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

Advice Memorandum

DATE: August 15, 2003

TO : Ronald K. Hooks, Regional Director
Ruth Small, Regional Attorney
Thomas H. Smith, Jr., Assistant to Regional Director
Region 26

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

SUBJECT: Sears Logistics Services, Inc. 530-4080
Case 26-CA-21073 530-4080-6125
530-4080-5012-0100
530-4080-5012-5000

This Levitz[1] case was submitted for advice as to (1) whether the Employer unlawfully withdrew recognition because it obtained some of the evidence of majority loss only after it had already withdrawn recognition; and (2) assuming that the Employer may rely upon post-withdrawal evidence of majority loss, whether that evidence which included individual employee polls was sufficient to establish that the Union lacked majority support when the Employer withdrew recognition.

We conclude that (1) the Employer unlawfully withdrew recognition because its withdrawal was based in part on post-withdrawal evidence; and in any event (2) the post-withdrawal evidence including unlawfully conducted polls, was insufficient to show that the Union lacked majority support.

FACTS

The Union was certified on April 1, 1999 as the representative of the Employer's 218 warehouse employees at the Employer's warehouse distribution facility in Olive Branch, Mississippi.[2] The parties began bargaining on April

[1] Levitz Furniture Company of the Pacific, Inc., etc., 333 NLRB 717 (2001).

[2] The unit consists of the Employer's merchandise handlers, certified material handlers, lead associates, warehouse associates, plant clerical associates, maintenance associates, and maintenance mechanics.

29, 1999. They met 30 times by December 31, 2000, and four times in 2001, but did not meet during the first half of 2002. On June 14, the Union filed Section 8(a)(5) charges alleging that the Employer refused to offer dates for bargaining and insisted on proposals in advance of providing dates.[3]

Between June 28 and July 14, 2002, an employee circulated a "Petition to Disband Sears (SLS) DDC Olive Branch Union." The employee obtained 114 signatures which was a majority of the 218 unit employees at that time. However, only 102 of those employees, a minority of the unit, were still employed at the time the Employer later withdrew recognition. The employee filed an RD petition on July 17, 2002.[4] The Region blocked the processing of this petition based upon the Union's June 14 unfair labor practice charges. On October 2, 2002, the Region approved a settlement of the unfair labor practice case, which included a notice posting from October 10 to December 9, 2002.

On November 13, 2002, the parties held their first negotiating session following the Region's approval of the settlement agreement. Since the parties had met only once following settlement of the charges, the Union asked the Region to hold the unfair labor practice case open and the RD petition in abeyance until January 16, 2003, which was the date for the parties' next bargaining session. The Region agreed and did not close the unfair labor practice case on compliance until January 16, 2003.

On that date, the parties held their scheduled negotiating session. Union President Leachman advised Employer Chief Negotiator Conhain that the Union was prepared to sign a contract if the parties reached agreement upon a wage increase for certain employees. The Employer had proposed $11.71 per hour, and the Union sought

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[3] 26-CA-20770. Previously, on September 14, 2000, the Region approved an informal settlement agreement to remedy a Weingarten violation and a unilateral change violation (filling a lead position without posting it). The notice posting period in that case ran from September 28 to November 27, 2000 (26-CA-19549 and 26-CA-19573). On April 23, 2002, the Region approved an informal settlement agreement to remedy a failure to provide information and a refusal to meet since August 1, 2001. The notice posting period was from April 30, 2002 to June 29, 2002 (26-CA-20259 and 26-CA-20435).

[4] Case 26-RD-1068.

$11.90 per hour. Conhain told Leachman that he would have an answer concerning the wage increase on January 20. Leachman told Conhain that if the Employer would agree to the wage increase, the parties "had a contract."

On January 23, Conhain told Leachman that it looked like they were about 20 cents apart, but he could get the Employer to agree if they were ten cents apart. Leachman told Conhain that the Union would accept that. Leachman also asked Conhain to respond to the Union's proposal before January 30, so that Leachman could present the whole package to employees at a Union meeting scheduled for that date.

