

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

SCOMA'S OF SAUSALITO, LLC

Case 20-CA-116766

and

UNITE HERE, LOCAL 2850

GENERAL COUNSEL'S STATEMENT OF POSITION WITH RESPECT
TO ISSUES RAISED ON REMAND FROM THE D.C. CIRCUIT COURT OF APPEALS

I. Procedural History and Issue

The Complaint in this matter, issued April 22, 2014, alleged that Scoma's of Sausalito, LLC (Respondent), unlawfully withdrew recognition from UNITE HERE Local 2850 (Union and Charging Party) at a time when the Union retained majority support within the bargaining unit of Respondent's servers, cooks, dishwashers, bartenders, hostesses, and bussers (Unit employees). *See Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). After finding that Respondent violated the Act as alleged, the Board ordered Respondent to cease and desist from withdrawing recognition and to affirmatively recognize the Union and bargain with it concerning Unit employees' terms and conditions of employment and, if an understanding were reached, embody that understanding in a signed agreement. 362 NLRB No. 174 (Aug. 21, 2015).

Respondent petitioned for review to the D.C. Circuit Court of Appeals. On May 7, 2017, the Court upheld the Board's finding that Respondent unlawfully withdrew recognition from the Union, but, due to the unique facts of the case, the Court vacated the Board's affirmative bargaining order and remanded the case to the Board for the determination of a new remedy.

Scomas of Sausalito, LLC v. NLRB, 849 F.3d 1147 (D.C. Cir. 2017), *vacating and remanding*

362 NLRB No. 174 (Aug. 21, 2015). The Court held that, under the law of the D.C. Circuit, an affirmative bargaining order is an “extreme remedy” because it comes with a decertification bar that prevents employees from challenging the Union’s majority status for a reasonable period, which in turn affects employees’ rights by preventing them from “dislodging the union.” *Id.* The Court found that Respondent acted in good faith in relying upon a facially valid decertification petition with verified signatures and that its violation was unintentional due to the Union’s failure to advise it that enough Unit employees had retracted their signatures from the decertification petition such that it no longer contained signatures from a majority of employees. The Court noted that the employees’ decertification petition did not result from any misconduct by Respondent. Because there was no “taint” to “dissipate,” the Court found that “an election can fairly be held without a bargaining order and attendant bar on questioning the Union’s majority status.” *Id.* at 1158. Under these facts, the Court determined that an affirmative bargaining order with a decertification bar was not justified.

- II. The Board should issue a cease-and-desist order prohibiting Respondent’s withdrawal of recognition and failing and refusing to bargain with the Union unless and until the Board, following a valid election, certifies that another labor organization or no labor organization has been selected.

General Counsel urges the Board to adopt its original order herein with the following modifications: (1) remove the affirmative bargaining order (paragraph 2(a)); and (2) modify paragraph 1(a) such that Respondent is ordered to cease and desist from withdrawing recognition and failing and refusing to bargain with the Union unless and until the Board, following a valid election, certifies that another labor organization or no labor organization has been selected.

This approach is similar to that undertaken by the Board and approved by the D.C. Circuit in *Lee Lumber*, 334 NLRB 399 (2001) (*on remand from* 117 F.3d 1454 (D.C. Cir. 1997), *denying enforcement of* 332 NLRB 175 (1996), *enforced*, 310 F.3d 209 (D.C. Cir. 2002).

In *Lee Lumber*, as here, the Board had reason to believe that its traditional affirmative bargaining order would not be enforced by the D. C. Circuit based on language in the court's remand. 334 NLRB at 406. Accordingly, the Board modified its original order to vacate the affirmative bargaining provision, but retained the provision enjoining the employer from withdrawing recognition from the union and from failing to bargain. It stated that these provisions would be effective unless and until, after complying with the other provisions of its order, including the 60-day notice-posting period, the employer was presented with objective evidence sufficient to warrant its challenging of the union's majority status again. On review, the D.C. Circuit enforced this remedy. *Lee Lumber and Bldg. Material Corp. v. NLRB*, 310 F.3d at 219.

