Sears, Roebuck and Co. *and* Local 881 United Food and Commercial Workers. Case 13–CA–191829

July 30, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On August 17, 2018, Administrative Law Judge Kimberly R. Sorg-Graves issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief. The General Counsel and the Charging Party filed cross-exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions,[1] to amend the remedy, and to adopt the rec-

[1] For the reasons stated by the judge, we affirm the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by withdrawing recognition from the Union based on a petition that employees signed and presented to it 3 weeks before the end of the certification year. However, we do not rely on the judge's statement that *LTD Ceramics, Inc.*, 341 NLRB 86 (2004), enfd. 185 Fed. Appx. 581 (9th Cir. 2006), is distinguishable in part because there was "no allegation [in *LTD Ceramics*] that [the employer] played even a ministerial role in facilitating the decertification petition." The Respondent's lawful assistance regarding the petition is not a legitimate basis to distinguish the case.

Contrary to our dissenting colleague, we also affirm the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) by providing more than ministerial aid to employees in removing the Union and that the Respondent's withdrawal of recognition was also unlawful because the petition was tainted. Store Manager Anthony Harris provided a decertification petition to openly antiunion employee Barbara Gregory in response to her unsolicited inquiry whether certain employees "could just be eliminated with anything to do with the [U]nion." Relying on *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001), the judge found that the Respondent lawfully assisted Gregory in achieving her "predetermined objective" because decertification was the "only way for a few of the employees in the [u]nit to be freed from the benefits, limits, obligations, and decisions that come with union representation." We agree. In *Bridgestone/Firestone, Inc.*, the Board determined that the respondent "reasonably understood" that the employee's query "if there was any way that [he] could get out of being in the union" was about decertification. Id. at 941–942. The employee had recently transferred from a nonunion facility, and thus, his request could "only logically have meant that he wanted to avoid both membership in the [u]nion and representation by the [u]nion." Id. Here, the Respondent also reasonably interpreted Gregory's question, since decertification was the only way to eliminate certain employees from the Union. Further, if the Respondent had misconstrued her question, Gregory could have simply refrained from signing the petition or pursuing decertification. In addition, there is no allegation that the Respondent coerced any employees to sign the petition. And the Respondent clearly did not coerce Gregory by providing the petition because she openly opposed the Union.

In dismissing the unlawful assistance allegation, the judge also relied on *Ernst Home Centers,* 308 NLRB 848 (1992). We rely on *Ernst* to the extent that the Board in that case found lawful the respondent's provision of petition language that included its name and the union's local number. Id. at 851. However, we do not rely on the judge's statement that in *Ernst*, "the employee[] did not specifically ask for a decertification petition or to rid the entire unit of union representation." Contrary to the judge, the employee specifically requested "verbiage" for a petition. Id. at 848.

The dissent claims that we fail to recognize the disconnect between Gregory's question and the Respondent's answer, but it is our colleague who fails to grapple with the fact that Gregory specifically inquired whether there was some way employees could be "eliminated with anything to do with the [U]nion." Contrary to the dissent, Gregory did not merely express concern that certain employees were confused by the Union. There is also no merit to the dissent's argument that the Respondent should have informed Gregory of other available options. "[T]he Board has never held that an employer has a duty to provide this kind of advice." *Bridgestone/Firestone, Inc.*, 335 NLRB at 941. Further, it is irrelevant that Harris placed the petition in his desk drawer rather than handing it to Gregory. The only case relied on by the dissent is distinguishable. In *Corrections Corp. of America*, the respondent suggested to employees that an employee had asked about decertification where the employee had simply inquired about how to obtain additional health benefits. 347 NLRB 632, 633 (2006). Here, by contrast, Gregory asked the Respondent how employees could be "eliminated" from having anything to do with the Union. Under Sec. 8(c), the Respondent had the right to furnish accurate information in response to Gregory's question, which it reasonably understood was about decertification. We reject the dissent's characterization of this lawful response as planting the seed of the decertification effort.

Contrary to her colleagues, Member McFerran would reverse the judge and find that the Respondent violated Sec. 8(a)(1) by providing unlawful assistance regarding the petition and that therefore the Respondent's withdrawal of recognition was also unlawful because the petition was tainted. Store Manager Harris gave employee Gregory a decertification petition in response to her question, set forth in full here, "[i]f there was anything that the company could do to protect three of the associates that I worked with. They're autistic and they get very confused. If they could just be eliminated from anything to do with the [U]nion." The judge and the majority fail to recognize the disconnect between Gregory's question and the Respondent's opportunistic response. Indeed, the majority quotes only a portion of Gregory's inquiry, failing to acknowledge the full context of her question, which demonstrates that she merely expressed concern that certain employees perceived as vulnerable were somehow "confused" about something to do with the Union. Gregory said nothing about employees no longer wanting union representation. Providing a decertification petition to address the vague concern raised by Gregory was not a lawful response. See *Corrections Corp. of America*, 347 NLRB 632, 633 (2006) (finding unlawful assistance where employer distorted employee question into opportunity to decertify the union; explaining that "this is not a case of an employer aiding employees in the expression of their predetermined objectives") (internal quotations omitted). Harris also permitted Gregory to access his desk drawer, a typically sacrosanct management area, to obtain and return the petition, further illustrating the Respondent's unlawful assistance.

Member McFerran further observes that there were many other ways the Respondent could have lawfully responded to Gregory's question.

ommended Order as modified and set forth in full below.[2]

AMENDED REMEDY

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct and, as explained in the remedy section of the judge's decision, to take certain affirmative action designed to effectuate the policies of the Act. The judge recommended an affirmative bargaining order to remedy the Respondent's unlawful withdrawal of recognition, but she did not justify the imposition of such an order as required by the United States Court of Appeals for the District of Columbia Circuit. Nevertheless, for the reasons set forth below, we agree with the judge that an affirmative bargaining order is warranted on the facts of this case.

