

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

# Advice Memorandum

DATE: December 29, 2003

TO : Gail Moran, Acting Regional Director  
Region 13

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

SUBJECT: Christy Webber Landscapes, Inc.                   530-4080-5012-0100  
Case 13-CA-41300                                           530-4080-5084-5000

This Levitz<sup>1</sup> case was submitted for advice as to whether the Employer was privileged to withdraw recognition from the Union based upon a conversation in which an employee told it that a majority of the bargaining unit had signed decertification petitions, in circumstances where the Region has evidence of the Union's actual loss of employee majority support.

We conclude that complaint is inappropriate where the Region is in possession of objective evidence sufficient to establish an actual loss of employee support of the Union.

### FACTS

Production Workers Local 707 represents laborers employed by Christy Webber Landscapes, Inc. The parties' most recent collective-bargaining agreement expired on October 31, 2003.<sup>2</sup>

Starting on August 18, employees David Wilcox and Berulo Salgado solicited employees to sign individual pieces of paper containing the statement "I no longer wish to be represented by Local 707," together with its Spanish translation.<sup>3</sup> Wilcox states that he told about six

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<sup>1</sup> Levitz Furniture Company of the Pacific, 333 NLRB 717 (2001).

<sup>2</sup> All dates are in 2003 unless specified otherwise.

<sup>3</sup> Wilcox further stated that he had received a letter from the Employer explaining the process of decertifying the Union. Wilcox composed the English wording of the petition and asked "Angel Ocampo from the office" to translate it into Spanish and type it up. According to Wilcox, Ocampo also made copies of the blank petition for Wilcox. It is unclear what position Ocampo holds for the Employer. There is no allegation that this conduct constitutes unlawful

employees that they needed more than 30% of the employees to sign the petition in order to have a good chance at getting rid of Local 707 "through an election." Salgado states that he told an unspecified number of employees that "there was going to be a vote coming up" and that the petition "was to get an election."

On about August 26, Wilcox asked the Company's human resources manager Lourdes Gutierrez in her office how many hourly employees the Company employed. Gutierrez told Wilcox that the hourly employee complement was about 70. Wilcox subtracted five non-unit equipment operators from that figure and calculated that Local 707 represented approximately 65 employees. Wilcox told Gutierrez that he had collected a specific number of employee signatures on the anti-Union petition, somewhere "in the 40s" and asked Gutierrez to calculate the percent of bargaining unit employees that that figure represented. Wilcox recalls that Gutierrez responded with a figure in the 60% range. Wilcox told Gutierrez that about 60% of the employees signed up to decertify the Union.

Also on about August 26, Union business agent Jose Diaz met with Employer owner Christy Webber at a jobsite. Diaz asked Webber if the Company was going to negotiate a new contract. Webber responded in the negative and handed Diaz her attorney's business card.

Wilcox filed a decertification petition in Case 13-RD-2441 on August 27. He submitted 48 employee anti-Union petitions as a showing of interest. As the bargaining unit consisted of 66 employees at the time, the showing of interest amounted to approximately 72% of the bargaining unit. The decertification petition currently is blocked by the instant charge.

#### ACTION

We conclude that the Employer did not unlawfully withdraw recognition from the Union because the Union suffered an actual loss of employee support, as evidenced by anti-Union petitions in the Region's possession signed by a majority of employees.

The Board in Levitz developed a burden-shifting analytical model to determine the lawfulness of an employer's withdrawal of recognition. An employer that withdraws recognition from an incumbent union bears the

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Employer assistance to the employees' decertification effort.

initial burden of proving that the union suffered a valid, untainted numerical loss of its majority status. The Employer can establish this loss by a variety of means, including direct evidence of employees' firsthand statements of their own anti-union sentiments or by an anti-union petition signed by a majority of unit employees. Once established, the General Counsel may present rebuttal evidence to show that the union in fact enjoyed majority support at the time of the withdrawal or that the employer's evidence is unreliable. The burden then shifts back to the employer to establish "actual loss" by a preponderance of all objective evidence. An employer that withdraws recognition does so at its peril. 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.<sup>4</sup>

Here, notwithstanding the Employer's reliance on an employee's hearsay statement calling into question the Union's majority, it is clear that the Union has, in fact, lost majority support. This is evidenced by the anti-Union petitions signed by a majority of unit employees, which are currently in the Region's possession. It has long been the practice of successive General Counsels that if the General Counsel possesses evidence establishing that a union has actually lost its majority status, there is no basis to issue complaint alleging an unlawful withdrawal of recognition.<sup>5</sup> This long-standing policy recognizes that issuance of complaint to impose a collective-bargaining representative on employees against their stated will would run directly afoul of the policies of the Act. Since objective evidence exists to establish that the Union suffered an actual loss of its majority support, the Company was privileged to withdraw recognition.

Thus, we need not resolve here whether the Employer would have been privileged to rely solely on Wilcox's hearsay statement, had he not also given the Region objective evidence of the Union's actual loss of majority support. Furthermore, although there is some indication that the Company had some involvement in the anti-Union

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<sup>4</sup> See Levitz, 333 NLRB at 725.

<sup>5</sup> See, e.g., Pat's Food Center, Inc., Case 7-CA-37043, Advice Memorandum issued on June 21, 1995; J.P. Data Com, Cases 21-CA-26562 and 26579, Advice Memorandum issued on April 3, 1989.

campaign, there is no contention that the Employer tainted the process.<sup>6</sup>

Accordingly, the Region should dismiss this charge, absent withdrawal.

B.J.K.

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<sup>6</sup> As the Region has concluded, the language of repudiation on the employees' signed statements clearly reflects the intent of the signers. Cumberland Shoe Corporation, 144 NLRB 1268 (1963).