In the instant matter, the General Counsel urges the Board to require the continuation of the cease and desist order unless and until the Board, following a valid election, certifies that another labor organization or no labor organization has been selected. A Board order requiring Respondent to cease and desist from withdrawing recognition and failing and refusing to bargain with the Union unless the Union is decertified as the result of a Board election is necessary in this case because Respondent has already "withdrawn recognition" from the Union again, or at least announced as much to its employees, even though it never restored the recognition it withdrew in 2013. Following the D.C. Circuit's remand of this matter to the Board, Respondent announced to its employees in March 2017 that it was again "withdrawing recognition" from the Union. Additionally, Respondent has acted in blatant disregard for the Union and the Board by making unilateral changes to Unit employees' terms and conditions of employment *even after* the Board found Respondent unlawfully withdrew recognition from the Union and must cease and desist from refusing to recognize and bargain with the Union. Thus, after both the Board

and the D.C. Circuit held that Respondent *unlawfully* withdrew recognition from the Union, and the only question remaining was the appropriate remedy, Respondent announced that it was again withdrawing recognition from the Union, and it implemented unilateral changes, without taking any action to remedy its prior unfair labor practices. On August 7, 2017, the Regional Director of Region 20 of the Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 20-CA-197147 and 20-CA-201086 alleging that Respondent violated Section 8(a)(1) of the Act by informing its employees that it was withdrawing recognition from the Union at a time when its prior unfair labor practices remained unremedied and violated Section 8(a)(5) of the Act by making unilateral changes to Unit employees' terms and conditions of employment. Accordingly, Respondent should not be able to avoid its bargaining obligation absent a Board-conducted election and certification.

The Board has routinely required that an employer cease and desist from recognizing a union until a Board election and certification in the context of an unlawful voluntary recognition. *See, e.g., Point Blank Body Armor, Inc.*, 312 NLRB 1097, 1101 (1993) (ordering that employer cease and desist from recognizing union until the union has demonstrated its exclusive majority status pursuant to a Board-conducted election); *S.M.S. Automotive Products*, 282 NLRB 36, 48 (1986) (same); *Ramey Super Markets*, 138 NLRB 1719, 1721 (1968)(same); *Bernhard-Altman Texas Corp.*, 122 NLRB 1289, 1295 (1959), *enforced sub nom. ILGU v. NLRB*, 280 F.2d 616 (D.C. Cir. 1960), *affirmed*, 366 U.S. 731 (1961). Such remedy has been applied also in the unlawful withdrawal of recognition context. *See, e.g., Mega Van & Storage*, 294 NLRB 975, 980 (1989).

The Board has long noted that elections are the preferred means of testing employee support for a union. *Levitz, supra* at 719, 725-26. Allowing the Employer to unilaterally

withdraw recognition immediately following the 60-day posting period in this case, after it did so unlawfully in 2013, could easily lead to years of additional litigation, a result that would be especially destructive of employee rights under the Act. It could also have the “collateral effect of precluding employees from filing a decertification petition with the Board.” *See, e.g., Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817, 820-21 (2007) (Member Walsh, dissenting) (noting that if the employer had not unlawfully withdrawn recognition, the Board could have held an RM or RD election to determine the unit employees’ true sentiments).

In summary, the proposed remedy comports with the D.C. Circuit’s remand to vacate the affirmative bargaining order. It is also in line with the *Lee Lumber* line of cases described above, in which the D.C. Circuit enforced a similar remedy where an affirmative bargaining order may not have been appropriate under its test. The proposed modification that would prohibit further unilateral withdrawals of recognition by Respondent has precedence under Board law, is necessary for the instant case due to its posture, and would still permit a decertification election after the notice-posting period.

Dated: August 7, 2017

/s/ David B. Reeves

David B. Reeves, Counsel for the General Counsel
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
David.reeves@nlrb.gov; (628) 221-9971