Pacific Coast Supply, LLC d/b/a Anderson Lumber Company *and* Chauffeurs, Teamsters, and Helpers Local 150, International Brotherhood of Teamsters. Case 20–CA–086308

March 24, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On June 19, 2013, Administrative Law Judge Mary Miller Cracraft 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.

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 amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[2]

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct and, as explained in the remedy section of the judge's decision, to take certain steps to effectuate the policies of the Act.

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition. We adhere to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' [Section] 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Id. at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's withdrawal of recognition and resulting refusal to bargain with the Union for a successor collective-bargaining agreement. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. To the extent such opposition exists, moreover, it may be at least in part the product of the Respondent's unfair labor practices.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances, because it would permit another challenge to the Union's majority status be-

[1] We agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on July 20, 2012, because the statements submitted by employees Davis, Hernandez, Rocha, and Singh did not show that they no longer wanted the Union to represent them for the purposes of collective bargaining. Therefore, we find it unnecessary to consider the statements submitted by employees Garcia, Gonzalez, Hartag, and Ramos Pompa, and we do not pass on the judge's alternative analysis of those statements.

In agreeing with his colleagues' adoption of the judge's finding that the Respondent violated Sec. 8(a)(5) and (1), Member Johnson relies solely on the statements of Hernandez ("I resign from Local 150") and Rocha ("I do not wish to be a Union member"), which explicitly refer only to union *membership* and, therefore, under extant Board law are insufficient to support the conclusion that they did not want to be represented by the Union.

[2] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and to conform to our standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

fore the taint of the Respondent's unlawful withdrawal of recognition has dissipated, and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a successor collective-bargaining agreement. Such a result would be particularly unjust in circumstances such as those here, where the Respondent's withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

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

ORDER

The National Labor Relations Board orders that the Respondent, Pacific Coast Supply, LLC d/b/a Anderson Lumber Company, North Highlands, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from Chauffeurs, Teamsters, and Helpers Local 150, International Brotherhood of Teamsters (the Union) and failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner 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 Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The unit is as follows:

> Saw tail off employees, material handlers, sawyers, and drivers, as described in the Wages section of the collective-bargaining agreement effective from April 1, 2011 to February 28, 2012.

(b) On request of the Union, adhere to any or all of the terms and conditions set out in the collective-bargaining agreement that expired on February 28, 2012, giving effect to its terms retroactive to July 20, 2012, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union.

(c) Make unit employees whole, with interest, in the manner set forth in the judge's remedy section for any loss of earnings and other benefits they may have suffered because of the Respondent's repudiation of the collective-bargaining relationship.

(d) Compensate unit employees for the adverse consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters.

(e) 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.

(f) Within 14 days after service by the Region, post at its North Highlands, California facility, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 20, 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 20, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 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.

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[3] 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."

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 withdraw recognition from and fail and refuse to recognize and bargain with Chauffeurs, Teamsters, and Helpers Local 150, International Brotherhood of Teamsters (the Union), as the exclusive collective-bargaining representative of our employees in the bargaining unit.

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

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The unit is as follows:

> Saw tail off employees, material handlers, sawyers, and drivers, as described in the Wages section of the collective-bargaining agreement effective from April 1, 2011 to February 28, 2012.

WE WILL, on request of the Union, adhere to any or all of the terms and conditions set out in the collective-bargaining agreement that expired on February 28, 2012, giving effect to its terms retroactive to July 20, 2012, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union.

WE WILL make you whole for any loss of earnings and other benefits you have suffered as a result of our repudiation of the collective-bargaining relationship.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

PACIFIC COAST SUPPLY, LLC D/B/A ANDERSON LUMBER COMPANY

Elvira T. Pereda, Esq. and *Matthew C. Peterson, Esq.,* for the Acting General Counsel.
Stephen Thomas Davenport, Esq., for the Respondent.
Costa Kerestenzis, Esq., for the Charging Party.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. On July 20, 2012, Pacific Coast Supply, LLC d/b/a Anderson Lumber Company (Respondent) withdrew recognition from Chauffeurs, Teamsters, and Helpers Local 150, International Brotherhood of Teamsters (the Union). The issue in this case[1] is whether the withdrawal of recognition was lawful pursuant to *Levitz Furniture Co. of the Pacific,* 333 NLRB 717 (2001) (employer may unilaterally withdraw recognition only if it can demonstrate that "the union has actually lost the support of the majority of the bargaining unit employees.")

