Management and Union's Rights and Obligations in Collective Bargaining

Section 9(a) of the NLRA requires a labor organization to have majority status in an appropriate unit to be the exclusive representative. The representative's role is exclusive with respect to "rates of pay, wages, hours of employment, or other conditions of employment." Except in the construction industry, it is a violation of Section 8(a)(2) and (1) for an employer to recognize and enter into a collective-bargaining agreement with a labor organization that does not represent a majority of the employer's employees in an appropriate unit.

I. Duty to Bargain Under Section 8(d)

Section 8(d) of the Act provides in part that the obligation to bargain collectively means:

> the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

This "mutual obligation" to bargain is enforced against employers and unions through Sections 8(a)(5) and 8(b)(3), respectively.

A. Subjects of Bargaining: Mandatory, Permissive and Illegal

In *NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342, 349 (1958), the Supreme Court concluded that "[t]he duty [to bargain] is limited to those subjects, and within that area neither party is legally obligated to yield . . . . As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." Thus, a distinction is drawn between mandatory subjects of bargaining, which fall within the statutory phrase, and permissive (or non-mandatory) subjects of bargaining, which fall without. In general terms, mandatory subjects of bargaining are those that "settle an aspect of the relationship between the employer and the employees." *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). A third category of cases involves illegal subjects of bargaining, i.e., subjects about which the parties are legally prohibited from bargaining.

II. Per Se Violations

Certain types of conduct have been found to violate Section 8(a)(5) of the Act without regard to the presence or absence of subjective good faith. These "per se" violations often impede or obstruct the process of reaching agreement in the same way as an outright refusal to negotiate.

A. Unilateral Changes and Refusal to Confer

Section 8(d) requires the parties to "confer in good faith with respect to wages, hours, and other terms and condition of employment." This requirement to confer provides the basis for unilateral changes being per se violations of the Act. Unilateral actions by an employer that materially or substantially modify employee conditions of employment constitute a per se violation of Section 8(a)(5). Such actions also permit an inference of subjective bad faith. *NLRB v. Katz*, 369 U.S. 736 (1962). At a minimum, an employer is obligated to maintain the status quo and bargain in good faith until impasse is reached. *Daily News of Los Angeles*, 315 NLRB 1236 (1994) (employer's unilateral discontinuance during negotiations of practice of annually granting discretionary merit increases violative since the increases had become an established condition of employment), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). At the point of impasse, the employer is generally permitted to unilaterally implement its offer. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *American Federation of Television and Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968) The Board has recognized two limited exceptions to this insistence on overall impasse: delay or avoidance by the union in fulfilling its obligation to bargain and economic exigency that compels prompt action. *Bottom Line Enterprises*, *Id.* at 374. See also *RBE Electronics of South Dakota*, 320 NLRB 80 (1995) (an employer confronted with economic exigency that is less compelling than one that would relieve it of any obligation to bargain is nonetheless obligated to provide the union with adequate notice and opportunity to bargain).

Unilateral changes which are not material, substantial, or significant do not violate Section 8(a)(5). *Crittenton Hospital,* 342 NLRB No. 51 (2004) (change in dress code policy not unlawful because not material). While the number of employees affected by the change can impact whether it is material, substantial, or significant, the Board in *Falcon Wheel Division* found that the layoff of one employee constituted a material, substantial, and significant change which was violative of the Act. 338 NLRB 576 (2002), (the Board in the terms and conditions of employment).

Unilateral changes in wages, hours, and other terms and conditions of employment after expiration of a collective-bargaining agreement are unlawful because these conditions generally survive expiration of the agreement. *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). However, only those changes that are "material," "substantial," and "significant" violate the Act." *Peerless Food Products, Inc.*, 236 NLRB 161 (1978) (concluding that an employer's unilateral limitation on union representatives' formerly unlimited right of access was not violative). The Board has also held that a small number of contractual provisions, including dues-checkoff clauses, union-security clauses, no-strike clauses (with limited exceptions), and arbitration clauses that establish terms and conditions of employment do not survive contract expiration. See *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000).

