

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 02-1199 & 02-1547

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HORIZON HOUSE DEVELOPMENTAL SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Horizon House Developmental Services, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board to enforce, a Board order issued against the Company. The Board had jurisdiction over this case under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices. The Court has

jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(f)); the unfair labor practices in question occurred in Philadelphia and Bucks County, Pennsylvania. The Board's decision and order issued on December 19, 2001, and is reported at 337 NLRB No. 9.<sup>1</sup> The order is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company filed its petition for review on January 18, 2002, and the Board filed its cross-application for enforcement on February 25, 2002. Both filings were timely; Section 10(e) and (f) of the Act places no time limit on such filings.

#### STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union, refusing to provide relevant information requested by the Union, and refusing to process grievances filed by the Union on behalf of unit employees.

#### STATEMENT OF THE CASE

The case came before the Board on a complaint issued by the General Counsel, following investigation of an unfair labor practice charge filed by the Union. After a hearing, an administrative law judge recommended that the Board

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<sup>1</sup> "A" references are to the Joint Appendix filed by the Company. "Br" refers to the Company's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

find no violation of the Act. (A 12-13.) The Board reversed the administrative law judge, issuing a decision and order finding that the Company had in fact violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union, refusing to furnish information to the Union, and refusing to process grievances filed by the Union. (A 3-8.) The Board's findings of fact are summarized below, and its conclusions and order are described immediately thereafter.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Background; the Company is Non-Responsive to the Union's Attempts To Schedule Collective Bargaining; the Company Refuses To Provide the Union with Requested Information Relevant to Collective Bargaining; the Company Refuses To Process Grievances Filed by the Union

The Company provides health-care and related services to mentally disabled individuals in the Philadelphia metropolitan area. (A 3.) In November and December of 1997, the Board conducted a representation election among company employees located at a number of facilities throughout Bucks County. The employees in favor of representation by District 1199c, National Union of Hospital and Health Care Employees, AFSCME ("the Union"), and the Board subsequently certified the Union as the employees' collective-bargaining representative. (A 3; A 220-21.) Following the Union's certification, the parties entered into a collective-

bargaining agreement effective from December 21, 1998 to September 30, 2000.

(A 3; A 222.)

In June 2000, the Union began to contact the Company in an effort to initiate negotiations for a successor agreement to the 1998-2000 contract. On June 8, Union President Henry Nicholas wrote to the Company requesting a meeting with company representatives. (A 258.) The Company did not reply to the Union's request until July 27, almost 2 months later. At that point, the Company suggested that the Union contact company counsel to schedule meeting times, but did not propose possible dates. (A 259.) Although union negotiator Vivian Giola placed a number of phone calls to company counsel Guy Vilim during August and September, she was unable to contact him. (A 208, 212).

At the same time, Union Representative Maureen Bendig began preparing for the upcoming collective-bargaining negotiations. On August 14, she sent a letter to the Company requesting information relating to the bargaining unit, including a recent payroll run, medical benefit costs, and the number of hours worked per pay period by each company employee. (A 3; A 31-32, 278.) The Union informed the Company that it needed the requested information in order to prepare its bargaining positions on health benefits and overtime. (A 32, 278.) On August 30, Union Representative Bendig requested a copy of the Company's "leave bank policy." (A 3; A 35-36, 281.) Although Bendig made a number of

follow-up inquiries at various times in August and September, the Company never furnished any of the information requested by the Union. (A 33, A 72-78, 208.)

On August 30, Bendig also filed three "class action" grievances with the Company under the existing collective-bargaining agreement. The grievances alleged that supervisors were performing bargaining-unit work and that the Company was not adhering to its contractual obligations regarding the scheduling of work. (A 3; A 35-36, 282-84.) The Company engaged in some preliminary telephone discussions regarding the grievances, but it never processed the grievances, met with the Union, or agreed to a grievance hearing. (A 3; A 39-40, 61-62, 208.)

