

Diversicare Leasing Corp. d/b/a Wurtland Nursing & Rehabilitation Center and District 1199, The Health Care and Social Service Union, SEIU.¹
Case 9–CA–40471

September 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS KIRSANOW
AND WALSH

On May 26, 2004, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

This case involves an allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally withdrawing recognition from the Union as the employees’ bargaining representative. The judge found that the Respondent’s withdrawal of recognition was unlawful because the evidence on which the Respondent relied—a petition signed by over 50 percent of employees seeking “a vote to remove the Union”—failed to show the Union’s actual loss of majority status. We find merit to the Respondent’s exception to that finding. Accordingly, we shall reverse the judge’s decision and dismiss the complaint.

I. BACKGROUND

This case was before the judge upon a joint motion filed by the parties. The parties provided a stipulation of facts and waived a hearing. The relevant stipulated facts are as follows.

In October 1997, the Union became the exclusive bargaining representative of the Respondent’s service and maintenance employees. On July 1, 2003,² after the parties’ collective-bargaining agreement had expired, unit employee Tammy Herrington filed a decertification (RD) petition with the Board. Included with this petition was an employee petition containing the signatures of more than 50 percent of the employees in the unit. The caption on the employee petition read, “We the employee’s [sic] of Wurtland nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199.” Herrington presented a copy of both petitions to the Respondent.

¹ We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

² All dates are 2003, unless otherwise noted.

Upon receiving the petitions, the Respondent compared the signatures on the employee petition with employee signatures on recent paycheck receipt lists, and determined that the employee petition had been signed by over 50 percent of the employees in the unit. By letter dated August 12, the Respondent notified the Union that it was withdrawing recognition because the Union no longer enjoyed the support of the majority of unit employees.

The Union filed the instant unfair labor practice charge alleging that the Respondent’s withdrawal of recognition was unlawful.

II. DISCUSSION

In determining whether the Respondent acted unlawfully in withdrawing recognition from the Union, we apply the standard established in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), under which “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. See also *Port Printing Ad & Specialties*, 344 NLRB 354 (2005), *enfd.* 192 Fed.Appx. 290 (5th Cir. 2006). Thus, in order to rebut the continuing presumption of majority status, the employer bears the burden of showing, through objective evidence, an actual loss of the union’s majority status at the time of the withdrawal of recognition. *Levitz*, *supra* at 725. Applying the *Levitz* standard here, we find that the Respondent lawfully withdrew recognition from the Union.³

The judge found that the petition language, “We the employee’s [sic] of Wurtland nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199,” established only that a majority of unit employees wanted a vote to determine whether to remove the Union. According to the judge, the word “vote” necessarily implied a choice, and, therefore, the language in the employee petition did not show that a majority of employees had already decided against union representation.

Absent any extrinsic evidence about the petition solicitation process, we agree with the judge that the resolution of this issue turns on the language in the petition. Contrary to the judge, however, we do not interpret this language as a mere request for a decertification vote without indicating the signatory employees’ position on continued representation. Although the judge’s view of the petition language represents a possible interpretation, we

³ Chairman Battista and Member Kirsanow did not participate in *Levitz*. Inasmuch as they find that the Respondent lawfully withdrew recognition under the *Levitz* standard, they do not pass on the Respondent’s argument in its exceptions that *Levitz* should be overruled, and they express no view as to whether that case was correctly decided.

find that the more reasonable reading of the petition is that the signatory employees wished “to remove” the Union as their representative. That language is not at all neutral. It does not say, for example, that the employees want a vote on the issue of union representation, or a vote on the union’s status as representative; nor does it echo the official ballot language of “do you wish to be represented” by the union. Rather, the language speaks of the removal of the Union as representative.

