

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

Advice Memorandum

DATE: May 29, 2007

TO : Rochelle Kentov, Regional Director
Region 12

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

SUBJECT: Central Locating Service, Ltd.
Case 12-CA-25173

530-4080-0125-0000

530-4080-5084-5000

This Levitz¹ case was submitted for advice as to whether: (1) the language on three disaffection petitions demonstrates the signers' intent to repudiate Union representation; (2) the Employer provided unlawful assistance by permitting two employees to travel in company vehicles to solicit employees to sign a disaffection petition during company time; and (3) the Employer's involvement, under all the circumstances, tainted the majority-based disaffection petitions and thereby eliminated the Employer's privilege to withdraw recognition from the Union.

We conclude that complaint should issue, absent settlement, alleging the Employer violated Section 8(a)(1) and (5). While the petition language sufficiently demonstrates the signers' intent to repudiate the Union as their bargaining representative, the Employer's unlawful assistance by permitting two employees to travel in company vehicles to solicit other employees to sign a disaffection petition during company time violated Section 8(a)(1). Further, because the Employer's unlawful 8(a)(1) conduct directly related to obtaining eight signatures on one of the disaffection petitions, those signatures were tainted and the Employer was not privileged to rely on them to establish actual Union loss of majority support under Levitz. Therefore, its withdrawal of recognition violated Section 8(a)(5).

FACTS

I. Background

Central Locating Services, Ltd. (Employer) is retained by contractors to locate underground utility lines to prevent damage during excavation and to enable the installation of new utility lines. Electrical Workers IBEW

¹ 333 NLRB 717 (2001).

Local 108 (Union) represents a unit of 50 locator employees who work in six western Florida counties: Sarasota, Manatee, Hillsborough, Polk, Pinellas, and Pasco. In the relevant time period, nine unit employees were Union members. The parties' most recent collective-bargaining agreement was effective from October 19, 2003 to October 14, 2006.² The first bargaining session for a successor agreement was scheduled for October 11.

Troy Tucker is the district manager for the six-county area covered by the contract, and oversees nine supervisors. Two supervisors in Tucker's district include Ray Ledee, who supervises locators in Hillsborough and Manatee counties, and project locators in Manatee and Sarasota counties;³ and Joe Grosklos, who supervises locators in Sarasota county.

The Employer provides each locator with a Nextel radio phone, laptop, and company truck. Employees work alone and, generally, only see each other at safety meetings. Safety meetings are conducted by supervisors and occur weekly or monthly, depending on the county. At these meetings, supervisors provide employees with work updates and supplies.

The Employer's handbook states that company trucks are to be used only for business purposes and prohibits the use of company trucks for personal use.⁴ "Business purposes" include travel to and from a worksite, and employees have the option of parking the trucks at home or in the company parking lot. The Employer also has a no-solicitation policy which states, "Employees are not permitted to solicit for any purpose during their work time. Examples of solicitation are: membership or subscription for any public, private or charitable enterprise."

II. The Four Disaffection Petitions

On August 12, and continuing through October 4, a total of 27 bargaining unit employees signed four disaffection petitions. Each petition was signed by different locators who work in Sarasota, Manatee,

² All dates are in 2006 unless otherwise noted.

³ Project locators work at contractors' work sites until a project is completed, while other locators work on shorter projects on a case-by-case basis.

⁴ On September 16, the Employer fired a locator for driving his company truck while on suspension.

Hillsborough, Pinellas, and Polk counties.⁵ In light of our conclusion that eight signatures on the Hillsborough county petition were tainted, we are setting forth only the detailed facts regarding the solicitation of signatures for that petition. The solicitation of signatures for the other petitions will be mentioned as necessary to demonstrate the number of signatures the Employer relied upon in withdrawing recognition from the Union.

A. The Sarasota/Manatee Petition

In early August, Ed Cummings, a Sarasota locator, drafted and began to circulate the first disaffection petition in Sarasota and Manatee counties after receiving notice from the Union that the collective-bargaining agreement was due to expire.⁶ Cummings drafted the following language on the Sarasota/Manatee petition:

We, the undersigned of Sarasota and Manatee Counties, respectfully decline the offer of becoming members of the [Union]. This petition is to remove Sarasota and Manatee counties from such union.