In addition to pursuing the information requests and grievances, Union Representative Bendig also followed up on union negotiator Giola's earlier attempts to schedule bargaining. On August 23, Bendig asked Company Human Resources Manager Robert Lindsay whether there were dates scheduled for negotiations. Lindsay promised that Human Resources Director Rita Kucsan would "get back to" Bendig. (A 72-73.) On September 19, Bendig met with Lindsay regarding a disciplinary action taken against a unit member. She reminded him that the current contract was expiring soon, and asked him to find out when the Company would be available for bargaining. Lindsay once again promised Bendig that he would look into the matter. (A 75-76.) When Bendig and

Lindsay met again on September 27, Lindsay promised to inform Kucsan of Bendig's interest in scheduling negotiations. Sometime during that same week, Bendig called Kucsan and asked whether the Company was available to negotiate that week. Kucsan demurred, stating that she had not yet spoken to company counsel about the matter. (A 70-71.)

On September 29, the day before the expiration of the collective-bargaining agreement, Bendig called Kucsan and offered to bargain "around the clock" until the parties could reach a new contract. Kucsan replied that she was waiting to hear from company counsel before committing to a date. (A 84.) Shortly thereafter, the Union discovered that the Company had informed the employees that it had withdrawn recognition from the Union, and bargaining never occurred. (A 3; A 84.)

#### B. The Company Withdraws Recognition from the Union

On October 2, the Company withdrew recognition from the Union. It distributed a memo to bargaining unit employees announcing the withdrawal and that the Company was going to attempt "to have the Union decertified." (A 3; A 105, 277.) The Company claimed that its withdrawal of recognition was predicated upon a good-faith doubt of the Union's continuing majority status. On October 11, the Company filed an "RM petition" with the Board's Regional Office seeking an election to determine whether the Union still enjoyed majority support;

in an addendum to the petition, the Company listed "objective considerations" allegedly demonstrating reasonable grounds for believing that the Union had lost its majority status.<sup>2</sup> (A 252.)

The Company's bases for withdrawal included an allegation that "the vast majority" of employees had not authorized the employer to deduct union dues from their paychecks, a claim that a union meeting was sparsely attended, the fact that the bargaining unit lacked a representative or steward, and an allegation that the majority of employees facing disciplinary action had declined union representation. (A 252.) Finally, the Company claimed that unidentified "employees routinely complain that the Union does not respond to requests for information or for assistance . . . and consistently state to supervisors that they do not know why they have a Union and do not support the presence of a Union." (A 252.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Hurtgen and Members Liebman and Walsh) found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C.

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<sup>2</sup> As a result of the Union's instant unfair labor practice charges alleging violations of Section 8(a)(5) and (1) of the Act, the Board's Regional Director dismissed the Company's petition. (A 3.)

§ 158(a)(5) and (1)) by withdrawing recognition from and refusing to bargain with the Union, refusing to provide relevant information requested by the Union, and refusing to process grievances filed by the Union on behalf of unit employees.

(A 8.) The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with the employees' Section 7 rights (29 U.S.C. § 157). (A 8.) Affirmatively, the Board's order requires the Company to bargain with the Union upon request as the exclusive representative of its employees and to embody any agreement that is reached in a signed agreement, to furnish the Union with the information requested in August 2000, to process the grievances filed by the Union in August 2000, and to post copies of a remedial notice. (A 8.)

#### STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before the Court previously. The U.S. District Court for the Eastern District of Pennsylvania granted the Board's request for temporary relief *pendente lite* pursuant to Section 10(j) of the Act (29 U.S.C. § 160(j)) prior to the Board's issuance of its decision in this case. *Moore-Duncan v. Horizon House Devel. Servs.*, 155 F.Supp.2d 390 (E.D. Pa. 2001). The Board's motion for temporary relief *pendente lite* pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) is now pending before the Court.

## STATEMENT OF STANDARD OR SCOPE OF REVIEW

The Board's findings of fact are conclusive if they are supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *St. Margaret Memorial Hosp. v. NLRB*, 991 F.2d 1146, 1151-52 (3d Cir. 1993). Moreover, the Board's factual inferences are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it de novo. *See Universal Camera Corp.*, 340 U.S. at 488; *Citizens Publishing & Printing Co. v. NLRB*, 263 F.3d 224, 231 (3d Cir. 2001). The Board's legal conclusions are entitled to deference on review and should be upheld if reasonable. *See CPS Chemical Co. v. NLRB*, 160 F.3d 150, 154 (3d Cir. 1998); *NLRB v. New Jersey Bell Tel. Co.*, 936 F.2d 144, 150 (3d Cir. 1991).

