

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

Advice Memorandum

DATE: October 25, 1999

TO : Victoria E. Aguayo, Regional Director
Region 21

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

SUBJECT: Campo Enterprises, Inc. 530-4080-0125
d/b/a Shred-It San Diego 530-4080-5012-6700
Case 21-CA-33357 530-8027-9000

This case was submitted for advice as to whether, in light of Allentown Mack v. NLRB,¹ a petition signed by all unit employees seeking an election created a reasonable good faith doubt of the Union's majority status.

FACTS

On May 18, 1998, Teamsters Local 481 (the Union) was certified as the collective-bargaining representative of the Employer's eight customer service representatives. The parties have engaged in hard bargaining for a first contract, and have not reached an agreement.²

On or around May 24, 1999, the Employer was presented with a petition signed by all eight unit employees. The petition states that:

Employee Petition for Union Decertification

The undersigned of Shred-It San Diego (Campo Enterprises, Inc.) presently represented by the Teamsters Union Local #481, wish to have the National Labor Relations Board conduct an election, since we believe that the majority of employees in our unit no longer wish to be represented by the above union.

On May 27, the Employer withdrew recognition from the Union, stating that it had obtained "sufficient objective

¹ 522 U.S. 359 (1998).

² The Union has filed a charge alleging that the Employer has bargained in bad faith. The Region has determined that there is insufficient evidence to support that allegation.

evidence that the Teamsters Local 481 no longer represents a majority of the employees within the appropriate bargaining unit."³

ACTION

The Region should issue complaint, absent settlement, alleging that the employee petition requesting a vote was insufficient to establish a good faith doubt of the Union's continued majority status, and thus that the Employer violated Section 8(a)(5) by withdrawing recognition from the Union. The Region should additionally argue that the Employer could not withdraw recognition under the General Counsel's position in Chelsea Industries.⁴

It is well established that upon expiration of a union's certification year, the Board presumes that an incumbent union has continued majority status.⁵ This presumption may be rebutted: (1) by showing that the union did not in fact enjoy majority status; or (2) by presenting evidence of a sufficient objective basis for a good faith reasonable doubt of the union's majority status.⁶ If either standard is satisfied, an employer is privileged to withdraw recognition from the union,⁷ or to conduct an informal

³ Employee Chris Garza originally sought to file the employee petition with the Resident Office as a decertification petition. No one was available to assist Garza at that time, and he was given a June 7 appointment. The Employer was then given the employee petition, and filed an RM petition on May 25. Prior to submitting its "objective considerations" documentation, the Employer submitted an oral withdrawal of its petition and instead withdrew recognition from the Union.

⁴ Chelsea Industries, Inc., Case 7-CA-36846.

⁵ Station KKHI, 284 NLRB 1339, 1340 (1987), enfd. sub nom. NLRB v. Buckley Broadcasting Corp. of California, 891 F.2d 230 (9th Cir. 1989), cert. denied, 496 U.S. 925 (1990).

⁶ Id.

⁷ Celanese Corp., 95 NLRB 664, 672 (1951) (employer's good faith doubt privileges withdrawal of recognition).

employee poll to determine the employees' continued support for the union.⁸

The employer has the burden of proving the existence of a good faith reasonable doubt as to the union's continued majority status.⁹ In order to establish a good faith doubt, "[t]he most persuasive evidence, of course, would consist of expressed, unsolicited indications from the majority of employees that they do not wish the union to represent them."¹⁰ The Board consistently has discounted the probity of circumstantial evidence in demonstrating an employer's reasonable good faith doubt.¹¹ The Board also has held that employee requests for an election are not expressions of repudiation of the union that can create a reasonable good faith doubt of a union's majority status. Thus, in Phoenix Pipe & Tube Co.,¹² the employer withdrew recognition from the union, citing a reasonable doubt based on: (1) the repudiation of the union by approximately 45% of the unit, (2) the opinions of several anti-union employees that other, unnamed employees similarly rejected the union, and (3) a petition signed by a majority of the unit requesting "the right to vote for or against a union shop." Even assuming arguendo the validity of the direct evidence of repudiation by 45% of the unit, the Board held that the employer unlawfully withdrew recognition because the employee petition could not serve as a basis for a reasonable, good faith doubt where, by its express terms, it "did not unequivocally repudiate the Union."¹³

⁸ Texas Petrochemicals Corp., 296 NLRB 1057, 1059, 1062-63 (1989), enfd. in pert. part, 923 F.2d 398 (5th Cir. 1991); Montgomery Ward & Co., 210 NLRB 717 (1974).

⁹ Auciello Iron Works, Inc., 317 NLRB 364, 368 (1995), enfd. 60 F.3d 24 (1st Cir. 1995), affd. 517 U.S. 781 (1996).

¹⁰ Liquid Carriers Corp., 319 NLRB 317, 319 (1995), enfd. 101 F.3d 691 (3d Cir. 1996).

¹¹ Id.

¹² 302 NLRB 122 (1991), enfd. 955 F.2d 852 (3d Cir. 1991) (emphasis supplied).

¹³ Id. at 122-23. The Board reaffirmed this "unequivocal repudiation" standard in Pic Way Shoe Mart, 308 NLRB 84 (1992), where it adopted an ALJD which, in reliance on Phoenix Pipe & Tube, rejected the probative value of a petition in which seven of the eight unit employees called for "a vote on whether to have a union or not." Id. at 89.