When Cummings solicited signatures from the locators in Sarasota and Manatee counties, he told them that the petition was to "get out from under the Union" so that they could get "paid as much as the employees in other counties not under the Union who are eligible for a higher top-out [wage] rate." Between August 12 and 15, seven locators signed the Sarasota/Manatee petition.

On August 15, Cummings contacted his supervisor, Grosklos, and told him about the Sarasota/Manatee petition. On August 16, Cummings met Grosklos at a gas station, gave him the Sarasota/Manatee petition, and asked him to give it to district manager Tucker. A few days later, Cummings radioed Grosklos to ask about the status of the petition. Grosklos then called Tucker who told him that the petition had been forwarded but that to decertify the Union, it had to contain signatures from at least 50 percent of the locators in all six counties. After his conversation with Tucker, Grosklos relayed this information to Cummings.⁷

⁵ No locators from Pasco county signed a petition.

⁶ Cummings claims that, at the time he started circulating the petition, he did not know which other counties were covered under the collective-bargaining agreement.

⁷ Cummings states that this was the last time he spoke with Grosklos about the petition.

Sometime that summer, Frank Breden, a locator in Manatee County, was told by his supervisor, Ledee, that a petition was circulating in Manatee county to remove the Union. Breden asked Ledee to bring him the petition because he wanted to sign it. Ledee agreed but, for reasons unknown, never brought Breden the Sarasota/Manatee petition.

B. The Hillsborough Petition

On August 22, employee Jeff Hunt, a project locator supervised by Ledee in Manatee and Sarasota counties, began circulating a petition in Hillsborough county. Hunt had already signed the Sarasota/Manatee petition because he wanted the Union out. He drafted the Hillsborough petition after learning from Cummings that Grosklos said that all counties had to be involved in the petition effort. Hunt asked Cummings for the petition language. The Hillsborough petition is the same as the Sarasota/Manatee petition, except "Sarasota and Manatee Counties" is replaced with "Hillsborough County." Hunt successfully solicited Breden to sign the Hillsborough petition on August 22. Prior to working in Manatee county, Breden had worked in Hillsborough county for 17 years. He states he understood the purpose of the petition was to remove the Hillsborough county employees from under the Union. Hunt then asked Breden to circulate the petition in Hillsborough county.

In mid-September, Hunt received the Hillsborough petition back from Breden with no new signatures and decided to travel to Hillsborough to solicit signatures. According to Hunt, the only way to solicit signatures was to speak to employees directly because there was no occasion to speak to the Hillsborough locators on the Nextel and they did not attend the same safety meetings. Hunt contacted his supervisor, Ledee, and asked if he could attend the next safety meeting for the Hillsborough locators.⁸ When Ledee asked why, Hunt replied that he wanted to "talk to the guys about a few things." Ledee told him he could talk to the locators at the end of the next safety meeting on September 18, at around 3 p.m. Hunt's request to address employees at a safety meeting in another county was unprecedented. After speaking with Ledee, Hunt contacted Cummings and asked that he accompany him to the September 18 Hillsborough safety meeting.

⁸ Hillsborough county safety meetings typically occur once or twice a month.

On September 18, Hunt and Cummings drove in separate company trucks from Sarasota and Manatee counties, respectively, to the Hillsborough safety meeting at the Greyhound bus station parking lot in Tampa. They arrived around 3 p.m. as the safety meeting was concluding. Supervisor Ledee told the Hillsborough locators that a "fellow teammate" was coming to talk to them and they could stay or go. He then left.

Cummings began by stating that the purpose of the discussion was to "get out from under the Union." Hunt circulated a copy of a non-unit locator's paycheck to show that locators not under the contract received a higher rate of pay. Cummings then produced the Hillsborough petition, which only included Breden's signature at that point, and all eight employees at the meeting signed. The meeting lasted about 15 to 20 minutes after Ledee left. All employees, including Hunt and Cummings, were on company time during the meeting and did not clock out until after the meeting.

After obtaining the signatures, Hunt and Cummings returned to Manatee and Sarasota counties, respectively, in their company trucks. A round trip from Sarasota county to the Hillsborough safety meeting location, without traffic, takes about two hours. Neither Hunt nor Cummings clocked out for the day until they returned.

