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

Advice Memorandum

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Region 1

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

530-4080-0125
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SUBJECT: Auciello Iron Works, Inc.
Case 1-CA-39338

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from an incumbent union based on a petition signed by employees in the context of unremedied unfair labor practices. We conclude that the Employer lawfully withdrew recognition because the evidence demonstrates that the unfair labor practices did not taint the employee petition.

FACTS

The facts are substantially set forth in the Region's Memorandum. The following facts are the most pertinent to the instant dispute between Auciello Iron Works, Inc. ("the Employer") and Iron Workers Local 501 ("the Union").

Background

The parties have negotiated a series of collective-bargaining agreements since the Union's certification in 1977. On October 14, 1988, unit employees engaged in an economic strike when negotiations for a successor agreement were unsuccessful. The parties continued to bargain throughout the period of the strike. On November 17, 1988, the Employer presented a complete contract proposal to the Union. Around this time, nine of the 23 unit employees crossed the picket line and 16 unit employees expressed their dissatisfaction with the Union to the Employer. In addition, the Employer received signed Union resignation forms from 13 unit employees all dated around November 22, 1988. On November 27, 1988, the Union notified the Employer in writing that it accepted the Employer's last contract proposal. On November 28, 1988, the Employer informed the Union that it doubted the Union's majority status based on the information it had received prior to

the Union's acceptance of its proposal and, as a result, disavowed the agreement and refused to bargain further.

The Union filed a charge alleging that the Employer unlawfully withdrew recognition from the Union in the face of a binding contract. The Board found a violation, holding that an employer may not rely on evidence of loss of majority status occurring *before* a contract is reached if it did not withdraw recognition on that basis until *after* the contract was reached.[1] The Supreme Court affirmed the Board's decision, and the Employer was ordered to abide by the 1988-1991 agreement and to make employees whole for any loss of wages or benefits incurred as a result of its unlawful actions.[2]

At some point following the Supreme Court's decision, a Union representative visited the Employer's facility and informed employees individually that they would be receiving their IRA payments as a result of the Union's work. In addition, the Employer held an "update meeting" at which it informed the employees that it lost the case and that the employees would be receiving their IRA money.

In May 1997, the parties met to negotiate a successor agreement. Those negotiations broke off quickly and resumed on January 20, 1998.[3] The parties engaged in several more negotiation sessions resulting in a few minor

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[1] See Auciello Iron Works, 317 NLRB 364, 369-370 (1995).

[2] See Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781 (1996). The agreement, however, already expired on November 26, 1991. By letter dated July 19, 1991, counsel for the Employer served timely notice of termination of the contract on the Union.

[3] Prior to resuming negotiations, the Union filed a charge on December 10, 1997 in Case 1-CA-34367 alleging that the Employer violated Section 8(a)(5) and (1) of the Act by failing to abide by certain terms of the expired contract in denying the Union access to its facilities and failing to meet with and bargain with the Union. Case 1-CA-34367 was consolidated with Case 1-CA-25969 (the Supreme Court case). In February 1998, the Region approved a settlement agreement resolving outstanding allegations in Case 1-CA-34367 and the contempt issues related to Case 1-CA-25969. Among other affirmative actions, the Employer agreed to a ten-year payment schedule to remedy its failure, from November 27, 1988 through November 26, 1991, to contribute to its employees' IRA accounts. The Employer also agreed to recognize and bargain with the Union.

agreements. At the last meeting between the parties on March 12, 1998, the Union told Employer's counsel that it would contact the Employer for further bargaining dates. The Union never contacted the Employer and the parties had no further contact until the Employer contacted the Union in January 2001.

[*FOIA Exemptions 6, 7(C), and 7(D)*] unit employees recalled that none of the employees favored continued Union representation when, after the Supreme Court decision issued, a Union representative visited the Employer's facility and the Employer held its "update" meeting. One employee [*FOIA Exemptions 6, 7(C), and 7(D)*] did not favor Union representation at that time because, when he started working for the Employer in 1994, he had heard employees complain that the 1988 strike was a bad idea and that the contract the employees got was not in their best interests. [*FOIA Exemptions 6, 7(C), and 7(D)*] the employees felt that the last contract accepted by the Union was a bad one for the employees and that it seemed like the Union was just trying to "keep its foot in the door."

