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The National Labor Relations Board has issued an opinion in *Shaw's Supermarkets Inc.* clarifying an employer's right to withdraw recognition from a union during the term of the parties' collective bargaining agreement. The Board held that a collective bargaining agreement exceeding three years in duration does not bar an employer, armed with proof that the union has lost the support of the majority of the bargaining unit employees, from withdrawing recognition prior to the expiration of the contract.

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Balancing Employee Free Choice: Withdrawal of Union Recognition During the Life of the Contract

By Shannon Huygens Paliotta

Recently, the National Labor Relations Board issued an opinion clarifying an employer's right to withdraw recognition from a union during the term of the parties' collective bargaining agreement. In *Shaw's Supermarkets Inc.*, 350 NLRB No. 55 (Aug. 10, 2007), the Board held in a 2-1 panel decision (Battista and Schaumber in majority; Liebman dissenting) that a contract exceeding three years in duration does not bar an employer, armed with proof that the union has lost the support of the majority of the bargaining unit employees, from withdrawing recognition prior to the expiration of the contract.

Methods for Withdrawing Recognition of Majority Support

Historically, the Board found that an employer may unilaterally withdraw recognition by showing either: (1) that the union has actually lost the support of a majority of the bargaining unit employees; or (2) that it has a good-faith doubt, based on objective considerations, of the union's continued majority status. See *Celanese Corp.*, 95 NLRB 664 (1951).

Since the Board's decision in *Levitz Furniture*, 333 NLRB 717 (2001), however, an employer is no longer permitted to withdraw recognition unilaterally merely because it harbors uncertainty or doubt concerning a union's majority status. In that instance, an employer must petition for a RM election and await the outcome of that election before withdrawing recognition. However, *Levitz Furniture* also stands for the proposition that an employer may, without petitioning for an election, unilaterally withdraw recognition where it can prove that the union has actually lost the support of the majority of the bargaining

unit employees. The issue raised by *Shaw's Supermarkets* is when that withdrawal may occur.

When an Employer May Withdraw Recognition

The National Labor Relations Act (NLRA) mandates that employees be given free choice of bargaining representatives. The Board has traditionally found that collective-bargaining relationships must be given a chance to bear fruit. Therefore, a union usually is entitled to a conclusive presumption of majority status for one year following certification and a conclusive presumption of majority status during the term of any collective-bargaining agreement for at least three years. *General Cable Corp.*, 139 NLRB 1123 (1962). These presumptions allow the union to concentrate on obtaining and fairly administering a collective-bargaining agreement and establishing a stable collective-bargaining relationship without worrying about the immediate risk of decertification or the employer's attempts to avoid good-faith bargaining by undermining union support. See *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996).

Prior to *Shaw's Supermarkets*, collective bargaining agreements that exceeded three years in duration barred an employer's right to petition for an RM election for the entire duration of the contract. See *Montgomery Ward & Co.*, 137 NLRB 346 (1962). In *Montgomery Ward*, the Board reasoned that allowing an employer to rebut the presumption of majority status prior to the expiration of the contract would give the employer an unfair advantage of taking whatever benefits might accrue from a contract, while being able

to avoid contractual obligations by simply petitioning the Board for an election.

The *Shaw's Supermarkets* Decision

A delicate balance exists between upholding employee free choice in representation and enforcing the contractual obligations of unions and employers. The issue presented before the Board in *Shaw's Supermarkets* was whether an employer could rely on evidence of actual loss of majority support to withdraw recognition from a union unilaterally, without an RM election (as discussed in *Levitz Furniture*), but during the life of a contract that exceeded three years.

In *Shaw's Supermarkets*, the company entered into a five year contract with the United Food and Commercial Workers International Union, Local 1445 covering approximately 1600 employees at twelve stores in central Massachusetts. Three years into that contract, a bargaining unit employee filed a decertification petition with the Board, attaching the signatures of fellow employees who sought to discontinue Local 1445's representation. The company hired an accounting firm to count and match the signatures on the petition to a list of bargaining unit employees. Once the company confirmed more than 900 matches, it unilaterally withdrew recognition despite the fact that nearly two years remained on its contract with Local 1445.

The Board's General Counsel filed a complaint against *Shaw's Supermarkets* alleging that its actions violated Section 8(a)(1) and (5) of the NLRA. The Board panel majority disagreed, finding that to balance the competing interests of upholding both employee free choice and enforcing contractual obligations, employers have the right to withdraw union recognition unilaterally if evidence of an actual loss of majority status exists. Because the evidence of signature matches received by the company was sufficient to verify the union's actual loss of majority support from bargaining unit employees, no violation occurred when *Shaw's Supermarkets* unilaterally withdrew union recognition.

In the decision, the Board majority explained that if bargaining unit employees have had the benefit of three years of undisturbed experience with the union as their representative, then

the interest of preserving the stability of bargaining relationships and contractual obligations has been preserved. At the same time, if those unit employees are dissatisfied with their representation after three years, they should have the freedom to sever their relationship with the union immediately.

Potential Ramifications and Practical Recommendations for Employers

The *Shaw's Supermarkets* decision is an important development because it allows an employer to take unilateral steps to respond to evidence of employee dissatisfaction without having to wait until the expiration of a contract with duration greater than three years.

At the same time, it is important to remember that an employer may not encourage employee dissatisfaction with the union, and the employer may only withdraw recognition when there is actual proof of loss of majority status untainted by employer encouragement. Therefore, employers confronted with evidence of a union's loss of majority support may be wise to consider using an outside source to identify the number of employees expressing support of union decertification to avoid any appearance of impropriety.

Although the Board majority did not specifically address the filing of an RM petition during the remainder of a collective bargaining agreement that is more than three years old, the logic behind *Shaw's Supermarkets* indicates a likelihood that the Board would overrule *Montgomery Ward* if presented now with the facts of that case. Therefore, it is possible that *Shaw's Supermarkets* signals the availability to employers of either unilateral withdrawal or an RM petition when confronted with proof of employee rejection of union representation during the term of an extended contract.

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