## SUMMARY OF THE ARGUMENT

The Company admits that it withdrew recognition from the Union and abandoned collective bargaining. It is settled that an employer may not withdraw recognition from an incumbent union unless the employer can either (1) prove that the Union is no longer supported by a majority of employees, or (2) demonstrate that it possessed a good-faith, reasonable doubt of the union's majority status. The Company does not offer proof of the Union's actual loss of majority support.

Therefore, the only issue before the Court is whether substantial evidence supports the Board's finding that the Company's withdrawal of recognition was not privileged by a genuine good-faith, reasonable doubt of the Union's majority status.

The Company has failed to carry the heavy burden of showing that its withdrawal of recognition was so privileged. The record evidence shows that at the time that the Company withdrew recognition from the Union, only 2 of 21 employees had actually expressed opposition to union representation. No probative circumstantial evidence existed to support the Company's supposed doubt of the Union's continuing majority status. Indeed, most of the evidence relied upon by the Company to justify its doubt was simply irrelevant to the question of whether the Union retained majority support; it is well-settled that "evidence" such as accounts of low attendance at union meetings and post-withdrawal expressions of union disaffection does not lend support to a claim of good-faith doubt of a union's majority status. Stripped of the irrelevant evidence, the Company's alleged doubt rests on statements indicating that fewer than 10 percent of the bargaining unit employees were opposed to union representation. Based on that evidence, the Board reasonably concluded that the Company's withdrawal of recognition and concomitant abandonment of its collective-bargaining obligations violated Section 8(a)(5) and (1) of the Act.

## ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM AND REFUSING TO BARGAIN WITH THE UNION, REFUSING TO PROVIDE RELEVANT INFORMATION REQUESTED BY THE UNION, AND REFUSING TO PROCESS GRIEVANCES FILED BY THE UNION ON BEHALF OF UNIT EMPLOYEES

## A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the "right to bargain collectively through representatives of their own choosing." Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) effectuates that right by making it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Once the Board has certified a union as the collective-bargaining representative of a unit of employees, the union is conclusively presumed to enjoy majority support among the unit members for one year following the certification. *Brooks v. NLRB*, 348 U.S. 27, 38-39 (1987). Likewise, the union is irrebuttably presumed to enjoy majority support among the unit members during the pendency—up to three years—of any collective-bargaining agreement entered into by the parties. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996) ("*Auciello*"); *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1173 (3d Cir. 1989). An employer therefore violates Section 8(a)(5) and (1) of the Act if it withdraws recognition from or refuses to bargain with a union

during either of the above-described periods. *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1244 (3d Cir. 1994).

Once a collective-bargaining agreement between an employer and a union has expired, the union enjoys a rebuttable presumption of majority status. *Auciello*, 517 U.S. at 786-87; *NLRB v. Rockwood Energy & Mineral Corp.*, 942 F.2d 169, 173 (3d Cir. 1991). Under applicable precedent, the Company could withdraw recognition from the Union only if it could show that the Union had in fact lost majority support, or that there were objective considerations to justify a reasonable, good-faith doubt of the union's continuing majority status.<sup>3</sup> *Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 361 (1998) ("*Allentown Mack*"); *CPS Chemical Co., Inc. v. NLRB*, 160 F.3d 150, 155 (3d Cir. 1998).<sup>4</sup> In order to satisfy that requirement, "the employer's doubt must be based on objective considerations . . . supported by evidence external to the employer's own (subjective) impressions." *Allentown Mack*, 522 U.S. at 368 n.2.

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<sup>3</sup> Like the Supreme Court's decision in *Allentown Mack*, our brief occasionally refers to "good-faith uncertainty" rather than "good-faith doubt." The Court's decision used the two terms interchangeably. 522 U.S. 359 at 367.

<sup>4</sup> Prior to issuance of the Board's decision in this case, the Board reconsidered the circumstances under which an employer may withdraw recognition from a union. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB No. 105 (2001). Because the Board decided in *Levitz* that it would not apply its holding retroactively, the case at bar was decided according to the principles explained in *Allentown Mack*, 522 U.S. 359. *Levitz*, 333 NLRB No. 105, slip op. at 12 (2001).