The parties' collective-bargaining agreement expired shortly before withdrawal of recognition. There is no claim that supervisory involvement tainted the signatures nor are there any contemporaneous, unremedied unfair labor practices at issue. The parties agree that all signatures are authentic and that the unit consisted of 15 employees at the time of withdrawal of recognition. The parties' dispute is whether the eight statements of disaffection indicated that these eight employees no longer desired union representation.

I find that four of the eight statements relied upon by Respondent do not reflect that those employees no longer wish to be represented by the Union. Thus, I find that withdrawal of recognition was not based upon proof that the Union had actually lost the support of a majority of unit employees. Accordingly, I find that Respondent has violated Section 8(a)(5) and (1) of the Act in withdrawing recognition from the Union.

Hearing was held in Sacramento, California on April 16, 2013. On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by counsel for the Acting General Counsel and counsel for the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

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

Respondent is a California corporation in the business of supplying lumber to home builders. It has an office and place of

[1] The unfair labor practice charge was filed on July 27, 2012, and complaint was issued on January 31, 2013.

[2] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

business in North Highlands, California. Respondent admits and I find that it meets the interstate commerce criteria for direct inflow and further admits and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).[3]

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

Respondent further admits and I find that the Union is a labor organization with the meaning of Section 2(5) of the Act.

3. Since the late 1960s, the Union has been the exclusive representative of employees of Respondent within the meaning of Section 9(a) of the Act in a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act

The parties have had a collective-bargaining relationship since the late 1960s with successive contracts throughout the years. The most recent contract, in effect from April 1, 2011, to February 28, 2012,[4] covers saw tail off employees (who stack materials from the saw, operate forklifts and perform yard work), material handlers, sawyers, and drivers. The parties agree and I find that this unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. The parties further agree and I find that the Union has been the exclusive representative of these employees within the meaning of Section 9(a) since the late 1960s.

4. Upon expiration of the most recent collective-bargaining agreement on February 28 and after an initial bargaining session on March 27, Respondent withdrew recognition of the Union on July 20

Upon expiration of the most recent agreement, the parties began bargaining for a successor agreement with their first negotiating session held on March 27. The next session was scheduled for July 30. On July 20, Mark Ingram, Respondent's Labor Consultant, an admitted agent of Respondent within the meaning of Section 2(13) of the Act, who was authorized to communicate on Respondent's behalf regarding withdrawal of recognition, spoke by telephone with Michael C. Tobin, Business Agent of the Union and the assigned representative of the unit employees of Respondent. Ingram told Tobin that Respondent did not think that the Union had majority support. Tobin responded, "Where's your proof." Ingram said he would send it to Tobin.

5. Respondent's withdrawal of recognition was based solely upon statements signed by 8 of its 15 bargaining unit employees

At the time of this July 20 conversation, the parties stipulated and I find that there were 15 bargaining unit employees, as follows: Jorge Alvarado, Donald Davis, Vital Estacio, Jorge Garcia, Luis Gonzalez, Craig Hartog, Miguel Hernandez, Don Hogg, Ricky Otto, Mario Ramos Pompa, Richard Remner, Mark Rocha, Ralph Schow, Sandeep Singh, and Terry Tillis.

After the phone conversation, Ingram sent an email to Tobin around 5 pm stating in relevant part,

> Following up on our conversation this morning, attached for your review are eight (8) individual statements from bargaining unit employees working at [Respondent]. As you can see, a majority of the employees have told [Respondent] they no longer wish to be represented by [the Union].
>
> While we've enjoyed a good working relationship over the years, both the Union and [Respondent] have an obligation to respect the employees' choice in this regard. Accordingly, [Respondent] must now withdraw recognition for [the Union].
>
> As we discussed, under the circumstances, it would not be appropriate for the parties to continue in collective bargaining negotiations.

