

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

Advice Memorandum

DATE: January 12, 2004

TO : Alan B. Reichard, Regional Director
Region 32

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

SUBJECT: AT Systems West, Inc. 530-4080-0112
Case 32-CA-20391-1 530-4080-0125
530-4080-0150
530-4080-0175-9000
530-4080-5012-6700
530-4080-5042-3300
530-4080-5084-5000

The Region submitted this Section 8(a)(5) case for advice as to (i) whether the parties' July 11, 2002 non-Board settlement agreement waived the Union's right to challenge the Employer's January 17, 2003 withdrawal of recognition; and (ii) if the settlement agreement did not constitute such a waiver, whether the Employer's withdrawal of recognition was nevertheless lawful under applicable Board law.¹

We conclude that the Employer lawfully withdrew recognition from the Union under controlling Board precedent, and therefore it is unnecessary to determine whether the settlement agreement waived the Union's right to challenge the withdrawal.²

FACTS

AT Systems West, Inc. (the Employer) transports cash and other valuables on behalf of its customers. It maintains offices throughout the western United States, including the Oakland, California facility at issue. Since 1997, Security, Police, & Fire Professionals of America (the Union) has represented the Employer's Oakland bargaining unit, but had yet to reach an initial collective-bargaining agreement at the time the Employer withdrew recognition.

¹ Pursuant to OM 99-37 and OM 03-57, Region 31 was designated to coordinate the processing of all Section 8(a)(5) charges filed against the Employer.

² In light of our determination, the Union's request for Section 10(j) relief is inappropriate.

On March 13, 1999, the Employer sent employees in its Oakland bargaining unit a letter entitled, "Don't Blame Us."³ The letter, to which a copy of the Employer's latest contract proposal was attached, noted the Employer's frustration that the parties had not reached a contract, and suggested that employees take the following actions:

1. Demand that the [U]nion sign the enclosed proposal.
2. Demand that the [U]nion let you actually vote on the proposal and that they sign the proposal if a majority favor [it].
3. Go to the NLRB and request a new election because you no longer desire to be represented by people from Orange or Los Angeles or Blackfoot, Idaho(?).
4. Go to the NLRB and demand a new election because you are of the opinion that you were misled (or deceived) by [the Union] and you never agreed that [the Union] was [one] you wanted to belong to.
5. Establish in some creditable [sic] fashion to Company management that [the Union] does not represent a majority of people in the Oakland branch.

The Employer had not provided the proposed contract to the Union beforehand. On April 27, May 10, and June 10, 1999 the Employer sent employees in all three bargaining units follow-up letters reiterating these five suggestions. The Union filed charges alleging that the "Don't Blame Us" letters were unlawful. A consolidated Section 8(a)(1) and (5) complaint issued and the proceedings were transferred to the Board on a stipulated record on December 6, 1999.⁴

In 2002, the Union filed several Section 8(a)(1), (3), and (5) charges concerning alleged Employer conduct at Oakland and other facilities, including a refusal to bargain. On July 11, 2002,⁵ the Union and Employer executed

³ The Employer sent similar letters to employees in its Sacramento and Ventura, California bargaining units.

⁴ On June 26, 2003, the Board issued its decision (Armored Transport, Inc., 339 NLRB No. 50), finding that the Employer's actions constituted direct dealing in violation of Section 8(a)(5), and solicitation of decertification and interference with internal Union matters in violation of Section 8(a)(1).

⁵ All dates hereafter are 2002 unless otherwise noted.

a non-Board settlement agreement (the Agreement), which resolved these charges. The Agreement did not settle the "Don't Blame Us" letters case then pending before the Board. In relevant part, the Agreement provided that for 90 days the Employer could not challenge Union's status as the exclusive bargaining representative of the Oakland unit, and that during this time the Employer would bargain in good faith with the Union, including responding in a timely fashion to any new contract proposals and making its representatives available to negotiate at reasonable times and locations. After 90 days, the Agreement permitted the Employer to act pursuant to the following provision (Paragraph 9):

With respect to [Oakland], the Parties agree that after ninety (90) days following the execution of this Agreement, any party, or third party as appropriate, may file a petition with the Board, including but not limited to an RM, RD, or RC petition. In the event such petitions are filed by any party, it is agreed by and between the Parties, and Counsel for the General Counsel of the Board shall be so directed, that with respect to any complaints that have issued against [the Employer] to date, such complaints shall not constitute "blocking charges" for the purposes of such petitions. The Parties also agree that after ninety (90) days following execution of this Agreement, [the Employer] may take any other action with respect to recognition of the Union as appropriate under applicable law.