In a case such as the instant case, where the Company does not dispute that it withdrew recognition from the Union and abandoned collective bargaining, "[i]t is appropriately the employer's burden to prove this defense [i.e., the existence of a good-faith reasonable doubt] to the established refusal to bargain." *CPS Chemical Co., Inc.*, 160 F.3d at 155 n.3. Whether the employer has carried that heavy burden is a question of fact. The Board's finding must therefore be upheld if supported by substantial evidence on the record as a whole. *Allentown Mack*, 522 U.S. at 366; *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The issue presented for review is "whether, on the evidence presented to the Board, a reasonable jury could have found that [the Company] lacked a genuine, reasonable uncertainty about whether [the Union] enjoyed the continuing support of a majority of unit employees." *Allentown Mack*, 522 U.S. at 366-67.

In its brief, the Company does not independently contest the Board's conclusion that its failure to provide the Union with requested information and its refusal to process grievances also violated Section 8(a)(5) and (1) of the Act. The Company therefore essentially concedes that if its withdrawal of recognition from the Union was unlawful, so too were its refusals to provide information and process grievances. *See Samaritan Medical Center*, 319 NLRB 392, 398 (1995) (holding that an employer's refusal to provide information following an unlawful withdrawal of recognition violates Section 8(a)(5)); *Earthgrains Co., Inc.*, 334

NLRB No. 139, slip op. at 1 (2001) (same). Accordingly, if the Court enforces the Board's finding that the Company unlawfully refused to bargain with the Union, the Board is entitled to enforcement of its finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to provide information to the Union and refusing to process grievances filed by the Union. *See Int'l Union of Petroleum & Indust. Workers v. NLRB*, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992).

B. Because the Company Failed To Rebut the Presumption of the Union's Majority Status, Its Withdrawal of Recognition and Repudiation of Its Collective-Bargaining Obligations Was Unlawful

As the foregoing uncontested principles make clear, the Union enjoyed a rebuttable presumption of continuing majority status following the expiration of the 1998-2000 collective-bargaining agreement. The Company admits (Br at 16-24) that it withdrew recognition from the Union on October 2, just after the expiration of the agreement, but argues that the withdrawal was lawful because it was based on a good-faith reasonable doubt of the Union's majority status. As we demonstrate below, the Company has failed to carry its burden of showing that it did in fact possess a good-faith reasonable doubt. In the first place, many of the "considerations" supposedly leading to the Company's doubt are simply irrelevant to the question at hand. The scant remaining evidence, although arguably relevant, is insufficient to have engendered a reasonable doubt of the Union's majority support. The Board therefore properly concluded, based on substantial evidence in

the record, that the Company's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act.

1. Many of the "objective considerations" purportedly relied upon by the Company are legally irrelevant, and therefore could not contribute to a good-faith doubt of the Union's majority status

Much of the evidence proffered by the Company is simply irrelevant to the issue at hand, since it is of a variety that both the Board and reviewing courts have repeatedly held cannot support a good-faith doubt as a matter of law. The Board followed the guidance of precedent in rejecting the evidence in question as irrelevant. (A 7.)<sup>5</sup>

For example, the Company argues (Br 17) that allegedly poor attendance at union meetings helped to substantiate its supposed uncertainty in the Union's majority. Regardless of whether attendance at such meetings was truly low, it is

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<sup>5</sup> The Company offers no legal argument as to why its evidence should now be considered, other than broadly stating (Br 24) that the Supreme Court in *Allentown Mack* "repudiated" virtually all prior jurisprudence concerning the good-faith doubt issue. That assertion, unsupported by any citation to the case, demonstrates a profound misunderstanding of the holding of *Allentown Mack*. That case clarified the meaning of "good-faith doubt," and it reiterated the principle that objective circumstantial evidence may contribute to such a doubt. *Allentown Mack*, 522 U.S. at 367, 372. Nowhere in the opinion, however, did the Court redefine or limit the sort of evidence that the Board may consider when evaluating a good-faith doubt; nor did it reject, implicitly or explicitly, the Board's settled jurisprudence regarding the probative value of various types of evidence. In short, circumstantial evidence that the Board and the courts deemed non-probative of good-faith doubt prior to *Allentown Mack* remains non-probative today, and was correctly rejected by the Board.

settled that such evidence does not support an employer's alleged good-faith doubt.<sup>6</sup> See, e.g., *Beverly Farm Found., Inc. v. NLRB*, 144 F.3d 1048, 1054 (7th Cir. 1998) ("workers' failure to participate [in union events] in greater numbers is not a reliable symptom of disaffection"); *NLRB v. North American Mfg. Co.*, 563 F.2d 894, 897, 897 n.2 (8th Cir. 1977) (holding that attendance at union meetings is not probative of actual union support; "[d]isinterest in attending union meetings can be attributed to many causes"); *Metro Health, Inc.*, 334 NLRB No. 75, slip op. at 10 (2001) (same). The Company therefore cannot base its withdrawal of recognition on allegedly poor attendance at union meetings.

