

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

Advice Memorandum

DATE: November 6, 2018

TO: Garey E. Lindsay, Regional Director
Region 9

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

SUBJECT: ARH Mary Breckinridge 512-5006-5037
Cases 09-CA-216861; 09-CA-217499; and 512-5060-7500
09-CA-216936 512-5060-7550
512-5060-8500
512-5072-3400

The Region submitted these cases for advice as to (1) whether the Employer unlawfully assisted employees in withdrawing their Union membership and whether that and other conduct tainted a disaffection petition upon which the Employer relied to withdraw recognition from the Union; and (2) whether the Employer's failure to provide the disaffection petition or a redacted version to the Union, upon request, violated Section 8(a)(5) of the Act.

We conclude that the Employer did not unlawfully assist employees in withdrawing their Union membership, because it provided only ministerial support. We also conclude that the Employer's conduct did not taint the disaffection petition, either directly under *Hearst Corp.*¹ because there is insufficient evidence that it assisted with the petition's circulation and any unlawful Employer statements were not directly related to the petition, or indirectly under *Master Slack*² because there is no causal link between the petition and any Employer unlawful conduct. Finally, given the absence of taint, if the Region determines that the Employer withdrew recognition based on evidence of the Union's actual loss of majority status, we conclude that the Employer had no obligation to respond to the information request.³

¹ 281 NLRB 764 (1986).

² 271 NLRB 78 (1984).

³ (b) (5)



FACTS

The United Steel Workers of America (the Union) and Mary Breckinridge Hospital (the Employer) have had a collective-bargaining relationship since 2011. The Employer has recognized the Union as the representative of 81 of its employees in a unit of:

All full-time and regular part-time technical employees, business office clerical employees, skilled maintenance employees and non-professional employees employed by the Employers in and out of the Hospital, Clinic and Home Health Care facilities located in Hyden, Kentucky; but excluding all other professionals, registered nurses, doctors, confidential and managerial employees, guards and supervisors as defined in the Act.

The parties' latest collective-bargaining contract, which contained a union-security clause, was set to expire after March 31, 2018, and Kentucky's "right-to-work" law banning union-security agreements, effective January 9, 2017, became applicable to the parties' bargaining relationship upon that contract's expiration.⁴ At a January 2018 meeting with the Employer, the Union expressed concern about how it would continue to collect dues once Kentucky's right-to-work law took effect.⁵ The Employer offered to accept new checkoff authorization forms from employees, and the Union agreed to that arrangement.

The parties began bargaining for a successor agreement on March 8. They met another three times, and, on March 19, the Employer notified the Union that it was pausing negotiations because it had received an employee petition with objective evidence that the Union had lost its majority status. The Union requested a copy of the petition; on March 20, the Employer responded that it would not provide a copy of the petition. On March 22, the Employer notified the Union that it was withdrawing recognition following the contract's March 31 expiration. On March 31, the Employer withdrew recognition from the Union.

Three employees (E1, E2, and E3) assert that the Employer encouraged them to withdraw their Union membership and assisted a coworker (CW) in soliciting them to

⁴ KY. REV. STAT. ANN. § 336.130(3), and § 336.132(5) (West 2017).

⁵ All dates are in 2018 unless otherwise indicated.

sign the disaffection petition.⁶ These employees worked in a (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) department led by a (b) (6), (b) (7)(C) supervisor (S1), who reported to a second supervisor (S2). E1, E2, and E3 assert that a Human Resources representative (HR1) dictated their Union-membership withdrawal letters.