The Union did not contact the Employer to schedule bargaining until sometime in September, at which time the Employer indicated that it could not schedule meetings because Richard Irvin, its vice president, was unavailable. It is unclear whether the Union pressed the Employer for bargaining dates. However, in mid-November, it conducted a three-day strike at the Employer's Los Angeles, Orange County, Las Vegas, and Phoenix locations to protest the fact that the Employer had not resumed negotiations. Following the strike, the parties reached contracts for three of those bargaining units, and the parties agreed to resume negotiations concerning the Employer's other locations, including Oakland.

On December 3, 34 of the 55 Oakland unit employees signed a petition stating that they no longer wished to be represented by the Union and wanted to negotiate a contract

without the Union's help. The Employer received the petition sometime prior to December 11.

On December 5, the Union contacted the Employer and proposed that the parties meet on December 16 and 17 to negotiate over the Oakland and Ventura units. The Employer agreed to meet on December 17 concerning Ventura and indicated that the parties could talk about dates for Oakland at that time. At the December 17 meeting and several times over the next few weeks, the Union inquired about bargaining dates for Oakland, but the Employer stated that it could not schedule any because Irvin's availability was still unknown.

In mid-January 2003, the Union again contacted the Employer to schedule a bargaining session for the Oakland unit. The Employer informed the Union that based upon the employee petition, it would no longer bargain with the Union as to the Oakland unit. On January 17, 2003, the Employer memorialized its withdrawal of recognition, effective that day, in a letter to the Union. The Employer enclosed a copy of the employee petition.

The Union states that it has no evidence showing that the Employer provided unlawful assistance in connection with the petition, or that any petition-signer acted based upon the 1999 "Don't Blame Us" letters. Over half of Oakland's workforce turned over between mid-1999 and December 2002.

The Employer contends that Paragraph 9 of the Agreement not only prevents the Union from relying on outstanding complaints to block the processing of an election petition, but also prevents the Union from relying on such complaints as evidence of taint precluding a withdrawal of recognition. The Union asserts that Paragraph 9 only waives its right to block a petition -- because the Union was willing to submit to a fair, impartial Board election -- but does not waive its right to challenge a unilateral withdrawal of recognition as tainted by preexisting, unremedied unfair labor practices.

ACTION

We conclude that absent withdrawal, the charge should be dismissed because, regardless of whether the Agreement constitutes a waiver, the Employer lawfully withdrew recognition under Board law.⁶ Thus, under Master Slack⁷ and

⁶ In view of this determination, we need not decide whether the Union clearly waived the right to contest the Employer's withdrawal of recognition. We note, however, that Paragraph

Lee Lumber,⁸ there is insufficient evidence of a nexus between the Employer's unlawful "Don't Blame Us" letters, dating to mid-1999, and the employees' December 3, 2002 anti-Union petition.⁹

The Board considers several factors in determining whether an employer's prior unremedied unfair labor practices have tainted a union's subsequent loss of majority status, thus rendering its withdrawal of recognition unlawful. They include (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the unlawful conduct's effect on employee morale, organizational activities, and union membership.¹⁰ Further, in Lee Lumber, the Board held that,

Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal

9 of the Agreement arguably does not constitute such a waiver. Thus, although Paragraph 9 explicitly precludes the Union from relying on any outstanding complaint to block the processing of an election petition after the 90-day insulated period, it contains no such express limitation on the Union's right to raise the existence of an outstanding complaint as a bar to "any other [Employer] action with respect to recognition of the Union as appropriate under applicable law."

⁷ Master Slack Corp., 271 NLRB 78 (1984).

⁸ Lee Lumber & Building Material Corp., 322 NLRB 175 (1996), affd. in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997).

