

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

IROQUOIS NURSING HOME, INC.,

Case 03-CA-073221

and

1199 SEIU, HEALTHCARE WORKERS EAST

*Alfred M. Norek, Esq. (NLRB Region 3),
for the General Counsel*

*Raymond J. Pascucci, Esq. (Bond, Schoeneck & King, PLLC),
of Syracuse, New York, for the Respondent*

*Ross P. Andrews, Esq. (Satter & Andrews, LLP),
of Syracuse, New York, for the Charging Party*

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves the government's contention that an employer unlawfully withdrew recognition from its employees' union. The employer withdrew recognition on the strength of a petition rejecting the union and signed by a clear majority (90 of 132) of the bargaining unit employees.

The government does not claim that the employer engaged in conduct undermining the validity of the petition, or that the petition was not validly signed by a majority of the bargaining unit. Rather, the government asserts that the petition should not have been relied upon to prove the union's lack of majority support because at the time the employer withdrew recognition the petition's initial 28 signatures were more than six months old. The government contends that in the six months before withdrawal of recognition, while the petition continued to circulate, the union reinvigorated its representation efforts with the employees and this changed the circumstances at the workplace in a manner that undermined the reliability of the petition as an expression of a lack of support for the union.

For the reasons set forth herein, I conclude that the petition provided an objective and uncontradicted basis for concluding that the union lacked majority support at the time the employer withdrew recognition. Neither the timing of the signatures nor the circumstances during the course of the petition drive undercuts the evidence of lack of support demonstrated by the petition. Accordingly, I will recommend dismissal of the complaint.

STATEMENT OF THE CASE

On January 26, 2012, 1199 SEIU Healthcare Workers East (Union) filed an unfair labor practice charge against Iroquois Nursing Home, Inc. (Employer or Iroquois), docketed by Region 3 of the National Labor Relations Board (Board) as Case 03-CA-073221.

On June 25, 2012, based on an investigation into the charge filed by the Union, the Acting General Counsel (General Counsel), by the Regional Director for Region 3, issued a complaint and notice of hearing against the Employer alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The Employer filed an answer denying all violations of the Act.

A trial in this case was conducted August 9, 2012, in Syracuse, New York. In accordance with my ruling at the hearing, on August 23, 2012, the Employer filed a stipulation of fact agreed to by the parties, which is hereby admitted into the record as Respondent's Exhibit 7.¹ Counsel for the General Counsel, the Respondent, and the Union filed briefs in support of their positions by September 13, 2012. On the entire record, I make the following findings, conclusions of law, and recommended Order.

JURISDICTION

The Employer is a corporation with an office and place of business in Jamesville, New York, where it is engaged in the operation of a long-term health care facility. In conducting this operation the Employer annually derives gross revenues in excess of \$100,000. The Employer purchases and receives at its Jamesville, New York facility goods valued in excess of \$5000 from points outside the State of New York. The General Counsel alleges, the Employer admits, and I find that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Background

On May 1, 2008, the Union was certified by the Board as the collective bargaining representative of a bargaining unit of Iroquois's employees. The Union and Iroquois subsequently entered into a collective-bargaining agreement, effective December 15, 2008, and scheduled to expire no earlier than December 31, 2011, covering the terms and conditions of employment for the bargaining unit employees. As of January 2012, there were 132 employees employed in the bargaining unit. The agreement described the unit as follows:

¹In the stipulation, counsel for the Respondent represents that the parties have agreed to the stipulated facts set forth therein, which concern the monthly tally of employees paying union dues between January 2011 and January 2012. No party has objected to the factual assertions of the stipulation and therefore I accept the stipulation.

5 All full-time and regular part-time Certified Nursing Aides, Activity Leaders, Unit Secretaries, Service Aides, Food Service Workers, Cooks, Maintenance and Grounds employees, Housekeeping employees, Laundry employees, Clerks and Receptionists, employed by Iroquois at [its] facility [] located at 4600 Southwood Heights Drive, Jamesville, New York. . .

10 . . . The bargaining unit does not include Licensed Practical Nurses or other technical employees, Registered Nurses or other professional employees, casual employees, temporary employees, confidential employees, guards, supervisors, or any other employees.

