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

Advice Memorandum

DATE: October 29, 2004

TO : Willie L. Clark, Regional Director
Region 11

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

SUBJECT: Goodyear Tire and Rubber Company 324-8025-7500
Case 11-CA-20433, 11-CA-20434, 11-CA-20435 518-4040-5025
and 518-4040-7567-6700
United Steelworkers Union, AFL-CIO 536-2563
Case 11-CB-3487, 11-CA-3488, 11-CA-3489 536-2563-5000

This case was submitted for advice on whether the Employer unlawfully granted recognition and the Union unlawfully accepted recognition, based upon a card majority, when both parties had notice that a determinative number of employees revoked their authorization cards between the time when the Union requested and the Employer granted recognition.

We conclude that the Employer violated Section 8(a)(1) and (2) by granting recognition, and the Union violated Section 8(b)(1)(A) by accepting recognition, at a time when the Union did not possess the support of an actual majority of the employees.

FACTS

In 2003, Goodyear Tire and Rubber Company (the Employer) and the United Steelworkers of America (the Union) entered into a new Master Labor Agreement. Letter 50 of that Agreement is a neutrality agreement that sets forth procedures for future Union organizing campaigns at the Employer's nonunion facilities. Of relevance here, the neutrality agreement establishes that the Union will provide written notification to the Employer of its intent to begin an organizing campaign at one of its facilities. The Union then has 90 days to complete its campaign. At any time before the expiration of the 90 days, the Union may demand recognition based on a simple card majority. Within five days of the demand, the parties will request a card check by a neutral third party.

On November 10, 2003, the Union informed the Employer that it was beginning a campaign to organize the Employer's Asheboro, North Carolina facility. On February 7, 2004, the last day of the 90-day period, the Union announced to the

Employer that it had obtained a card majority.[1] The parties arranged to meet with an arbitrator on February 26 for a confidential verification of signatures.

In the meantime, following the end of the organizing campaign, 10 employees signed letters revoking their authorization cards. The revocations were dated between February 9 and 15. An employee submitted the revocations to the Union, the Employer and the arbitrator, and all had notice of their existence at the time the parties met for the card verification on February 26.[2]

At the February 26 meeting, the arbitrator initially authenticated the employees' signatures. He then conducted the card check and notified the parties that the Union had obtained a simple card majority. He also notified the parties that the 10 revocations were determinative to the results and that the parties would need to address the issue before he could decide whether the Union had a card majority.

The parties discussed the issue during a conference call with the arbitrator on March 5. The Union argued that the revocation letters should not invalidate the card majority because they were all dated and submitted after the February 7 request for recognition, which was the last day of the 90-day campaign period. The Employer took the position that the arbitrator should decide the issue based on his interpretation of the parties' agreement and existing Board law.

By letter and fax dated March 5, the arbitrator notified the parties that the Union had obtained a simple card majority. The Employer granted recognition to the Union on March 9, and posted a notice to employees on March 12 informing them of the grant of recognition. The arbitrator died on July 2.

The Region has determined that there is no evidence of unlawful assistance by the Employer, or any independent violations of the Act that would taint the Union's cards.

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[1] The Union obtained a majority of only one or two cards, depending on the date of the eligibility list.

[2] The Union had not actually seen the revocations in advance of the meeting, because they were mailed to the wrong local office. However, the Union does not dispute that it was aware of their existence in advance and saw them for the first time on February 26.

ACTION

We conclude that the Employer violated Section 8(a)(1) and (2) by granting recognition, and the Union violated Section 8(b)(1)(A) by accepting recognition, at a time when the Union did not possess the support of an actual majority of the employees.

An employer may voluntarily grant recognition to a union based on a showing of majority support, such as a card check or employee-signed petition.[3] However, an employer violates Section 8(a)(1) and (2) by granting recognition, and a union violates Section 8(b)(1)(A) by accepting that recognition, if a majority of employees do not support the union at the time recognition is granted.[4] An employer that extends recognition in the good-faith but mistaken belief that the union has majority support violates Section 8(a)(2).[5] Thus, the Board will give effect to employee letters withdrawing support from a union, where the union has majority support at the time it requests recognition, but a determinative number of employees revoke their support prior to the employer granting recognition.[6]

In light of these principles, the Employer's grant of recognition to the Union was unlawful because at the time the Employer granted recognition, the Union did not in fact represent a majority of the employees. When the parties met to conduct the card check on February 26, they were both aware of the clear and unambiguous revocations submitted by 10 unit employees. As a result, both the Union and the Employer knew that the Union had lost the card majority it had attained on February 7. At that point, the Union and the Employer could not lawfully agree to disregard the revocations and enter a bargaining relationship based on the Union's earlier majority status, because such an agreement would have the effect of negating the sentiments concerning representation of a majority of the unit.