An employer acts at its peril if it makes unilateral changes while objections are pending, *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975); or while determinative challenged ballots are pending, *Hand-Dee Pak*, 253 NLRB 898 (1980).

B. Direct Dealing

The obligation to bargain in good faith requires "at a minimum recognition that the statutory representative is the one with whom [the employer] must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees." *NLRB v. Insurance Agents (Prudential Insurance Co.)*, 361 U.S. 477, 484-485 (1960). Efforts to bypass the exclusive bargaining representative constitute evidence of subjective bad faith. *General Electric Co.*, 150 NLRB 192 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970).

Polling employees as to their preferences concerning alteration of existing conditions of employment also constitutes direct dealing. *Hancock Fabrics*, 294 NLRB 189 (1989), enfd. 902 F.2d 28 (4th Cir. 1990). On the other hand, the Board has refused to find a violation of Section 8(a)(5) where an employer communicated directly with its employees and accurately informed them of the terms of its collective-bargaining proposals. *Emhart Industries, Hartford Div.*, 297 NLRB 215 (1987), enf. denied on other grounds 907 F.2d 372 (2d Cir. 1990).

C. Refusal to Execute Written Contract

Once the parties have reached final agreement on a contract and one party has requested execution of a written agreement, it is a per se violation for the other party to refuse to execute a written agreement. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941) A frequent issue in such cases is whether there was a meeting of the minds. *Buschman Co.*, 334 NLRB 441, 442 (2001). An offer, once made, will remain on the table (even if rejected or countered by the other party) unless explicitly withdrawn by the offer or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn. *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 90 (8th Cir. 1981), enfg. 251 NLRB 187 (1980).

D. Insisting to Impasse on a Permissive Subject of Bargaining

Insistence to the point of impasse on agreement concerning a permissive subject of bargaining is a per se violation. *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958).

E. Refusal to Meet at Reasonable Times

Section 8(d) also requires the parties "to meet at reasonable times: but does not define the term "reasonable". That language commands not only that the parties meet but that they do so as appropriate and without unreasonable delays. *Carbonex Coal Co.*, 248

NLRB 779, (1980), *enfd.* 679 F.2d 200 (CA 10, 1982) A party's busy schedule is not a defense to a continued failure to meet or schedule meetings. *Fern Terrace Lodge of Bowling Green,* 297 NLRB 8 (1989)

III. The Good Faith Requirement

The parties to a collective-bargaining relationship are required to approach negotiations with "more than a willingness to enter upon a sterile discussion of union management differences." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952). A common formulation of the duty to bargain in good faith is that it constitutes the "obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement" and a "sincere effort . . . to reach a common ground." *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943).

A. Totality of the Parties' Conduct is Assessed to Determine Surface Bargaining

In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. See, e.g., *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989); enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton and Tower*, 271 NLRB 1600, 1603 (1984).

B. Indicia of Bad-Faith Bargaining

While not all factors may be present in a surface bargaining case, there are factors that the Board considers in determining whether the entirety of a party's conduct constitutes bad-faith bargaining.

1. Delay Tactics: Refusing to Confer At Reasonable Times and Intervals

Some type of delaying tactic is almost always present in a surface bargaining case. This can include refusal of a party's representative to be available to meet, insisting on meeting at an unreasonable time, insisting on meeting for short periods of time, failure to timely respond to dates for meetings, delay in providing information or proposals, attending bargaining sessions unprepared to negotiate, and changing negotiators.

2. Representative With Inadequate Authority

Both parties are required to send a representative to the bargaining table who has sufficient authority to negotiate a collective-bargaining agreement. However, a representative's authority may be limited. For example, an employer is free at the beginning of negotiations to advise a union that its negotiator only has the authority to negotiate a tentative agreement which will need final approval by the employer. *Mid-Wilshire Health Care Center,* 337 NLRB 72 (2001).

3. Unilateral Changes During Negotiations

An employer's implementation of unilateral changes during negotiations is independently violative of Section 8(a)(5), but it is also evidence of an employer's bad-faith bargaining.

