

Littler Diecasting Corporation and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW.
Cases 25–CA–23466, 25–CA–24771, and 25–CA–25243

July 20, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On April 7, 1998, Administrative Law Judge Richard A. Scully issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

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

The principal issue in this case is whether the Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Union in May 1996 and thereafter making unilateral changes to employees' terms and conditions of employment. As a preliminary matter, we must consider whether the Respondent failed to comply with the terms of a September 5, 1995 settlement agreement. For the reasons set forth below, we find, in agreement with the judge, that the Respondent did not fail to comply with the settlement agreement and that the Respondent did not commit any postsettlement unfair labor practices. Accordingly, we shall dismiss the complaint in its entirety.¹

Factual Background

The facts are as follows. On September 19, 1994, the Union was certified as the exclusive collective-bargaining representative of the Respondent's production and maintenance employees. On that same day, the Union filed a charge in Case 25–CA–23466, alleging violations of Section 8(a)(1), (3), and (5). Thereafter, on December 30, 1994, the Regional Director issued a complaint in Case 25–CA–23466.²

¹ In addition, we shall reinstate the settlement agreement, which the Regional Director set aside. See *Shell Ray Mining*, 286 NLRB 466 fn. 2 (1987).

² The complaint alleged that the Respondent violated Sec. 8(a)(1) by threatening employees with discharge, physical harm, disciplinary warnings, more stringent enforcement of work rules, and unspecified reprisals for supporting the Union and by making statements of futility concerning union representation. It also alleged that the Respondent violated Sec. 8(a)(3) by changing and more strictly enforcing work rules and procedures, restricting employee access to the Respondent's facility during nonwork hours and for nonwork purposes, removing a

break area table, issuing warnings and written reprimands to employees, changing an employee's work duties, and suspending an employee. Further, the complaint alleged that the Respondent violated Sec. 8(a)(5) by unilaterally changing employees' terms and conditions of employment.

On September 5, 1995, the Regional Director approved an informal settlement of Case 25–CA–23466.³ The settlement agreement required the Respondent to pay back-pay, expunge employee personnel files, restore work rules and policies, bargain with the Union concerning employees' terms and conditions of employment, and post a notice to employees. The notice advised employees that the Respondent would undertake and forego certain actions, consistent with the employees' Section 7 rights. The Respondent posted the notice for 60 days beginning September 18, 1995. For the first week (September 18–25, 1995), the Respondent posted a letter next to the notice stating that the Company believed it had not violated the Act and that it had settled the case to avoid litigation costs.

On September 20, 1995, a petition was filed in Case 25–RD–1241, seeking to decertify the Union. The Regional Director dismissed that petition on May 17, 1996, because of the affirmative bargaining provision in the settlement agreement.

On May 31, 1996, the Respondent notified the Union by letter that it was withdrawing recognition. The Respondent, claiming that the Union no longer enjoyed majority support among the bargaining unit employees, based its belief on the Union's failure to request bargaining since August 23, 1995, and receipt of a decertification petition signed by a majority of the unit employees.⁴ The petition stated, "we believe that a majority of employees in our unit no longer want to be represented by the . . . [U]nion." On March 5, 1997, the Respondent unilaterally granted employees a wage increase.

On May 19, 1997, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing in Cases 25–CA–23466, 25–CA–24771, and 25–CA–25243, in which he set aside the September 5, 1995 settlement agreement because the Respondent's letter posted next to the notice violated the terms of the settlement agreement. The consolidated complaint alleges that the Respondent violated Section 8(a)(5) by withdrawing recognition and by unilaterally increasing wages, in addition to the presettlement 8(a)(1), (3), and (5) allegations discussed above.

³ The settlement agreement included a nonadmission clause.

⁴ On July 5, 1996, a decertification petition was filed with the Board in Case 25–RD–1264.

The Judge's Decision

The judge found that the Respondent had complied with the terms of the settlement agreement in Case 25-CA-23466 and that the Respondent's letter, posted for only 1 week of the 60-day notice-posting period, did not undermine the settlement agreement so as to amount to noncompliance. He found that the Respondent took all actions specified in the settlement agreement, such as paying backpay, expunging personnel files, and restoring work rules and policies. The acts the Respondent performed constituted significant remedial action that meaningfully illustrated to employees that the Company was abiding by the settlement agreement. Nothing in the Respondent's letter contradicted the impression that the Respondent was abiding by the settlement agreement and respecting employees' rights under the Act. The judge specified that the letter contained no misstatements, did not preempt the Board's notice, glossed over none of the required remedial actions, and neither disparaged nor blamed the Union.