The Board has previously held that 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." *Caterair International*, 322 NLRB 64, 68 (1996). In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' [Section] 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Although we adhere to *Caterair*, supra, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.[3]

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition. At all relevant times, the Union was actively representing the unit employees and was bargaining for an initial collective-bargaining agreement to advance employees' interests with respect to their employment terms. However, the Respondent unlawfully withdrew recognition from the Union based on a petition signed by employees, and received by the Respondent, during the certification year. The Respondent's unlawful conduct undermined the collective-bargaining process, defeating the policy behind the special status given to the Union during the certification year, a status meant to ensure that the parties' bargaining relationship will be allowed to function free from distraction for the full year.

At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable period of time, will not unduly prejudice the Section 7 rights of employees who may oppose continued union representation. The bar does not continue indefinitely, but rather only for a reasonable period of time to allow the good-faith bargaining that the Respondent's unlawful withdrawal of recognition cut short. It is only by requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess the Union's effectiveness as a bargaining representative in an atmosphere free of the Respondent's unlawful conduct.

To begin, it could have sought to clarify the nature of Gregory's concern about the three employees. But even taking her question at face value, the Respondent could have said that there was nothing "the company" could do with respect to the employees, if Gregory's aim was somehow to carve the three employees out of the bargaining unit. Alternatively, the Respondent could have informed Gregory that all employees have a Sec. 7 right to refrain from union activity and that the three employees were free to rebuff the Union in this respect. These many possible lawful responses demonstrate that, contrary to the judge and the majority, decertification was not the only---or even the most reasonable---answer to Gregory's inquiry.

In addition, Member McFerran finds that the cases relied on by the majority and the judge are easily distinguishable. The employee in *Ernst,* supra, 308 NLRB at 848, expressly requested language for a decertification petition, and the employee in *Bridgestone/Firestone, Inc.*, supra, 335 NLRB at 941, specifically asked the respondent about "get[ting] out of being in the union." Here, as stated, there is no indication that Gregory or any other employee sought to oust the Union. Indeed, Gregory did not even know about decertification until she read the petition. In these circumstances, the Respondent clearly planted the seed of the decertification effort by giving Gregory the petition. Thus, contrary to the majority, it is irrelevant that Gregory could have subsequently decided not to sign the petition.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. The judge recommended a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted under the circumstances of this case, and we substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979). We shall substitute a new notice to conform to the Order as modified.

[3] Chairman Ring and Member Kaplan would adopt the D.C. Circuit's view that the Board should determine, on the facts of each case, whether an affirmative bargaining order with its attendant decertification bar is appropriate by balancing the three considerations set forth in *Vincent*, supra. They agree that the conditional three-factor analysis set forth here in affirming the need for an affirmative bargaining order is consistent with extant precedent, but in light of adverse judicial rulings they believe this precedent warrants full Board review in a future case.

The employees can then determine whether continued representation by the Union is in their best interest.

(2) An affirmative bargaining order serves the purposes and policies of the Act by fostering meaningful collective bargaining and industrial peace, and by removing the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. Such an order also ensures that the Union will be afforded a reasonable time to bargain and will not be pressured to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. These considerations are particularly relevant in this case, where the Respondent withdrew recognition from the Union based on evidence it obtained during the certification year. Without an affirmative bargaining order, the Respondent's unlawful conduct will be rewarded and the purposes and policies underlying the certification-year rule will be undermined.

(3) A cease-and-desist order alone would be inadequate to remedy the Respondent's withdrawal of recognition because such an order would not provide the Union with a reasonable period of time to bargain and would allow another challenge to the Union's majority status before the taint of the Respondent's unlawful conduct has dissipated and before the unit employees have had a reasonable time to regroup and bargain through their chosen representative in an effort to reach an initial agreement. Such a result would be particularly unjust here because litigation of the Union's charges took more than 2 years and, as a result, the Union needs to reestablish its representative status with the unit employees. Further, the Respondent's withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all of the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violation in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Sears, Roebuck and Co., Chicago Ridge, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully withdrawing recognition from Local 881 United Food and Commercial Workers (the Union) and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time backroom associates employed by Respondent at its facility currently located at 6501 West 95th Street, Chicago Ridge, Illinois, but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its Chicago Ridge, Illinois facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 2, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 30, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully withdraw recognition from Local 881 United Food and Commercial Workers (the Union) and fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time backroom associates employed by Respondent at its facility currently located at 6501 West 95th Street, Chicago Ridge, Illinois, but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

SEARS, ROEBUCK AND CO.

The Board's decision can be found at www.nlrb.gov/case/13-CA-191829 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Vivian Perez Robles, Esq., for the General Counsel.
Joseph C. Torres, Esq. (The Karmel Law Firm), for the Charging Party.
Brian Stolzenbach, Esq. (Seyfarth Shaw, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. On January 25, 2017, Local 881 United Food and Commercial Workers (Union) filed Case 13–CA–191829 with Region 13 of the National Labor Relations Board (Board) alleging that Sears, Roebuck and Co. (Respondent) had unlawfully withdrawn recognition of the Union as the exclusive collective-bargaining representative of a certain group of its employees and thereafter refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (Act). On May 31, 2017, the Region issued the complaint in this matter and later amended the complaint on June 30, 2017.[1] (GC Exh. 1(c) and 1(f).)[2]

I heard this matter on March 12, 2018, in Chicago, Illinois,

[1] During the hearing, I granted General Counsel's unopposed, oral request to withdraw Par. VIII(c) of the amendment to the complaint which states: By the conduct described above in Par. VII, Respondent unilaterally withdrew recognition absent the results of a Board election in violation of Section 8(a)(5) and (1) of the Act. (GC Exh. 1(f); Tr. 7–8.)

