

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

Advice Memorandum

DATE: February 12, 2001

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: Horizon House
4-CA-29830

530-4080-0125

530-4080-5012-1700

This case was submitted for advice as to whether the Employer had a valid "good faith doubt" about the Union's continued majority status under Allentown Mack,¹ such that its refusal to bargain for a successor contract did not violate Section 8(a)(5).

FACTS

The contract between District 1199C, National Union of Hospital and Health Care Employees, AFSCME (the Union) expired on September 30, 2000. The Union made repeated requests for negotiations beginning on July 1. On August 14 and 30, the Union requested information relevant to collective-bargaining. The Employer never responded to the Union's requests for bargaining or to the requests for information. On August 30, the Union filed grievances protesting supervisors performing bargaining unit work, employees not being paid overtime, and the Employer failure to post work schedules. The Employer has failed to process these grievances. On September 21, the Union sent the Employer a list of tentative proposals. The Employer has not responded to the Union's proposals.

On October 2, the Employer, by memorandum, notified employees that it "would try to have the union decertified" and that it was filed a petition with the Board to have an election in which employees could "vote to have a union or not." By letter to the Employer dated October 9, the Union enclosed seven union cards, one a dues checkoff card, which it had obtained at an August 29 meeting. The Union had obtained five additional cards prior to that. On October 11, the Employer filed an RM petition, stating that there are 20 employees in the unit.

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

The Employer asserts that it has a good faith doubt concerning the Union's majority status. It relies on the following:

- A majority of bargaining unit employees have failed to sign dues authorization cards.
- Only three employees attended a Union meeting.
- No employee has replaced the in-house Union delegate who resigned in January.
- Employees routinely decline Union representation during disciplinary proceedings.
- A prominent Union leader told the Employer in January that employees did not want the Union anymore and wanted to get rid of the Union and told a supervisor in March or April that employees were working on a decertification petition.
- Employees collected an unknown number of signatures for a decertification petition.

ACTION

Complaint should issue, absent settlement, alleging that the Employer did not have good faith doubt of the Union's majority status. Thus, the Employer violated Section 8(a)(5) when it refused to bargain with the Union as of July 1; failed to provide relevant information to the Union, and failed to process grievances.

In Allentown Mack, the Supreme Court held that "doubt" in the context of the Board's good faith doubt standard can only mean "an uncertainty" as to majority union support, not "a disbelief."² Specifically, the Court held that "[u]nsubstantiated assertions that other employees do not support the union certainly do not [reliably] establish the fact of that disfavor," but that under the Board's legal standard all that is required is "the existence of a reasonable uncertainty. . . ." Id. at 824.

² Id. at 823 (emphasis added). The Court also held that "[t]he Board cannot covertly transform its presumption of continuing majority support into a working assumption that all of a successor's employees support the union until proved otherwise." Id. at 825.

Applying this standard to the evidence excluded by the Board in Allentown Mack, the Court held that the employer was privileged to rely on the circumstantial evidence excluded by the Board because it "contribute[d] to a reasonable uncertainty whether a majority in favor of the union existed." Id. at 825. Further, the Court held that, in light of the direct anti-union statements of seven employees, the additional circumstantial evidence of the shop steward that a majority of employees would vote the Union out, and the night shift mechanic that the entire shift of five to six employees did not want the Union, established a good faith doubt of the union's majority status. This was particularly true where, as the Court noted, the "most pro-union statement . . . was [the shop steward's] comment that he personally 'could work with or without the Union,' and 'was there to do his job.'"³

We conclude that the Employer did not have a good faith doubt of the Union's majority status under Allentown Mack. Unlike the facts in Allentown Mack, there is no direct evidence that employees no longer supported the Union. The only direct evidence relied on by the Employer is a statement by one employee allegedly stating that employees do not want the Union. While this evidence must be considered, it is not sufficient evidence to establish a good faith doubt of majority status,⁴ especially where the employee in question, the Union's former delegate and current member of the its negotiating team, denied telling the Employer that employees did not want the Union but asserts that she told the Employer only that she personally was dissatisfied with the Union. Thus, these facts distinguish this case from Allentown Mack, where the Court noted that a statement by an employee (Bloch) that the entire night shift did not support the union contributed to "existence of a reasonable uncertainty on the part of the employer regarding" employees' lack of support for the union, and should "be given considerable weight" 118 S.Ct. at 824, in circumstances where there was direct evidence that 20% of the unit did not want the union. Moreover, evidence from January is too stale to form the basis of good faith doubt in October.⁵

³ Id. at 825 (citing the ALJ's decision, 316 NLRB at 1207).

⁴ Westbrook Bowl, 293 NLRB 1000, 1001, n.11 (1989).

⁵ Rock-Tenn Co., 315 NLRB 670, enfd. 69 F.3d 803 (7th Cir. 1995).

Further, all the circumstantial evidence relied on by the Employer is insufficient to establish a good faith doubt. First, the Board has long held that employees' unwillingness to authorize dues deductions or join the union does not demonstrate lack of union support.⁶ Second, poor attendance at union meetings by itself does not indicate lack of majority support.⁷ We note, however, that between 8 and 10 employees out of a unit of 20-21 attended the Union's August 29 meeting. Third, the fact that the Union has not replaced the union delegate who resigned in January does not establish good faith doubt of union majority status.⁸ Fourth, the Employer has failed to provide evidence as to its assertion that employees have declined union representation at disciplinary meetings. But even if they had, that alone would not indicated lack of employee support for the union for there are many reasons employees may decide not to involve the union, including fear of employer retaliation. Further, the Union states that it has processed six grievances in the past three months and asserts that it regularly represents employees in disciplinary proceedings. Finally, as to the alleged decertification petition, it was never filed and there is no evidence how many employees actually signed it nor did statements to the Employer concerning the decertification petition give the Employer a good faith doubt since the extent of employee dissatisfaction was never discussed.

Accordingly, at no time did the Employer have sufficient good faith doubt of the Union's majority status. Thus, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) when it refused to bargain with the Union as of July 1⁹; failed to provide relevant information to the Union, and failed to process grievances.

B.J.K.

⁶ Stratford Visiting Nurses Assn., 264 NLRB 1026 (1982); Odd Fellows Rebekah Home, 233 NLRB 143 (1977); Henry Bierce Co., 328 NLRB No. 85 (1999).

⁷ Robinson Bus Service, Inc., 292 NLRB 70 (1988).

⁸ Henry Bierce Co., supra.

⁹ We use this July 1 date since the Union requested bargaining at that time and the Union never responded to the Union's requests despite the Union's numerous phone calls.