

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

Advice Memorandum

DATE: June 30, 2000

TO : Paul Eggert, Regional Director
Region 19

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

SUBJECT: Bi-Mart Corporation
Case 36-CA-8514

This Section 8(a)(5) withdrawal of union recognition case was submitted for advice on whether (1) the Region should pursue the Employer's withdrawal under a Chelsea¹ theory, and (2) alternatively, under a Penn Tank² theory, whether the Employer should have restored recognition based on a post-withdrawal demonstration of the Union's majority support.

FACTS

In 1998, Teamsters Local Union 206 (Union) was certified by the Board as collective-bargaining representative of a unit of warehouse employees at retailer Bi-Mart Corporation's (Employer) warehouse in Eugene, Oregon. Thereafter, the Employer and Union bargained unsuccessfully for a collective-bargaining agreement. In around March 1999, the Employer engaged in several alleged unfair labor practices, including unilateral changes and refusal to furnish information requested by the Union.

At approximately the same time, warehouse employee Ali Savusa circulated for co-workers' signatures, a petition that expressed dissatisfaction with the their representation by the Union and indicating that the signers no longer wanted to be represented by it. By the end of March, Savusa had collected signatures from a bare majority of the Employer's 66 employees. On April 19, Savusa filed a decertification petition with the Board and submitted the March signatures as his showing of interest. The petition was blocked by the pending unfair labor practice charges.

¹ See General Counsel's Position Statement on Reconsideration by the Board, Chelsea Industries, Case 7-CA-36846 (filed May 15, 1998) (pending before the Board).

² Case 12-CA-19746 (pending before the Board).

On April 22, Savusa handed a copy of the showing of interest to the Employer's warehouse manager and simultaneously submitted a letter to the Employer requesting that it "dismiss" the Union, without an election if possible. The Employer declined. At a bargaining session in May, Union Agent Stephan Ostrach told Employer negotiators that he believed that the Union still represented a majority of the employees, the Savusa petition notwithstanding.

In the first half of June, 34 employees (of 66 or 67) signed a petition requesting that Savusa "withdraw the petition he filed with the NLRB." Around that time, Union Agent Ostrach told Employer negotiators about the new petition and reasserted his belief in continued majority support. On June 8, the Union conducted "sticker day" at the warehouse, during which approximately 40 employees wore stickers bearing the phrase "Teamster Unity = A Good Contract." The next day, based on participation in sticker day, Ostrach again expressed to the Employer his belief in majority status. On June 18, the Employer informed the Union that it was withdrawing recognition. On June 28, Ostrach wrote the Employer asking it to reconsider because, in asserting a doubt of majority it should not have ignored either the petition requesting that Savusa withdraw the decertification petition or the results of sticker day. Ostrach also offered to have a neutral third party chosen by the Employer verify that a majority had signed the Union's June petition. The Employer declined and told the Union that only the Board was qualified to assess the Union's current status.

In mid-July, the Union proposed an election for August, a suggestion that the Employer almost immediately rejected. On the 22nd, the Union informed the Employer that it had a new petition, signed by 39 employees (of approximately 65) who pledged to vote for the Union in a new election and expressly authorized their signatures to be distributed "to convince management to return to negotiations or to encourage others to vote yes." On July 27, the Employer proposed an election for September 8 and gave the Union until August 6 to agree. The Union never responded and the offer lapsed, but on July 28, the Union published its recent petition and the 39 supporting employee signatures in the Eugene daily newspaper.

ACTION

The Region has concluded that it will issue complaint alleging lack of good faith reasonable doubt of the Union's majority because the Employer relied exclusively on the April decertification petition, which was "tainted" by the

Employer's unremedied unfair labor practices. See Vincent Industrial Plastics.³ As discussed in detail below -- even assuming that the unfair labor practices were insufficient to taint the decertification petition -- we concluded that the Employer lacked of good faith reasonable doubt as defined by the Supreme Court in Allentown Mack.⁴ We further conclude that the Region should also allege under Chelsea that the Employer is not privileged unilaterally to withdraw recognition from a certified union, but must await the results of a new election or other agreed-upon test of actual union support. Lastly, we conclude that the Region should argue, under Penn Tank, that the Employer was not privileged to ignore the post-withdrawal prounion petition and that AMBAC International, Ltd.⁵ should be overruled.

1. As noted, the Region intends to allege that the Employer's unremedied unfair labor practices were sufficiently destructive of the Union's representative status to have tainted the decertification petition upon which the Employer exclusively relied. It should also argue that, even assuming that the petition was not tainted, other circumstances existing at the time of withdrawal nevertheless undermine the Employer's assertion of a good faith reasonable doubt of a union majority.

In Allentown Mack, the Supreme Court rejected a Board order finding that the employer there lacked a good faith doubt of the incumbent union's continued majority status. The Board had discounted some of the employer's evidence of doubt because it was based in significant part on "indirect" (that is, second- or third-hand) employee reports that co-workers also disfavored the union. The Court viewed the Board's analysis as predicated on a tacit rule that employers were required to prove actual loss of majority by "a strict head count."⁶ It held that the Board's good faith doubt standard on its face required a less rigorous evidentiary standard -- that, based on the totality of the circumstances, the employer entertained "a genuine, reasonable uncertainty" as to majority status.⁷ The Court held that the employer had therefore legitimately relied on a combination of direct and indirect evidence to

³ 328 NLRB No. 40 (1999), enf'd. in rel. part 209 F.3d 727 (D.C. Cir. 2000).