While Cummings was at the Hillsborough safety meeting, a fellow Sarasota locator, Patrick Maye, fielded an emergency work call from Cummings's area. When Maye could not reach Cummings, he contacted Grosklos who told him that Cummings had taken leave to go to Tampa. When Maye asked why, Grosklos replied: "[Cummings] requested to go up to Tampa to help you guys out with the petition you signed." Maye had signed the Sarasota/Manatee petition on August 15.

From August 22 through October 2, 12 locators signed the Hillsborough petition. Breden signed on August 22, eight employees signed at the meeting on September 18, and three employees signed on October 2.

C. The Pinellas Petition

On October 2 and 3, five locators from Pinellas county signed a petition. The Pinellas petition read: "We the undersigned locators of Central Locating Service Pinellas County no longer wish to be represented by a Labor Union." One of the signers was a Union member. It is unclear who solicited signatures for this petition.

D. The Polk Petition

On October 3 and 4, three locators from Polk county signed a petition. The Polk petition contained the same typed language as the Sarasota/Manatee and the Hillsborough petitions. It read: "We, the Undersigned respectfully decline the offer of becoming members of the [Union]. This petition is to remove Polk county from such [Union]." It is unclear who drafted the Polk petition, but it was circulated by one of its signers. When soliciting the other two signatures, he told them that the petition was to get rid of the Union.⁹

III. The Employer's Withdrawal of Recognition

Tucker received the four petitions, which contained a total of 27 signatures, at different times and forwarded each to the Employer's labor relations manager. The Sarasota/Manatee, Hillsborough, and Polk petitions, all contain the same typed language and were signed by a total of 22 employees. None of the signers of these three petitions were Union members. The Pinellas petition, with different language, was signed by five employees, one of whom was a Union member.

There is no evidence that any of the employees were actually told that the purpose of any of the petitions was for anything other than to get rid of the Union. One employee at the Hillsborough safety meeting testified that he thought the petition was to facilitate discussions between the Employer and Union regarding the disparity between Union and nonunion wage rates. There is no evidence that any other signers shared this employee's understanding of the petition's purpose. Except for the eight signatures obtained at the September 18 Hillsborough group safety meeting, the signatures were obtained individually.

By October 10, the Employer verified that 27 of the 50 unit employees had signed the petitions. By letter dated the same day, the Employer informed the Union that it was withdrawing recognition based on the four petitions signed by a majority of employees and that it was cancelling the first bargaining session that had been scheduled for the next day. The Employer does not rely on any verbal assertions or any other evidence of disaffection apart from the four petitions as the basis for withdrawing recognition from the Union.

⁹ The Polk county locators are not supervised by either Ledee or Grosklos.

ACTION

We conclude that a Section 8(a)(1) and (5) complaint should issue, absent settlement. While the petitions sufficiently demonstrate the signers' intent to repudiate Union representation, the Employer's unlawful assistance by permitting employees Hunt and Cummings to travel in company vehicles to solicit other employees to sign a disaffection petition during company time violated Section 8(a)(1). Because the Employer's unlawful 8(a)(1) conduct was directly related to obtaining eight signatures on the Hillsborough petition, the Employer was not privileged to rely on those signatures to demonstrate numerical loss of support for the Union. Therefore, the Employer violated Section 8(a)(5) by withdrawing recognition from the Union without demonstrating actual loss of majority support under Levitz.¹⁰

I. The Petitions Sufficiently Demonstrate the Signers' Intent to Repudiate Union Representation

In Levitz, the Board held that an employer may unilaterally withdraw recognition from a union only if it can show actual, numerical loss of majority support for the union based on objective evidence.¹¹ An anti-union petition signed by a majority of the employees is one such objective consideration.¹² The Board has found that "proof of loss of majority support does not require any particular words so long as the basic thrust of the group message is the repudiation of the union as the bargaining representative."¹³ Further, to determine a signer's intent, the Board looks at circumstances surrounding the signing of the petition, including what signers were told regarding the petition's purpose¹⁴ and the signers' stated reasons for signing a petition.¹⁵

¹⁰ 333 NLRB 717.

