

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

# Advice Memorandum

DATE: January 18, 2008

TO : Celeste Mattina, Regional Director  
Region 2

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

SUBJECT: Citywide Mobile Response Corp.  
Case 2-CA-37864

316-6733  
324-0193  
324-8025-3300  
530-4080-5012  
530-4080-5084

The Region resubmitted this Levitz<sup>1</sup> case for advice as to whether the Employer lawfully withdrew recognition from the Union, based upon an anti-union petition. [FOIA Exemption 5

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Resolution of the Levitz issue turns upon: (1) whether page one of the petition, which calls for the withdrawal of union shop authority and also contained the parenthetical "remove [Local] 707," constitutes reliable objective evidence of actual loss of majority support; and (2) alternatively, whether evidence that two of the signers did not intend to disavow support for the Union and that another employee signed while discussing the petition with his supervisor demonstrates that those employees' signatures should be discounted.

We conclude that the Region should issue a Section 8(a)(5) complaint, absent settlement, alleging that the Employer unlawfully withdrew recognition from the Union, because the language on the first page of the petition and extrinsic evidence rebuts the Employer's showing under Levitz. However, there is insufficient evidence to support an alternative argument that, even if page one of the petition is not discounted, the Employer cannot demonstrate actual loss.

### **FACTS**

The background of this case is set forth in more detail in a prior Advice Memorandum dated July 19, 2007. Briefly, Citywide Mobile Response Corp. ("the Employer")

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<sup>1</sup> Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001).

provides ambulance and ambulance services in New York City. Prior to 2004, the Employer had an established collective-bargaining relationship with Teamsters Local 531 for several years, covering a unit of full-time and part-time paramedics, emergency medical technicians, and drivers. In July 2004, Teamsters Local 707 ("the Union") succeeded Local 531 as the unit's exclusive bargaining representative. On September 15, 2004, the Employer and the Union began negotiations for a new collective-bargaining agreement.

On April 28, 2006,<sup>2</sup> the Region issued a Section 8(a)(5) complaint in Case 2-CA-37321, which alleged, in part, that the Employer violated Section 8(a)(5) by insisting to impasse that the Union refrain from increasing dues and initiation fees and by retracting its agreement on union security to prevent the Union from increasing dues and initiation fees. Negotiations between the parties continued and, while a major stumbling block to a contract was the issue of union security, during a settlement conference on July 14, the parties finally reached agreement on that issue. The Employer and Union then scheduled a meeting for August 24, at 1:00 p.m., to finalize their contract.

Meanwhile, on August 15, employee Edwin LeBron filed a UD petition with the Region.<sup>3</sup> A Board agent contacted him on August 22 to find out his intentions, and he explained that he wanted to get rid of the Union. At the Board agent's suggestion, LeBron withdrew his UD petition and prepared a second petition.

The first page of that petition, also entitled "Petition Against Local Union 707," stated:

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<sup>2</sup> All dates hereinafter are in 2006 unless otherwise noted.

<sup>3</sup> That petition was entitled "Petition Against Local Union 707" and stated:

This Petition is for the withdrawal of union shop authority of Local Union 707. We the employees of Citywide Mobile Response are petitioning to remove the obligation to pay dues to Local Union 707. In signing this petition, I understand that I am part of the thirty percent of the employees at Citywide Mobile Response in a bargaining unit covered by an agreement between my employer and Local Union 707, that wish for such authority to be rescinded.

This Petition is for the withdrawal of union shop authority of Local Union 707. In signing this petition, I understand that I am part of the employees at Citywide Mobile Response in a bargaining unit covered by an agreement between my employer and Local Union 707, that wish for such authority to be rescinded (remove 707).

He collected 14 undated signatures on this page and filed it with the Region later that day. [FOIA Exemption 7(D)], the Board agent suggested that he use different language and informed LeBron that he had 48 hours to collect additional signatures.

