 2, when it changed to \$19 per hour for neon work and \$14 per hour for nonneon work.

Pursuant to Smith's new terms of employment as a regular part-time employee his entitlement to all fringe benefits, such as health insurance and vacation pay ceased.

Union Membership Amongst Respondent's Bargaining Unit Employees

In justifying its withdrawal of recognition from the Unions, Respondent relies solely on the fact that a minority of its bargaining unit members were dues paying members of either the IBEW or Sheet Metal Workers Union. In May 2009, there were seven unit members who paid dues to one union or the other. Kim Smith, Dennis Debo, and Glen Mitchell were dues paying members of IBEW Local 683. Jim Reed, George Payne, John Hamilton, and Ron Pollard were dues paying members of the Sheet Metal Workers Local No. 24. All were still employed by Respondent and were still dues-paying members of their union on March 5, 2010. In addition, two union members, Bill Wheeler and Debbie Stacey, who were laid off in May 2009, had recall rights under the collective-bargaining agreement until May 2010.

As of May 18, 2009, the following seven unit members were not paying dues to either union: Andy Gerhardt, Bob Chaffin, James Buechner, John Buck, Ray McDonnell, Ray Tigner, and Ryan Zimmerman. Two laid-off employees, Floyd Thompson and Mike Ream, with recall rights until May 2010, also were not dues-paying members of either union.

Between May 18, 2009, and March 5, 2010, Respondent hired several other employees: Ernie Seymour, Greg Woods, Brian (or Ron) Fisher, Josh Eckelson, Aaron Pauley, Noah Brown, and an employee whose first name is Sean. There is no evidence as to when each of these individuals was hired and

there is some question as to whether Eckelson, Pauley, Brown, and Sean had completed their 90-day probation period as set forth in the 2004–2009 collective-bargaining agreement by March 5, 2010.⁴ I find the evidence to be inconclusive on this issue. Brown worked 3 days a week and it is unclear how long Sean worked for Respondent. He was no longer Respondent's employee on June 29, 2010.

Analysis

Respondent was a Successor Employer to the Previous Owners of DaNite Sign Company and Succeeded to the Collective-Bargaining Obligations of the Prior Owners, Which Encompassed the Unions' Representation of All its Production Employees

An employer, which buys or otherwise takes control of the unionized business of another employer, succeeds to the collective-bargaining obligation of the seller if it is a successor employer. For it to be a successor employer, the similarities between the two operations must manifest a "substantial continuity between the enterprises" and a majority of its employees in an appropriate bargaining unit must be former bargaining unit employees of the predecessor. The bargaining obligation of a successor employer begins when it has hired a "substantial and representative complement" of its work force. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), affg. 775 F.2d 425 (1st Cir. 1985).

DaNite Holdings continued the operations of DaNite Sign Company in July 2007 with the same employees, identical business operations and no change in the terms and conditions of the employment of its production employees. Thus, it was a successor employer to DaNite Sign Company and had a bargaining obligation with the collective-bargaining representative of its production employees.

Respondent, in its brief, contends that the Unions only represented production employees who were members of the Unions. If the unit consisted only of union members, Respondent was obviously not privileged to withdraw recognition since the Unions represented 100 percent of the unit. However, the language in the recognition clauses of the collective-bargaining agreement and the production handbook is not controlling. In granting wage increases, vacation time, etc., Respondent drew no distinction between union members and other production employees.

Respondent granted de facto recognition to the Unions as bargaining representative of all its production employees. It did so by applying the terms of the 2004–2009 agreement to all production employees and by bargaining with the Unions in 2009 as bargaining representative of all its production employees, *Capitol Theatre, Capital Rock*, 231 NLRB 1370, 1375–1376 (1977); *Destileria Serralles*, 289 NLRB 51, 57–58 (1988), enfd. 882 F.2d 19 (1st Cir. 1989). Respondent tacitly acknowledged that the Union represented all its production employees in its response to the Unions' information request at the start of

⁴ Eckelson worked for Respondent through a temporary employment agency and then was hired directly by DaNite. There is no evidence as to when either of these events took place.

bargaining in May 2009 (GC Exh. 17). It provided the Unions information about all its production employees, not just those who belonged to the Unions. Furthermore, in its RM petition of July 9, 2009, Respondent essentially conceded that the Unions represented all its production employees. It identified the Unions as the recognized or certified bargaining agent of a bargaining unit composed of 17 of its production employees (GC Exh. 2).

Respondent Did Not Legally Withdraw Recognition
from the Unions

All the 8(a)(5) issues in this case turn on whether or not Respondent was lawfully entitled to withdraw recognition from the unions on March 5, 2010. The controlling Board precedent in this regard is *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001).

