

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

LEGGETT & PLATT, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS (IAM), AFL-CIO

Cases 09-CA-194057
09-CA-196426
09-CA-196608

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION AND ITS BRIEF FILED IN SUPPORT THEREOF**

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I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this answering brief to Respondent's exceptions to the decision of Administrative Law Judge Andrew S. Gollin which issued on October 2, 2017. Judge Gollin correctly concluded that Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the Unit in the absence of the results of a Board election, making changes to employees' terms and conditions of employment without bargaining with the Union, and violated Section 8(a)(1) of the Act by directing an employee to meet with a fellow employee to sign a petition to decertify the Union. (ALJD pp. 20-21) ^{1/}

The instant case is controlled by the Board's decision in *Levitz Furniture Co.*, 333 NLRB 717 (2001). Many of the arguments raised by Respondent in its exceptions were previously argued in its brief to the Administrative Law Judge, and were summarily rejected. For the reasons set forth herein, Respondent's exceptions to the Administrative Law Judge's decision, including his factual findings, analysis, legal conclusion, and remedy, are without merit. Judge Gollin's decision concerning the unlawfulness of Respondent's actions should be affirmed in its entirety.

II. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT RESPONDENT VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY WITHDRAWING RECOGNITION FROM AND REFUSING TO BARGAIN WITH THE UNION (Exceptions 1-2, 14-39, 45)

A. Brief Summary of Relevant Facts

Leggett & Platt, Inc. (Respondent) manufactures innerspring mattresses at its two facilities in Winchester, Kentucky. (G.C. Ex. 1; Tr. 61, 200) The International Association of Machinists

^{1/} References to the Administrative Law Judge's Decision will be designated as (ALJD p. ___); references to Respondent's exceptions and brief in support thereof will be designated as (R. Except. p. ___) and (R. Br. p. ___) respectively; references to the trial transcript will be designated as (Tr. p. ___); references to the General Counsel's exhibits are designated as (G.C. Ex. ___); and references to Respondent's exhibits and the Union's exhibits are designated as (R. Ex. ___) and (U. Ex. ___), respectively.

and Aerospace Workers (IAM), AFL-CIO, Local Lodge 619 has represented Respondent's production and maintenance employees at these facilities since 1965. (Tr. 63; Jt. Ex. 1) The most recent collective-bargaining agreement expired on February 28, 2017. (Jt. Ex. 1; Tr. 216-217)

In about December 2016, employees began circulating a petition stating that the undersigned employees "do not want to be represented by IAM 619." (R. Ex.7; Tr. 318, 328, 379-380) (hereafter referred to as the anti-union petition) By March 1, 2017, the anti-union petition had 182 signatures, but 15 of the employees contributing signatures had left the bargaining unit. (R. Ex 7; Jt. Ex. 8) This brought the number of signatures to 167 (not including the 28 employees who signed the pro-union petition subsequent to signing the anti-union petition (discussed further, supra). On December 22, 2017, the Union, by Directing Business Representative Billy Stivers, sent Respondent a letter requesting to bargain for a new collective-bargaining agreement. (Jt. Ex. 2; Tr. 217) Rather than responding, on January 11, 2017, Respondent sent a letter to the Union stating that it had received evidence from a majority of unit employees that they no longer desired to be represented by the Union and that Respondent would withdraw recognition of the Union when the collective-bargaining agreement expired on February 28, 2017. (Tr. 243; Jt. Ex. 4)

On February 21, 2017, the Union replied to Respondent's January 11, 2017 letter. (Tr. 248; Jt. Ex. 6) The Union stated that it did not believe Respondent's claim that the Union had lost majority support. (Jt. Ex. 6) The Union also requested that Respondent bargain over a successor collective-bargaining agreement. (Jt. Ex. 6) Respondent refused the Union's request and instead reiterated, in a February 22, 2017 letter, that it intended to withdraw recognition upon expiration of the collective-bargaining agreement. (Tr. 249, Jt. Ex. 7) Respondent did not show or provide the Union with the anti-union petition it received. (Tr. 268)

After it received Respondent's January 11, 2017 letter, the Union began collecting signatures on a counter-petition in support of the Union (hereafter referred to as the pro-union petition). (Tr. 64, 110, 633; G.C. Ex. 2) All pages of the petition stated on top, "We the undersigned members of the International Association of Machinists and Aerospace Workers, Local Lodge 619, support the Union at Leggett & Platt, Inc." (Tr. 71, 112-114, 618, 634, 644; G.C. Ex. 2) The statement at the top of each page was on the page before any employees signed the document. (Tr. 71-72, 634, 657)