⁹ The Union does not challenge the petition's validity and, under the "actual loss" standard adopted in Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001), the petition constituted direct evidence that the Union had in fact lost its majority. See GC Memorandum 02-01, "Guideline Memorandum Concerning Levitz," dated October 22, 2001, at pp.3-4.

¹⁰ Master Slack, 271 NLRB at 84.

relationship between the unfair labor practice and the ensuing events indicating a loss of support.¹¹

Applying these factors, the Board has recognized that dealing directly with represented employees and soliciting them to decertify their union are the kinds of unfair labor practices which can detrimentally affect the union-employee relationship and cause employee disaffection from a union.¹² Significantly, however, all of the cases presenting such violations also involved close temporal proximity between the employers' unremedied unfair labor practices and the employee disaffection which preceded the employers' withdrawals of recognition. We conclude that the three-and-

¹¹ 322 NLRB at 177. In this regard, the Union's argument, that any unremedied unfair labor practice taints a withdrawal of recognition, is a plain misstatement of Board law. Indeed, the Board has cited Pittsburgh & New England Trucking Co., 249 NLRB 833 (1980), enf. denied 643 F.2d 175 (4th Cir. 1981), on which the Union relies, for the proposition that an employer can only rely on a loss of majority "free of unfair labor practices...likely, under all the circumstances, to affect the union's status, cause employee disaffection," etc., and then reiterated the Master Slack criteria. See Hillhaven Rehabilitation Center, 325 NLRB 202, 204-205 (1997).

¹² See, e.g., RTP Co., 334 NLRB 466, 467-469 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), cert. denied 124 S.Ct. 51 (2003) (employer unlawfully blamed union for preventing wage increase and dealt directly with employees in letters announcing wage increase and health insurance premium decrease; "strong causal connection" given the two to six weeks between these ULPs and employee petition that employer relied on to withdraw recognition); Heritage Container, Inc., 334 NLRB 455, 459-460, 462 (2001) (employer unlawfully solicited strikers to return by promising more money and threatening job loss only three weeks before employee petition, which Board found could not serve as basis for withdrawal of recognition); Bridgestone/Firestone, Inc., 332 NLRB 575, 575-577 (2000), enfd. in relevant part, 47 Fed.Appx. 449, 2002 WL 31060500 (unpublished decision) (9th Cir. 2002), and cases cited therein (withdrawal of recognition tainted where employer unlawfully solicited employee signatures on decertification petition; ULPs commenced less than three months prior to withdrawal of recognition); and Detroit Edison, 310 NLRB 564, 565-566 (1993) (employer's unlawful direct dealing on October 22 tainted December 17 employee decertification petition).

a-half year passage of time in the instant case weighs heavily against finding the Employer's withdrawal of recognition tainted by the then-unremedied "Don't Blame Us" violations.¹³ In addition, because fewer than half of the bargaining unit members working in mid-1999 remained on the Employer's payroll in December 2002, it is unlikely that the 2002 workforce's disaffection bore any relationship to unfair labor practices committed in 1999.

Moreover, the Union admits that it has no independent evidence that any employee who signed the petition did so as a consequence of the "Don't Blame Us" letters.¹⁴ Therefore, the Union has not adduced any specific proof of a causal relationship between these unfair labor practices and the Union's loss of majority support, as Lee Lumber requires.

In all these circumstances, we conclude that the Employer's January 17, 2003 withdrawal of recognition was lawful. The charge should therefore be dismissed, absent withdrawal.

B.J.K.

¹³ Compare Overnite Transportation Co., 333 NLRB 1392, 1392-1395 (2001) (despite four-year passage of time, Board found causal connection between employer's "outrageous" unfair labor practices and employees' subsequent disaffection from union which tainted decertification petitions; employer had not complied with a previous Board order, enforced by the Fourth Circuit, finding that it had engaged in a "nationwide campaign of extensive and egregious [ULPs], including 'hallmark' violations"). Notwithstanding the similarly long passage of time, the scope and severity of the violations in Overnite, as well as the surrounding circumstances, distinguish it from the instant case.

¹⁴ The "Don't Blame Us" letters were the only unremedied unfair labor practices that could have unlawfully tainted the petition. There is no contention that the Employer breached the Agreement by failing to bargain in good faith with the Union during the 90-day insulated period.