4. Concessions, Proposals, and Demands

The Board does not examine the proposals made by the parties to determine whether they are acceptable or unacceptable. However, it will do so to determine whether, based on objective factors, bargaining demands constitute evidence of overall bad-faith bargaining. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001), citing *Reichhold Chemicals*, 288 NLRB 69, affd. in relevant part 906 F.2d 719 (D.C. Cir. *1990*), cert. denied 498 U.S. 1053 (1991). The Board considers timing of proposals and whether the parties are interjecting new proposals late in the bargaining process or raising new issues after the parties have reach agreement on the issue. *Shovel Supply Co.,* 162 NLRB 460 (1966)

5. Willingness to Consider Other Parties Proposals

Section 8(d) expressly provides that neither party has an obligation to agree to a proposal or to make a concession. The Supreme Court has interpreted this language to preclude the Board from compelling a party to agree to a particular proposal even as a remedy for a breach of the obligation to bargain in good faith. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). However, this does not privilege a party to refuse to consider and discuss another party's proposal which they strongly oppose.) *I.T.T. Rayonier, Inc.,* 305 NRLB 405 (1991).

6. Withdrawal From Agreed-Upon Provision

While parties can withdraw from agreed-upon provisions, the Board will consider the justification for the withdrawal. For example, has there been a change in the employer's economic condition or has the bargaining strength of a party changed. *Oklahoma Fixture Co.,* 331 NLRB 1116 (2000). Where there is not a sufficient justification for the withdrawal, it will not be found evidence of bad-faith bargaining. *US Ecology,* 331 NLRB 223 (2000).

7. Imposing Conditions on Bargaining

Attempts to place conditions upon bargaining or the execution of a contract are scrutinized closely by the Board to determine whether they are so onerous or unreasonable as to indicate bad faith. *Fitzgerald Mills Corp.,* 133 NLRB 877 (1961) Conditioning further negotiations on cessation of a strike also violates the Act, since the obligation to bargain continues during a strike. *General Electric Co.,* 168 NLRB 198 (1967).

8. Bypassing the Representative

Engaging in direct dealing during negotiations is an indicia of bad-faith bargaining. Such conduct is inherently destructive to a union's bargaining authority. The effects of direct dealing are particularly harmful to the union when the employer offers something directly to employees which it has failed to offer to the union at the bargaining table. *Flambeau Plastics*, 151 NLRB 591 (1965)

9. Commission of Other Unfair Labor Practices

The most obvious unfair labor practices indicating bad-faith bargaining are statements violative of Section 8(a)(1) announcing that the employer will not sign a contract or engage in good-faith bargaining. However, all violations of the Act which indicate animus towards the union will be considered as part of an employer's conduct when deciding whether they are engaged in good-faith bargaining.

IV. Employer and Union's Duty to Furnish Information

Under the Act, an employer is obligated upon request to furnish the union with information that is potentially relevant and that would be useful to the union in discharging its statutory responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

The duty to provide information extends to unions as well. See, e.g., *Local 13, Detroit Newspaper Printing & Graphic Communications Union (The Oakland Press)*, 233 NLRB 995 (1977) (concluding that the union violated Section 8(b)(3) during negotiations by refusing to furnish the employer with information concerning referral policies of employees who would be performing unit work).

A. Demand or Request

The duty to provide information does not arise until one party makes a request for information. *Boston Herald-Traveler Corp.,* 102 NLRB 627 (1953) The request need not be in writing and it need not be repeated. *Bundy Corp.*, 292 NLRB 671 (1989).

B. Relevance Necessity

The test for relevance is a liberal "discovery-type standard." *Id.* at 437. Information that aids the grievance-arbitration process is considered relevant. *Id.* at 438. So too is information necessary to evaluate a party's claims made during negotiations. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956). The Board has long held that information pertaining to the bargaining unit is presumptively relevant and no showing of relevance is required. *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd.. 531 F.2d 1381 (6th Cir. 1976). Presumptively relevant information includes the names of unit employees and their addresses; seniority dates; rates of pay; a list of job classifications

and other pay-related data; a copy of insurance plans in effect and rates paid by the employer and employees; the number of paid holidays in effect; pension or severance plans; requirements for and amounts of vacation; incentive plans; night-shift premiums; and "any other benefit or privilege that employees receive." *Dyncorp/Dynair Services*, 322 NLRB 602 (1996), enfd. 121 F.3d 698 (4th Cir. 1997). On the other hand, social security numbers of bargaining unit employees are not presumptively relevant. See *Polymers, Inc.*, 319 NLRB 26 (1995). Information concerning non-unit employees is also not presumptively relevant and must be produced only upon a showing of relevance. *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018-1019 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980).

