

Composite Energy Management Systems, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Case 7-CA-42398

September 28, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On July 11, 2000, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief answering the exceptions.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Thomas W. Doerr, Esq., for the General Counsel.
Philip W. Nantz and Steven K. Girard, Esqs., of Grand Rapids, Michigan, for the Respondent.
Michael L. Fayette, Esq., of Grand Rapids, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on February 17, 2000. The charge was filed by the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Union) on September 24, 1999, and the complaint was issued on December 1, 1999. The complaint alleges that Composite Energy Management Systems, Inc. (CEMSI or Respondent) violated Section 8(a)(1) and (5) of the Act on and after July 22, 1999, by refusing to execute a plant-closing agreement negotiated with the Union.

On November 8, 1995, the Respondent and the Union commenced negotiating a plant-closing agreement. On February 16, 1996, the Respondent permanently closed its plant. The parties continued to negotiate. By letter, dated September 16, 1997, the

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Respondent submitted a proposed plant-closing agreement that was preapproved by the appropriate company officials. (Jt. Exh. 13.) The Union proposed changes to the plant-closing agreement, which the Respondent rejected. Two months later, in November 1997, the Union withdrew many of its proposed changes which brought the parties closer to reaching an agreement for closing the plant. However, at the same time, the Union raised many complicated issues relating to termination of the pension plan, which required time-consuming analysis by both parties.

Protracted negotiations continued mainly by written correspondence with the Respondent eventually accepting only one minor change proposed by the Union to the September 1997 plant-closing agreement. Eighteen months later, on July 22, 1999, the Union's attorney, Michael Fayette, phoned his management counterpart, Attorney Philip Nantz, in connection with the plant-closing agreement negotiations. According to Fayette, he told Nantz by phone that the Union was withdrawing all of its outstanding proposals and was willing to sign the proposed agreement of September 16, 1997. According to Nantz, Fayette stated that he wanted to schedule a formal meeting between the parties to finalize the bargaining process, but he did not state that the Union was withdrawing its proposals or that it was ready to sign the agreement. Nantz further testified that after conferring with the Respondent about scheduling a meeting he called back Fayette telling him that the Respondent would not agree to a plant-closing agreement along the terms of the September 16, 1997 proposal because too much time had passed and circumstances had changed. On July 28, 1999, in an informal meeting with Fayette, and on August 13, 1999, in a formal meeting with the bargaining teams, Nantz reiterated the Respondent's position.

In its answer to the complaint, the Respondent denied the allegations that it violated the Act. It also denied that it was engaged in commerce within the meaning of the Act on or after the closing date of the plant, February 16, 1996, and therefore denied that the Board has jurisdiction in this matter. At the trial, the parties were given a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.

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

FINDINGS OF FACT

I. ISSUES

1. Does the Board have jurisdiction over the Respondent even though the alleged violation occurred more than 3 years after the Respondent permanently closed?

2. Did the Respondent's September 16, 1997 proposed plant-closing offer remain open for acceptance until July 22, 1999?

¹ The Union's unopposed motion to correct the transcript, dated March 14, 2000, and the Respondent's unopposed motion to correct the transcript, undated, are granted and received in evidence as GC Exh. 3 and R. Exh. 2, respectively.

3. Did the Union accept the Respondent's proposed plant-closing offer during the first telephone conversation on July 22, 1999?

II. JURISDICTION

The Respondent does not dispute that it met the Board's jurisdictional amount standard during the 12-month period immediately preceding February 16, 1996, the date it permanently closed. Rather, the Respondent argues that the Board does not have jurisdiction over it because it did not purchase and/or sell goods of at least \$50,000 in any fiscal or calendar year after February 16, 1996, and therefore it was not engaged in commerce within the meaning of the Act at the time the alleged violation occurred on July 22, 1999, more than 3 years after it closed.

The General Counsel argues that the Respondent was engaged in commerce up until the date it closed, February 16, 1996, and that the Board retained jurisdiction to enforce the Respondent's bargaining obligations after it terminated its operations, citing *Kranz Heating & Cooling*, 328 NLRB 401 (1999). The General Counsel argues that to hold otherwise would render meaningless an employer's obligation to bargain over the effects of closing operations.

It is settled law that the Board's jurisdictional criteria expressed in terms of annual dollar volume of business do not literally require evidentiary data respecting any certain 12-month period of operation. *J & S Drywall*, 303 NLRB 24, 29 (1991), and cases cited there. In general, the Board asserts jurisdiction using the most recent calendar or fiscal year preceding the unfair labor practice, as well as the most recent calendar year preceding the year of trial and decision. *Reliable Roofing Co.*, 246 NLRB 716 fn. 1 (1979).

