**ADT, LLC, Employer-Petitioner *and* Communication Workers of America, Local 6215.** Case 16–RM–123509

May 17, 2017

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

## Introduction

The issue in this case is whether the Employer's RM petition meets the requirements of Section 9(c)(1)(B) of the Act, namely whether the Employer demonstrated that the Union made a demand for recognition in the petitioned-for unit and whether the Employer established that it had a good-faith reasonable uncertainty regarding the Union's majority status. This case arises from the Employer's reorganization of several of its Texas facilities in a manner that resulted in employees who historically had been represented by the Union working alongside unrepresented employees whom the Employer had inherited as a result of a merger with another company. The Union never sought to represent those inherited employees, and employees currently represented by the Union never indicated a desire to end the Union's representation of them. The Employer nevertheless filed a petition seeking an election among the combined group of employees to determine whether a majority of the whole group wished to be represented by the Union. Notwithstanding the absence of any claim by the Union to represent the inherited employees and the lack of any evidence that the Union had lost support among its current bargaining unit members, the Regional Director for Region 16 decided to process the Employer's petition.

On March 9, 2015, the Regional Director issued a Decision and Direction of Election in a unit of "all installation and service technicians employed by the Employer in the Dallas/Fort Worth area at its Carrollton, Haltom City, Trinity, and Tyler facilities." The Regional Director found that the Employer met the "threshold showing" necessary for processing the petition. The election was held on April 8, 2015, and the ballots were impounded. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Union filed a timely request for review, contending that the petition is inappropriate under Board precedent and should be dismissed. The Employer filed an opposition. On April 22, 2015, the Board granted the Union's request for review.[1]

After carefully considering the entire record in this proceeding, including the Employer's and the Union's briefs on review, the Employer's supplemental brief, and the Union's response, for the reasons set forth below, we reverse the Regional Director's decision to process the petition. Contrary to the Regional Director and our dissenting colleague, we find that the Employer's petition does not meet the requirements of Section 9(c)(1)(B).[2] We therefore vacate the direction of an election and dismiss the petition.

## Facts

The Employer installs and repairs security systems for private residences and small businesses. It employs installer technicians and service technicians who travel to job sites to perform their work. The Employer and the Union have had a collective-bargaining relationship since 1978, when the Union was certified as the exclusive collective-bargaining representative of certain of those technicians. The current collective-bargaining agreement between the parties defines the bargaining unit as "all servicemen employed by the Employer at its facilities located in Dallas and Fort Worth, Texas."[3]

Until 2010, the Employer had facilities located in Carrollton and Haltom City, Texas. In 2010, the Employer acquired Broadview, another security systems company, and took over Broadview's three Texas locations (Mesquite, Irving, and Fort Worth). Although the Broadview technicians became the Employer's technicians in 2010, the parties never applied the collective-bargaining agreement to them, and the Union does not currently represent them. Until early 2014, the 70 former Broadview technicians worked at the three former Broadview facilities, separate from the Employer's 58 unit techni-

[1] Chairman Pearce and Member McFerran; Member Miscimarra dissenting.

[2] Sec. 9(c)(1)(B) provides that a petition may be filed

> by an employer, alleging that one or more individuals or labor organizations have presented to him [her] a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

[3] By its terms, the agreement was effective from May 29, 2011 through May 28, 2014, with an automatic year-to-year renewal provision. No party contends there is a contract bar.

cians who worked at its two locations in Carrollton and Haltom City.

In February 2014, the Employer closed offices, combined locations, and created new office locations. It moved the Carrollton office to a new address in Carrollton and created a satellite office in Tyler, Texas. It created a new office location in Trinity, Texas, but retained the Haltom City location. The former Broadview technicians were combined with the Employer's existing unit technicians at all locations except Tyler, where some unit technicians but no former Broadview technicians were reassigned.[4] The three former Broadview offices were closed.

All the technicians work under similar working conditions, and the parties stipulated that all the technicians perform the same or similar work. Most benefits are the same for all technicians. Although the method of compensation differs between the represented and unrepresented technicians, wages overall are comparable. The parties stipulated that should an election be held, the petitioned-for unit would be an appropriate unit, but the Union reserved its right to seek review of the decision to process the petition.

The Employer filed the instant petition on March 3, 2014,[5] seeking an election in a unit of all "install and service technicians at ADT's Carrollton, Tyler, Trinity, and Haltom City facilities in the Dallas/Fort Worth area." The petition submitted to the Regional Director was accompanied by a letter from the Employer's director of labor relations, James Nixdorf. The letter set forth the basis for the petition, including a "claim for continued recognition" by the Union and a "question as to majority status" on the part of the Employer. The Employer inferred the claim for continued recognition from an email communication between Union Vice President Bonnie Mathias and Nixdorf on February 3, in which Mathias purportedly claimed to represent "some, if not all, of the integrated offices." The Employer's asserted doubt as to the Union's majority status was based on the Employer's final integration of its offices, after which, based on a chart "showing the current numbers of represented and unrepresented technicians in each office,"[6] the Employer contended that it had a reasonable good-faith uncertainty as to the Union's continued majority status.

## THE REGIONAL DIRECTOR'S DECISION

Prior to the hearing, the Union filed a motion to dismiss the petition, alleging that the Employer's asserted grounds for good-faith uncertainty were insufficient. The Regional Director denied the motion. Following the hearing, the Regional Director issued an order to reopen the record in which she also determined, pursuant to Sections 11021 and 11042 of the Board's Casehandling Manual, Part Two, Representation Proceedings (CHM),[7] that the Employer had met the necessary threshold showing for processing the petition. In the Decision and Direction of Election, citing her previous denial, the Regional Director denied a renewed motion to dismiss by the Union made during the reopened hearing. The Regional Director concluded that the Union "claims to represent certain employees of the Employer and that the Employer has provided sufficient evidence to establish a good faith uncertainty as to the Union's majority status." Further the Regional Director found that a question concerning representation exists, and that a unit of "[a]ll installation and service technicians employed by the Employer in the Dallas/Fort Worth area at its Carrollton, Haltom City, Trinity, and Tyler facilities" is an appropriate unit.

