

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: April 9, 2003

TO : Rochelle Kentov, Regional Director  
Margaret Diaz, Regional Attorney  
Karen K. LaMartin, Assistant to Regional Director  
Region 12

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

SUBJECT: Cutrale Citrus Juices, Inc. 512-5048-0100  
Case 12-CA-22269 512-5048-5000  
530-4080-0125  
530-4080-5012-1700  
530-4080-5012-5000  
530-4080-5024-2500  
530-4080-5030-5000  
530-4080-5030-5500  
530-4080-5036

This case was submitted for advice as to whether the Employer had a reasonable uncertainty of the Union's majority status so as to permit it to conduct a poll of its employees.

We conclude that the Employer violated Section 8(a)(1) and (5) by polling its employees when it did not have a sufficient basis to form a reasonable uncertainty regarding the Union's majority status.

### **FACTS**

Coca-Cola Food Company and Teamsters Local 444 had a long collective-bargaining relationship. In 1996, Cutrale Citrus Juices (Employer) took over Coca-Cola's operation at the Auburndale, Florida plant and recognized Local 444. The parties negotiated a successor collective-bargaining agreement effective from March 1, 2000 through February 28, 2003. In 2000, Local 444 merged with Teamsters Local 79 (Union), and the Union assumed the role of representing the unit employees.

In May 2002,<sup>1</sup> the Employer sent the Union a letter stating that it had hired an outside consultant to poll the bargaining unit, consisting of 128 employees, regarding

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<sup>1</sup> All dates are in 2002 unless noted.

their Union support. The Union objected that the Employer did not have a good-faith reason to conduct the poll. On June 3 and 4, the Employer polled its employees.<sup>2</sup> The Employer has never released the results of the poll. In December, the Employer filed an RM petition supported by the same evidence of loss of majority status on which it relied in conducting its poll.<sup>3</sup>

As evidence of employee disaffection, the Employer cites direct evidence from approximately thirteen employees who made antiunion statements to the Employer during the year prior to the poll, some of whom also resigned from Union membership. An additional eight employees resigned from the Union during this period without making antiunion statements. Of this evidence, it appears that eight employee resignations, and one isolated antiunion statement, occurred within the six-month period before the poll.<sup>4</sup>

In addition to the direct evidence of disaffection noted above, the Employer relies on a June 2001 statement by an employee who stated that no one in his department needed or wanted the Union; and a July 2001 statement by another employee that he wanted nothing to do with the Union and had talked with other employees who felt as he did. The Employer also states that on two occasions in September and November 2001, unnamed employees complained about an increase in health insurance premiums under the Union contract, and that in May, unnamed employees expressed unhappiness with a Union dues increase. The Employer also states that various shop supervisors had reported that the "talk" among the unit employees had been "extremely negative" in the years 2001-2002. Finally, the Employer notes as further evidence of disaffection the failure of any employee to authorize dues checkoff since 2000, the failure of new hires to join the Union, and the decrease in the number of Union stewards from 10 in 2001 to one in 2002.

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<sup>2</sup> The Union does not contend that the Employer's poll failed to meet the procedural safeguards required by Struksnes Construction Co., 165 NLRB 1062 (1967).

<sup>3</sup> The Employer's RM petition is currently blocked by the instant, as well as other, charges.

<sup>4</sup> Of the eight employees who resigned within this six-month period, one employee had made an earlier antiunion comment to the Employer during those six months, while another made a contemporaneous antiunion comment while resigning from the Union.

**ACTION**

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (5) by polling its employees at a time when it did not have a sufficient basis to form a reasonable uncertainty as to the Union's majority status.

Under Levitz, an employer must have a good-faith reasonable uncertainty as to a union's majority status in order to poll its employees regarding their union sentiments.<sup>5</sup> The Employer's direct evidence of employee disaffection from a small minority of employees, in the absence of other reliable evidence of disaffection, clearly is insufficient to establish a reasonable uncertainty of the Union's majority status.<sup>6</sup> Thus, in the year prior to conducting its poll, the Employer's direct evidence consists of antiunion statements and/or employee resignations from 21 employees, or roughly 16% of the bargaining unit. Moreover, we agree with the Region that the Employer is precluded from relying on much of this

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<sup>5</sup> See Levitz, 333 NLRB No. 105, slip op. at 7 (2001). Because the Board declined to change the standard for employer polling, the current reasonable uncertainty standard as interpreted by the Supreme Court in Allentown Mack Sales & Service v. NLRB, 522 U.S. 359 (1998) should be applied.