After receiving this email,[5] Tobin called Ingram and told him he disputed that the eight statements showed the employees no longer wanted the Union and the Union would be filing an unfair labor practice charge. The parties have not engaged in further bargaining. In withdrawing recognition, the Respondent relied only on these eight statements.

The signed and dated statements of the 8 employees are as follows:[6]

- 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. (July 16)
- My name is Jorge Garcia and I am a load/bldr at [Respondent] and do not wish to be a part of the Union now or in the future. (July 16)
- My name is Luis Gonzalez am working for [Respondent] in the production area Load/bldr. I do not wish to be part of the union. Thank you. (July 16)
- Hi my name is Craig Hartag. I am employed with [Respondent]. I no longer wish to be a part of [the Union]. (July 17)
- I resign from [the Union]. Miguel Hernandez. (July 19)
- I Mario Ramos [Pompa][7] am working at [Respondent]. I do not wish to be part of the Union. (July 16)
- I Mark A. Rocha do not wish to be a Union member. (July 17)
- I Sandeep Singh employee of [Respondent] wish to get out of the Union. (July 17)

There is no dispute that the signatures of these individuals are authentic.

[3] 29 U.S.C. Sec. 152(2), (6), and (7).

[4] All dates are in 2012, unless otherwise referenced.

[5] Although Tobin could not access the attached employee statements, they were later faxed to him by Ingram.

[6] The eight employee statements are written in English although five of the eight employees testified in Spanish and stated that they spoke and wrote only a little English. Some of the non-English speaking employees had assistance from a coworker who drafted the statement in English for them and translated it into Spanish for them.

[7] The parties stipulated that employee Mario Ramos Pampa wrote this statement which is signed "Mario Ramos."

ANALYSIS AND CONCLUSIONS OF LAW

1. An employer may unilaterally withdraw recognition only on a showing that the union has in fact lost the support of a majority of employees

The foundation for exclusive bargaining representative status is majority support of unit employees. *Auciello Iron Works v. NLRB,* 517 U.S. 781, 786 (1996). In order to foster industrial peace and stability in bargaining relationships as well as employee free choice, the Board presumes that an incumbent union retains its majority status. Id. 785–786. This presumption is irrebutable during the term of a collective-bargaining agreement not to exceed three years. *Trailmobile Trailer, LLC,* 343 NLRB 95, 97–98 (2004). At the expiration of a collective-bargaining agreement, the presumption becomes rebuttable. *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 778 (1990). Withdrawal of recognition in this case occurred after the most recent contract expired; thus, the presumption of majority status was rebuttable.

In *Levitz,* the Board overruled *Celanese Corp.,* 95 NLRB 664, 671–673 (1951) (employer may withdraw recognition from incumbent union on basis of reasonable good-faith doubt as clarified in *Allentown Mack*[8] to a "genuine, reasonable uncertainty") and held that "an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." *Levitz,* supra, 333 NLRB at 725. Because the presumption of continued majority status is based on important principles underlying the Act, those of fostering industrial stability as well as employee rights to designate their collective-bargaining representative, the Board noted, id., that the evidence of loss of majority must be objective and that the employer acts at its peril by withdrawing unilaterally:

> We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding the employer will have to prove by a preponderance of the evidence that the union has, in fact, lost majority support at the time the employer withdrew recognition.

In rejecting the lower *Celanese* standard (genuine reasonable uncertainty) and adopting the more stringent *Levitz Furniture* standard of actual loss of majority, the Board relied heavily on its parallel holding that when in doubt, an employer may forego unilateral action and resolve the issue in a representation proceeding based on a lower "uncertainty" standard. Id. at 727.

Respondent relied on statements from 8 employees in a unit of 15 employees. It is undisputed that the remaining seven unit employees would not constitute majority support for the Union. There is no evidence of supervisory taint on the record nor is there any evidence of contemporaneous, unremedied unfair labor practices.

[8] *Allentown Mack Sales & Service, Inc. v. NLRB,* 522 U.S. 359, 367 (1998).