Having found that the Respondent complied with the settlement agreement, the judge concluded that there were no unremedied unfair labor practices outstanding when the Respondent withdrew recognition. He found that the employees' petition, containing the signatures of more than a majority of unit employees, gave the Respondent "an objectively based reasonable and good-faith doubt that a majority of the unit employees still wanted representation by the Union when it withdrew recognition." Accordingly, the judge concluded that the Respondent did not violate Section 8(a)(5) by withdrawing recognition or by its subsequent unilateral wage increase, and he dismissed the complaint.

The General Counsel's Exceptions

The General Counsel excepts to the judge's dismissal of the complaint. The General Counsel argues, *inter alia*, that the Respondent failed to comply with the settlement agreement by posting the letter next to the notice and committing subsequent unfair labor practices, *i.e.*, withdrawing recognition. The General Counsel argues that the settlement agreement must be set aside and that all the allegations it encompassed must be adjudicated.

The General Counsel asserts that those numerous and substantial unfair labor practices tainted the employee petition and that the Respondent did not have a good-faith doubt about the Union's majority status when it withdrew recognition.⁵ The General Counsel further contends that the language of the employee petition was

⁵ There is no contention that the Respondent's withdrawal of recognition was unlawful on the ground that a reasonable time for bargaining had not elapsed since the execution of the settlement agreement.

not a clear statement that the signers no longer desired union representation.

Discussion

1. For the reasons stated by the judge, we find that the Respondent's letter posted alongside the notice to employees did not so undermine the settlement agreement as to amount to noncompliance. Accordingly, we also agree with the judge that there were no unremedied unfair labor practices at the time the Respondent withdrew recognition.

2. We now turn to the principal issue before us of whether the Respondent lawfully withdrew recognition from the Union. While this case was pending, the Board issued *Levitz*, 333 NLRB 717 (2001), in which the Board "reconsider[ed] whether, and under what circumstances, an employer may lawfully withdraw recognition unilaterally from an incumbent union."⁶ In *Levitz*,⁷ the Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny insofar as they permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith doubt of the union's continued majority status. The *Levitz* Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." *Id.* at 717. However, the Board also held that its analysis and conclusions in that case would only be applied prospectively. "[A]ll pending cases involving withdrawals of recognition [will be decided] under existing law: the 'good-faith uncertainty' standard as explicated by the Supreme Court" in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). *Id.* at 729.

Applying the *Allentown Mack* standard here, we find that the Respondent's withdrawal of recognition was lawful. The facts show that the Respondent's plant manager received a petition signed by 56 of the 81 unit employees stating that "[w]e believe that a majority of employees in our unit no longer want to be represented by the . . . [U]nion." As set forth in *Levitz*, "employees' unverified statements regarding other employees' anti-union sentiments" constitute the kind of evidence that employers may present to establish reasonable uncertainty. *Id.* at 728. Here, where a majority of the unit employees have stated that a majority of their coworkers are against union representation, we find that the Respondent would reasonably have been uncertain about the Union's majority status. Therefore, we conclude that the Respondent did not violate Section 8(a)(5) and (1) by withdrawing recognition from the Union or by subse-

⁶ *Id.*

⁷ *Id.* at 725.

quently changing employee terms and conditions of employment.

ORDER

The recommended Order of the administrative law judge is adopted, the complaint is dismissed, and the settlement agreement in Case 25–CA–23466 is reinstated.

Michael T. Beck, Esq. and *Norton B. Roberts, Esq.*, for the General Counsel.

Michael A. Moffatt, Esq. and *Jack H. Rogers, Esq.*, of Indianapolis, Indiana, for the Respondent.

Joseph E. Allman, Esq., of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon charges¹ filed by International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW (the Union) the Regional Director for Region 25, National Labor Relations Board (the Board) issued a complaint on December 30, 1994, and consolidated complaints on September 26, 1996, and May 19, 1997, alleging that Littler Diecasting Corporation (the Respondent) had committed certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed timely answers denying that it had committed any violation of the Act.

