



Labor & Employment Issues Client Alert

Pitta LLP
For Clients and Friends
July 9, 2019 Edition

Jettisoning Precedent, NLRB Prescribes How to Withdraw Union Recognition at Contract End Without Election

On July 3, 2019, the National Labor Relations Board (“NLRB” or “Board”) quietly issued a decision in *Johnson Controls, Inc.*, establishing a new framework for evaluating an employer’s withdrawal of recognition from a recognized union and overruling much of its 2001 decision in *Levitz Furniture*. 368 NLRB No. 20 (July 3, 2019). The 3-1 decision continues the trend of attacking unions in the name of “employee” choice.

Facts and Procedural History:

Johnson Controls manufactures, distributes, and sells interior automotive components from a facility in South Carolina. The Board certified UAW Local 3066 as the representative of 160 employees following a secret ballot election in 2010. The parties reached a CBA in 2012, which was set to expire on May 7, 2015. On April 21, 2015, the Employer received a petition signed by 83 of the 160 employees stating they no longer wished to be represented by the Union. The same day, the Employer notified the Union that it would withdraw recognition as soon as the contract expired, refusing to provide a copy of the petition to the Union. The Union then began soliciting authorization cards from employees, collecting 69 before May 7. Crucially, six employees who signed Union authorization cards had previously signed the petition. The Union notified the Employer that it did not believe it lost majority support and offered to meet with Johnson Controls to compare evidence. On May 7, the Employer rebuffed the Union, stating its unwillingness to share the names of the petition signatories and that absent receipt of contrary evidence, it was required to withdraw recognition. The next day, Johnson Controls withdrew recognition. The Union filed a charge and the Region issued a complaint. The National Right to Work Legal Defense Foundation took notice, however, and filed a Motion to Intervene.

On February 16, 2016, Administrative Judge Locke dismissed the complaint, concluding that Johnson Controls lawfully withdrew recognition. The Union filed exceptions and this case sat dormant for more than three years.

Prior Status of the Law, *Levitz*, and its Progeny:

Section 8(a)(5) of the National Labor Relations Act (“NLRA”) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. During the term of a CBA, but limited to three years, a union is entitled to a conclusive presumption of majority support. Prior to *Levitz*, an employer could rebut this presumption on the basis of a “good-faith reasonable doubt” of a union’s majority status. See *Celanese Corp.*, 95 NLRB 664 (1951). In addition, under the “anticipatory withdrawal” doctrine, an employer with a good faith reasonable doubt could announce, during the term of a CBA, that it did not intend to negotiate a successor agreement with the union and then it could withdraw recognition and implement unilateral changes when the existing agreement expired.

In *Levitz*, the Board reassessed and established that an employer may rebut majority status and unilaterally withdraw recognition only upon a showing that “the union has, in fact, lost the support of the majority of the employees in the bargaining unit.” The Board held that it would assess loss of support at the time the employer withdraws recognition. After *Levitz*, the Board reaffirmed anticipatory withdrawal using the same standard - actual loss of support at the time the employer withdrew recognition. *Levitz* explained that employers withdraw at their own peril because failure to prove loss of support will result in a violation of 8(a)(5). However, employers were given a safer avenue to test a union’s status. If they could establish a “good-faith reasonable uncertainty” as to the union’s majority status, they could petition for an election.

Following *Levitz*, cases emerged involving disputes over majority status based upon conflicting evidence prior to withdrawal of recognition as to the intentions of individual employees (i.e., “dual signers”). The Board’s decision here involves just such a dispute.

Majority Decision:

The Board’s majority frames the issue as involving a particular set of facts - the employer obtains evidence of actual loss of support, announces an anticipatory withdrawal, and the union claims it “reacquired” majority status before the employer withdrew recognition. The majority argues that existing Board precedent applies a “last in time” rule, under which the union’s evidence as to majority support determines the outcome. Thus, employers that withdraw recognition may unwittingly find themselves on the losing end of an 8(a)(5) charge, the remedy for which could include a bargaining order that prohibits challenge to the union’s majority status for a reasonable period of time. The

majority reasons that this issue is inherent in the *Levitz* framework as both parties are disinclined from disclosing the identities of signers for their respective sides out of a legitimate fear of retaliation. Moreover, the majority claims that because of this “last in time” evidentiary rule, unions have deliberately failed to disclose a belief of majority support and instead brought charges in order to obtain a bargaining order.

The majority gives lip service to its mandate to balance labor relations stability against employee wishes. It asserts that a “last in time” principle ignores the temporal proximity of the contrary assertions of intent by dual signers and concludes that employees may not understand what they are doing. Second, the majority argues that stability in labor relations is not promoted by the disruption resulting from the union’s failure to offer evidence of its support. Third, they contend that *Levitz* permits an unjustified asymmetry in evidentiary burdens. Finally, the majority points to one D.C. Circuit judge that questioned the Board’s treatment of dual signers in a 2017 concurrence.