15 The newly-certified Iroquois bargaining unit was initially serviced by Union Administrative Organizer Edward Ruiz for over two years. In the mid to latter part of 2010, he was replaced by administrative organizer Dennis Zgoda. By letter to the Employer dated July 18, 2011, the Union advised Iroquois that effective July 27, 2011, Zgoda was leaving the Union and that the new organizer would be Maria Revelles. While Revelles' appointment was effective July 27, she did not begin her duties until early August.

20 When Revelles reviewed the Union's files on the Iroquois unit before taking over as the administrative organizer, she found little evidence of union activity. She found

25 no grievances, no notes from bargaining no notes from labor-management [meetings] no notes from meetings. So then I figure out, you know, really there's nothing going on.

Employee Janet Straw testified that when Zgoda was the representative, the union bulletin board remained unchanged for months with outdated "long gone" events. Zgoda only visited the facility "a few times," perhaps three to five times.

30 *Revelles' tenure as administrative organizer*

35 Revelles took some steps to try to reinvigorate the unit and the union representation. She contacted Iroquois about taking a facility tour and took steps to exercise the Union's right under the contract to "orient" new employees with a presentation about the Union and an offer to have them join the Union.²

40 The Union distributed a newsletter to employees that featured a photograph and introduction from Revelles and provided her contact information. Revelles organized a "blitz" in which staff from the Union's Syracuse office spent a long weekend in early August telephoning and house-calling on every unit employee, and successfully contacting many or most of them.

45 Revelles began visiting the facility. She visited a couple of times a week in August and (although the record is unclear) a couple of times a month after that. Revelles continued to mail and distribute monthly newsletters to employees during the following six months. She made sure the bulletin board notices were changed and kept up to date.

²The parties' agreement provided that employees hired after January 1, 2008, must either join the Union (with an obligation to pay dues) or pay an agency fee not to exceed the cost of regular dues. Employees who were hired prior to January 1, 2008, retained the option of not being a member of the Union and paying neither dues nor an agency fee.

Revelles began announcing weekly union meetings and soliciting employees to attend through the newsletters, house visits, and telephone calls. However, there were never more than four employees who attended through January 2012. Revelles caused the Union to
5 distribute surveys to employees to ascertain what issues they were interested in emphasizing for bargaining. Revelles testified that the Union received back 40–50 surveys from employees. However, when Revelles established the bargaining committee she had to rely on the same four employees who attended union meetings. According to Revelles, “those [four] were the
10 members who were ready to come forward and wanted to join the bargaining committee.” There is evidence that one additional employee participated on the bargaining committee as well.

Revelles filed two grievances between August 2011 and January 2012, a number she considered low in comparison to other facilities she represented. She caused three unfair labor
15 practices to be filed by the Union, which, although settled without admission or finding of wrongdoing, resulted in reinstatement and backpay for an employee and a change to the Employer’s social media policy.

The labor agreement called for labor-management meetings “not less” than every other
20 month. Revelles conducted one such meeting in October, accompanied by one employee. (The contract permits up to four employee representatives.)

One of Revelles’ goals was to establish a functioning delegates system in the bargaining unit. Delegates, the Union’s name for what is typically known as a union steward, were
25 responsible for filing first step grievances, sitting in with coworkers during disciplinary meetings and generally serving as the “eyes and ears” of the administrative organizer. By Union procedures, delegates were given training by the Union in their duties and voted into the position by the bargaining unit.

According to Revelles, ideally there would be one delegate per shift per job, or
30 approximately eight to ten delegates in the Iroquois unit. When Revelles became the union representative, there was no elected delegate at Iroquois. One employee, Janet Straw performed some of the delegate duties, but she had never been elected or officially become a delegate, and based on her testimony felt untrained and not able to perform much of the
35 delegate duties. Straw began doing some of the delegate’s work while Ruiz and Zgoda were the unit’s organizers, and she had received two hours of training while working with Zgoda. In the summer of 2011, before he resigned, Zgoda had requested time from Iroquois management to conduct a delegate election among employees. The Employer agreed to two dates Zgoda requested but the election was never held and the matter dropped. Revelles worked with Straw
40 and involved her in numerous union activities, but as of January 2012, Straw had not received any additional formal delegates training (conducted periodically by the Union for prospective delegates from multiple units). She was never appointed or elected a delegate.

The petition for decertification

45 Beginning with signatures dated July 12, 2011, and ending with a signature dated January 25, 2012, a majority of the Iroquois bargaining unit employees signed a petition declaring they did not want to be represented by the Union.