Contrary to the dissent, *Levitz* does not require that the evidence proving loss of majority be “unambiguous.” An employer must prove loss of majority by a preponderance of the evidence. Under *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust of Southern California*, 508 U.S. 602, 622 (1993), the preponderance-of-the-evidence standard “simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.” The extent to which specific evidence is ambiguous is merely a factor to be considered in determining whether the employer has met the preponderance standard.⁴ Here, the majority of the employees signed the petition, 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.

The petitions at issue in *Pic Way Shoe Mart*, 308 NLRB 84 (1992), and *Laidlaw Waste Systems*, 307 NLRB 1211 (1992), the pre-*Levitz* cases principally relied upon by the judge, are distinguishable. In *Pic Way*, the petition stated, “Our contract has just expired [and] we would like to have a vote on whether to have a union or not.” *Pic Way*, supra at 87. In *Laidlaw*, the petition stated that its purpose was “to find out if the majority of Laidlaw employees would like to take a vote on the union.” *Laidlaw*, supra at 1214. In each of those cases, a majority of employees asked for a vote on union representation without indicating *how* they would vote.⁵ Here,

⁴ The dissent’s claim that we have confused the weight of the evidence with the type of evidence needed to meet *Levitz*’ preponderance standard is incorrect. *Levitz* said nothing to restrict the type of evidence that could meet this standard. Nor do we. Our colleague’s argument that only clear or unambiguous evidence should suffice would elevate the preponderance standard to the more demanding clear and convincing level.

⁵ The dissent also relies on *Laidlaw Waste Systems*, supra at 1212, for the proposition that, under *Levitz*, an employer who withdraws recognition must provide evidence showing “clear” rejection of the union. In *Laidlaw*, the Board explained the use of the phrase “clear and cogent” in certain cases involving evidence other than a written petition, such as expressions of disenchantment with the union to supervisors or cessation of dues checkoff, as meaning only that these particular indicia were not “convincing manifestations, taken as a whole, of a loss

to be sure, employees asked for a vote. But they also gave a clear statement as to how they would vote: “to remove the Union.” We agree with the Respondent that this statement was objective proof of the employees’ withdrawal of support for the Union, and that employees simply asked for a vote because they believed it was the means to their desired outcome.

The dissent also relies on *Highlands Regional Medical Center*, 347 NLRB 1404 (2006), where the employer withdrew recognition based on a petition captioned “Highlands Regional Medical Center Showing of Interest for Decertification of SEIU Registered Nurses.” The Board found that the employer did not meet its *Levitz* burden of proving that the union had actually lost majority support.

The *Highlands* petition was denominated “a showing of interest for decertification”—language suggested by a Board’s Regional Office in response to an employee’s inquiry about how to obtain an election—and was filed for this precise purpose. Unlike the present petition, the *Highlands* petition made no reference to the removal of the union. Moreover, there was extrinsic evidence (including the testimony of the employee who drafted the petition and of employees who signed the petition) that several signatory employees believed the purpose of the petition was solely to obtain an election. There is no such evidence in the instant case.⁶ Consequently, the Respondent here may rely upon the more reasonable interpretation of the petition’s express reference to removal of the Union—that is, that a majority of the employees had already rejected the Union. Under these circumstances, the Respondent met its burden of proof under *Levitz*.⁷

Finally, our dissenting colleague suggests that the Respondent should have let a Board election determine employees’ sentiments about continued representation by

of majority support.” *Id.* at 1211–1212. Although we do not necessarily subscribe to the use of this terminology in assessing any evidence under *Levitz*, the Respondent’s evidence in this case is a written petition signed by a majority of employees, not isolated oral statements to supervisors or an action like checkoff revocation. As stated, we find that this written petition, absent any countervailing evidence, is sufficient proof of a loss of majority support.

⁶ *Highlands* is also distinguishable from the instant case on the basis that, in *Highlands*, at least one petition-signer reaffirmed her support for the Union prior to the employer’s withdrawal of recognition and that, without that employee’s signature, the petition was not supported by a majority of the unit employees.