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[3] See, generally MGM Grand Hotel, 329 NLRB 464, 465-466 (1999).

[4] Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 736-738 (1961).

[5] Levitz Furniture Co. of the Pacific, 333 NLRB 717, 724-725 (2001), citing Garment Workers, id.

[6] See Martin Theatres of Georgia, 126 NLRB 1054, 1059 (1960) (employer privileged to refuse to recognize union where employees effectively revoked their support for the union after the union's request for recognition).

We recognize that the Union possessed majority support at the time it requested recognition from the Employer, and the employees revoked that support after the Union made its demand. We further recognize that, in Alpha Beta Co.,[7] the Board stated, "It is well established that an authorization card cannot be effectively revoked in the absence of notification to the union prior to the demand for recognition." However, Alpha Beta is both distinguishable from this case and also should not be read broadly to extinguish the fundamental requirement of recognition based on majority support.

In Alpha Beta, the employer had refused to participate in a card check with the union, even though a clause in its collective-bargaining agreement called for such a card check. The Board concluded that the contract clause did waive the employer's right to demand an election and upon majority showing the employer was obligated to recognize the union. The employer, however, contended that a sufficient number of employees revoked their authorization cards and wanted an election. The Board found "it was not at all clear" whether employees who signed the petition were repudiating support for the union or simply saying that they wanted an election on the question of representation. It also was not clear whether the employer had received the petition at the time when the employer refused to participate in the card check. In fact, the employer refused to participate in the card check because it asserted that authorization cards were unacceptable and unreliable evidence of employee wishes concerning representation, not because of the petition. Alpha Beta is therefore distinguishable because here it is clear that the employees were repudiating support for the Union, and it is clear that the Employer had notice of the employees' repudiation when it granted recognition to the Union.

Moreover, the cases that the Board cited in Alpha Beta, at 230 fn. 9, for the proposition that a revocation is not valid in the absence of notice to the union before it demands recognition are also distinguishable. In James H. Matthews & Co. v. NLRB,[8] the issue was whether the union had majority status on January 11, 1964, when it made its demand for recognition. The court found that a letter of revocation postmarked January 22 could not be relevant to the union's status on January 11. In reaching this conclusion, the court cited the Restatement (2d) of Agency, Sec. 119(c), for the proposition that "a principal's revocation of his agent's authority is ineffective until communicated to his agent."

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[7] 294 NLRB 228, 230 (1989).

[8] 354 F.2d 432, 438 (8th Cir. 1965), cert. denied 384 U.S. 1002 (1966).

Thus, the union had majority status when it made its bargaining demand and when the employer rejected that demand. In NLRB v. Southbridge Sheet Metal Works,[9] the Board had set aside an election and issued a bargaining order. The issue before the court was whether a majority of employees supported the union at the time of a pre-election petition. Holding that there was sufficient proof of the union's majority to warrant the bargaining order, the court found no significance in the testimony of employees that they had changed their minds about the union since they never communicated their views to any union official or revoked any authorization cards. In both of these cases, the question of the timing and communication of a revocation of union authorization was relevant to show whether the employees had effectively revoked their designation of the union as their bargaining representative. In both these cases, as in Alpha Beta, the employees had delegated authority to the union that had not been effectively repudiated.

Thus, neither the facts of Alpha Beta, nor the cases upon which it relies, require a conclusion that a union and an employer can enter a consensual bargaining relationship based upon a putative majority of authorization cards when a determinative number of employees have repudiated their support for the union. Such a broad construction of Alpha Beta would contravene the well-established principle of exclusive representation based on majority support established in Garment Workers (Bernhard-Altmann Texas Corp.), supra. For, if an employer violates Section 8(a)(2) by extending recognition in the good-faith but mistaken belief that the union has majority support,[10] it surely violates the Act by extending recognition with knowledge that the union does not have majority support.

In this case, it is clear that the Union had notice of the revocation, and that the revocation had also been communicated to the Employer at the time the parties entered into a bargaining relationship. In these circumstances, a broad application of Alpha Beta that would allow the Union and Employer to ignore employee sentiments on the question of union representation would contravene the fundamental principle of exclusive union representation based on majority employee support.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (2) by granting recognition, and the Union violated Section

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[9] 380 F.2d 851, 856 (1st Cir. 1967).

[10] Levitz Furniture Co., 333 NLRB at 724-725.

8(b)(1)(A) by accepting recognition, at a time when the Union did not possess the support of an actual majority of the employees.

B. J. K.