[2] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits and "R. Exh."

and I afforded all parties a full opportunity to appear, introduce evidence, examine and cross-examine witnesses, and argue orally on the record. General Counsel, Respondent, and Charging Party filed post trial briefs in support of their positions.[3]

After carefully considering the entire record, including my observation of the demeanor of the witnesses, and the parties' briefs I find that

FINDINGS OF FACT

JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, Sears Roebuck and Co., is a corporation with an office and a place of business located in Chicago Ridge, Illinois, where it engages in the retail sale of merchandise. In conducting its operations during the calendar year prior to the issuance of the complaint, Respondent derived gross revenues in excess of $500,000, and received goods valued in excess of $5000 directly from points outside the State of Illinois. I find, that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(c) and 1(e).) I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce, and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

1. Background

On November 30, 2015, the Union was certified as the collective-bargaining representative of Respondent's full-time and regular part-time backroom associates at its Chicago Ridge, Illinois retail merchandise store (Unit). Backroom associates work in the merchandise pickup area where they unbox, remove plastic wrapping, and hang clothing in preparation for display on the sales floor. (Tr. 30–31, 42.)

Between February 2, and November 9, 2016,[4] Respondent and the Union held 32 bargaining sessions. The parties had reached numerous tentative agreements, but still needed to negotiate healthcare and wages. (Tr. 68–69.) The parties cancelled sessions planned for the beginning of December due to individuals' schedules and the busy retail holiday season. As of the date of the hearing, the parties have not resumed bargaining. (Tr. 80–81.)

2. The decertification petition

Barbara Gregory (Gregory) has worked for Respondent as a backroom associate since 1986. Gregory reports directly to Operations Manager Shannon Evans, who reports to Store Manager Anthony "Tony" Harris (Harris). (Tr. 31.) Gregory works part-time and is, as she describes, eligible for retirement. (Tr. 143.) Gregory openly informed other employees and Harris that she had voted against the Union in the representation election. (Tr. 63.) Prior to October, Gregory had asked Harris about the progress of negotiations, stated that she had not voted for the Union, and expressed her belief that they did not need a union. (Tr. 65, 101–102.)

Sometime in October, Gregory was approached by a fellow backroom associate while she was working in the merchandise pickup area. (Tr. 32.) The associate, whom Gregory described as having autism, stated that he was confused, overwhelmed, and needed to get out of the building. (Tr. 33.) Gregory accompanied him to an outside bench where they took a break and he explained to Gregory that there was a lot of talk about the Union and "he didn't know what to do about it." (Tr. 35.) They returned to work after about 15 to 20 minutes.

Gregory could not recall the date but about a day or two after taking this break with her coworker, she went to speak with Harris in his office. (Tr. 36, 55, 57; R. Exh. 5.) Gregory testified that she asked Harris:

> if there was anything that the company could do to protect three of the associates that I worked with. They're autistic, and they get very confused. If they could just be eliminated with anything to do with the union.[5]

Gregory testified that Harris responded that he would have to "get back to corporate" and "get back to her." (Tr. 36.)

Gregory was not able to recall the exact amount of time lapse between these events except that it was a few days later when she saw Harris in the hub office at the facility and they went to his office to talk alone. Harris told her that "there was a form that they could sign stating that they no longer wanted to be associated with the union." (Tr. 37–38, 55–57.) Harris told her that he would not be there to give her the form, but it would be in the top drawer of his desk and that she could go into the drawer to get it. The next day that she worked, which was on November 8, she went into Harris office and removed the decertification petition form from his middle desk drawer. (GC Exh. 2.)

The Union's Local number and the store number were handwritten on the form. Gregory believes that it was filled in before she took it the form from the drawer. Gregory stated that the handwriting was not hers, she did not recognize the handwriting, and that she did not know the Union's Local number at that time.

---

for Respondent's Exhibits. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive. My findings and conclusions are not based solely on the record citations contained in this decision, but rather are based upon my consideration of the entire record for this case.

[3] General Counsel and Respondent filed briefs by the due date of May 4, 2018. Charging Party did not file a brief until May 9, 2018. On that same date, Charging Party also filed a motion requesting the acceptance of the untimely filed brief. Charging party asserts that the failure to timely file was caused by a miscommunication between counsel and support staff who attempted to file and serve the document while counsel was out of the office. The motion asserts that the acceptance of the untimely filed brief would not cause the other parties undue prejudice, because identical copies had been served by email on General Counsel and Respondent on May 4 at 4:31 p.m. I issued a notice to show cause why the untimely filed brief should not be accepted under the circumstances to which neither General Counsel nor Respondent responded. Under the circumstances, I find no evidence that any party suffered undue prejudice by Charging Party's untimely filing of its brief and accept it as part of the record in this matter. See *Elevator Construction Local 2 (Unitec Elevator Services Co.),* 337 NLRB 426, 427 (2002).

[4] All dates are in 2016, unless otherwise indicated.

[5] The record contains no evidence of a tentative contract agreement of a union-security clause or some other specific reason for Gregory's coworkers' concerns about the union.

(Tr. 40–41.)

Gregory had not known that they could decertify the Union before reading the form. She signed and dated the form on November 8. (Tr. 44.) She took the petition to the table where backroom associates were performing work. She told the approximately 7 or 8 employees present that she had "requested a form to help kind of protect the three associates with autism and that if anyone wanted to sign it they could sign it." She then placed the form on the table. She did not read the form to the other employees, but they could have read it to themselves. (Tr. 43.) Six other employees signed and dated the form, then Gregory locked the form in her work locker. (GC Exh. 2; Tr. 49.)

