

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 12, 2001

TO: Victoria E. Aguayo, Regional Director, Region 21

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Hanson Aggregates West, Case 21-CA-33817

530-4080-0125, 530-4080-5012-1700

This case was resubmitted for advice as to whether the Employer had a valid "good faith doubt" or "uncertainty" about the Union's continued majority status under Allentown Mack, ⁽¹⁾ such that its withdrawal of recognition upon the termination of a contract did not violate Section 8(a)(5).

BACKGROUND AND FACTS

The background of this case is set forth in our earlier Advice Memorandum dated July 25, 2000. ⁽²⁾ Briefly, on about February 23, the Union received a letter from the Employer stating that it had "objective evidence, which clearly indicates that your organization no longer represents a majority of the employees" in the three-person unit, but that the Employer would honor the contract through its termination. The Union's business agent spoke with the three unit employees. One employee, Coleman, said that he wanted the Union; employee Clay said that he did not want the Union; and the third unit employee, Wooten, did not voice his opinion on the Union. The Employer did not cooperate with the Region.

We determined that a Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer unlawfully withdrew recognition from the Union without a good faith doubt as to the Union's continuing majority support, because the Employer made only a bald assertion of a loss of majority, with no identification of employees or what they said.

The Region issued a Section 8(a)(5) complaint. Shortly before the scheduled hearing, the Employer produced documents and witnesses to support its assertion of a good-faith doubt. Specifically, the Employer submitted three letters, dated February 18, with identical language stating that the employees no longer wished to be represented by the Union; one was signed by employee Wooten alone, one by Clay alone, and the third signed by both Wooten and Clay.

Employer area manager Warburton stated in a Board affidavit that after a January meeting of all employees at the plant, where new company-wide uniform benefits were discussed, he received a call from the plant manager stating that unit employee Wooten had asked how unit employees could become eligible for the benefits discussed, and the plant manager had responded that the benefits were available for non-union employees. ⁽³⁾

Warburton states that about a week later, he was at the plant on his twice-weekly visits and was approached by employee Wooten, who asked Warburton, "What do we have to do to become non-union employees? What's the process?" Warburton responded that the employees had to write a letter to the Employer that they no longer wanted the Union; Warburton said he did not have the exact language but, recalling the Operating Engineers' decertification, said he would try to find sample language. Warburton also said the decision had to be that of the employees, and that the Employer had to be "hands-off." Several days later, Warburton gave Wooten a copy of a letter he had obtained from an employee involved in the Operating Engineers decertification.

The Region was unable to contact employee Wooten, who no longer works for the Employer; a letter to him was returned as undeliverable. Employee Clay did call in response to a letter from the Region. Clay stated that he initiated a conversation with manager Warburton, asking how to become a non-Union plant, after hearing that employees at another, non-Union plant

(Irwindale) received better vacation benefits. Clay said that Warburton referred Clay to a former Teamster at Irwindale, who had been involved in a decertification campaign some years earlier, but that Warburton did not comment on Clay's question or encourage Clay in his efforts. Clay called that employee, who provided Clay with language for the letter Clay sent to the Employer. Clay said he had already spoken with Wooten, who was also interested in getting rid of the Union. The Region states that the Union has been unable to provide any evidence to rebut the Employer's testimony.

ACTION

We agree with the Region that the complaint should be withdrawn in light of the new evidence and the charge dismissed, absent withdrawal, because we would be unable to prove that the Employer lacked a "good faith doubt" or "uncertainty"⁽⁴⁾ when it prospectively withdrew recognition from the Union.

Thus, when the Employer prospectively withdrew recognition,⁽⁵⁾ it possessed signed statements from two of the three unit employees stating they no longer wished to be represented by the Union. The only possible question as to the Employer's good-faith uncertainty is whether the Employer unlawfully solicited, supported, or otherwise assisted the decertification efforts by either referring employee Clay to an employee at another plant for decertification language, or by obtaining such language and giving it to employee Wooten. We agree with the Region that the Employer's conduct did not constitute unlawful assistance,⁽⁶⁾ where the employees initiated the conversations, where the Employer merely replied to the employees' requests, and where the Employer did not encourage the employees' efforts or where the atmosphere was not otherwise coercive.⁽⁷⁾

B.J.K.

¹ Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359 (1998).

² All dates are in 2000 unless otherwise indicated.

³ The three unit employees are the only organized employees at this Employer plant; the remaining employees had been represented by the Operating Engineers until 1996, when that union disclaimed interest after a decertification petition was filed.

⁴ This withdrawal of recognition case is to be analyzed under the "good faith uncertainty" standard of Allentown Mack rather than the "actual loss" standard of Levitz, 333 NLRB No. 105 (March 29, 2001), which is to be applied only prospectively. *Id.*, slip op. at 12.

⁵ Such prospective withdrawal of recognition, to be effective upon contract expiration, is lawful if the employer possesses a good-faith uncertainty of the union's majority status. See Levitz, slip op. at 13 n. 70; Bridgestone/Firestone, Inc., 331 NLRB No. 24, slip op. at 4 (2000).

⁶ Eastern States Optical Co., 275 NLRB 371, 372 (1985).

⁷ See, e.g., Eastern States Optical, 275 NLRB at 372, and cases cited therein; Ernst Home Centers, 308 NLRB 848 (1992)(no Section 8(a)(1) violation to provide employee with requested decertification language); compare, e.g., Vic Koenig Chevrolet, 3321 NLRB 1255, 1259-60 (1996)(employer unlawfully provided more than "ministerial aid" by, inter alia, correcting language on ballots used in employees' decertification poll), enf. denied in rel. part 126 F.3d 947 (7th Cir. 1997).