

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

## Advice Memorandum

DATE: April 9, 2014

TO: Joseph Frankl, Regional Director  
Region 20

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

SUBJECT: Scoma's Sausalito  
Case 20-CA-116766

Levitz Chron  
530-4080  
530-4080-5012-0100  
530-4080-5012-0150  
530-4080-5084

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) of the Act when it unilaterally withdrew Union recognition based on evidence available to it at the time that the Union had lost majority support. We conclude that the Employer unlawfully withdrew recognition from the Union because the Employer failed to meet its burden of demonstrating that the Union suffered an actual loss of majority support on the date the Employer withdrew recognition. Accordingly, the Region should issue complaint, absent settlement.

### FACTS

UNITE HERE, Local 2850 ("Union") has represented the employees of Scoma's ("Employer") restaurant in Sausalito, California for decades. The bargaining unit employees have worked under successive three-year collective bargaining agreements, the last one having expired on November 18, 2008. At all times relevant the bargaining unit consisted of 54 employees.

The parties sporadically bargained for a successor contract from February 2009 to January 2011. Although the Union's membership ratified the proposed successor agreement, the parties were unable to agree on final language and the contract was never signed. The Employer made attempts to finalize the agreement with the Union but never received any response and, until the events at issue, has not had contact from the Union since October 2011. The Employer has nonetheless maintained the status quo per the terms of the expired contract.

On September 26, 2013<sup>1</sup>, employees began circulating a decertification petition as a reaction to dissatisfaction with the Union's absence and complaints over employees' inability to change certain policies that the Employer maintained under the expired Union contract. By October 28, when the last signature was collected, 29 of the 54 employees had signed the petition, thus demonstrating majority support for decertification. On that same day, the decertification petition was filed with the Board and a copy was provided to the Employer. That evening, the Union contacted the Employer requesting negotiations.

The following day, October 29, the Union obtained seven employee signatures on a counter petition that stated, "If I signed a petition to decertify . . . the Union, I hereby revoke my signature . . . [and] wish to continue being represented by [the Union] for the purposes of collective bargaining." Six of the seven signers of the Union's counter petition had previously signed the decertification petition. The Union did not send a copy of the counter petition to the Employer or inform the Employer that it had any evidence demonstrating continued Union support.

After receiving the employees' decertification petition, the Employer reviewed the signatures and verified, using personnel records, that each signature was legitimate; that it had 54 bargaining unit employees; and that each of the 29 employee-signers was a bona fide employee at that time. On October 31, the Employer informed the Union that it was withdrawing recognition. On November 1, the Employer informed the employees of its withdrawal of recognition.

On November 5, the Employer notified the Region of its withdrawal of recognition. On November 6, the filing employee withdrew the decertification petition.

On November 11, a new decertification petition began circulating, which was ultimately signed by 32 employees. Of the 32 employees, three were cross-over employees who signed the original decertification petition and then the Union's counter petition. One employee who signed the initial decertification petition, then the Union's counter petition, but not the second decertification petition, submitted a letter of resignation to the Union and requested revocation of automatic dues deductions. Several other employees also submitted resignation letters and automatic dues deduction revocations.

### ACTION

We conclude that the Employer unlawfully withdrew recognition from the Union because there is insufficient evidence that the Union suffered an actual loss of

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<sup>1</sup> All dates hereinafter are in 2013 unless otherwise stated.

majority support on October 31, the date the Employer withdrew recognition. Accordingly, the Region should issue a Section 8(a)(5) complaint, absent settlement.

In *Levitz*, the Board held that an employer may rebut the continuing presumption of a union's majority status and unilaterally withdraw recognition only if it can show actual loss of majority support based on objective evidence.<sup>2</sup> An employer that withdraws recognition from an incumbent union bears the initial burden of proving that the union suffered a valid, untainted loss of its majority status at the time it withdrew recognition, and may do so with an anti-union petition signed by a majority of the unit employees.<sup>3</sup> The General Counsel may present rebuttal evidence to show that the employer's evidence is unreliable or that the union had majority support at the time of the withdrawal.<sup>4</sup> If there is such evidence, the employer must prove actual loss of majority support by a preponderance of all the evidence, including rebuttal evidence.<sup>5</sup> The Board has further noted that the "preferred method of testing employees' support for unions" under *Levitz* is to file an RM petition with the Board.<sup>6</sup> In light of its burden under *Levitz*, an employer with objective evidence that a union has lost majority support "withdraws recognition *at is peril*."<sup>7</sup> Moreover, the union has no obligation to advise the employer that it possesses countervailing evidence of its majority status prior to the employer's withdrawal of recognition.<sup>8</sup> Still, any

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<sup>2</sup> *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001).

<sup>3</sup> *Id.* at 725, 725 n.49.