On November 10, Gregory went to work and retrieved the decertification petition from her locker. Gregory showed another backroom associate the form and told him he could sign it. He asked if the Union would be taking out dues to which she responded affirmatively and then he signed the form. (GC Exh. 2; Tr. 51.) Immediately thereafter Gregory took the petition and placed it in the middle drawer of Harris' desk as he told her that he would not be there, and she could return it to his desk drawer after getting it signed. (Tr. 51–52, 61.)

Harris' recollections of these same events are significantly different than Gregory's. Harris could not recall the exact date of his initial conversation with Gregory concerning these issues but believed it occurred 2 to 3 weeks before the November 8 and 9 bargaining sessions that he attended. (Tr. 105.) Harris testified:

> We sat down. I asked her what was on her mind. We talked about a couple of different topics. She specifically asked, you know, how can this go away? How can the union go away. I told her that I knew there was a process, but as a member of management it was something that I couldn't be involved in.

When asked if he recalled anything else about that conversation, Harris responded:

> She did push a little bit. You know, after I said, hey, there's stuff I can't help with. She did ask, you know, some more questions about, like, well, how do I go about it? What do we do? I just kind of said, you could probably look on Google.

(Tr. 103–104.)

When Respondent counsel asked Harris if Gregory mentioned her colleagues with autism, Harris testified that she had expressed that they were overwhelmed by all the information about the Union. She mentioned that a coworker was providing much of the information about the Union to these employees. Harris asked Gregory if the coworker was being hostile or aggressive while providing this information, and she denied that he was. Harris told her that there was nothing he could do about that employee sharing information about the Union. (Tr. 105–107.)

The parties bargained on November 8 and 9. Harris testified that it was impossible for him to have gone to the facility on the days that they bargained because the scheduled time for bargaining required him to leave his home at approximately 6 a.m. On November 8, Bradley Powell, the Union's lead negotiator, requested a sidebar with Respondent's representatives, lead negotiator Jim Wingfield and Harris. (Tr. 111.) Powell called the sidebar to ask Wingfield and Harris about the decertification petition that he had heard was being circulated during work time. (Tr. 111.) Powell admits expressing disappointment with learning of the petition due to his belief at the time that both parties had been negotiating in good faith towards an agreement. (Tr. 82.) Harris and Wingfield expressed surprise that a decertification petition was being circulated, and Harris questioned the Union representatives about who was circulating the petition to which they responded that they did not know. (Tr. 83.)

Harris stated that on the afternoon of November 29, he found the decertification petition in his top middle desk drawer which he accesses two or three times per day to retrieve office supplies. (Tr.129.) Harris denies recognizing the handwriting of whoever wrote the store number and the local union number on the petition form. (Tr. 115.) After finding the decertification petition, Harris sought out Gregory and asked her if that is what "they" wanted to do, and she affirmed that they did. (Tr. 110.)

3. Credibility

My credibility analysis relies upon a variety of factors, including, but not limited to, the witness's demeanor, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination; therefore, I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622. Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961); enfd. in rel. part 308 F.2d 89 (5th Cir. 1962) *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972).

I credit Gregory's testimony over Harris' testimony in the instances where they contradict.[6] I note that Gregory, who was

[6] Respondent contends it was prejudiced in its ability to examine Gregory's credibility by my granting of Charging Party's petition to revoke Respondent's subpoena request for the position statement that Charging Party submitted to General Counsel during the investigation of this case. Respondent's assertion that the Board's holding in *Ralph's Grocery Co.*, 360 NLRB 529, 529 (2014), enfd. 669 Fed. Appx. 397 (9th Cir. 2016) supports this contention is misplaced. In *Ralph's Grocery*, the Board held that a respondent waived its work product privilege in relation to audit information, which was subpoenaed by the charging party in a Board proceeding, by admitting those same documents as evidence in criminal proceedings against some of its officers and managers. The circumstances in that case simply are not applicable to the situation in this case where there is no evidence that Charging Party shared its position statement with anyone other than General Counsel. Respondent's reliance on *Steinhardt Partners*, 9 F.3d 230, 234–235 (2d Cir. 1993), is also misplaced because it is not controlling precedent in Board proceedings and because it is factually distinct from the current matter with regards to the juxtapositions of the parties involved with whom the

subpoenaed by General Counsel, saw herself in the uncomfortable position of testifying against the interests of her current employer and against her personal desires to not be represented by the Union. Gregory openly informed others that she had not voted for the Union and did not see it as a benefit to her, which was still her position at the hearing. Although Gregory was unable to recall some of the specific details of the events such as the exact dates, her recollection of other details was clear. For example, the frankness and clarity with which Gregory recalled reading the petition after retrieving it from Harris' desk drawer and realizing for the first time that there was a means to decertify the Union leads me to credit her testimony. She clearly recalled the moment of learning that they could decertify the Union not just exempt the workers with autism from participating with the Union. This recollection was evidenced by the tone of her voice and conviction of her testimony in this regard from which she did not waiver. This evidence also corroborates Gregory's claim that she received the petition from Harris.

I also credit her testimony that she told the group of employees that she had asked Harris for something to allow the employees with autism to be exempt from dealing with the Union. She then handed the petition that she had already signed and dated to the employees sitting at the table without explaining further. Those employees may or may not have read the petition to themselves before six of them signed the petition. Her testimony concerning this interaction was also consistent on direct and cross-examination.

I further credit Gregory's testimony that she secured the petition in her locker until she returned to work on November 10, when she obtained the last signature. She then returned the petition to Harris' desk drawer as he had given her permission to do. Gregory did not report directly to Harris and stated that she was not familiar enough with Harris to realize that Thursday was his regular day off. I find it unlikely that an employee with limited interaction with a store manager would venture into his office and put a petition in his middle desk drawer without having permission to do so.