In effects bargaining cases like this one, however, the Board has asserted jurisdiction over the Respondent, irrespective of whether the alleged unlawful conduct occurred before or after the employer ceased doing business, either temporarily or permanently, provided the employer met the jurisdictional standards at the time of closing. For example, in *Kirkwood Fabricators*, 285 NLRB 33, 34 (1987), the Board asserted jurisdiction over an employer that had permanently closed where the violation occurred prior to the closing; that is, the employer had failed to notify the Union that it was going to close before it went out of business. The respondent met the jurisdictional amounts standard at the time of closing. The charge was filed 3 months after the employer shut down and the trial was held 2 months after the charge was filed. The Board adopted the administrative law judge's finding that it retained jurisdiction over the respondent, even though the charge was filed after it permanently closed, because otherwise the Board would be precluded from determining and remedying a violation which occurred before the respondent ceased doing business. *American Gypsum Co.*, 231 NLRB 1291, 1298 (1977), the Board asserted jurisdiction over an employer that had met the jurisdictional amounts standard while in operation, but was temporarily shut down for 1 year when the unlawful conduct occurred. Although the employer met the annual monetary jurisdictional standards at the time it shut down, it argued that there was no legal or statutory basis for asserting jurisdiction

based on a violation that arose when it was not operating. The Board upheld the administrative law judge's determination that "[i]f Congress or the Board intended that the Act were not to apply to an employer meeting said standards [when it was in operation] because it was not operating at the time the unfair labor practices were committed, it would follow that any time an employer was shut down (whether for seasonal, economic or other reasons) it . . . would be free to ignore the provisions of the Act."

Subsequently, in *Benchmark Industries*, 269 NLRB 1096, 1097 (1984), the Board asserted jurisdiction over a company that had been destroyed by fire, had no employees, and was in the process of dissolving at the time the unfair labor practice charge was filed. The charge, which was filed 1 month after the plant was destroyed by fire, alleged that the employer violated the Act by refusing to bargain with the union about the effects of its decision to close the plant after the fire. The Board adopted the administrative law judge's jurisdictional findings, which noted that the employer had met the jurisdictional amount standard prior to the date that its facility burned down and expressly followed the rationale of *American Gypsum Co.*, supra. See also *Pacific Consolidated*, 286 NLRB 1102 (1987).

In *Kranz Heating & Cooling*, supra, the Board adopted the administrative law judge's finding that it had jurisdiction over the respondent who met the jurisdictional amounts standard when it went out of business in November 1996, even though the unlawful conduct occurred 6 months after the employer had permanently closed.²

Thus, under Board law if the Board has jurisdiction over an employer at the time the duty to bargain arose, it continues to have jurisdiction over that employer until the bargaining process is consummated by agreement or lawful impasse. Otherwise, an employer could engage in effects bargaining in good faith for a predetermined period of time after it closed its doors and then abruptly cease bargaining leaving the Union without recourse and the Board without jurisdiction to determine and remedy the violation.

The evidence shows, and the Respondent admits, that it met the jurisdictional standards on the date that it permanently closed. The evidence shows that the Respondent and the Union commenced effects bargaining prior to the closing and continued to bargain in good faith for more than 3 years, up to and beyond the date of the alleged unlawful conduct. I find that once the Board had jurisdiction it retained jurisdiction until the bargaining process was complete by agreement or lawful impasse. The fact that the alleged unlawful conduct occurred more than 3 years after the facility closed does not matter, so long as the jurisdictional standard was met on the date of the plant closing.

Accordingly, I find that the Respondent, a corporation, was engaged until February 16, 1996, in the manufacture and nonretail sale of automotive parts and related parts at a facility located in Grand Rapids, Michigan. In the fiscal year ending January 31, 1996, it sold and shipped from its Grand Rapids

² *Kranz Heating & Cooling* was a refusal to provide information case.

plant goods valued in excess of \$50,000 directly to points outside the State of Michigan.³

I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In addition, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Effects bargaining begins

The Respondent and the Union were parties to a collective-bargaining agreement, covering approximately 150–200 production and maintenance employees, that was due to expire on October 1, 1996. Prior to November 1995, the Respondent announced that it would permanently close in early 1996.

On November 8, 1995, negotiations for a plant-closing agreement commenced. The Respondent's bargaining team consisted of, CEMSI President and CEO Phillip Sandmann, CEMSI Human Resources Director Thomas Heitzman, and Attorney Philip Nantz, the Respondent's counsel, who served as the Respondent's chief spokesperson. The Union's bargaining team consisted of Union International Representative Dennis VanderLind and several bargaining unit workers. VanderLind served as the chief spokesperson for the Union and was assisted by UAW Attorney Michael Nicholson.