Respondent withdrew recognition of the Union as the collective-bargaining representative of its employees on March 1, 2017. (Jt. Ex. 9; Tr. 73, 253-254) As of March 1, 2017, the bargaining unit consisted of 295 employees. (Jt. Ex. 8; Tr. 251-252) As of that date, 182 people had signed the anti-union petition. (R. Ex. 7) However, 15 employees who signed the petition had left the bargaining unit by March 1, 2017, reducing the number of signatures to 167. (Jt. Ex. 8; R. Ex. 7) Additionally, Respondent did not count employee Fred Gross because it could not verify his signature. (Tr. 275, 285) Jacob Purvis testified that Fred Gross had actually asked for his name to be removed from the petition. (Tr. 324, 341) Hence, Purvis wrote a "no" next to Fred Gross's name. (Tr. 324; R. Ex. 7) Gross's name does not appear anywhere else in the anti-union petition. (R. Ex. 7) Gross also later signed the pro-union petition. (G.C. Ex. 2; Tr. 675) Respondent maintains that it verified Donnie Butler's name when he came to the office and personally signed the anti-union petition after the petition was submitted to Respondent. (Tr. 278) However, Jacob Purvis, who collected Butler's signature, claims the signature was added before the anti-union petition was given to Respondent. (Tr. 375-376) Division Sales Manager Kurt Bruckner, who verified the page of signatures that includes Donnie Butler's name, did not verify Butler's signature. (Tr. 303) Additionally, 28 bargaining unit members who had signed the anti-union petition later signed the pro-union petition.

(Tr. 675-676; G.C. Ex. 2; R. Ex. 7) Although his testimony was not credited by the Administrative Law Judge, another employee whose signature appears on the anti-union petition, William Woodruff, denies ever signing such a petition. (Tr. 629-630) Thus, at the time of withdrawal, the anti-union petition contained only 137 valid signatures, representing less than 148 or 50 percent of the bargaining unit. ^{2/}

B. Controlling Case Law Firmly Supports the Administrative Law Judge's Findings and Decision

Respondent excepts to the Administrative Law Judge's determination that Respondent unlawfully withdrew recognition from and refused to bargain with the Union. By focusing on the point that Respondent did not have a copy of the Union's counter-petition in this matter, Respondent entirely ignores well-settled law that under the objective standard adopted by *Levitz Furniture Co. of the Pacific, Inc.*, the Union was not required to provide Respondent with its counter-petition.

The Administrative Law Judge correctly found that the controlling case law firmly places the burden of proof to show that the Union lacked majority support at the time of withdrawal (March 1, 2017) on Respondent. Section 8(a)(5) of the Act requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. In order to promote the Act's policies of industrial stability and employee free choice, the Board will presume that, once chosen, a union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-85 (1996). Such a presumption "enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying about the immediate risk of decertification and by removing any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support." *Id.* at 576. The

^{2/} This was calculated as follows: 182 signatures - 15 who left the unit - Donnie Butler - 28 crossover signers (including Fred Gross) - William Woodruff = 137

presumption of majority status is irrebuttable during the term of a collective-bargaining agreement; upon expiration of the collective-bargaining agreement, the presumption continues, but becomes rebuttable. *Id.* at 785-87.

When the presumption of a union's majority status is subject to challenge, an employer has a variety of options for testing the union's support. One such option - one that Respondent rejected - is to petition the Board to hold a secret-ballot election. It has long been the Board's view that "[s]ecret elections are generally the most satisfactory - indeed the preferred - method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). Thus, an employer that has reason to question whether a majority of employees supports the union may initiate an election by filing a Representation Management ("RM") petition under Section 9(c)(1)(B) of the Act. If the union fails to garner a majority of votes in the ensuing RM election, the employer is relieved of its bargaining obligation.

An employer may also pursue other permissible, though less-favored, options for testing a union's majority status. Of relevance here is the option that Respondent chose, which allows an employer to unilaterally withdraw recognition of the Union and attempt to marshal facts regarding the union's lack of support as a defense to an unfair labor practice charge. An employer may overcome the presumption of majority status, and therefore lawfully withdraw recognition, only by showing that the union actually lacked majority support at the time recognition was withdrawn. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 725 (2004). Notably, prior to the Board's decision in *Levitz*, an employer could lawfully withdraw recognition from a union after the expiration of a contract if it could demonstrate either (1) that the union did not in fact enjoy majority support, or (2) that the employer had a good-faith doubt as to the union's majority support. See, *Auciello Iron Works*, 517 U.S. at 786-87.

