

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

Advice Memorandum

DATE: March 20, 2019

TO: Kathy Drew King, Regional Director
Region 29

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Domino's Pizza LLC
Case 29-CA-229500

324-4020-3000

The Region submitted this case for advice as to whether Domino's Pizza, LLC (the "Employer") violated Section 8(a)(1) by "packing" a bargaining unit with additional, newly-hired/transferred employees in order to dilute the United Crafts and Industrial Workers Union, Local 91's (the "Union") showing of interest accompanying its representation petition. Rather than issue complaint based on an expansion of the Board's pre-election unit-packing doctrine to the Union's showing of interest, we conclude that employees' Section 7 interests, and the purposes and policies of the Act, are best effectuated by allowing the Union to proceed directly to an election based on its showing of interest.

FACTS

The Employer operates a nationwide chain of pizza stores. In addition to franchised stores, the Employer maintains its own corporate-owned stores, including a facility in Woodhaven, New York. On June 15, 2018¹ the Union filed a petition seeking to represent all employees at the Woodhaven store, including Customer Service Representatives ("CSRs"), Delivery Experts, and Assistant Managers. The Region's check of the Union's showing of interest indicated (b) (4), (b) (6), (b) (7)(C) [REDACTED], short of the required 30 percent. The Union withdrew its petition on June 27 with the stated intention of refileing the petition at a later date after obtaining additional cards.

In the meantime, from June 26 until July 1, the Employer terminated seven employees, (b) (4), (b) (6), (b) (7)(C) [REDACTED], and hired/transferred into the store 16 employees. On July 2, unaware of the Employer's discharges and hiring, the Union filed a second election petition, this time seeking to represent only the Employer's CSRs and Delivery Experts, and provided (b) (4), (b) (6), (b) (7)(C) [REDACTED]

¹ All remaining dates are in 2018, unless otherwise noted.

(b) (4), (b) (6), (b) (7)(C). However, the drastic workforce turnover caused the Union to have significantly less than the required 30 percent showing of interest. On July 9, the Employer terminated an eighth employee.

The Union filed unfair labor practice charges on July 9 and August 23 alleging numerous instances of unlawful Employer conduct during the Union's organizing campaign, including unlawful discharges, unlawful 8(a)(1) statements, and unlawful unit "packing" to frustrate the Union's showing of interest. The Region blocked further processing of the Union's petition pending resolution of those charges. On October 10 the Region issued complaint alleging that the Employer discriminatorily terminated seven employees, interrogated employees, created the impression of surveillance, and solicited grievances and promised benefits. However, on the Region's recommendation, the Union withdrew the unit-packing allegation to facilitate securing Section 10(j) authorization, which the Board granted. On December 17, the parties reached an informal settlement agreement resolving all of the complaint allegations, with the discriminatees agreeing to waive reinstatement.

The Employer asserts that the substantial additions to its Woodhaven workforce were necessary because the store was one of several significantly understaffed stores as evidenced by the Employer's weekly staffing reports provided to the Region; the Employer has not yet hired additional employees at the other understaffed locations.

ACTION

We conclude that the charge should be dismissed, absent withdrawal. Although there are arguments in favor of applying "unit packing" principles in the "showing of interest" context, we conclude that it would best effectuate the purposes and policies of the Act to allow the employees to vote, with the Union permitted to challenge the votes of any "packed" employees, rather than further delay the election while the Region litigates the issue through a lengthy administrative hearing.

The Board has found unlawful unit packing after a union has filed a petition and the accompanying showing of interest, but prior to a representation election, where an employer's intent in augmenting its workforce is to dilute union support and frustrate employees' choice of a collective-bargaining representative.² The Board analyzes an

² See *Regency Grande Nursing & Rehabilitation Center*, 354 NLRB 530, 540-41 (2009), affirmed 355 NLRB 587 (2010), enforced 441 F. App'x 948 (3d Cir. 2011); *Suburban Ford, Inc.*, 248 NLRB 364, 366-70 (1980), enforced in part and denied in part, 646 F.2d 1244 (8th Cir. 1981); *Einhorn Enterprises*, 279 NLRB 576, 596-97 (1986), enforced, 843 F.2d 1507 (2d Cir. 1988).