The petition text was typed, with the name of the employer and the name of the Union written in by hand in parts that called for an employer or union name. The petition stated:

Petition for Decertification (RD)
Removal of Representative

5

The undersigned employees of Iroquois Nursing Home (employer name) do not want to be represented by SEIU 1199 (union name).

10

Should the undersigned employees make up 30% or more (and less than 50%) of the bargaining unit represented by SEIU 1199 (union name), the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether a majority of employees wish to be represented by this union.

15

Should the undersigned employees make up 50% or more of the bargaining unit represented by SEIU 1199 (union name), the undersigned employees hereby request that Iroquois Nursing Home (employer name) withdraw recognition from this union immediately, as it does not enjoy the support of a majority of employees in the bargaining unit

20

Employees' signatures, their printed name, and the date on which they signed were affixed to this petition.

25

A bargaining unit employee filed an RD (decertification) petition with Region 3 of the Board on September 14, 2011. A stipulated election scheduled for October 20, 2011, was cancelled by an October 5, 2011 order of the Regional Director, based on the unfair labor charges filed by the Union on October 4, 2011, that blocked the election. These unfair labor practice cases were the subject of a settlement approved by the Region on November 11, 2011, that resolved these unfair labor practices, and included a non-admission clause.

30

Beginning in December 2011, and into January, 2012, the employee decertification petition averring that the signers did not want to be represented by the Union was signed by additional employees.

35

As of January 26, 2012, 90 of the current employees out of a bargaining unit of 132 employees (or 68 percent) had signed the petition.

40

Broken down by month, 30 employees signed in July 2011, 23 employees signed in August 2011, two employees signed in September 2011, 22 employees signed in December 2011, and 12 employees signed in January 2012.³

45

³In some cases an individual signed the petition twice. For purposes of this description, the later signature is counted.

*Bargaining for a new labor
agreement; withdrawal of recognition*

5 The parties first met for bargaining for a new labor agreement on November 29, 2011. This was a short meeting, as three of the employee bargaining committee members were not present.⁴ The parties met again December 28, 2011. During that session the parties extended the labor agreement—scheduled to expire December 31—to January 18, 2012. On January 18, the parties agreed to extend the agreement a second time, until January 25, 2012. The Employer refused to extend the agreement beyond that date and the agreement expired.

10 On January 26, 2012, the Employer withdrew recognition from the Union as the bargaining unit's collective-bargaining representative, effective immediately. In a letter to the Union on that date, the Employer announced the withdrawal of recognition, noting that "[t]he collective-bargaining agreement between Iroquois and the Union expired on January 25, 2012" and stating that "Iroquois has been presented with objective evidence that a majority of bargaining unit employees no longer wish to be represented by the Union." It is undisputed that this "objective evidence" was the decertification petition signed by 90 of the 132 bargaining unit employees employed by Iroquois as of January 26, 2012.

20 **Analysis**

A. *Background precedent*

25 The precondition for a union's service as a bargaining unit's exclusive representative is the existence of majority support for the union within the unit. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996). This reflects "the Act's clear mandate to give effect to employees' free choice of bargaining representatives." *Levitz Furniture Co.*, 333 NLRB 717, 720 (2001). However,

30 [t]he Board has also recognized that, for employees' choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subjected to constant challenges. Therefore, from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.

Levitz, supra at 720; *Auciello Iron Works*, supra at 785–786.

35 The presumption of majority support is usually rebuttable, but in some periods of a collective-bargaining relationship it is conclusive. One such period is during the life of a collective-bargaining agreement that is not longer than three years duration.⁵ During a period when the presumption of majority support is rebuttable—i.e., when no labor agreement is in

⁴The Union claims employees were not permitted, or thought they may not be permitted, to leave work to attend. The Employer denies this. Resolution of this factual dispute would not affect my decision and I decline to resolve it.