On that date, January 30, Conhain advised Leachman that the Employer had withdrawn recognition from the Union.[5] A few days later, General Manager Raven held a meeting with unit employees and told them that the Union no longer represented them. Raven distributed a memo announcing new benefits including two additional paid holidays, increased vacation benefits, a short-term disability plan, and a pension plan. Raven stated that the Union "had previously prevented the Employer" from offering these new benefits.

The Union rescheduled the ratification meeting from January 30 to February 6. Around 35 employees attended that meeting and voted to accept the Employer's $11.71 wage proposal. Leachman then notified Conhain that the unit employees ratified the contract as discussed on January 16. Conhain, however, denied that the parties had reached agreement over wages on January 16. The Employer has since made other changes in employees' wages, schedules and attendance point system.

Shortly after the Employer withdrew recognition and announced the new benefits, Employer's counsel conducted an investigation in which it interviewed numerous employees after first providing them with Johnnie's Poultry[6] assurances. Employer's counsel asked all employees who voluntarily agreed to be interviewed "whether as of January 30, 2003, they wanted the Union to represent them in collective bargaining or for any other purpose." The Employer avers that 42 of these employees, who were not among the June/July 2002 petition signatories, indicated that they did not want the Union on January 30.

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[5] The Employer does not explain the timing of its withdrawal other than to assert that it believed that the Union was rushing to a ratification vote.

[6] Johnnie's Poultry Co., 146 NLRB 770 (1964).

The Employer bases its contention that the Union lacked majority status on January 30 when it withdrew recognition on (1) the pre-withdrawal petition signed by the 102 employees still employed on January 30, 2003; (2) the 42 post-withdrawal statements made by employees to Employer's counsel; and (3) 11 statements allegedly made by employees to supervisors before the withdrawal of recognition, which the Employer learned about during the post-withdrawal investigation. The Employer has refusal to provide any details concerning these 11 statements.[7]

ACTION

We conclude that the Employer unlawfully withdrew recognition Union on January 30 because it did not have evidence, on that date, that the Union had actually lost the support of a majority of unit employees. Assuming that the Employer may rely upon post-withdrawal evidence, we further conclude that the Employer's post-withdrawal individual employee polls were unlawful and thus cannot be used as evidence of majority loss, and that the additional 11 employee statements are otherwise insufficient to show that the Union lacked majority support.

An employer that withdraws recognition from an incumbent union bears the burden of proving by a preponderance of objective evidence including any counter evidence of union support that the union suffered an actual loss of majority support at the time of the withdrawal.[8] An employer sustains its initial burden of establishing "actual loss" if it presents untainted, valid evidence that establishes that a numerical majority of unit employees no longer desire representation. However, an employer that withdraws recognition does so at its peril.[9] If the employer is incorrect in its assessment of the evidence of loss of support, it will violate Section 8(a)(5) by withdrawing recognition.

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[7] The Employer has refused to provide any employee names, what allegedly was said, when any of the statements were made, and when the Employer learned about them.

[8] See Levitz, above, 333 NLRB at 725.

[9] Levitz, 333 NLRB at 725.

The Employer here withdrew recognition on January 30 based on a June/July 2002 petition signed by 114 employees. However, only 102 of these employees, a minority of the bargaining unit, were still employed on January 30 when the Employer withdrew recognition. The Employer does not dispute that it possessed the list of the individuals who signed the petition at the time it withdrew recognition. Thus, the Employer could easily have ascertained the actual number of current unit employees who had signed the petition.[10] By withdrawing recognition at a time when the Employer did not have proof that the Union had, in fact lost majority support, the Employer violated Section 8(a)(5).