C. Availability

The availability of information from another source does not alter a party's duty to provide relevant information that it has readily available. *Holyoke Water Power Co.*, 273 NLRB 1369 (1985). A party has a duty to supply relevant requested information which may not be in its possession, but likely can be obtained from a third party with whom the party has a business relationship. *Firemen & Oilers Local 288 (Diversy Wyandotte)*, 302 NLRB 1008, 1009 (1991). For example, if a union requests relevant information which is possessed by the employer's insurance provider, the employer must request that the insurance provider supply the documents.

D. Form and Manner

A party fulfills its obligation by making reasonable efforts to accommodate a request for information and providing the information, albeit in an alternate form. *Airport Aviation Services,* 292 NLRB 823 (1989). Although a requesting party may be required to pay the reasonable costs of providing copies of requested information, the Board has held that the parties should bargain in good faith over which party shall bear such costs. *Food Employer's Council,* 197 NLRB 651 (1972).

E. Defense Based on Employer Interests or Employee Privacy

Otherwise relevant information is sometimes exempt from disclosure because it is confidential, proprietary, or otherwise privileged. For example, in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the Supreme Court upheld an employer's contention that certain standardized tests the employer had administered to bargaining unit employees as part of a selection process for promotions would become useless in the future if the test instruments were not kept confidential. The Court concluded that the Board's order directing the employer to furnish the union rather than an intermediary with the test instruments failed to adequately protect the employer's interest in maintaining the security of the tests.

The burden of establishing that requested and relevant information is confidential is on the party asserting it. *Lasher Service Corporation*, 332 NLRB 834 (2000). An employer cannot avoid its obligation to furnish information merely by asserting that it has

a confidentiality interest. Rather, the employer has an obligation to seek an accommodation that meets the needs of both parties. *National Steel Corporation*, 335 NLRB 747 (2001). See also *Metropolitan Edison Co.*, 330 NLRB 107 (1999) (scope of duty to accommodate may vary depending on the nature and weight of interests asserted by the employer and the union).

The Board narrowly construes privileges to disclose requested and relevant information. For example, in *Washington Gas Light Co.*, 273 NLRB 116 (1984), the Board found that the employer violated the Act by refusing to provide the union with disciplinary records of unit employees (at least to the extent that they did not contain references to medical conditions). While laws such as HIPPA and the Federal Privacy Act may restrict information entities can provide, they do not shield an party from attempting to provide the information in a form which would protect privacy interest. *Goodyear Atomic Corp.*, 266 NLRB 890 (1983).

F. When the Duty to Provide Information Exists

The duty arises as soon as the union is elected. An employer acts at its peril if it refuses to provide requested information following a Board election even though the request is made prior to the certification and while objections are pending. *Pony Express Courier Corp.*, 286 NLRB 1286 (1987) The duty continues through the life of a contract so far as it is necessary to resolve grievances and administer the contract. *Budde Publications*, 242 NLRB 243 (1979).

G. Information Which Must Be Furnished

1. Financial Information

If an employer claims it is financially unable to meet a union's contract demand, it will be required to furnish information supporting this claimed inability. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956) see also *Lakeland Bus Lines, Inc.*, 335 NLRB 322 (2001).

