

Labor Board Corrects ‘Unjustified Asymmetry’ in Anticipatory Withdrawal of Union Recognition Doctrine

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Since 2001, an employer presented with evidence that at least 50 percent of its unionized bargaining unit no longer wanted to be represented by the union could anticipatorily withdraw recognition from that union. The union, however, could rebut that evidence by showing that, subsequent to the employer’s pronouncement and prior to the actual withdrawal, it regained majority status. *Levitz Furniture*, 333 NLRB 717 (2001). Now, in *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019), the National Labor Relations Board (NLRB) has overturned *Levitz*’s “last in time” rule, under which the union’s evidence controlled the outcome because it postdated the employer’s evidence. Instead, the NLRB created a procedure by which employees’ wishes will be determined by a secret-ballot election.

Anticipatory Withdrawal of Recognition

Under the Board’s “anticipatory withdrawal of recognition” doctrine, an employer may withdraw recognition from the union that represents its employees after receiving objective evidence of the union’s loss of majority support of represented employees within a reasonable time prior to the expiration of the collective bargaining agreement (CBA) covering those employees. The employer may provide the union advance notice that it received such evidence, will withdraw recognition upon expiration of the contract, and refuse to bargain for a successor contract.

Levitz Framework

Under *Levitz*, an employer that has made an anticipatory withdrawal of recognition did so “at its peril.” If the union challenged the withdrawal in an unfair labor practice case, and the employer did not establish the union lacked majority status at the time recognition was actually withdrawn, the employer was found to have violated the National Labor Relations Act (NLRA). The NLRB relied on evidence that the union reacquired majority status in the interim between anticipatory and actual withdrawal. (This is the “last in time” rule.) It did not matter whether the employer *knew* the union had reacquired majority status. As a result, an employer that properly withdrew recognition anticipatorily still could be found to have violated the NLRA when it actually withdrew recognition when the CBA expired. The remedy for that violation typically included an order that the employer bargain with the union and precluded any challenge to the union’s majority status for a reasonable period of time — from six months to a year. To make matters worse, if the employer and the union reached agreement on a successor contract within that reasonable period of time, the union’s majority status would be irrebuttably presumed to continue for the duration of that contract, up to an additional three years.

Criticism of *Levitz* in *Johnson Controls*

In *Johnson Controls*, the Board noted its concern with the “unjustified asymmetry” that the *Levitz* doctrine created by allowing a union to rebut an employer’s evidence of the union’s loss of majority support with “after-acquired evidence the employer did not possess” or

even know about. The Board said that scenario incentivized unions to surreptitiously campaign to re-establish majority support following an employer's notice of withdrawal to obtain an extension of its irrebuttable presumption of majority support. Such an extension may be obtained, for example, if the union's countercampaign to defeat the withdrawal is successful (necessarily meaning one or more employee has "flipped" from against the union to for it in the time between the anticipatory withdrawal and the actual withdrawal), resulting in the employer being found by the NLRB to have committed an unfair labor practice. As set forth above, those violations may be remedied with a bargaining order, and, where a successor contract is bargained, a new contract bar prohibiting further challenges to the union's majority status for up to three more years.

The *Johnson Controls* Board found such an "unwarranted disruption of the bargaining relationship" entirely avoidable and contrary to the goals of the NLRA. The Board also found the *Levitz* procedure ill-suited to accurately determine the employees' wishes — a primary concern of the Act.

Johnson Controls Framework

In order to better protect employees' Section 7 rights to be represented or not be represented by a union, the Board decided in *Johnson Controls* to no longer allow a union to defeat an employer's objective evidence of majority support with mere cards or a counter-petition. Instead, the Board issued a procedure that provides more certainty to all parties involved.

Thus, under *Johnson Controls*:

- If an employer receives objective evidence of a union's loss of majority support within 90 days before a contract's expiration, the employer may provide notice of anticipatory withdrawal to the union and refrain from bargaining for a successor contract. Assuming the evidence in the employer's possession at that time survives any challenges (for example, as to numerical sufficiency, authenticity, and lack of coercion), the employer is absolutely privileged to withdraw recognition upon contract expiration. The evidence of the union's loss of majority support defeats the union's rebuttable presumption of majority support following contract expiration, and no number of cards or petition signatures from the union affects that result.
- To continue representing the employees following contract expiration, the union must file a post-anticipatory withdrawal election petition within 45 days of the employer's announcement of its anticipatory withdrawal. A rival union also may intervene during that time, as long as it has a sufficient showing of interest. If an election petition is not filed during the 45-day period, the loss of majority support will be deemed conclusively established.

The NLRB decided this method of requiring a secret-ballot election conducted by the Board is appropriate because it "is the preferred means of resolving questions concerning representation." The Board also found it no more burdensome for a union to file an election petition than the effort involved in a countercampaign and collecting evidence of re-gained majority support.

Takeaways

- The Board in *Johnson Controls* clarified that employers do not have to provide unions with the actual evidence of loss of majority support upon which they rely, because the

union already is in position to obtain information from union stewards or other bargaining unit employees to determine whether an unfair labor practice charge may be warranted.

- While the *Johnson Controls* framework is a significant improvement over *Levitz*, the first step in a successful withdrawal of recognition remains an actual loss of majority status by the union. Employers still may not assist in the development of the evidence of that loss.

Please contact a Jackson Lewis attorney with any questions about *Johnson Controls* or the NLRB.

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