A hearing was held in Muncie, Indiana, on July 14 and 15, 1997, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel, the Charging Party, and the Respondent have been given due consideration. On the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation engaged in the production of die castings with an office and place of business in Albany, Indiana. During the 12-month period preceding May 1997, the Respondent in the conduct of its business operations purchased and received at its Albany, Indiana facility goods valued in excess of \$50,000 directly from points outside the State of Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹ The charge and an amended charge in Case 25–CA–23466 were filed on September 19 and 27, 1994, respectively. The charge in Case 25–CA–24771 was filed on June 26, 1996, and that in Case 25–CA–25243 on March 13, 1997.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Settlement Agreement Issues

On September 19, 1994, following an election conducted by the Board on September 9, the Union was certified as the collective-bargaining representative of certain of the Respondent's employees in a unit consisting of

[a]ll full-time and regular part-time production and maintenance employees including all quality control employees, all set-up employees and all toolroom employees employed by the Employer at its Albany, Indiana facility, but excluding all office clerical employees, all professional employees, all draftsmen, all engineers, all employees of temporary service and all guards and supervisors as defined in the Act.

On December 30, 1994, the Regional Director for Region 25 issued a complaint in Case 25–CA–23466 amended, alleging that the Respondent had committed certain violations of Section 8(a)(1), (3), and (5) of the Act. On September 5, 1995, the Regional Director approved an informal settlement agreement entered into by the parties disposing of all issues raised by the complaint. Under the terms of the settlement agreement, numerous allegations were remedied, including, 8(a)(1) allegations concerning threats of unspecified reprisals, more stringent enforcement of work rules, discharge and physical harm, and statements concerning the futility of selecting the Union as their bargaining representative; 8(a)(3) allegations concerning changes in work rules, break and cleanup times, and the procedure for giving notice of absences, the removal of a picnic table where employees took breaks, the issuance of warnings and written reprimands to several employees, and the suspension of employee Mark Beaty; and 8(a)(5) allegations concerning unilateral changes in terms and conditions of employment. The agreement called for the payment of backpay to Beaty, the revocation and removal of disciplinary notices from the files of seven employees, the reinstatement of preexisting work rules and policies, and the posting of an appropriate remedial notice for the usual 60-day period. It also contained a nonadmissions clause.

The Respondent posted the Board's remedial notice on its bulletin board. It also posted a letter, dated September 18, 1995, on the same bulletin board next to the Board notice for approximately 1 week. That letter, on the Employer's letterhead and signed by Company President John Littler, stated:

To All Employees:

Next to this letter is a notice which we agreed to post as a part of a settlement with the National Labor Relations Board in order to avoid incurring the costs of litigation concerning the unfair labor practice charges from last year. We have consistently maintained that we did not violate the National Labor Relations Act and the settlement agreement says this.

In fact, we have always respected employee Section 7 rights and will continue to do so. Virtually all we would gain from continuing an expensive legal battle would be to avoid posting the adjacent notice. Consequently, we have decided to settle this matter and to focus on making this company an industry leader in quality, service, delivery and costs.

On May 31, 1996, the Respondent's counsel sent a letter informing the Union that it was withdrawing recognition because of its belief that the Union no longer had the support of a majority of its employees. This belief was allegedly based on the fact that the Union had requested no bargaining sessions since August 23, 1995, and receipt of a decertification petition signed by a majority of the employees in the bargaining unit. On March 5, 1997, the Respondent granted a 4-percent wage increase to certain of its employees without first giving the Union notice and the opportunity to bargain about the increase.

In the present action, the Regional Director has ordered the September 1995 settlement agreement vacated, reinstated the presettlement allegations, and consolidated them with postsettlement allegations concerning the Respondent's refusal to recognize and bargain with the Union on and after May 31, 1996.

Analysis and Conclusions

It is well established that a settlement agreement entered into by all parties will not be set aside and the underlying matters litigated unless the Respondent has failed to comply with its provisions or has committed postsettlement unfair labor practices. E.g., *Oster Specialty Products*, 315 NLRB 67, 70 (1994); *R. T. Jones Lumber Co.*, 303 NLRB 841, 843 (1991); and *U.S. Gypsum*, 284 NLRB 4, 11–13 (1987).

The General Counsel contends that the Respondent has failed to comply with the settlement agreement by virtue of its posting of the above-quoted letter to employees next to the Board's remedial notice which served to completely undermine that notice and that by withdrawing recognition from the Union and making unilateral changes it has committed additional unfair labor practices which warrant vacating the settlement agreement.