Respondent appears to argue that Gregory was motivated to falsely testify because of backlash from other employees. I find this argument implausible or, at least, contrary to Respondent's contention that its actions were lawful. Even if some of Gregory's coworkers expressed their frustrations with her involvement with the petition and acted "standoffish" towards her, Respondent's contention that its actions were lawful is based upon an argument that a majority of the employees were supporting her actions. Thus, if Respondent's argument is correct, that it was just following through with the majority of the employees' non-coerced decision to decertify the Union, there should be no motive on Gregory's part to lie in contradiction of her and the majority of her coworkers' wishes. Such a motive would exist only if the majority of the employees disagreed with the petition, which would support General Counsel's allegation that Respondent's actions coerced employees into signing the petition.[7]

Respondent contends that Gregory testified untruthfully and to support this assertion relies on hearsay testimony given by one of its attorneys. I give no weight to this testimony. First, this evidence is hearsay and is emblematic of the pitfalls of relying upon hearsay evidence. The interview between the attorney and Gregory was not recorded or documented and adopted by Gregory, and therefore, is not reliable evidence. Second, Gregory, on rebuttal, again stated that her recollection was that she retrieved the petition form from Harris' desk drawer, and if she said something different to Respondent's attorney she had not meant to do so. Third, Respondent was given a copy of the sworn affidavit that Gregory provided during the investigation of the underlying charge. The affidavit must not have contained a statement contrary to Gregory's testimony that she had retrieved the petition from Harris' desk drawer, because Respondent did not question her in that regard about her affidavit. Fourth, the attorney testified that Gregory had stated during the interview that Harris "gave" her a copy of the petition and that she immediately thereafter sought to get it signed. Respondent's counsel in further questioning characterized that testimony to mean that Gregory said that Harris "handed" her the petition when the attorney testifying never used that term. (Tr. 130–131.) In recounting events, details sometimes unintentionally become lost or distorted, or the importance of a specific detail is not apparent to the individual providing the information.

Regardless, Gregory has consistently stated, even in a direct interview by her employer's attorney at her place of work, that she asked Harris if there was some way for her coworkers with autism to be excused from dealing with the Union, that Harris told her he would get back to her after speaking with "corporate/legal," and that she later received the petition from Harris in some manner, and that he said he would not be there so she could return the petition to his desk drawer. (Tr. 130–132.)

I give little credit to Harris' testimony. When asked by Respondent counsel about the key conversation with Gregory, Harris did not recount a conversation but made conclusive statements that supported Respondent's position:

> We sat down. I asked her what was on her mind. We talked about a couple of different topics. She specifically asked, you

documents had already been shared when they were subpoenaed in another matter. The controlling precedent in this situation is the Board's holding in *Kaiser Aluminum & Chemical Corp.*, 339 NLRB 829 (2003), where it found that a charging party does not waive the work product privilege in regard to its position statement because it gave it to the General Counsel. Furthermore, Respondent has not demonstrated a substantial need for the position statement contending only that it may contain some information that could be used to discredit Gregory. As this argument is likely to be true with regards to all charging party position statements submitted to General Counsel, that argument alone is not sufficient to establish substantial need. Respondent also makes a general due process claim, but the balancing of due process rights were considered in the formulation of Rule 26(b)(3) of the Federal Rules of Civil Procedure on which the Board relied in its holding in *Kaiser Aluminum*, supra at 829. Therefore, I find, as I did during the hearing, that Respondent's arguments that it was prejudice by not receiving the Charging Party's position statement pursuant to its subpoena is without merit.

[7] Respondent also argued at hearing that Gregory was somehow motivated or coerced into lying by the Region's determination to issue complaint in this matter asserting that Respondent violated the law. This would require Gregory to violate the law by committing perjury in order to punish Respondent for violating the law, which she knows it did not do because she is lying. There is simply no benefit for Gregory in such paradoxical actions. Thus, I find this argument to have no merit.

> know, how can this go away? How can the union go away[?] (Tr. 103.)

When asked to elaborate about the conversation, Harris gave some more specifics including that Gregory had expressed concerns about her coworkers with autism experiencing confusion over union issues and that he knew there was some sort of process to get rid of the Union but he did not know what it was. (Tr. 107.) In this subsequent testimony, he never put Gregory's alleged request to make the Union go away into context. Harris vaguely, hesitantly testified that in response to her questions about how to get rid of the union, he responded that she "could probably look on Google."[8]

Harris claims that he did not find the petition in his top middle drawer that he opens 2 or 3 times per day to retrieve office supplies, until November 29. (Tr. 109.) Harris reiterated this testimony despite Respondent's position statement's assertion that Gregory gave the decertification petition to Harris on December 1, which was 1 day after the end of the certification year. (Tr. 124.) Harris claims that he spoke to vice president of human resources Donald Strand about the petition on November 29 and either texted or emailed a copy to Strand on December 1. (Tr. 121.) I found it suspicious that no printout of a text or email was offered into the record to verify the date of this transmission. Nor did Harris testify that he had reviewed such a text or email before testifying enabling him to recall the specific date of November 29. Again, I find Harris' testimony unreliable.

Harris testified that it was impossible for him to have gone to the facility on November 8 to leave the petition in his desk drawer because scheduled bargaining required him to leave his home at approximately 6 a.m. This testimony was in response to leading questions, and I found the response nonsensical. While one may not like to leave one's residence earlier than 6 a.m., it certainly is not impossible. Furthermore, Harris could have instructed some other member of management or employee to place the form there for him. Harris did not go to the facility on November 9, because of bargaining, or on Thursday, November 10, his regularly scheduled day off which corroborates Gregory's testimony that he was not at work on November 8 during her shift when she retrieved the petition from his desk drawer and on November 10 when she returned it to his desk drawer. (Tr. 113.)