On the other hand, a claim of inability to compete, or unwillingness to meet a union's demands, does not give rise to a duty to provide financial information. *Nielson Lithographing Co.*, 305 NLRB 697 (1991), enfd. 977 F.2d 1168 (7th Cir. 1992); *Advertisers Manufacturing Co.*, 275 NLRB 100 (1985); *Atlanta Hilton and Tower*, 271 NLRB 1600 (1984). The Board recently found that an employer's statement that it was "fighting for its life" and the union's demands were "pie in the sky" did not constitute an claim of inability to pay. *AMF Trucking & Warehouse, Inc.*, 342 NLRB 116 (2004). A union is also not entitled to financial information from an employer in advance of negotiations to assist it in formulating contract demands. *Pine Industrial Relations Committee, Inc.*, 118 NLRB 1055 (1957), enfd. 263 F.2d 483 (D.C. Cir. 1959).

2. Right to the Employer's Premises

The right of a union to gain access to an employer's premises for purposes of securing relevant information is governed by the restrictive standards of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), rather than the liberal "discovery-type standard" of *Acme Industrial*, above. See *Holyoke Water Power Company*, 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985).

V. Impasse in Bargaining

The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. Both parties must believe that they are at the end of their rope." *A.M.F. Bowling Co.*, 314 NLRB 969 (1994) enf. denied 63 F.3d 1293 (4th Cir. 1995) (concluding contrary to the Board that a good faith impasse existed).

A. Elements of Impasse

In determining whether the parties are at impasse, the Board considers the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors in deciding whether an impasse in bargaining existed. In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1969), enfd. 395 F.2d 622 (D.C. Cir. 1968).

B. Effects of Impasse on the Bargaining Obligation

At the point of impasse, the employer is generally permitted to unilaterally implement its offer. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *American Federation of Television and Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968). Overall bargaining impasse will not justify a unilateral change concerning a subject over which there had been no bargaining. *NLRB v. Intracoastal Terminal,* 286 F.2d 954 (CA 5, 1961)

Impasse suspends but does not terminate the obligation to bargain in good faith. *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963). Thus, if the employer does not unilaterally implement its final offer and one party sufficiently changes its position after impasse, such that further negotiations might be fruitful, the other party is obligated to resume bargaining. *Jano Graphics, Inc.,* 339 NLRB 251 (2003).

C. Defenses and Exceptions: Waiver, Suspension, and Termination of Bargaining Rights

1. Waiver of Bargaining Rights

Absent waiver, the duty to bargain continues during the term of an existing collective-bargaining agreement. *NLRB v. Jacobs Manufacturing Co.*, 196 F.2d 680 (1952).

2. Waiver by Express Agreement

A party may by "clear and unmistakable" contract language waive its right to bargain about a subject. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

A "zipper" clause and a management rights clause are frequently relied on to show waiver by express agreement. A so called "zipper" provides that the collective-bargaining agreement is the complete agreement between the parties and purports to relieve them from bargaining during the term of the agreement. *Radioear Corp.*, 214 NLRB 362 (1974). Likewise, so-called management rights clauses, which typically reserve to the employer the right to act unilaterally with respect to specified subjects, may also be construed as a waiver. *Allison Corp.*, 330 NLRB 1363, 1365 (2000). On the other hand, the Board has refused to find that a management rights clause constituted a clear and unmistakable waiver where it was couched in very general terms but failed to make any specific reference to the particular subject at issue, *Johnson Bateman Co.*, 295 NLRB 180 (1989).

In *NLRB v. C&C Plywood,* 385 US 421 (9161), the Supreme Court held that the Board has jurisdiction to interpret collective-bargaining agreements to the extent necessary to determine whether the union has waived its right to bargain about a specific subject.

3. Waiver by Inaction

A waiver of the right to bargain may be found where a union has notice that an employer intends to implement changes in conditions of employment but fails to request bargaining concerning the changes. *American Buslines, Inc.*, 164 NLRB 1055, 1056 (1967). Such a waiver will not be found in the absence of clear notice of an intended change. *Sykel Enterprises*, 324 NLRB 1123 (1997). An employer's announcement that it might institute a change in conditions of employment in the future is too "inchoate and imprecise" to obligate a union to request bargaining. *Oklahoma Fixture Co.*, 314 NLRB 958, 960-961 (1994), enf. denied 79 F.3d 1030 (10th Cir. 1996). A union is also excused from requesting bargaining where the contemplated changes are presented to it as a fait accompli. *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994); *UAW-Daimler Chrysler.*, 341 NLRB No. 51 (2004).