2. Respondent has failed to show by a preponderance of the evidence that the Union lost the support of a majority of employees

It remains for consideration whether the eight statements satisfy Respondent's burden to show by a preponderance of the evidence that a majority of employees no longer supported the Union. In order to sustain the preponderance of the evidence burden, an employer must show that it relied upon a "reasonable interpretation " of the language utilized to prove loss of majority support. *Wurtland Nursing & Rehabilitation Center,* 351 NLRB 817 (2007). In other words, as the Board explained, id., the language need not be unambiguous.

> [T]he 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. Here, the majority of the employees signed the petition [stating they desired "a vote to remove the union"], and, as explained above, we conclude 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.

a. Four of the eight statements of disaffection clearly indicate that these four employees desired to withdraw from Union membership

I find that four of the statements, those of Davis (I would like to exit the union), Hernandez (I resign from the Union), Rocha (I do not wish to be a Union member), and Singh (I wish to get out of the Union), clearly state a desire to withdraw from membership in the Union. They are not in the least ambiguous.

b. Statements of a desire to withdraw from union membership may not be relied upon to withdraw recognition

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. *DaNite Sign Co.,* 356 NLRB 975 (2011);[9] *Crete Cold Storage,*

[9] The Board adopted Administrative Law Judge Amchan's decision which stated: 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 how many employees who favor union bargaining do not become or remain members thereof," *Terrell Machine Co.,* 173 NLRB 1480, 1481 (1969) [enfd. 427 F.2d 1088 (4th Cir. 1970)]. 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), enfd. 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

LLC, 354 NLRB 1000 fn. 2 (2009) (determination of majority support turns on whether a majority of unit employees wish to be represented by a particular union, not on whether a majority choose to become members of the union).[10] See also *Narricot Industries,* supra, 353 NLRB at 776 (decreased union membership does not constitute objective proof of a union's loss of majority support).

Respondent argues that these cases are inapplicable in California, a nonright-to-work state, because Respondent operated as a closed shop.[11] Thus, Respondent claims an employee's resignation from the Union under closed shop circumstances in which Union membership is a condition of continued employment can only mean that the employee no longer desires to be represented by the Union. I reject this argument as it rests on a misapprehension of the law. Closed shops are prohibited by Section 8(a)(3) of the Act. Union shop or agency shop provisions are common in both right-to-work and nonright-to-work states. However, these provisions do not compel full union membership. Rather, membership as a condition of employment is whittled down to its financial core. *NLRB v. General Motors Corp.,* 373 U.S. 734, 742 (1963).

c. Were it necessary to determine the meaning of the four remaining statements, I would find they support withdrawal of recognition

It is unnecessary to determine whether the remaining four statements are clear or ambiguous and, if ambiguous, whether it is more probable than not that they reflect an intention to no longer be represented by the Union. Were it necessary to consider these statements—those of Garcia (I do not wish to be a part of the Union), Gonzalez (I do not wish to be a part of the union), Hartag (I no longer wish to be a part of [the Union], and Pompa (I do not wish to be a part of the Union)—I would find they are ambiguous and further find that the more reasonable understanding of these statements is that these four employees no longer desired to be represented by the Union.

My finding regarding the Garcia, Gonzalez, Hartag, and Pompa statements is based not only on the reasonable meaning of the words used but also on a pre-*Levitz* decision. In *Green Oak Manor,* 215 NLRB 658 (1974), the employer relied on oral statements from a majority of unit employees that they did not want the union or did not want any part of the union. The Board adopted the administrative law judge's conclusion, id. at 663–664, that these statements meant that employees were dissatisfied with the union's representation and no longer desired the union to represent them.

d. Respondent has failed to rebut the presumption of majority support

Four of the eight employee statements of disaffection indicated a desire to withdraw from membership in the Union. These statements do not indicate that those four employees no longer desired Union representation. Those four employees plus the seven remaining employees who did not submit statements of disaffection (11 in total) constitute a majority of the 15-employee unit—a clear majority—who continue to support the Union. Thus, Respondent has failed to rebut the Union's continuing presumption of majority support.