I also took into consideration Harris' disingenuous denial of any knowledge about a decertification petition during the sidebar conversation with Union negotiators on November 8, and his questioning of Powell as to the identity of the employee circulating the petition.

Considering the totality of the evidence and the demeanors of the witnesses, I credit Gregory's testimony over Harris' testimony to the extent that they conflict.

4. Withdrawal of recognition

After receiving a copy of the decertification petition from Harris, Strand verified that the signatures on it "matched the signatures in the same employees' personnel files." (Tr. 90.) Strand also reviewed a roster for backroom associates at the Chicago Ridge store for December 1 listing 16 employees. (Tr. 91; R. Exh. 3.) Upon review, Strand determined that one of the employees listed on the roster had been hired but never started work. (Tr. 91–93.) After determining that the unit consisted of 15 employees on December 1, Strand directed Wingfield to send a letter notifying the Union that Respondent was withdrawing recognition.[9]

On December 2, Respondent sent the Union a letter by which Respondent withdrew recognition of the Union as the collective-bargaining representative of the Unit employees based upon the petition that Gregory had placed in Harris' desk drawer. (Tr. 71; GC Exh. 3.) The Union sent a reply letter asking for a copy of the petition but never received it. (Tr. 75–76; GC Exh. 4 and 5.)

ANALYSIS

1. Was the petition tainted?

Section 8(a)(1) of the Act prohibits employers from interfering with employees' right under Section 7 of the Act to select or reject a bargaining representative. Employer's actions to initiate, sponsor, sanction, or support a decertification petition constitute coercion of employees' Section 7 rights in violation of Section 8(a)(1) of the Act, if these actions go beyond ministerial aid or are done in an atmosphere of unresolved significant unfair labor practices. *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985); *Craftool Mfg. Co.*, 229 NLRB 634, 637 (1977). In *Craftool* the general manager read a statement suggesting the desirability of circulating a decertification petition to employees who had expressed some dissatisfaction with their union; suggested the language for the petition, directed employees to return the petitions to him, failed to fully inform employees of their legal rights, including that the union's majority status was presumed for 1 year, and allowed employees to circulated the petition on work time. Supra, at 636–637. Considering all of these factors the Board found that Craftool's support for the petition went beyond ministerial aid. Id.

General Counsel contends that the petition was tainted because Harris provided the petition form in response to Gregory's question about whether her coworkers with autism could be exempt from involvement with the Union. General Counsel relies upon *Craftool Mfg. Co.*, 229 NLRB 634, 637 (1977), to support its contention that Harris by providing the petition form to Gregory in response to her request to aid her coworkers coerced the employees in violation of Section 8(a)(1) of the Act. General Counsel notes that Gregory never asked Harris how to get rid of

[8] In its brief Respondent argues that anyone could obtain an example decertification petition by searching, "how to decertify a union" on Google, but submitted no evidence supporting this contention into the record. (R. Br. 29.) I decline to take notice of information retrievable by a Google search as such information is not static. Even if Respondent had proffered such evidence at hearing, this argument presupposes that the individual is aware of the term "decertify" in the context of unionization of which Gregory credibly testified that she did not have knowledge until reading the petition that she retrieved from Harris' desk. Also, equally true is that any official of Respondent could have just as easily as Gregory obtained the petition through a Google search. Therefore, I give this argument no weight.

[9] I find that the Unit consisted of 15 employees on December 1, as there is no evidence in the record that disputes Strand's assessment as to the size of the Unit on that date.

or decertify the Union, because she did not realize that was possible until she obtained the petition from Harris via his desk drawer. Thus, General Counsel contends that Harris did not provide solely ministerial aide to Gregory in furtherance of her desire to decertify the Union, but planted the idea of decertifying the Union and then provided the means to do so.

The instant case is in some ways similar to *Craftool* relied upon by General Counsel. Based upon Gregory's complaints and the concern she raised for her coworkers with autism, Harris provided Gregory with the petition without any request for information specifically about decertifying the Union. Also, similar to the *Craftool* case, Harris provided Gregory no explanation of employee rights, including the right to an insulated period to effectuate their choice of a collective-bargaining representative during the certification year. Gregory, having received the petition from Harris without any information about circulating it in a form free of possible coercion, presented it to her coworkers to sign during work time at their work stations and after giving them an incomplete explanation of the purpose of the petition. I note that the record is silent as to whether any supervisor or manager was present when she solicited the other employees to sign the petition. Similarly, Gregory's testimony about her comment to her fellow employees as she placed the petition on the table does not indicate whether she informed the employees that she had received the petition from Harris. Thus, the evidence regarding Harris' actions in furtherance of the petition falls significantly short of what the employer did in *Craftool*, and I decline to find the holding *Craftool* controlling in this situation.

Respondent maintains that Harris did not provide the petition to Gregory, but even if he did provide the petition it was in response to Gregory's unsolicited inquiry about how to remove the union, and therefore, was only ministerial aid. As discussed above, I credit Gregory's testimony that she never requested information about removing the Union because she had no knowledge that a union could be decertified until she received the form from Harris via his desk drawer. Thus, the only question that remains is whether Harris' act of providing Gregory with the petition in response to her question about whether anything could be done to exclude the three employees with autism from being in the Union constituted only ministerial aid.