Manufacturing ceased in December 1995. On February 16, 1996, the plant permanently closed. At a March 29, 1996 bargaining session, the Respondent presented a handwritten informal proposal that addressed several plant closing issues. Key among those were a proposal soliciting the withdrawal with prejudice of all pending grievances under the collective-bargaining agreement; a proposal to amend the plan to allow the use of a different interest rate for calculating the termination of benefits, rather than the interest rate provided for under the pension plan; and a proposal to terminate the plan following the amendment. In exchange for the amendment and a prompt resolution of the other issues, the Respondent expressed a willingness to grant severance pay, an item sought by the Union. The informal proposal was rejected by the Union and bargaining continued.

2. Bargaining proceeds slowly

On July 25 and October 18, 1996, two more bargaining sessions were held, but little progress was made. At the October 18 session, Attorney Michael Fayette, joined the Union's bargaining team, effectively replacing Union Attorney Nicholson. Although VanderLind remained the official union chief spokesperson, Fayette actively participated in negotiations with the

Respondent. The parties met again on December 20, 1996, and January 7, 1997.

On March 5, 1997, Fayette sent Nantz a written proposal "concerning the outstanding issues remaining between the parties, including the closing of the facility." (Jt. Exh.10.) It proposed a one-time payment of a gift certificate for a local department store in the amount of either \$75 or \$80 to compensate several former employees who lost Memorial Day pay in May 1994; severance pay in the amount of \$20 per year of completed service through October 1, 1996, to all employees covered by the collective-bargaining agreement as of the date of the WARN letter (Dec. 21, 1995); and an in-depth proposal for calculating pension benefits. In response to the above, the Union indicated that it would agree to amend the pension plan along the lines sought by the Respondent, provided the benefits negotiated in the closing agreement or in the pension plan were not altered. Significantly, the Union sought to substitute October 1, 1996 (the expiration date of the collective-bargaining agreement), for the actual closing date of February 16, 1996, in order to enhance the employees' benefit package.

At a May 30, 1997 meeting, the Union presented a "complete proposal" for closing the plant. After waiting almost 4 months for a response, Fayette wrote to Nantz on August 22, 1997, stating that "despite repeated promises, we have yet to receive a written response to our proposal." (Jt. Exh. 12.) He further stated, "We have done everything but beg you for a response to our proposal and have received only vague assurances that such a response will be forthcoming. If there is some response of which I am not aware, I would appreciate being advised of the same immediately." Fayette closed the letter by stating, "In any event, it is time that this matter be brought to a conclusion. The only way that can be done is if you respond to our proposal. I hope the same can be accomplished forthwith." (Jt. Exh. 12.)

3. The Respondent's proposed plant-closing agreement of September 16, 1997

On September 16, 1997, the Respondent responded by letter enclosing "the CEMSI Plant-Closing Agreement," which had been preapproved by CEMSI Officials McKeon and Sandmann. (Jt. Exh. 13.) The comprehensive agreement contained many of the same provisions included in the Respondent's handwritten informal proposal that was rejected by the Union on or about March 26, 1996. For example, it sought to establish February 16, 1996, as the official date for closing the plant, separating all employees, and terminating the collective-bargaining agreement. It also sought to amend the pension plan by substituting the GATT interest rate for the pension-plan rate and afterwards to terminate the pension plan. It sought the withdrawal with prejudice of all pending grievances under the collective-bargaining agreement. Finally, it sought to have the Union withdraw an unemployment insurance lawsuit appealing the denial of benefits for several individual former employees that was pending in Kent County Circuit Court.

In a September 22, 1997 letter, Fayette responded by reiterating the Union's position that October 1, 1996 (the contract expiration date), should be designated as the last day of employment for benefit purposes. He also explained that the Un-

³ The evidence does not show that the Respondent corporation was dissolved prior to July 22, 1999, or at the time of trial. Two witnesses for the Respondent, Philip Nantz, Esq., and Phillip Sandmann, testified that they thought the Respondent had been dissolved but could not state with any certainty when or whether it had been dissolved. (Tr. 124, 160–162.) No documentation was submitted reflecting that the Respondent had been dissolved.

ion could not withdraw the unemployment appeal lawsuit because the individual claimants would have to waive their right to benefits, which he believed was highly unlikely because the matter had already been briefed on appeal. Finally, Fayette requested more time to review the proposed interest rate amendment to the pension plan, as well as the lists of employees eligible to receive the severance and holiday pay benefit.

