Stability in Bargaining and Employee Free Choice: A Balancing of Policies that Divides the Board in *Johnson Controls, Inc.*

By Elizabeth Torphy-Donzella

The right of employees to engage in "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" is enshrined in Section 7 of the National Labor Relations Act. So, too, is the right "to refrain from any or all such activities."[1]

Consistent with the goal of genuine employee choice, free from interference, the secret ballot election has been deemed by the NLRB to be the preferred means of determining employee support for unions.[2] However, the Board's application of these bedrock principles to a unionized workplace where continued support for the union is in doubt, has been anything but consistent. Indeed, the tension between the presumption of majority support that a union enjoys after being selected as the representative of employees and the reality that employees sometimes change their minds has been the subject of shifting legal standards by the NLRB over time.

As explained in this article, the NLRB's recent decision in *Johnson Controls, Inc.,*[3] represents the latest "shift." As also explained, the dueling majority and dissenting opinions reveal the ideological "fault lines" that underly viewpoints on the proper method for measuring employee support (or lack thereof) in an existing bargaining unit.

Facts of the Case

In August of 2010, a majority of employees at Johnson Controls' Florence South Carolina facility voted to be represented by Local 3066 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union"). Johnson Controls ("the Employer") and the Union negotiated a collective bargaining agreement ("CBA"), which was effective from May 7, 2012 through May 7, 2015.[4]

The parties began negotiations for a successor CBA on April 20, 2015.[5] The day after negotiations began, the Employer was presented with a petition signed by 83 of the 160 bargaining unit employees. The petition stated that the undersigned employees no longer wished to be represented by the Union for collective bargaining or any other purpose and that they understood the petition could be used to obtain an election supervised by the NLRB or to withdraw recognition. The record before the Board showed no evidence that that employer had solicited the petition.[6]

Later that same day, April 21, the Employer notified the Union of the petition and that it was cancelling the remaining bargaining sessions. The Employer stated that it intended to withdraw recognition. The Union responded on April 22, stating that it had not received any such petition and demanded that the Employer return to the bargaining table. On April 24, the Employer refused to provide the Union with the Petition or to resume bargaining.[7]

On May 5, the Employer informed the Union that it had not received evidence that the Union continued to enjoy majority support among bargaining unit employees. As such, the Employer said absent such evidence, it would withdraw recognition from the Union when the contract expired on May 7. Unbeknownst to the employer, however, the Union had been collecting authorization cards from employees beginning on April 24 stating their desire to be represented by the Union. By May 7, the date the CBA was to expire, the Union had collected cards from 69 employees. Six of the employees had also signed the petition for decertification (so-called "dual signers").[8]

On May 6, the Union responded that it had credible evidence that it continued to enjoy majority support and would be "happy to meet" to compare evidence. By letter dated May 7, the Employer rejected the Union's request, stating that the Employer was unwilling to share the names of employees who had signed the petition. The Employer advised the Union that it would withdraw recognition based on the evidence before it of loss of majority support absent contrary evidence from the Union. Receiving no response from the Union, the Employer

[1] 29 U.S.C. § 157.

[2] *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 602 (1969).

[3] 2019 NLRB LEXIS 384, 368 NLRB No. 2020 (July 3, 2019).

[4] 2019 NLRB LEXIS 384 at *9.

[5] All dates referenced are 2015 except where otherwise noted.

[6] 2019 NLRB LEXIS 384 at *9-10.

[7] 2019 NLRB LEXIS 384 at *10-11.