E1

E1 has been a (b) (6), (b) (7)(C) employee with the Employer since (b) (6), (b) (7)(C) (b) (6), (b) (7)(C). E1 states that in late February 2018, CW approached (b) (6), (b) (7)(C) while they were both on the clock and attempted to convince (b) (6), (b) (7)(C) to stop paying Union dues so that E1 could save money. At the time, E1 was unsure about no longer paying dues because (b) (6), (b) (7)(C) did not completely understand what it would mean for (b) (6), (b) (7)(C) status with the Union. About a week later, CW and S1 started talking about the Union while they were on a smoke break with E1. S1 said that (b) (6), (b) (7)(C) could not start a conversation about the Union, but (b) (6), (b) (7)(C) could talk about it if someone asked. E1 states that S1 and CW then discussed the local Union (b) (6), (b) (7)(C), saying (b) (6), (b) (7)(C) was only out for (b) (6), (b) (7)(C) and that the Union was not helpful.

On March 7, a few days after (b) (6), (b) (7)(C) conversation with S1 and CW, E1 went to S1's office and told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) no longer wanted to pay Union dues. S1 stopped what (b) (6), (b) (7)(C) was doing and offered to escort E1 to the HR office, and did so. When they arrived, S1's boss, S2, was sitting with HR1. When S1 saw S2, (b) (6), (b) (7)(C) stated, I got you another one, and S2 led E1 into HR1's office.

In HR1's office, E1 told HR1 that (b) (6), (b) (7)(C) did not want to pay Union dues anymore. HR1 pulled out a binder, gave E1 a piece of paper, and explained that (b) (6), (b) (7)(C) would tell (b) (6), (b) (7)(C) exactly what to write on it. HR1 then dictated a letter to E1, which (b) (6), (b) (7)(C) wrote down, signed, and handed to HR1. The letter stated: "I (Name), want to resign from my USW membership and no more dues taken out of my check."

On March 12, CW approached E1 and asked (b) (6), (b) (7)(C) to sign (b) (6), (b) (7)(C) name on a piece of paper, which CW said was the same thing that E1 had signed upstairs with HR1. E1 believes that the top of the piece of paper contained a sentence saying: "I want to get rid of the USW at [the Employer]." E1 signed the petition. E1 asserts that these events occurred while both employees were on the clock and took less than five minutes. CW, for (b) (6), (b) (7)(C) part, states that (b) (6), (b) (7)(C) always approached employees to sign the

⁶ CW used the same petition to request a decertification election (09-RD-217672). That representation case is being held in abeyance by the Region pending the resolution of the instant ULP charges.

petition when [REDACTED] and they were on break or lunch periods, and supervisors or managers were not present or otherwise capable of observing [REDACTED] actions.

By March 19, after talking with several other employees and attending a Union meeting, E1 decided that [REDACTED] did not want to stop paying dues or resign from the Union. [REDACTED] went with another coworker, E3, to HR1 and both asked for their letters back. HR1 returned the letters.

E2

E2 has been a [REDACTED] employee with the Employer since [REDACTED]. E2 states that in mid-March, on a Wednesday or Thursday, [REDACTED] went to get a water bottle from the refrigerator in the [REDACTED] employees' break room, which is only [REDACTED] S1's [REDACTED]. After getting a bottle of water, E2 passed through S1's [REDACTED] where CW and S1 were sitting and talking. CW asked E2 (in front of S1) if [REDACTED] was still paying Union dues. E2 said that [REDACTED] was, and CW explained that [REDACTED] did not like the local Union [REDACTED]. CW said that E2 should stop paying dues because it would save [REDACTED] money and the Union was not doing anything for them. E2 then asked what exactly the Union was all about because [REDACTED] was not familiar with the Union's role in their employment and how much [REDACTED] could save by no longer paying dues. CW said that E2 would save a lot of money. S1 then agreed with [REDACTED] and said that [REDACTED] could escort E2 up to HR on the third floor. E2 agreed to go to HR.

E2 states that [REDACTED] did not ask S1 to take [REDACTED] to HR or indicate to S1 that [REDACTED] wanted to stop paying dues; [REDACTED] simply asked how the process worked and S1 immediately offered to escort [REDACTED] to HR.

