OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 16-03 May 09, 2016

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel /s/

SUBJECT: Seeking Board Reconsideration of the *Levitz* Framework

This memorandum sets forth the new procedure that Regions should follow after making a determination to issue complaint alleging that an employer has violated Section 8(a)(5) by unlawfully withdrawing recognition from an incumbent union absent objective evidence that the union actually had lost majority support. This procedure includes pleading an alternative theory of violation in the complaint and incorporating the attached model argument into the briefs submitted to administrative law judges and the Board.

Extant Board law permits employers to unilaterally withdraw recognition from an incumbent union based on objective evidence that the union has actually lost majority support. *See Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001). In *Levitz*, the Board rejected the General Counsel's position that employers should not be permitted to withdraw recognition absent the results of Board elections. Rather, it adopted a framework that increased the showing required of employers to unilaterally withdraw recognition and decreased the showing required for obtaining RM elections, anticipating that employers would be likely to withdraw recognition only if the evidence before them "clearly indicate[d]" that a union had "lost majority support." *Id.* at 726. However, the Board noted that it would revisit this framework if experience showed that it did not effectuate the purposes of the Act. *Id*. at 726.

Experience has shown that the option left available under the *Levitz* framework for employers to unilaterally withdraw recognition has proven problematic. It has created peril for employers in determining whether there has been an actual loss of majority support for the incumbent union, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation. As a result, *Levitz* has failed to serve two important functions of federal labor policy noted in that decision, specifically, promoting stable bargaining relationships and employee free choice. *Id.* at 723-26.

In order to best effectuate these central policies of the Act, Regions should request that the Board adopt a rule that, absent an agreement between the parties, an employer may lawfully withdraw recognition from a Section 9(a) representative based only on the results of an RM or RD election. This proposed rule will benefit employers, employees, and unions alike by fairly

and efficiently determining whether a majority representative has lost majority support. Moreover, the proposed rule is even more appropriate now because the Board's revised representation case rules have streamlined the election process.

Thus, in order to place this issue before the Board, in cases where a Region has made a determination to issue complaint alleging that an employer has violated Section 8(a)(5) by unilaterally withdrawing recognition under extant law, it should also plead, in the alternative, that the employer violated Section 8(a)(5) by unilaterally withdrawing recognition absent the results of a Board election. Regions should also include in their briefs to administrative law judges and to the Board the model brief section attached below.

If a Region has any questions or concerns regarding this new policy, it should contact the Division of Advice.

Attachment

Release to the Public

MEMORANDUM GC 16-03

[I.] The Board Should Require that Employers Utilize Board Representation Procedures to Fairly and Efficiently Determine Whether their Employees' Exclusive Bargaining Representative Has Lost Majority Support.

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725-26 (2001), the Board stated that it would revisit the framework it established for when employers may unilaterally withdraw recognition from their employees' exclusive bargaining representative if experience showed that it did not effectuate the purposes of the Act. Experience has shown that the *Levitz* framework has created peril for employers in determining whether there has been an actual loss of majority, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation.

Thus, the General Counsel urges the Board to hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.[1] Such a rule would benefit employers, employees, and unions alike by fairly and efficiently determining whether a majority representative has lost majority support. It will also better effectuate the Act's goals of protecting employee choice and fostering industrial stability, and is even more appropriate now because the Board's revised representation case rules have streamlined the election process.

A. The Board in *Levitz* sought to create a framework to encourage employer use of RM elections and left open future consideration of the General Counsel's proposal to require exclusive use of RM elections to resolve questions of majority support.

In *Levitz,* the then-General Counsel proposed that employers should be prohibited from unilaterally withdrawing recognition. *Id.* at 719, 725. The Board acknowledged that its early case law supported the General Counsel's view. *Id.* at 721 & n.25. Specifically, it noted that in

[1] The General Counsel does not seek any change to the holding in *Levitz* that employers can obtain RM elections by demonstrating a good-faith reasonable uncertainty as to a representative's continuing majority status. *Levitz*, 333 NLRB at 717.