[8] 2019 NLRB LEXIS 384 at *11.

withdrew recognition on May 8 and implemented improvements to wages and benefits.[9]

On August 28, an employee filed a petition for a decertification election, but the petition was blocked by the Union's unfair labor practice ("ULP") charges challenging the withdrawal of recognition. At the ULP hearing, the six dual signers testified about their position on Union representation on May 8, the day the Employer withdrew recognition. Four of the six testified that they no longer wished to be represented by the Union as of that date. Crediting this testimony, the administrative law judge concluded that the Union did not enjoy majority support when recognition was withdrawn because these four, combined with the 77 other employees who has signed only the petition seeking to end the relationship with the Union, comprised a majority: 81 of 160 bargaining unit employees. As such, the Union's complaint was dismissed.[10]

The Opinions of the Board Majority and Dissent

The majority and dissenting Board members agreed on one thing: the judge's analysis was inconsistent with controlling precedent. That precedent disregards the sentiments of dual-signers when a union has obtained authorization cards in an effort to show majority support after an employer's declared intent to withdraw recognition. In this case, disregarding the signatures of the six employees would mean that on the date the employer refused to bargain, only 77 of the 160 employees had conclusively requested that the employer no longer recognize the union.

To the dissent, properly analyzed, the facts and established precedent made the outcome clear: the employer's refusal to bargain was unlawful. Holding otherwise would undermine stability in bargaining relationships.[11] To the majority, properly analyzed, the facts and the outcome established that precedent needed to be changed in order to effectuate employee free choice.

Relevant Provisions of the NLRA and Controlling Precedent

When a union is selected as the employees' representative for purposes of collective bargaining, the employer has a duty to bargain with the union. A refusal to bargain with the certified union violates Section 8(a)(5).[12]

The union enjoys an irrebuttable presumption of majority support for a year from the date of Board certification ("the insulated period") absent some extraordinary circumstance, such as the union becoming defunct. The union also enjoys a presumption of majority support during the term of a CBA or up to three years (the "contract bar" period).[13] In endorsing these presumptions, the U.S. Supreme Court has observed, "[t]hese presumptions are based not so much on an absolute certainty that the union's majority status will not erode as on the need to achieve stability in collective-bargaining relationships."[14]

In *Auciello Iron Works, Inc. v. NLRB* the Court identified a "third presumption, though not a conclusive one."

> At the end of the certification year or upon expiration of the collective-bargaining agreement, the presumption of majority status becomes a rebuttable one. . . . Then, an employer may overcome the presumption (when, for example, defending against an unfair labor practice charge) by showing that, at the time of [its] refusal to bargain, either (1) the union did not in fact enjoy majority support, or (2) the employer had a "good-faith" doubt, founded on a sufficient objective basis, of the union's majority support.[15]

After years of conflicting precedent about what evidence was sufficient to permit an employer to withdraw recognition based on "good faith doubt" (as opposed to evidence of actual loss of majority support) the Board abandoned the good faith doubt standard in *Levitz Furniture Co. of the Pacific*.[16] Under the new standard announced in *Levitz*, only actual loss of support will suffice for an employer to withdraw recognition. However, an employer that has announced a lawful anticipatory withdrawal of recognition "withdraws recognition at its peril."[17]

> If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer

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[9] 2019 NLRB LEXIS 384 at *12-13.

[10] 2019 NLRB LEXIS 384 at *13.

[11] 2019 NLRB LEXIS 384 at *76-77.

[12] 29 U.S.C. § 158(a)(5).

[13] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996). Challenges to a union's representational status also may be made by a rival union or the bargaining unit employees by the filing of an election petition during the "open period" (i.e. the 30-day period beginning at 90 days before the CBA expires and ending at 60-days before expiration in all contexts other than healthcare). In healthcare, the open period begins at 120 days and ends at 90 days before the contract expires. *Trinity Lutheran Hospital,* 218 NLRB 199 (1975).

[14] *Auciello*, 517 U.S. at 786.

[15] *Auciello,* 517 U.S. at 787 (citations and internal quotations omitted).

[16] 333 NLRB 717, 725 (2001). The majority opinion in *Levitz* sets forth the statutory and case history on the standards governing employer withdrawal of support from an incumbent union. *Id.* at 720-723.

[17] 333 NLRB at 725.

> will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).[18]

After *Levitz*, an employer believing that its employees no longer supported the union has had two choices in the period immediately before the expiration of a contract.[19]

An employer with evidence of actual loss of majority support (like Johnson Controls) may announce an intent to withdraw recognition, refuse to bargain, and then withdraw recognition once the contract expires. If the union can show that it reacquired majority support, then the employer will be found to have engaged in a ULP despite its good faith at the time.