In *Levitz Furniture*, the Board overruled its longstanding rule set forth in *Celanese Corp.*, 95 NLRB 664 (1951), and held that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of bargaining unit employees. An employer can no longer lawfully withdraw recognition from an incumbent union on the basis of a good-faith doubt as to the union's majority status. Under the *Levitz Furniture* rule an employer defending against an 8(a)(5) and (1) allegation for refusing to bargain with an incumbent union must show that the incumbent union actually lost the support of a majority of bargaining unit employees.

The Board has held for over 40 years that, "there is no necessary correlation between membership and the number of union supporters since no one could know many employees who favor union bargaining do not become or remain members thereof," *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969). The reasons as to why there is no such correlation was explained by Administrative Law Judge Fannie Boyls (then called a trial examiner) in *Gulfmont Hotel Co.*, 147 NLRB 997 (1964), enf. 362 F.2d 588 (5th Cir. 1966), at pp. 1000-1001:

Employees for various reasons unconnected with their desire to have a union represent them, may fail to execute check off authorizations. There may be some who prefer, as a matter of principle, to pay their financial obligations in person; there may be others who prefer to decide when and if they can afford to spare the money for dues and fees; and there may even be some who are willing to vote for and accept union representation but who decide to be free riders and enjoy the expected benefits of representation without paying for them at all. Accordingly, although the voluntary signing of check off authorization by a majority in the unit may be considered as evidence of a union's majority status, the converse is not true
....

The Board also disregards turnover in the bargaining unit. It adheres to a presumption that newly hired employees support the union in the same proportion as the employees they have replaced, *Levitz Furniture*, at p. 728 fn. 60.

There are two court of appeals' decisions taking the Board to task for ignoring evidence of a decline in the number of employees authorizing dues check-off. Both cases, *Tri-State*

Health Service, 374 F.3d 347 (5th Cir. 2004), and *McDonald Partners, Inc. v. NLRB*, 331 NLRB 1002 (D.C. Cir. 2003), were decided pursuant to the rule in *Celanese*, not the rule in *Levitz Furniture*. Both courts applied the *Celanese* rule in light of the decision of the United States Supreme Court in *Allentown Mack*, 522 U.S. 359 (1998), holding that under the *Celanese* rule an employer need only substantiate uncertainty as to whether the union had majority support.

These cases have no bearing on the instant case in which Respondent must establish that the unions actually lacked majority support. Respondent has nothing to rely on in the instant case other than the absolute number of employees authorizing check-off compared to the number of employees in the bargaining unit. This is simply not enough to satisfy the *Levitz Furniture* test for a valid withdrawal of recognition.

Moreover, in both cases the record established sharp declines in the number of employees authorizing dues check-off. In *Tri-State Health* there was additional circumstantial evidence supporting the employer's uncertainty as to majority status. For example there wasn't any union steward for the bargaining unit.

In the instant case, by way of contrast, both unions had stewards and the number of employees authorizing dues check-off remained static. None of Respondent's employees either resigned from their union or terminated his or her dues check-off authorization between May 2009, when Respondent began bargaining for a successor contract and March 5, 2010 when it withdrew recognition. The only factor that changed was that Respondent hired additional employees. One cannot assume in the absence of other evidence that any of the new unit employees did not support the Union.⁵ Given this fact and the fact that one cannot assume that any of the nonmembers no longer wished to have the unions represent them, Respondent has not met its burden under *Levitz Furniture*.

Since Respondent was not entitled to withdraw recognition from the Unions, it follows that it violated Section 8(a)(5) and (1) by reconstituting the Moving Forward Team in order to deal directly with its employees and bypass their collective-bargaining representative. An employer whose employees are represented by a statutory collective-bargaining representative may not bypass this representative and bargain or deal directly or indirectly with bargaining unit employees, *Excel Fire Protection Co.*, 308 NLRB 241 (1992).

Similarly, when employees are represented, their employer cannot change their wage rates, hours of work, or other terms and conditions of employment without giving their collective-bargaining representative notice of the proposed changes and an opportunity to bargain over such changes, *United Refining Co.*, 327 NLRB 795 (1999). Thus, Respondent's unilateral change to the hours and wage rate of Kim Smith violated Section 8(a)(5) and (1).

⁵ McCord testified that two employees told him that they were feeling pressure to sign a union authorization card, Tr. 233-234. There is no evidence as to when these conversations occurred, or under what circumstances. Even assuming the truth of this hearsay assertion, it proves nothing as to whether these two employees wanted to continue to be represented by the unions.

