

Board Ends Union's "Gotcha" Strategy to Counter Anticipatory Withdrawal of Recognition

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The National Labor Relations Board ("NLRB") recently determined in *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019), that a new framework was required to analyze employees' representation wishes when an employer receives evidence before an existing collective bargaining agreement ("CBA") expires that the union no longer enjoys the majority support of the employees. In response, an employer could give notice to the union that it plans to withdraw recognition from the union when the CBA expires and could also suspend or refuse bargaining for a successor contract. This process is called an "anticipatory" withdrawal of recognition.

Background

Historically, an employer could rebut an incumbent union's presumption of majority status by establishing that the union did not enjoy majority support from the bargaining unit or that it possessed a good-faith reasonable doubt, supported by objective considerations, regarding the union's majority status. If an employer could establish a good-faith doubt of the union's majority status within a reasonable time prior to the expiration of a CBA, it could announce that it did not intend to negotiate a successor agreement and then lawfully withdraw recognition of the union when the CBA expired. *Burger Pits, Inc.*, 273 NLRB 1001 (1984). The Supreme Court subsequently found that, under the NLRB's reasonable doubt standard, an employer must have a "genuine, reasonable uncertainty" regarding the union's majority status. *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998).

However, under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the NLRB abandoned the good faith doubt standard and instead held that an employer makes the decision to withdraw recognition "at its peril." If a union challenges the withdrawal and establishes that it regained majority status after receiving notice from the employer, but before the employer is actually able to withdraw recognition, the employer will have violated Section 8(a)(5) of the National Labor Relations Act ("NLRA"). This provided unions with an opportunity: if presented with an anticipatory withdrawal of recognition, a union would commence a counter-offensive to reacquire majority status in the interim between the anticipated and actual withdrawal. If the union was successful, it could entrap an employer. An employer would withdraw recognition based on its good-faith reliance on the objective support it had already received, without knowing that the union reestablished majority support. Such action, despite its reasonable, good-faith basis, would violate section 8(a)(5) of the NLRA under *Levitz*. Such a violation could result in an affirmative bargaining order (precluding a challenge to the union's majority status) for at least six months and up to one year.

Johnson Controls

The NLRB noted the problem in this scenario. Where both the employer and union possess evidence that a union has lost, and then reacquired, majority status, some employees are necessarily “dual signers.” Rather than merely assuming the last signature trumps prior signatures (“last in time” principle) or requiring employees to testify before both parties (and expose themselves to possible retaliation from whomever they disappoint), the NLRB determined that a secret ballot election would be a more accurate and safer way to determine a union’s majority status or lack thereof. The secret ballot election recognizes the problems with dual signers who, in a short period of time, express both dissatisfaction and support of the union. It also allows the dual signers to make a final decision under protection of anonymity, insulating them from retaliation from whichever side they fail to support.

Treatment of dual signers was also inconsistent under *Levitz*. The NLRB required employers to prove the dispositive fact - that a union lost majority support - with evidence the employer possessed and relied upon, but permitted a union to challenge the employer’s evidence with after-acquired evidence the employer never possessed. Similarly, an employee’s union authorization card cannot be revoked absent notification to the union prior to a demand of recognition, but an employee’s signature on a disaffection petition *is* effectively revoked by a pro-union counter signature without notification to the employer. This dichotomy further required a new standard when analyzing anticipatory withdrawals of recognition. In fact, in *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017), a judge questioned whether an employer even violates the NLRA when it withdraws recognition in good faith as a result of a union’s “intentional nondisclosure” of restored majority support. The court unanimously refused to enforce the NLRB’s bargaining order as a result of the employer’s unintentional violation and the union’s decision to withhold evidence of its restored majority status. The court determined that the question was better resolved through an election.

The NLRB also noted that an NLRB-conducted election promotes stable labor relations. Under the *Levitz* model, an employer is held in limbo due to the uncertainty of whether a union reestablished majority status. A subsequent bargaining order disrupts the bargaining relationship and could be avoided if the employer was aware of the status of the employees’ wishes. An election provides clarity regarding the bargaining unit’s wishes and does not leave an employer to wonder if its objective evidence of disaffection is still valid.

Additionally, the NLRB expressed concern over the union’s ability to take advantage of the timeline created by an anticipatory withdrawal of recognition. A union has “an opportunity, if not an actual incentive,” to take advantage of an employer that withdraws recognition of the union in good faith only to learn that some of the signers of the disaffection petition also signed new authorization cards for the union, voiding the signatures on the disaffection petition.

New Standard

As the NLRB expressed in *Levitz* (and the D.C. Circuit expressed in *Scomas of Sausalito*), a secret ballot election is the Board’s preferred means for resolving questions of employees’ representation preferences. The decision in *Johnson Controls* confirms and reinforces that method for resolving questions of whether a union has maintained the required majority support of the bargaining unit and outlines the standard for such review.

Johnson Controls reaffirms NLRB precedent in *Burger Pits* that, if an employer receives evidence that a union has lost majority support within a reasonable time before a CBA expires, the employer may

notify the union that it will withdraw recognition upon expiration of the CBA and refuse to bargain or suspend bargaining. *Johnson Controls* clarifies this precedent to establish the “reasonable time” as a 90-day period prior to expiration of the CBA. While a union may challenge the basis of the disaffection petition (i.e., allege that it was employer initiated or assisted, fails to make employees’ wishes clear, is tainted by unremedied unfair labor practices, or the number of valid signatures fails to establish a majority), the NLRB will not consider whether the union reestablished majority support as part of an unfair labor practice proceeding. Instead, the union must file an election petition within 45 days of the employer’s announcement of its anticipatory withdrawal of recognition. The election will establish whether a majority of employees wish to continue the union’s representation after expiration of the CBA.

To promote labor relations stability, *Johnson Controls* also establishes a safe harbor to allow an employer to wait for the expiration of the 45-day period before withdrawing recognition. Thus, an employer that refrains from such withdrawal after the expiration of a CBA, but before the expiration of the union’s 45-day period to file an election petition, does not violate Section 8(a)(2) of the NLRA by continuing to recognize the union during the interim. Similarly, a union does not violate Section 8(b)(1)(A) if it accepts the withdrawal of recognition.

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