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

Advice Memorandum

DATE: March 27, 2008

TO : Joseph A. Barker, Regional Director
Region 13

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

SUBJECT: First Group, Inc.
Case 13-CA-44361 530-4080-0112
530-4080-5012-6700
Amalgamated Transit Union Local 1028 530-4080-5084-5000
Case 13-CB-18816 530-8027-9000

The Region submitted this case for advice on (1) whether the language of an anti-Union petition indicated that signatory employees wished to remove the Union as their representative,[1] justifying an earlier withdrawal of recognition from the Union by the Employer's predecessor; and (2) if it did, whether the Employer then violated Section 8(a)(2) and (3) and the Union violated Section 8(b)(1)(A) when the Employer subsequently re-recognized the Union as the unit employees' exclusive bargaining representative.

We conclude that regardless of whether the anti-Union petition's language indicated employee disaffection from the Union, that petition could not establish disaffection by a majority of unit employees on the day that the Employer's predecessor withdrew recognition because of an intervening pro-Union petition. Thus, there is insufficient evidence that the Employer's subsequent re-recognition of the Union violated the Act and the Region should dismiss these charges, absent withdrawal.

FACTS

Laidlaw Transit, Inc. and Amalgamated Transit Union Local 215, which later consolidated into Local 1028 ("the Union"), had a bargaining relationship since 2002. The parties' only collective-bargaining agreement had a term of

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[1] See Wurtland Nursing & Rehabilitation Center, 351 NLRB No. 50 (2007).

September 1, 2002 to September 1, 2007, and it covered a unit of school bus drivers and monitors that worked out of Laidlaw's facility in Batavia, Illinois.

By letter dated June 4, 2007,[2] a unit employee submitted to Branch Manager Tom Tourek an anti-Union petition signed by 100 unit employees. Laidlaw's payroll records and seniority list show that the bargaining unit was composed of about 160 employees at that time. Because a majority of the unit employees no longer supported the Union, the employee requested in an accompanying letter that Laidlaw immediately withdraw recognition from the Union. Each page of the anti-Union petition was titled "Petition for Decertification" and stated, in relevant part:

> [t]he union member employees listed below . . . do not want to be represented for collective bargaining purposes by the currently recognized labor organization; and request the [NLRB] to conduct an election to determine whether the union member employees of Laidlaw . . . wish to continue to be represented by [the Union]. . . ."

On June 5, Laidlaw's Human Resources Director sent a copy of the anti-Union petition to the Union and stated that Laidlaw would withdraw recognition from the Union after the parties' contract expired on September 1. By letter dated June 18, Laidlaw's Human Resources Director provided the Union with the requisite notice to terminate the 2002-2007 contract and reiterated that Laidlaw would withdraw recognition from the Union after the contract expired on September 1.

In late July and early August, a Union Steward circulated a pro-Union petition. She obtained signatures from 57 unit employees, 21 of whom had previously signed the anti-Union petition. Each page of the pro-Union petition was titled "Petition in Support of the Amalgamated Transit Union" and stated, in relevant part:

> [w]e, the operators and monitors employed by Laidlaw . . . desire to retain the [Union] as our

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[2] All subsequent dates are in 2007 unless otherwise noted.

> representative. We hereby revoke our signature on any petition provided to my [sic] employer prior to the date of this petition that may have been interpreted to indicate that we no longer support the [Union] as our representative.

After the contract expired on September 1, Laidlaw did withdraw recognition from the Union. At that time, there were 180 employees in the bargaining unit. The Union filed a Section 8(a)(5) charge in Case 13-CA-44208, which alleged that Laidlaw had unlawfully withdrawn recognition and refused to bargain with the Union.

On or about October 1, First Group, Inc. ("the Employer") acquired and took over the operations of Laidlaw including its unit employees. In late October, the Union agreed to settle the Section 8(a)(5) charge against Laidlaw in Case 13-CA-44208 by entering into an agreement with the Employer wherein the Employer agreed to, among other things, re-recognize the Union, extend the expired contract by 60 days, resume payroll dues deductions on November 1, and engage in bargaining for a successor contract. Pursuant to this agreement, the Union withdrew the charge in Case 13-CA-44208 against predecessor Laidlaw.

On October 30, the unit employee who had submitted the disaffection petition filed the charges in the current case against the Employer and the Union. Based on the June anti-Union petition, the Charging Party alleged that the Employer was unlawfully recognizing, preparing to negotiate with, and arranging to deduct dues for a minority union. On November 5, that same employee filed an RD election petition and later filed a request to proceed with the election. On December 18, the Union lost the election by a vote of 83 to 64, with one non-determinative, challenged ballot. On January 3, 2008, the Region certified the results of the election.

Based on the election results, the Region solicited the withdrawal of the current charges. The Charging Party refused, arguing that unit employees should be reimbursed for the Union dues that were unlawfully deducted from their paychecks in November and December.

ACTION

We conclude that, regardless of whether the anti-Union petition indicated employee disaffection from the Union, that petition does not show that the Union had actually lost majority support on the day that Laidlaw withdrew recognition, i.e., September 1, because of the intervening pro-Union petition. Thus, there is insufficient evidence that the Employer's subsequent re-recognition of the Union, and the concomitant deduction of dues on its behalf, violated the Act.