S1 did not talk to E2 while taking [REDACTED] to HR. When they arrived at HR1's office, S1 said that they would take care of [REDACTED] and walked away. S2, S1's boss, was in HR1's office with HR1. S2 was the first to speak and began explaining how much money E2 could save by no longer paying Union dues. [REDACTED] then said that if the Employer had reason to fire someone, whether they were in the Union or not, the Employer would still be able to fire them. [REDACTED] insisted that the Union was no help to employees because the Employer would not fire someone for no reason. E2 responded by saying that at least [REDACTED] could be able to save a little bit of money if [REDACTED] stopped paying Union dues. S2 laughed in agreement and then left HR1's office.

HR1 then handed E2 a blank piece of notebook paper and a pen and told [REDACTED] to write down exactly what [REDACTED] said. E2 did so, signed and then dated the document. HR1 also told [REDACTED] to write "C: [HR1]," which [REDACTED] did and then handed the letter to HR1. As above, the letter signed by E2 stated [REDACTED] resigned [REDACTED] Union membership and asked that dues not be taken out of [REDACTED] check. [REDACTED] asserts, however, that [REDACTED] believed that the document was only to stop [REDACTED] ing Union dues, not that [REDACTED]

was leaving the Union or that [REDACTED] no longer wanted the Union to represent [REDACTED]. After HR1 made a copy for E2, E2 went to the break room [REDACTED] S1's [REDACTED] to get [REDACTED] lunch since it was now almost time for [REDACTED] lunch break.

When E2 entered S1's office, S1 asked what happened in HR1's office. E2 responded that [REDACTED] had withdrawn [REDACTED] Union dues deduction. S1 asked if that was it and E2 replied yes.

Within the next day or two, CW approached E2 and asked [REDACTED] to sign [REDACTED] name in a notebook that [REDACTED] was carrying around with [REDACTED]. When E2 asked what it was for, CW did not tell [REDACTED] but instead replied that other [REDACTED] names were on it, and that [REDACTED] should just trust [REDACTED]. E2 initially refused to sign the paper, but CW then proceeded to ask [REDACTED] 10-12 times over the next two days to sign it. E2 eventually acquiesced to CW's request and signed the notebook but noted that the page [REDACTED] signed did not say anything on it; it was only a list of signatures. CW, however, states that when [REDACTED] solicited co-workers to sign the petition, [REDACTED] explained that it was to get rid of the Union, and that the top of the petition contained language to that effect.

A few days later, E2 overheard other employees talking about a petition to get rid of the Union. Someone mentioned that CW had been the one circulating it. E2 then realized that this was probably the document CW had [REDACTED] sign. E2 had the day off work the next day, but [REDACTED] went into the hospital and up to HR and asked for the withdrawal-of-membership letter [REDACTED] had given to HR1 back. HR1 handed the letter back to E2. E2 then went downstairs to where CW was working and told CW to cross [REDACTED] name off the petition. CW agreed to do it when [REDACTED] went on [REDACTED] lunch break but didn't.

E3

E3 has been a [REDACTED] employee with the Employer for [REDACTED]. In early March, CW approached E3 while E3 was [REDACTED] on the ground floor of the hospital. CW told E3 that [REDACTED] should stop paying Union dues because the Union was not helping them. E3 agreed and said [REDACTED] would. CW then said that [REDACTED] should talk to HR and go sign paperwork up on the third floor. E3 said okay and washed [REDACTED] hands while CW made [REDACTED] way to S1's office, which was [REDACTED]. E3 followed CW into S1's office.