United States Gypsum Co., 90 NLRB 964, 966 (1950), decided shortly after Congress amended the Act to provide for employer-filed petitions, the Board held that it was bad faith for an employer to unilaterally withdraw recognition rather than file a RM petition, which it described as "the method whereby an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt." *Levitz*, 333 NLRB at 721. The *Levitz* Board also acknowledged that the General Counsel's proposed rule might minimize litigation and be more protective of employee choice. *Id.* at 725. In this context, the Board noted that elections are the preferred means of testing employee support, and that the proposed rule would be more consistent with *Linden Lumber Division v. NLRB*, 419 U.S. 301, 309-10 (1974), which allows an employer to insist that a union claiming majority support prove it through an election. *Levitz*, 333 NLRB at 725.

However, the Board rejected the General Counsel's proposed rule and instead adopted a rule that it believed would effectively encourage employer use of RM petitions by elevating the evidentiary requirement for an employer's unilateral withdrawal, while lowering the standard for an employer's filing of an RM petition. *Id.* at 717. The Board then concluded that under its new framework, employers would be likely to unilaterally withdraw recognition only if the evidence before them "clearly indicate[d]" that a union had "lost majority support." *Id.* at 725. It stated that if future experience proved otherwise, it could revisit the issue. *Id.* at 726.

B. Experience under *Levitz* has failed to result in employers acting only where the evidence before them "clearly indicates" a loss of majority support and has caused protracted litigation undermining the core purposes of the Act.

In the 15 years since *Levitz*, the option left available under the *Levitz* framework for employers to unilaterally withdraw recognition has proven problematic. In a number of cases involving unilateral withdrawal, employers have acted based on evidence that did not "clearly

indicate[]" a loss of majority, causing protracted litigation over the reliability of that evidence. This unnecessary litigation has resulted in significant liability for employers and substantial interference with employee free choice. It also encourages the disclosure and litigation of individual employees' representational preferences, which can interfere with employees' Section 7 rights.

A fundamental flaw with the *Levitz* framework is that it fails to account for the difficulty of ascertaining whether evidence relied on by an employer actually indicates a loss of majority support, creating significant liability even for employers acting in good faith. For example, employers have unlawfully withdrawn recognition based on ambiguously worded disaffection petitions that did not clearly indicate that the signatory employees no longer desired union representation. *See, e.g., Anderson Lumber Co.,* 360 NLRB No. 67, slip op. at 1 n.1, 6-7 (2014) (written statements submitted by four employees that they did not want to be union members did not show they no longer desired union representation), *enforced sub nom., Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321 (D.C. Cir. 2015). Employers have also unlawfully withdrawn recognition where they relied on untimely disaffection petitions. *Latino Express,* 360 NLRB No. 112, slip op. at 1 n.3, 13-15 (2014) (rejecting petition signed by employees during the certification year, when the union has an irrebutable presumption of majority status). In other cases, employers mistakenly relied on disaffection petitions that were invalid because they contained signatures that employees had revoked. *See, e.g., Scoma's of Sausalito, LLC,* 362 NLRB No. 174, slip op. at 3 (Aug. 21, 2015) (employees revoked signatures on disaffection petition before employer withdrew recognition). Additionally, questions have arisen regarding unit composition, creating confusion as to how many, and which employees would actually constitute a majority. *See, e.g., Vanguard Fire & Security Systems*, 345 NLRB 1016, 1018

(2005) (finding employer unlawfully withdrew recognition where signatures on disaffection petition were of non-unit employees), *enforced*, 458 F.3d 952 (6th Cir. 2006). Moreover, employers have unlawfully withdrawn recognition based on facially valid disaffection petitions that did not actually constitute objective evidence of a loss of majority support because they were tainted by unfair labor practices. *See, e.g., Mesker Door, Inc.*, 357 NLRB 591, 596-98 (2011) (concluding that unlawful threats by employer's attorney and plant manager had a causal relationship with employees' disaffection petition and thus the employer's withdrawal of recognition based on it was unlawful).