LeBron used different language on the second and third pages of the petition, which stated:

We the employees of Citywide Mobile Response, located at 1624 Stillwell Ave., Bronx, NY 10461 do not wish to be represented by Local Union 707, Teamsters.  
(Remove Local Union 707, Teamsters)

[FOIA Exemption 7(D)] he gathered most of the petition signatures on pages two and three on the morning of August 23, between 6:00 a.m. and 7:00 a.m., while the employees were inspecting and loading their vehicles. He attached the petition to a clipboard and had employees pass it around. He and his wife collected additional signatures in the afternoon, by meeting employees at their standby locations. He collected 31 signatures dated August 23 on the second page of the petition and 20 signatures dated August 23 and 24 on the third page.

On August 24, LeBron presented his petition to the Employer's Chief Operating Officer, Warren Golden. At that time, the three pages of the petition contained a total of 65 signatures out of a unit of 122 employees, but two of the employees had signed the petition twice, on pages one and three.

The Employer did not appear at the 1:00 p.m. meeting scheduled with the Union; instead, at about 2:30 p.m., the Employer's counsel informed the Union that the Employer would not meet with the Union because the Employer had reason to believe that the Union no longer had majority support.

[FOIA Exemption 5

.] [FOIA Exemption 7(D)] he changed the language on the second and third pages at the

Board agent's suggestion. The Region was unable to determine from LeBron what he told employees with respect to page one, because he claimed that employee Luis Santiago circulated the first page of the petition on his behalf. Santiago denied that he circulated page one, and none of the page one signers that the Region was able to contact recalled receiving the petition from Santiago.

The Region successfully contacted seven of the employees who signed page one of the petition. Only one of those employees recalled seeing any language printed or written at the top of page one, and that employee also signed page three of the petition (after it was submitted to the Employer) and may have been remembering the language on page three. Three page one signers testified specifically that there was no language at the top of page one.

Two employees specifically testified that they did not intend to disavow the Union. [FOIA Exemption 7(D)] he does not recall signing a petition about Local 707, and that the signature on the petition does not look exactly like my signature. [FOIA Exemption 7(D)] he would not have signed a petition against Local 707 because he wanted them in, and that if he did sign it, he would not have done so knowing that the petition was to remove Local 707. [FOIA Exemption 7(D)] that LeBron approached her and her partner and said he was collecting signatures to become shop steward. He had a petition with him, but it was just a piece of paper with lines and peoples' signatures and nothing was written or printed on the top of the page. Both she and her partner signed. However, [FOIA Exemptions 6, 7(C), and 7(D)] signature also appears on page three of the petition, even though she testified that she signed only one petition. She did not testify as to the authenticity of her signature on page three.

[FOIA Exemptions 6 and 7(C)] signed page one after a discussion with LeBron and an operations manager. [FOIA Exemption 7(D)] he asked LeBron several questions, and the operations manager chimed in, giving his views against the Union. At the end of the conversation, [FOIA Exemptions 6 and 7(C)] signed the petition.

#### **ACTION**

We conclude that the Region should issue a Section 8(a)(5) complaint, absent settlement, alleging that the Employer unlawfully withdrew recognition from the Union in the absence of an actual loss of majority support. The ambiguity in the language of page one, together with the extrinsic evidence that employees signed with no language

on the top of the page, is sufficient to invalidate all 14 of the signatures on page one. The number of the remaining signatures is insufficient to show an actual loss of majority support.

Although we agree with the Region that, even if page one is not discounted in its entirety, the page one signatures of employees [*FOIA Exemptions 6 and 7(C)*] are not reliable evidence of loss of Union support, [*FOIA Exemptions 6 and 7(C)*] signature on page three cannot be discounted. Since discounting only three employees on page one but including [*FOIA Exemptions 6 and 7(C)*] signature on page three will leave 61 valid signatures out of a total of 122 employees, if page one is not discounted in its entirety the Region cannot rebut the Employer's showing of actual loss.