¹¹ Id. at 717.

¹² Id. at 725.

¹³ Industrial Waste Service, 268 NLRB 1180, 1186 (1984) (petition stating, "we don't want the Union" was sufficient to give employer a good-faith doubt as to union's majority status).

¹⁴ Highlands Regional Medical Center, 347 NLRB No. 120, slip op. at 3 (2006) (employer violated Section 8(a)(5) by withdrawing recognition based on petition because employees

We conclude that the four petitions sufficiently demonstrate the signers' intent to repudiate Union representation. The Pinellas petition, which has different language than the others, states: "We the undersigned locators of Central Locating Service Pinellas County no longer wish to be represented by a Labor Union." We agree with the Region that the phrase "no longer wish to be represented by the Union" clearly states the signers of the Pinellas petition no longer wanted the Union (or any other union) to represent them. Further, there is no evidence that the signers of the Pinellas petition were told or intended otherwise when they signed the petition.

The remaining petitions (Sarasota/Manatee, Hillsborough, and Polk) each had the following petition language:

We, the undersigned of [enumerated counties], respectfully decline the offer of becoming members of the [Union]. This petition is to remove [enumerated county/ies] from such union.

We conclude that while the petition language is arguably ambiguous, the surrounding circumstances including the petition's purpose, what signers were told, and what signers believed when they signed the petitions, all demonstrate that the signers intended to repudiate the Union.

Unlike the Pinellas petition, the language of the other three petitions does not clearly state that the signers no longer wanted the Union to represent them. The first sentence appears to concern the employees' obligation to become Union members. The second sentence states that the purpose is to remove a county or counties from the Union. As such, the petition language is arguably ambiguous because it could be interpreted as the signers' rejection of Union membership, and not necessarily of Union representation. However, repudiation of the Union does not

were told the petition's purpose was to obtain a decertification election).

¹⁵ Bridgestone/Firestone, Inc., 335 NLRB 941, 941 (2001) (employer did not violate Section 8(a)(5) by withdrawing recognition based on petition because, under the circumstances, the employee's verbal statements could only logically be interpreted to mean he wanted to avoid union membership and representation since he had transferred from a non-union shop and did not want to be in a union).

require any particular words and, when viewed in context, this language supports the conclusion that the petition was intended to repudiate Union representation. That there was no Union membership drive underway when the petitions were being circulated, and that none of the signers of these three petitions were Union members, support the interpretation of the petition language as repudiating Union representation rather than declining Union membership. In addition, the fact that Florida is a right-to-work state and employees cannot be required to be members of a labor organization to maintain their jobs further supports the conclusion that the signers' intent was not to decline membership but to repudiate the Union as their bargaining representative. For these reasons, we conclude that the petition language on the Sarasota/Manatee, Hillsborough, and Polk petitions was sufficient to show the signers' intent to repudiate Union representation.

Besides the petition language itself, the circumstances surrounding the signing of these three petitions supports the conclusion that the signers intended to repudiate Union representation. First, the uncontroverted evidence shows that the petition drive was started for the purpose of getting rid of the Union. Hunt, who drafted and circulated the first petition, stated that he did so because the Union was not doing anything for employees, the contract was coming up, and he wanted to get rid of the Union. Further, there is no evidence that the petition signers were told that the petition's purpose was for any other reason than to repudiate the Union as the employees' bargaining representative. Hunt stated that when soliciting signatures, he told employees the petition's purpose was to "get out from under the Union." Hunt and Cummings solicited signatures for the Hillsborough petition and, during the safety meeting, told locators that they should sign the petition if they wanted to get rid of the Union.¹⁶ The solicitor of the Polk petition also claims he wanted to get rid of the Union and told the other two signers this when soliciting signatures. In these circumstances, the solicitors' actions, as well as evidence of the signers' intent, all support the conclusion that the petitions were intended to repudiate the Union.

¹⁶ Only one signer was confused as to the petition's purpose, apparently believing the petition was going to be shown to both the Employer and Union to facilitate discussions regarding wage disparities. However, there is no evidence that the seven other signers believed, or that any of the eight were told that the petition was for some other reason than to get rid of the Union.