Another employee also [*FOIA Exemptions 6, 7(C), and 7(D)*] had no interest in the Union's representation at that time because the Union never let the employees know what was going on in the litigation. [*FOIA Exemptions 6, 7(C), and 7(D)*] the Union never made any attempt to contact the employees throughout the case. [*FOIA Exemptions 6, 7(C), and 7(D)*] employees felt that the Union just wanted their dues and was not interested in keeping them informed. [*FOIA Exemptions 6, 7(C), and 7(D)*] the Union never even contacted him when he started working for the Employer in 1994 and he felt that "a newsletter now and then just doesn't do it."

The Instant Charges

By letter dated January 17, 2001, the Employer "reminded" the Union that it had been three years since the parties had met to negotiate and, therefore, the Employer would assume the Union no longer wished to represent the employees unless it informed the Employer otherwise. The Union responded with a request to bargain and the parties met to negotiate on several occasions in the months of February through August. On about May 2, two days before the parties were to meet for their next bargaining session, the Employer implemented an across-the-board wage increase and five unit employees received promotions. At the May 4 bargaining session, the Employer stated its position that

it would not discuss any economic items until the parties reached agreement on non-economic items.

Sometime in June or July, the Union sent a letter to all eight bargaining unit employees informing them that it was bargaining on their behalf for a new contract. This was the first contact the Union had with the employees since its visit to the Employer's facility after the 1996 Supreme Court decision. The letter charged that the Employer was refusing to present or bargain over economic proposals. In addition, the letter discussed the Union's ability to find the employees better work and higher paying jobs elsewhere.

Within a few days after receiving this letter, an employee circulated a petition among the unit employees stating that the employees did not wish to be represented by the Union. All eight unit employees signed the petition within a three-day period. The petition was delivered to one of the Employer's owners on July 26.

[*FOIA Exemptions 6, 7(C), and 7(D)*] the employees signed the petition in response to receiving the Union's letter. [*FOIA Exemptions 6, 7(C), and 7(D)*] during employees' discussions about the letter, in which the employees agreed that the Union's sudden reappearance was "kind of a joke," the employees decided to sign a petition to get rid of the Union. [*FOIA Exemptions 6, 7(C), and 7(D)*] the letter bothered him because it seemed that the Union was trying to pull the employees away from the Employer. [*FOIA Exemptions 6, 7(C), and 7(D)*] the letter was "the last straw" and said he didn't want a letter from the Union if it wasn't going to do anything for him. That employee subsequently circulated the petition.

In early August, the Employer sent a letter to the Union stating that it was suspending the negotiations and that it planned to conduct a poll as it believed the Union did not represent a majority of employees. The Union filed an unfair labor practice charge. In mid-August, the Employer responded to numerous information requests and attended one bargaining session. The Employer explained that it had decided to continue negotiating and to postpone its poll pending the outcome of the unfair labor practice charges. By letter dated September 6, however, the Employer informed the Union that it had received additional complaints from employees regarding its continued relationship with the Union and that it planned to suspend any further negotiating sessions pending the outcome of the poll that it planned to conduct on September 13. The Employer sent this same letter to the Union the following

day in response to the Union's inquiry as to whether the Employer would attend the September 12 bargaining session. The Employer never attended that session.

On September 13, the Employer conducted a poll of the unit employees. Eight employees voted against Union representation Union and one voted in favor of representation.[4] On September 17, the Employer filed an RM petition. It has not responded to the Union's subsequent bargaining requests.

On October 4, the Union filed the amended charge in the instant case alleging that the Employer violated Section 8(a)(5) and (1) of the Act by implementing a unilateral wage increase and granting promotions; failing and refusing to bargain over economic terms and conditions; failing to grant a Union agent access to conduct a safety and health inspection; failing to provide requested information; failing and refusing to meet and bargain since September 6; and withdrawing recognition from the Union. The Region has determined that all allegations other than the withdrawal of recognition allegation have merit.

ACTION

We conclude that the Employer lawfully withdrew recognition from the Union because it possessed evidence of actual loss of the Union's majority support that was untainted by its unfair labor practices.