⁵*Trailmobile Trailer, LLC*, 343 NLRB 95, 97–98 (2004) (Thus, it is a "long-established principle that a union enjoys an irrebuttable presumption of majority support during the term of a collective-bargaining agreement, up to 3 years").

effect or beyond the first three years of a long term agreement— an "employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." *Levitz*, 333 NLRB at 725. The Board in *Levitz* explained:

5 [A]n employer with objective evidence that the union has lost majority support—
 for example, a petition signed by a majority of the employees in the bargaining
 unit—withdraws recognition at its peril. If the union contests the withdrawal of
 recognition in an unfair labor practice proceeding, the employer will have to prove
 10 by a preponderance of the evidence that the union had, in fact, lost majority
 support at the time the employer withdrew recognition. If it fails to do so, it will not
 have rebutted the presumption of majority status, and the withdrawal of
 recognition will violate Section 8(a)(5).⁶

B. Contentions

15 In this case, Iroquois was party to a collective-bargaining agreement of more than three
 years in duration, effective December 15, 2008. Accordingly, the Union enjoyed an irrebuttable
 presumption of majority support until December 15, 2011. After that and certainly on January
 26, 2012, when the extended collective-bargaining agreement ceased to be in effect and
 20 Iroquois withdrew recognition, the Union's presumption of majority support was rebuttable.

Iroquois asserts that the presumption is rebutted by the decertification petition signed by
 a majority of the unit employees employed as of January 26. This is, indeed, precisely the type
 of evidence that can demonstrate a lack of majority support for the Union. And there is no
 25 evidence that the signatures were invalid, or that the Employer in any objectionable matter
 interfered with or tainted the petition and signature-gathering process.⁷

However, the General Counsel and the Union argues that Iroquois' evidence fails to
 prove a lack of majority support for the Union as of the date of withdrawal of recognition,
 30 January 26, 2012. Two related arguments are advanced.

First, the Union contends (CP Br. at 10–11) that the bare fact that 28 of 90 petition
 signatures were obtained more than six months before the January 26 withdrawal of recognition
 means those signatures are "necessarily unreliable" and "stale" evidence that cannot contribute
 35 to proof of the Union's lack of majority support. If this argument is accepted, it leaves the
 employer with evidence of only 62 "timely" signatures, five less than needed to prove lack of
 majority for the Union in this 132-person bargaining unit.⁸

⁶In addition, an employer's violation of Sec. 8(a)(5) of the Act is a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679, enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

⁷See *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (quoting *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967)) ("an employer may only withdraw recognition if the expression of employee desire to decertify represents "the free and uncoerced act of the employees concerned").

⁸At trial, the General Counsel appeared to endorse theory (Tr. 138), but the contention is not advanced in his post-trial brief.

Second, the General Counsel (GC Br. at 9-10), and the Union (CP Br. at 11-12), advance the related (but distinct) argument that the older signatures on the petition may not be relied upon, because, in the intervening months after these signatures were obtained but before the withdrawal of recognition, circumstances within the unit “changed significantly” (GC Br. at 9).
 5 The General Counsel and the Union argue that the renewed efforts at union representation marked by the assignment of Maria Revelles to service the facility in late July, date the older signatures rejecting the Union because they were collected before her arrival and her subsequent “reestablish[ment of] the Union’s presence.” (GC Br. at 10).

10 I consider both arguments below.

1. *The Union’s contention that age alone renders signatures over six months old “stale”*

15

I reject the Union’s contention that the six-month or older signatures are per se “stale” and unreliable as evidence. Contrary to the Union’s claim, the contention is supported by neither logic nor law. Essentially, the argument is that employees who signed the petition in the summer clearly stating their desire not to have a union, were required to reaffirm their
 20 declaration if their view is to count. I can imagine no reason for individual employees to be required, in every case, to keep reaffirming their desire not to have a union every six months in order for their objective demonstration of their opinion to be considered as part of the collective-bargaining unit’s opinion. Certainly, in an analogous (albeit, less than perfectly so) context it is recognized that “the Board has long found union authorization cards signed even more than a
 25 year prior to the filing of a petition to be ‘current’ for purposes of a representation petition seeking certification.” *Covenant Aviation*, 349 NLRB 699, 703 (2007).