II. The Employer Unlawfully Assisted Employees with Obtaining Eight Signatures on the Hillsborough Petition

An employer may not solicit, support, or assist in the initiation, signing, or filing of an employee decertification petition or another union repudiation document.¹⁷ The Board has found that an employer's involvement beyond providing "ministerial aid" in a decertification effort unlawfully interferes with employees' Section 7 rights in violation of Section 8(a)(1).¹⁸ Specifically, in Lee Lumber and Building Material Corp., the Board found that the employer violated Section 8(a)(1) by providing unlawful assistance in the form of time off with pay, reimbursed parking expenses, and transportation to employees who filed a decertification petition with the Board.¹⁹

We conclude that the Employer provided unlawful assistance by permitting employees Hunt and Cummings to travel in company vehicles to solicit signatures from other employees on a disaffection petition during company time in violation of Section 8(a)(1). On September 18, Hunt and Cummings traveled to the Hillsborough safety meeting in separate company vehicles and spoke with a group of assembled employees for at least 15 minutes. The employees were all on company time during this meeting. After the meeting, Hunt and Cummings traveled back to Manatee and Sarasota counties, respectively, and did not clock out until they returned. Supervisors Ledee and Grosklos subsequently approved all the employees' time after 3 p.m. at the September 18 meeting, as well as Hunt's and Cummings's travel time of more than two hours to and from

¹⁷ See, e.g., Eastern States Optical Co., 275 NLRB 371, 372 (1985) (unlawful for an employer to lend more than minimal support and approval to the securing of signatures on a decertification petition); Central Washington Hospital, 279 NLRB 60, 64 (1986) (holding that same standard applies to disaffection and decertification petitions) (citations omitted).

¹⁸ See Placke Toyota, Inc., 215 NLRB 395, 395 (1974) (employer's involvement in securing signatures and the filing of the decertification petition went beyond ministerial aid in violation of Section 8(a)(1)).

¹⁹ 306 NLRB 408, 410 (1992), relevant portion unaffected by supp. dec., 322 NLRB 175 (1996), affirmed and remanded in part by 117 F.3d 1454 (D.C. Cir. 1997).

the meeting. This conduct is very similar to that which the Board found unlawful in Lee Lumber, where the employer paid employees for their time spent on a decertification effort, and provided a driver and vehicle to the Board's Regional office to file the petition.²⁰

That the Employer encouraged Hunt and Cummings's decertification activity is further supported by its failure to discipline either employee for violating its no-solicitation policy or its policy against personal use of company trucks. The Employer's no-solicitation policy clearly prohibits employees from "soliciting for any purpose during their working time." Hunt and Cummings traveled to Hillsborough for the sole purpose of soliciting signatures on a disaffection petition and succeeded at getting eight employees to sign the petition by the end of the meeting. Supervisor Grosklos's statement to Maye that Cummings "went up to Tampa to help you guys out with the petition" demonstrates the Employer's knowledge of Hunt and Cummings's solicitation efforts during work time.

As for the Employer's policy against the personal use of company vehicles, supervisors Ledee and Grosklos approved Cummings's and Hunt's travel time to and from the Hillsborough meeting. That neither Hunt nor Cummings works or attends safety meetings in Hillsborough county further supports the conclusion that they were using their vehicles for personal purposes, as they would have had no business purpose to be in Hillsborough. The Employer's unprecedented support for this use of a company vehicle to assist the decertification effort is in contrast to its discharge of an employee for violating this policy just two days prior to the Hillsborough safety meeting. Under all the circumstances, we conclude that the Employer's permission and encouragement of Hunt and Cummings's decertification efforts amounted to unlawful assistance in violation of Section 8(a)(1).

III. The Employer Cannot Rely on the Tainted Eight Signatures on the Hillsborough Petition to Show Actual Loss under Levitz

Having concluded that the Employer's unlawful 8(a)(1) conduct was directly related to obtaining the eight signatures on the Hillsborough petition, the Employer was not privileged to rely on those signatures to establish the numerical loss of support for the Union. Without these eight signatures, we conclude the Employer has failed to demonstrate actual loss of support for the Union as

²⁰ Id. at 418.

required under Levitz,²¹ and thus its withdrawal of recognition violated Section 8(a)(5).