When E3 walked into S1's office, CW and S1 were discussing something, but E3 could not hear what it was. S1 then asked E3 if [REDACTED] was ready to go upstairs to sign the paper. E3 said yes, and S1 escorted E3 to HR1's office on the third floor. HR1 then dictated a letter for E3 to write, which E3 did. Within a day or two, CW approached E3 and asked [REDACTED] to sign [REDACTED] name in a notebook that E3 had seen CW carrying around. E3 states that CW only said that it was for the Union and did not

tell E3 that it was a disaffection petition. E3 states that the notebook only contained a list of signatures; it did not have anything written on it except other signatures. Several days later, E3 went with E1 up to HR1's office to request (b) (6), (b) Union membership resignation letter back, which, as noted above, was returned to both employees. CW learned that E3 had changed (b) (6), (b) mind and confronted (b) (6), (b) on multiple occasions the next several days, telling (b) (6), (b) that (b) (6), (b) should go talk to S1 about the Union.

ACTION

We conclude that the Employer did not unlawfully assist employees in withdrawing from Union membership, because giving employees the language that they needed to provide the Union was the kind of ministerial aid permitted by the Board. We also conclude that the Employer's conduct did not directly taint the disaffection petition under *Hearst Corp.*, because there is insufficient evidence that it assisted with the petition's circulation and, to the extent that Employer supervisors or managers made coercive statements regarding withdrawal of Union membership, there is no direct evidence linking these withdrawals with the employee-sponsored disaffection petition. Additionally, we conclude that the Employer did not indirectly taint the disaffection petition under *Master Slack*, because there is no causal link between the petition and any Employer unlawful conduct.⁷ Finally, given the absence of taint, if the Region determines that the Employer withdrew recognition based on evidence of the Union's actual loss of majority status, we conclude that the Employer had no obligation to respond to the information request.⁸

⁷ The Region has not made clear whether it would find any of the Employer's conduct to constitute individual Section 8(a)(1) violations, but assuming the Region would find such individual violations, we conclude that the Employer's conduct *in toto* did not invalidate the membership withdrawals or taint the disaffection petition.

⁸ (b) (5)

1. The Employer Did Not Unlawfully Assist Employees in Withdrawing from Union Membership.

Under established Board law, “an employer may provide only ministerial or passive aid to employees who wish to withdraw from union membership.”⁹ Such ministerial assistance is lawful as long as the employer makes no attempt to monitor whether employees in fact withdraw their membership, and does not create an atmosphere “wherein employees would tend to feel peril in refraining from [withdrawing].”¹⁰

We conclude that the Employer provided only ministerial or passive aid to the employees regarding how to end their dues obligations.¹¹ E1 and E3 each initiated the process of withdrawing their Union memberships (after speaking with a co-worker, CW) by telling S1 that they no longer wanted to pay Union dues. HR1 merely provided them with form language so they could resign and end their dues obligation to the Union.¹² Additionally, although S1 said “I got you another one” before E1

⁹ *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 2 (Jan. 30, 2015) (citing *Chelsea Homes*, 298 NLRB 813, 834 (1990), *enforced mem.*, 962 F.2d 2 (2d Cir. 1992)), *enforced mem.*, 692 F. App’x 462 (9th Cir. 2017).

¹⁰ *Id.*; *Mohawk Industries*, 334 NLRB 1170, 1170-71 (2001) (quoting *Vestal Nursing Center*, 328 NLRB 87, 101 (1999)). Compare *Erickson’s Sentry of Bend*, 273 NLRB 63, 63-64 (1984) (unlawful solicitation of withdrawal from union membership where manager not only provided employee with petition language for withdrawing but also assisted in gathering signatures on petition, gave the appearance to other employees that employer favored the petition, and conveyed that employer was monitoring who had and had not signed it), with *Mid-Mountain Foods*, 332 NLRB 229, 231 (2000) (no violation where employer neither assisted employees nor tracked their responses), *enforced*, 269 F.3d 1075 (D.C. Cir. 2001), and *R. L. White Co.*, 262 NLRB 575, 576 (1982) (same).