Levitz specifically overruled this standard and no longer permits an employer to withdraw

recognition if it only has a good-faith doubt as to the union's majority support. Instead, an employer's good-faith uncertainty entitles the employer to file an RM petition with the Board requesting a decertification election. *Levitz*, 333 NLRB at 717. Employees have a similar avenue for invoking the Board's election process to test a union's majority status. If 30 percent of the employees in the bargaining unit support a petition declaring that the union no longer enjoys their support, the Board will conduct a decertification (“RD”) election under Section 9(c)(1)(A)(ii) of the Act.

An employer that decides to forego the Board's favored policy of an RM election “withdraws recognition at its peril.” (Emphasis added) *Levitz*, 333 NLRB at 725. In *Levitz*, the Board observed: [I]f the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. 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). *Levitz*, 333 NLRB at 725. The Board emphasized that the evidence produced must be objective evidence – for example, a petition signed by a majority of the employees in the bargaining unit. *Id.*

Moreover, even where an employer produces objective evidence of a lack of majority support, that evidence might not remain conclusive. For if the General Counsel comes forward with evidence rebutting the employer's evidence, “the burden remains on the employer to establish loss of majority support by a preponderance of all the evidence.” *Id.*

The Board had an opportunity to revisit the standard in *HQM of Bayside, LLC*, 348 NLRB 758 (2006). There, the Board affirmed the principle in *Levitz* that the burden of proving actual loss of majority support rests squarely on Respondent. *Id.* at 759. In acknowledging that the employer in *HQM* received a decertification petition signed by an apparent majority of

employees, the Board nevertheless found the withdrawal of recognition was unlawful because 12 employees who previously signed the decertification petition signed a subsequent pro-union counter-petition, much like the case at hand. The Board reiterated its “preferred method of testing employees’ support for union” is the filing of an RM petition. *Id.*, citing *Levitz*, *supra*, 333 NLRB at 727.

The first time the Board encountered a situation akin to the one here, where the Union did not notify Respondent of counter-evidence to the decertification petition was *Fremont-Rideout*, in which the Board adopted the ALJ’s decision relying heavily on *Levitz*. *Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital*, 354 NLRB 453 (2009) (two-member Board decision), incorporated by reference in *Fremont-Rideout Health Group*, 359 NLRB 542 (2013). There, the ALJ concluded “the Union was under no obligation to notify the [employer], even if it had time and an opportunity, of its continued majority status by way of the reaffirmation cards it had obtained.” *Id.* at 460. This interpretation is squarely in line with the Board’s rationale in *Levitz* that an employer must prove actual loss of majority support at the time it withdraws recognition. If the burden is to truly rest with the employer, as the Board made clear, then the union has no burden to present counter-evidence to the employer. Indeed, the union in *Fremont-Rideout* was found to have “no burden nor was it obligated, in any way, to notify or advise the Hospital of the 18 cards in its possession” which nullified decertification signatures prior to the withdrawal of recognition. *Id.* at 459. Not surprisingly, Respondent does not address *Fremont-Rideout* in its Brief.

Taken together, the Board’s decision in *Levitz*, *HQM*, and *Fremont-Rideout* have shaped the landscape in withdrawal of recognition cases. They serve to warn Respondent that it withdraws recognition at its peril and place a high burden on Respondent to show the Union suffered an actual loss of majority support at the time it withdrew recognition. Thus, the

Administrative Law Judge correctly held that Respondent is precluded from counting the signatures of employees who demonstrated support for the Union after signing the decertification petition, even if it was unaware that the employees had repudiated their support for the anti-union petition.

Ignoring this clear precedent, Respondent instead relies on alleged and irrelevant “concealment” of the pro-union petition from Respondent, and an also irrelevant and unsupported “atmosphere of confusion” around the Union’s counter-petition. In this respect, Respondent’s arguments center around witness credibility. The Administrative Law Judge correctly credited the Union’s witnesses with respect to the Union’s counter-petition. It is beyond question that an Administrative Law Judge’s credibility resolutions should be given a great deal of weight and should be overturned only “where the clear preponderance of all the relevant evidence convinces the Board that they are incorrect.” *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). Here, the Judge correctly credited the testimony of the General Counsel’s witnesses over those of Respondent and found that Respondent violated the Act based on his determination of credibility and a preponderance of all the relevant evidence. Moreover, it is well settled that where demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, “and reasonable inferences which may be drawn from the record as a whole.” *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). Here, the Administrative Law Judge’s findings crediting the General Counsel’s witnesses are bolstered by the preponderance of all relevant evidence, which establishes that the Union forthrightly collected signatures for its counter-petition and clearly identified it as such. (Tr. 64, 69-72, 101-105, 107, 110-114, 405, 425, 453, 513, 525, 553, 557, 610, 618, 633-635, 638-641, 644-645, 647-650, 652, 655-657, 665, 671-672; G.C. Exs. 2 and 3)

Given the Administrative Law Judge's credibility determinations, the cases cited by Respondent in its brief are inapplicable because there was no credible testimony that there was any misrepresentation by the Union.