Respondent Also Violated Section 8(a)(2) by Dealing
With the Moving Forward Team

The Board conducts a two-pronged inquiry to determine whether a violation of Section 8(a)(2) has occurred. First, it determines whether an employee group is a “labor organization” within the meaning of Section 2(5) of the Act. Second, if the organization is a “labor organization,” the Board determines whether the employer dominated, interfered with or supported the “labor organization,” *Polaroid Corp.*, 329 NLRB 424 (1999).

As to the second criteria, I conclude that Respondent clearly dominated the Moving Forward Team. Tim McCord selected the members, scheduled the meetings, and set the agenda for the Moving Forward Team deliberations. McCord’s explanation to team members as to why they were selected indicates that he intended the team to represent his entire production work force in its discussions with him.

Under the statutory definition set forth in Section 2(5), the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of “dealing with” employers, and (3) these dealings concern “conditions of work” or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment.

There is no question that employees participated in the Moving Forward Team and that team meetings concerned statutory subjects such as wages. The closer question is whether the Moving Forward Team exists or existed in part for the purpose of “dealing with” Respondent.

The Board has explained that “dealing with” contemplates a bilateral mechanism involving proposals from the employee committee concerning statutory subjects coupled with real or apparent consideration of those proposals by management. The Board in *Polaroid* stated further that the bilateral mechanism ordinarily entails a pattern or practice in which an employee group makes proposals to management over time, and management responds to those proposals.

In the instant case, since the Moving Forward Team met so few times, there has been no pattern or practice of this employee group dealing with Respondent. However, the Team was established for this purpose and Respondent has indicated an intention to hold meetings of the Moving Forward Team in the future. From the testimony in the record, I conclude that it was Respondent’s intention to obtain a consensus from the Moving Forward Team as to employee sentiment on such issues as incentive pay and fringes.

I also infer that it was Respondent’s intention to consider employee sentiment as expressed by the Moving Forward Team and to decide whether to abide by it. There is certainly no indication that McCord intended to cede his authority to set employees’ terms and conditions of employment to the Moving Forward Team. On this basis I find that Respondent violated Section 8(a)(2) in forming (or reestablishing) and operating the Moving Forward Team beginning in March 2010.

Respondent Violated the Act in Threatening Employees
With Discipline if They Discussed Their Wages

An employer’s rule which prohibits employees from discussing their compensation is unlawful on its face, *Freund Baking Co.*, 336 NLRB 847 (2001). I infer that Respondent realized this when it issued a revised production and outside crew handbook deleting its unlawful rule.

In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board set forth its criteria for curing past unfair labor practices. However, in *Claremont Resort & Spa*, 344 NLRB 832 (2005), two of the three Board members stated that they “do not necessarily endorse all the elements of *Passavant*.” In any event, by its terms the *Passavant* decision indicates that what an employer must do to cure a violation may depend on the nature of the violation. The *Passavant* case concerned a threat, which was communicated to 30–40 employees, that they would be fired if they engaged in an economic strike. In such a case, the Board found that repudiation must be (1) timely, (2) unambiguous, (3) specific to the coercive conduct, and (4) free from other prescribed illegal conduct.

I find that Respondent did not cure its violation of Section 8(a)(1) by simply issuing a revised production and outside crew handbook that deleted the prohibition against discussing wages. In order to cure its violation, Respondent would have been obligated, at a minimum, to clarify for its employees that they have a Section 7 right to discuss wages. Moreover, the revocation of the overly broad rule in this case was not free from other illegal conduct. Respondent continued to illegally withhold recognition from the Unions and continued to make unilateral changes in the working conditions of employees and continued to deal directly with unit employees.

CONCLUSIONS OF LAW

1. Respondent, DaNite Holdings, Ltd. violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Unions as exclusive collective-bargaining representation of its production employees; by ceasing its contributions to the IBEW pension fund; by unilaterally reducing the hours of employee Kim Smith and changing his wage rate; by directly dealing with Kim Smith and bypassing the unions with regard to Smith’s hours of work and other terms and conditions of his employment.

2. Respondent also violated Section 8(a)(5) and (1) by reviving the Moving Forward Team in order to deal directly with its employees and bypass their collective-bargaining representative.

3. Respondent violated Section 8(a)(2) of the Act in reinstating and operating the Moving Forward Team.

4. Respondent violated Section 8(a)(1) by promulgating a rule that prohibited employees from discussing their compensation.

REMEDY

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

[Recommended Order omitted from publication.]

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