¹¹ Although the employees only told the Employer that they wanted to end their dues obligation, the Employer did not provide more than ministerial aid merely because it provided them with form language that also said that the employees wanted to withdraw their Union membership. Considering that the collective-bargaining agreement was about to expire, after which Kentucky’s “right-to-work” law would apply, the employees’ desire to cease paying dues was the functional equivalent of seeking to withdraw their Union memberships.

¹² See *Ernst Home Centers*, 308 NLRB 848, 848 (1992) (merely responding to employee questions about language for a decertification petition and supplying it, lawful, where

entered HR1's office, that statement merely indicates that S1 had previously referred at least one other employee who wanted to withdraw from Union membership; it does not demonstrate that the Employer was orchestrating the membership withdrawals.

We recognize that E2, unlike [REDACTED] co-workers, did not expressly communicate to S1 that [REDACTED] wanted to stop paying dues; however, E2 did explain, in S1's presence, that [REDACTED] was unfamiliar with the Union's role in the workplace and wanted to know how much [REDACTED] could save by no longer paying dues, all before S1 told [REDACTED] anything about Union dues or offered to take [REDACTED] to the HR office. And various supervisors' statements to E2 that [REDACTED] would save money by ceasing dues payments were simply communicating a mathematical fact that E2 had, indeed, asked about. Moreover, one of these supervisors, S1, was a (b) (6), (b) (7)(C) supervisor who seemed to be friendly with [REDACTED] coworkers, and, therefore, [REDACTED] actions are unlikely to have coerced E2 to withdraw from Union membership.¹³

employer did not otherwise encourage or suggest that employee file it); *see also Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (no violation where employer's attorney supplied employee with readily-available factual information and provided some assistance in the wording of decertification petition).

¹³ *See Real Foods Co.*, 350 NLRB 309, 310 n.4 (2007) (low-level supervisor's suggestion that employees interested in forming a union "might find themselves unemployed rather than better employed," was an expression of his "personal feelings and experience" with unionization; this had no reasonable tendency to coerce employees where this supervisor did not participate in facility-closure decision); *Toma Metals, Inc.*, 342 NLRB 787, 788-89 (2004) (finding no unlawful interrogation where supervisor asked his wife's first cousin, an individual who he was friendly with and spoke to daily, "you don't think a union will help you, do you?"); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985) (finding manager's question to employee about why he joined the union to be non-coercive where, inter alia, manager and employee had a friendly and amicable relationship); *The Mark Hopkins Hotel*, 246 NLRB 931, 934 (1979) (finding no 8(a)(1) violation where supervisor who allegedly solicited employees to run against candidate for steward was low-level, friendly, and sympathetic to employees, and his statements merely expressed his personal opinions without management's knowledge or encouragement); *Gibson Greeting Cards*, 205 NLRB 239, 242-43 (1973) (finding no unlawful coercion where low-level supervisor told employee that employer could get find reasons to "get rid of" employees who talked about unions, in response to employee asking for her opinion of the union, where supervisor had a friendly relationship with employees and often talked with employees about a variety of subjects).

Even assuming that S2's isolated statement to E2 that the Union could not protect employees who the Employer decided to fire for cause violated Section 8(a)(1), when viewed in context, this did not create an atmosphere where E2 would tend to "feel peril" in refraining from withdrawing [REDACTED] membership. In that regard, the atmosphere in HR1's office appeared to be jovial, as S2 laughed in response to E2's comment about saving money; within a few days, E2 (like E1 and E3) told HR1 that [REDACTED] wanted to rescind [REDACTED] withdrawal of Union membership; the Employer did not subsequently retaliate against [REDACTED] or [REDACTED] co-workers before it withdrew recognition from the Union; and all of their rescissions appear to have been effective.¹⁴ And, as with the other employees, HR1 merely provided E2 with form language for resigning [REDACTED] Union membership, and the Employer did not otherwise make any attempt to track employees to see if they resigned their Union membership.