employer's intent based on the totality of circumstances.³ For instance, in *Regency Grande*, the Board affirmed the ALJ's determination that the employer unlawfully packed the bargaining unit where there was longstanding evidence of employer anti-union animus, the newly-hired employees' personnel files were missing important information, the newly-hired employees worked far less than usual, the hiring was atypical of the employer's usual practices, and the employer did not offer a business justification for the additional hiring.⁴ Similarly, in *Einhorn Enterprises*, the Board affirmed the ALJ's conclusion that the employer unlawfully packed the unit where many of the newly-hired employees were customers, relatives, or friends of management, and the employer offered no adequate business justification for abruptly switching from a full-time employee model to a part-time employee model, which increased its employee complement right before a representation election.⁵ By contrast, in *Golden Fan Inn*, the Board determined there was no unit packing where the employer offered a legitimate business justification—an impending addition to its property and the necessary related maintenance—for hiring additional employees.⁶

However, the Board has thus far only applied its unit-packing doctrine to circumstances where additions to the bargaining unit were made *after* a representation petition was filed and the union had already secured a sufficient

³ The Region raised the question of whether employer knowledge of “packed” employees’ union sentiments is necessary in order to demonstrate unlawful unit packing. Although our decision to proceed to an election obviates the need to resolve that question, we note that traditionally an employer’s knowledge, if any, of employees’ union sentiments is but one factor in a larger totality-of-the-circumstances analysis. See *Golden Fan Inn*, 281 NLRB 226, 229 (1986) (“cases involving unit packing frequently turn on circumstantial evidence”); *D & E Electric*, 331 NLRB 1037, 1039 (2000) (“the totality of the circumstantial evidence” must be considered in determining unit packing); *Regency Grande Nursing & Rehabilitation Center*, 354 NLRB at 540-41; *Einhorn Enterprises*, 279 NLRB at 596-97. *Sam’s Club*, 349 NLRB 1007, 1021 (2007) (ALJ, affirmed by the Board, found that in order to prove unit packing, General Counsel must prove, *inter alia*, that employer had some knowledge that newly-hired employees would oppose union) is the only case we found where the Board approved an articulation of the test as requiring such knowledge.

⁴ 354 NLRB at 540-41.

⁵ 279 NLRB at 596-97.

⁶ 281 NLRB at 228-29.

showing of interest among prospective unit employees to proceed to an election. Packing the unit with employees after the showing of interest and shortly before an election creates a high risk of undermining employee free choice given that the union will lose the election if it cannot convince the new employees to support the union within the very short amount of time prior to the upcoming election.

Here, although an argument could be made that protecting the “showing of interest” stage of the process from unit packing would also help to protect employee free choice, we conclude that it would best effectuate employee free choice and the purposes and policies of the Act to allow the Union to proceed directly to an election based on the Union’s original showing of interest rather than litigate difficult issues, including the legality of “unit packing” to frustrate a showing of interest, in a lengthy administrative proceeding.

The (b) (4), (b) (6), (b) (7)(C) the Union originally offered exceeded the 30 percent threshold for the 26 CSRs and Delivery Experts employed at that time, notwithstanding the Employer’s later workforce alterations.⁷ If allowed to proceed to an election, the Union can challenge any voter that it believes was unlawfully hired or transferred into the unit to frustrate its showing of interest.⁸ The parties may then appeal the Regional Director’s determinations directly to the Board.⁹ This route will best protect employees’ Section 7 rights by ensuring a quick resolution to a matter that has already gone unresolved for nearly a year, and is the most efficient use of the Board’s limited resources.

⁷ Cf. *Avondale Shipyards*, 174 NLRB 73, 73 n.3 (1969) (Board typically does not count newly-hired employees against a union’s showing of interest after the showing of interest and petition have been filed) (citing *Trenton Foods*, 101 NLRB 1769 (1952)).

⁸ Cf. *Regency Grande*, 354 NLRB at 540-41 (ALJ, affirmed by the Board, concluded that of 31 “packed” employees, 30 votes should not be counted as they did not perform legitimate work for the employer); *Einhorn Enterprises*, 279 NLRB at 595-98 (ALJ, affirmed by the Board, concluded that even though some of the “packed” employees performed legitimate work and would ordinarily have been included in the bargaining unit, the employer’s unlawful scheme resulted in those ballots being voided).

⁹ See NLRB Casehandling Manual (Part Two) Postelection Challenges and Objections Sec. 11364.7(a)-(b).

For the foregoing reasons, the charge should be dismissed, absent withdrawal, and the Region should immediately proceed to an election.

/s/
J.L.S.

ADV.29-CA-229500.Response.Dominos (b) (6), (b) (7)