### The Parties' Contentions

On review, the Union asks the Board to reverse the Regional Director's decision, asserting that it has "never" claimed to represent the former Broadview technicians and challenging the Employer's view that the parties' February 3 email correspondence indicates that the Union was making such a claim. The Union further con-

[4] The composition of the facilities are as follows: Carrollton: 19 former Broadview technicians and 25 existing unit technicians; Tyler: no former Broadview technicians and 6 existing unit technicians; Trinity: 23 former Broadview technicians and 14 existing unit technicians; and Haltom City: 28 former Broadview technicians and 13 existing unit technicians. The total number of technicians is 128.

[5] All dates are in 2014 unless otherwise indicated.

[6] The chart characterized the former Broadview technicians as nonunion and the existing technicians as union technicians. See fn. 4, above.

[7] Sec. 11021 indicates that the investigation of the extent of a showing of interest in support of a petition is an administrative matter not subject to litigation and is within the discretion of the Board. Sec. 11042, entitled "Objective Considerations in RM Petition," provides that "[t]he Regional Director should process a RM petition based on a prima facie showing of objective considerations that a union has lost its majority status." More specifically, Sec. 11042.1 states in part:

> The RM petition must be supported by evidence, viewed in its entirety, which might establish good-faith uncertainty as to the union's continued majority status. The information submitted by the employer must be specific and detailed: for example, names of employees must be listed. The evidence must be objective and reliably indicate that a majority of the employees oppose the incumbent union, rather than mere speculation. Such evidence would include, but is not limited to, anti-union petitions signed by unit employees, firsthand employee statements indicating a desire to no longer be represented by the incumbent union, employees' unverified statements regarding other employees' antiunion sentiments, and employees' statements expressing dissatisfaction with the union's performance as bargaining representative. *Levitz*, supra at 728, 729. See also GC 02–01 at 9.

tends that the Employer presented "zero objective evidence" of employee opposition to the Union. It also maintains that the Employer's actions effectuated only a relocation of represented bargaining unit technicians, under which the technicians were entitled to continued representation by the Union.

The Employer counters that the Regional Director's decision should be affirmed because it is consistent with applicable principles of accretion. In addition to the evidence in support of its petition submitted below, it contends that the Union lost its majority status when the larger group of unrepresented technicians "merged" with the smaller group of represented technicians. In support, the Employer relies principally on *Nott Co*., 345 NLRB 396, 401 (2005), and the cases cited therein, including *Geo. V. Hamilton*, 289 NLRB 1335, 1339 (1988), and *Renaissance Center Partnership*, 239 NLRB 1247 (1979), for the proposition that, where a new group of unrepresented employees is added to an extant unit, and the new group equals or outnumbers the extant group, there is a question raised as to whether a majority of the employees in the combined group support the union.[8] The Employer further asserts that *Levitz Furniture Co.,* recognizes that an election is the preferred method of testing the employees' support for the Union. Notably, however, it acknowledges that "the Union claimed a continued representational interest in only those employees who had been represented prior to the consolidation."[9]

## Discussion

To warrant processing a petition under Section 9(c)(1)(B), an employer must demonstrate both that the union has made a claim for recognition and, by objective considerations, that the employer has a reasonable good-faith uncertainty as to the union's continuing majority status in the unit it currently represents. *Levitz Furniture Co.,* supra at 727; *Postal Service*, 256 NLRB 502, 503 (1981); *United States Gypsum Co.*, 157 NLRB 652, 656 (1966); CHM, Secs. 11003.1(b) and 11042. The burden is on the employer to demonstrate that a request for recognition has been made. *Brylane, L.P.*, 338 NLRB 538, 542 (2002). Reasonable good-faith uncertainty must be based on evidence that objectively and reliably indicates employee opposition to an incumbent union, and is not merely speculative. *Levitz Furniture Co.*, above at 729. Such evidence may include "antiunion petitions signed by unit employees and first hand statements by employees concerning personal opposition to an incumbent union." Id. at 728. *Levitz* emphasizes, however, that all evidence should be taken into account which, viewed in its entirety, might establish uncertainty as to the union's continued majority status. Id. For the reasons discussed below, we find that the Employer has not established that either of these criteria has been met in this case.[10]

### *A. The Absence of a Demand for Recognition*

In a letter accompanying its petition, the Employer alleges a claim for recognition by the Union based on the contents of an email from Director of Labor Relations Nixdorf to Union Vice President Mathias recounting a telephone conversation between the two. Although the Employer's letter states that Mathias' statements indicated that the Union claimed to recognize "some, if not all," technicians "in the integrated offices," the underlying email does not support that assertion. The relevant email, sent by Nixdorf to Mathias, reads in part as follows:

> Thanks for taking my call the other day. I just wanted to confirm my understanding of our conversation in which we discussed your presence at the opening meeting in the Trinity office of the newly reorganized Dallas-Fort Worth ("DFW") ADT operation. When I asked if your visit there on Monday meant the CWA was trying to represent the employees in the recently integrated ADT and heritage Broadview DFW offices, you said no. However, you did say that you were there because the CWA had "bargained-for employees." ADT can only interpret this as a statement that the union claims to represent some —if not all—employees in the DFW offices.

In this email, the only statements attributed to Mathias are his "no," in response to Nixdorf's query whether Mathias' visit to the Trinity office "meant the CWA was trying to represent the technicians in the recently integrated ADT and heritage Broadview DFW offices," and Mathias' explanation that he visited the Trinity office

[8] To the extent that *Nott Co.*, above, is applicable, the Union contends it should be overruled as inconsistent with *Levitz Furniture Co., of the Pacific,* 333 NLRB 717, 723 (2001) .