⁷ Contrary to the dissent’s claim, we do not shift the ultimate burden of proof to the General Counsel or require that he produce extrinsic evidence in every case where petition language is susceptible of more than one possible interpretation. We merely hold that because the petition’s language here is more reasonably read as expressing nonsupport of the Union than support for a decertification election, the Respondent has met its burden. See *Highlands*, supra at 1407 fn. 15.

the Union. Under Board law, however, the Union would have remained the de jure representative until the election results were certified, including any period required for the resolution of challenges and objections.⁸ Even if an election petition is pending, *Levitz* also gives the employer the option of immediately withdrawing recognition based on objective evidence showing the union's loss of majority status. 333 NLRB at 725. The Respondent did so here.

For the reasons discussed above, we find that the Respondent has met its burden of showing actual loss of majority support at the time it withdrew recognition from the Union. We therefore find that the Respondent's withdrawal of recognition was lawful, and we reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act.

ORDER

IT IS ORDERED that the complaint is dismissed.

MEMBER WALSH, dissenting.

Reversing the judge, my colleagues conclude that the Respondent satisfied its burden under *Levitz*¹ to show the Union's actual loss of majority status, based solely on an employee petition seeking "a vote to remove" the Union. The majority's decision does not withstand scrutiny. As the majority concedes, the employee petition at issue is susceptible of more than one reasonable interpretation. In light of that ambiguity, we cannot say with confidence whether employees were merely petitioning for an election, or whether they were expressing their outright rejection of the Union as their representative. Moreover, the Respondent cannot point to any other documents or testimony that might tip the scale in favor of its interpretation of the petition language. Accordingly, on this record, the Respondent has failed to meet its burden to show actual loss of majority status under *Levitz*. Therefore, the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union.

I.

As my colleagues acknowledge, a union recognized as the collective-bargaining representative of a unit of employees is entitled to a presumption that it enjoys the support of a majority of the represented employees. *Levitz*, 333 NLRB at 720. Under *Levitz*, an employer may rebut the presumption of an incumbent union's majority status only by proving, by a preponderance of the evidence, actual loss of majority support. *Id.* at 725.

Prior to *Levitz*, an employer "could lawfully withdraw recognition pursuant to a good-faith doubt of the union's

majority status, even if the union actually enjoyed majority support." *Id.* at 722. In *Levitz*, the Board rejected that standard, reasoning that there is "no basis in either the language or the policies of the Act to warrant withdrawing recognition from a union that has not actually lost majority support." *Id.* at 724. Therefore, the Board decided to adopt a "more stringent standard for withdrawals of recognition," one that would place the burden on the employer "to prove by a preponderance of the evidence that the union had, *in fact*, lost majority support at the time the employer withdrew recognition." *Id.* at 723, 725 (emphasis added).

The rigorous *Levitz* standard advances the fundamental statutory goals of promoting the stability of existing bargaining relationships and protecting the statutory right of employees to designate their collective-bargaining representatives. *Id.* at 723–724. To the extent that uncertainty about employee sentiment exists, it is best resolved by means of a Board election. An election, rather than allowing an employer to choose on its employees' behalf, is "the preferred means of testing employees' support."² Indeed, the *Levitz* Board warned that an employer who withdraws recognition in reliance on an employee petition does so "at its peril." *Id.* at 725. In sum, the central teaching of *Levitz* is that an employer cannot lawfully withdraw recognition from an incumbent union unless it defeats the continuing presumption of majority status by providing unambiguous evidence that the union no longer enjoys the employees' support.

Applying those principles here, the judge correctly determined that the Respondent failed to satisfy its burden under *Levitz* to show the Union's actual loss of majority support. The language of the employee petition relied on by the Respondent can reasonably be interpreted in two different ways. Consistent with my colleagues' interpretation, when the employees stated their "wish for a vote to remove the Union," they could have been expressing their desire to remove the Union. As the judge pointed out, however, the employees' use of the term "vote" implies a choice. The addition of the words "to remove" could reasonably have been a description of what the vote was about, rather than an expression of the employees' sentiment one way or the other. Thus, the judge properly found that the language of the petition is am-

⁸ See *Levitz*, supra at 727.