On October 14, 1997, Nantz wrote back effectively adhering to the Respondent's original proposals. Notably, he rejected the Union's assertion that it was unable influence the withdrawal of the unemployment insurance appeals. Nantz stated, "The unemployment benefits appeal itself and the Union's refusal to withdraw it has obviously struck a nerve with the Company. A decision adverse to the Company in this matter can be expected to cause the Company to reevaluate its position." (Jt. Exh. 15.)

Fayette responded quickly by letter, dated November 5, 1997. In an effort to complete the negotiations, the Union withdrew several of its proposed changes, which ostensibly bought the parties closer together. Regarding the unemployment insurance appeal, however, Fayette reiterated that the Union had no control over the litigation, but agreed not to support a further appeal if the claimants were unsuccessful in the state circuit court. The Union implicitly allowed the Respondent to amend the pension plan by using the GATT interest rate and acknowledged that the pension plan would be terminated afterwards. It requested that the pension plan board of adjustment remain active until the plan was terminated in order to resolve several individual pension issues that had come up.

Unaware of any unresolved individual employee pension issues, Nantz wrote back on November 17, stating that while it "appears that the parties have now moved closer to consummating an agreement for the closing of the plant . . . your reference to the fact that there are apparently a number of unresolved pension issues is of concern." (Jt. Exh. 17.) Nantz asked Fayette to identify the individual pension issues. He also stated that "[w]ith regard to the unemployment compensation proceedings currently on appeal to Circuit Court, the Company understands the Union's problem regarding a withdrawal. However, having said this, the Company's high level of frustration on this issue continues."

4. Bargaining bogs down

At a time when the parties appeared to be making noticeable progress toward reaching a plant-closing agreement, the Union raised several individual pension issues to gain bargaining leverage, which impeded the plant-closing negotiations. Fayette would later concede, that it was a tactical error to link the plant closing and individual pension issues, and that the latter should have been sent to the pension joint board of adjustment for resolution. (Tr. 43, 45.)

For the next several months, negotiations occurred by correspondence and were primarily focused on individual pension issues, with secondary attention being devoted to a plant-closing agreement. In a letter, dated August 20, 1998, Fayette addressed several of the outstanding pension issues and also threatened to file a ulp charge if the Respondent did not provide a list of all current and future pension participants and beneficiaries that he had requested 6 weeks earlier. He then stated that

"with regard to specific provisions of the Plant-Closing Agreement, and assuming satisfactory resolution of the above issues, we are prepared to enter in to the same with the following minor changes." (Jt. Exh. 25). Fayette proposed three language changes to the proposed plant closing agreement, one of which sought to place all former employees on "layoff status" for 1 year after they ceased working for the Respondent for purposes of determining pension benefits. In closing, Fayette stated that the Union was anxious to complete the plant-closing agreement and that it was prepared to meet at any convenient time to discuss the same. He concluded by stating, "This matter must be resolved or we will be forced to take all steps appropriate to insure a prompt resolution." (Jt. Exh. 25.)

On September 17, Nantz responded by providing two pension plan documents that had been requested by the Union. He also generally acknowledged the changes requested by the Union to the proposed plant-closing agreement by stating:

Your letter of August 20, 1998, has been forwarded to Mr. Sandmann and Mr. Heitzman. As you stated, the letter attempts to capsulize all of the Union's outstanding questions and issues in connection with finalization of the CEMSI plant closing. In this regard it is a helpful document. [Jt. Exh. 26.]

For the next several months, the parties exchanged correspondence seeking and providing information about various pension issues.

In a letter, dated December 29, 1998, however, Nantz specifically addressed the changes requested in Fayette's August 20 letter. (Jt. Exh. 30.) He began by stating:

11. The Union has requested some changes to the previously forwarded draft of the proposed Plant-Closing Agreement. The most recent and current draft of the proposed Agreement was forwarded to you along with the related Holiday Benefit Payment List, Severance Pay List, and Last Day Worked List by my letter dated February 12, 1998. The Company has reviewed the Union's requests and responds as follows.

The Respondent rejected the Union's proposed language that would give former employees an additional full year of eligibility under the pension plan beyond their last day worked and steadfastly maintained that February 16, 1996, was the termination date for collective-bargaining and pension benefits purposes. The Respondent also rejected the Union's proposed language assuring that the pension joint board of administration would remain in place until the plan was terminated, stating that because the pension plan had not been terminated the board was "obviously still in place." Finally, the Respondent agreed to a minor change to paragraph 9 of the plant-closing agreement.