[9] The Employer also requests that the Board take administrative notice of a decertification petition filed in May 2015 (Case 16–RD-152333). Contrary to the Employer's assertion, that petition is irrelevant in this proceeding regarding the Employer's March 2014 RM petition.

[10] We also note that the Regional Director, in denying the Union's motions to dismiss, limited her analysis to whether the Employer had a reasonable good-faith uncertainty as to the Union's continuing majority status because of the merger of its represented and unrepresented technicians. Although the Union's motions to dismiss were primarily concerned with whether there was a reasonable good-faith uncertainty, as discussed below, the issue of whether there was a claim for recognition also was presented because the Union did not seek to represent the former Broadview technicians. The failure to specifically address the issue of whether there was a claim for recognition–a statutory mandate –undermines the Regional Director's decision to process the petition.

"because the CWA had 'bargained-for employees'" there. The Employer presented no other basis to support its assertion that the Union claimed to represent the disputed employees.

We conclude that neither of the statements attributed to Mathias constitutes a demand for recognition of the combined group of technicians. The first attribution negates any argument that the Union was seeking to represent the integrated unit, i.e., that of technicians currently covered by the contract and the former Broadview technicians not covered by the agreement. Nor can the Employer find sufficient support in the second attribution, that Mathias was at the facility because the Union had "bargained-for employees." This statement does not convey a claim or demand for recognition either with respect to the so-called "integrated" unit of former Broadview technicians and the existing technicians or for a separate unit excluding the pre-Broadview existing technicians. The Employer therefore failed to meet its burden of demonstrating that the Union "presented . . . a claim to be recognized as the representative defined in section 9(a)" as required under Section 9(c)(1)(B).[11] In the absence of a demand for recognition, the Board will normally dismiss an RM petition on the ground that no question of representation exists. See *Postal Service*, above; *PMS Steel Construction*, 309 NLRB 1302, 1303 fn. 9 (1992).[12]

[11] "The legislative history . . . shows that Congress understood this provision to mean that '[e]mployers may ask for elections, *but only after a representative has claimed collective-bargaining rights*.'" *Windee's Metal Industries*, 309 NLRB 1074, 1075 (1992) (citing from the legislative history of Sec. 9(c)(1)(B)) (emphasis in original).

[12] We also find unpersuasive our dissenting colleague's position that the Union's request for a private non-Board election among the former Broadview technicians constitutes a claim to represent those employees. Contrary to our colleague's argument, evidence that the Union is seeking a private self-determination election does not support processing the RM petition at issue here. At the outset, we note that the agreement was not entered into the record and there was no testimony concerning it at the hearing. Even so, the non-Board agreement, by its own terms, states that it is not to be used as evidence in any other proceeding, except as to its own enforcement. Moreover, even were we to take judicial notice of the proceedings to enforce the non-Board agreement, it would be insufficient to constitute a claim by the Union. The Board has long allowed unions to add unrepresented employees to units of historically represented employees via self-determination elections. But we have found no case holding that the Board will conduct an election among a combined group of those employees pursuant to an RM petition rather than a self-determination election among a subset simply because the union seeks to add the subset to a unit via the self-determination process. Doing so would have the adverse consequence of allowing employers to force unions to defend their majority each time the union sought to add employees via a self-determination election. It would also deprive the historically unrepresented employees of the ability to determine, as a group unto themselves, whether they wish to be a part of the existing unit. Indeed, those unrepresented employees could potentially be swept into the unit against their will in circumstances where they are outnumbered by the existing unit employees.

Contrary to the dissent, we find that the Union's January 2015 unfair labor practice charge in Case 16–CA–144548 is irrelevant in this proceeding regarding the Employer's March 2014 RM petition. In any event, as our colleague acknowledges, the Union's charge relates only to the Employer's "newly hired" employees. Thus, even if the charge was deemed relevant, it does not demonstrate that the Union seeks to represent the former Broadview employees.

### *B. The Absence of a Reasonable Good-faith Uncertainty as to the Union's Majority Status*

The Employer provided no evidence that unit employees were dissatisfied with the Union, let alone wished to no longer be represented by the Union, to satisfy the second element of its burden under *Levitz*, above. The Employer instead relied solely on the reorganization of its operations to support its claim of good-faith uncertainty as to the Union's continued majority status. The Employer thus describes the reorganization of the five preexisting offices and their technicians into the one preexisting office, two new offices and one satellite office, and argues that, consistent with accretion principles, there is a reasonable good-faith uncertainty regarding the Union's continuing majority status because the overall number of "unrepresented" technicians exceeds the number of "represented" technicians following the reorganization. In support, the Employer and the dissent cite cases involving the merger or integration of represented and unrepresented employees into the same unit in which the Board found an accretion issue and a question of majority status because the number of unrepresented employees being merged was equal to or exceeded the number of represented employees in the unit. See *Nott Co.*, above; *Geo. V. Hamilton*, above; *Renaissance Center Partnership*, above. This position and cited cases are not persuasive.

