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DECERTIFICATION PURSUANT TO THE NATIONAL LABOR RELATIONS ACT

by

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A decertification petition constitutes a challenge to the representative status of a presently certified or recognized union.

RD PETITION

Section 9(c)(1)(a) of the National Labor Relations Act[1] permits employees to file a decertification petition. A petition filed by employees requires a thirty percent (30%) "showing of interest" among the employees in the bargaining unit affected. This is the same showing of interest which the National Labor Relations Board requires for an initial certification election.[2] A supervisor as defined in the Act[3] may not file an RD petition.

RM PETITION

An employer pursuant to Section 9(c)(1)(b) of the Act may file a representation petition to question the continued majority status of an incumbent union. The petition does not require a thirty percent (30%) showing of interest from employees but does require a demonstration of objective considerations that provide some reasonable grounds for believing that the union has lost its majority status since its certification (or recognition) and that the union continues to claim recognition.[4] The Board administratively determines whether there is a question concerning representation such that an election should be conducted.[5]

THE APPROPRIATE UNIT

The bargaining unit involved in a decertification election is generally the same unit as that certified or recognized.

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TIMING OF THE PETITION AND THE DUTY TO BARGAIN

The One-Year Rule

During the initial year following the certification of a union by the National Labor Relations Board or recognition by an employer, a union enjoys an irrebuttable presumption of a continuing majority status in that unit of employees.[6] No decertification petition may be entertained by the Board prior to the expiration of the first year of representation.[7]

After One Year

Upon the expiration of one year, an employer remains obliged to bargain with the majority representative of the bargaining unit unless the employer is able to substantiate with sufficient objective indicia, that its withdrawal of recognition is premised upon a good faith doubt of the union's continuing majority status in that unit of employees.

If an employer ceases to recognize an incumbent union after the initial year, the union usually will file an unfair labor practice charge with the Board, alleging a refusal to bargain in violation of Section 8(a)(5) of the National Labor Relations Act. The employer's burden in such a case is a heavy one. The employer must establish affirmatively that the union in fact lacked majority status at the time recogntion was withdrawn or that the employer, in a context free of employer unfair labor practices, knew of objective facts which indicated a loss of majority status.[8] If an employer's unfair labor practices are the cause of the loss of employee support for an incumbent union, an employer cannot justify its withdrawal of recognition on the basis of a good faith doubt as to the union's majority status.[9]

One factor which the Board has traditionally weighed in favor of a justified employer withdrawal of recognition of a union is the fact that a decertification petition has been filed by employees in the unit. However, such a filing was not considered conclusive evidence of a loss of majority support since a representation petition only requires the support of thirty percent (30%) of the employees in the unit. The Board in Telautograph Corp.[10] departed from its previous extensive analysis of other evidence of loss of majority support in refusal to bargain cases where a valid RD petition had raised a question concerning representation at the time of recognition withdrawal. In Telautograph Corp., the Board summarily dismissed refusal to bargain charges filed by the union, holding that the scheduled representation election would determine whether or not the employer had an obligation to bargain with the union. The Telautograph case clarified the employer's responsibility in situations where the employer has not engaged in misconduct and where there is a timely filed petition supported by an adequate showing of interest such that the Board will determine that a genuine question concerning representation exists.

Other factors which have been considered some evidence of a loss of majority support for a union in defense of a Section 8(a)(5) refusal to bargain charge include high employee turnover and declining union dues checkoff,[11] a lack of representative activity on the union's part[12] and/or a lack of support by employees of a strike.[13]

Contract Bar Rule

If an employer and a union have executed a valid written collective bargaining agreement of definite duration, the contract will bar the processing of a petition for decertification for up to three years, or for the length of the contract if the length is less than three years. A decertification petition should be filed between ninety (90) and sixty (60) days prior to the expiration of the first three years of the contract. This period of time is called the "open period". A petition filed during the sixty(60) days prior to the expiration of the contract (or of the three year period) is not timely. The Board allows the parties this "insulated period" in which to negotiate for a new collective bargaining agreement without election interference. If no agreement is executed during the insulated period, a petition for decertification will be entertained by the Board thereafter.[14]

CONDUCT OF THE EMPLOYER

An employer's conduct is restricted by the Board's requirements prior to any representation election. In the decertification situation, if the employer or its supervisor initiates, circulates or sponsors an RD petition, the petition is invalid.[15]

An employer may not promise benefits to encourage employees to vote the union out, nor may it threaten employees concerning an unsuccessful attempt to decertify the union.[16] Where an employer engages in conduct which interferes with employee free choice as guaranteed in Section 7 of the Act, an employee or the union may file an unfair labor practice charge with the Board. A scheduled representation election will be "blocked" or postponed until the unfair labor practice charge is investigated and disposed of by dismissal, settlement or Board-ordered remedy.

ELECTION RESULTS

In order for a union to be certified as the exclusive representative of the employees in the bargaining unit in question, the union must obtain a majority of the votes cast in the election. This rule applies to decertification as well as to other representation elections.

NOTES

[1] 29 U.S.C. §151-169 (1976).

[2] NLRB Rules and Regulations and Statements of Procedure, Series 8, as amended, revised January 1, 1965, §101.18 (GPO, 1965).

[3] 29 U.S.C. §152(11)

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[4] United States Gypsum Co., 157 NLRB 652, 61 LRRM 1384 (1966).

[5] J.C. Penney Co., Inc., 162 NLPB 1553, 64 LRRM 1241 (1967), aff'd J.C. Penney Co., Inc., v. N.L.R.B. 391 F 2d 935 (1968).

[6] Brooks v. N.L.R.B., 348 U.S. 96, 35 LRRM 2158 (1954).

[7] Pennco, Inc., 250 NLRB 716, 104 LRRM 1473 (1980).

[8] Computer Sciences Corp., 236 NLRB 266, 99 LRRM 1028 (1978), aff'd Computer Sciences Corp. d/b/a Computer Science-Technicolor Associates, 86 LC¶11, 395 (4th Cir. 1979).

[9] Providence Medical Center 243 NLRB 714 (1979).

[10] Telautograph Corp., 199 NLRB 892, 81 LRRM 1337 (1972).

[11] Dalewood Rehabilitation Hospital v. N.L.R.B., 566 F. 2d 77, 97 LRRM 2632 (10th Cir. 1978), denying enforcement of Golden State Rehabilitation Convalescent Center, 224 NLRB 1618, 92 LRRM 1372 (1976).

[12] Burns International Security Services v. N.L.R.B., 567 F. 2d 945, 97 LRRM 2350 (10th Cir. 1977), denying enforcement of 225 NLRB 271, 92 LRRM 1439 (1976).

[13] N.L.R.B. v. Randele-Eastern Ambulance Service, Inc., 584 F. 2d 720, 99 LRRM 3377 (5th Cir. 1978).

[14] Deluxe Metal Furniture Co., 121 NLRB 995, 42 LRRM 1470 (1958) as modified in Leonard Wholesale Meats, Inc., 136 NLRB 1000, 49 LRRM 1901 (1962).

[15] Maywood Plant of Grede Plastics, 235 NLRB 363, 97 LRRM 1510 (1978), as modified in N.L.R.B. v. Maywood Plant of Grede Plastics, 628 F.2d 1, 104 LRRM 2646 (D.C., Cir. 1980).

[16] Section 8 (a) (1) - (3) of the Act.