#### I. The Reliability of Page One

In Levitz the Board held that an employer may unilaterally withdraw recognition from a union only if it can show actual loss of majority support based on objective evidence.<sup>4</sup> An employer that withdraws recognition from an incumbent union bears the initial burden of proving that the union suffered a valid, untainted loss of its majority status, and may do so with an anti-union petition signed by a majority of the unit employees.<sup>5</sup> The General Counsel may then present rebuttal evidence to show that the union in fact enjoyed majority support at the time of the withdrawal or that the employer's evidence is unreliable. The burden then shifts back to the employer to establish actual loss by a preponderance of the evidence.<sup>6</sup> An employer that withdraws recognition does so "at its peril." If the employer is incorrect in its assessment of the evidence of loss of support, it will violate Section 8(a)(5) by withdrawing recognition.<sup>7</sup>

In its recent decision in Wurtland Nursing & Rehabilitation Center, in the absence of any extrinsic evidence regarding the petition solicitation process, the Board held it was more probable than not that a petition stating that employees "wish for a vote to remove the

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<sup>4</sup> 333 NLRB at 717.

<sup>5</sup> *Id.* at 725, n. 49.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.* at 725.

Union" demonstrated rejection of union representation.<sup>8</sup> In Wurtland, the Board distinguished but did not overrule prior Board cases, such as Pic Way Shoe Mart<sup>9</sup> and Laidlaw Waste Systems,<sup>10</sup> where the signers' sentiment could not be discerned from language stating that the employees wanted a "vote on whether to have a union or not."<sup>11</sup> The Board explained that in those cases the employees' intent was not clear, because there was no indication as to how the petition signers would actually vote in the ensuing election.<sup>12</sup> And as the Board held in Pic Way Shoe Mart, "the evidence must demonstrate a clear intention by employees not to be represented by the Union."<sup>13</sup> In contrast, the Board read the petition language in Wurtland - seeking a "vote to remove the Union" - as an indication of how the signers would vote.

In Wurtland, the Board also distinguished those cases in which extrinsic evidence is available.<sup>14</sup> In such cases, the Board looks to the circumstances surrounding the signing of the petition to determine the signers' intent, including what signers were told regarding the petition's purpose and whether employees were misled as to what document they were signing, particularly where the document had no heading.<sup>15</sup>

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<sup>8</sup> 351 NLRB No. 50, slip op. at 1-2 (2007).

<sup>9</sup> 308 NLRB 84 (1992).

<sup>10</sup> 307 NLRB 1211 (1992).

<sup>11</sup> 351 NLRB No. 50, slip op. at 2.

<sup>12</sup> Ibid.

<sup>13</sup> 308 NLRB at 89 (citation omitted). Although Pic Way and Laidlaw are pre-Levitz decisions, as the dissent in Wurtland notes, if the petitions in those cases could not meet the good-faith doubt standard, they certainly could not meet the more stringent Levitz standard. 351 NLRB No. 50, slip op. at 4.

<sup>14</sup> 351 NLRB No. 50, slip op. at 2, distinguishing Highlands Regional Medical Center, 397 NLRB No. 120 (2006), enfd. 2007 U.S. App. LEXIS 27567 (D.C. Cir. 2007).

<sup>15</sup> See Highlands Regional Medical Center, 347 NLRB No. 120, slip op. at 3 (employer violated Section 8(a)(5) by withdrawing recognition based upon a petition titled "showing of interest for decertification," when employees were told the petition's purpose was to obtain a decertification election); "Guideline Memorandum Concerning

Here, looking just to the language on the first page of the petition, it is equally plausible that the signers intended merely to revoke union security as it is that the signers wanted to remove the Union altogether. The first sentence printed at the top of page one states that the petition is "for the withdrawal of union shop authority," and the second sentence reiterates that the signers "wish for such authority to be rescinded[.]" This language expressly limits the petition to a revocation of Local 707's union shop authority. On the other hand, the final parenthetical, consisting of merely two words and purporting to explain the preceding language, suggests that the signers wanted to remove the Union as bargaining representative. Therefore, unlike in Wurtland, the Employer cannot establish that a *preponderance* of the evidence demonstrates an actual loss of support among the page one signers.<sup>16</sup>

More importantly, in contrast to Wurtland, here there is "extrinsic evidence about the petition solicitation process[.]"<sup>17</sup> LeBron circulated his petition in the aftermath of a dispute about union security. The Region issued complaint in Case 2-CA-37321 alleging that the Employer unlawfully insisted to impasse that the Union refrain from increasing dues and initiation fees and retracted its agreement on union security to prevent the Union from increasing dues and initiation fees. Settlement of that case ultimately turned upon an agreement on union security. In this context, the employees who signed page one may just as likely have wanted to end union security as to end union representation.