Importantly, the Union has never sought to represent the unrepresented Broadview technicians or apply the contract to them. Thus, this case does not present an accretion issue or a question concerning majority status in the unit the Union currently represents. By contrast, in the three cases relied on by the Employer and our dissenting colleague, the Board found that an accretion issue and a question of majority status were raised because the union claimed to represent the unrepresented employees in the same unit with the represented employees.[13] In none of those cases did the union expressly

[13] For example, in *Renaissance Center Partnership*, the union filed a unit clarification petition seeking to include unrepresented security officers and guards in an existing unit with security officers and guards represented by the union. 239 NLRB at 1247–1248. The Board in that case directed an election because the union claimed to represent all the employer's security officers and guards. Id. at 1248. Likewise, in *Nott Co.*, the union contended that new employees from an acquired em-

deny, as the Union did here, that it was seeking to represent the unrepresented employees as part of an existing unit. Absent a claim or demand to represent the former Broadview technicians in the current unit, the accretion and majority status issues present in those cases do not exist in this case.[14]

We also reject our dissenting colleague's view that we must uphold the processing of the petition because a unit of all technicians would be an appropriate unit if a new election were to be held today.[15] The dissent asserts that if the Union were to file a new petition for only the employees it historically represented, such a unit would be inappropriate as a matter of law, and that the Board should therefore uphold the Regional Director's decision to process the petition. We disagree. Even if the historic bargaining unit may no longer be an appropriate unit because of the merger, we emphasize again that the issue before us is not the continuing appropriateness of the historical unit, but whether an election is appropriate under Section 9(c)(1)(B). On that point, moreover, "[t]he Board has never held . . . that merely because an existing recognized unit may be inappropriate for certification, an employer may force a labor organization to an election in a larger unit alleged to be appropriate." *Postal Service*, 256 NLRB at 504; see also *Abbott-Northwestern Hospital*, 274 NLRB 1063 (1985) (employer petitions for an election not processed because no question concerning representation was raised and no demand for recognition had been made). In addition, under Section 9(c)(1)(B), the Board will not force a union to an election in a larger unit alleged to be appropriate if the union does not seek to represent all the employees in that larger unit. Contrary to our dissenting colleague's claims, the fact that the Union continues to demand recognition as the representative of its historic members does not mean that it is "inescapably" claiming a potential combined unit.

We also reject the dissent's related assertions that the Employer was not required to present evidence that the Union lost majority support among the historically-represented employees and that the correct measure of the Union's support is with reference to the entire group of technicians. Our dissenting colleague relies in particular on *Renaissance Center Partnership*, above, a case that is distinguishable in its procedural posture from the present matter. In *Renaissance Center Partnership*, the Union's unit clarification petition, expressing a desire to include the newly consolidated employees, opened the door for the Board to consider the appropriateness of the unit and whether accretion or an election would be warranted. 239 NLRB at 1247–1248. Here, in contrast, there has been no unit clarification petition, no suggestion from the Union that it wishes to represent the merged employees, and no withdrawal of recognition. There has been only the Employer's RM petition, which must be analyzed under the *Levitz* framework we apply today. This requires the Employer to establish a good-faith belief that the Union has lost majority support amongst those employees it currently represents, not that the Union may lack majority support in a combined unit of those employees and employees it has never represented.

Nor do we find persuasive the Employer's related suggestion that if this was an unfair labor practice case, it would be privileged to withdraw recognition from the Union under *Nott, Co.*, because, it contends, the Union has actually lost its majority status. 345 NLRB at 401; *Levitz Furniture Co.*, 333 NLRB at 717. First, we reject the Employer's attempt to import the principles discussed in *Nott, Co.*, into this case because the question of whether a withdrawal of recognition would be lawful simply is not before us. In this case, we consider and apply only Section 9(c)(1)(B) and the requisite elements for determining whether an employer RM petition should be processed, not Section 8(a)(5) and the different criteria for determining whether a withdrawal of recognition violates the Act.[16] Second, as explained, *Nott, Co.*, and its progeny are inapposite because the Union has never claimed to represent a combined unit including both the historically represented employees and the former

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ployer were an "expansion" of the existing unit represented by the union. 345 NLRB at 397. And in *Geo. V. Hamilton*, the union contended that it was the exclusive representative of the employees working in two warehouses, one of which was recently acquired by the employer, and that an existing collective-bargaining agreement between the union and the employer was applicable to them. 289 NLRB at 1339–1340.

[14] We note that this case does not involve a successorship issue, and thus, the case and legal principles cited by our dissenting colleague are not applicable in this proceeding.

[15] In her unit findings, the Regional Director found that the former Broadview technicians share a "significant community of interest" with the Employer's existing technicians. In view of our dismissal of the petition, we find it unnecessary to address that finding.

[16] The Board has acknowledged in some circumstances the practical difficulty and unworkability of the continued recognition of an historic bargaining unit where, as the result of a merger, unit employees worked side-by-side with nonunit employees performing the same work. See *Abbott-Northwestern Hospital*, 274 NLRB at 1064 (withdrawal of recognition lawful). But we decline to create a rule in representation cases presuming that all such arrangements, including this one, are unworkable and that a reasonable good-faith uncertainty as to the union's continued majority status will automatically exist. Notably, while the withdrawal of recognition in *Abbott-Northwestern Hospital* was lawful, previous employer petitions in that case were dismissed by the Board, in part, because as here, no demand for recognition had been made. Id. at 1063.

Broadview employees. Thus, the Employer failed to meet its burden of establishing a reasonable good-faith uncertainty regarding the Union's majority status as required by Section 9(c)(1)(B).[17]

## Conclusion

In declining to process the Employer's petition, we are mindful of the changes made in *Levitz* to "enable employers who seek to test a union's majority status to use the Board's election procedures . . . rather than the more disruptive process of unilateral withdrawal of recognition." 333 NLRB at 717. And we share the *Levitz* Board's sentiment that there are good reasons to prefer that questions concerning a union's continuing majority status be resolved through elections rather than self-help. *Levitz*, however, did not confer on employers an absolute right to file an RM petition. Employer-petitioners are still bound to the statutory requirements of Section 9(c)(1)(B), and for the reasons we have stated, the Employer has not satisfied those requirements. Accordingly, the Employer's petition must be dismissed.

## ORDER

The Regional Director's Decision is reversed, the Direction of Election is vacated, and the petition is dismissed.