Alternatively, an employer with evidence establishing "reasonable uncertainty" about the union's majority status (or one that is unwilling to withdraw recognition at its peril) may, under *Levitz,* file a petition for election (RM petition) to test the Union's support. However, such an employer must continue to recognize and bargain until the election, and if the Union files ULPs against the employer, the election will be blocked pending the final disposition of the case (often for years).[20]

Notably, employees may also during this period, independently of the employer, file a decertification petition (RD petition) to challenge the union's continuing majority status. However, as with the RM petition, the employer must continue to bargain with the union, and the election may be delayed for years by blocking charges.

The Board Majority's Decision

The Board majority (Members Ring, Kaplan and Emanuel) overruled *Levitz* "and its progeny insofar as they permit an incumbent union to defeat an employer's withdrawal of recognition in an unfair labor practice proceeding with evidence that it reacquired majority status in the interim between an anticipatory and actual withdrawal."[21] The majority deemed a change to be necessary because, in its estimation, the existing standard neither promotes stability in labor relations nor effectuates employee free choice.

First, the majority reasoned, the rule disregarding dual signers' initial expression of support fails to take account of the practical realities that such employees may be confused about the effect of a subsequently signed authorization card. On the other hand, permitting their testimony at an ULP hearing does not solve the problem. "Employees' testimony about their representational wishes, given the presence of the parties' representatives and bound to displease one of them, is an unreliable substitute for a secret ballot, cast within the safeguards of a Board-conducted election."[22]

Second, given that the union is not obligated in response to an employer's anticipatory withdrawal announcement to disclose that it has evidence of majority status, the employer may unwittingly become ensnared in an ULP proceeding. The majority reasoned that this is an unwarranted disruption of the bargaining relationship. "The union may obtain a decertification-barring affirmative bargaining order as a result, but the bargaining relationship has been unlawfully and unnecessarily disrupted"[23] (something that would not happen if a union were permitted to reestablish its majority status through an election).

Third, the majority noted an "unjustified asymmetry" at work in the *Levitz* standards that has not been explained by precedent. One aspect is that the employer may only rely on evidence in its possession at the time it acted to prove loss of majority support. By contrast, the union and Board's General Counsel are able to challenge the alleged lack of majority support by use of after-acquired evidence of authorization cards unavailable to the employer. Another aspect of asymmetry is the treatment of authorization cards under Board standards, which cannot effectively be revoked without notice to the union. Yet, an employee's signature on a petition expressing disaffection with the union effectively is negated prior to the withdrawal of recognition without notice to the employer.

Finally, the majority pointed out that a fairly recent decision from the D.C. Circuit had questioned whether an employer could be found to have violated the NLRA where it withdrew recognition based on information about employee lack of support and the union intentionally failed to disclose its "restored majority status."[24] Although in that case the court upheld the finding that the employer's

[18] 333 NLRB at 725.

[19] 333 NLRB at 725-26.

[20] The NLRB has issued a notice of proposed rulemaking to, in part, rescind the blocking charge policy in order to address "a systemic problem in blocking charge cases, which have been identified as the likely cause of what has been characterized as 'the long tail' of delay in the Board's processing of representation cases." 84 Fed. Reg. 39,930, 39,931 (Aug. 12, 2019).

[21] 2019 NLRB LEXIS at *7.

[22] 2019 NLRB LEXIS at *26.

[23] 2019 NLRB LEXIS at *27.

[24] 2019 NLRB LEXIS at *31, *citing Scomas of Sausalito, LLC v. NLRB,* 849 F.3d 1147, 1160 (D.C. Cir. 2017).

withdrawal violated Section 8(a)(5), the court refused to enforce the bargaining order. The court suggested that, on remand, the Board order an election.[25]

The majority explained what it saw as the practical problem with the aftermath of *Levitz*.