25

Contrary to the claims of the Union, no precedent supports the view that age alone renders petition evidence unreliable. On this very point, the D.C. Circuit has opined: “The Board
 30 has never found a withdrawal of recognition to be unlawful solely on that ground. Rather, the Board has also relied upon intervening, post-petition evidence demonstrating continued majority support for the Union.” *McDonald Partners, Inc. v. NLRB*, 331 F3d 1002, 1008 (D.C. Cir. 2003) (footnote omitted). Notably, the General Counsel has acknowledged and accepted this position in the past. See *Sears Logistics Services*, Case No. 26-CA-21073 (Div. of Adv. Aug. 15, 2003)
 35 at p. 6 (“Although the Board has found seven-month-old petitions to be ‘stale evidence,’ the Board has never found a withdrawal of recognition to be unlawful solely on that ground. Rather, the Board has also relied upon intervening, post-petition evidence demonstrating continued majority support for the Union”) (citing *Hospital Metropolitan*, 334 NLRB 555, 556 (2001), enfd. 49 Fed.Appx. 320 (D.C. Cir. 2002)).⁹

35

40

In this instance the Union asserts that *Hospital Metropolitan*, supra, supports its position. However, consistent with the views of the D.C. Circuit and the General Counsel from 2003, I find that *Hospital Metropolitan* does not stand for the proposition urged by the Union.

⁹Division of Advice memoranda are not Board decisions and have no precedential weight. They are of weight only to the extent that the reasoning is persuasive. However, they do represent the view of the General Counsel’s office at the time issued.

In *Hospital Metropolitano*, an employer withdrew recognition from the union on December 3, based on a petition signed by employees seven and a half months before in April. However, the petition at issue did not state that employees no longer wanted union representation. Rather, it stated that

the [undersigned] employees of Hospital Metropolitano, disallow Mr. Radames Quiñones Aponte to represent us or to bargain any employment condition in our name. In addition we will not authorize check-off dues [sic] in favor of [the Union] as an employment condition.

334 NLRB at 555 (Board's parentheticals).

The employer relied upon this petition as its chief basis for withdrawing recognition. However, the Board rejected the employer's withdrawal, explaining:

We agree with the judge that, whether considered individually or cumulatively, the factors relied on by the Respondent would not create a good-faith reasonable doubt (uncertainty) as to the Union's majority status. As the judge found, the April 21 petition indicated that the signers were displeased with Quinones as their representative at the bargaining table, not with the Union itself. Moreover, the petition was executed some 7 months before the December 3 withdrawal of recognition. Such stale evidence is not a reliable indicator of the employees' union sentiments at the time recognition was withdrawn. This is especially true since there were significant changed circumstances between the April petition and the December withdrawal of recognition. Quinones had been replaced as the Union's negotiator in July, when Arturo Grant became the Union's sole representative in negotiations. Thus, the employees' earlier statements indicating unhappiness with Quinones were not a reasonable basis for questioning the Union's majority support in December, when the Respondent withdrew recognition.

The April petition also indicated that the signers did not want union dues to be withheld from their paychecks. However, employees' opposition to dues checkoff is irrelevant to the issue of whether they support the union. As the judge noted, employees may prefer to pay their dues only at convenient times or in person, or may even be "free riders" who desire and accept union representation without joining the union and paying dues. . . .

Finally, as the judge found, the Respondent overstated the percentages of the unit employees who signed the petition. A number of employees who signed the petition were no longer working at the hospital in December, and several of the individuals signed the petition more than once. These facts may explain, in part, the Respondent's mistakes. In any event, the Respondent was given a copy of the April 21 petition on August 21. It thus had more than 3 months before it withdrew recognition on December 3 in which to verify the number of current employees who had signed it, yet it apparently did not. Had it done so, it would have known that a majority of the current employees in at least two, and possibly three, of the units had *not* signed the petition. The

Respondent's failure to verify the evidence on which it purported to rely in withdrawing recognition strongly suggests that it did not act in good faith.

334 NLRB at 556 (footnotes omitted).¹⁰

5

Thus, in *Hospital Metropolitano*, the seven month old petition found “stale” had been signed by a minority of employees working at the time of withdrawal (in two units, and perhaps a minority of those in the third unit), and, in any event, did not state that employees no longer wanted to be union-represented, but rather, that they no longer wanted to be represented by a particular union official, a demand that was resolved in accordance with employee wishes five months prior to the withdrawal of recognition. Such a petition could not even support a pre-*Levitz* good-faith doubt of a union’s lack of majority support.

10

This is a thin reed on which to base the claim that Board precedent views a petition signed by a clear majority of the unit employees working at the time of the withdrawal of recognition and unequivocally rejecting union representation, as—necessarily—“stale” evidence because some of the signatures were more than six (but less than seven) months old.

