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

Advice Memorandum

DATE: June 9, 1998

TO : Gerald Kobell, Regional Director
Region 6

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

SUBJECT: Northwest Medical Center, Inc. 530-4080-0125
d/b/a Sugar Creek Station 530-4080-5012-1700
Case 6-CA-29549

This case was submitted for advice as to whether the Employer's refusal to recognize and bargain with the Union, based on an asserted good faith doubt of the Union's majority support, violated Section 8(a)(5) in light of the Supreme Court's decision in Allentown Mack.[1]

FACTS

The facts are set out in detail in the Region's Request for Advice. Briefly, the Employer, a Burns[2] successor, purchased this nursing home facility on December 9, 1997 and began operating it on January 1, 1998[3] with virtually all of its predecessor's employees. By letter dated January 20, the Union, which had represented the employees since 1976, demanded bargaining. By letter dated January 29, the Employer refused to recognize the Union, and stated in pertinent part that:

> [B]ased on our review of county records, we do not believe that a majority of Sugar Creek

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[1] Allentown Mack Sales & Service, Inc. v. NLRB, 118 S. Ct. 818, 157 L.R.R.M. 2257 (January 26, 1998). This case was also submitted for a determination regarding the propriety of Section 10(j) injunctive relief. That will be addressed in a separate memorandum.

[2] NLRB v. Burns Int'l Security Serv., 406 U.S. 272 (1972).

[3] All dates hereafter are in 1998 unless otherwise noted.

> Station employees are members of the Union or have authorized membership in the Union. Secondly, based on numerous comments our supervisors have overheard, it appears that the Union has lost the support it may have had in the past.

By letter dated February 3, the Union disputed those asertions and submitted a copy of a May 1997 membership list, and December 1997 checkoff roster, demonstrating that 64 employees were active, dues-paying members of the Union at those times.[4] As of the first pay period after the takeover, in January 1998, there were 128 employees in the bargaining unit.

The Employer has continued to refuse to recognize the Union, and has made various unilateral changes in terms and conditions of employment. On March 18, the Employer filed a petition in Case 6-RM-711 seeking an election among the unit employees, which is being held in abeyance pending the resolution of the unfair labor practice issues.

In support of its contention that it had a reasonable, good faith doubt of the Union's majority status, which privileged its denial of recognition and subsequent unilateral changes, the Employer relies primarily on alleged statements by employees to supervisors regarding their dissatisfaction with the Union.[5] Those alleged statements are described in numerous affidavits from supervisors, which were supplied by the Employer. The

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[4] An additional member was on disability leave at the time.

[5] The Employer also relies upon several assertions which the Region correctly has found to be untrue and/or irrelevant to the question of the Union's continued majority status: (1) that there was no collective bargaining agreement in effect for two years prior to the takeover (false); (2) that the Union was never certified as the majority representative of these employees (false); (3) that fewer than a majority of the employees had authorized dues checkoff (false and irrelevant); and (4) that there was low attendance at Union meetings and at informational picketing conducted by the Union (irrelevant).

affidavits generally do not specify names, dates, or contextual details regarding the alleged employee statements. In response to the Region's request for more specific information, the Employer responded that the supervisors could not provide any further details. The Region has contacted the few employees the supervisors have identified as making anti-Union statements, and some have adamantly denied making the alleged statements.

ACTION

We conclude that the Employer lacked a good faith reasonable doubt as to the Union's majority status, and therefore violated Section 8(a)(5) when it refused to recognize and bargain with the Union.

In Allentown Mack, 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 when it conducted an internal poll of employee support for the union and relied on that poll to refuse to recognize the union. The Court concluded that the Board has, in practice, applied a more rigorous legal standard by systematically excluding probative circumstantial evidence.

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.[6] 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.[7]

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[6] 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).

[7] 118 S.Ct. at 824.

The Court upheld as rational the Board's "unitary" legal standard -- good faith reasonable doubt as to the union's majority status by a preponderance of the evidence which the Board applies to employer polling of employees, as well as employer withdrawal of recognition and RM petitions.[8] However, the Court held that the Board has de facto consistently and unlawfully applied a higher legal standard by systematically excluding probative circumstantial evidence.[9] According to the Court, in applying its good faith reasonable doubt standard, the Board interprets "doubt" as "disbelief" regarding the Union's majority status.[10] As a result, the Board effectively requires that "employers establish their reasonable doubt by more than a preponderance of the evidence."[11] The Court rejected this interpretation, and held that "doubt" in the context of the Board's good faith doubt standard need only be "an uncertainty" as to majority union support, not "a disbelief."[12] 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. . . ."[13]

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

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[8] Id. at 822-23.

[9] Id. at 823.

[10] Ibid.

[11] Id. at 826.

[12] 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.