<sup>6</sup> See Allentown Mack, above, 522 U.S. at 369 (confirmed opposition from 20% of the unit alone was not enough to permit a conclusion of reasonable uncertainty). See also Hospital Metropolitan, 334 NLRB No. 75, slip op. at 3 (2001), enfd. 49 Fed.Appx. 320 (D.C. Cir. 2002) (decertification petition alone could not support a withdrawal of recognition under reasonable uncertainty standard because such petitions require the support of only 30% of unit employees, citing Dresser Industries, 264 NLRB 1088, 1088 (1982)); Heritage Container, Inc., 334 NLRB No. 65, slip op. at 1 (2001) (employer could not establish reasonable uncertainty by showing that only 35% of unit signed antiunion petition, even if petition were untainted). Compare Alcon Fabricators, 334 NLRB No. 85, slip op. at 2 (2001) (employer had a reasonable uncertainty where, within a two-month period preceding withdrawal of recognition, 5 of 14-15 unit employees stated they did not wish to be represented by the union, a decertification petition was filed, and two employees stated that in their view, a majority of employees no longer supported the union).

direct evidence of disaffection because it is stale. The Board has held that evidence of employee disaffection that is seven months old is too stale to be a reliable indicator of the employees' union sentiments.<sup>7</sup> In the six months prior to the poll, there were only eight employee resignations from the Union, and one isolated employee antiunion statement. Thus, the Employer had probative direct evidence of disaffection from only one percent of the unit.

With regard to indirect evidence that must be considered under Allentown Mack, the June 2001 employee statement regarding the Union sentiments of employees in a particular department might be relied on by the Employer to establish reasonable uncertainty under different circumstances,<sup>8</sup> but was too stale to be a reliable indicator of the employees' Union sentiments when the poll was conducted a year later. The statement by another disaffected employee that other employees felt as he did, did not in any way identify these alleged employees so as to create a reasonable uncertainty about the Union sympathies of a specific number or group of employees. The supervisors' statements that the "talk" among the employees had been "extremely negative" in the years 2001-2002, and that unnamed employees had expressed dissatisfaction with the Union's health plan and dues increase, were similarly vague. Finally, the failure of employees to authorize dues checkoff, the failure of new hires to join the Union, and the decrease in the number of Union stewards, cannot constitute evidence of a change in employee desires regarding Union representation.<sup>9</sup>

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<sup>7</sup> See Hospital Metropolitano, above, slip op. at 2 (seven month old employee petition was "stale evidence" and thus not a reliable indicator of employees' union sentiments at time of employer's withdrawal); Rock-Tenn Co., 315 NLRB 670, 672 (1994), enfd. 69 F.3d 803 (7<sup>th</sup> Cir. 1995), overruled on other grounds Chelsea Industries, 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002) (seven month old employee petition was stale and did not accurately indicate employees' true union sentiments).

<sup>8</sup> See, e.g., Allentown Mack, above, 522 U.S. at 369-70 (employer could rely in part on employee statement that "the entire night shift did not want the [u]nion").

<sup>9</sup> See Levitz, above, slip op. at 11-12 n.60 & 12, citing Henry Bierce Co., 328 NLRB 646, 649-51 (1999), affd. in relevant part per curiam and remanded 234 F.3d 1268 (6<sup>th</sup> Cir. 2000).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer's poll violated Section 8(a)(1) and (5).<sup>10</sup>

B.J.K.

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<sup>10</sup> Arguably the poll was also unlawful in that it was conducted eight months prior to the contract's expiration, and approximately five months before the open period in which the Employer could have filed an RM petition. Thus, the poll was conducted at a time when the Union enjoyed an irrebuttable presumption of majority status and the Employer could not have lawfully withdrawn recognition. However, the Region should not allege this as an alternative theory of violation. We have uncovered no specific case support for a *per se* rule that the Employer could not have lawfully conducted a poll eight months before contract expiration if it had a reasonable uncertainty regarding the Union's majority status. The Employer clearly violated the Act here by polling without a reasonable uncertainty regarding the Union's majority status.