Dated, Washington, D.C. May 17, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

Unlike my colleagues, I would affirm the Regional Director's decision to process the Employer's petition seeking an election in a unit of all installation and service technicians (collectively "technicians") employed by the Employer at its Carrollton, Haltom City, Trinity, and Tyler, Texas facilities. Following its acquisition of another company and subsequent restructuring of its operations, the Employer merged an existing group of represented technicians with a larger group of unrepresented technicians who had previously worked for the acquired company. Accordingly, the preacquisition unit of represented technicians *no longer exists*. I believe that these facts sufficiently call into question the continuing majority status of the Union in the only appropriate unit here—the merged unit in which unrepresented technicians outnumber historically represented technicians. Moreover, and contrary to the majority, the Union has taken measures that can only be understood as a claim for recognition in the consolidated unit of technicians. In these circumstances, I believe the Board must process the petition and direct an election, which is the preferred means of resolving a question regarding whether a union enjoys majority status in an appropriate bargaining unit.

## Facts and Background

The Employer installs and services residential and commercial security systems nationwide, including in the Dallas/Fort Worth, Texas area. Technicians perform this work. Beginning in 1978, the Union represented all of the Employer's technicians in the Dallas/Fort Worth area, who worked out of facilities in Carrollton and Haltom City, Texas.[1] In May 2010, the Employer acquired Broadview, another security systems company operating in the Dallas/Fort Worth area. In addition to its two existing facilities in Carrollton and Haltom City, the Employer chose to maintain Broadview's three Texas facilities (in Mesquite, Irving, and Forth Worth), and it hired all of the technicians that worked at those three facilities. Technicians covered by the collective-bargaining agreement with the Union continued to work out of the Carrollton and Haltom City facilities. Former Broadview technicians—now employed by the Employer—continued to work out of the Mesquite, Irving, and Fort Worth facilities, and the Employer did not apply the terms of the collective-bargaining agreement to the former Broadview technicians.

In February 2014, the Employer restructured its operations. It closed the three Broadview facilities, retained its Haltom City facility, moved its Carrollton facility to a new Carrollton address, and opened new facilities in Tyler and Trinity, Texas. Accordingly, the Employer now maintains facilities in Carrollton, Haltom City, Trinity, and Tyler. This restructuring resulted in the merger of the unrepresented former Broadview technicians with union-represented technicians. As the Regional Director found, at the time of the February 2015 hearing there

[17] Contrary to the position of our dissenting colleague, our application of Sec. 9(c)(1)(B) here is not improperly inflexible. To the contrary, our application of the *Levitz* standard to the facts, based on the RM petition before us, reflects an interest in predictability and consistency across cases. These statutory requirements and precedential legal principles cannot be disregarded simply because in this particular case the Employer may be in a challenging position.

[1] The most recent collective-bargaining agreement was effective May 29, 2011 through May 28, 2014.

were 89 former Broadview technicians and 51 union-represented technicians working out of the four facilities.[2] The Employer has continued to apply the collective-bargaining agreement to just those technicians historically represented by the Union. In response to this restructuring and merger of unrepresented and represented technicians, in March 2014 the Union demanded that the Employer agree to a private, non-Board election among the former Broadview employees—pursuant to an alleged agreement providing for such an election—and to their inclusion in the existing unit and coverage under the parties' then-current collective-bargaining agreement if the former Broadview employees voted in favor of representation. When the Employer refused this demand, the Union filed a lawsuit in federal district court seeking to enforce the alleged election agreement. See *Communication Workers of America v. ADT, LLC,* Civil Action No. 3–14–CV–04205. In February 2015, the Union also filed a Board charge in Case 16–CA–144548 alleging, among other things, that the Employer was violating Section 8(a)(5) by "refusing to apply to newly hired bargaining unit employees the terms and conditions of the current labor agreement between the parties."

On March 3, 2014, the Employer filed an RM petition seeking an election in a unit of all technicians at its four facilities. Citing its restructuring, the subsequent integration of its work force, and the fact that its nonunion technicians outnumber its union technicians, the Employer asserted that it had a reasonable good-faith uncertainty as to the Union's continued majority status.

Based on evidence introduced at the preelection hearing, the Regional Director found, and no party disputes, the following facts:

- All of the Employer's technicians, union and non-union alike, perform the same or similar types of work.
- The technicians work side by side with one another, share common supervision, engage in significant cross-facility interchange, and are functionally integrated within the Employer's operations. They share the same retirement, disability, medical and dental benefits. They wear the same uniforms, receive the same allowance for safety equipment, use the same company equipment and tools, drive the same company vehicles, and receive the same holidays, sick days, and additional leave. They also share the same work schedules, the same types of job assignments, and the same training.
- Although the collective bargaining agreement establishes the method of compensation for those technicians that have historically been represented by the Union, all technicians earn similar wages and fall within similar hourly pay ranges.

Based on the above facts, the Regional Director found that unrepresented technicians share an "overwhelming community of interest" with the technicians covered by the collective-bargaining agreement. Moreover, the parties stipulated that if the Board decides to hold an election, a unit consisting of all technicians at the four facilities is appropriate.[3]

In these circumstances, the Regional Director found that "due to the Employer's 2010 acquisition of . . . Broadview, as well as a subsequent 2014 restructuring of its facilities, locations, and employees, . . . the Union's continued majority status among such unit, is no longer clear." In addition, the Regional Director previously made a determination that the Employer had met the "threshold showing necessary for processing" the petition, i.e., a demand to be recognized and "a good faith

[2] More specifically, at the time of the hearing, there were 23 union-represented technicians and 32 nonunion technicians at the Carrollton facility, 16 union-represented technicians and 32 nonunion technicians in Haltom City, 5 union-represented technicians and 23 nonunion technicians in Trinity, and 7 union-represented technicians and 2 nonunion technicians in Tyler.

My colleagues cite the work force composition at the time the Employer filed its petition, when there were 70 non-union technicians and 58 union-represented technicians.

