

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

Advice Memorandum

DATE: September 10, 2004

TO : Ronald K. Hooks, Regional Director
Region 26

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

SUBJECT: Memphis Compress Company
Case 26-CA-21655

530-4080-5012-0100
530-4080-5012-6700
530-4080-5084-5000

This Levitz¹ case was resubmitted for advice to determine whether the Employer has proven by a preponderance of all the evidence that the Union suffered an actual loss of majority employee support.

We conclude that the evidence establishes that employees who were Union members at the time they signed petitions entitled "I want out of the Union" and "I would like to get out of the Union" intended to repudiate the Union, rather than merely to resign their Union membership. Since these employees combine with other employees to constitute a majority of the bargaining unit, we conclude that the Employer did not unlawfully withdraw recognition from the Union.

FACTS

As set forth in more detail in the Advice memo in this case dated July 23, 2004, the Employer withdrew recognition from the Union in reliance on employee signatures on four petitions. Two petitions were entitled "Vote the Union Out," one petition was entitled "I want out of the Union" and the final petition was entitled "I would like to get out of the Union." Out of a 79-person bargaining unit, 32 unit employees incontrovertibly repudiated the Union by signing these petitions. However, ten employees who were Union members signed the latter two petitions providing that they wanted "out of the Union."² We concluded that the

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

² During the post-Advice investigation, the Region identified one additional Union member who signed an ambiguous petition.

intention of these individuals, who comprised a determinative number of petition signers for Levitz purposes, as evidenced by the petition was unclear. They could have intended to withdraw support from the Union, or they could have intended merely to resign their Union membership.

[FOIA Exemption 5

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[FOIA Exemptions 6, 7(C) and 7(D)

individuals circulating the petitions told them that by signing they would indicate that they did not "want[] the union anymore," or that they would be "getting the union out." [FOIA Exemptions 6, 7(C), and 7(D)] the petition circulator explained to them that they could improve their wages and benefits if employees "get out of the union."³ No employee reported that the topic of their Union membership arose during any conversation.

As explained in the prior memorandum, the petition campaign arose in the context of employee dissatisfaction with the state of collective-bargaining negotiations concerning wages, insurance benefits and backpay. Union steward Samuel Gatewood, who did not sign a petition, stated that he understood that the petitions concerned "not being represented by the union." Union steward Edward Abram similarly stated that he understood that the petition (which he had not seen) "was to get the union out." And UAW International Representative Danny Boren stated that an employee told him the petitions were "to get rid of the union."

ACTION

We conclude that a preponderance of all the evidence establishes that eight employee-Union members who signed facially ambiguous petitions intended to withdraw their

³ The ninth employee did not provide probative evidence explaining the circumstances surrounding her signature.

support from the Union, rather than merely to resign from the Union. Accordingly, since a majority of employees expressed their intention to repudiate the Union, the Employer lawfully withdrew recognition.

Under Levitz, an employer that withdraws recognition from an incumbent union bears the burden of proving by a "preponderance of all the evidence," including any counter evidence of union support, that the union suffered an actual loss of majority support at the time of the withdrawal of recognition.⁴ Proof of loss of an incumbent union's majority support may be established by an anti-union petition, but it does not require any particular "magic" words. Even artless wording on the face of a petition may indicate an employee's intentions, in combination with evidence establishing that the basic thrust of the group message is the repudiation of the Union as bargaining representative.⁵

Here, the objective evidence establishes that a majority of 40 employees in a 79-person unit signed the anti-Union petitions with the intention of revoking their support for the Union. As set forth above, four employees demonstrated their intention to repudiate the Union when they signed petitions in response to explanations essentially that their signature would be used to "get the Union out." Thus, the Union's continued majority status depends on the intentions of the other Union members who signed petitions stating that they wanted to get "out of the Union." [FOIA Exemptions 6, 7(C), and 7(D)

] they wanted to "get out" or "come out" of the Union because of their perception that this would lead to improved wages and benefits. This outcome, of course, has nothing to do with membership or non-membership in the Union; rather, it is a commentary on the Union's efficacy at the bargaining table. Thus we conclude that these four employees intended to withdraw support from the Union out of frustration with the Union's perceived failures at the bargaining table. This determination is buttressed by the fact that none of the employees discussed their Union membership with the petition solicitor at the time they were asked to sign. Moreover, unit employees, Union

⁴ Levitz, 333 NLRB at 725 and n.49.

⁵ The inquiry here is analogous to a determination as to whether, under the totality of circumstances, the language on an employee's signed union authorization card clearly reflects the intent of the signer to support the Union. Cumberland Shoe Corporation, 144 NLRB 1268 (1963).

stewards and even a UAW international representative shared the common understanding that the petitions were circulated in order to get rid of the Union. Thus, the preponderance of all the evidence reliably indicates that a unit majority of 40 employees withdrew support from the Union.

It is not relevant that the Employer, at the time it withdrew recognition, was not privy to the specific conversations that led employees to sign the petitions. The Levitz "actual loss" standard does not rely on an employer's subjective understanding or good faith; rather, it simply assesses whether a unit majority revoked support for the Union.⁶ Further, we conclude that the evidence supporting such a revocation is reliable, despite the Employer's subsequent grant of improved wages and benefits to these same employees, as well as others. Our conclusion is predicated upon the employees' factual responses [*FOIA Exemptions 6, 7(C) and 7(D)*] to objective questions that probed the circumstances surrounding their decision to sign a petition. Our determination is not dependent on responses to general questions about their intent, which could more readily have led employees to offer subjective, goal-oriented answers colored by their recently improved wages and benefits.

Since a majority of unit employees repudiated the Union, the Region should dismiss the Section 8(a)(5) withdrawal of recognition charge, absent withdrawal.

B.J.K.

⁶ Levitz, 333 NLRB at 724-25.