4. Waiver by Bargaining History

Where a mandatory subject of bargaining has been discussed in negotiations, but not included in a resulting contract a waiver will be found only where the union has "consciously yielded" its position." *New York Mirror,* 151 NRLB 834 (1965). For waiver to occur, the matter must be "fully discussed" and "consciously explored". *Bunker Hill Co.,* 208 NLRB 27 (1973).

VI. Bargaining During Term of Existing Contract

The obligation to bargain does not end upon negotiation of a collective-bargaining agreement. The administration of the grievance procedure is an obvious example. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

Section 8(d) of the Act imposes an additional requirement when a collective bargaining agreement is in effect and an employer seeks to "modify" terms and conditions of employment "contained in" the agreement. In that instance, the employer must obtain the union's consent before implementing the change. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enfd.. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). The use of economic pressure to compel a party to agree to negotiate over a matter "contained in" an existing agreement is unlawful. *Rangaire Co.*, 309 NLRB 1043 (1992), enfd.. 9 F.3d 104 (5th Cir. 1993) (lockout to coerce union to consent to midterm modification of agreement violated Section 8(a)(5)).

Section 8(d) does not prohibit parties from freely agreeing to engage in mid-term bargaining. If the parties reach an agreement to modify or supplement the agreement, the change becomes part of the existing agreement. *St. Vincent Hospital*, 320 NLRB 42 (1995).

VII. Withdrawal of Recognition

For an employer to lawfully withdraw recognition based on its belief that the incumbent no longer enjoys the support of a majority of employees in the appropriate unit, that employer's conduct must be: (1) timely, (2) in accord with the appropriate standard and supporting evidence, and (3) untainted by unfair labor practices. The three bases for withdrawal for an employer are: (1) a unilateral withdrawal, (2) a Board election (RM petition), and (3) a poll. Employees may also obtain an NLRB election (RD petition) to vote on whether or not an incumbent should be decertified.

A. Timeliness of Withdrawal

To promote stability in labor relations, which is fostered by collective-bargaining agreements, the Board has established certain presumptions about the existence of majority support for the exclusive bargaining representative. These are reviewed by the Supreme Court in *Auciello v. Iron Works v. NLRB*, 517 U.S. 781, 152 LRRM 2385, 2387 (1996), and the Board in *Levitz Furniture Co.*, 333 NLRB 717, 720 fn. 17 (2001).

1. During and After the Certification Year and After Voluntary Recognition

Unless there are "unusual circumstances," a union has an irrebuttable presumption of majority during the certification year, even if the employer is presented with evidence of the union's loss of majority before the end of the certification year. The three types of "unusual circumstances" are defunctness of the certified union, schism within the certified union, and radical fluctuations in the size of the bargaining unit. *Brooks v. NLRB,* 348 U.S. 96, 35 LRRM 2158 (1954). After the expiration of the

certification year, the presumption of majority status continues but may be rebutted. A voluntarily recognized (but not certified) union is irrebuttably presumed to retain its majority status for a reasonable period of time following recognition. *Keller Plastics Eastern*, 157 NLRB 583, 587 (1966).

2. During and After the Term of a Collective-Bargaining Agreement

During the term of a collective-bargaining agreement (for a period of up to 3 years), there is an irrebuttable presumption that the union retains its majority status. See *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786, 152 LRRM 2385, 2387 (1996). Once the collective-bargaining agreement expires, the presumption of majority status continues but may be rebutted.