To lawfully withdraw recognition from an incumbent union, an employer must prove by a preponderance of the evidence that the union had actually lost the support of a majority of the bargaining unit employees at the time the employer withdrew recognition.[3] The relevant date is not when the employer announces its intent to withdraw recognition in the future, but rather the date on which it actually withdraws recognition.[4]

In Parkwood Development Center, after receiving an anti-union petition signed by a majority of the unit employees, the employer announced that it would withdraw recognition when the contract expired about three months later.[5] The day before the contract expired, the union presented the employer with a pro-union petition and authorization cards signed by a majority of the unit employees. The employer still withdrew recognition the next day.[6] The Board held that the employer violated Section 8(a)(5) because on the date it withdrew

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[3] See Levitz Furniture Co. of the Pacific, 333 NLRB 717, 725 (2001); HQM of Bayside, LLC, 348 NLRB No. 42, slip op. at 2 (2006) ("it is the employer's burden to show an actual loss of the union's majority support at the time of the withdrawal of recognition"), enfd. ___ F.3d ___, 2008 WL 624937 (4th Cir. 2008).

[4] See Parkwood Development Center, 347 NLRB No. 95, slip op. at 2 & n.10 (2006); HQM of Bayside, LLC, 348 NLRB No. 42, slip op. at 3.

[5] See 347 NLRB No. 95, slip op. at 1.

[6] Id.

recognition, i.e., the date the contract expired, it could not prove by a preponderance of the evidence, which included the pro-union petition and cards, that the union had lost majority support.[7]

The current case is very similar to Parkwood. In early June, Laidlaw informed the Union that it would withdraw recognition after the contract expired on September 1 based on the first petition signed by 100 out of about 160 unit employees. However, after the first week of August, 21 of those 100 unit employees had also signed the pro-Union petition. Laidlaw could not rely on the conflicting evidence from these 21 employees to assert that they did not support the Union.[8] Accordingly, by September 2, i.e., the date Laidlaw withdrew recognition, the evidence showed that only 79 unit employees (100 minus 21) no longer supported the Union. Because that group of employees did not constitute a majority of the 180 unit employees working at that time, Laidlaw could not have lawfully withdrawn recognition from the Union.[9] Thus, neither the Union nor the Employer, which by then had acquired Laidlaw, violated the Act when they agreed in late October that the Employer, among other things, would re-recognize the Union. Indeed, because there was substantial continuity between the employing enterprises and because the Employer hired Laidlaw employees as a majority of its workforce, the Employer was a Burns successor.[10] In light of the lack of evidence rebutting the Union's continued majority support, the Employer was obligated to recognize the Union pursuant to Burns.[11]

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[7] Id., slip op. at 2-3.

[8] Id., slip op. at 2 ("Although [conflicting] evidence might have supported the filing of an RM election petition . . . it was not sufficient to support a withdrawal of recognition."); HQM of Bayside, LLC, 348 NLRB No. 42, slip op. at 2.

[9] We note, however, that the Union withdrew its earlier Section 8(a)(5) charge against Laidlaw.

[10] See NLRB v. Burns Intl. Security Services, Inc., 406 U.S. 272, 280 (1972).

[11] Id. at 281.

We note that unlike in Parkwood, here there is no evidence that the Union or one of the unit employees presented Laidlaw with the pro-Union petition before the contract expired on September 1.[12] However, Laidlaw's knowledge of the Union's majority status is not relevant to determining whether the Employer unlawfully re-recognized the Union.[13] To prove that the Employer violated Section 8(a)(2), the General Counsel would have to establish at a minimum that a majority of the unit employees did not support the Union when the Employer re-recognized it in late October.[14] As explained above, the June petition evidence relied upon by the Charging Party fails to show that the Union had lost its majority support as of September 2 because of the intervening pro-Union petition. There is no evidence of any additional loss of employee support for the Union between that pro-Union petition and the date of re-recognition.[15] Thus, there is insufficient evidence that the Union had lost majority support and that the Employer violated Section 8(a)(2).[16]

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[12] See also HQM of Bayside, LLC, 348 NLRB No. 42, slip op. at 1 (union informed employer about pro-union petition it had submitted to Regional Office three days before contract expired and employer unlawfully withdrew recognition).

[13] This case does not present the issue of whether an employer violates Section 8(a)(5) if a union fails to timely provide it with evidence to rebut a majority-supported, anti-union petition. See generally Parkwood Development Center, 347 NLRB No. 95, slip op. at 2 & n.8.

[14] The General Counsel would also have to establish that the Employer, as opposed to Laidlaw, knew that the Union had lost majority support. See Kenrich Petrochemicals, Inc., 149 NLRB 910, 911 (1964); S.M.S. Automotive Products, 282 NLRB 36, 41 (1986); Levitz, 333 NLRB at 724.

[15] The Union did not lose the RD election until mid-December.

[16] Therefore, it is also unnecessary to address the Region's suggestion that, because of the Board's recent decision in Dana Corp., 351 NLRB No. 28 (2007), Laidlaw and the Employer could not have lawfully withdrawn recognition from the Union absent a Board-conducted election.

Based on the preceding, the Region should dismiss the charges, absent withdrawal.

B.J.K.