In addition, there is extrinsic evidence that the employees who signed page one signed a petition that had no language printed at the top of the page. Of the seven page one signers whom the Region was able to contact, only one remembered seeing language at the top of the page, and it is quite possible that she remembered the third page of the petition, which she also signed, rather than the first page. Three others testified that there was no writing at the top of the page they signed. Since there is virtually no evidence that there was any heading to page one when the employees signed it, the Employer cannot prove by a

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Levitz, "Memorandum GC 02-01, dated October 22, 2001, at 5-6.

<sup>16</sup> Cf. 351 NLRB No. 50, slip op. at 2.

<sup>17</sup> Id., slip op. at 1.

preponderance of the evidence that the page one signers intended to disavow the Union. Without page one, there are an insufficient number of petition signatures to demonstrate an actual loss of majority support.

## II. Other Evidence Of Signature Unreliability

If page one of the petition is not discounted in its entirety, then there are 65 signatures in a unit of 122 employees. Two employees signed pages one and three and should only be counted once, leaving 63 signatures.

[*FOIA Exemptions 6 and 7(C)*] signatures on page one also can be discounted as unreliable evidence of actual loss of Union support. [*FOIA Exemptions 6, 7(C), and 7(D)*] failed to authenticate his signature and stated that he would not have signed a petition against Local 707 because he wanted the Union in. There is also no evidence from a petition solicitor authenticating [*FOIA Exemptions 6 and 7(C)*] signature.] In these circumstances, the Employer cannot rely upon his signature as reliable evidence of his lack of Union support.<sup>18</sup> [*FOIA Exemptions 6 and 7(C)*] signature is tainted by the operations manager's efforts to persuade him to sign the petition. It is well established that a signature solicited by a supervisor is tainted and may not be counted for a showing of interest.<sup>19</sup>

However, while [*FOIA Exemptions 6 and 7(C)*] would be sufficient to discount her signature on page one of the petition, the Region cannot discount her signature on page three. With respect to the page one signature, [*FOIA Exemption 7(D)*] LeBron told her that the petition was to support his selection as shop steward and that there was no language on the top of the page. The General Counsel's Guideline Memorandum sets forth this precise situation as an example of unreliability sufficient to rebut evidence of actual loss of majority status.<sup>20</sup> Evidence purporting to show employee disaffection from a union obtained by

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<sup>18</sup> See Memorandum GC 02-01 at 6 ("the Region may need to specifically authenticate the signatures of employees who allegedly signed the petition....").

<sup>19</sup> See, e.g., Dejana Industries, Inc., 336 NLRB 1202, 1202 (2001) (dismissing RC petition because supervisor was directly involved in collecting all of the authorization cards).

<sup>20</sup> Memorandum GC 02-01 at 6.

material misrepresentation will not be given effect.<sup>21</sup> On the other hand, [FOIA Exemptions 6, 7(C), and 7(D)] did not testify about the circumstances surrounding her signing of page three, insisting instead that she only signed the petition once. Nor did she testify as to the authenticity or lack of authenticity of her page three signature. [FOIA Exemption 5

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If the page one signatures of [FOIA Exemptions 6 and 7(C) ] are discounted but [FOIA Exemptions 6 and 7(C)] page three signature is counted, then 61 employees in a unit of 122 signed the decertification petition, indicating an actual loss of majority support.<sup>22</sup> [FOIA Exemption 5

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B.J.K.

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<sup>21</sup> J.D. Eckman, Inc., Cases 4-CA-32638, 4-CA-32850, 4-CA-32975 & 4-CA-33174, Advice Memorandum dated October 12, 2004 at 8. See, e.g., Laverdiere's Enterprises, 297 NLRB 826, 826-27 (1990), enfd. in pertinent part, 944 F.2d 1045 (1<sup>st</sup> Cir. 1990) (an employer officer's statement that a petition was just for a revote "'cancelled'" clear language on the petition disavowing the Union).

<sup>22</sup> See Renal Care of Buffalo, Inc., 347 NLRB No. 112 (2006), slip op. at 3.