Protracted litigation over these evidentiary issues also has interfered with the right of employees to choose a bargaining representative. It may take years of litigation before employees deprived of their chosen union obtain a Board order restoring the union's representational role, which completely undermines their Section 7 rights in the interim. *See, e.g., id.* (ordering employer to bargain with union five years after employer's unlawful withdrawal of recognition). Because a restorative bargaining order that operates prospectively fails to compensate employees for their lost representation, employees are irreparably deprived of what benefits their union could have obtained for them during the course of the employer's unlawful conduct. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1363 (9th Cir. 2011) (affirming Section 10(j) bargaining order in part because the Board's inability to order retroactive relief for a failure to bargain, partly due to an unlawful withdrawal of recognition, means employees will never be compensated for "the loss of economic benefits that might have been obtained had the employer bargained in good faith").

At the same time, such litigation under *Levitz* can also delay the process for employees who want to reject representation. For example, an unfair labor practice charge filed by an

incumbent union can create the "collateral effect of precluding employees from filing a decertification election petition with the Board." *Scoma's of Sausalito, LLC,* 362 NLRB No. 174, slip op at 1 n.2 (Member Johnson, concurring). *See also Wurtland Nursing & Rehabilitation Center,* 351 NLRB 817, 820-21 (2007) (Member Walsh, dissenting) (noting that if the employer had not unlawfully withdrawn recognition, the Board could have held an RM or RD election to determine the unit employees' true sentiments).

Finally, evidentiary disputes about the reliability of employee petitions have resulted in the disclosure of individual employees' union sympathies and litigation of their subjective motivations for signing a petition. *See, e.g., Scoma's of Sausalito,* 362 NLRB No. 174, slip op. at 4-5 (reviewing multiple petitions and employee testimony to determine whether employees' representative had majority support at the time of the withdrawal of recognition); *Johnson Controls, Inc.*, Case 10-CA-151843, JD-14-16 (NLRB Div. of Judges Feb. 16, 2016) (same). Such open questioning of employees regarding their union support can chill the future exercise of Section 7 rights. *See National Telephone Directory Corp.,* 319 NLRB 420, 421 (1995) (confidentiality interests of employees have long been a concern to the Board and "it is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed") (internal citations omitted). The courts have also noted that such inquiries are unreliable because of the pressure that employers may exert over their employees to give favorable testimony. *See Pacific Coast Supply,* 801 F.3d at 332 n.8; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969).

In short, the experience under *Levitz* has not yielded the results that the Board anticipated and intended. Consistent with the General Counsel's original recommendation in *Levitz,* the Board should hold that, absent an agreement between the parties, an employer may lawfully

withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.

C. A rule precluding employers from withdrawing recognition absent the results of an RM or RD election will best effectuate the policies of the Act and better accomplish what the Board set out to do in *Levitz*.

It is within the Board's expertise and discretion to determine how a withdrawal of recognition can be accomplished. *See Linden Lumber,* 419 U.S at 309-10 (relying on Board's expertise in affirming rule that union must petition for an election after an employer has refused to recognize it based on a card majority); *Brooks v. NLRB,* 348 U.S. 96, 104 (1954) (noting that matters "appropriately determined" by the Board include when employers can ask for an election or the grounds upon which they can refuse to bargain). The Board should exercise its discretion and adopt the rule proposed above to best effectuate the policies of the Act.

The proposed rule is more consistent with the principle that "Board elections are the preferred means of testing employees' support." *Levitz,* 333 NLRB at 725. It is also more consistent with the Act's statutory framework and the Board's early interpretation of the Act's provision providing for employer-filed petitions. As the Board held in *United States Gypsum Co.* and referenced in *Levitz,* RM petitions are "the method" provided in the Act by which employers may test a representative's majority support. *Levitz,* 333 NLRB. at 721. Moreover, the interests of both employers and employees would be best served by processing this issue through representation cases, which are resolved more quickly than unfair labor practice cases.[2] Indeed, the Board's new representation case rules, which have revised the Board's blocking charge procedures, have made elections an even more efficient manner of resolving

[2] In FY 2015, 87.1% of representation cases were resolved within 100 days while 80.4% of unfair labor practices were resolved within 365 days. *See* National Labor Relations Board Performance and Accountability Report (2015) at 25-26.

representation questions. In light of these considerations, requiring an RM or RD election before a withdrawal of recognition will best serve the purposes of protecting employee free choice and industrial stability, which are the statutory policies the Board sought to protect in *Levitz*.