> In combination, the change from the . . . "good-faith doubt" standard to the "actual loss of majority status" requirement, plus the *Levitz* "peril" rule, created an opportunity that unions reasonably seized. An employer's anticipatory withdrawal of recognition became a signal to the union to mount a counter-offensive. If, in the interim between anticipatory and actual withdrawal, a union were able to reacquire majority status, the employer's withdrawal of recognition would violate Section 8(a)(5). The remedy for that violation would most likely include an affirmative bargaining order, which would insulate the union's majority status from challenge for up to one year. And if a successor contract could be concluded within that insulated period, a new contract bar would take effect, giving the union up to 3 more years during which its majority status would be irrebuttably presumed. Moreover, an incumbent union need not show the employer its evidence of reacquired majority status prior to contract expiration. From one perspective, this rule is justified by concern that an employer might retaliate against employees should their identities and preferences be revealed. But it is also true that the union's ability to *covertly* reacquire majority status increases the odds that the employer's withdrawal of recognition will unwittingly violate Section 8(a)(5), potentially resulting in an affirmative bargaining order, concomitant decertification bar, successor contract, and another contract bar.[26]

In place of the *Levitz* proof scheme, the Board majority adopted the following standard:

> [W]e hold that proof of an incumbent union's actual loss of majority support, if received by an employer 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 reestablish that status by filing a petition for a Board election within 45 days from the date the employer gives notice of an anticipatory withdrawal of recognition.[27]

Thus, under the new standard, the Board will not consider whether a union has reacquired majority support in an unfair labor practice proceeding. Instead, the union must file a petition for an election. The majority stated, "We recognize that so long as the contract remains in effect, the union's majority status is irrebuttably presumed. The election, however, is to determine whether a majority of unit employees wish the union to continue to represent them *after* the contract expires. Although a union typically enjoys a rebuttable presumption of majority support post-contract, the fact that at least fifty percent of the unit has signaled its nonsupport of the union rebuts the presumption."[28]

To address the concern about the amorphous "reasonable period of time before the contract expires" measure for an employer to announce an intention to withdraw recognition, the Board majority specified that this period shall be no more than 90 days before the contract expires.[29] In adopting this period, the majority aligned the announcement with the start of the "open period" during which challenges to a union's majority status may be made.[30] (For example, during this period, employees may file a decertification petition, or a rival union may file a representation petition.) Thereafter, the union has 45 days to file a petition for election (regardless of whether the employer has given notice more or fewer than 45 days before the contract expires) and the usual bar to election petitions filed within the 60-day "insulated" period before the expiration of the CBA will not apply.[31]

If no petition is timely filed by the union, the employer will be able to rely on the disaffection evidence in its possession when it announced its anticipatory withdrawal. In that event, the withdrawal will be lawful if there are no grounds to render the underlying evidence of disaffection to be unlawful. If, however, a petition is filed by the union, the employer *may* withhold recognition until the union's status is determined by a vote. However, the Board majority included in its new standard an exception to Section 8(a)(2) (and, as to the Union, 8(b)(1)(A)) where employers choose to continue to recognize and bargain with the previously certified union.[32]

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[25] 2019 NLRB LEXIS at *31-32.

[26] 2010 NLRB LEXIS 384 at *23-24 (emphasis in original).

[27] 2019 NLRB LEXIS at *7-8.

[28] 2019 NLRB LEXIS at *36.

[29] 2019 NLRB LEXIS at *36. In the healthcare context, the open period is from day 120 to day 90. See note 13, *supra.*

[30] 2019 NLRB LEXIS at *36. See note 13, *supra*, discussing the open period.

[31] 2019 NLRB LEXIS at *36. The majority noted that the union's showing of interest is satisfied by its status as the currently certified representative.

[32] 2019 NLRB LEXIS at *43-44. The majority noted that if a rival union has filed a petition or seeks to intervene, continued recognition will be impermissible.