15

The Union mounts its argument by plucking from context the Board’s statement in *Hospital Metropolitano*, that, among the many infirmities of the petition:

20

Moreover, the petition was executed some 7 months before the December 3 withdrawal of recognition. Such stale evidence is not a reliable indicator of the employees' union sentiments at the time recognition was withdrawn.

25

However, the Board’s view in *Hospital Metropolitano* that the seven-month-old petition was stale evidence cannot reasonably be extracted from the context. Even when fresh, the petition did not reject union representation—it requested removal of a specific union official. That demand was met. Reasonably, under such circumstances, this rendered the petition obsolete.

30

The Board in *Hospital Metropolitano* did not announce that all seven month old petitions were necessarily stale. *Hospital Metropolitano* is a case in which numerous other basic and dispositive factors rendered the petition inadequate evidence even on which to base a subsequent claim of good- faith doubt supporting a withdrawal of recognition. The better view is that in *Hospital Metropolitano* and every other case where the issue has arisen, the “staleness” of the petition evidence is based on what the full circumstances reveal, not based on merely the rote passage of a preestablished increment of time.¹¹

35

¹⁰*Hospital Metropolitano* was decided under the pre-*Levitz*, “good-faith doubt” standard. The employer contended that the petition provided the good-faith doubt of union majority support that the Board, pre-*Levitz*, required employers to show to withdraw recognition.

¹¹Notably, the case cited by the Board in *Hospital Metropolitano* for the proposition that the evidence was “stale,” is *Rock Tenn Co.*, 315 NLRB 670 315 NLRB 670, 672 (1994), enfd. 69 F.3d 803 (7th Cir. 1995). In that case, “staleness” of the petition evidence was very obviously a product of “circumstances” subsequent to the petition showing employee support for the union. These included the employees’ rallying for the union at a rally, the overwhelming rejection by employees of the employer’s contract offer, and a majority of employees signing new union membership cards prior to a negotiating session just prior to the withdrawal of recognition. In

5 The Union contends that the window for considering the petition signatures should be strictly limited because *Levitz* holds that the employer's evidence must demonstrate actual loss of majority support—not just a good-faith doubt of majority support, as the standard had been for many years prior to the *Levitz* decision.¹² The Union also contends that the petition signatures must be very recent because *Levitz* holds that the lack of majority support must be demonstrated to exist at the time of withdrawal of recognition; it cannot document a loss of majority support at some earlier time.

10 Neither of these contentions is compelling. A signed employee petition has always been the type of evidence that can prove actual employee sentiment—not just doubts about employee sentiment. Indeed, it is the archetypal example of evidence of a loss of majority support referenced in *Levitz*, supra at 725 (“an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—”). Moreover, the need to prove loss of majority support at the time of withdrawal provides no basis for arbitrarily claiming that the signatures are unreliable because they were procured a week or month or six and a half months before the withdrawal. Indeed, in one relevant regard a petition is far superior to other methods—such as an election—of measuring employee sentiment and should warrant a longer “shelf life”: an election is a snapshot that does not permit for individual recanting or second chances. But the six month old signatures on the petition could be withdrawn, countermanded or negated by any individual at any time. Such subsequent evidence would be highly relevant—as a practical matter fatal—to a decertification petition.¹³

25 No such evidence was adduced here. The ability of an individual employee to provide evidence negating her earlier expression of sentiment adds to the lack of justification for and

these circumstances, in assessing majority support at the time of withdrawal,

the Respondent was obligated to test its ‘objective evidence’ of the Union’s loss of majority status by fully considering more recent evidence to the contrary. Having failed to do so, the Respondent cannot then rely selectively on only part of the conflicting evidence regarding the union sentiments of its employees.

315 NLRB at 672–673.

¹²In *Levitz* the Board overruled the line of cases that had held that an employer could withdraw recognition on the basis of doubt or uncertainty regarding the union’s majority status. The Board held that, henceforth, an employer may withdraw recognition only by showing that, at the time of withdrawal, the union had actually lost majority support.