[3] In doing so, the Regional Director cited *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. 727 F.3d 552 (6th Cir. 2013). Under the standard established there, when a party contends that the smallest appropriate unit must include employees in addition to those in the petitioned-for unit, the burden on the party "so contending [is] to demonstrate that the excluded employees share an overwhelming community of interest with the included employees." 357 NLRB at 934. I would not apply this "overwhelming community of interest" standard to determine whether a petitioned-for unit must include additional employees. See generally *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 22–33 (2014) (Member Miscimarra, dissenting). Rather, I would apply the Board's traditional standards, including an assessment of "'whether the interests of the [petitioned-for] group . . . are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.'" *Wheeling Island Gaming*, 355 NLRB 637, 637 fn. 2 (2010) (quoting *Newton-Wellesley Hospital*, 250 NLRB 409, 411–412 (1980) (emphasis in *Wheeling Island Gaming*)); see also *Constellation Brands v. NLRB*, 842 F.3d 784, 787 (2d Cir. 2016) (holding that before the Board may proceed to apply the "overwhelming community of interest" standard, it must first determine "whether the excluded employees ha[ve] meaningfully distinct interests from members of the petitioned-for unit in the context of collective bargaining that outweigh similarities with unit members"). Nonetheless, under either standard, I agree that a unit consisting of all technicians at the four facilities is appropriate, and the parties so stipulated. Indeed, as the Regional Director found, such a unit is the *only* appropriate unit.

uncertainty" as to the Union's majority status.[4] Accordingly, the Regional Director directed an election among the petitioned-for unit employees to determine whether they wish to be represented by the Union. The election was held in April 2015, and the ballots were impounded.

For the reasons stated below, I would affirm the Regional Director's decision, open and count the impounded ballots, and issue the appropriate certification. My colleagues disagree and, instead, reverse the Regional Director's decision and dismiss the RM petition, which prevents the Board from even considering the results of the election.

## Discussion

It is hard to believe that the issues in this case have been decided by the same Agency that, approximately 2 years ago, adopted an Election Rule that rewrote most of the Board's representation-election procedures, ostensibly based on the importance of conducting elections at the earliest date practicable, with the premise that the Board would give effect to the election results to determine whether an employee majority supports union representation.[5] In the instant case, the prior union-represented bargaining unit has been extinguished, and there is only one existing bargaining unit, in which a majority of employees have never been represented by the Union. Moreover, the employer has not withdrawn recognition, but rather has filed a petition seeking an election to determine whether a majority of employees in the sole existing unit favor union representation, and my colleagues find that the outcome of the election should be disregarded. Indeed, because the majority orders the petition's dismissal, we will never even know the outcome of the election. For several reasons, I believe the Board is required to uphold the Regional Director's decision to process the petition, and the Regional Director should be directed to open and count the impounded ballots and issue the appropriate certification.

First, the facts bear out a plain truth: after restructuring, the Employer's work force consisted of an integrated whole that combines the previously represented and unrepresented groups. As the Regional Director correctly determined, the prior unit of historically represented technicians no longer exists, and the only appropriate unit is one that includes all of the Employer's technicians at the four facilities. Indeed, the Regional Director found that all technicians at the four facilities share an "overwhelming community of interest." As described in more detail in the Regional Director's decision, union and nonunion technicians engage in significant interchange, contribute equally to the Employer's operations, and share virtually identical terms and conditions of employment, including job duties, supervision, and wages and benefits. Even under the Board's strict *Specialty Healthcare* standard,[6] these facts preclude the appropriateness of any unit that does not include all technicians. See 357 NLRB at 943–945 (when community-of-interest factors "overlap almost completely," all employees must be included in a single unit). Accordingly, if the Union now sought to represent a unit limited to the group of employees it has historically represented, such a petitioned-for unit would be inappropriate as a matter of law. The parties understand this new reality: they stipulated that if the Board were to hold an election, a unit of all technicians would be appropriate.

Second, I believe that my colleagues err by failing to accord a further undisputed fact the weight it deserves: the majority of technicians in the only appropriate unit have never been represented by the Union. At the time the Employer filed its petition, it employed 70 unrepresented and 58 represented technicians. This disparity has only grown. At the time of the hearing, nonunion technicians outnumbered union technicians 89 to 51. For the Employer to continue to recognize and bargain with the Union would be inconsistent with Section 9(a) of the National Labor Relations Act (the Act), which provides for union representation only where the union has been designated or selected for the purposes of collective bargaining by the majority of employees in an appropriate unit. As explained above, a unit limited to the historically represented employees within the merged unit is *not* an appropriate unit. Moreover, recognizing and negotiating with a minority-supported union violates Section 8(a)(2) of the Act. See *International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961).

Third, given these facts, I agree with the Regional Director that pursuant to *Levitz*, the Employer has demonstrated a good-faith uncertainty as to the continuing majority status of the Union in the only appropriate unit. Specifically, evidence that the former unit employees have been consolidated into a numerically larger unrep-

[4] See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001) (the Board will process an RM petition if the employer can demonstrate "reasonable good faith uncertainty" as to a union's continued majority status). I did not participate in *Levitz Furniture*, and I express no views on the merits of that decision. The Regional Director's previous determination was in her February 10, 2015 Order Reopening Record and Notice of Representation Hearing.

[5] For reasons not directly relevant to the disposition of the instant case, I disagree with the Election Rule for reasons articulated at length in the dissenting views that I jointly authored with former Member Johnson. See 79 Fed. Reg. 74308, 74430–74460 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson).