Nantz however added the following cautionary note:

12. With regard to the possible termination of the CEMSI Pension Plan, you have requested a copy of the Plan termination calculations. The Plan termination calculations were prepared sometime ago and are now outdated. New calculations would be necessary and a copy will be forwarded to you as may be provided by the Company's actuarial consultants. This data will, of course, be an es-

sential ingredient in determining whether the Company has any continuing interest in terminating the Plan at this time. [Jt. Exh. 30]

In an April 28, 1999 letter, Fayette responded first to the pension issues and then to the plant-closing issues. Regarding the latter, he explained in detail why the Union was seeking the proposed language changes to certain paragraphs of the proposed plant-closing agreement. Fayette concluded his remarks on the proposed plant-closing agreement by asserting that “with these provisions, it appears that we have an agreement.” (Jt. Exh. 32.)

Responding by letter, dated June 28, 1999, Nantz addressed the pension issues first and the plant-closing agreement second. Regarding the latter, he reiterated the Respondent’s position: that February 16, 1996, was the official date of the plant closing; that the Respondent would not agree to any language characterizing the former employees as being on layoff status from their respective last days of work until October 1, 1996; and that the Respondent would not agree to any language changing the composition of the joint board of adjustment. In short, the Respondent yielded nothing. Nantz ended the letter by stating, “As you acknowledged in your letter, this matter is indeed continuing to be troublesome to the Company. Hopefully the information set forth in this letter will serve to further narrow the issues currently separating the parties.” (Jt. Exh. 36.)

In June 1999, it appeared that only a relatively small number of issues kept the parties from consummating an agreement. Yet, their respective bargaining positions concerning those issues had remained unchanged for 10 months. In late June 1999, Union Representative VanderLind sent a letter to former CEO Sandmann accusing the Respondent of making cash settlements with the former employees without the Union’s knowledge or consent and threatening to bring a lawsuit. That placed a significant strain on the parties’ over-extended bargaining relationship.

5. The July 22 telephone conversations

In July 1999, Nantz and Fayette agreed to meet informally on July 28 to discuss where the plant-closing negotiations stood. In the meantime, Fayette called VanderLind on July 17, and the two met at 8:30 a.m. on July 22 to discuss the Union’s bargaining position. They reviewed Nantz’ June 28 response to Fayette’s April 28 letter and concluded that after several months of negotiations the Respondent simply was not going to yield on the three issues raised in the April 28 letter. They decided to capitulate by withdrawing their remaining proposed changes and by accepting the proposed plant-closing agreement of September 16, 1997, with the minor change to paragraph 9 as agreed to by the Respondent on December 29, 1998.

Shortly after lunch on July 22, Fayette phoned Nantz to discuss the Union’s position. Two different versions of the phone conversation were presented at the trial. According to Fayette, he told Nantz that he and VanderLind had met and “that we had heard them say, ‘No’ enough, and we were ready to meet to sign the closing agreement and to talk about how the checks would be distributed and issued under the closing agreement . . . we had to sort out the details, because we are now three years from having good addresses for people.” (Tr. 33,

65.) Fayette testified that he and Nantz talked about the agreed change to paragraph 9 and that he asked Nantz if he had the plant-closing agreement on word processing so that the change to paragraph 9 could be easily inserted. Nantz indicated that he had the agreement on the computer and that he would contact his client to arrange a date to meet. (Tr. 34.) Fayette further testified that later that afternoon Nantz called back and said, “Are you sitting down?” He said that he “had talked to his client and they were no longer interested in entering into a plant-closing agreement.” (Tr. 34–35.) Fayette suspected that the strongly worded letter recently sent by VanderLind to Sandmann may have poisoned the bargaining relationship. In an attempt to revive the agreement, Fayette asked if everyone could still meet in August, which Nantz agreed to do.

Nantz testified that Fayette told him “that he had met with his client, specifically Mr. VanderLind, to review and discuss the Union’s position regarding various issues . . . he was optimistic/confident that we could reach a final settlement on the closing negotiations with another meeting.” (Tr. 114.) Asked whether Fayette told him that the Union was withdrawing its objections to the plant-closing agreement and was “[w]illing to sign,” Nantz replied that he “did not remember Mr. Fayette using those words.” “What I remember is that he was optimistic confident that the process could be finalized with another meeting.” (Tr. 114.) Nantz also recalled Fayette asking him if the agreement was on his word processing agreement to which he responded affirmatively. (Tr. 115.) According to Nantz, he told Fayette that he would have to contact Sandmann to “see where we stand on all of this.” After conferring with Sandmann, Nantz phoned Fayette. He asked Fayette if he was “sitting down” and then told him that he had talked with Sandmann, “and that the terms discussed two and a half years ago, were no longer viable and no longer workable, and those could not—in total, all of those terms as reflected back in those discussions, were not acceptable to the Company as a plant final—final plant-closing settlement.” (Tr. 117.) Fayette told Nantz that he still wanted to have a formal meeting between the parties, which was tentatively scheduled for August 13.