Likewise, the absence of a union delegate (that is, a steward appointed from the ranks of unit employees) is not probative of the Union's continuing majority status. "These and similar concerns are purely internal union matters and beyond the [employer's] purview. Unit employees, if dissatisfied with the Union's performance in these or other areas, may petition for an election to oust it as their collective-bargaining representative." *Henry Bierce Co.*, 328 NLRB No. 85 slip op. at 5 (1999), *enf'd in relevant part, remanded to the Board on other grounds*, 234 F.3d 1268 (6th Cir. 2000).

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<sup>6</sup> In fact, attendance at union meetings mirrored attendance at Company-held staff meetings. In late August 2000, prior to the withdrawal of recognition, 8 to 10 employees—nearly half the employees in the unit—attended a union meeting. (A 47-48.) This is roughly the same number of employees who routinely attended staff meetings. (A 196.)

The Company's claim (Br 8) that relatively few unit employees had authorized the Company to deduct union dues from their paychecks is also irrelevant to the validity of its alleged good-faith doubt. Although the Company has characterized (Br 8) the decision of some employees not to authorize dues deduction as tantamount to an explicit disavowal of interest in union representation, the Board and reviewing courts—including this Court—have unambiguously rejected that position, holding instead that "the fact that less than a majority of employees have dues checked off does not *ipso facto* indicate opposition to union representation." *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1245 (3d Cir. 1994). *See also Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 491 (2d Cir. 1975) (there is a lack of correlation "between support for the union as bargaining representative, on the one hand, and the payment of dues or membership in the union, on the other"); *Henry Bierce Co.*, 328 NLRB No. 85 slip op. at 4 (1999), *enfd in relevant part*, 234 F.3d 1268 (6th Cir. 2000) (holding that because "some employees did not authorize the [employer] to deduct their union dues directly from their paychecks does not establish that they were not union members and is irrelevant to the issue of whether they did or did not support the Union").

The Company not only ignores the foregoing precedent, but it also omits key facts unhelpful to its argument. By October 9, just a week after the

withdrawal of recognition, 12 of 18 non-probationary employees (and 12 of 23 employees in total) had authorized payroll dues-deduction. (A 306.) If the Company's October 2 decision to withdraw recognition was genuinely predicated on a doubt engendered in large part by a low number of dues-deduction authorizations, its receipt of additional authorizations in the ensuing week should have resulted in at least a reconsideration of its position. *See Allentown Mack*, 522 U.S. at 379 (holding that an employer must take "all the circumstances" into account when considering a withdrawal of recognition) (emphasis added).

The Company's allegation (Br 10) that a few employees did not request a union presence at disciplinary meetings is similarly irrelevant to the issue at hand. An employee's decision to request or not request a union presence at a disciplinary hearing simply does not bear on that employee's desire for union representation in general, as a number of reasons may account for the employee's declining such a presence. An employee who feels that he or she deserves discipline, for example, might not feel a need to bring a union agent to the disciplinary meeting; in fact, of the three pertinent employees here who agreed to accept discipline without a Union presence, two agreed that discipline was appropriate, thus obviating the need for a Union representative. (A 181-82.) Further, at least four employees—Tanisha Moore, Akua Konadu, Charlotte Haynes and Janine Cleveland-Macharashvili—

actually requested that Union representatives be present at disciplinary meetings held between August and early October. Thus, during the months leading up to the withdrawal of recognition, when the Company was evaluating the Union's majority status, a majority of unit employees had *not* ceased requesting Union assistance at disciplinary interviews. (A 187-92, 289-92, 319-22.)<sup>7</sup>

Lastly, the Company's assertion (Br 11) that "[e]ach of the supervisors agreed that the Union no longer served any useful purpose" is irrelevant to the issue at hand. As the Supreme Court has stated, the employer bears "the burden of showing that [its doubt] was supported by evidence external to the employer's own (subjective) impressions." *Allentown Mack*, 522 U.S. at 367 n.2. The personal impressions and beliefs of company supervisors—individuals who may not vote in union elections or become union members—have no bearing on the Company's burden of showing that it possessed adequate objective evidence of *employee* disaffection with the Union.