The Employer contends that as long as it can present evidence at trial that the Union actually lacked majority support when it withdrew recognition, the Employer need not demonstrate that it had such evidence at the time it withdrew recognition. We reject this contention. This result would allow an the employer to withdraw recognition at its discretion, absent any evidence that the union lacks majority support and even where the Employer lacks a good-faith doubt, and then proceed, as the Employer did here, to rely upon evidence arising after the Union had already been removed, and perhaps after the employer had already implemented additional benefits or engaged in other conduct that would taint the employees' responses. The Board in Levitz did not specifically address whether an employer must have actual knowledge of employee disaffection at the time it withdraws recognition. We conclude that this requirement is implicit in the rationale underlying Levitz.

We first note that before Levitz, the Board would analyze an employer's majority loss defense to a withdrawal of recognition by examining only the factors "actually 'relied on' by the employer . . . . Conduct of which the employer may have been aware, but on which the employer 'did not base' its decision to withdraw recognition from the Union, is of 'no legal significance."[11] The Board later stated in Levitz that "we anticipate that as a result of our decision today, employers will be likely to withdraw recognition only *if the evidence before them* clearly

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[10] This case therefore does not involve a withdrawal of recognition based on a reasonable, good faith mistaken belief that the evidence at hand established that the Union lacked majority status. We therefore need not consider whether an employer may adduce post-withdrawal evidence of majority loss in those circumstances.

[11] RTP Co., 334 NLRB 466 (2001).

indicates that unions have lost majority support."[12] Finally, the Board made clear in Levitz that it was imposing a "more stringent requirement for withdrawals of recognition. . . ."[13] Given the Board's pre-Levitz refusal to take into account unconsidered evidence, together with the Board's imposition of a stricter standard in Levitz, we conclude that Levitz implicitly bars the use of post-withdrawal evidence of loss of majority.[14]

We note that the signatures on the petition were obtained some seven months before the Employer withdrew recognition. However, we would not argue that the petition was insufficient evidence of majority loss because the signatures were "stale." Although the Board has found seven-month-old petitions to be "stale evidence," the Board has never found a withdrawal of recognition to be unlawful solely on that ground. Rather, the Board has also relied upon intervening, post-petition evidence demonstrating continued majority support for the Union.[15] Here, the Union

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[12] Id. at 726, emphasis added.

[13] Id. at 717.

[14] This issue is now pending before the Board on exceptions to the ALJD in Highlands Regional Medical Center, Case 9-CA-30186, JD-129-02, January 9, 2003. The employer in Highlands withdrew recognition based upon an invalid petition. At the hearing, the employer adduced employee testimony attempting to show that a majority of employees had not supported the union when the employer had withdrawn recognition. The ALJ ruled that the employer could not rely upon such evidence and, even assuming that it could, that this evidence did not establish majority loss.

[15] See, e.g., Hospital Metropolitano, 334 NLRB 555, 556 (2001) (seven month old employee petition was "stale evidence" and not a reliable indicator of the employees' union sentiments at time of the employer's withdrawal, especially "since there were significant changed circumstances between the April petition and the December withdrawal of recognition."); Rock-Tenn Co., 315 NLRB 670, 672 (1994), enfd. 69 F.3d 803 (7th Cir. 1995), overruled on other grounds (in finding that seven month old employee petition was "stale," Board relied not only on the passage of time, "but also on the facts that unit employees showed their support for the Union in the intervening time . . ."). See also McDonald Partners Inc., d/b/a Rodgers & McDonald Graphics v. NLRB, No. 01-1491, (D.C. Cir. 6/20/03), enf. denied and remanded ("The Board has never dismissed evidence as stale based solely on its age; it has

has offered no intervening evidence of continued employee support. Although the employees did meet and ratify the contract on February 6, 2003, it appears that only about 35 employees attended that meeting. Therefore, we would not argue that the withdrawal of recognition was unlawful on the ground that petition signatures were "stale."