The majority noted that employers may be wise to refrain from making unilateral changes in the terms and conditions of employees' employment after an election petition has been filed but before the election – the so-called "critical period." Doing so could result in the union being able to claim that a loss was tainted by the employer's conduct.[33] In addition, an employer that refrained from unilateral changes might still wisely refrain if the union lost the election and challenged ballots. This is because if the challenges are sustained and would have resulted in a union victory, the unilateral changes will be unlawful under Section 8(a)(5). At the same time, even without outcome determinative challenges, a second election might be ordered if the union prevailed on its objections.[34] Other risks would arise where the union won.

"Accordingly, as a practical matter, whereas withdrawing recognition after the contract expires following a lawful anticipatory withdrawal will generally be a risk-free act, making unilateral changes poses considerable risks. An employer should take these risks into consideration in its decision making, although we are well aware that the exigencies of running a business may exert other pressures."[35]

Member McFerran's Dissent

In dissenting, Member McFerran asserted that the majority's decision amounted to a change in "longstanding principles" without the sort of reasoned decision-making required of the agency.[36]

In the dissent's estimation, the balance struck by *Levitz*, to which the courts of appeals have uniformly deferred, properly respected a union's position as the certified representative, entitled to a continuing presumption of majority support. This precedent also provided an employer that had a basis to question continued majority support for a union with two options (which the dissent thought reasonably borne by the employer). The employer could withdraw recognition, subject to the requirement that it prove an actual loss of majority support as of the date of withdrawal (which the employer would admittedly do at its peril).[37] Alternatively, an employer with simply a good faith doubt could file an RM petition seeking a Board conducted election. "Thus, the *Levitz* framework is clearly designed to encourage employers to pursue the preferred route of a Board election rather than the riskier – and more destabilizing path of withdrawing recognition unilaterally."[38]

By contrast, requiring an incumbent union to file a petition to establish that is has not lost majority support, to the dissent, flies in the face of the established presumption the union enjoys. According to the dissent, the issue as framed by the majority misstates what is at work in cases involving an anticipatory withdrawal of recognition. These "cases do not involve a union's supposed 'reacquisition' of majority support but rather the employer's inability to meet its burden to demonstrate that the union has actually *lost* majority support at the crucial time: when the employer withdrew recognition after the collective bargaining agreement expired (and not earlier, when the agreement remained in effect and the employer was not allowed to withdraw recognition."[39] That is why, under established precedent, an employer concerned about whether it can prove actual loss of majority support at the time of withdrawal must file an RM petition, during the pendency of which "the incumbent union (because it is the incumbent union) remains in place unless and until employees reject the union in a secret ballot election vote."[40]

Seeming to lay out the analysis for a willing court of appeals on review, the dissent asserted,

> Incredibly, the majority states that its new framework is a 'better option' than the *employer*-initiated election option under *Levitz,* without explaining why the latter option does not adequately serve the policies of the National Labor Relations Act. Because it has "failed to consider an important aspect of the problem" ostensibly before the Board, the majority has not engaged in reasoned decision-making.[41]

Analysis

The Board's withdrawal of recognition precedent brings to mind the "old saw" – it is easier to get into a relationship than out of it. The barriers to employees who want to get out

[33] 2019 NLRB LEXIS at *44-45.
[34] 2019 NLRB LEXIS at *46.
[35] 2019 NLRB LEXIS at *46-47.
[36] 2019 NLRB LEXIS at *64.
[37] Ironically, the General Counsel appointed by President Obama (who also appointed Member McFerran), advocated overturning *Levitz Furniture* but for quite a different purpose than the Board majority in this case. Richard Griffin's proposal was to eliminate an employer's right to withdraw recognition without an election, thereby further limiting the options for ousting an incumbent union. See Memorandum GC 16-03 (May 9, 2016).
[38] 2019 NLRB LEXIS at *70.
[39] 2019 NLRB LEXIS at *82.
[40] 2019 NLRB LEXIS at *83.
[41] 2019 NLRB LEXIS at *83 (emphasis in original). In footnote 28, the dissent cites to *Hawaiian Dredging Construction Co., Inc. v. NLRB*, 857 F.3d 877, 881 (D.C. Cir. 2017) in which the court specified that a failure to engage in reasoned decision-making (including to engage the arguments of a dissenting Board member) renders its actions arbitrary and capricious.

of their "relationship" with a union that has been certified as the bargaining representative are significant and real.