Respondent also argues that the Judge incorrectly excluded employees' subjective testimony of their recollection of whether they supported decertification of the Union on March 1, 2017 even if they signed the pro-union petition. The Judge correctly excluded such testimony since it would have been inherently coercive and akin to unlawful polling employees on the stand. This is true regardless of the employees' stance on unionization. Respondent's reliance on *Johnson Controls, Inc.*, No. 10-CA-151843, 2016 NLRB Lexis 110 (ALJ Feb. 16, 2016) to support its contentions in this matter is likewise misplaced, as that case is wrongly decided, currently before the Board on exceptions on the subjects Respondent is relying upon, and as an interim decision is not controlling Board law. It is telling that Respondent cites no binding Board authority in support of its claims that testimony was incorrectly excluded, because no such authority exists.

C. Respondent's Arguments that Levitz Should Be Overturned are Unsound. If the Board is to Change the Levitz Standard, it Should Require that Employers Utilize Board Representation Procedures to Fairly and Efficiently Determine Whether their Employees' Exclusive Bargaining Representative Has Lost Majority Support

Respondent argues that *Levitz* should be overturned and replaced because it encourages "gamesmanship." Counsel for the General Counsel Submits that to the extent that *Levitz* should be overturned, the new standard should hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election. ^{3/}

^{3/} The General Counsel does not seek any change to the holding in *Levitz* that employers can obtain RM elections by demonstrating a good-faith reasonable uncertainty as to a representative's continuing majority status. *Levitz*, 333 NLRB at 717.

In *Levitz*, supra. at 725-26, the Board stated that it would revisit the framework it established for when employers may unilaterally withdraw recognition from their employees' exclusive bargaining representative if experience showed that it did not effectuate the purposes of the Act. Experience has indeed shown that the *Levitz* framework has created peril for employers in determining whether there has been an actual loss of majority, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation. Thus, the General Counsel urges the Board to hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition based only on the results of an RM or RD election. Such a rule would benefit employers, employees, and unions alike by fairly and efficiently determining whether a majority representative has lost majority support. It will also better effectuate the Act's goals of protecting employee choice and fostering industrial stability, and is even more appropriate now because the Board's revised representation case rules have streamlined the election process.

1. The Board in *Levitz* sought to create a framework to encourage employer use of RM elections and left open future consideration of the General Counsel's proposal to require exclusive use of RM elections to resolve questions of majority support

In *Levitz*, the then-General Counsel proposed that employers should be prohibited from unilaterally withdrawing recognition. *Id.* at 719, 725. The Board acknowledged that its early case law supported the General Counsel's view. *Id.* at 721 and n. 25. Specifically, it noted that in *United States Gypsum Co.*, 90 NLRB 964, 966 (1950), decided shortly after Congress amended the Act to provide for employer-filed petitions, the Board held that it was bad faith for an employer to unilaterally withdraw recognition rather than file a RM petition, which it described as "the method whereby an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt." *Levitz*, 333 NLRB at 721. The *Levitz* Board also acknowledged that the General Counsel's proposed rule might minimize

litigation and be more protective of employee choice. *Id.* at 725. In this context, the Board noted that elections are the preferred means of testing employee support, and that the proposed rule would be more consistent with *Linden Lumber Division v. NLRB*, 419 U.S. 301, 309-10 (1974), which allows an employer to insist that a union claiming majority support prove it through an election. *Levitz*, 333 NLRB at 725.

However, the Board rejected the General Counsel's proposed rule and instead adopted a rule that it believed would effectively encourage employer use of RM petitions by elevating the evidentiary requirement for an employer's unilateral withdrawal, while lowering the standard for an employer's filing of an RM petition. *Id.* at 717. The Board then concluded that under its new framework, employers would be likely to unilaterally withdraw recognition only if the evidence before them "clearly indicate[d]" that a union had "lost majority support." *Id.* at 725. It stated that if future experience proved otherwise, it could revisit the issue. *Id.* at 726.