On July 28, Fayette and Nantz met informally as originally scheduled. They discussed individual pension issues pertaining to two former employees. The un rebutted testimony shows that Nantz also reiterated that the Respondent was unwilling to enter into a plant-closing agreement based on the terms of its September 16, 1997 proposal.

Two weeks later, on August 13, the bargaining teams for both sides met. They discussed the alleged cash payments made to former employees that VanderLind had accused the Respondent of making. Nantz also told the Union that the Respondent would not enter into the plant-closing agreement proposed on September 16, 1997. He explained that too much time had passed since the proposal was made and that the actuarial assumptions for terminating the pension plan had changed. Nantz further pointed out that VanderLind’s letter to Sandmann asserting that the Respondent had made cash payments to former employee has soured the bargaining relationship.

6. Credibility resolutions

Fayette's version of the first telephone conversation with Nantz on July 22 simply does not withstand scrutiny. The credible evidence shows that from January 1998 the protracted negotiations took place almost exclusively by correspondence. It is implausible that when it came to the single most important part of the bargaining process (i.e., the unconditional acceptance of the Respondent's offer) Fayette communicated that acceptance in an informal telephone conversation.

The lack of any explanation for deviating from the practice of memorializing positions raises additional doubts about the true purpose and content of the first telephone conversation. There is no evidence that there was no time to write a letter. Rather, the evidence shows that Fayette and VanderLind met in the early morning of July 22. Fayette afterwards went to another meeting and apparently to lunch before returning to his office. He testified that upon returning to his office after lunch, he phoned Nantz and they chatted informally about the practice of law and former partners. In the course of their conversation, Fayette announced that the Union accepted without conditions the proposed plant-closing agreement. This somewhat cavalier approach to wrapping up a rather intense 2-1/2 years of negotiations is inconsistent with the established practice of putting things in writing.

Nor does the evidence disclose why Fayette did not immediately hang up the telephone and send Nantz a letter memorializing the fact that the Union had accepted the September 16, 1997 agreement as slightly modified and that it was ready to sign it. I am unconvinced that after being told for the first time in almost 2 years that the proposed plant-closing agreement was no longer on the table, an attorney with Fayette's labor relations experience would not have reacted immediately by sending a letter, if, in fact, he had accepted the proposal.

Further, the evidence shows that on two occasions following the July 22 telephone conversation, Fayette failed to memorialize the fact that the Union allegedly had accepted the proposed plant-closing agreement, and the Respondent allegedly had reneged on the deal. On July 28, he met face-to-face with Nantz at which time they discussed the individual pension issues of two former employees, Doane and Earhart. (Tr. 120.) According to Nantz' un rebutted testimony, he reiterated to Fayette that "the Company had reservation and was not willing to enter into a plant settlement agreement on the same terms that had been discussed years ago." (Tr. 120.) Two weeks later, on August 13, the full bargaining teams met for the first time in almost 18 months. In his un rebutted testimony, Nantz stated that they discussed the alleged cash payments and that he told the Union's bargaining team which included Fayette, that the Respondent was not willing to enter into a plant-closing agreement based on its September 16, 1997 proposal. Fayette therefore had two other opportunities to write a letter, but failed to do so.

Thus, the evidence shows that despite being told three times in less than a month that the Respondent would not enter into a plant-closing settlement agreement on the same terms that had been discussed, Fayette never responded with a letter pointing out that the Union had accepted the proposal and therefore the parties had consummated an agreement. I find the absence of a writing memorializing the acceptance and what allegedly oc-

curred during and after the first telephone conversation casts serious doubt on Fayette's version of what was discussed.

Fayette's credibility is further undercut by his failure to prod the Respondent to fulfill its obligation by threatening to file an unfair labor practice (ulp) charge as he had done during negotiations. For example, in his August 20, 1998 letter, Fayette twice threatened to file charges with the Board if the Respondent did not provide information that had been requested (Jt. Exh. 25, p. 3, pars. 6 & 7), and also closed the letter by threatening to take all steps appropriate if the matter was not quickly resolved. Yet, when it came to enforcing the plant-closing agreement, there is no evidence that he threatened to file a charge and waited 2 months before actually filing a charge.