Under Levitz Furniture Company of the Pacific,[5] an employer may lawfully withdraw recognition from an incumbent union based upon proof that the union had lost majority status at the time of the withdrawal. An employer sustains its initial burden of proof of establishing "actual loss" if it presents valid evidence, such as a petition, that establishes that a numerical majority of unit employees no longer desire representation by the incumbent union.

It is well established that an employer may not rely upon an employee petition to withdraw recognition where it has committed serious unremedied unfair labor practices that tainted employee expressions of disaffection.[6] To

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[4] One new employee was hired after the petition was circulated and before the poll to bring the unit total to nine employees.

[5] 333 NLRB No. 105 (2001).

[6] 333 NLRB No. 105, slip op. at 1, fn. 1.

establish that an employee expression of disaffection was tainted by an unfair labor practice, the Board requires "proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support."[7] The Board has identified the following factors as relevant in evaluating this causal relationship:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.[8]

Here, the Employer withdrew recognition from the Union based upon an employee petition signed by the entire unit.[9] Thus, at the time of its withdrawal of recognition, the Employer possessed evidence establishing the Union's actual loss of majority support. As set forth above, however, the Employer may not rely upon this evidence if it was tainted by the unilateral wage increase and promotions, and/or by the refusal to bargain over economic issues, unfair labor practices which occurred prior to the petition and were known by the employees.

We conclude that, although recent unfair labor practices are close in time to the withdrawal, there is no

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[7] Lee Lumber and Building Material Corp., 322 NLRB 175, 177 (1996) (footnote omitted), affd. in part, remanded in part, 117 F.3d 1454 (D.C. Cir. 1997).

[8] Master Slack Corp., 271 NLRB 78, 84 (1984).

[9] The Employer effectively withdrew recognition from the Union by its letter dated September 6 informing the Union that it would engage in no further negotiations unless an Employer-conduct poll demonstrated majority support for the Union. See, e.g., Paramount Poultry, 294 NLRB 867 (1989)(effective withdrawal when employer first refused to bargain further pending the outcome of an employee decertification petition); Exxel-Atmos, 309 NLRB 1024, 1024 fn. 1, 1029 (1992)(effective withdrawal when employer refused to engage in formal negotiations until employees voted in an election). The Employer has acknowledged that it withdrew recognition from the Union and asserts that the withdrawal was based on evidence of actual loss of majority status.

causal connection between the Employer's unfair labor practices and the employee petition. As discussed above, employee disaffection in this unit first surfaced during the 1988 strike when a majority of the unit expressed to the Employer their dissatisfaction with the Union. Although the Employer was obligated to continue bargaining because the Board found it was not entitled to rely on this disaffection to withdraw recognition *after* the formation of the parties' agreement, the evidence establishes that this untainted disaffection never subsided but in fact continued throughout the years. [*FOIA Exemptions 6, 7(C), and 7(D)*] the Union's conduct during the 1988 strike and in the years following the strike caused continued disaffection.

Thus, [*FOIA Exemptions 6, 7(C), and 7(D)*] unit employees were angered by the Union's handling of the strike and dissatisfied with the contract accepted by the Union. [*FOIA Exemptions 6, 7(C), and 7(D)*] the employees resented the way the Union represented them during the pendency of the litigation leading to the Supreme Court decision, i.e., the Union's failure to communicate with the employees during that time.[10] Finally, employees [*FOIA Exemptions 6, 7(C), and 7(D)*] signed the petition in 2001 because they were angered upon learning that the Union was still attempting to represent them.

This evidence establishes that the Employer's unfair labor practices did not taint the petition. Rather, the employees' disaffection preceded and was unrelated to the unfair labor practices. Thus, the Employer was entitled to rely on the employee petition as objective evidence of the Union's actual loss of majority status, and to withdraw recognition based upon it.

Accordingly, the withdrawal of recognition allegation should be dismissed, absent withdrawal.

B.J.K.

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[10] It does not appear that any of the disaffection experienced by employees following the Supreme Court decision was caused by the unlawful withdrawal of recognition that was the subject of that decision, or the alleged unfair labor practices referred to in note 3, supra.