¹ *Levitz Furniture of the Pacific, Inc.*, 333 NLRB 717 (2001).

² *Levitz*, supra, 333 NLRB at 725–726. Indeed, as the Supreme Court has held, the Board properly gives "a short leash" to an employer who seeks to withdraw recognition as a means of vindicating its employees' organizational freedom. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). The Court observed that "the Board is entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one." *Id.*, citing *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

biguous. Given that ambiguity, we cannot say with confidence that the Union did, in fact, lose the support of a majority of the employees in the bargaining unit.

Furthermore, the Respondent has not introduced any extrinsic evidence to support its interpretation of the petition language. I disagree with my colleagues' assertion that, in the absence of such evidence, the Respondent may successfully rely on the ambiguously worded petition alone. In effect, my colleagues place the burden of proof on the General Counsel to clarify the ambiguity. As stated above, however, under *Levitz*, the employer "has the burden of establishing [its] defense." 333 NLRB at 725. Where petition language is ambiguous and no other evidence is introduced, the presumption of continued majority status resolves that ambiguity against the employer. Thus, in these circumstances, it was not incumbent on the General Counsel to introduce evidence that reinforces the presumption of majority status because that presumption remains controlling.

The *Pic-Way*³ and *Laidlaw*⁴ decisions, cited by the judge and discussed by the majority, illustrate that ambiguously worded petitions, standing alone, cannot establish an employer's affirmative defense. In both of those pre-*Levitz* cases, the petitions at issue arguably expressed employees' intent to remove the incumbent union, but in neither instance did the petitions *unequivocally* repudiate the union. *Pic-Way*, 308 NLRB at 89; *Laidlaw*, 307 NLRB at 1212. Thus, in both cases, the Board resolved the ambiguity, as a legal matter, by determining that employees had expressed their desire to have an election. *Id.* Moreover, both of those cases were decided under the Board's then-operative good-faith doubt standard, which allowed employers to withdraw recognition on the basis of a good-faith doubt that the union retained majority status. Given that the Board found the petitions in those cases insufficient to establish even the employer's good-faith doubt, it follows that the ambiguously worded petition at issue in this case cannot satisfy *Levitz*' "more stringent" requirement that the Respondent show actual loss of majority status. *Levitz*, *supra* at 723.⁵

³ *Pic Way Shoe Mart*, 308 NLRB 84, 87 (1992).

⁴ *Laidlaw Waste Systems*, 307 NLRB 1211, 1214 (1992).

⁵ My colleagues emphasize that *Levitz* requires that an employer show the union's actual loss of majority status by a preponderance of the evidence, not some higher standard. But the burden of proof should not be confused with the type of evidence that will suffice to meet that burden. Even under the Board's former, more lenient good-faith standard, the Board held that it would not find that an employer had supported its defense by a preponderance of the evidence if the evidence on which the employer relied did not amount to a "clear" rejection of the union. *Laidlaw*, *supra* at 1211-1212. Thus, my colleagues are mistaken when they contend that ambiguity in the Respondent's evidence is but one "factor to be considered in determining whether the employer has met the preponderance standard." Given that the Union

Subsequent to *Levitz*, the Board has reaffirmed the principle that ambiguous evidence of employee sentiment cannot be relied on to rebut the presumption of majority status. In *Highlands Regional Medical Center*, 347 NLRB 1404 (2006), the employer withdrew recognition from the union based on an employee petition describing itself as "a showing of interest for decertification." The Board found that the petition could neither be construed as a clear statement of employees' rejection of union representation nor as a request that the employer withdraw recognition from the union. *Id.*, slip op. at 3. Rather, the Board concluded that employees intended the document to serve as a showing of interest for an election. *Id.* Significantly, the Board found that the employees' intent was evidenced, "first and foremost," by the employees' use of the document for that precise purpose when the employees provided it to the Board as an attachment to the decertification petition.⁶ *Id.* Similarly, in this case, the employees' intent to obtain an election as opposed to an outright removal of the Union is evidenced by employee Herrington's submission of the employee petition to the Board and not solely to the employer.⁷