2. Experience under *Levitz* has failed to result in employers acting only where the evidence before them "clearly indicates" a loss of majority support and has caused protracted litigation undermining the core purposes of the Act

In the 15 years since *Levitz*, the option left available under the *Levitz* framework for employers to unilaterally withdraw recognition has proven problematic. In a number of cases involving unilateral withdrawal, employers have acted based on evidence that did not "clearly indicate" a loss of majority, causing protracted litigation over the reliability of that evidence. This unnecessary litigation has resulted in significant liability for employers and substantial interference with employee free choice. It also encourages the disclosure and litigation of individual employees' representational preferences, which can interfere with employees' Section 7 rights. Indeed, in the litigation of this matter, Respondent attempted on numerous occasions to elicit such testimony, and even filed exceptions over the Administrative Law Judge's refusal to allow such testimony.

A fundamental flaw with the *Levitz* framework is that it fails to account for the difficulty of ascertaining whether evidence relied on by an employer actually indicates a loss of majority support, creating significant liability even for employers acting in good faith. For example, employers have unlawfully withdrawn recognition based on ambiguously worded disaffection petitions that did not clearly indicate that the signatory employees no longer desired union representation. See, e.g., *Anderson Lumber Co.*, 360 NLRB No. 67, slip op. at 1 n. 1, 6-7 (2014) (written statements submitted by four employees that they did not want to be union members did not show they no longer desired union representation), *enforced sub nom., Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321 (D.C. Cir. 2015). Employers have also unlawfully withdrawn recognition where they relied on untimely disaffection petitions. *Latino Express*, 360 NLRB No. 112, slip op. at I n. 3, 13-15 (2014) (rejecting petition signed by employees during the certification year, when the union has an irrebutable presumption of majority status). In other cases, as here, employers mistakenly relied on disaffection petitions that were invalid because they contained signatures that employees had revoked. See, e.g., *Scoma's of Sausalito, LLC*, 362 NLRB No. 174, slip op. at 3 (Aug. 21, 2015) (employees revoked signatures on disaffection petition before employer withdrew recognition). Additionally, questions have arisen regarding unit composition, creating confusion as to how many, and which employees would actually constitute a majority. See, e.g., *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1018 (2005) (finding employer unlawfully withdrew recognition where signatures on disaffection petition were of non-unit employees), *enforced*, 458 F.3d 952 (6th Cir. 2006). Moreover, employers have unlawfully withdrawn recognition based on facially valid disaffection petitions that did not actually constitute objective evidence of a loss of majority support because they were tainted by unfair labor practices. See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 596-98 (2011) (concluding that unlawful threats by employer's attorney and plant manager had a causal

relationship with employees' disaffection petition and thus the employer's withdrawal of recognition based on it was unlawful).

Protracted litigation over these evidentiary issues also has interfered with the right of employees to choose a bargaining representative. It may take years of litigation before employees deprived of their chosen union obtain a Board order restoring the union's representational role, which completely undermines their Section 7 rights in the interim. See, e.g., *Id.* (ordering employer to bargain with union 5 years after employer's unlawful withdrawal of recognition). Because a restorative bargaining order that operates prospectively fails to compensate employees for their lost representation, employees are irreparably deprived of what benefits their union could have obtained for them during the course of the employer's unlawful conduct. See, *Frankl v. HTH Corp.*, 650 F.3d 1334, 1363 (9th Cir. 2011) (affirming Section 10(j) bargaining order in part because the Board's inability to order retroactive relief for a failure to bargain, partly due to an unlawful withdrawal of recognition, means employees will never be compensated for "the loss of economic benefits that might have been obtained had the employer bargained in good faith").

At the same time, such litigation under *Levitz* can also delay the process for employees who want to reject representation. For example, an unfair labor practice charge filed by an incumbent union can create the "collateral effect of precluding employees from filing a decertification election petition with the Board." *Scoma's of Sausalito, LLC*, 362 NLRB No. 174, slip op at 1 n.2 (Member Johnson, concurring). See also, *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).

Finally, evidentiary disputes about the reliability of employee petitions have resulted in the disclosure of individual employees' union sympathies and litigation of their subjective motivations for signing a petition. See, e.g., *Scoma's of Sausalito*, 362 NLRB No. 174, slip op. at 4-5 (reviewing multiple petitions and employee testimony to determine whether employees' representative had majority support at the time of the withdrawal of recognition); *Johnson Controls, Inc.*, Case 10-CA-151843, JD-14-16 (NLRB Div. of Judges Feb. 16, 2016) (same). Such open questioning of employees regarding their union support, as Respondent urges should be allowed, can chill the future exercise of Section 7 rights. See, *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) (confidentiality interests of employees have long been a concern to the Board and "it is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed") (internal citations omitted). The courts have also noted that such inquiries are unreliable because of the pressure that employers may exert over their employees to give favorable testimony. See, *Pacific Coast Supply*, 801 F.3d at 332 n. 8; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969).