3. By withdrawing recognition from the Union without proof of loss of majority support, Respondent has failed to rebut the presumption of continuing majority status and has violated Section 8(a)(1) and (5) of the Act

Respondent withdrew recognition after its most recent collective-bargaining agreement expired and thus at a time when the presumption of majority status was rebuttable. Respondent relied on eight statements of disaffection. Four of the statements indicated a desire to terminate membership in the Union. Those four statements could not be relied upon to withdraw recognition and thus the presumption of continuing majority has not been rebutted. Evidence of a desire to withdraw from membership in a union is insufficient to satisfy the *Levitz* requirement of proof that the Union has in fact lost the support of a majority of the unit. Thus, by unilaterally withdrawing recognition from the Union without proof that the Union had in fact lost majority support, Respondent violated Section 8(a)(1) and (5) of the Act. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent's postwithdrawal, subjective evidence is irrelevant

Respondent argued at the hearing and on brief that subjective, after-acquired evidence is relevant to the question of whether a majority of unit employees supported the Union. In disagreement, I find the evidence irrelevant not only because the *Levitz* standard is objective and Respondent's proffered evidence was subjective, but also because *Levitz* requires that Respondent have objective evidence of loss of majority status at the time it withdraws recognition—not later.

Respondent avers that in January 2013, it learned that when the eight employees were asked the question "When you wrote [your statement], did you mean you wanted to be represented by the Union or you did not want to be represented by the Union for purposes of collective bargaining?" the employees uni-

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. . . .

[10] The Board cited *Trans-Lux Midwest Corp.,* 335 NLRB 230, 232 (2001), enfd. mem 53 Fed. Appx. 571 (D.C. Cir. 2002); *TLC St. Petersburg, Inc.*, 307 NLRB 605 (1992), enfd. 985 F.2d 579 (11th Cir. 1993); see also, generally, *Narricot Industries,* 353 NLRB 775, 776 (2009), enfd. 587 F.3d 654 (4th Cir. 2009), cert denied, 131 S.Ct. 59 (2010).

[11] Respondent cites *Terrell Machine Co. v. NLRB,* 427 F.2d 1088, 1090 (4th Cir. 1970), in support of this argument. However, I do not find that *Terrell* supports the argument. It merely notes that in a right to work state, evidence of union membership is entitled to little or no weight as evidence of employee disaffection because many employees in these states are content to reap the benefits of the union's representation without paying union dues.

formly meant that they did not want to be represented by the Union for purposes of collective bargaining.[12]

The General Counsel strenuously objected to introduction of this subjective, after-acquired evidence. I sustained these objections and thereafter rejected the Respondent's question and answer offers of proof on this issue because the evidence was subjective and because it postdated the withdrawal of recognition and therefore Respondent was not aware of this evidence at the time it withdrew recognition.

Moreover, given the leading format of the offer of proof question that elicited these subjective revelations, "When you wrote [your statement], did you mean you wanted to be represented by the Union or you did not want to be represented by the Union for purposes of collective bargaining?," I would be unwilling to accord the responses much weight even were there no objection to the questions. In any event, during the offer of proof each of the eight employees stated that what they meant was that they did not wish to be represented by the Union for purposes of collective bargaining.

Similarly, after withdrawing recognition, Respondent learned that five unit employees of, at that time, twelve total unit employees signed an attendance sheet at a March 22, 2013 Union meeting to discuss Respondent's bargaining proposals. Not only does this after-acquired evidence not tend to support Respondent's position,[13] it also fails to rise to the level of objective proof necessary under *Levitz*. In any event, this evidence was acquired long after withdrawal of recognition, was not relied on by Respondent in withdrawing recognition, and is not relevant for that reason.[14]

In *Highlands Regional Medical Center,* 347 NLRB 1404, 1407 fn. 17 (2006), enfd. 508 F.3d 28, 32 (D.C. Cir. 2007), the Board stated,

> 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 [of recollections of their sentiments] irrelevant.