Finally, although the employee petition at issue here was not sufficient to support a withdrawal of recognition, the petition *would* have supported the filing of an RM election petition with the Board under the "good-faith reasonable-uncertainty" standard announced in *Levitz* for such petitions, and the Respondent would not have been subject to 8(a)(2) liability for continuing to recognize the Union while election proceedings were ongoing. See *HQM of Bayside*, 348 NLRB 787, 789 (2006) (discussing *Levitz*). In addition, had the Respondent not withdrawn recognition, there would have been no basis for an 8(a)(5) blocking charge, and an election could have been held pursuant to Herrington's RD petition. In either

enjoys an ongoing presumption of majority status, and that *Levitz* requires proof of actual loss of that status, the Respondent cannot carry its burden by relying solely on evidence that could reasonably be interpreted as being consistent with, rather than defeating, the presumption of majority support.

⁶ Contrary to the suggestion of my colleagues, the testimony of some employees that they had signed the employee petition believing that its purpose was solely to obtain an election was not critical to the Board's finding of a violation in *Highlands*. This extrinsic evidence merely buttressed the Board's conclusion that the employer had unlawfully withdrawn recognition based on the petition language alone.

⁷ My colleagues' reference to fn. 15 of *Highlands* is misplaced. In that footnote, the Board referred in dicta to a hypothetical dual-purpose decertification petition, i.e., one indicating both nonsupport for a union and support for a decertification election. The instant case, however, does not involve a dual-purpose petition. Rather, the petition purports to express a single purpose, but the petition language is susceptible to more than one interpretation.

event, we would have learned—through a secret-ballot election—the employees’ true sentiments.

II.

In concluding that the Respondent has proven actual loss of majority status solely on the basis of an ambiguously worded employee petition, my colleagues have not been faithful to *Levitz* or its animating policies. Accordingly, I dissent.

Eric V. Oliver, Esq., for the General Counsel.
Timothy P. Reilly, Esq., of Cincinnati, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case is before me upon a joint motion filed by the parties pursuant to Section 102.35(a)(9) of the Board’s Rules and Regulations, providing for “stipulations of facts that waive a hearing and provide for a decision by the administrative law judge.” By Order of February 23, 2004, I approved the stipulation of facts and set a time for the filing of briefs. Counsel for the parties submitted their briefs on April 5, 2004, dealing with the issue raised in the complaint, dated October 31, 2003, that the Respondent withdrew its recognition of the Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent’s answer, dated November 5, 2003, admitted the jurisdictional allegations in the complaint and denied the substantive allegation of a violation of the Act. On the entire record, consisting of the complaint, the answer, and, having waived a hearing before an administrative law judge, the stipulation of facts (including Exhs. A–F as attachments), and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACTS

I. JURISDICTION

Diversicare Leasing Corp. d/b/a Wurland Nursing & Rehabilitation Center (the Respondent) is engaged in the operation of a nursing home at Wurland, Kentucky. During the past 12 months, in conducting its operation described above, the Respondent derived gross revenues in excess of \$100,000 and purchased and received at its Wurland, Kentucky facility goods valued in excess of \$50,000 from suppliers located outside the Commonwealth of Kentucky. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

At all material times, Ralph Wright has held the position of administrator and is a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

All full-time and regular part-time and PRN service and mainte-

nance employees employed by the Respondent at its 100 Wurland Avenue, Wurland, Kentucky facility, as described in article I of the collective-bargaining agreement effective June 30, 1998, between the Respondent and the Union (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At all material times since about October 10, 1997, the Union has been the designated exclusive collective-bargaining representative of the unit. The Respondent’s recognition of the Union as the unit employees’ representative has been embodied in the collective-bargaining agreement described above.

On July 1, 2003, and following the expiration of the collective-bargaining agreement described above, Tammy Herrington, a unit employee, filed a decertification petition with Region 9 of the National Labor Relations Board, a copy of which was given to Ralph Wright on such date. (A copy of the petition in the matter of Case 9–RD–2038 is attached to the stipulation as Exh. B.) Included with the decertification petition was an employee petition containing current signatures of more than 50 percent of the unit employees. The caption on the employee petition reads as follows: “We the employee’s of Wurland nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199” [sic]. (A copy of the employee petition is attached to the stipulation as Exh. C.) Following its receipt of the foregoing information, the Respondent compared the above-referenced signatures with employee signatures that were inscribed on July 11 and August 8, 2003 employee paycheck receipt lists and determined that the employees’ petition was signed by over 50 percent of the employees in the unit.

By letter dated August 12, 2003, the Respondent advised the Union that because it (the Union) no longer represented a majority of the unit employees, it (the Respondent) was withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit. (A copy of Wright’s August 12, 2003 letter to the Union is attached to the stipulation as Exh. D.)

The Respondent’s decision to cease recognizing the Union as the exclusive collective-bargaining representative of the unit was based solely on the information described above.

III. STATEMENT OF THE ISSUE PRESENTED

The parties agree that the sole issue in the instant case is whether the Respondent lawfully withdrew recognition from the Union based on its review of an employee petition signed by a majority of bargaining unit employees stating: “We the employee’s of Wurland Nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199.”

Analysis

The issue is whether the Respondent, Diversicare Leasing Corp., lawfully withdrew its recognition of the SEIU as the bargaining agent of its employees when its employees submitted a petition, “for a vote to remove the union,” is governed by *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). *Levitz* holds that an employer must have objective evidence of a lack of majority support for the union among the employees to counter the rebuttable presumption in favor of continued majority support. “[F]rom the earliest days of the Act, the Board has

sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.” Id. at 720. Without such objective evidence, an employer cannot unilaterally withdraw its recognition of the union as the bargaining representative of its employees.

The presumption in favor of continued majority support is predicated upon two basic purposes of the Act, as explained in *Levitz*, supra, continuity in the bargaining relationship which fosters industrial peace and stability, and the employee’s right to designate a collective-bargaining representative without the employer’s interference with these rights. Only when an employer has objective evidence that the bargaining representative no longer enjoys majority support can recognition be withdrawn.

This objective standard in *Levitz* is more stringent and replaced the subjective “good faith” test in *Celanese Corp.*, 95 NLRB 664 (1951). While the Supreme Court articulated a similar subjective test in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), the door was left open for the Board to adopt a more stringent standard. Conceivably, an employer, under the impression that the union lost majority support, could withdraw recognition of the union under the old standard, even though the union had not actually lost its support among the employees. The subjective standard could undermine the democratic purposes of the Act and the fairness of representation.

The Respondent contends that there is no need for the Board to determine the intention of the employees who signed the petition, because the employees had clearly indicated their intent to oust the Union. To illustrate, the Respondent compares the instant petition with that in *Pic Way Shoe Mart*, 308 NLRB 84, 87 (1992), where the employee petition stated, “OUR CONTRACT HAS JUST EXPIRED & WE WOULD LIKE TO HAVE A VOTE ON WHETHER TO HAVE A UNION OR NOT.” The Board found that the employees had expressed their desire to have a vote, rather than a unilateral withdrawal of recognition. In contrast, the employee sentiment is expressed far more unequivocally in the instant scenario, according to the Respondent.

Nevertheless, it is conceivable that the employees signed this petition, because they wanted a vote. The term “to remove” may have been an indication to them of what the vote was all about, rather than the signatories’ expression of their sentiment. Given that uncertainty, the employer cannot unilaterally withdraw recognition. “If employees’ exercise of the right to choose union representation is to be meaningful, their choices must be respected by employers. That means that employers must not be allowed to refuse to recognize unions that are, in fact, the choice of a majority of their employees . . . [and] 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.” *Levitz*, supra at 723, 725.

The Respondent also distinguishes *Laidlaw Waste Systems*, 307 NLRB 1211 (1992), where the employee petition was, “to find out if the majority of Laidlaw employees would like to take a vote on the union.” As in *Pic Way Shoe Mart*, supra, the

Board found that a majority of employees had not demonstrated a lack of majority support for the union without a vote. Significantly, both *Pic Way Shoe Mart* and *Laidlaw*, share with the present case similar petition language demanding a vote. However, in *Easton Hospital*, 335 NLRB 1091 (2001), also cited by the Respondent, the Board found employee dissatisfaction with union representation based upon the statement in the petition: “We feel that we have been misrepresented and therefore would like an immediate opportunity to revote to determine whether we want the union to continue its representation.” *Easton Hospital* was decided under the prior standard, the “good faith” test. The precedential value of *that decision* is extremely limited, because the Board expressed its view that it would reach a different result under the *Levitz* standard.

Respondent also cites *Voca Corp.*, Case 9–CA–38812 (May 30, 2002), which involved a petition whose language justified a legal refusal to recognize the bargaining representative. But the petition’s language did not call for or even mention a request for a vote. It stated, “We the undersigned, current employees of . . . wish to decertify our affiliation and union representation with [the union]” and, “We . . . wish to no longer recognize our affiliation and representation by [the union].”

In the present case, however, the use of the term “vote” is evidence that the petitioners wanted an election.

The Respondent finally argues “that the specific supersedes the general,” and that consideration of all the words on the petition leads to the conclusion that a majority of the employees no longer wanted the Union.” Yet it is clear that the word “vote” necessarily implies a choice. The “wish for a vote to remove” may be assumed by some signatories as an opportunity to vote for or against removal. The petition would have been clear and unambiguous if it had stated, “wish to remove.”

The General Counsel submits that an irrebuttable presumption of majority support exists during the effectiveness of a collective-bargaining agreement, and a rebuttable presumption upon the expiration of the agreement. *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996). In order to rebut the presumption of majority status, the employer must prove that there was an actual loss of majority support for the union. *Levitz*, supra. The choice of words in the petition, according to the General Counsel, was insufficient to show actual loss, it was a showing of interest in having an election. A request for a vote coupled with an expression of dissatisfaction with the incumbent union still connotes a choice to be made. Under these facts, the employer’s reliance on a showing of interest does not constitute proof of majority opposition to the union. The employer’s good-faith belief of majority opposition is irrelevant to the determination of whether a refusal to bargain is established.

When an employer withdraws recognition of a certified bargaining representative without an election or unequivocally clear intention of the employees, an 8(a)(5) violation has been committed. “Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether.” *Karp Metal Products Co.*, 51 NLRB 621 (1943). I accordingly find that the Respondent violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. The Respondent, Diversicare Leasing Corp. d/b/a Wurland Nursing & Rehabilitation Center, is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, District 1199, the Health Care and Social Service Union, SEIU, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time and PRN service and maintenance employees employed by the Respondent at its 100 Wurland Avenue, Wurland, Kentucky facility, as described in article I of the collective-bargaining agreement effective June 30, 1998, between the Respondent and the Union, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union has been the exclusive collective-bargaining representative of the unit.

5. By withdrawing recognition of the Union as the exclusive

collective-bargaining representative of the unit, the Respondent has been failing and refusing to bargain collectively and in good faith, in violation of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

REMEDY

The remedy for a failure to bargain is an order to bargain in good faith with the Union, an order to cease and desist from all such unfair labor practices, and to post notices to that effect.

[Recommended Order omitted from publication.]

¹ 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.