<sup>4</sup> *Id.* E.g., *HQM of Bayside, LLC*, 348 NLRB 787, 789-790 (2006), *enforced*, 518 F.3d 256 (4th Cir. 2008). In *HQM of Bayside* the Board found that 12 of the 35 signatures on a decertification petition were nullified by the same 12 employees subsequently signing a pro-union petition; thus, the employer was unable to rely on the original decertification petition as evidence of a union loss of majority support. *Id.*

<sup>5</sup> *Levitz*, 333 NLRB at 725, 725 n.49. E.g., *Parkwood Developmental Center*, 347 NLRB 974, 974, 975 (2006) (finding employer failed to prove actual loss of majority support where union obtained signatures and authorization cards from majority of employees), *enforced*, 521 F.3d 404 (D.C. Cir. 2008).

<sup>6</sup> *HQM of Bayside, LLC*, 348 NLRB at 789, citing *Levitz*, 333 NLRB at 727.

<sup>7</sup> *Levitz*, 333 NLRB at 725 (emphasis added).

<sup>8</sup> *Fremont Medical Center & Rideout Memorial Hospital*, 354 NLRB 453, 459-60 (2009) *adopted by* 359 NLRB No. 51 (Jan. 15, 2013) (finding employer unlawfully withdrew recognition where union had not actually lost majority support on date employer withdrew recognition even though union had not informed employer, prior to withdrawal of recognition, of countervailing evidence of union support); *HQM of*

evidence used by the parties to show majority status, or loss thereof, “must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union’s status, cause employee disaffection, or improperly affect the bargaining relationship itself.”<sup>9</sup>

Based on the above, we conclude that the Employer unlawfully withdrew recognition on October 31, notwithstanding that the evidence available to it on that date indicated that the Union had lost majority support, because there was actual evidence on that date, based on the Union’s counter petition, that undermined the Employer’s evidence of majority disaffection. Specifically, the evidence establishes that although a majority of 29 employees in a 54-person unit signed a union decertification petition, six of those employees on October 29 signed the Union’s counter petition that revoked their signatures on the decertification petition and stated that they wished to continue being represented by the Union, thus negating the original petition’s majority. Therefore, the Employer cannot sustain its burden of proving, by a preponderance of the evidence, that the Union suffered an actual loss of majority support on October 31, the date the Employer withdrew recognition.<sup>10</sup>

Moreover, although a majority of employees signed a second decertification petition that began circulating on November 11, that petition is tainted because it was circulated *after* the Employer unlawfully withdrew recognition and, therefore, was not “raised in a context free of unfair labor practices.”<sup>11</sup> In *Lee Lumber*, the Board emphasized that “[i]n cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union . . . the causal relationship between unlawful act

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*Bayside, LLC*, 348 NLRB at 788 (stating that union has no obligation to demonstrate conclusively to the employer prior to withdrawal of recognition that it still has majority status).

<sup>9</sup> *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), *enforced in relevant part*, 117 F.3d 1454 (D.C. Cir. 1997).

<sup>10</sup> *See, e.g. Heartland Human Services*, 359 NLRB No. 76, slip op. at 3 (Mar. 18, 2013) (finding employer violated 8(a)(5) when it unilaterally withdrew recognition and refused to bargain following contested union decertification election that employer claimed was objective proof of “will of majority” notwithstanding hearing officer and Board ordering rerun election), *enforced*, --- F.3d --- (7th Cir. 2014), 2014 WL 983618; *HQM of Bayside, LLC*, 348 NLRB at 788-90; *Parkwood Developmental Center*, 347 NLRB at 974-76.

<sup>11</sup> *See Lee Lumber*, 322 NLRB at 177.

and subsequent loss of majority support may be presumed.”<sup>12</sup> Thus, the Employer is precluded from using the second decertification petition as evidence of majority disaffection from the Union.

There is some evidence suggesting that the Union may have made misleading and threatening statements to induce employees to sign its counter petition by allegedly telling those employees that the Employer would fire them or that they would lose benefits if the Union were removed. Assuming these statements were made, we agree with the Region that they did not rise to a level of an unlawful threat sufficient to taint the evidence of Union support. In this regard, we note that the Board has held that union statements asserting employees would lose benefits if the union lost an election were “misrepresentations,” not unlawful “threats,” reasoning that the union had no control over employee benefits; nor does it control whom the employer may terminate in their absence.<sup>13</sup>

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by withdrawing recognition from the Union on October 31.<sup>14</sup>

/s/  
B.J.K.

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cc: Injunction Litigation Branch

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<sup>12</sup> *Id.* The Board in *Lee Lumber* went on to explain that it was not adopting a “per se rule,” but that it was appropriate to apply the presumption of a causal relationship because it would take from the employer the “temptation” to avoid bargaining duties while hoping that the delay would erode employees’ support for the union. *Id.* at 177, 179. See *Erie Brush & Mfg. Corp.*, 357 NLRB No. 46, slip op. at 4 n.11, 11 (Aug. 9, 2011) (relying on *Lee Lumber* to find that absence of evidence of a causal relationship between loss of majority support and employer’s unfair labor practice was irrelevant), *enforcement denied*, 700 F.3d 17 (D.C. Cir. 2012).

<sup>13</sup> See, e.g., *Air La Carte*, 284 NLRB 471, 473-74 (1987).

<sup>14</sup> The Region’s recommendation not to seek injunctive relief will be addressed in a separate memorandum.