

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

Advice Memorandum

DATE: June 19, 1998

TO : James S. Scott, Regional Director
Region 32

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

SUBJECT: University Medical Center
Cases 32-CA-15864 and 15976

530-4080-0125
530-4080-5012-0150
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This Section 8(a)(5) case was submitted for advice on whether the Employer, a putative Burns successor, lawfully declined to accord recognition under Allentown Mack.¹

In 1976, the California Nurses Association (Union) was certified by the County as the representative of a unit of 307 registered nurses (RNs) at a County owned acute care hospital, Valley Medical Center (VMC). Most recently from 1994 through mid-1995, the Union negotiated with VMC at length finally reaching a bargaining agreement in June 1995. On October 7, 1996, the Employer took over operation of VMC, providing the same services to substantially the same customers, and employing a majority of predecessor VMC's unit RNs. The Employer refused to recognize the Union and raised various justifications including alleged employee turnover, inclusion of alleged supervisors in the unit, and the fact that it had succeeded to only a portion of the original County-wide unit. The Region issued complaint and a lengthy hearing was held between October 1997 and April 1998. Briefs to the ALJ are now due June 29, 1998.

Midway through the hearing, the Supreme Court issued Allentown Mack. The Employer then contended that it's refusal to recognize was also lawfully based upon a good faith doubt of the Union's majority status at the time of the takeover. In support of this argument, the Employer adduced the testimony of eight unit RNs, two supervisors and a manager, the Director of Human Resources. The RNs

¹ Allentown Mack Sales & Service v. NLRB, 118 S. Ct. 818 (1998).

testified about what information they had concerning RN disaffection with the Union. The RNs also testified that they then went to the Employer, i.e., the Employer's two supervisors and/or the manager, and advised them in conclusory, general terms about antiunion sentiment among RN staff.²

Concerning the testimony of the supervisors themselves, Kinder stated that in early 1995, after the speech by then Union President Short, some ten RNs asked Kinder how they could get out of the Union. Kinder also testified that after a March 1996 Union rally, 3 RNs told him that they felt "not represented" by the Union. Ultimately, Kinder testified that he believed that the Union did not have majority support, based upon his "close" and "personal" relationship with his staff, which allow Kinder to "pretty much know how people felt." Kinder admitted on cross examination, however, that he did had "no idea" how many employees were in the bargaining unit in the fall of 1996 before he left VMC and became employed by the Employer.

Supervisor Amy Tobin testified that, during the 1994 and early 1995 negotiations, between five and ten RNs stated that they were "dissatisfied" with the Union. Tobin also testified that other nurse managers told Tobin that their staff was "very dissatisfied" and felt that the Union was not representing their concerns during these negotiations. Tobin then testified that after she left VMC in October 1995, which was one year before the Employer took over VMC, she maintained contact with nurse managers who were still employed at VMC. According to Tobin, these

² For example, RN Sandra Yovino told Supervisor Bruce Kinder that "staff had verbalized to me how unhappy they were" with the Union. Yovino told Supervisor Amy Tobin that the "nursing staff felt unsupported and morale was very low." RN Janet McQuillen testified that she generally conveyed to these two Supervisors the opinions of the RNs with whom she worked, and that her RNs were upset with an incendiary speech given in January 1995 by then Union President Karen Short. In that speech, Short angered many RNs by publicly stating that patient care at VMC was insufficient, and that patients lives were being lost do to inadequate conditions at VMC.

nurse managers advised Tobin that the RN level of dissatisfaction remained the same at VMC.

The time intervals in the above testimony centered upon two events, the first being a two week period immediately after the January 1995 speech by the then President Short. Around two months later in March 1995, Short resigned her Union President position. The other time interval concerned the bargaining agreement negotiations occurring throughout the first half of 1995 and continuing until a final agreement was finally reached in June 1995. As noted earlier, the Employer took over VMC well over one year later, in October 1996.

The Region adduced rebuttal testimony from two RNs, who set forth the basis of their mutual belief that the Union in fact did have majority support around October 1996, the time of the Employer's takeover. However, it does not appear that the knowledge and/or beliefs of these two RNs was timely communicated to the Employer. The Region also adduced the testimony of County Human Resources Director Henry Perea who stated that he met with the Employer's attorney and also its Human Resource Director a few months before the Employer's takeover. In that meeting, Perea told both Employer representatives that the Union was the strongest union at VMC, and that more than 50 percent of the unit RNs were Union members.

We conclude, in agreement with the Region, that the Employer did not have a good faith doubt of the Union's majority status under Allentown Mack, and that in addition the Region should argue that the Employer could not refuse to accord recognition under the General Counsel's position in Chelsea.³

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. 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

³ Chelsea Industries, Inc., Case 7-CA-36846.

unit.⁴ 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. 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. Id. at 822-23. 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. Ibid. As a result, the Board effectively required that "employers establish their reasonable doubt by more than a preponderance of the evidence." Id. at 826. 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."⁵ 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.

⁴ Allentown Mack, 118 S. Ct. at 824. See Allentown Mack Sales & Service, Inc., 316 NLRB 1199, 1199-1200 (1995), enf'd, 83 F.3d 1483 (D.C. Cir. 1996).