[6] I disagree with *Specialty Healthcare*, as indicated in fn. 3, supra.

resented group of employees, rendering the two groups of employees indistinguishable, raises a question concerning representation that can only be resolved through an election in the new, consolidated unit. See *Renaissance Center Partnership*, 239 NLRB 1247 (1979); see also *Nott Co.*, 345 NLRB 396 (2005) (finding that employer lawfully withdrew recognition following consolidation of represented employees with equal number of unrepresented employees); *Geo. V. Hamilton,* 289 NLRB 1335 (1988) (finding that employer lawfully refused to recognize union as representative of a consolidated unit consisting of equal numbers of unrepresented and previously represented employees). In *Renaissance Center Partnership*, supra, the Board, as here, was presented with a situation in which the employer consolidated a certified unit of represented employees with a greater number of unrepresented employees. Finding the certified unit no longer appropriate, the Board directed an election in the consolidated unit without requiring evidence that the union had lost majority support in the certified unit. *Renaissance Center Partnership* compels the same outcome here.[7] Because the historically represented unit is no longer appropriate, the Employer was not required to present evidence that the Union had lost majority support among the historically represented employees. Instead, the Union's majority status can only be measured by reference to the entire appropriate unit, not some segment of that unit. My colleagues therefore err in dismissing the evidence of good-faith uncertainty discussed above and instead focusing on the fact that the Employer provided no evidence that employees in the prior certified unit "were dissatisfied with the Union, let alone wished to no longer be represented by the Union." Under the circumstances presented here, such evidence is not required to support an RM petition.[8]

Fourth, directing an election pursuant to the Employer's RM petition also accords with the policy the Board emphasized in *Levitz*—that "Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions." 333 NLRB at 723. To further that policy, the Board in *Levitz* established different standards governing when an employer may withdraw recognition from a union and when it may file an RM petition. In *Levitz*, the Board adopted a "stringent" requirement that an employer may withdraw recognition only if the union has actually lost majority support, while at the same time adopting the "more lenient" "reasonable good faith uncertainty" standard for RM petitions. Id. The Board adopted this approach to encourage employers to pursue RM elections, which the *Levitz* Board viewed as "a more attractive alternative to unilateral action" because it promotes "both employee free choice . . . and stability in collective-bargaining relationships." Id. at 727.[9] The Employer here did precisely what *Levitz* prescribes. The Employer had a reasonable good faith uncertainty as to the continuing majority status of the Union, it refrained from withdrawing recognition, and it filed an RM petition seeking an election. In this respect, today's decision upsets the balance devised by the Board in *Levitz* because future employers will be deterred from taking the more measured approach adopted by the Employer when it sought an election by filing an RM petition instead of withdrawing recognition.

*Abbot-Northwestern Hospital,* 274 NLRB 1063 (1985), an unfair labor practice case on which my colleagues rely, illustrates the flaws in the approach they adopt today. In representation proceedings predating this case, the Board refused to process RM petitions filed by the employer based on a merger of represented employees with a larger group of unrepresented employees into a single unit similar to this case, on the grounds that the union had made no cognizable demand for recognition. Thereafter, in the cited case, the Board found that the employer lawfully withdrew recognition from the union because (1) the employer had no obligation to bargain in the overall unit; (2) a unit limited to the formerly represented employees was inappropriate because they had been merged into the larger employee group; and (3) the Board lacked authority to order bargaining in an inappropriate unit. Had the Board processed the RM petitions, the parties would have been spared the withdrawal of recognition and ensuing litigation disputing that action.[10] The majority's decision to follow that course here

[7] The majority vainly attempts to distinguish *Renaissance Center Partnership* on the grounds that there, the union filed a unit clarification petition seeking to include the newly consolidated employees, which "opened the door" for the Board to direct an election in the consolidated unit. As noted infra, the Board has also found that continuing claims by competing unions to represent portions of a merged unit that are no longer appropriate separate units "opened the door" for an election in the merged unit even though no union sought to represent all of the employees in that unit. I believe that the Board should "open the door" in this case as well.

[8] Under *Levitz*, RM cases should be decided on "a case-by-case basis," 333 NLRB at 729, and "regional offices should take into account all of the evidence which, viewed in its entirety, might establish uncertainty as to unions' continued majority status," id. at 728. In my view, this case requires the Board to acknowledge the unusual circumstances here rather than focusing on the Employer's failure to provide the type of evidence present in a standard *Levitz* case.

[9] Again, I express no views regarding the "actual loss of majority support" standard adopted in *Levitz* for determining whether a withdrawal of recognition is lawful.

[10] The Board in *Abbot-Northwestern Hospital* noted that "[n]one of [its] current members participated in those representation proceedings. Id. at 1063 n.1.

not only places the Employer in a "challenging position," as my colleagues acknowledge, but also raises a real risk of precisely the sort of disruption of commerce this agency has been charged by Congress to prevent. See National Labor Relations Act Section 1.

Fifth, my colleagues' decision is also inconsistent with the law in the related areas of successorship and accretion. Under this law, the courts and the Board recognize that (i) bargaining units may be materially altered or extinguished based on major business changes, such as the integration of previously represented and unrepresented employees as occurred here based on the Employer's 2014 restructuring; (ii) the only appropriate unit following such a transition may be the post-transition combined group of employees; and (iii) a union's representative status, following such a transition, should turn on whether it has majority support in the posttransition unit. See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972) (assuming substantial continuity between the predecessor's and successor's business operations, successor employer must recognize and bargain with union that represented predecessor employer's employees only if a majority of the successor's work force in an appropriate unit consists of represented employees previously employed by the predecessor); *Renaissance Center Partnership*, 239 NLRB at 1247–1248 (where employer's consolidation of its security forces resulted in a single security-guard work force in which unrepresented employees outnumbered unit employees, the Board rejected the union's petition to clarify the unit by accreting the nonunion employees into the prior unit and instead ordered an election because "only the overall security force of the [e]mployer [was] now appropriate"); *Nott Co.*, 345 NLRB at 401 ("[A]n employer is not obligated to continue to recognize and bargain with a union as the exclusive bargaining representative of one group of employees when that represented group is merged with an unrepresented group in such a manner that an accretion cannot be found and the original represented group is no longer identifiable.").