In support of its argument that even if Harris provided the petition to Gregory, doing so constituted only ministerial aid, Respondent cited *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006); *Bridgestone/Firestone, Inc.*, 335 NLRB 941, 942 (2001); *Ernst Home Centers*, 308 NLRB 848 (1992); and *Eastern States Optical Co.*, 275 NLRB 371, 371–372 (1985). Respondent quotes a portion of the administrative law judge's decision in *Roosevelt Memorial* stating that "[t]he employer may provide general information about the [decertification] process in response to employee's unsolicited inquiries." First, I note that the full quote reads: "The employer may provide general information about the process in response to employees' unsolicited inquiries, but an employer has no legitimate role in that activity, either to instigate or to facilitate it." Citing, *Lee Lumber & Building Material*, 306 NLRB 408 (1992). Second, in *Roosevelt Memorial* the administrative law judge's credibility determination and conclusion concerning the decertification petition were overturned by the Board. As a result, there was no viable evidence that the employer took any action to facilitate the petition in that case. Thus, I find *Roosevelt Memorial* irrelevant to the issue of whether Harris' actions in furtherance of the petition were more than ministerial.

In *Eastern States Optical*, the Board held that the employer lawfully withdrew recognition of the union representing certain of its employees. In that case, employer representatives responded to multiple inquiries by an employee, who actively sought information on how to word and effectuate a decertification petition, by giving him some assistance with the wording of the petition, the description of the union in the collective-bargaining agreement, and the number of signatures necessary to decertify the union. *Eastern States Optical* is dissimilar to the instant case in that the employee actively sought the specific information that was provided by the employer representative. That still leaves at issue whether Harris' provision of a decertification petition, when one was not specifically requested, tainted the petition in this case.

In both *Ernst Home Centers* and *Bridgestone/Firestone* individual employees sought information from their employers about how they could individually avoid or get out of the union. *Ernst Home Centers*, supra at 848; *Bridgestone/Firestone*, supra at 941–942. In these cases, the Board found that the employer's provision of a copy of or language for a decertification petition constituted only ministerial aid, even though, the employees did not specifically ask for a decertification petition or to rid the entire unit of union representation. Id.

Similarly, in this case, Gregory requested information from Harris about how certain employees could avoid the union without requesting information about how to decertify the Union. In response Harris provided her with a decertification petition. Much like in *Ernst Home Centers* and *Bridgestone/Firestone*, in this case the only way for a few of the employees in the Unit to be freed from the benefits, limits, obligations, and decisions that come with union representation is for the Union to be decertified.[10] Thus, Harris provided Gregory information on how to achieve her predetermined objective to exclude certain of her coworkers from having to deal with issues arising out of unionization. While I note that the record does not reflect what these employees' actually wanted at the time or whether they had fully formed any conclusions, Gregory had a predetermined goal when she walked into Harris' office and Harris provided her with information to reach that goal. The fact that it had consequences for the Unit as a whole is not different than what occurred in *Ernst Home Centers* and *Bridgestone/Firestone*.[11]

Following the Board's holdings in *Ernst Home Centers* and

[10] There is one significant difference between the circumstances in *Ernst Home Centers* and *Bridgestone/Firestone* and the instant case. The petition in the instant case arose during the certification year, the significance of which is discussed more below.

[11] Respondent also contends that to find Harris' conversation with Gregory concerning how to eliminate certain employees' inclusion in the Union and providing her the petition to do so is protected free speech pursuant to the First Amendment of the U.S. Constitution which is recognized in Sec. 8(c) of the Act. In allowing employers to provide

Bridgestone/Firestone, I find that Harris' discussions with Gregory concerning how to exclude certain employees from union representation and the provision of a decertification petition form in response to Gregory's questions constituted no more than ministerial aid. Therefore, I find that Respondent did not violate Section 8(a)(1) of the Act by soliciting, supporting, or assisting in the initiation and signing of a decertification petition or by providing a copy of the decertification petition to Gregory.

2. The timing of the decertification petition

The Board has long "recognized that, for employees' choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subject to constant challenges. Therefore, from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status." *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001). In furtherance of this goal, the Board has consistently held that a union's majority status is irrebuttably presumed to continue for 1 year after certification in order to protect employees' Section 7 right to select their bargaining representative and allow that representative a reasonable time to prove its worth to the employees. *Brooks v. NLRB*, 348 US 96 (1954); *Chelsea Industries, Inc.*, 331 NLRB 1648, 1649 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002); *Craftool Mfg. Co.*, 229 NLRB 634, 637 (1977); *Certr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1952).

Based upon this 1 year irrebuttable presumption, referred to as the certification year, the Board has rejected an employer's reliance on decertification petitions signed by employees during the certification year as the employer's legal basis for withdrawing recognition after the certification year. *Chelsea Industries*, supra at 1649; *Latino Express, Inc.*, 360 NLRB 911, 923 (2014) (Board affirmed the administrative law judge's decision that the employer could not rely upon a petition signed during the certification year to withdraw recognition after the certification year in accordance with *Chelsea Industries*). In *Chelsea Industries* the decertification petition was signed about 78 days before the end of the certification year, and in *Latino Express* the employees signed the petition about a month before the end of the certification year. In contrast, the Board in *LTD Ceramics, Inc.*, 341 NLRB 86, 88 (2004), enfd. 185 Fed.Appx. 581 (9th Cir. 2006) found that withdrawal of recognition was lawful when in a unit of 171 employees, 49 employees signed the decertification petition on the last day of the certification year and another 48 signed over the next 5 days.

The Board has further held that in order for a withdrawal of recognition to be lawful, the support for the withdrawal "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." *LTD Ceramics*, supra at 88 (citing, *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), affd. in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997).