⁴ 522 U.S. 359 (1998).

⁵ 299 NLRB 505 (1990).

⁶ Allentown Mack, 522 U.S. at 372-73.

⁷ Id., 522 U.S. at 368-70.

establish the requisite uncertainty.⁸

As noted, the circumstances in Allentown Mack all indicated that the union no longer enjoyed majority support. The Court made clear, however, that if there had been similarly direct or indirect evidence that weighed on the side of union support, it would have been relevant to the employer's consideration of whether it could entertain a good faith reasonable doubt.⁹ That observation by the Supreme Court is consistent with the Board's longstanding view that when evidence supporting a union's minority status is undermined, or at least offset by, evidence of continuing majority status, an employer must show that it had reasonable grounds nevertheless to doubt continuing majority. In other words, the employer must attempt to "unravel the conflicting messages it had received from its employees in order to determine the extent of true opposition to the Union." NLRB v. LaVerdier's Enterprises,¹⁰ quoted in Rock-Tenn Co. v. NLRB.¹¹ See also Safe-Way Door;¹² Katz's Delicatessen;¹³ Vic Koenig Chevrolet.¹⁴

Here, at the time the Employer withdrew recognition on June 18, relevant evidence included the conflicting messages contained in the March decertification petition supported by 34 of 66 unit employees and the June petition,

⁸ Id., 522 U.S. at 370.

⁹ Allentown Mack, 522 U.S. at 371.

¹⁰ 933 F.2d 1045, 1053 (1st Cir. 1991) enf'g in rel. part 297 NLRB 826 (employer "took a risk when it withdrew recognition in the midst of mixed signals").

¹¹ 315 NLRB 670, 672-73 (1994), enf'd 69 F.3d 803, 809 (7th Cir. 1995) (employer could not "rely selectively on only part of the conflicting evidence regarding the union sentiments of its employees" when presented with more recent evidence of majority support).

¹² 320 NLRB 849, 851 (1996) (decertification petition no longer supported by majority by time employer withdrew recognition based on petition).

¹³ 316 NLRB 318, 3323 (1995), enf'd. 80 F.3d 755 (2d Cir. 1996) (employer unlawfully withdrew recognition despite evidence of majority support for both incumbent and rival unions, precluding employer from relying exclusively on rival's support).

¹⁴ 321 NLRB 1255, 1260 (1996), enf. denied in rel. part 126 F.3d 947 (7th Cir. 1997) (evidence of both rejection and support for union in consecutive informal polls).

signed by an equal number, asking that Savusa withdraw the decertification petition. In addition, sticker day had resulted in 40 employees wearing pro-union insignias. Those numbers indicate probable overlap and extensive vacillation among employees,¹⁵ if not an outright resurgence of union support. In any event, although the Employer clearly could have a doubt of some sort, it could not have had a genuine, reasonable uncertainty about whether the presumption of continuing majority support was still viable.¹⁶ In light of the above analysis, and the cases cited, we would continue to argue that it was not reasonable for the Employer to resolve selectively the conflicting evidence against the Union and withdraw recognition based exclusively on the decertification petition.

2. We further find that in any event the Employer violated Section 8(a)(5) by withdrawing recognition without a Board-conducted election. The General Counsel's position, articulated to the Board in Chelsea Industries, is that termination of a bargaining relationship can only be predicated on actual loss of majority union support -- as indicated by a Board-conducted election, or through an alternative means of testing majority status that has been agreed upon by the employer and incumbent union. Here, there was neither a Board-conducted election nor an agreed-upon alternative procedure to test actual union support. Consequently, the Employer was not privileged to withdraw recognition of the Union.

3. Finally, the Employer's asserted good faith doubt is further undermined by its disregard of the Union's post-withdrawal petition signed by 39 employees. Under Penn Tank, an employer must consider any such evidence it

¹⁵ It was concluded that the fact that the Union did not immediately offer to document its evidence of support did not relieve the Employer from taking that "indirect" prounion evidence into account in asserting doubt, or at least requiring the Union to in some manner demonstrate its showing of support.

¹⁶ In Allentown Mack, the Supreme Court also pointed out that the union had never won an election, "or even an informal poll," after the successor employer took over and reduced the unit to 32 employees, or 20 percent of the predecessor's work force. Thus, "the union's claim to represent [the 32 employees] rested entirely on the Board's presumption that the work force of the successor has the same disposition regarding the union as did the work force of the predecessor company." 522 U.S. at 371. In the instant case, unlike Allentown Mack, the certified Union won an election in 1998, therefore continued to represent 100 percent of the bargaining unit employees, and had been in negotiations for an initial collective-bargaining agreement for over a year when the Employer withdrew recognition.

receives within a reasonable time of withdrawal. We find that the approximately one-month hiatus between withdrawal and notice to the Employer of the new petition was a reasonably short time to have reversed the withdrawal once again and extended recognition.

[*FOIA Exemptions 2 and 5*

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B.J.K.