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

Advice Memorandum

DATE: September 20, 2005

TO : Rosemary Pye, Regional Director
Region 1

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

SUBJECT: Young Women's Christian Association of
Western Massachusetts
Case 1-CA-42618-1

347-4001-2575-5000
347-4040-5001
530-4080-0175-8000

This Section 8(a)(5) case was submitted for advice regarding whether an employer's withdrawal of recognition from a certified union was unlawful when the withdrawal was based on evidence of loss of majority support that arose and was received after the parties reached agreement on an initial collective-bargaining agreement. We conclude that the Employer unlawfully withdrew recognition because it did so after the parties reached agreement on a collective-bargaining agreement, and thus while there existed an irrebuttable presumption of union majority status.

FACTS

International Union, United Automobile, Aerospace & Agricultural Workers Local 2322 ("the Union") became the certified bargaining representative of about 64 employees of the Young Women's Christian Association of Western Massachusetts ("the Employer") in October 2003. In early 2004, the Union and the Employer began bargaining for an initial collective-bargaining agreement. Between February and November 2004, they reached tentative agreement on several provisions, including a recognition clause with a unit description, a no strike-no lockout clause, union security and dues checkoff, management rights, vacations, nondiscrimination, and a grievance and arbitration procedure. As they reached agreement on individual provisions, each party initialed the provisions. They did not reach agreement on certain significant economic issues, such as wages and health insurance, until April 2005.

On about April 5, 2005, the Employer presented its final contract offer to the Union, which included provisions for wages and health benefits. Shortly thereafter, the Employer issued a memorandum to employees urging them to ratify the contract or risk facing the uncertainties of a strike. The Union initially scheduled a ratification vote for April 8, but postponed it until April

20 when fewer than 25 percent of the members appeared to vote. Between April 8 and April 20, the Employer issued a second memorandum to employees urging them to ratify the proposed contract, and the Union held several informational meetings for employees.

On April 20, the Union held the postponed ratification vote, and the voting employees ratified the contract. On that same day, a Union representative notified the Employer's counsel by telephone of the contract's ratification and acceptance. The Employer's counsel offered to draft a contract to be ready for signature within two weeks. On April 25, the Union notified the employees of the result of the vote and discussed steward selection. In early May, at the Employer's counsel request, the Union selected a date for an additional holiday; the parties had agreed to leave that selection to the Union's choice. On May 13, the Employer and the Union discussed, by email, contract implementation and the status of the draft contract.

Also on May 13, the Employer received 34 signed and dated cards from employees which stated that the employees no longer wanted Union representation. Those cards had been signed on the following dates: between April 14 and April 19, 19 employees signed cards; on April 20, the same day the Union accepted the Employer's contract proposal, 6 employees signed cards; and between April 21 and May 12, 9 employees signed cards.

By letter dated May 19, the Employer informed the Union that it would not execute the collective-bargaining agreement and that it was withdrawing recognition. The Employer stated that it had evidence in the form of 34 cards from the 64-person bargaining unit indicating that a majority of the unit employees did not want Union representation.

ACTION

We conclude that the Employer violated Section 8(a)(5) of the Act when it withdrew recognition from the Union after the parties had reached agreement on a contract because a conclusive presumption of majority support arose once the Union accepted the Employer's offer, forming a contract.[1]

[1] It is undisputed that the parties had reached an agreement, and there is no claim that the Employer refused to sign the contract upon the request of the Union, in violation of Heinz Co. v. NLRB, 311 U.S. 514 (1941).

As the Supreme Court stated in Auciello Iron Works, Inc. v. NLRB, it is settled that a conclusive presumption of majority status exists during the term of a collective-bargaining agreement, up to three years.[2] The Court in Auciello rejected an employer's argument that an employer may withdraw recognition after a contract is formed, but before the parties sign it, based upon a good-faith doubt.[3] The Court stated that the conclusive presumption of majority status arises "at the moment a collective-bargaining contract offer has been accepted."[4] Under well-established Board precedent, reaffirmed by the Board on remand in its Auciello decision, which was enforced by the First Circuit and affirmed by the Supreme Court,[5] once a union and an employer have reached an agreement on a contract, the employer may not unilaterally withdraw recognition from the union.[6] That a contract is unsigned or has not been reduced to a writing does not privilege an employer to withdraw recognition; while the irrebuttable presumption of majority support applies, the employer may not withdraw recognition.[7]

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[2] 517 U.S. 781, 785-786 (1996)(citing NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 290 n.12 (1972)).

[3] 517 U.S. at 787-788. In that case, the evidence giving rise to the employer's action existed before the contract was reached, and was known to the employer.

[4] Auciello, 517 U.S. at 791.

[5] Auciello Iron Works, Inc., 317 NLRB 364, 368 (1995), enfd. 60 F.3d 24 (1st Cir. 1995), affd. 527 U.S. 781 (1996).

[6] North Bros. Ford, 220 NLRB 1021, 1022 (1975)(employer unlawfully withdrew recognition after contract acceptance; evidence of union loss of majority support postdated acceptance). See also Belcon, Inc., 257 NLRB 1341, 1346 (1981) (employer unlawfully withdrew recognition after contract acceptance; employer relied upon conduct predating contract acceptance); Utility Tree Serv., Inc., 215 NLRB 806 (1974), motion to reopen record denied 218 NLRB 784 (1975), enfd. 539 F.2d 718 (9th Cir. 1976)(table)(employer unlawfully withdrew recognition after contract ratification and after union communicated contract acceptance to the employer; valid contract dated from the union's notification of its acceptance).

[7] North Bros. Ford, 220 NLRB at 1022, quoted in Auciello Iron Works, Inc., 317 NLRB at 373 n.5.

Here, the Employer unlawfully withdrew recognition after the contract was formed and after the irrebuttable contract term presumption of majority support arose. Thus, on April 20, before the evidence of loss of majority support was gathered and presented to the Employer, the Union accepted the Employer's contract offer. The Employer withdrew recognition on May 13 based on employee disaffection that did not constitute a majority until about three weeks after the contract was formed, when the irrebuttable presumption already was in place.[8] As the Board stated in North Bros. Ford,"[o]nce final agreement on the substantive terms was reached, and regardless of the status of any written instrument incorporating that agreement, [the employer] was not free to refuse to bargain even if it then has lawful grounds for believing that [the union] has subsequently lost its majority status."[9] Therefore, that withdrawal, under settled precedent, was unlawful.

The Employer's claim that Auciello is distinguishable because its withdrawal of recognition was based on an actual loss of majority rather than a good-faith doubt is without merit. What is crucial is that the Employer's withdrawal of recognition postdated the contract's acceptance, and thus postdated the point at which the irrebuttable presumption attached.[10]

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[8] The contract was formed, and the irrebuttable presumption arose on the Union's April 20 acceptance of the contract terms offered by the Employer. The cards giving rise to the Employer's claim were not submitted to the Employer until May 13, and the card majority was not attained until May 9.

[9] North Bros. Ford, 220 NLRB at 1022. See also Flying Dutchman Park, Inc., 329 NLRB 414, 417 (1999) (employer unlawfully refused to sign contract after the union had accepted the employer's contract offer; claimed preacceptance loss of support and post acceptance events did not negate the conclusive presumption of majority status).

[10] The Employer does not allege, and there is no evidence to suggest, that the contract was void from the outset. In Auciello, the Supreme Court did not consider the employer's suggestion that its contract was void from the outset due to loss of support that predated contract formation because, as the employer conceded, it had not preserved that question for review. 517 U.S. at 785. As the Board stated in Auciello, while the presumption of majority status was rebuttable before contract acceptance, neither the employer nor the employees sought to attack it. 317 NLRB at 371.

In addition, the Employer's reliance on Levitz[11] is misplaced. Under Levitz, an employer who, during a period when the presumption of majority support is rebuttable, withdraws recognition from the bargaining representative of its employees, must prove that the union had, in fact, lost majority support at the time of the withdrawal.[12] However, in Levitz, where the withdrawal occurred after the contract had expired, and before any new collective-bargaining agreement was reached, the irrebuttable contract term presumption had changed upon contract expiration to a rebuttable presumption.[13] By contrast, here, the parties had reached an agreement on the collective-bargaining agreement, and the conclusive presumption of majority status had attached. As Levitz indicates, the Board's preference for elections limits an employer's options for withdrawing recognition.[14]

The Board's limits on the Employer's options do not impair the employees' exercise of their Section 7 rights. To safeguard employees' free exercise of their Section 7 rights, in the processing of a representation petition, the Board requires that in order for a contract to be a bar under Appalachian Shale,[15] it must be signed.[16] This is so because a finding of contract bar necessarily results in the restriction of the employees' right to freely choose a bargaining representative.[17]

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[11] Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001).

[12] Levitz, 333 NLRB at 725. Rebuttal evidence may be produced to show that the employer's evidence is unreliable and/or that the union had majority support at the time of the withdrawal of recognition. Id. at 725 n.49. If such evidence is presented, the employer has the burden of proving actual loss by a preponderance of all the evidence, including the rebuttal evidence. Id.

[13] Levitz, 333 NLRB at 730.

[14] Levitz, 333 NLRB at 723, 727. See Auciello, 317 NLRB at 374 (permissible methods of employer self help are circumscribed).

[15] Appalachian Shale, 121 NLRB 1160, 1161 (1958).

[16] Seton Medical Center, 317 NLRB 87, 87-88 (1995).

[17] See NLRB v. Arthur Sarnow Candy Co., 40 F.3d 552, 557 (2d Cir. 1993); Waste Mgmt. of Maryland, 338 NLRB 1002, 1002 (2003).

After parties have reached agreement on a contract, the Board will still process a decertification petition if the contract has not been reduced to a writing that memorializes the parties' agreement as to significant terms and conditions of employment.[18] Thus, contract formation in itself is not a determining factor in whether a representation petition is barred.[19] The Appalachian Shale test ensures the speedy processing of representation petitions without requiring lengthy litigation, which would thwart the Board's policy of expediting elections.[20]

Here, although the Employer was not free to take unilateral action, the employees' Section 7 rights were subject to the protection of the Board's election processes. The unsigned contract is binding on the parties, but this collective-bargaining agreement would not have barred a representation petition, if one had been filed. It is undisputed that the unexecuted contract with several initialed provisions did not meet Appalachian Shale requirements.[21] In such circumstances, the employees could have opted to file a decertification petition if they had wished to be released from an agreement with a representative that they no longer supported. As was true for the employees in Auciello, the employees had "ample opportunity to initiate decertification of the Union but apparently chose not to do so."[22]

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[18] Terrace Gardens Plaza, Inc. v. NLRB, 91 F.3d 222, 226, 228 (D.C. Cir. 1996)(unsigned agreement is not insulated from election proceedings), enfg. 315 NLRB 749 (1994); De Paul Adult Care Communities, Inc., 325 NLRB 681, 682 (1998)(unsigned, ratified contract did not thwart the processing of a decertification petition where although parties had begun to implement its provisions, they had not formalized the contract's agreed-upon terms).

[19] De Paul Adult Care Communities, Inc., 325 NLRB at 682 (citing Auciello). See also Waste Mgmt. of Maryland, 338 NLRB at 1002 & n.3.

[20] Seton Medical Center, 317 NLRB at 88; Terrace Gardens Plaza, Inc., 91 F.3d at 227-228.

[21] Seton Medical Center, 317 NLRB at 87-88 (initialing of tentative agreements does not alone constitute signed document)(citing Appalachian Shale, 121 NLRB at 1161).

[22] Auciello, 517 U.S. at 791. The Auciello employees who had indicated a loss of support for the union to the employer before the contract was signed also could have filed a decertification petition during the period while the union

The Employer's argument that, by withdrawing recognition, it was fostering employee free choice as to their bargaining representative is rejected, as it was in Auciello, particularly where the employees had the option to file a decertification petition.[23] In Auciello, the Court "rejected the position that employers may refuse to bargain whenever presented with evidence that their employees no longer support their certified union," and it found "nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedoms."[24] Therefore, the Employer's asserted interest in employees' Section 7 rights does not undermine the irrebuttable presumption of majority status, and the Employer was not privileged to unilaterally withdraw recognition after it had reached agreement with the Union on the contract.

In sum, we conclude that a Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer unlawfully withdrew recognition after the parties reached agreement on a collective-bargaining agreement, and thus while there existed an irrebuttable presumption of majority status.

B.J.K.

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had a rebuttable presumption of majority support, but did not do so. Id.

[23] Id., 517 U.S. at 790 (citing Brooks v. NLRB, 348 U.S. 96, 103 (1954))(Court viewed with suspicion employer unilateral action claimed to be undertaken to protect employee Section 7 rights). The Employer here had, in earlier dealings with the Union, expressed a preference for the Board's electoral processes as a means of protecting employee Section 7 rights. Thus, in September 2003, the Employer had refused to voluntarily recognize the Union through a card check, stating that it preferred a Board-conducted election.

[24] Id., 517 U.S. at 790.