General Counsel and Charging Party contend that Board precedent requires strict adherence to the 1-year insulation period, and therefore, Respondent violated Section 8(a)(1) by withdrawing recognition of the Union as the employees' collective-bargaining representative based upon the signatures on the decertification petition form which were gathered about 3 weeks before the end of the certification year. Respondent contends that the Board's holding in *LTD Ceramics* supports a finding that this 1-year rule should not be mechanically applied especially in situations like the instant case where the employee petition arose in an atmosphere free from unfair labor practices. Respondent points out that its employees signed the petition within about three weeks of the end of the certification year as compared to a month or more before the end of the certification year in *Chelsea Industries* and *Latino Express*.[12]

I find unconvincing Respondent's argument that the facts in this case more closely resemble those in *LTD Ceramics* than *Chelsea Industries* and *Latino Express*, and therefore, the reasoning in *LTD Ceramics* should be applied here. First, I note that there was no allegation that LTD Ceramics played even a ministerial role in facilitating the decertification petition that it relied upon in withdrawing recognition from its employees' representative. In *LTD Ceramics*, the employees started circulating their petition on the last day of the certification year and completed 5 days later.[13]

Here, Respondent supplied the decertification petition to Gregory about three weeks before the end of the certification year at the same time the parties were engaged in their last bargaining sessions before the end of the certification year. The Union learned of the petition while they were engaged in bargaining. Despite Union representative Powell's comments that the Union believed both parties had been negotiating in good faith up to that point, such a situation does not foster good-faith collective bargaining, one of the goals of implementing the certification year. *Chelsea Industries*, supra at 1648. While a year is a long time in many respects, the Board and the Supreme Court in finding the certification year promotes labor relations stability and is necessary to give meaning to employees' selection of a

employees with information and other ministerial aid in response to questions about ending union representation, the Board has balanced employers' free speech rights recognized in Sec. 8(c) of the Act with employees' right under Sec. 7 of the Act to not be coerced by their employers in their choices regarding collective- bargaining representatives.

[12] Respondent further contends that the *Chelsea Industries* and *Latino Express* should be overturned to allow employees to sign decertification petitions during the certification year to be used as the basis for finding the loss of majority after the certification year ends. See, Board Member Hurtgen's decent in *Chelsea Industries*, supra at 1651. As I am bound to apply the current Board precedent, I note that Respondent will have to raise this argument directly with the Board, if it so chooses.

[13] Respondent also cites, *Dresser Industries*, 264 NLRB 1088, 1088 fn. 2 (1982), to support its proposition that evidence acquired during a decertification year can be the basis for a lawful withdrawal of recognition outside the certification year. In *Dresser* the employer did not withdraw recognition of the employees' bargaining representative but put a hold on bargaining pending the outcome of a decertification petition filed with the Board on the last day of the certification year. The Board's regional office did not reject the decertification petition as untimely filed until months later. Based upon those specific facts, the Board considered the petition timely filed for the purposes of that case alone, and therefore, reliance upon that case is inapposite in the instant matter.

bargaining representative have recognized that collective bargaining is often a long process. Id.; *Brooks*, 348 U.S. at 100. I do not find that the Board's allowance of a 1-day infringement on this insulated certification year in *LTD Ceramics*, supports allowing the certification year to be further eroded. Thus, I find the Board's holding and reasoning in *Chelsea Industries* and its affirmation of the ALJ's decision in *Latino Express*, in which the petition was circulated amongst employees only 4 weeks before the expiration of the certification year, prohibit a further infringement on the certification year.

Accordingly, I find that Respondent's reliance on the decertification petition signed within the certification year in withdrawing recognition from the Union after the certification year constitutes a violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Sears, Roebuck and Co. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 881 United Food and Commercial Workers (Union) is a labor organization within the meaning of Section 2(5) of the Act and is the certified bargaining representative of the following appropriate unit of Respondent's employees:

> All full-time and regular part-time backroom associates employed by Respondent at its facility currently located at 6501 West 95th Street, Chicago Ridge, Illinois, but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

3. Respondent violated Section 8(a)(5) and (1) on about December 2, 2016, by withdrawing recognition from the Union as the representative of the full-time and regular part-time backroom associates at its Chicago Ridge, Illinois retail merchandise store on December 2, 2016, based upon a decertification petition signed during the certification year.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as set forth above.

6. I recommend dismissing that portion of the amended complaint which alleges that Respondent violated Section 8(a)(1) of the Act by soliciting, supporting, and assisting in the initiation and signing of the decertification petition and by providing employees with a copy of the decertification petition, thereby providing more than ministerial assistance to employees in helping them get rid of the Union.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union as the collective-bargaining representative of an appropriate unit of its employees and thereby failing and refusing to collectively bargain with the Union as the collective-bargaining representative of the unit employees. Accordingly, the Respondent shall recognize the Union and, upon request, bargain for a reasonable period of time (as set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002)), with the Union as the bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed document.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

Respondent, Sears, Roebuck and Co. Chicago Ridge, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from, and failing and refusing to recognize and bargain collectively with Local 881 United Food and Commercial Workers (Union) as the exclusive collective-bargaining representative of the bargaining unit employees of the following appropriate unit:

> All full-time and regular part-time backroom associates employed by Respondent at its facility currently located at 6501 West 95th Street, Chicago Ridge, Illinois, but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, recognize and bargain for a reasonable period of time (as set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002)), with the Union as the bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, at its Chicago Ridge, Illinois facility, copies of the attached notice marked "Appendix," on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posted on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and

[14] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Chicago Ridge, Illinois facility at any time since December 2, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 17, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from, or fail and refuse to recognize and bargain in good faith with, Local 881 United Food and Commercial Workers (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time backroom associates employed by Respondent at its facility currently located at 6501 West 95th Street, Chicago Ridge, Illinois, but excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as your collective-bargaining representative, and upon request of the Union, bargain in good faith with the Union and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

SEARS, ROEBUCK AND CO.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-191829 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.