B. Standards for Withdrawal

1. Standard for an Employer's Unilateral Withdrawal of Recognition

In *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board held that an employer may unilaterally withdraw recognition from an incumbent union only on a showing that the union has actually lost the support of a majority of the bargaining-unit employees. The Board emphasized that the burden would be on the employer to show loss of actual majority support in any litigation that might arise. To meet its initial burden, an employer must present untainted, valid evidence, such as a petition, establishing that, at the time of its withdrawal of recognition, a numerical majority of unit employees no longer desired to be represented by the incumbent. In a unilateral withdrawal of recognition, the employer risks committing an 8(a)(5), if the union can rebut the evidence. By requiring a showing of actual loss of majority support, the Board raised the standard and overruled *Celanese Corp.*, 95 NLRB 664 (1951), 30-year precedent that had allowed employers to withdraw recognition merely by establishing an objectively based, good-faith reasonable doubt as to a union's majority support. The Board reasoned that the prior standard had allowed a unilateral withdrawal of recognition from unions that had not, in fact, lost majority support.

The Board left for a later case the question of whether the existing good-faith doubt standard for an employer to poll its employees to determine if the incumbent union retains majority support should also be changed.

2. Standards for RM and RD elections

Stressing that Board elections are the preferred means for testing employees' support for unions, the Board in *Levitz* eased the standard that employers must meet to obtain NLRB elections based on employer-filed (RM) petitions. An employer will now be able to obtain an RM election by demonstrating an objectively based, good-faith reasonable "uncertainty" as to the union's majority status.

The NLRB in *Levitz* retained an even lower standard for employees to invoke the Board's processes. Thus, employees can file a decertification petition (RD) on the basis of a representation, evidenced by authorization cards or other signatures, that 30 percent of the unit employees desire an election. *Dresser Industries, Inc.,* 264 NLRB 1088 (1982). This is the same percentage as for filing for an initial election.

3. Standard for Employer Poll

Levitz, 333 NLRB 717 (2001), did not change the standard for an employer poll of its employees, which requires a showing of objective, good-faith "uncertainty" as to the union's majority status, the same test as for filing for an RM. *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 157 LRRM 2257 (1998); *Texas Petrochemicals Corp*. 296 NLRB 1057 (1989), order modified 923 F.2d 398 (5th Cir. 1991).

4. Evidence to Establish Good-Faith Uncertainty

In *Levitz,* at 726-727, the Board reviewed the evidence necessary to meet the requirement of the Supreme Court in *Allentown Mack* that the Board's good-faith doubt standard, now used only for RM petitions and polls, no longer be read as good-faith "disbelief," but now be read as good-faith "uncertainty." Under this test, employers must present evidence that is objective and reliably indicates employee opposition to an incumbent union—not evidence that is merely speculative. The regional offices are to look at all the evidence and decide on a case-by-case basis. Some examples of the types of evidence that employers may present to establish "uncertainty" include anti-union petitions signed by unit employees, firsthand statements by employees concerning personal opposition to an incumbent union, employees' unverified statements regarding other employees' anti-union sentiments, and employees' statements expressing dissatisfaction with the union's performance as bargaining representative. In contrast, evidence that only one employee made an anti-union statement; that newly hired employees failed to join the union; that some employees failed to authorize dues checkoff; and that the union failed to file grievances, appoint a steward, or submit a tentative agreement to employees for ratification may be insufficient to demonstrate a good-faith uncertainty. In *Levitz*, the Board also reaffirmed that it will not look to employee turnover as a basis for employer "uncertainty," because the Board, with Supreme Court approval, will continue to adhere to the presumption that newly-hired employees support the union in the same proportion as the employees they have replaced. *Levitz*, 333 NLRB 717, 728 fn. 60 (2001), citing *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 779, 133 LRRM 3049, 3050 (1990). The Supreme Court in *Curtin Matheson* also agreed with the Board that there is no presumption that strike replacements or nonstriking employees no longer desire representation. Instead, there must be specific evidence of their lack of support, if it exists.

C. Tainted Withdrawal of Recognition

An employer may not withdraw recognition where it has committed serious unremedied unfair labor practices that tainted its employees' expressions of disaffection. *Levitz*, slip op. at 1 fn. 1. To establish that an employee expression of disaffection was tainted by an unfair labor practice, the Board requires "proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Lee Lumber Corp.*, 322 NLRB 175, 177 (1996) (footnote omitted), affd. in part, remanded in part, 117 F. 3d 1454 (D.C. Cir. 1997).