1. The letter posted next to the Board's notice

Charged parties "risk having a settlement agreement set aside if they post their own comments alongside an official Board notice." *Diester Concentrator Co.*, 253 NLRB 358, 359 fn. 5 (1980). In the present case, the letter that the Respondent posted next to the official remedial notice implies that it has done nothing wrong and that it settled the subject unfair labor practice charges only to avoid the costs of litigation. Similar comments have been found to be sufficiently offensive to warrant setting aside settlement agreements because they tend to minimize the effect of the Board's notice, thereby defeating its purpose, i.e., to assure employees that their rights will be respected, and to suggest that the employer's true sentiments are contained in its notice. E.g., *Bingham-Williamette Co.*, 199 NLRB 1280, 1281–1282 (1972); *Bangor Plastics, Inc.*, 156 NLRB 1165, 1166–1167 (1966). However, in determining whether a settlement agreement should be set aside, the Board

has consistently rejected the application of mechanical or rigid *a priori* rules and directed that the determination be made through the exercise of sound judgment based upon all the circumstances of each case. E.g., *Oster Specialty Products*, supra at 70; *Steelworkers Local 3489 (Stran Steel)*, 263 NLRB 934 fn. 1 (1982); and *Ohio Calcium Co.*, 34 NLRB 917, 935 (1941).

After considering all of the surrounding circumstances, I find that the Respondent's letter, which was posted for only 1 week during the 60-day period that the Board's notice was posted, did not vitiate the effects of the notice. Unlike *Bingham-Williamette Co.* and *Bangor Plastics*, supra, and similar decisions where the notice-posting was the only affirmative action the employer was required to take under the terms of the settlement agreement, here, the Respondent agreed to and did take *significant* remedial action in addition to the notice-posting. In so doing, it illustrated "in a manner meaningful to employees that it is abiding by the settlement agreement." *Diester Concentrator Co.*, supra at 359 fn. 5.

The General Counsel seeks to distinguish *Diester*, involving a notice which the employer posted next to the Board's notice that contained language very similar to that used here, on the grounds that the remedial actions taken in the cases were not comparable. In *Diester*, in addition to the notice-posting, the remedial actions included paying more than \$25,000 in backpay to alleged discriminatees, making whole employees for holiday pay, offering reinstatement to five strikers and four other employees and placing other employees on a preferential hiring list. Here, the Respondent was required to pay one employee three days of backpay, to revoke and remove disciplinary notices from the files of seven employees, to reinstate policies governing cleanup and breaktimes, restroom use and call-in procedure in effect before the Union's election victory, to reinstate afterhours access to and use of company facilities for personal work, and to permit employees to assist each other as they had previously. It serves no purpose to try to compare cases in quantitative terms such as backpay amounts or the number of employees affected by the terms of the settlement. What is important is whether, in the context of a particular case, the remedial action apart from the notice posting was "significant." The decision in *Diester* appears to be based on the theory that "actions speak louder than words." Here, the bulk of the affirmative remedial action the Respondent was required to take pursuant to the settlement agreement, i.e., reinstatement of preexisting work rules and policies, directly touched all employees in the bargaining unit on a daily basis. I find it much more likely that the reinstatement of these rules and policies and the expunging and removal of disciplinary warnings from employees' personnel files would have more of an impact on the employees, indicate to them that the Respondent was abiding by the terms of the settlement agreement, and impress on them that their rights under the Act were being respected, than language in a posted notice. Nothing in the letter the Respondent posted alongside the notice was likely to overcome or minimize that impact or that impression. Unlike the situation in *Gould, Inc.*,² cited by the General Counsel as allegedly more comparable to the present case, the Respondent's letter did not

² 260 NLRB 54 (1982).

contain any misstatements, it did not attempt to preempt the Board's notice or to ignore or gloss over the remedial action it had agreed to take, and it did not disparage or blame the Union. I find that the Respondent's posting of the letter did not so contradict or serve to undermine the Board's notice as to amount to noncompliance with the terms of the settlement agreement.

2. Withdrawal of recognition from the Union

The Respondent does not deny withdrawing recognition from the Union on May 31, 1996, or refusing to bargain since that date, but contends when it withdrew recognition it had a good-faith doubt based on objective evidence that the Union still represented a majority of the employees in the bargaining unit. Plant Manager David Littler testified that in late May 1996 he became aware that a decertification petition was being passed around. He met employee Karen Lehman in the plant and she asked if he would like to see the petition. Littler said that he would and Lehman put it on his desk. The top of each page of the document contains the following statement:

The undersigned employees of Littler Diecast Corp. Albany, IN 47320, presently represented by the UAW local 321, wish to have the National Labor Relations Board conduct an election. We believe that a majority of employees in our unit no longer want to be represented by the above union.