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<sup>7</sup> Some of the Company's cited examples of employees allegedly passing up union representation in disciplinary situations are particularly unpersuasive. For example, employee Morrison received discipline without the presence of a union agent, but initially asked for representation. (A 162.) Employee Kyra Faust also accepted discipline without the presence of a union agent, but did so in March and April 2000, well before the Company began seriously entertaining the notion that the Union's majority was in question. (A 264-67, Br 6.) Employees Wanda Funderbuck and DiYenno also accepted discipline without the presence of a union agent, but did so in early 2001, long after the Company had withdrawn recognition from the Union. (A 264, 271, 273-74.)

2. The Company's scant objective evidence does not establish a good-faith doubt of the Union's majority status

Stripped of the evidence just described, the Company's only concrete basis for its alleged doubt rests, as we now show, on antiunion statements made by only 2 of the 21 unit members. That evidence is plainly not a sufficient showing of discontent to warrant a good-faith, reasonable doubt in the Union's continuing majority status.

Substantial evidence supports the Board's conclusion that only two of the employee statements supposedly relied upon by the Company could actually contribute to a genuine good-faith, reasonable uncertainty concerning the Union's majority. Because only 2 of 21 employees expressed opposition to union representation, and because the Company offered no secondhand indication of quantifiable employee dissatisfaction, the Board reasonably concluded that the Company failed to sustain its burden. Thus, there is credited record evidence that employee Karen DiYenno informed Home Coordinator Barbara Rossi that she "was not interested in the Union[.]" (A 5, A 163-64.) Likewise, employee Traci Thompson indicated to both Human Resources Manager Kucsan and Program Director Betti Jo Murphy that she wanted to remove the Union as collective-bargaining representative. (A 6; A 142-46.)

But an examination of the record shows that the balance of the employee comments to which the Company points as expressions of antiunion sentiments do

not in fact express genuine opposition to—or even dissatisfaction with—the Union. For example, conversations between Home Coordinator Rossi and employees Lucy Morrison and Tanisha Moore uncovered no evidence of employee opposition to the Union. Morrison merely told Rossi that she had difficulty contacting the Union to represent her in a disciplinary matter. (A5; A 153, 155-56.) Moore, who had authorized dues deduction from her paycheck, complained that other employees were not paying dues. (A5; 168.) On their face, neither comment demonstrates opposition to union representation. Morrison merely expressed frustration at her difficulty in contacting the Union on a single occasion, while Moore's comment could be read a criticism of those of her fellow employees who had not authorized paycheck dues deduction. Simply put, neither Moore nor Morrison expressed any disaffection from the Union that could support a good-faith doubt of the Union's majority status.

Likewise, comments made by employees Arthur Garglahn and Linda DeJesus to Home Coordinator Erica Mount do not demonstrate relevant lack of support for union representation; in the first place, Mount herself testified that they were made in December 2000, months *after* the Company had withdrawn recognition from the Union. (A 6; A 175-77, 182-84). The comments therefore could not possibly have been a probative gauge of union support at the time that the Company actually withdrew recognition. In any event, although Mount's

retelling of these conversations is somewhat muddled, it appears that Garglahn and DeJesus merely objected to filling out new dues deduction authorization cards after their original cards were lost. It is unclear whether the employees' opposition was motivated simply by frustration over the inconvenience of having to complete a second card, or by an opposition to paying dues through paycheck deduction. In either case, the statements do not constitute disaffection from the Union, as it is settled that opposition to dues deduction does not constitute opposition to union representation. *See* above at pp. 17-18. A remark made by Garglahn in April 2001 regarding difficulties in contacting the Union is similarly irrelevant, as it was made six months after the withdrawal of recognition.

Record evidence therefore plainly demonstrates that in a unit that numbered 21 employees at the time that the Company withdrew recognition from the Union, only 2 employees—Thompson and DiYenno—had expressed disaffection from the Union. Since the Company lacked any additional, probative, secondhand evidence of employee opposition, the Board was warranted in concluding that the withdrawal of recognition was not based on a good-faith, reasonable doubt of the Union's majority status.