Finally, we would not allege that the petition signatures were tainted by the unfair labor practices contained in the Union's June 14 charge (alleging that the Employer refused to offer dates and insisted on proposals in advance of providing dates).[16] The Region has not found that the prior allegedly unlawful conduct caused employee disaffection in the unit, and there is no evidence that the Employer's conduct was disseminated among the bargaining unit. In these circumstances, we agree with the Region that the employee petition was not tainted by the Employer's prior alleged unlawful conduct.

Assuming that an employer may lawfully withdraw recognition based upon post-withdrawal evidence, we conclude that the post-withdrawal evidence here is insufficient to establish majority loss. First, we conclude that the Employer's post-withdrawal individual employee polls were unlawfully conducted and thus unavailable to establish a loss of majority.

Under Struksnes Construction,[17] an employer is permitted to poll employees about their union sentiments only if: (1) the poll's purpose is to determine the truth of a union's claim of majority;[18] (2) this purpose is

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required changed circumstances or new evidence calling the reliability of the old evidence into doubt.").

[16] An employer is precluded from withdrawing recognition in the context of serious, unremedied unfair labor practices tending to cause employee disaffection, where additional evidence establishes that the employee petition was tainted by the prior unfair labor practices. See Levitz, above, 333 NLRB at 717, n.1; Lee Lumber & Building Material Corp., 322 NLRB 175, 177 (1996), enfd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997), supp. decision 334 NLRB No. 62 (2001); see also generally Master Slack Corp., 271 NLRB 78 (1984).

[17] 165 NLRB 1062 (1965).

[18] See Lackawanna Electrical Construction, Inc., 337 NLRB No. 62, slip op. at 14, quoting Public Service Company of Oklahoma (PSO), 334 NLRB 487, 504 fn. 10 ("'an employer may

communicated to the employees; (3) employer assurances against reprisals are given; (4) employees are polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.[19] In addition, the employer must provide the union with reasonable advance notice of the time and place of the poll.[20] A failure to comply with any one of the Struksnes requirements is sufficient to render the poll unlawful.[21]

Here, the Employer's attorney did provide assurances against reprisal prior to conducting the individual employee polls. However, the Employer failed to fulfill virtually all the other Struksnes requirements. The purpose of the individual polls was not to determine the existence of the union's majority. Rather, as the Employer acknowledges, the purpose of the polls was to obtain evidence that would prove that the Union did *not* have majority support.[22] The Employer failed to provide the Union with reasonable advance notice of the time and place

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not initiate a poll of employee sentiments in an attempt to create – as opposed to confirm – a good-faith doubt of the union's continuing majority support among employees'").

[19] Id. at 1063. This last criterion is limited to unfair labor practices that can be shown to have caused the loss of employee support for the union.

[20] Texas Petrochemicals Corp., 296 NLRB 1057, 1063 (1989), enfd. in relevant part and remanded 923 F.2d 398 (5th Cir. 1991), rehearing denied 931 F.2d 892 (5th Cir. 1991) (Table).

[21] Lackawanna Electrical Construction, Inc., 337 NLRB No. 62, slip op. at 12 (April 24, 2002), citing American National Insurance Co., 281 NLRB 713 (1986); Ravenswood Electronics Corp., 232 NLRB 609, 616 (1977).

[22] [*FOIA Exemptions 6, 7(C), and 7(D)*] the conclusion that the polls were aimed at proving that the Union already lacked a majority rather than at determining whether the Union had a majority or not. [*FOIA Exemptions 6, 7(C), and 7(D)*

.] In sum, substantial evidence indicates that the polls were not a means to determine the truth regarding the Union's majority status, but rather were a tool to bolster the Employer's legal argument that it had lawfully withdrawn recognition from the Union.

of the polls, and the polls were not conducted by secret ballot. The polls also were not conducted in an atmosphere free of unfair labor practices. Indeed, the polls took place just one week after the Employer's withdrawal of recognition and the unilateral granting of significant benefits.[23]

Finally, the Employer's polls were unlawful because there were conducted while a Board decertification petition was pending. In Struksnes, the Board stated that