¹³See e.g., *HQM of Bayside*, 348 NLRB 787, 787–788 (2006) (disaffection “signatures had effectively been nullified by subsequent signatures on a petition unequivocally supporting continued representation by the Union”), enfd. 518 F.3d 256, 261 (4th Cir. 2008) (“The Board reasonably rejected Bayside’s argument that the disaffection petition satisfied its burden of proving an actual loss of majority support “*at the time [it] withdrew recognition,*” [*Levitz*] at 725 (emphasis added), because many of the signatories evidenced a change of heart, or, at the very least, an incompatible position, by also signing the Union’s petition before Bayside withdrew recognition”). Accord *Parkwood Developmental Center*, 347 NLRB 974, 974–975 (2005), enfd. 521 F.3d 404 (D.C. Cir. 2008).

arbitrariness of rejecting on principle and in every case the reliability of petition signatures obtained more than six months before the withdrawal of rejection. The point is that there can and should be something in the passage of time after the petition signatures and before withdrawal of recognition that provides evidence of unreliability of the signatures. The passage of time, with nothing else, does not render the signatures on a petition unreliable.

2. *Intervening circumstances do not render the petition signatures unreliable evidence of employee sentiment*

I turn to the second contention urged on brief by the General Counsel and the Union: whether the circumstances surrounding and during the course of the petition drive demonstrate “changed circumstances” (*Hospital Metropolitan*) or provide “conflicting evidence” (*Rock Tenn*) of employee support for the Union that undermines the reliance on the petition signatures as an accurate expression of employee sentiment.

In some cases, the evidence represented by a majority-endorsed decertification petition can be undercut, or contradicted, by other evidence tending to show majority support and therefore reviving the presumption of majority support. To take one particularly effective example, referenced above, in some cases, a new “pro-union” petition might be circulated and secure either a majority of unit employees or, perhaps, the signatures of enough of the employees that previously signed the anti-union petition to render the remaining “anti-union” signatures less than a majority. See, *HQM of Bayside*, supra; *Parkwood Developmental Center*, supra.

But the evidence undermining the reliability of the petition need not be that pointed or direct as “counter signatures” on a pro-union petition. In *Rock Tenn*, supra, as discussed, the evidence conflicting with the earlier petition evidence of employee dissatisfaction included an employee rally in support of the union, the overwhelming rejection by employees of the employer’s contract offer, and the fact that just prior to the withdrawal of recognition a majority of unit employees signed new union membership cards.

The difficulty for the General Counsel and the Union in this case is that here, the “changed circumstance” evidence does not amount to much. First, there are no “counter petitions” or any suggestion that a single employee who signed the decertification petition later tried to take his or her signature back, or evinced support for union representation in any way.

Rather, in this case, the changed circumstances claim is the assertion that the new union representative Maria Revelles brought increased efforts and attention to the unit. She organized a four day “blitz” in August that put Union organizers in contact with much of the bargaining unit. She visited the plant two or three times a month throughout the fall and winter and distributed monthly newsletters trying to keep employees informed about and interested in the Union. She filed two grievances, caused three unfair labor practices to be filed, and had some success there, and she caused the Union to distribute surveys to employees in preparation for bargaining to ascertain what issues employees were interested in the Union pursuing.

But the fact is, these efforts did not result in any objective manifestation of employee support for the Union that could undercut the objective evidence of the signatures of a majority of employees on a decertification petition.

At most, four employees out of 132 attended the union meetings and sometimes there were less. These four were the only employees who showed interest in the bargaining committee. There were no rallies of a majority of employees expressing support for the Union.

5 Revelles made no progress in her goal of increasing the presence of union delegates on the shop floor: employee Straw continued to act, to some extent, as a delegate, as she had for over a year. But she did not receive further formal training, she did not stand for election or even appointment as a delegate. There was no other action taken to create additional delegates—informal or official—in addition to Straw. In sum, there was no increase in the
10 number of delegates, or employees interested in being delegates, or in the responsibilities, function, or assignment of the one employee who for some time had seemed on the verge of becoming an official delegate.

