

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

Advice Memorandum

DATE: July 23, 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 submitted for advice as to whether the Employer lawfully withdrew recognition from the Union based on employee signatures on petitions entitled "Vote Out the Union," "I want out of the Union," and "I would like to get out of the Union."

We conclude that signatures on the two petitions indicating a desire to "get out" of the Union are ambiguous, because employees could have intended either to repudiate the Union or to resign from Union membership. Consequently, it currently is not possible to determine whether the Union suffered an actual loss of majority status. [FOIA Exemption 5

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FACTS

Memphis Compress Company warehouses cotton at five locations in Memphis, Tennessee. Since the 1950's, United Automobile Workers, Local 6519 has represented a unit of the Employer's 79 production and maintenance employees. The most recent contract expired on January 31, 2003. Since then, the parties have been operating under an extension of that contract. The parties have met four times in an unsuccessful attempt to negotiate a new agreement.

Dissatisfied with the Union's inability to secure a favorable contract, in the spring of 2004,² unit employee

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

² All dates are in 2004 unless specified otherwise.

O.C. Mayes asked the Employer's Vice President and General Manager Robin Coffman how to get rid of the Union. Coffman replied that it would require a petition signed by a majority of the employees.

Mayes and unit employee Albert Dear subsequently circulated four petitions among the unit employees located at the Employer's five warehouses. One of those petitions was titled "Vote Out the Union" and was signed by nine employees on April 9. A second petition, also titled "Vote Out the Union," was signed by 12 employees between April 12 and 14. A third petition has the heading "I want out of the Union" and was signed by 12 employees between April 8 and 12.³ Four signers of that petition were dues paying members of the Union. The last petition, titled "I would like to get out of the Union," was signed by eight employees on April 8. Five of those eight employees were dues paying members of the Union.⁴

The circumstances under which Mayes and Dear circulated the petitions are unclear. It is unknown which employee circulated which petition or petitions. Some employees contacted by Mayes state that the petition was blank when they signed it; other employees, including Mayes himself, state that "Vote out the Union" was at the top of the petition they signed. Employees variously state that Mayes told them the petition was to "vote out the Union," "to get out of the Union," and to "get rid of the Union." Mayes states that he told employees the petition was "to get out of the Union ... that if we get enough people to sign the petition, we could vote the Union out ..." Dear states

³ This petition was signed by an additional employee, who was discharged prior to the Employer's withdrawal of recognition. Accordingly, his signature is not indicative of a loss of majority.

⁴ In addition, two employees submitted hand-written notes to Mayes. One note provides that the employee "no longer wishes to be represented by the Union ..." This employee was discharged prior to the Employer's withdrawal of recognition from the Union, and thus plays no role in this matter. The other note, dated more than two months prior to the anti-Union campaign, provides that the employee "would like to withdraw from the Union ..." The employee states that she wrote this note in order to resign from the Union in an unsuccessful attempt to get a non-unit position. Accordingly, the Region has concluded that this note does not establish that the employee unequivocally repudiated the Union on the date the Employer withdrew recognition.

that he told employees whom he contacted that the petition was "to get the Union out."

Mayes and Dear gave the Employer the petitions on or around April 13. On April 14, counsel for the Employer faxed the Union a letter stating the Employer "has received objective evidence that your Union in fact no longer represents a majority of the Company's unit employees." As a result, on that date the Employer withdrew recognition from the Union. Following the Employer's withdrawal of recognition, it implemented a new health insurance plan for unit employees, a 401(k) plan, and new work rules.

On June 18, the Region informed the Employer that it had found merit to the instant charge alleging an unlawful withdrawal of recognition. The Region explained that it was taking the position that the intent of nine employees who were Union members and who signed petitions entitled "I want out of the Union" or "I would like to get out of the Union" was ambiguous and could not be relied upon in withdrawing recognition.

Subsequently, the Employer contacted those nine employees. Seven of those employees signed new statements dated June 21 that indicated they did not want to be represented by the Union when they signed the petitions and that they still felt the same way. By letter dated June 24, the Employer advised the Union that even if its initial withdrawal of recognition was not proper, the Employer had additional objective evidence that the Union did not represent a majority of the Employer's employees.