Additionally, S2's comments were made at a time when unit employees' legal rights and obligations vis-à-vis the Union were in flux. The parties' contract (and the union-security clause contained therein) was set to expire, after which Kentucky's "right-to-work" law banning future union-security agreements became applicable to the parties' bargaining relationship. The contract's checkoff provision also provided the employees, at contract expiration, an opportunity to revoke their dues obligation, which could be accomplished by resigning their Union membership. Likewise, the Union and Employer agreed that, when the right-to-work law became applicable, the Employer would require employees who wished to have dues deducted from their pay to sign new checkoff authorizations. Thus, it was not unreasonable for all involved to believe that the Employer was under some obligation to explain this new circumstance to employees.

The Union argues that CW, the employee who initially urged E1, E2, and E3 to cease paying Union dues, was an Employer agent and, therefore, [REDACTED] conduct should be imputed to the Employer. We reject this argument. First, there is no evidence that the Employer authorized CW to solicit co-workers to cease paying dues or resign their Union memberships. And, under the apparent authority doctrine, an agency

¹⁴ Cf. *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 3 (finding unlawful assistance where employer actively solicited all employees by letter and advised them that they could resign from the union to circumvent the dues-checkoff window period; instructed its managers to advise employees orally that the employer would prefer if they chose not to pay dues through checkoff; and later unlawfully reneged on its agreement to reinstate payroll dues deduction); *Mohawk Industries*, 334 NLRB at 1170-71 (finding violation where supervisor directly solicited employees to revoke authorization cards close in time to employer's unlawful threats to close plant or move); *Erickson's Sentry of Bend*, 273 NLRB at 63-64 (employer unlawfully assisted in gathering signatures on petition to withdraw union membership).

relationship is only established when the principal's manifestation to a third party supplies a reasonable basis for the third party to believe that the principal has authorized the act in question.¹⁵ There is no record evidence that the Employer made any statement to any employee that CW was acting on its behalf. Although CW discussed ceasing dues deductions with E1, E2, and E3 in front of S1, the employees would not reasonably interpret this as a signal that CW was acting on the Employer's behalf, especially considering that S1 was a ^{(b) (6), (b) (7)(C)} supervisor. We also note that the Employer did not provide CW with an office or material to carry out this activity.

2. The Employer's Conduct Did Not Taint the Disaffection Petition.

An employer acts unlawfully where it actively solicits, encourages, promotes, or provides assistance in the initiation, signing, or filing of a decertification or disaffection petition.¹⁶ Where the employer's unlawful actions directly "instigate or propel" the de-unionization effort, the Board irrebuttably presumes that the employer's meddling taints any resulting expression of employee disaffection.¹⁷ This presumption applies regardless of the number of impacted employees.¹⁸ The employer may not rely upon an unlawfully-assisted petition to establish that a union has actually lost majority support, justifying a withdrawal of recognition.¹⁹

¹⁵ See *Dentech Corp.*, 294 NLRB 924, 925 (1989).

¹⁶ See, e.g., *Mickey's Linen & Towel Supply*, 349 NLRB 790, 791 (2007); *Armored Transport, Inc.*, 339 NLRB 374, 377-78 (2003) ("Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate it or to facilitate it." (quoting *Harding Glass Co.*, 316 NLRB 985, 991 (1995))).

¹⁷ *SFO Good-Nite Inn*, 357 NLRB 79, 80 (2011) (citing *Hearst Corp.*, 281 NLRB 764 (1986), *enforced mem.*, 837 F.3d 1088 (5th Cir. 1988), *reh'g denied mem.*, 840 F.2d 15 (5th Cir. 1988)), *enforced*, 700 F.3d 1 (D.C. Cir. 2012).

¹⁸ *Id.* at 81 (stating that, in *Hearst Corp.*, 281 NLRB at 765, the Board "rejected an employer's attempt to resuscitate the reliability of a decertification petition by proving that a majority of petition signers were unaware of its unfair labor practices").

¹⁹ *Hearst Corp.*, 281 NLRB at 764.