> a poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate interest of the employer that would not be better served by the forthcoming Board election. In accord with long-established Board policy, therefore, such polls will continue to be found to violate Section 8(a)(1) of the Act.[24]

The Board recently applied this principle in Heritage Hall, E.P.I..[25] There, the union had filed a petition for an election to be held on December 8, 1995. On December 7, the union filed blocking charges. When the election was not held, the employer conducted what it termed a "mock election," which the union then alleged to be an unlawful employee poll. The ALJ found the poll unlawful under Struksnes because it had not been conducted in an atmosphere free of unfair labor practices or coercion.[26] As to this finding, however, the Board stated:

> we stress that under Struksnes...the Respondent was prohibited from lawfully conducting its own election while the Union's petition was pending even if the Respondent had complied with the procedural safeguards set forth in that case.[27]

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[23] See Lackawanna Electrical Construction, Inc., 337 NLRB No. 62, slip op. at 14 (election not conducted in atmosphere free of unfair labor practices or coercion where just prior to the actual balloting, the employer unlawfully promised employees a wage increase if they voted against the Union).

[24] 165 NLRB at 1063.

[25] 333 NLRB 458 (2001).

[26] Id. at 466.

[27] Id. at 458 n. 4.

In sum, the Employer's individual employee polls were unlawful for a number reasons and thus not available to show a Union loss of majority status.

The Employer argues that the Struksnes safeguards are inapplicable here because the Employer was merely defending itself against unfair labor practice charges, and thus was only required to follow the requirements established under Johnnie's Poultry. This contention is without merit.

Johnnie's Poultry[28] listed "specific safeguards" necessary to afford an employer the "privilege" of questioning employees for the purpose of preparing for a Board hearing:

> the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

The purpose of the Johnnie's Poultry safeguards is to protect employees when an employer interrogates them on matters involving their Section 7 rights.[29] These safeguards serve a completely different purpose than the Struksnes polling requirements, which instead assure that an employer-run poll can be relied upon as a fair and accurate measure of employee support for the Union. Thus, the Employer's compliance with Johnnie's Poultry standards for lawful interrogations did not relieve the Employer of the obligation to comply with Struksnes safeguards when the Employer sought to use the results of its interrogations as individual employee polls.[30]

Finally, the Employer can not justify its withdrawal of recognition by relying on alleged hearsay statements

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[28] 146 NLRB 774-775.

[29] Safelite Glass, 283 NLRB 929, 949-950 (1987).

[30] In any event, even under the Johnnie's Poultry safeguard, the Employer's interviews were inherently unreliable. As discussed above, the employees were asked whether they supported the Union after the Employer had withdrawn recognition and implemented significant benefits.

from supervisors that 11 additional employees had stated before the withdrawal of recognition that they did not support the Union. These statements are inadequate because the Employer has refused to provide the Region with the names of the employees or a description of precisely what the employees said.[31] At best, these are unsubstantiated employee statements which are mere indirect evidence of employee disaffection only tending to establish an employer's good-faith doubt of majority loss.[32]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer's withdrawal of recognition was unlawful because it was not based on objective evidence of actual loss of Union majority support at the time recognition was withdrawn, and otherwise was not based on valid, sufficient evidence of loss of majority.

B.J.K.

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[31] The Employer also has refused to disclose when the statements were made or when the Employer learned of the statements.

[32] See Allentown Mack v. NLRB, 522 U.S. 359, 369-70 (1998) where the Court stated with respect to the reasonable, good-faith doubt standard for polling:

> Unsubstantiated assertions that other employees do not support the union certainly do not establish the fact of that disfavor with the degree of reliability ordinarily demanded in legal proceedings. But under the Board's enunciated test for polling, it is not the fact of disfavor that is at issue (the poll itself is meant to establish that), but rather the existence of a reasonable uncertainty on the part of the employer regarding that fact.