Fayette's version of the first telephone conversation is also placed in doubt by the discussions that occurred at the July 28 and August 13 meetings. The uncontradicted evidence shows that at the July 28 informal meeting, Fayette and Nantz discussed the individual pension issues and at the August 13 formal bargaining session the full bargaining committees discussed the alleged cash payments made to former employees. It stands to reason that if the Respondent had refused to sign the proposed plant-closing agreement after the Union accepted the proposal, the main focus, if not the only focus, of these two meetings would have been on that topic. The fact that the parties continued to discuss issues that Fayette stated had been delinked from the plant-closing agreement negotiations during two meetings that were ostensibly scheduled to try to revive the plant-closing negotiations, raises doubt as to whether there was an unconditional acceptance on July 22.

The evidence taken as a whole shows that Fayette's conduct is inconsistent with his testimony. In addition, at the time Fayette testified, his demeanor caused me to doubt his credibility. For all of these reasons, including his demeanor, I do not credit his version of the first telephone conversation that he had with Nantz on July 22, 1999.

In contrast, Nantz' demeanor was more convincing, his testimony is corroborated by his contemporaneous notes of the first telephone conversation (R. Exh. 11), and his version of the first telephone conversation is more plausible. With respect to the latter, the evidence shows that on June 30 VanderLind wrote to Sandmann accusing the Respondent, but effectively accusing Sandmann, of making cash payments to former employees and demanding that Sandmann "immediately sit down and negotiate" about the alleged cash settlements. (Jt. Exh. 37.) Nantz responded with an equally strong letter that bluntly stated, "You should be aware of the *fact* that unsubstantiated assertions and threats have been and continue to be *increasingly* counterproductive to the effort to reach an amicable resolution of this process." (Jt. Exh. 38.) The evidence supports a reasonable inference that Fayette was aware that VanderLind's June 30 letter had irked Sandmann and jeopardized the chances of finalizing a plant-closing agreement. (Tr. 35.) He therefore called Nantz to set up a formal meeting for two purposes: to accommodate his client's demand for an immediate meeting to address the alleged cash payment issue and to finalize the closing agreement before it was too late, if it was not already too late. Given the tension level at that point, and the uncertainty of where things stood, I am persuaded that by Nantz' testimony

that the purpose of Fayette's phone call was to schedule a meeting to discuss these issues.

The General Counsel asserts that Nantz' testimony is not credible because his notes of the second phone conversation on July 22 reflect that he told Fayette over the phone that Sandmann was unwilling to sign the proposed plant-closing agreement. (Tr. 34, GC Exh. 2.) The General Counsel argues that Nantz would not have made such a statement if Fayette had not told him in the first conversation that the Union accepted the closing agreement and was prepared to sign it. However, it is equally, if not more, likely that Nantz was expressing Sandmann's sentiments in the wake of VanderLind's June 30 accusations without knowing for sure what the Union wanted to discuss at the formal meeting in order to convey the clear message that the bargaining relationship had definitely changed.

Finally, the fact that Fayette asked Nantz if the proposed plant closing agreement was still on word processing does not impeach Nantz' credibility. Nantz did not deny that Fayette asked the question. It would be consistent for Fayette to ask that question if he intended on "finalizing" the process at the formal meeting. What I find significant is that Fayette did not testify that he asked Nantz to make the minor change and bring an amended copy of the plant-closing agreement to the August 13 meeting so all the parties could sign it. If that was the purpose of the August 13 meeting, it logically follows that Fayette would have asked Nantz to do so.

I therefore credit Nantz' version of the first telephone conversation.

B. Analysis and Findings

1. The proposed plant-closing agreement remained open for acceptance on July 22, 1999

Under Board law, an offer, once made, remains on the table unless explicitly withdrawn by the offeror or unless circumstances arise that would reasonably lead the parties to believe that the offer has been withdrawn. *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989). There is no evidence that the proposed plant-closing agreement contained an expiration date for acceptance or that it was ever withdrawn prior to the July 22, 1999 telephone conversation.

Nor is there evidence that the Respondent withdrew any one or more individual provisions of the proposed plant-closing agreement. Nantz testified that the Respondent was having second thoughts about terminating the pension. He stated that by December 1998 the investment performance of the plan had improved significantly and that the plan had become overfunded. As a result, Sandmann concluded that it made no sense from the Respondent's point of view to necessarily terminate the pension plan. (Tr. 105-106.) Nantz nevertheless wrote in a letter of December 28, 1998:

12. With regard to the possible termination of the CEMSI Pension, Plan you have requested a copy of the Plan termination calculations. The Plan termination calculations were prepared sometime ago and are now outdated. New calculations would be necessary and a copy will be forwarded to you as may be provided by the Company's actuarial consultants. This data will, of course, be an es-

sential ingredient in determining *whether the Company has any continuing interest in terminating the Plan at this time.* [Jt. Exh. 30, p. 5.] [Emphasis added.]