[13] Id. at 824.

excluded by the Board because it "contribute[d] to a reasonable uncertainty whether a majority in favor of the union existed."[14] Further, the Court held that, in light of the direct anti-union statements of seven employees, the circumstantial evidence of the shop steward and the night shift mechanic established a good faith doubt as to 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.'"[15]

Here, the Employer asserts that a majority of the employees have at some time either directly or indirectly (i.e., through other employees) expressed their disaffection with the Union to the Employer's supervisors. However, with regard to most of the alleged employee statements, the supervisor-affiants were unable to specify whether the statements were made before or after the Employer's refusal to recognize the Union.[16] Also, with regard to most of the alleged statements, the supervisor-affiants could not name the employees who made the statements, much less name the additional employees for whom some employees purported to speak. Thus, there is no way the Employer reasonably could have determined that there were a large number of dissatisfied employees, rather than a few employees making similar statements to many supervisors.

It appears, from the Region's evaluation of the evidence, that there are at most nine employees, of the 128 employees in the unit at the relevant time, as to which the Employer had either direct or probative circumstantial evidence that they disavowed Union representation prior to its decision to refuse to recognize and bargain with the

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[14] Id. at 825.

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

[16] Indeed, at least 13 of the alleged statements clearly were made after the refusal to recognize.

Union: Gary Blum, Russell Bell,[17] James McDonald, Madeline Carlson, William Carlson,[18] and four employees whom the Carlsons described to supervisors as no longer wanting Union representation (Deb Hines, Dennis Moore, Sandy Secco, and one unnamed employee). Thus, there were direct anti-union statements from at most five employees who expressed their views to the Employer prior to its refusal to recognize the Union. In addition, pursuant to Allentown Mack, the Employer was entitled to consider circumstantial evidence, conveyed to the Employer by named employees prior to the refusal to recognize, that four other employees no longer supported the Union. The remaining Employer assertions that employees made statements to supervisors regarding their dissatisfaction with the Union cannot constitute meaningful circumstantial evidence of a loss of majority support on which the Employer could legitimately have relied in denying recognition. In this regard, the Employer merely contends that employees who could not be identified, made general statements of dissatisfaction that could not be particularized, to supervisors at unspecified times which concededly could have been after recognition was denied. The dissatisfaction of 9 of 128 employees in the bargaining unit could not have engendered a reasonable uncertainty regarding the Union's majority status.

Nor did the Employer have a reasonable uncertainty regarding the Union's majority support based on its knowledge that 64 of the 128 employees, just under a majority, were dues-paying members of the Union.[19] The

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[17] Bell might not be a unit employee. He is a temporary employee who works no regular schedule, and his name is not on the January payroll records.

[18] McDonald and the Carlsons confirm that they made the alleged statements, before the Employer's refusal to recognize, but to supervisors of the predecessor who were not (with one exception) hired by the Employer. The Employer has not as of yet demonstrated that it was aware of those statements before it refused to recognize the Union.

[19] In fact, 65 employees were members; one member was on disability leave and his name was not included on the list given to the Employer.

Board has long held that membership or check-off by fewer than a majority of unit employees cannot form the basis for a reasonable doubt permitting a withdrawal of recognition.[20] That is because the number of employees who are members of, or have chosen to financially support, an incumbent union does not reflect the number of employees who desire representation by that union; employees often are content to enjoy the benefits of union representation without joining the union or giving it financial support. Indeed, it could even be argued here that the Union membership of almost a majority of the employees should have indicated to the Employer that it was likely that a majority of the unit favored Union representation.[21]

Accordingly, the Region should issue a complaint, absent settlement, alleging violations of Section 8(a)(5) of the Act.[22]

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[20] See Odd Fellows Rebekah Home, 233 NLRB 143 (1977); Golden State Habilitation Convalescent Center, 224 NLRB 1618, 1619 (1976).

[21] In Allentown Mack, the court indicated that contemporaneous evidence of continued majority status would be relevant in determining whether evidence of dissatisfaction with the union created a reasonable uncertainty as to the union's majority status. 118 S.Ct. at 825. That is consistent with Board precedent finding that an employer faced with "dueling evidence" cannot selectively choose to rely alone on the evidence supporting a loss of majority. See Katz's Deli, 316 NLRB 318, 322 (1995), enfd. 80 F.3d 755 (2d Cir. 1996); Rock-Tenn Co., 315 NLRB 670, 672-673 (1994), enfd. 69 F.3d 803 (7th Cir. 1995).

[22] In Chelsea Industries, Inc., 7-CA-36846, and Levitz Furniture Co., 20-CA-26596, the General Counsel recently filed briefs with the Board wherein he took the position that Celanese Corp. of America, 95 NLRB 664 (1951), should be overruled and withdrawals of recognition from a certified union prohibited absent an election. [*FOIA Exemption 5*

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B.J.K.