In determining whether an employer has unlawfully assisted a decertification effort, the appropriate inquiry is whether the employer's conduct constitutes more than "ministerial aid" to the employees' efforts.²⁰ The Board has repeatedly held that promises of improved terms or conditions of employment if the employees decertify a union constitute unlawful direct assistance.²¹ An employer may also violate the Act by providing concrete aid to a decertification campaign by, for instance, providing company property to assist in the campaign and/or paid work time to carry out the solicitation or filing of the petition.²² On the other hand, where an employer merely gives information in response to employees' questions regarding decertifying the union, it is providing lawful "ministerial aid."²³

In cases where the employer's unfair labor practices are merely coincident with the decertification campaign but do not directly instigate or propel it, i.e., where there is no "straight line" between the violations and the campaign, the unfair labor practices may taint the decertification petition only if a causal connection can be

²⁰ *Mickey's Linen & Towel Supply*, 349 NLRB at 791.

²¹ *Royal Himmel Distilling Co.*, 203 NLRB 370, 375 (1973). *See id.* at 376-77 (supervisor's comments to employees that the employer's benefit programs would continue in force and that their wages might thereafter be raised if they rid themselves of union representation contributed to employer's overall program of unlawful solicitation and encouragement); *see also, e.g., Hi-Tech Cable*, 318 NLRB 280, 283 (1995) (employer could not rely on decertification petition signed in context of several unfair labor practices, including statement that employees "could get more without a union"), *enforced in pertinent part*, 128 F.3d 271 (5th Cir. 1997); *Hearst Corp.*, 281 NLRB at 764 (employer solicited employees to quit union and to repudiate it as representative, and promised benefits to employees if they decertified the union).

²² *See, e.g., Dayton Blueprint Co.*, 193 NLRB 1100, 1107-08 (1971) (company provided employee who filed petition with a company car to drive to Board's Regional Office to file petition and did not dock his pay for the time it took to file petition).

²³ *Compare Royal Himmel Distilling Co.*, 203 NLRB at 375 (employer's president did more than merely provide information responsive to questions; he described his personal feeling that the employees "should" have a second chance to vote, held out the subtly-stated prospect that employees would share "benefits" resulting from employer's continued growth, and suggested that it could not raise their wages so long as they remained unionized), *with Rose-Terminix Exterminator Co.*, 315 NLRB 1283, 1288 (1995) (employer provided very basic wording assistance to employee who requested assistance in drafting a decertification petition).

drawn based on a *Master Slack* analysis.²⁴ Under *Master Slack Corp.*, the Board examines four factors in determining whether disaffection from the union was in fact caused by unremedied unfair labor practices: 1) the length of time between the unfair labor practices and withdrawal of recognition; 2) the nature of the violation; 3) whether it is of a type which tends to cause disaffection; and 4) its effect on union activity and membership.²⁵

Here, we have concluded, in Part 1. of this memorandum, that the Employer did not unlawfully assist employees' resignations from Union membership by simply providing them with the appropriate resignation language; therefore, this was not unlawful conduct and did not taint the disaffection petition. As described below, we also conclude that the statements by the supervisors, even if they were determined to be coercive, did not directly taint the petition.

There is insufficient evidence to establish a "straight line" that directly connects any of the arguably unlawful Employer conduct to the disaffection petition. Thus, the statements made by S1 and S2 estimating how much employees could save by withdrawing their Union membership and S2's comment to E2 about the Employer's ability to terminate employees with or without the Union came after the employees expressed interest in withdrawing their Union membership, and were not made in connection with the employee-led disaffection petition. Nor is there any evidence that the Employer approved any of those statements or made any promises of improved benefits for rejecting the Union. Additionally, while some of the employees state that CW circulated the disaffection petition on work time, their claims are uncorroborated, and CW states that [REDACTED] activity only occurred during lunch and break periods. There is no evidence that supervisors witnessed or were otherwise aware of CW's petition or that the Employer otherwise offered concrete assistance to [REDACTED] efforts.²⁶ And, for the reasons mentioned above, we conclude that CW was not acting as the Employer's agent when circulating the disaffection petition.