The language falls short of an explicit withdrawal of the pension plan proposal. The fact that Nantz knew in December 1998 that the pension plan was over funded, but did not expressly withdraw the proposal precludes an inference that the proposed termination of the plan was no longer on the table.

In addition, the evidence shows that in February 1998 Nantz sent Fayette a copy of the proposed plant-closing agreement and ironically in his December 28, 1998 letter, he reminded Fayette of that fact: "The most recent and current draft of the proposed Agreement was forwarded to you along with the related Holiday Benefit Payment List, Severance Pay List, and Last Day Worked List by my letter dated February 12, 1998." Thus, the evidence reflects that Nantz himself acknowledged in writing that the proposed plant-closing agreement remained on the table through December 1998.

The evidence also shows that after December 1998 both sides continued to negotiate over various paragraphs of the proposed plant-closing agreement as reflected in Fayette's April 28, 1999 letter and Nantz' response letter, dated, June 28, 1999. (Jt. Exhs. 32 & 36.) Thus, more than ample evidence exists showing that both parties reasonably believed that the September 1997 closing agreement was still on the table in July 1999.

The Respondent nevertheless argues that even though the proposed plant-closing agreement did not contain a deadline for acceptance, it lapsed, because it was not accepted within a reasonable time. The Board has held that it is not the length of time itself that governs whether a contract proposal has lapsed. Rather, it is the "surrounding circumstances" in each case, which determine whether the time period is reasonable. *Worrell Newspapers*, 232 NLRB 402 (1977). The fact that bargaining continued over the key terms of the proposed closing agreement through June 28, 1999 shows that neither side reasonably believed that the proposal had lapsed.

The Respondent further argues that "changed circumstances" precluded acceptance of the proposed agreement on July 22. Specifically, the Respondent points to the Union's failure to withdraw the unemployment insurance lawsuit and its failure to withdraw the pending grievances under the collective-bargaining agreement. However, the evidence shows that the Union twice advised the Respondent in the fall 1997 that it did not have the authority to withdraw the lawsuit because the Union was not a party to the lawsuit and as a practical matter the case had already been submitted on brief to the court. (Jt. Exhs. 14 & 16.) It also shows that the Union stated that if the Respondent prevailed it would not support an appeal. Although the Respondent expressed dissatisfaction with the Union's response, it continued to negotiate. No appeal was taken when the Respondent subsequently prevailed in the state circuit court. The Respondent's argument is therefore unpersuasive.

As to the withdrawal of the pending grievances, the evidence shows that the Union did not withdraw the grievances because there was no signed agreement and that the Union did not submit the grievances to arbitration until after Nantz told Fayette

that the Respondent would not enter into a September 1997 plant-closing agreement. (Jt. Exh. 40.) Thus, I also reject this argument.

Finally, the Respondent asserts that it would be unfair to hold it to the proposed plant-closing agreement because interest rate changes and improved plan performance made terminating the pension plan an unattractive option for the Respondent. The evidence shows that Nantz and Sandmann were aware of these changes as early as December 1998, but did nothing to withdraw the proposal to terminate the pension plan. In addition, there is no evidence showing that the Respondent would have suffered any detriment if the over funded pension plan had been terminated.

Thus, I find that the proposed plant-closing agreement remained on the bargaining table open for acceptance on July 22, 1999.

2. The Union did not accept the proposed plant-closing agreement on July 22, 1999, or otherwise indicate it would sign it

The complaint alleges that on July 22, 1999, the parties reached complete agreement on a plant-closing agreement and the Union requested the Respondent to execute it, which the Respondent failed and refused to do. The success of the General Counsel's case in large part turns on Fayette's version of the first telephone conversation that he had with Nantz on July 22. I have already determined that Fayette's version of the first telephone conversation with Nantz on July 22, 1999, is not

credible. I have also credited Nantz' testimony of that conversation. There is no other evidence showing that Fayette told Nantz that the Union was withdrawing its proposed changes to the proposed plant-closing agreement, that a plant-closing agreement was no longer conditioned on agreement of the individual pension issues, that the Union accepted the September 16, 1997 proposed plant-closing agreement with the agreed-upon minor change, or that the Union was ready to sign the agreement.

Accordingly, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The complaint is dismissed.

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