3. The ambiguous circumstantial evidence proffered by the Company offers little support for the withdrawal of recognition

The Company makes much (Br 21) of employee Thompson's statements to Supervisors Kucsan and Murphy that an unidentified, unquantified "they" were

circulating a petition to show that "they" no longer desired union representation. (A 6; A 108-09; 142-46.) As the Board concluded, the record shows that these statements fell far short of proving the existence of the sort of petition that might give rise to a good-faith uncertainty.

Indeed, the alleged petition was never seen by the Board, the Company, or the Union. No employee other than Thompson ever mentioned its existence. Perhaps most importantly, in her comments to company supervisors, Thompson never estimated—even roughly—how many employees had signed or supported the petition. Because the Company had no knowledge of the percentage of employees who had signed the alleged petition, Thompson's statements could give rise only to a reasonable doubt of *Thompson's* support for the Union. *See Raven Government Services*, 331 NLRB No. 84, slip op. at 1 n.3 (2001), *petition for review and cross-application for enforcement pending* (5th Cir.) (holding that an employer could not base reasonable, good-faith doubt of union's majority on an alleged decertification petition where the employer had never seen the alleged petition, and had no knowledge as to the number of employees who had signed).

The facts of this case—where the Company never saw the petition in question, and had no idea how many employees, if any, supported it—are very different from those cases where employers have lawfully predicated their withdrawals of recognition on tangible petitions signed by quantifiable *majorities*

of bargaining units. *See, e.g., Prime Service Inc. v. NLRB*, 266 F.3d 1233, 1240 (D.C. Cir. 2001) ("[a]n anti-union petition signed by a *majority* of the . . . employees stating that they do not want to be represented by the union may serve to create . . . a good faith doubt") (emphasis added); *Americare Pine Lodge Nursing & Rehab. Center v. NLRB*, 164 F.3d 867, 882 (4th Cir. 1999) ("petition signed by *at least half* of the bargaining unit's members in which they indicate that they do not wish to be represented by the union ordinarily constitutes sufficient objective evidence to rebut the union's presumed majority status") (emphasis added; citations omitted). Here, as noted, the Company was entirely ignorant of how many employees signed the alleged petition.

Thompson's statement that "they" no longer desired union representation is also far less concrete than a comment deemed probative, even if only as circumstantial, secondhand evidence, by the Supreme Court in *Allentown Mack*. In that case, the Court held that an employee's statement that "the entire night shift did not want the Union" could contribute to the employer's uncertainty as to the Union's majority status. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 369-70 (1998). Thompson's statement, by contrast, gave no indication whatever how many employees supported the petition effort. It was therefore of no value even as a supporting basis for a reasonable uncertainty in the Union's majority.

4. The administrative law judge's finding of the existence of a good-faith doubt did not preclude the Board's contrary finding

The Company argues (Br 19-20) that because the administrative law judge found "a basis for [the Company's] doubts, it is impossible as a matter of logic to sustain the Board's conclusion." This is simply untrue. First, the Board's contrary conclusion is based on its rejection of the administrative law judge's "inaccurate characterization" of certain evidence—including the statements of employees Morrison, Moore, Garglahn, and DeJesus, discussed above—that he had relied upon to find that those employees had expressed opposition to union representation. As explained above (*see* pp. 20-23), the record plainly supports the Board's conclusion, contrary to that of the administrative law judge, that those employees did not express opposition to or dissatisfaction with the Union. Furthermore, the administrative law judge erred by placing weight on employee Thompson's extremely vague statements regarding the alleged petition. The Board was well within its authority in reversing the judge, and concluding that Thompson's statements could not create doubt of anything other than Thompson's own support for the Union.

To the extent that the Company argues that its doubt *must* have been reasonable—because the administrative law judge considered it reasonable—its position is meritless. That argument is tantamount to a contention that the Board can never justifiably reverse the findings of an administrative law judge who found

a good-faith basis for an employer's withdrawal of recognition. The argument flies in the face of the Board's settled authority to review findings that are excepted to by a party (*see, e.g., Nova Plumbing, Inc.*, 336 NLRB No. 61 (2001); *Liquid Carriers Corp.*, 319 NLRB 317 (1995)), and has been rejected, at least implicitly, by the courts. *See generally NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130 (2d Cir. 1982); *NLRB v. King Radio Corp.*, 510 F.2d 1154 (10th Cir. 1975). In addition, it undermines the Board's statutory authority to prevent unfair labor practices.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that judgment enter enforcing the Board's order in full.

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