An employer may not rely on a disaffection petition that is tainted by its own unfair labor practices to withdraw recognition from a union or it also violates Section 8(a)(5).²² In Lee Lumber, the Board found the employee petition tainted because without the employer's unlawful assistance, it might not have been filed.²³ Similarly, if the Employer here had not allowed Hunt and Cummings to use company vehicles to travel to Hillsborough to address employees on company time, there is no evidence that they still would have obtained those eight signatures on the Hillsborough petition.

Moreover, the evidence establishes that the Employer knew of and assisted with the decertification effort even prior to September 18, lending further support to a conclusion that those signatures were tainted.²⁴ By August 12, supervisor Grosklos had received the Sarasota/Manatee petition from Cummings and was told that the petition had been circulated to get rid of the Union. A few days after receiving the petition, Grosklos and district manager Tucker engaged in email communications regarding the decertification effort. During that exchange, Tucker told Grosklos that the petition needed signatures from at least 50 percent of the locators in all six counties covered by the contract. Grosklos communicated this to Cummings. Further, although Grosklos claims that he did not know that Cummings had traveled to Hillsborough on September 18, employee Maye's testimony shows that he did. Maye stated that when he spoke to Grosklos that day, Grosklos told him

²¹ 333 NLRB 717 (2001).

²² See RTP Co., 334 NLRB 466, 468 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003) (internal citations omitted); Central Washington Hosp., 279 NLRB at 64.

²³ 306 NLRB at 410 n.13 ("But for the employer's granting time off (with pay) for involved employees, the petition might not have been filed.") Citation omitted.

²⁴ Samaritan Medical Center, 319 NLRB 392, 397 (1995) (in finding unlawful assistance, Board relied on employer's knowledge of employee's solicitation of petition).

that Cummings had driven to Tampa to "help locators with the petition they signed."²⁵

Supervisor Ledee also knew of the decertification effort at the time he granted Hunt permission to address the Hillsborough locators at the September 18 safety meeting. Employee Breden states that sometime that summer, Ledee approached him and told him that a petition was circulating in Manatee county. While Breden could not specify a date, the facts show that this conversation must have occurred between August 12, when the Sarasota/Manatee petition began circulating, and on August 22, when Breden received the Hillsborough petition from Hunt and signed it. Thus, although Ledee denies knowing Hunt's purpose for wanting to speak to the Hillsborough employees, he knew about the disaffection petition at least a couple of weeks before Hunt asked him for permission to address the employees at the upcoming Hillsborough safety meeting. Ledee admits that such a request was unprecedented which makes it more unlikely that he would grant Hunt's request without knowing his purpose. In all, the evidence is sufficient to show that Employer agents Tucker, Grosklos, and Ledee all had knowledge of the decertification movement, and two of them specifically knew about Hunt and Cummings's purpose for going to the Hillsborough safety meeting on September 18.

Based on the above, we conclude that the eight signatures on the Hillsborough petition that were obtained on September 18 directly resulted from the Employer's unlawful assistance in the form of knowingly allowing employees Hunt and Cummings to travel to Hillsborough in company trucks for the sole purpose of soliciting signatures on company time. The extent of the Employer's unlawful involvement tainted the eight signatures on the Hillsborough petition and, therefore, the Employer could not rely on these signatures to establish actual loss of support for the Union under Levitz. The Employer needed at least 25 signatures from a 50 person unit to withdraw recognition under Levitz. Without the eight tainted signatures, the Employer was only privileged to rely on 19 signatures which constitute substantially less than a majority, and thus, the Employer's withdrawal from the Union violated Section 8(a)(5). Based on this conclusion, it is not necessary to address whether the Hillsborough petition was tainted in its entirety by the Employer's unlawful 8(a)(1) conduct, since the tainted eight

²⁵ Maye's credibility is strengthened by the fact that he had signed the Sarasota/Manatee petition on August 15 in support of the decertification effort.

signatures are more than sufficient to establish the Section 8(a)(5) violation.²⁶

Based on the foregoing, we conclude a Section 8(a)(1) and (5) complaint should issue, absent settlement.

B.J.K.

²⁶ [*FOIA Exemptions 2 and 5*