Because of these perceived deficiencies in *Levitz*, the Board announced that it will now, retroactively, hold that proof of an incumbent union’s actual loss of majority support, if received within 90 days prior to contract expiration, conclusively rebuts the union’s presumptive continuing majority status when the contract expires. However, the union may attempt to re-establish that status by filing a petition for a Board election within 45 days from the date the employer gives notice of an anticipatory withdrawal. A rival union may intervene upon a showing of interest. Failure to file a petition will render the employer’s evidence dispositive as it will be the “only cognizable evidence” of representational desires. A union can file a petition and an 8(a)(5) charge, for which blocking charge policy will apply for the time being. But filing the charge alone will not toll the 45-day period. Despite the change, the Board will permit, but not require, employers to withdraw recognition at contract expiration, except in the case of a rival union petition. Thus, employers may delay withdrawal until the outcome of the election.

The majority asserts that the newly imposed election is no more burdensome to unions than its current obligation to obtain evidence that it has majority support prior to withdrawal of recognition. The majority argues that if a majority of employees actually desire representation, “it should not be difficult for the union to rally support in time for the new election. . . .” Furthermore, a secret ballot election will ascertain dual signers’ true wishes through the Board’s preferred method, rather than “divining” based on the unreliable “last in time” principle. The Board also notes that unions still have a “variety of options” if they receive notice of an anticipatory withdrawal, including filing charges alleging that: (1) the employer initiated or unlawfully assisted in the union-disaffection petition; (2) the petition fails to make employee wishes sufficiently clear; (3) the petition is tainted by serious unremedied unfair labor practices; or (4) the number of valid

signatures on the petition fails to establish loss of majority support. Lastly, in a particularly odd section, the Board majority provides employers essentially a guidance memo concerning whether or not they should make unilateral changes.

Applying its new standard retroactively, the majority ignored the Union's authorization cards and concluded that a majority of employees wished to no longer be represented by the Union based on the Employer's evidence alone.

The Dissent:

Member McFerran, the lone Democratic appointee, contends that the majority's decision upends free choice and stability in collective bargaining, imposing a "contrived solution on a nonexistent problem." Perhaps best articulating the result, she explains: "[t]he majority's framework permits the employer to oust an incumbent union *without* a Board election, based on evidence that does not prove actual loss of majority support, and then requires the *union* to seek and win a Board election to restore the status taken away by the employer." (emphasis in original).

McFerran initially chides the majority for ignoring the facts, noting that the Union had offered to show the Employer its evidence of support but the Employer rejected, inconsistent with part of the majority's rationale.

Most importantly, though, McFerran argues that the majority's framing of the case obscures the principle that an incumbent union is entitled to a presumption of majority support. She notes that the Board's anticipatory withdrawal cases do not involve a reacquisition of majority support, but rather an employer's inability to meet its burden to demonstrate that the union actually lost majority support. Contravening the majority's "free choice" rationale, McFerran explains that the choice at issue is not whether or not a union becomes the bargaining representative, but under what conditions it remains in place for the time being. The existing precedent merely concludes that dual-signed cards do not sufficiently rebut the presumption of continuing majority support. However, *Levitz* leaves ample room for the employer to file a petition and the majority does not explain why that is not sufficient. With respect to labor relations stability, McFerran explains that the disruption is one caused by the employer's unilateral withdrawal of recognition, entirely avoidable if an employer chooses to file a petition. Additionally, less severe options are available to address this alleged disruption, including requiring the union to disclose its signers to the employer, which was previously advocated for by Republican Board members.

McFerran also explains that under *Levitz*, an incumbent union remains in place unless and until employees reject the union in a secret ballot vote. Thus, the majority's reason for the new framework has nothing to do with the need for an election but rather the "peril" imposed on employers by *Levitz* for choosing to withdraw recognition rather than simply filing an election petition. McFerran claims that the majority never explains why its new framework is a better option than the employer-initiated election option under *Levitz*. On the contrary, McFerran suggests that the majority should consider making employer-initiated election mandatory, prohibiting employers from unilaterally withdrawing recognition altogether.

In closing, McFerran quoted the Supreme Court's pronouncement in *Auciello Iron Works* that "there is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." She claims that this is precisely what *Levitz* did and the majority's apparent aim is to let employers off the leash completely, even in cases like this one, where it is clear that the employer is acting in its own interest. McFerran exclaims that letting employers off the leash means that unions and the workers that support them get bit, and while that result does not bother the majority, it is inimical to the NLRA.

Legal Advice Disclaimer: The materials in this **Client Alert** report are provided for informational purposes only and are not intended to be a comprehensive review of legal developments, to create a client-attorney relationship, to provide legal advice, or to render a legal opinion. Readers are cautioned not to attempt to solve specific legal problems on the basis of information contained in this **Client Alert**. If legal advice is required, please consult an attorney. The information contained herein, does not necessarily reflect the opinions of Pitta LLP, or any of its attorneys or clients. Neither Pitta LLP, nor its employees make any warranty, expressed or implied, and assume no legal liability with respect to the information in this report, and do not guarantee that the information is accurate, complete, useful or current. Accordingly, Pitta LLP is not responsible for any claimed damages resulting from any alleged error, inaccuracy, or omission. This communication may be considered an advertisement or solicitation.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.