In short, the experience under *Levitz* has not yielded the results that the Board anticipated and intended. Consistent with the General Counsel's original recommendation in *Levitz*, the Board should hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.

3. A rule precluding employers from withdrawing recognition absent the results of an RM or RD election will best effectuate the policies of the Act and better accomplish what the Board set out to do in *Levitz*

It is within the Board's expertise and discretion to determine how a withdrawal of recognition can be accomplished. See, *Linden Lumber*, 419 U.S. at 309-310 (relying on Board's expertise in affirming rule that union must petition for an election after an employer has refused

to recognize it based on a card majority); *Brooks v. NLRB*, 348 U.S. 96, 104 (1954) (noting that matters "appropriately determined" by the Board include when employers can ask for an election or the grounds upon which they can refuse to bargain). The Board should exercise its discretion and adopt the rule proposed above to best effectuate the policies of the Act.

The proposed rule is more consistent with the principle that "Board elections are the preferred means of testing employees' support." *Levitz*, 333 NLRB at 725. It is also more consistent with the Act's statutory framework and the Board's early interpretation of the Act's provision providing for employer-filed petitions. As the Board held in *United States Gypsum Co.* and referenced in *Levitz*, RM petitions are "the method" provided in the Act by which employers may test a representative's majority support. *Levitz*, 333 NLRB at 721. Moreover, the interests of both employers and employees would be best served by processing this issue through representation cases, which are resolved more quickly than unfair labor practice cases.^{4/} Indeed, the Board's new representation case rules, which have revised the Board's blocking charge procedures, have made elections an even more efficient manner of resolving representation questions. In light of these considerations, requiring an RM or RD election before a withdrawal of recognition will best serve the purposes of protecting employee free choice and industrial stability, which are the statutory policies the Board sought to protect in *Levitz*.

In the past, the Board's blocking charge procedure had been the major concern regarding the use of RM elections as a prerequisite for withdrawing recognition because of the potential delay in proceeding to an election. See, e.g., *Levitz*, 333 NLRB at 732 (Member Hurtgen, concurring) ("Faced with an RM petition, unions can file charges to forestall or delay the election."); *B.A. Mullican Lumber & Mfg. Co.*, 350 NLRB 493, 495 (2007) (Chairman Battista,

^{4/} In FY 2015, 87.1 percent of representation cases were resolved within 100 days while 80.4 percent of unfair labor practices were resolved within 365 days. See, National Labor Relations Board Performance and Accountability Report (2015) at 25-26.

concurring) (stating that "an RM petition leading to an election is superior to an employer's unilateral withdrawal of recognition," but expressing concern about the potential delay caused by union-filed blocking charges), *enforcement denied*, 535 F.3d 271 (4th Cir. 2008). However, the Board's new election rules should allay this concern. For instance, the rules impose heightened evidentiary requirements; a party must now affirmatively request that its charge block an election petition, file a written offer of proof in support of its charge, include the names and anticipated testimony of its witnesses, and promptly make its witnesses available. See, NLRB Rules and Regulations Sec. 103.20 (effective April 14, 2015). If the Region determines that the proffered evidence is insufficient to establish conduct interfering with employee free choice, it will continue to process the petition and conduct the election. *Id.*

Indeed, initial data shows that this change has significantly reduced the number of blocking charges. Between April 2014 and April 2015, in the year before the new election rules went into effect, unfair labor practice charges blocked 194 of 2,792 election petitions.^{5/} Between April 2015 and April 2016, in the year after the new election rules went into effect, charges blocked only 107 of 2,674 petitions, a decrease of just over 40 percent.^{6/} This data shows that the more efficient election procedures have largely resolved prior concerns regarding blocking charges.

Beyond the foregoing substantive and procedural reasons justifying the proposed rule, its adoption will not interfere with other methods of dissolving an existing bargaining relationship that do not involve unilateral action by an employer. Employees will still be able to exercise

⁵ See, NLRB News & Outreach, Fact Sheets, Annual Review of Revised R-Case Rules (Apr. 20, 2016), <https://www.nlr.gov/sites/default/files/attachments/news-story/node-4680/R-Case%20Annual%20Review.pdf>.