In agreement, the court stated,

> *Levitz* places the burden on [respondent] to prove by a preponderance of the evidence that on April 12, the day the collective bargaining agreement expired [and the date recognition was withdrawn], the union "had, in fact, lost majority support. Id. [at 725].
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> . . . .
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> [The respondent] insists that it did have additional evidence of loss of majority support. Specifically, it points to the hearing testimony of thirty-five nurses, five of whom had declined to sign the petition but later claimed, after the [May 26] pay raise, to have opposed the union. Both the Board and ALJ, however, refused to credit this testimony, and for good cause: [respondent] had no knowledge of that corroborating evidence on the day it withdrew recognition. On that crucial date, then, besides the committee's petition, [respondent] had only unsubstantiated hearsay assertions that other employees opposed the union, which "certainly do not establish the fact of . . . disfavor with the degree of reliability ordinarily demanded in legal proceedings." [Citations omitted.]

Thus, the Board and the court clearly rejected use of after-acquired evidence regarding employee sentiment. See also, *RTP Co.,* 334 NLRB 466, 469 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003) ("In analyzing the adequacy of an employer's defense to a withdrawal of recognition allegation, the Board will only examine factors 'actually relied on' by the employer. Conduct of which the employer may have been aware, but on which the employer 'did not base' its decision to withdraw recognition from the Union, is of 'no legal significance.'") [citations omitted]. Accordingly, I find that Respondent may not rely on the evidence it received after withdrawal of recognition—either in NLRB affidavits or at the hearing herein.

3. Respondent's claim that it was forced to withdraw recognition or face a claim that it violated Section 8(a)(2) by continuing to recognize a minority union is unfounded

The Board held in *Levitz* that an employer acts at its peril in withdrawing recognition based on objective evidence that the union has lost majority support. Due to the presumption of continuing majority, an employer who cannot meet this burden is not in jeopardy of a finding that he has rendered unlawful assistance to the union. *Levitz,* supra, 333 NLRB at 725. The Board anticipated that by raising the bar for unilateral withdrawal of recognition and lowering the bar for obtaining an RM election, there would be less temptation to act unilaterally. Id. The Board rejected the dissent position that the majority holding in *Levitz* places employers in a "no-win situation." The majority stated, id. at 726:

> That dilemma, however, is more apparent than real. An employer with evidence of actual loss of majority status can petition for an RM election rather than withdraw recognition immediately; we would not find that the employer violated 8(a)(2) by failing to withdraw recognition while the representation proceeding was pending. [Footnotes omitted.]

Thus, Respondent's argument that it would violate Section 8(a)(2) unless it withdrew recognition is without merit.

[12] Respondent produced acknowledgements signed by the eight employees regarding their *Johnnie's Poultry* rights. See *Johnnie's Poultry,* 146 NLRB 770, 774, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965) (setting out safeguards for pretrial employee questioning).

[13] For instance, there is no proof that everyone present actually signed the sheet. Additionally, 5 of 12 employees attending an informational meeting might be considered considerable support thus not warranting an inference of lack of majority support.

[14] Additionally, Respondent sought to introduce postwithdrawal NLRB affidavits of three of the eight employees. These statements were rejected as after-acquired.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent must recognize the Union as the bargaining representative of the bargaining unit of employees. Although there is no evidence one way or the other as to continuation of the terms and conditions of employment of the expired collective-bargaining agreement, if the terms have not been adhered to, then restoration of the status quo ante requires that Respondent must, upon request of the Union, continue the terms and conditions of its expired agreement unless and until changed through collective bargaining with the Union. Respondent must bargain upon request with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement.

If the terms and conditions of the expired collective-bargaining agreement have not been adhered to since July 20, 2012, Respondent shall make whole its employees for losses in earnings and other benefits which they may have suffered as a result of Respondent's repudiation of the collective-bargaining agreement with such losses to be calculated in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). Interest on all such sums shall be computed as prescribed in accordance with *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Additionally, Respondent shall reimburse the unit employees for any expenses ensuing from failure to make the required contributions, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service,* supra, with interest as prescribed in *New Horizons,* supra, and *Kentucky River Medical Center,* supra. Further, in accordance with *Latino Express,* 359 NLRB 518 (2012), Respondent must compensate unit employees for any adverse tax consequences of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 20 of the Board what action it will take with respect to this decision. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 20, 2012.

Respondent shall, 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, if any, under the terms of this Order.