First, the window to challenge the union's majority status is short; the "open period" begins on the 90th day before the expiration of a CBA and ends on day 60. Thus, employees untutored in the applicable rules may fail to act in time to effectuate their Section 7 right to forego representation by a union.

Second, petitions for elections to challenge the union's continuing majority support (whether filed by employees – assuming they can navigate that process without employer assistance, as they must – or by the employer based on reasonable doubt) are an ineffective solution. Such petitions are invariably met with unfair labor practice charges that block any election from proceeding. As the Board majority noted, "[u]nder the blocking-charge policy, the pendency of an unfair labor practice charge–regardless of whether it is meritorious–may prevent an election from occurring for an extended period of time."[42] During this extended "limbo" period, an employer must continue to recognize and bargain with the union (one that may no longer represent the will of a majority of employees).[43]

By putting the onus on the union to petition for an election when an employer announces an anticipatory withdrawal of recognition, the majority in *Johnson Controls* appears to be attempting to implement a process that may more quickly resolve questions about a union's majority support (and by a more reliable means – a secret ballot). Presumably, unions will be less inclined to file charges to block a union-initiated election, although blocking charges remain available[44] (at least for the time being. The Board has issued a notice of proposed rulemaking to change these procedures, which would involve holding elections and impounding the ballots pending a determination of unfair labor practice charges rather than blocking elections.[45]) In addition, although the employer is permitted, despite the filing of a petition by the union, to cease recognizing the union and bargaining, the majority makes clear that "peril" still exists for employers that make unilateral changes. This is because the union may win the election, successfully challenge a loss, or prove that the information on which the employer relied in announcing the anticipatory withdrawal was tainted. Thus, the Board majority adopted a safe harbor from liability under Section 8(a)(2) and 8(b)(1)(A) where the employer refrains from withdrawing recognition in this context.[46]

The dissent contends that the majority has changed the standard without adequately explaining the "rational connection between the reasons offered . . . for rejecting established law and the new approach it adopts here."[47] In failing to explain why the requirement that the employer initiate an election, as *Levitz* provides, is the "better option" the dissent asserts that the majority has not engaged in reasoned decision-making. Tellingly, however, the dissent omits any discussion of the Board's blocking charge policy and how it interferes with the free choice right of those employees who oppose a union.

The U.S. Supreme Court has cautioned that "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice."[48] In practical application, the processes established by *Levitz* seemed to favor the position of incumbent unions (in the name of labor stability) and interposed barriers to employee efforts to reject their unions. The new process implemented by the Board (assuming it survives judicial scrutiny) may allow more opportunity for the expression of employee free choice. Only time and experience will tell.

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[42] 2019 NLRB LEXIS at *40. The majority further observed, "For this reason, among others, the Board plans to revisit the blocking charge policy in a future rulemaking proceeding. As of the issuance of this decision, however, the Board has not yet revisited the policy. Thus, for institutional reasons, we continue to maintain extant law pertaining to blocking charges." *Id.*

[43] Employers that have tried to take a middle path between outright withdrawal of recognition (which permits the employer to make changes without dealing with the union, albeit at its peril) and full-scale bargaining with what may be a union lacking majority support have not fared well. *See generally* E. Torphy-Donzella, *"T-Mobile, Inc. v. National Labor Relations Board: Why the Perilous Choice Is Best"* 18 Bender's Lab. & Empl. Bull. 138 (April 2018).

[44] 2019 NLRB LEXIS at *37 n. 45.

[45] 84 Fed Reg. 39,930 (August 12, 2019).

[46] 2019 NLRB LEXIS at *43.

[47] 2019 NLRB LEXIS at * 64.

[48] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973) *quoting NLRB v. Tower Co.*, 329 U.S. 324, 330 (1946).