^{6/} *Id.* In addition, since the implementation of the Board's new election rules, RM petitions have increased from 49 in each of FY 2013 and FY 2014 to 61 in FY 2015, demonstrating increased employer confidence in the RM process. See, *Employer-Filed Petitions-RM*, NLRB, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/employer-filedpetitions-rm> (last visited May 3, 2016).

their choice to not be represented by their current union by filing an RD petition, and they will be able to do so without the threat of an employer's unlawful withdrawal blocking an RD election. In addition, the proposed rule will permit a voluntary agreement between the employees' bargaining representative and their employer for withdrawal, whether this involves a union's disclaimer of interest or a private agreement between the parties to resolve the question. Finally, if a bargaining representative, through its own egregious unfair labor practices creates an atmosphere of employee coercion that renders a fair RM election improbable, the Board could permit a unilateral withdrawal if an employer provided objective evidence of an actual loss of majority support.^{7/}

For the above reasons, the Board should exercise its discretion to modify its *Levitz* standard as Respondent suggests, but modify it to hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.

III. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT RESPONDENT VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY MAKING CHANGES TO EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT (Exceptions 2, 40, 46-47)

Respondent argues that the Administrative Law Judge erred in concluding that it violated Sections 8(a)(1) and (5) of the Act by making changes to employees' terms and conditions of employment. Not so. Respondent stipulated that after withdrawing recognition, it made changes to employees' terms and conditions of employment, including wages, benefits and job procedures set forth in Joint Exhibit 10. Thus, Respondent's arguments in this regard are based

^{7/} Cf. *Union Nacional de Trabajadores (Carborundum Co.)*, 219 NLRB 862, 863-64 (1975) (revoking union's certification based on its violent and threatening conduct and extensive record of similar aggravated misconduct in other recent cases), *enforced on other grounds*, 540 F.2d 1, 12-13 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Laura Modes Co.*, 144 NLRB 1592, 1596 (1963) (refusing to grant union bargaining order remedy based on card majority where union created atmosphere of coercion based on its agents physically assaulting employer officials who displayed unwillingness to recognize their employees' rights under the Act).

on its contention that its withdrawal of recognition was proper. As explained in detail in the prior section, the Administrative Law Judge correctly found that withdrawal was unlawful under *Levitz*. Therefore, Respondent's subsequent unilateral changes to employees' terms and conditions of employment violate Sections 8(a)(1) and (5) of the Act.

IV. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT WHEN DAY DIRECTED ROSEBERRY TO PURVIS (Exceptions 3, 11-13, 41-44)

Respondent excepts to the Administrative Law Judge's conclusion that Day directed Roseberry to Purvis to discuss the decertification petition in violation of Section 8(a)(1) of the Act, arguing that the General Counsel did not meet its burden of proof on the issue. Specifically, Respondent excepts to the Administrative Law Judge's credibility determination crediting Roseberry over Day. As noted, it is beyond question that the credibility resolutions of Administrative Law Judges should be given a great deal of weight and should be overturned only "where the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). Here, the Judge correctly credited the testimony of Roseberry over Day. Respondent argues that Day's testimony does not conflict with Roseberry's. However, Day testified about the purpose of his meeting with Roseberry, and the Administrative Law Judge correctly discredited Day. Thus, Roseberry's version of the meeting is the only credited version. Moreover, contrary to Respondent's arguments, there is nothing dictating that Day's testimony must conflict with any other testimony to be deemed unreliable.

The Administrative Law Judge, in crediting Roseberry, discrediting Day, and drawing an adverse inference against Respondent for failing to call a witness, Purvis, who could have corroborated Day's testimony, properly engaged in credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, "and

reasonable inferences which may be drawn from the record as a whole.” *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). Having discredited Day, the reasonable inference based on the record as a whole, is that Respondent engaged in the unlawful actions as found by the Administrative Law Judge. This record evidence includes Roseberry’s testimony, including that Purvis’s regular job did not entail taking employees to meet their supervisors, that Purvis did not talk to Roseberry about anything work-related, only about signing the decertification petition, and that Day was then aware that Purvis had submitted a decertification petition. (Tr. 145, 155, 164, 186, 378) Although not making a specific exception to the Judge’s decision in this regard, Respondent argues in its brief that Day’s directions to Roseberry did not go beyond ministerial aid in support of a decertification effort as is permitted under the Act. However, in *Corrections Corp. of America*, 347 NLRB 632, 633 (2006), the Board found that an employer’s encouragement of decertification went beyond minimal support when the credited testimony established that the employer’s communications about decertification were not prompted by employee inquiries and that the idea about decertifying was conceived by the employer and then proffered to employees. Here, as in *Corrections Corp. of America*, Roseberry did not inquire as to how to decertify the Union, and Day’s assistance in directing Roseberry to the decertification petitioner and his petition went beyond the minimal ministerial aid allowed under the Act.

