

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

Advice Memorandum

DATE: October 12, 2004

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: J.D. Eckman, Inc.

Cases 4-CA-32638, 4-CA-32850, 530-4080-0112
4-CA-32975 & 4-CA-33174 530-4080-5012-0100
530-4080-5012-6700
530-4080-5084-5000

The Region submitted these Section 8(a)(1), (3), and (5) withdrawal of recognition cases for advice concerning (i) whether the Union's majority status should be assessed under Levitz¹ on the date the Employer announced a future withdrawal or on the date it actually withdrew recognition; (ii) whether the Employer's post-announcement, but pre-withdrawal, unfair labor practices invalidate the evidence of employee disaffection; and (iii) whether misrepresentations made by employees circulating anti-Union petitions, as well as other factors, preclude the Employer from establishing that the Union actually lost majority employee support.

We conclude that the Union's majority status should be measured on the date the Employer withdrew recognition, rather than the date on which the Employer announced its intention to do so. We also conclude that the petition circulators' misrepresentations, together with other counter-evidence of employee support for the Union, preclude the Employer from showing that a valid majority of unit employees no longer supported the Union. Therefore, absent settlement, the Region should issue complaint alleging that the Employer's withdrawal of recognition violated Section 8(a)(5).

However, we conclude that the Region should not allege that the unfair labor practices which the Employer committed after announcing, but before implementing, its withdrawal of recognition coerced employees who would otherwise have reaffirmed their support for the Union from

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

doing so. Accordingly, the Region should not allege that these unfair labor practices invalidate the petitions.

FACTS

J.D. Eckman, Inc. (the Employer) repairs bridges and highways throughout Pennsylvania and in neighboring states. For approximately 30 years, until the fall of 2003,² the Employer belonged to the Pennsylvania Heavy & Highway Contractors Bargaining Association (the Association), a multi-employer bargaining group. As an Association member, the Employer was bound to successive collective-bargaining agreements with the United Steelworkers of America and its signatory locals, including Local 15253 (the Union). In addition, following a voluntary card check in September 1994, the Employer executed an agreement recognizing the Union as the exclusive Section 9(a) representative of its construction employees and truck drivers. The most recent contract expired by its terms on December 31.

The Employer typically performs its bridge and highway projects between March and November. Employees work in small crews led by working foremen and overseen by project superintendents.³ The Employer lays off most of its workforce over the Christmas and New Year holidays, although it retains some employees, usually on a voluntary basis, to work year-round. The Employer then recalls employees to work between January and April.⁴

By letter dated October 16, the Employer timely revoked the Association's authority to negotiate on its behalf.

On October 17, working foreman Jan Zimmerman contacted an information officer at the Region to inquire about decertification procedures. Around this date, the Employer's president, Mark Eckman, met with a group of employees, mostly working foremen, at the Employer's office. It is unclear whether Eckman called this meeting

² All dates are 2003 unless otherwise noted.

³ Working foremen are bargaining unit employees. The Region has concluded that the Employer's superintendents are statutory supervisors.

⁴ Except for contractual notice and hiring hall provisions, the Employer retained complete discretion to determine employee layoffs, new hires, and recalls.

of his own accord or did so in response to an employee request, but the meeting was apparently convened so employees could ask Eckman about benefits the Employer would offer if the Union were decertified. While there is limited evidence that employees discussed the anti-Union petitions among themselves at the meeting, which lasted 20 to 30 minutes, there is no evidence that Eckman instructed those in attendance to circulate the anti-Union petitions or that he otherwise initiated the anti-Union campaign.⁵ Eckman reportedly stated that he could offer benefits comparable to those the Union provided, but he declined to provide specifics when asked to do so, citing legal constraints. Some employees at the meeting evidently interpreted Eckman as suggesting that the Employer could present them with details of its benefits proposal if they obtained signatures from 30% of the bargaining unit employees.

Between October 20 and October 28, working foremen and employees circulated 16 petitions at the Employer's various jobsites. Though not worded identically, the petitions all unambiguously indicated that the signers no longer wanted Union representation. The petitions were circulated during working hours, and company vehicles and fax machines were utilized in this regard. In some cases, superintendents knew of and supported the petition drive, and there is limited uncorroborated evidence that Employer officials initiated or circulated the petitions. However, the Region has concluded that the Employer did not unlawfully assist the petition circulators.⁶

⁵ In this regard, the Region's investigation disclosed that employees had discussed getting out of the Union for some time before the events at issue arose.