In the past, the Board's blocking charge procedure had been the major concern regarding the use of RM elections as a prerequisite for withdrawing recognition because of the potential delay in proceeding to an election. *See, e.g., Levitz*, 333 NLRB at 732 (Member Hurtgen, concurring) ("Faced with an RM petition, unions can file charges to forestall or delay the election."); *B.A. Mullican Lumber & Mfg. Co.*, 350 NLRB 493, 495 (2007) (Chairman Battista, concurring) (stating that "an RM petition leading to an election is superior to an employer's unilateral withdrawal of recognition," but expressing concern about the potential delay caused by union-filed blocking charges), *enforcement denied*, 535 F.3d 271 (4th Cir. 2008). However, the Board's new election rules should allay this concern. For instance, the rules impose heightened evidentiary requirements; a party must now affirmatively request that its charge block an election petition, file a written offer of proof in support of its charge, include the names and anticipated testimony of its witnesses, and promptly make its witnesses available. *See* NLRB Rules and Regulations Sec. 103.20 (effective April 14, 2015). If the Region determines that the proffered evidence is insufficient to establish conduct interfering with employee free choice, it will continue to process the petition and conduct the election. *Id.*

Indeed, initial data shows that this change has significantly reduced the number of blocking charges. Between April 2014 and April 2015, in the year before the new election rules went into effect, unfair labor practice charges blocked 194 of 2,792 election petitions.[3] Between

[3] *See* NLRB News & Outreach, Fact Sheets, Annual Review of Revised R-Case Rules (Apr. 20, 2016), https://www.nlrb.gov/sites/default/files/attachments/news-story/node-4680/R-Case%20Annual%20Review.pdf.

April 2015 and April 2016, in the year after the new election rules went into effect, charges blocked only 107 of 2,674 petitions, a decrease of just over 40%.[4] This data shows that the more efficient election procedures have largely resolved prior concerns regarding blocking charges.

Beyond the foregoing substantive and procedural reasons justifying the proposed rule, its adoption will not interfere with other methods of dissolving an existing bargaining relationship that do not involve unilateral action by an employer. Employees will still be able to exercise their choice to not be represented by their current union by filing an RD petition, and they will be able to do so without the threat of an employer's unlawful withdrawal blocking an RD election. In addition, the proposed rule will permit a voluntary agreement between the employees' bargaining representative and their employer for withdrawal, whether this involves a union's disclaimer of interest or a private agreement between the parties to resolve the question. Finally, if a bargaining representative, through its own egregious unfair labor practices creates an atmosphere of employee coercion that renders a fair RM election improbable, the Board could permit a unilateral withdrawal if an employer provided objective evidence of an actual loss of majority support.[5]

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[4] *Id.* In addition, since the implementation of the Board's new election rules, RM petitions have increased from 49 in each of FY 2013 and FY 2014 to 61 in FY 2015, demonstrating increased employer confidence in the RM process. *See Employer-Filed Petitions-RM*, NLRB, https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/employer-filed-petitions-rm (last visited May 3, 2016).

[5] *Cf. Union Nacional de Trabajadores (Carborundum Co.)*, 219 NLRB 862, 863-64 (1975) (revoking union's certification based on its violent and threatening conduct and extensive record of similar aggravated misconduct in other recent cases), *enforced on other grounds*, 540 F.2d 1, 12-13 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Laura Modes Co.*, 144 NLRB 1592, 1596 (1963) (refusing to grant union bargaining order remedy based on card majority where union created atmosphere of coercion based on its agents physically assaulting employer officials who displayed unwillingness to recognize their employees' rights under the Act).

For the above reasons, the Board should exercise its discretion to modify its standard to hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.