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

] ⁵ The employees did not provide any evidence to the Region as to the circumstances under which they signed the original employee-circulated petitions, or what their intentions were by signing those documents.

ACTION

We conclude that it is not possible at this point to test the Employer's claim that the Union suffered an actual loss of majority status. [*FOIA Exemption 5*

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An employer that withdraws recognition from a union bears the burden of proving by a preponderance of objective evidence, including any counter evidence of union support, that the union suffered an actual loss of majority support at the time of the withdrawal.⁶ An employer sustains its burden of establishing "actual loss" if it presents untainted, valid evidence that establishes that a numerical majority of unit employees did not desire representation at the time of withdrawal and such evidence is not convincingly rebutted. However, an employer that withdraws recognition does so at its peril.⁷ 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.

Under this standard, the evidence is insufficient to ascertain whether the Employer is able to successfully defend against a Section 8(a)(5) complaint allegation by proving that the Union suffered an "actual loss" of majority employee support. Initially, we conclude that 21 employees repudiated the Union by signing petitions entitled "Vote Out the Union." On its face, this language unambiguously indicates that employees no longer desire Union representation. Unlike instances where employees seek an election or a revote, which does not clearly indicate any particular position with respect to the

⁵ [*FOIA Exemption 5*

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⁶ Levitz, 333 NLRB at 725.

⁷ Id.

union,⁸ the "vote out" language on the petitions here unambiguously demonstrates that signatory employees have made a decision and that they no longer desire Union representation.⁹

As set forth above, the Employer would have a complete defense to the Section 8(a)(5) charge if it can establish that the Union suffered an "actual loss" of majority employee support. A resolution of this question requires determining what the employees who signed the two petitions entitled "I want out of the Union" and "I would like to get out of the Union" were told when they signed the petition. Initially, these headings are facially ambiguous, in that they could be interpreted either as repudiating the Union or resigning membership.¹⁰ Since 11 of these petition signers were not members of the Union, it is reasonable to conclude that they intended their signature to constitute a repudiation of Union representation. However, it is unclear what the other nine Union members meant when they signed these petitions to "get out" of the Union. If these signatures were excluded, the Employer would be able to rely on only 32 signatures, which would not constitute a majority of the unit.

Clearly, however, the res gestae of the employees' anti-Union campaign was to repudiate the Union, not merely to reduce its membership rolls. [FOIA Exemption 5

.] Many of these employees have already signed statements on behalf of the Employer indicating that their intention was to repudiate the Union.

⁸ Cf. Laverdiere's Enterprises, 297 NLRB 826, 826-27 (1990) (decertification petition which was described as merely seeking a "revote" did not evidence loss of majority status), enf'd in pertinent part, 933 F.2d 1045 (1st Cir. 1991); Alpha Beta Co., 294 NLRB 228, 230 (1989) (employee petition requesting vote and revoking authorization cards did not express clear intent to repudiate union).

⁹ See Penn Tank Lines, Inc., Advice Memorandum in Case 12-CA-19746, dated July 15, 1999 (petition entitled "vote out the union" constitutes unambiguous repudiation of union).

¹⁰ See Vic Koenig Chevrolet, Inc., 321 NLRB 1255, 1260 (1996), enf'd in part, den. in part 126 F.3d 947 (7th Cir. 1997) (vote in which employees were asked "Do you wish to remain in the Union?" was ambiguous, and thus did not express unequivocal repudiation of union under good-faith doubt of majority status standard set forth in Celanese Corp. of America, 95 NLRB 664 (1951)).

However, as the Region has concluded, the Employer failed to provide the employees with Johnnie's Poultry¹¹ safeguards. The Employer's conduct thus calls the statements' reliability into question. Nonetheless, these employees may be reluctant to respond to a direct question under oath, which may contradict their previous statements to the Employer. [FOIA Exemption 5

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B.J.K.

¹¹ Johnnie's Poultry Co., 146 NLRB 770, 775 (1964), enf. den. on other grounds 344 F.2d 617 (8th Cir. 1965).