The copy of the petition in evidence, dated June 19, 1996, has four pages and contains the name, department, and clock number of 67 people. Littler credibly testified that when he saw the petition in May, it had the signatures of 56 employees on it. Company attendance records he relied on established that there were 81 employees in the bargaining unit at that time. After he had checked that the signatures on the petition were those of employees in the unit, he returned the petition to Lehman. Having concluded that more than a majority of unit employees had signed the petition, Littler contacted the Company's attorney who drafted and sent the May 31 letter informing the Union that recognition was being withdrawn.

Analysis and Conclusions

The law is clear that a certified union enjoys a rebuttable presumption that its majority status continues after the expiration of the first year following certification. The employer remains obligated to bargain with that union unless it can rebut that presumption by establishing by a preponderance of the evidence (1) that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) that its withdrawal was predicated on an objectively based reasonable and good-faith doubt as to the union's majority status. E.g., *Laidlaw Waste Systems*, 307 NLRB 1211 (1992); *Hollaender Mfg. Co.*, 299 NLRB 466, 468 (1990); and *Terrell Machine Co.*, 173 NLRB 1480 (1969). The assertion of a good-faith doubt must be raised in a context free of unfair labor practices. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996); *Guerdon Industries*, 218 NLRB 658, 661 (1975). Having concluded that the Respondent did not fail to comply with the September 1995 settlement agreement, I find that there were no unremedied unfair labor practices outstanding at the time the

Respondent withdrew recognition.³ The General Counsel and the Union contend that the petition Littler was shown cannot support a good-faith doubt as to the Union's continuing majority status because it did not unequivocally demonstrate the employees' intention not to be represented by the Union.

Petitions which state, without more, that the signers would like the opportunity to vote on whether to continue to have a labor organization represent them have been found to be insufficient to establish a good-faith doubt on the part of the employer. See *Pic Way Shoe Mart*, 308 NLRB 84 (1992); *Laidlaw Waste Systems*, supra; and *Phoenix Pipe & Tube Co.*, 302 NLRB 122 (1991). Likewise, statements by less than a majority of unit employees that they believe a majority no longer support the union have been found to not constitute objective considerations justifying a good-faith doubt on the part of the employer. See *Alexander Linn Hospital Assn.*, 288 NLRB 103, 109-110 (1988); *Bryan Memorial Hospital*, 279 NLRB 222, 225 (1986) and *Atlanta Hilton & Towers*, 278 NLRB 474, 481 (1986). However, in *Bil-Mar Foods*, 286 NLRB 786 (1987), the Board agreed with the administrative law judge's conclusions that petitions bearing the following language:

The undersigned employees of Bil-Mar Foods, Inc., presently represented by the International Brotherhood of Teamsters, Local 406, wish to have the National Labor Relations Board conduct an election since we believe a majority of employees in our unit no longer want to be represented by the above union.

conveyed "the distinct impression that the signers no longer wanted to be represented by the Union" and were "sufficient to support Respondent's reasonable belief that the Union no longer represented a majority of its employees." *Id.* at 796. In *Phoenix Pipe & Tube Co.*, supra, the Board specifically distinguished that case and *Bryan Memorial Hospital* from *Bil-Mar Foods* by again noting that the petition in *Bil-Mar* conveyed the clear impression that the employees no longer wanted union representation. 302 NLRB at 123 fn. 3.

The petition in the present case contains language practically identical to that used in *Bil-Mar Foods* and I find no basis for distinguishing the two cases. Accordingly, I find that based on the decertification petition reviewed by Plant Manager Littler in May 1996 which was signed by 56 of the 81 unit employees, the Respondent has established that it had an objectively based reasonable and good-faith doubt that a majority of the unit employees still wanted representation by the Union when it withdrew recognition.

The General Counsel also argues that the Board should reconsider the above-mentioned rules concerning on what basis an employer can withdraw recognition from a collective-bargaining representative and replace them with one prohibiting withdrawal of recognition unless the employees reject union

³ There are no allegations nor any evidence that the decertification petition was tainted by supervisory instigation, encouragement, or assistance.

representation in a secret ballot election. This argument must be taken up with the Board.⁴

Having found that the Respondent did not unlawfully withdraw recognition from the Union, I also find that it was not required to give it notice and the opportunity to bargain over the wage increases it granted in March 1997 and that its failure to do so did not violate the Act.

CONCLUSIONS OF LAW

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

⁴ An administrative law judge must apply established Board precedent which it or the Supreme Court has not reversed. E.g., *Herbert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979); and *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1965).

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

3. The Respondent did not fail to comply with the settlement agreement approved on September 5, 1995.

4. The Respondent did not commit the postsettlement unfair labor practices alleged in the consolidated complaint.

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

ORDER

The complaint is dismissed in its entirety.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.