In Allentown Mack v. NLRB, the Supreme Court denied enforcement of a Board order finding that the employer lacked a good faith reasonable doubt as to the union's majority status. The Board had concluded that the employer lacked a good faith doubt because it could legitimately rely only on the direct statements of 7 of the 32 employees retained by the employer, or roughly 20 percent of the unit.¹⁴ The Board excluded the following evidence due to its asserted lack of probative value: statements made by 8 employees during job interviews that they no longer supported the union; a statement of a night shift mechanic that his entire shift of 5 or 6 employees did not want the union; and a statement by the unit's shop steward that he believed the employees did not want a union and that, if a vote were taken, the union would lose.¹⁵

The Court upheld as rational the "unitary" legal standard which the Board applies to employer polling of employees, withdrawal of recognition and RM petitions -- good faith reasonable doubt as to the union's majority status as established by a preponderance of the evidence.¹⁶ However, the Court held that the Board has de facto consistently and unlawfully applied a higher legal standard by systematically excluding probative circumstantial evidence. According to the Court, in applying its good faith reasonable doubt standard, the Board has interpreted "doubt" as "disbelief" in the Union.¹⁷ As a result, the Board has effectively required that "employers establish their reasonable doubt by more than a preponderance of the evidence."¹⁸ The Court rejected this interpretation, and instead 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."¹⁹ Specifically,

¹⁴ Allentown Mack, 118 S. Ct. at 824. See Allentown Mack Sales & Service, Inc., 316 NLRB 1199, 1199-1200 (1995), enfd. 83 F.3d 1483 (D.C. Cir. 1996).

¹⁵ Allentown Mack, 118 S.Ct. at 824.

¹⁶ Id. at 822-23.

¹⁷ Ibid.

¹⁸ Id. at 826.

¹⁹ Id. at 823 (emphasis added). The Court also held that "[t]he Board cannot covertly transform its presumption of

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. . . ."20

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."21 Further, the Court held that, in light of the direct anti-union statements of seven employees, the additional circumstantial evidence of the shop steward and the night shift mechanic 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.'"22

In Allentown Mack, the Court implicitly called into question the continued viability of the Board's Phoenix standard of "unequivocal repudiation." Although the Court did not directly address the probative value of an employee petition for a vote, it admonished the Board that indirect evidence "depending on the circumstances ... can unquestionably be probative to some degree of the employer's good faith reasonable doubt."23 The Court concluded that circumstantial evidence at issue there (employee opinion testimony and expressions of dissatisfaction with the quality of union representation) which the Board had rejected as unreliable, properly constituted some evidence of repudiation. Thus, Allentown Mack requires the Board to assess the reasonable impact of a petition requesting a vote regarding union representation on an employer asserting a good faith doubt.

continuing majority support into a working assumption that all of a successor's employees support the union until proved otherwise." Id. at 825.

20 Id. at 824.

21 Id. at 825.

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

23 Id. at 829.

In this case, there is no evidence that any employee unequivocally repudiated the Union. Since the employee petition constitutes the only evidence proffered by the Employer in support of its good faith doubt, it merits close scrutiny.²⁴ The petition states that the employees "wish to have the National Labor Relations Board conduct an election. . .," which clearly indicates that the employees wanted to vote about union representation. Concededly, the petition states, as the reason for the election request, that "we believe that the majority of employees in our unit no longer wish to be represented by the above union." However, in signing such a statement, no employee has indicated that he himself does not want union representation, or even that he knows others do not want union representation. Rather, each employee has stated that he believes a majority of the employees may no longer desire union representation and that the appropriate thing to do under the circumstances is conduct an election to determine whether the union still has majority support. Thus, we conclude that the employees were not through this petition expressing their rejection of the Union, but merely their desire to vote about continued representation.²⁵

We therefore conclude that, although the petition provided some evidence of employee disaffection with the Union, it was insufficient to establish a reasonable good faith doubt under Allentown Mack in circumstances where the employees clearly wanted an opportunity to vote about continued representation. Thus, the Employer could not have had a "genuine, reasonable uncertainty about whether [the Union] enjoyed the continuing support of a majority of unit employees,"²⁶ and violated Section 8(a)(5) when it withdrew recognition.

The Region should also argue in the alternative that the Employer should not be permitted to withdraw recognition from the Union absent a loss in a Board-run election, as

²⁴ In Liquid Carriers, 319 NLRB at 320, the Board stressed that it is "particularly diligent in its examination of the circumstantial evidence presented" when an employer's claim of good faith doubt is not based on any direct indication from employees as to their disaffection with the union.

²⁵ See Easton Hospital, 4-CA-27704, Advice Memorandum dated March 30, 1999 (concluding that petition seeking election because "we feel that we have been misrepresented" did not create a reasonable doubt of the union's majority status).

²⁶ 118 S.Ct. at 823 (emphasis added).

argued in the General Counsel's brief in Chelsea Industries, supra (attached).

Accordingly, the Region should issue complaint, absent settlement, to allege that the Employer violated Section 8(a)(5) by withdrawing recognition from the Union.

B.J.K.