V. THE ADMINISTRATIVE LAW JUDGE’S PROPOSED REMEDY AND ORDER ARE PROPER AND APPROPRIATE (Exceptions 48-57)

Respondent excepts to the Administrative Law Judge’s recommended bargaining order as an extreme and unwarranted remedy in this situation. As discussed above, the Judge correctly found that Respondent violated Sections 8(a)(1) and (5) of the Act. The Judge also correctly issued an affirmative bargaining order to remedy Respondent’s unlawful withdrawal of recognition. (ALJD pp. 21-22) The Board has long held that an affirmative bargaining order is a

reasonable exercise of its remedial authority. *Caterair International*, 322 NLRB 64, 64-68 (1996). An affirmative bargaining order is “the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.” *Id.*, at 68.

The Board recently affirmed a bargaining order in a similar withdrawal of recognition case. *Anderson Lumber*, 360 NLRB 538 (2014). There, the Board noted a bargaining order vindicates the Section 7 rights of employees denied their collective-bargaining representative without infringing upon the rights of employees who do not support the union because the order is limited in time. *Id.* An affirmative bargaining order furthers the policies of the Act by “fostering meaningful collective bargaining and industrial peace.” *Id.* Finally, an affirmative bargaining order is necessary to remove any taint from Respondent’s unlawful withdrawal of recognition that a cease-and-desist order alone cannot achieve. *Id.* The record evidence and current Board law fully support the Judge’s remedial order and the Judge’s proposal remedy and Order are proper and appropriate. Accordingly, Respondent’s Exceptions 48-57 should be dismissed in their entirety.

Finally, Respondent, while not making a specific exception stating as much, argues that the remedy is inappropriate insofar as the Judge failed to consider an election as an alternative remedy. In addition to its general exception to the remedy, Respondent argues in its Brief in Support that because there is a decertification pending before the region that has been blocked due to Respondent’s unfair labor practices, employees’ rights are somehow infringed upon. The pending decertification petition, filed after Respondent’s unfair labor practices in this case, is entirely irrelevant to this case and more appropriately addressed in the context of that representation case. If Respondent truly desired an election to determine representation, it could have availed its self of the election procedures by filing an RM petition with the Board upon

receipt of the decertification petition in the present case. Respondent failed to do so, opting instead for unilateral action resulting in unlawful withdrawal of recognition. Judge Gollin's affirmative bargaining order, without mention of an election, is well within the statutory requirements of the Act and Board law.

VI. CONCLUSION

Based on the record as a whole, and for the reasons referred to herein, Counsel for the General Counsel submits that Respondent's 57 exceptions should be rejected in their entirety and that the Administrative Law Judge's legal and factual conclusions be affirmed with the exception of the findings addressed in the General Counsel's Cross Exceptions.

Dated: November 20, 2017

Respectfully submitted,

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TABLE OF AUTHORITIES

Cases

<i>Anderson Lumber Co.</i> , 360 NLRB No. 67, slip op. at 1.....	12, 20
<i>Auciello Iron Works, Inc. v. NLRB</i> , 517 U.S. 781 (1996).....	4, 5
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<i>Corrections Corp. of America</i> , 347 NLRB 632 (2006)	19
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<i>Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital</i> , 354 NLRB 453 (2009)	17
<i>Fremont-Rideout Health Group</i> , 359 NLRB 542 (2013)	7
<i>HQM of Bayside, LLC</i> , 348 NLRB 758 (2006)	6
<i>Johnson Controls, Inc.</i> , Case No. 10-151843, 2016 NLRB Lexis 110 (ALJ Feb. 16, 2016)	9, 14
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<i>Mesker Door, Inc.</i> , 357 NLRB 591 (2011)	12
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<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969).....	5, 14
<i>Pacific Coast Supply, LLC v. NLRB</i> , 801 F.3d 321 (D.C. Cir. 2015).....	12, 14
<i>Scoma's of Sausalito, LLC</i> , 362 NLRB No. 174, slip op at 1 n.2	13, 14
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<i>Shen Automotive Dealership Group</i> , 321 NLRB 586 (1996)	8, 19

<i>Standard Drywall Products,</i>	
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CERTIFICATE OF SERVICE

November 20, 2017

I hereby certify that I served the attached Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and its Brief Filed in Support Thereof on all parties by mailing true copies thereof by electronic mail today to the following at the addresses listed below:

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