15 Finally, it is worth pointing out that there is no evidence of an uptick in employees joining the Union from in August 2011 through January 2012. In August 2011 there were 64 union dues-paying employees, five agency-fee payers, and the remainder paid neither (an option afforded to employees hired prior to 2008). The number of union dues-payers did not increase in any month after that, and in January 2012 there were 52 union dues-payers, four agency-fee payers, and the remainder chose to pay neither. Thus, there is no indication of increased
20 support for the Union to be found in membership data.¹⁴

25 To be clear, none of these factors regarding Revelles' efforts, or the lack of increase in union participation or membership, independently *support* a claim that the Union has lost the presumption of majority support.¹⁵ But they do not counter such a claim, independently supported. Here, the sentiments of a majority of employees declaring that they no longer wanted the Union to represent them stands uncontradicted by any evidence. Moreover, it is notable that in December 2011 and January 2012, the number of petition signers went from 56 to 90, an addition of 34 signatures that broke through the majority mark *after* Revelles had been the representative for months and “reinvigorated” representation efforts. Nothing that occurred
30 or is discernible under Revelles' tenure as servicing representative provides a basis on which to conclude that the lack of majority support for the Union evidenced by the petition signatures had been undercut, dissipated or counteracted as of January 26, 2012.¹⁶

¹⁴The situation may be contrasted to that in *Rock Tenn*, where the union launched a membership drive among employees after a majority signed a decertification petition. A majority of unit employees signed the union membership cards, but the employer ignored this evidence and withdrew recognition based on the earlier decertification petition. While the Board found the union membership drive (and other evidence of support for the union) was “not dispositive of union sentiment,” it found that such evidence must be considered as “contrary” to the employer’s petition evidence and that it undercut the contention that the petition constituted sufficient evidence to support withdrawal of recognition. 315 NLRB at 672–673.

¹⁵See also, *Hospital Metropolitan*, supra at 556 (“employees’ opposition to dues checkoff is irrelevant to the issue of whether they support the union. . . . [E]mployees . . . may even be ‘free riders’ who desire and accept union representation without joining the union and paying dues”).

¹⁶Notably, in terms of “changed circumstances,” the chief case relied upon by the General Counsel and the Union, *Hospital Metropolitan*, supra, is instantly distinguishable, among other reasons, because the employees’ petition upon which withdrawal of recognition was based, demanded that a particular union official not be permitted to represent or bargain for employees,

At bottom, the General Counsel and Union's contention is that renewed union efforts are, without any evidence of employee response, and no evidence that employee demands were addressed, enough to undercut and contradict the objective evidence of majority rejection of union representation. Precedent does not support this claim. Indeed, the Union and the Board's view of the quality and effort of union organizing efforts are beside the point. The issue is evidence of employee sentiment. Revelles' efforts notwithstanding, no record evidence of employee support for the union contradicts—or even lends ambiguity—to the objective demonstration that a majority of unit employees did not want representation.

I accept that there may be some limit to the length of time that a petition and its signatures can remain valid evidence of a loss of majority support. After all, the passage of time does, indeed, lead inexorably to changes in circumstances. A new contract ratified, a proposed contract voted down—majority employee action like this might well serve to vitiate the force of pre-existing petition signatures. But that is not this case. Here, in the months prior to and during bargaining for a new labor agreement, a majority of employees stated clearly in a petition, without evidence of coercion or taint, that they no longer wanted union representation. There is no contrary evidence that undermines that statement by the majority.¹⁷

I will recommend dismissal of the complaint.

CONCLUSIONS OF LAW

Respondent did not violate the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

and that union official was replaced after the petition but five months before withdrawal of recognition. Thus even granting that employees' rejection of a particular union official could raise a good-faith doubt about employee support for union representation per se—the *pre-Levitz* standard at issue in *Hospital Metropolitan*—the circumstances animating the petition in that case were redressed, thus rendering the petition an outdated basis for a withdrawal of recognition. Here, by contrast, we consider a post-*Levitz* claim of actual loss of majority support. The unequivocal statement by a majority of employees that they did not want union representation certainly meets that standard and the “changed circumstances” asserted by the Union and the General Counsel do not contradict or even meet that evidence.

¹⁷That a mirror recognition petition or majority of authorization cards would not require initial employer recognition of a new union is notable. See *Linden Lumber*, 190 NLRB 718 (1971), approved, *Linden Lumber v. NLRB*, 419 U.S. 301 (1974). However, the policy concerns animating that anomaly, such as they are, should not be viewed as a rejection of employee petitions as a method of ascertaining employee sentiment. Employee petitions, cards, and written assertions of representation desires have long been accepted as a reliable expression of employee sentiment.

¹⁸if no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

5

The complaint is dismissed.

10 Dated, Washington, D.C. September 26, 2012

David I. Goldman
U.S. Administrative Law Judge