⁶ The Employer fired employee Dale Weaver on September 21, shortly after reprimanding him and threatening him with discharge for distributing Union materials at his jobsite. The Region has concluded that, although this conduct violated Section 8(a)(3), it did not taint the anti-Union petitions, since it was directed only at Weaver and there is no evidence the Employer took similar action against any other employee.

One hundred fifteen employees signed the petitions. Applying the Steiny/Daniel⁷ eligibility formula, the Region determined that the unit contains 191 employees. Thus a majority of unit employees signed the petitions.

Although the petitions consistently and clearly indicated that their purpose was to remove the Union as the employees' bargaining representative, six employees stated that the petition circulators essentially told them the petitions were just to permit Eckman to propose a benefits package to them.⁸ Five of the six employees who signed the petition after being told the petition was just to allow Eckman to make a benefits proposal to them subsequently signed Union authorization cards, as set forth infra.

The Employer verified the petition signatures by comparing them against an employee roster. On October 31, the Employer gave the Union written notice that, based upon the "clear, objective evidence" of majority employee disaffection it had received, it would not recognize the Union upon expiration of the collective-bargaining agreement then in effect. The Employer added that, while it would recognize the Union for the remainder of the contract term, it would not negotiate for a successor agreement.

In late October or early November, Eckman traveled to the Employer's jobsites to inform employees of the

⁷ Steiny & Co., 308 NLRB 1323 (1992), and Daniel Construction Co., 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

⁸ Eight other non-signers similarly stated that petition circulators told them that signing would allow the Employer to propose a benefits package to them. [*FOIA Exemptions 6, 7(C), and 7(D)*]

withdrawal of recognition. He also told employees that he was preparing a benefits package comparable to the one the Union offered. During these meetings, several employees complained that they had been misled about the petition's purpose and questioned why they had not voted on whether to remain with the Union. Eckman replied that no election would be held, but that any employee who wished to add or remove his name from the petition could do so by contacting him or a designated employee, without fear of reprisal.

On November 18, Eckman mailed employees a "non-Union" benefits proposal that he indicated would take effect January 1, 2004. The Employer also asked that employees provide family data to enable the Employer to prepare more detailed benefits information. The Region has concluded that these communications would constitute direct dealing in violation of Section 8(a)(5) only if the Employer's withdrawal of recognition is found unlawful.

On December 18, the Union requested information about Eckman's proposed benefits package. The Employer denied the request, asserting that it had no duty to furnish the information because it concerned a period of time during which the parties would no longer have a collective-bargaining relationship. On December 19, the Employer held a meeting at which insurance company representatives explained the new benefits package to employees.

The Region has concluded that during November and December the Employer committed numerous other unfair labor practices. Thus, the Region has determined that Employer agents, including working foremen,⁹ violated Section 8(a)(1) by questioning employees about their support for the Union, asking employees why they had not signed a petition, asking employees whether they intended to stay with the Employer or with the Union, and stating that employees who sided with the Employer would receive Christmas bonuses. The Region has also concluded that the Employer violated Section 8(a)(3) because it based layoff and recall decisions on employees' responses to the foregoing questions, and withheld Christmas bonuses from 23 employees who failed to show "loyalty" to the company.

Also during November and December, the Union obtained signed authorization cards from 65 employees, including 19 from employees who had signed one of the anti-Union petitions. Although the Employer knew about the Union's

⁹ The Region has concluded that the working foremen involved in this conduct acted as Employer agents.

efforts in this regard, the Union never presented the authorization cards to the Employer. Instead, the Union filed a representation petition with the Region on December 30.¹⁰

The Employer instituted its new benefits package and ceased using the Union hiring hall on January 1, 2004. The Region would find these unilateral changes to be additional Section 8(a)(5) violations if the Employer's withdrawal of recognition is deemed unlawful.

The Region recommends that the Union's majority status be measured on January 1, 2004, the effective date of the Employer's withdrawal of recognition. The Region also recommends issuing complaint on the theory that the Employer's post-announcement unfair labor practices likely coerced otherwise favorably inclined employees from reaffirming their support for the Union. Thus, the Employer cannot rely on the petitions to establish that the Union had actually lost majority employee support as of January 1, 2004.

ACTION

We conclude that the Union's majority status should be assessed on the date the Employer actually withdrew recognition, and not on the date the Employer announced its intention to do so. We also conclude that petition circulators' misrepresentations, together with other counter-evidence of employee support for the Union, preclude the Employer from showing that a valid majority of unit employees no longer supported the Union. Therefore, absent settlement, the Region should issue complaint alleging that the Employer's withdrawal of recognition violated Section 8(a)(5).

However, we conclude that the Region should not allege that the Employer's post-announcement unfair labor practices prevent the Employer from relying upon the petitions as evidence that the Union lost majority employee support as of January 1, 2004.

- A. The Union's majority status should be measured on January 1, 2004, the date the Employer withdrew recognition from the Union.

¹⁰ Case 4-RC-20757. The petition is blocked by the instant unfair labor practice charges.

We conclude that under Levitz, the Union's majority status should be assessed on the date the Employer actually withdrew recognition from the Union, rather than on the date it announced its intention to do so. Thus, in Levitz, the Board stated that if a union contests an employer's withdrawal of recognition in a unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition.¹¹ Accordingly, the Union's employee support must be measured as of January 1, 2004.

B. The Employer cannot establish that the Union had actually lost majority employee support when it withdrew recognition on January 1, 2004.

We conclude that complaint should issue, absent settlement, alleging that the Employer's January 1, 2004 withdrawal of recognition violated Section 8(a)(5) because the evidence, taking into account the solicitors' misrepresentations and the subsequent Union authorization cards, does not establish that the Union had actually lost majority employee support on that date, as Levitz requires.

Levitz established a burden-shifting analytical model to determine the lawfulness of an employer's withdrawal of recognition. An employer that withdraws recognition from an incumbent union bears the initial burden of proving that the union suffered an untainted numerical loss of its majority status. The employer can establish this loss by various means, including an anti-union petition signed by a majority of unit employees. Once established, the General Counsel may present rebuttal evidence to show that the employer's evidence is unreliable or that the union in fact enjoyed majority support at the time of the withdrawal. The burden then shifts back to the employer to establish

¹¹ 333 NLRB at 725. See id. at 725, n.49 ("An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forth with evidence rebutting the employer's evidence."). See also Memorandum GC 02-01, "Guideline Memorandum Concerning Levitz," dated October 22, 2001, at pp.6-7 (explaining, inter alia, that Levitz reaffirmed the proposition set forth in AMBAC International, 299 NLRB 505, 506 (1990), that evidence relating to a union's majority status is evaluated as of the time of the employer's withdrawal).

"actual loss" by a preponderance of evidence standard. An employer that withdraws recognition does so at its peril; if the employer incorrectly assesses the evidence of the Union's loss of support, it will violate Section 8(a)(5) by withdrawing recognition.¹²

We conclude that the anti-Union petitions do not establish that a majority of unit employees disavowed the Union. As set forth below, a significant number of petition signers either acted pursuant to material misrepresentations by petition solicitors or subsequently signed Union authorization cards. When this is taken into account, number of valid decertification petition signatures falls to less than a majority of the unit.

The Board has held that the principles enunciated in Gissel¹³ regarding a union's demonstration of majority support are equally applicable to the demonstration of a loss of majority support. Thus, evidence purporting to show employee disaffection from a union, which is obtained by virtue of a material misrepresentation, will not be given effect. In Laverdiere's Enterprises,¹⁴ the Board held that the employer vice president's statements to several employees that a petition was "just for a revote" cancelled language on the petition disavowing the union. Thus, the employer was precluded from relying upon signatures so secured as objective considerations supporting its good faith reasonable doubt of the union's majority status.

Here, at least one employee who signed the petition and did not thereafter execute a Union authorization card

¹² Levitz, 333 NLRB at 725. See also Guideline Memorandum Concerning Levitz at p.2 ("An employer who withdraws recognition from an incumbent union, in the honest but mistaken belief that the union has lost majority support, should be found to violate Section 8(a)(5).").

¹³ NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

¹⁴ Laverdiere's Enterprises, 297 NLRB 826, 826-827 (1990), enfd. in relevant part 933 F.2d 1045 (1st Cir. 1991) (applying principles articulated in Gissel and Cumberland Shoe, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1965)). See also "Guideline Memorandum on Levitz" at pp.5-6 (among the relevant factors in assessing the bona fides of an employer's showing of "actual loss" is whether employees were misinformed about the petition's purpose).

was misled about the petition's purpose.¹⁵ He and a number of others were essentially told that the petitions' purpose was just to allow them to hear about the Employer's benefits proposal. Any cards signed under such circumstances should not be given effect.

In addition, Levitz permits an employer's evidence of actual loss to be challenged by pro-union evidence which exists prior to the employer's withdrawal of recognition.¹⁶ Here, 19 employees who signed the anti-Union petitions subsequently executed Union authorization cards prior to the Employer's January 1, 2004 withdrawal of recognition.¹⁷ Therefore, at least 20 of the 115 employees who signed the petitions either did so based upon a misrepresentation, revoked their petition signatures by executing Union cards prior to the Employer's withdrawal of recognition, or did both. Discounting these employees, the petitions contain only 95 signatures, less than a majority of the 191 unit employees.¹⁸ [FOIA Exemptions 2 and 5

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Accordingly, complaint should issue, absent settlement, alleging that the Employer's withdrawal of recognition was unlawful because the evidence does not establish that the Union had in fact lost majority support on January 1, 2004, as Levitz requires.

¹⁵ [FOIA Exemptions 2, 5, 6, and 7(C)

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¹⁶ See, e.g., "Guideline Memorandum on Levitz" at pp.6-7 (since Levitz allows an employer's evidence of "actual loss" of majority to be challenged, evidence such as pro-union petitions that could establish that the union retained majority employee support and that conflicts with the anti-union evidence relied on by the employer to justify its withdrawal may be relevant; such evidence is analyzed as of the time of the employer's withdrawal).

¹⁷ Five of these 19 employees are among the witnesses who testified that they were misled about the petition's purpose.

¹⁸ Assuming the Region obtains [FOIA Exemptions 6 and 7(C)], the petitions would contain only 94 valid signatures.

- C. The Region should not allege that the unfair labor practices which the Employer committed after announcing but before implementing its withdrawal of recognition taint the petitions on which the Employer based its announcement.

We conclude that the Region should not allege that the Employer's unfair labor practices, committed after receiving the petitions and announcing that it would withdraw recognition but prior to actually doing so, foreclose the Employer from relying upon the petitions as evidence that the Union had actually lost majority employee support as of January 1, 2004.

First, while it is well-settled that unfair labor practices committed prior to or contemporaneously with expressions of employee disaffection from a union may taint such a showing of loss of employee support,¹⁹ we are unaware of any Board case holding that evidence of employee disaffection that is not tainted by an employer's prior or contemporaneous unfair labor practices may be tainted by employer unfair labor practices committed after the evidence of anti-union employee sentiment has been received. Thus, we conclude that, in the absence of supporting Board precedent, this theory of violation is not viable.

Second, this theory -- that the Union likely would have obtained signed authorization cards from more unit employees but for the Employer's unlawful conduct between announcing and implementing its withdrawal of recognition -- would require the Board to issue a non-majority bargaining order. In First Legal Support Services, LLC,²⁰ however, the Board reaffirmed its adherence to established Board precedent holding that it lacks the remedial authority to do so. Therefore, because the Union only obtained authorization cards from 65 of the 191 unit employees prior to the effective date of the Employer's withdrawal of recognition, we conclude that this theory of

¹⁹ See, e.g., Master Slack Corp., 271 NLRB 78 (1984); Fruehauf Trailer Services, 335 NLRB 393, 394 (2001) (upholding ALJ's finding that employer's prior and contemporaneous unfair labor practices fatally tainted the anti-union petition, based upon which the employer withdrew recognition).

²⁰ 342 NLRB No. 29, slip op. at 1-2 (2004), endorsing Gourmet Foods, 270 NLRB 578 (1984).

Cases 4-CA-32638, et al.

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violation is unsupportable under extant Board law for this reason as well.

B.J.K.