²⁴ See *Master Slack Corp.*, 271 NLRB at 84; see also *SFO Good-Nite*, 357 NLRB at 79-80 (explaining the difference between an employer directly tainting a decertification effort under *Hearst* and indirectly tainting a decertification effort under *Master Slack*).

²⁵ *Master Slack Corp.*, 271 NLRB at 84.

²⁶ CW states that [REDACTED] initially learned about the decertification process from an unsuccessful petition that other employees had circulated three years earlier when the prior collective-bargaining agreement had expired, not from any supervisors or managers.

We also conclude that, under the *Master Slack* standard, the Employer's conduct did not taint the petition. Assuming that the supervisors' statements to E2 or [REDACTED] coworkers a few days before CW circulated the disaffection petition violated Section 8(a)(1), the first factor of the *Master Slack* test, i.e., the timing of the ULPs and the petition, would weigh in favor of a finding that the petition was tainted. However, the remaining factors—the nature of the violation, whether the ULPs would tend to cause disaffection, and their effect on union activity and membership—would weigh against a finding that the conduct tainted the petition. Regarding the nature of the violations, as noted above, some of the potentially coercive statements were merely the opinion of S1, a [REDACTED] supervisor, and hence would have little coercive effect. S2's statement to E2 that the employer could fire employees with or without the Union was an isolated event that had no detrimental or lasting impact; indeed, within a few days, E2 informed HR1 that [REDACTED] was rescinding [REDACTED] withdrawal of Union membership and asked CW to remove [REDACTED] name from [REDACTED] disaffection petition. Most significantly, there is no evidence that this conduct, directed at [REDACTED] employees in a [REDACTED] department was ever disseminated to any other members of the [REDACTED]ing unit, and hence it is unlikely that these violations would tend to cause disaffection or would have any substantial effect on union membership or activity.²⁷ In these circumstances, we conclude that the Employer's conduct did not taint the disaffection petition.²⁸

²⁷ See *Champion Home Builders Co.*, 350 NLRB 788, 792 (2007) (no dissemination of the employer's threats and unlawful confiscation of literature); *Quazite Corp.*, 323 NLRB 511, 512 (1996) (employer made two "serious" but isolated threats to employees).

²⁸ In Case 09-CA-216936, the Region concluded that the Employer had unlawfully failed to provide employee contact information to the Union; however, there is no evidence in the instant case that employees were ever aware of this unfair labor practice. Thus, there would be no causal nexus between that unfair labor practice and the disaffection petition. See *Airport Aviation Services*, 292 NLRB 823, 824, 832 (1989) (unlawful refusal to provide information had no immediate or perceptible long-term impact on employee working conditions at the time employees repudiated the union, and there was no evidence employees knew of employer's failure to provide requested information or that such employer conduct caused their disaffection).

3. The Employer Lawfully Refused to Provide the Union with the Disaffection Petition If the Withdrawal of Recognition Was Lawful.

Lastly, assuming the Region concludes that the withdrawal of recognition is otherwise lawful under *Levitz*,²⁹ i.e., the Employer had actual evidence that the Union had lost its majority, then the information-request allegation would lack merit because the Employer would have had no bargaining obligation shortly after the request was made.³⁰

Accordingly, the Region should dismiss, absent withdrawal, the allegation that the Employer unlawfully assisted the employees in resigning their membership from the Union, and proceed as directed regarding the other allegations.

/s/
J.L.S.

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²⁹ *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001).

³⁰ See *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1286 (2006) (“Following the lawful withdrawal of recognition, the [employer] no longer had a duty to provide the [u]nion with the requested information.”). (b) (5)

(b) (5)