Finally, I disagree with my colleagues' view that the election is inappropriate on the grounds that the Union never sought to represent the merged group of technicians.[11] Here, my colleagues contend that the Union "has never sought to represent the unrepresented technicians." However, this contention is contradicted by the Union's claim in a different proceeding (Case 16–CA–144548) to be recognized on behalf of the Employer's "newly hired" unit employees.[12] My colleagues also give no weight to the Union's demand for a private, non-Board election among the former Broadview technicians and for their inclusion in the certified unit if they vote for representation, as well as the Union's lawsuit filed in federal district court seeking to enforce an alleged agreement to conduct this private election.[13] Moreover, to the extent the Union continues to demand recognition, this inescapably involves a claim for recognition as the representative of the combined unit, which is the *only* bargaining unit that remains in existence because the prior unit consisting of the previously represented technicians has been extinguished. These considerations are more than sufficient to satisfy the statutory requirement of "a claim to be recognized," and it exalts form over substance to find that the Union has not demanded recognition on behalf of the combined unit. In fact, had the Union filed a petition to clarify the unit to include the former Broadview technicians, the Board would have directed an election in the overall consolidated unit. *Renaissance Center Partnership*, above.

Citing *Postal Service,* 256 NLRB 502 (1981), my colleagues contend that even if the Union's historical unit is no longer appropriate, the Employer cannot "force" the Union into an election in a broader unit unless the Union explicitly seeks to represent all the employees in the

[11] Sec. 9(c)(1)(B) provides that where a petition is filed "by an employer, alleging that one or more labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) . . . the Board shall [process the petition]." The legislative history of Sec. 9(c)(1)(B) reveals a narrow congressional focus on a concern that is absent here. Congress "recognized that there was a potential for abuse in giving employers expanded rights to petition for an election, in that employers might file petitions early in organizational campaigns in an effort to obtain a vote rejecting the union before the union had a reasonable opportunity to organize." *New Otani Hotel & Garden*, 331 NLRB 1078, 1078 (2000). I believe that my colleagues' inflexible application of Sec. 9(c)(1)(B) is further misguided because the concerns that prompted the statutory mandate are not present here.

[12] Because the number of non-union technicians has increased while the number of union technicians has decreased, I believe that the Union's claim to represent "newly hired" employees reasonably included employees outside of the historical unit.

[13] Invoking a version of the "slippery slope" argument, the majority contends that the Union's demand for this election should not be treated as a "claim to be recognized" as the representative of the former Broadview technicians because otherwise a union that seeks a self-determination election to add an unrepresented group of employees to an existing unit could always be forced into an election in the combined employee group. I disagree. In cases where, unlike here, the existing unit remains appropriate without the inclusion of the unrepresented employees, neither the union's claim to be recognized as the representative of the existing unit nor the filing of a petition for a self-determination election for the unrepresented employees creates a question concerning representation in either the existing unit or in an overall unit. In those circumstances, an election in the overall unit would not only be unwarranted, it would deprive the unrepresented employees of their opportunity to express their wishes concerning representation, which is the purpose for holding a self-determination election in the first place. Here, however, the existing unit does *not* remain appropriate, and the only appropriate unit is the merged unit.

larger unit. But the Board in that case specifically acknowledged that such an election *would* be appropriate where a merger of units "trigger[s] the need for the RM petition." Id. at 504. In support of that point, the *Postal Service* Board cited several cases where the Board directed an election in an overall unit despite the fact that "there has been no demand for representation by one Union in an overall unit."[14] Instead, the continued demand by competing unions to represent *some* of the employees in the merged unit was sufficient to warrant processing the RM petition where "there [was] no basis on which the employees who are members of the separate Unions could be deemed to be appropriate separate units" and all of the employees "appropriately belong in the same unit." *Boston Gas,* supra, 221 NLRB at 629. Even though this case does not involve competing unions, I believe that, as in *Boston Gas* and other cases cited above, the Union's claim to represent employees in a merged unit who could not appropriately be separately represented is a claim for representation in the overall unit in the circumstances presented here.

[14] *Boston Gas Co.,* 221 NLRB 628, 629 (1975) (directing election in merged unit of customer service employees who had formerly been represented by different unions in separate units where neither union claimed to represent entire unit). See also *Westinghouse Electric Corp.,* 144 NLRB 455 (1963) (directing election in merged unit of maintenance employees who had formerly been represented by different unions in separate units where neither union claimed to represent entire unit); *Massachusetts Electric Co.,* 248 NLRB 155 (1980) (directing election in merged unit of "physical" employees who had formerly been represented by different unions in separate units where neith *The Denver Publishing Co.*, 238 NLRB 207 (1978), where an election was directed in a merged unit of electronic maintenance employees who had formerly been represented by different unions in separate units, where both unions "currently" disclaimed an interest in representing all the employees. I believe that these cases, rather than *Postal Service,* supra, are more apposite to the situation presented here.

## Conclusion

The only appropriate unit that exists here is one that includes all technicians employed by the Employer at all four facilities. If the Union wishes to continue its representative status, this necessarily requires the Union to seek recognition on behalf of all technicians. To the extent the Union is only willing to represent the subset of technicians that it has historically represented, this is tantamount to a disclaimer of interest in representing the Employer's technicians because the prior bargaining unit has been extinguished. Obviously, the Union continues to claim a right to recognition. In the circumstances presented here, the only conceivable way that the Union can claim representative status is to have majority support in a unit consisting of all technicians at all four facilities. This makes it appropriate to process the RM petition and to give effect to the results of the election. As noted above, employees in the combined unit have now cast their ballots expressing their wishes concerning representation. By reversing the Regional Director, my colleagues extinguish the right of the employees, the Union and the Employer to have the ballots counted. This is the opposite of what Congress contemplated that the Board should do when resolving a question concerning representation. Accordingly, I respectfully dissent.

Dated, Washington, D.C. May 17, 2017

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Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD