*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: March 27, 2001

TO : Wayne R. Gold, Regional Director
Region 5

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Heartland of Martinsburg
Case 5-CA-29160

530-4080-5012-6700
530-4080-5060-6700
530-8009-2700

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) when it anticipatorily withdrew recognition from the certified Union based upon a majority anti-Union petition, when, two months later but before the contract expired, the Union obtained a majority-supported pro-Union petition.

## FACTS

Briefly, the Union was certified in 1997, and the parties entered into a collective-bargaining agreement effective until October 1, 2000.[1] Between June 6-23, an employee circulated a petition stating that the employees no longer wished to be represented by the Union; the petition was signed by 43 of 70-72 unit employees.[2] The Employer administrator found the petition on her desk on June 23; after verifying the signatures, the Employer, by letter to the Union dated June 27, informed the Union that the Employer was terminating their contract upon its expiration and that it would not bargain for a successor agreement based on a good faith reasonable doubt of the Union's continued majority status. The letter cited objective considerations, including the petition.[3]

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[1] All dates hereinafter are in 2000.

[2] While there is some suspicion that the employee may have circulated the petition during her work hours, the Region has concluded that there is insufficient evidence that the anti-Union petition was tainted.

[3] The Employer also asserts that three employees told it that the employees could not wait until they could "kick out" the Union.

An employee who was also a Union representative began circulating a petition stating that the employees wanted to keep the Union. The employee asserts that he obtained signatures between July and August 31; the undated petition was signed by 42 unit employees, out of somewhere between 60 and 72 employees during that time.[4]

In an August 4 letter to the Union, the Employer stated that it was going to increase the starting pay of CNAs effective August 11, and that all CNAs' wages would be increased to at least the new starting pay.[5]

On or about August 31, two Union representatives were visiting the facility and were sitting in the employee breakroom with the employee who had circulated the pro-Union petition, waiting to speak with other employees. Employer administrator Raines came by. Union representative McKinney asked Raines about bargaining dates. McKinney states that Raines responded that McKinney had to talk with the Employer attorney because their position was that the Union did not have majority support and the Employer would not bargain. McKinney asked about some information she had requested for bargaining, and Raines responded that she would not provide the information. McKinney stated that the Union had passed a pro-Union petition among the employees and had obtained signatures from a majority of employees. Raines responded that McKinney should talk to the Employer's attorney. Raines did not ask for a copy of the petition, nor did the Union give a copy to the Employer.[6] McKinney did not follow up with the Employer's attorney.

ACTION

[4] While the signatures lack dates, the available evidence supports the Union's assertion that the employees signed the petition in July and August.

[5] The contract allows the Employer to increase starting rates for new employees, but the increase for current employees is alleged as a unilateral change in Case 5-CA-29192. The Region intends to issue complaint on that allegation.

[6] While employee Bronk states that in mid-September he saw a copy of the pro-Union petition on Raines' desk, the Union states that it never presented the petition to the Employer.

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer's withdrawal of recognition and refusal to meet and bargain over a successor contract violated Section 8(a)(5) where, within approximately 2 months after it anticipatorily withdrew recognition, a majority of the employees signed a pro-Union petition.

An employer may lawfully anticipatorily withdraw recognition from a union, to be effective upon contract expiration, if the employer has a good faith reasonable doubt that the union continues to enjoy majority support.[7] Under current Board law as expressed in AMBAC,[8] withdrawal of recognition based on an employer's good faith reasonable doubt of majority union support is unaffected by evidence of subsequent pro-union support, and the withdrawing employer lawfully may refuse to consider such evidence. In AMBAC, the Board expressly overruled an ALJ's reliance on post-withdrawal majority union support (which was gathered within two weeks of the employer's withdrawal of recognition based on a decertification petition) as evidence that the withdrawal of recognition was unlawful.

However, we believe that allowing an employer to refuse to consider expressions of pro-union sentiment that are reasonably close in time to its withdrawal of recognition (as AMBAC now allows) is anomalous and inconsistent with an employer's right to refuse to consider pro-union evidence at the recognition stage, and consequently promotes labor relations instability, which result is contrary to the Act.[9] Therefore, we have urged the Board to reconsider AMBAC and related Board decisions, and instead adopt the position that post-withdrawal evidence of support for a union within a reasonable time following withdrawal of recognition may deprive an employer of the privilege to withdraw recognition from the union.[10]

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[7] See Bridgestone/Firestone, Inc., 331 NLRB No. 24, slip op. at 4 (2000).

[8] AMBAC International, Ltd., 299 NLRB 505, 506 (1990).

[9] Section 1 of the Act; Auciello Iron Works Inc. v. NLRB, 517 U.S. 781, 786 (1996) (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38 (1987)).

[10] See Advice Memorandum in Penn Tank Lines, Inc., 12-CA-19746, dated July 15, 1999, for a complete discussion of this theory. In Penn Tank an ALJ found an unlawful

Under our theory in Penn Tank, an employer that intends to withdraw recognition based on a good faith reasonable doubt has an affirmative obligation to immediately inform the union of its intention to withdraw recognition, and must maintain the status quo for a reasonable period thereafter to ensure that its good faith doubt about whether a majority of employees desire union representation is still reasonable. Thus, the presumption of majority union support continues until the incumbent union fails to demonstrate continued majority support during a reasonable period following the employer's announcement that it intends to withdraw recognition.

Here, the Union obtained support from a majority of unit employees within approximately two months after the Employer prospectively withdrew recognition, at a time when there was still a bargaining obligation with the Union during the term of the contract. We conclude that a pro-Union showing within that period of time, especially when it was during the term of the contract, was reasonably contemporaneous with the withdrawal of recognition.[11] Accordingly, the Region should argue that the Employer did not possess a good faith reasonable doubt about whether a majority of employees desired Union representation, and consequently was not privileged to withdraw recognition from the Union.

We considered whether the Penn Tank theory here is affected because the Union did not actually give the Employer a copy of the pro-Union petition when it informed the Employer on August 31 of the petition's existence. We conclude that the Union was not obligated to actually give the Employer a copy of the petition, since the Union could have reasonably believed that to do so would have been futile. Thus, the Employer had not only prospectively withdrawn recognition from the Union, but had unilaterally implemented wage increases in apparent violation of Section 8(a)(5) prior to August 31. When the Union asked for

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withdrawal of recognition, but did not address the AMBAC issue (JD-NY-29-00, April 6, 2000); the General Counsel filed exceptions, asking the Board to overrule AMBAC.

[11] See, e.g., Goya Foods of Florida, Case 12-CA-20542, Advice Memorandum dated March 31, 2000 [*FOIA Exemption* 7(A) ]; Bi-Mart Corp., Case 36-CA-8514, Advice Memorandum dated June 30, 2000 (union informed employer of majority support approximately one month after employer withdrew recognition).

bargaining dates on August 31, Employer administrator Raines rebuffed the Union by referring them to the Employer's attorney. When the Union told Raines that they had a majority-supported petition, Raines again directed the Union to the Employer's lawyer, even though it was Raines who had originally seen the anti-Union petition. In these circumstances, Raines' message was clear: nothing was going to change the Employer's decision not to recognize or bargain with the Union. It would thus have been futile for the Union to do more than it did in informing Raines of the pro-Union petition.[12] In other cases, we have not required a union to affirmatively provide an employer with the actual evidence of pro-union support, in addition to informing the employer of such support.[13]

In the alternative, the Region should assert, consistent with the General Counsel's position in Levitz,[14]

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[12] See generally Laura Modes Co., 144 NLRB 1592, 1606, 1608 (1963)(employer official's response of "you'll have to talk to my lawyer" to union's requests to meet and bargain were "additional evidence of the refusal to bargain and the [employer's] fixed determination not to deal with the Union"); Dock Workers Local 1 (Trans Ocean Maritime Services), 330 NLRB No. 194, slip op. at 5 (2000)(union caused employer to fire casual employee referred to jobs on a daily basis; union defended on basis that employee did not come back to the hiring hall to be referred out; Board found that future appearances at the hiring hall would have been futile, in light of the fact that the one time the employee did return to the hall and asked to be referred to a job, the union official told the employee to see the union's lawyer).

[13] Goya Foods of Florida, supra, Advice Memorandum [*FOIA Exemption* 7(A)

]; Bi-Mart Corp., supra, Advice Memorandum at p. 2 (union informed employer of majority-supported petition, and later published petition in newspaper ad).

[14] Case 20-CA-26596. The General Counsel filed a position statement urging the Board to overrule Celanese Corp., 95 NLRB 664 (1951); in Chelsea Industries, 331 NLRB No. 184, slip op. at 1 n. 2 (August 31, 2000), the Board stated that

that the Employer violated Section 8(a)(5) by withdrawing recognition without a Board conducted election. The General Counsel's position articulated in Levitz is that termination of a bargaining relationship can only be predicated on actual loss of majority union support -- as indicated by a Board conducted election, or through an alternative means of testing majority status which has been agreed upon by the employer and incumbent union.

B.J.K.

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it would address the General Counsel's position when it decides Levitz.