⁵ 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 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.'"⁶

In the instant case, the Region should first argue that the knowledge and/or beliefs of lack of Union majority held by the 8 RNs is irrelevant, except to the extent that this knowledge and/or beliefs were communicated to the Employer. It is well settled that in asserting a good faith doubt of majority status, an employer is entitled to rely upon only that information it actually possessed at the time it asserted it's good faith doubt or refused to accord recognition.⁷ Thus, the Employer here is entitled to rely upon only the information possessed and testified to by Supervisors Kinder and Tobin, which would include whatever information the 8 testifying RNs conveyed to these Supervisors.⁸

Kinder testified that around 13 RNs directly advised him of their lack of support for the Union; Tobin testified that around 10 RNs similarly directly advised her of their lack of support. Even fully crediting this testimony, the Employer only had direct evidence of Union disaffection from less than 8 percent of the unit. In contrast, the

⁶ Id. at 825 (citing the ALJ's decision, 316 NLRB at 1207.)

⁷ See, e.g., Orion Corp., 210 NLRB 633, 634 (1974), *enfd.* 515 F.2d 81 (7th Cir. 1975); Arkay Packaging Corp., 227 NLRB 397, 398 (1976).

⁸ Thus, the testimony of the eight unit RNs is relevant only to the extent that it corroborated the knowledge of the two Supervisors themselves.

direct evidence of union disaffection in Allentown Mack involved around 20 percent of the unit. The Region should then argue that, although the Employer was entitled to rely in some measure upon the other, indirect evidence of disaffection, that evidence fell far short of establishing a good faith doubt for several reasons.

First, much of the indirect evidence consists of hearsay testimony about what other nurse managers told Kinder and Tobin about unspecified numbers of unit RNs. This nonspecific hearsay evidence is unreliable and vague. In addition, much of both the direct as well as the indirect evidence of employee disaffection occurred in early to mid-1995, well over a year before the Employer refused to accord recognition. This purported disaffection thus occurred in reaction to events that had largely lost their impact and importance by the time the Employer declined recognition. To the extent that RNs were dismayed with the personal outburst of then Union President Short in January 1995, that Union official soon thereafter resigned her position, almost 18 months before the Employer's takeover. And to the extent that RNs were "dissatisfied" with the Union's bargaining progress and the inordinate length of time the Union took to finally reach a bargaining agreement, a final agreement was in fact entered and implemented into almost 16 months before the takeover.

The Employer's attempt to rely upon this stale antiunion sentiment consisted mostly of additional hearsay evidence about nurse managers, who purportedly told Kinder and Tobin that the RNs "continued to be dissatisfied" with the Union. In effect, then, the Employer's good faith doubt in October 1996 was based substantially upon double hearsay evidence of indirect evidence of employee disaffection.⁹ Such evidence cannot establish a good faith reasonable doubt, particularly in the context of direct evidence of disaffection from less than 8 percent of the unit.

⁹ In that regard, the Supreme Court stated: "Of course the Board is entitled to be skeptical about the employer's claimed reliance on second-hand reports when the reporter has little basis for knowledge, or has some incentive to mislead." Allentown Mack, supra, 118 S. Ct. at 829.

Finally, much of both the direct as well as the indirect evidence of employee disaffection involved RNs allegedly stating that they were "dissatisfied" with the Union's performance. Thus, this evidence did not consist of clear, affirmative statements from RNs that they no longer wished to be represented by the Union. We concede that evidence of "dissatisfaction with union performance" is relevant and appropriately part of the mix of circumstances upon which an employer may rely in deciding whether or not it has a good faith doubt. The Supreme Court specifically disapproved of Board cases holding that an employee's statements of "dissatisfaction with the quality of union representation may not be treated as opposition to union representation." *Id.* At 829. On the other hand, the Court went on to note that "such statements are not clear evidence of an employee's opinion about the union . . ." and "depending on the circumstances, the statements can unquestionably be probative to some degree of the employer's good-faith reasonable doubt." *Id.* (Emphasis added.) The Region should argue that direct evidence of employee disaffection from less than 8 percent of the unit, coupled with only this type of vague, unclear indirect evidence, is far less than the evidence found sufficient in Allentown Mack, and also far less than that necessary to establish a good faith doubt.¹⁰

Lastly, we note the Region's rebuttal evidence in the form of testimony from County Human Resources Director Perea, who timely advised the Employer that the Union was the strongest union at VMC and that more than 50 percent of the Union's unit RNs were members. Thus, at the time the Employer declined recognition in October 1996, it knew of

¹⁰ We also note that the Employer, at the time of its refusal to accord recognition, did not rely upon this evidence of good faith doubt of majority status and instead asserted other defenses to the instant allegation. In other words, the Employer itself did not believe that this evidence was sufficiently important to rely upon when it initially refused to accord recognition. The Region should argue for an adverse inference to be drawn from the Employer's failure to assert this evidence at a timely juncture, i.e., should argue that the minimal importance of this evidence is demonstrated by the Employer's untimely, belated assertion of this as a basis for its conduct long after it refused recognition.

both the limited and hearsay evidence of employee disaffection, as well as of the pro-Union evidence related by Perea.

Given this conflicting evidence, plus the limited direct evidence and the limited probative value of that indirect evidence, the Region should argue that the Employer could not have had a "genuine, reasonable uncertainty about whether [the Union] enjoyed the continuing support of a majority of unit employees" (emphasis added).¹¹ In these circumstances, it was unreasonable for the Employer to discount the pro-Union evidence and to refuse recognition. In contrast, in Allentown Mack there was only direct and circumstantial evidence indicating that the union no longer enjoyed majority support. The Court clearly indicated that if there were evidence which would have weighed on the other side, such evidence would be relevant to a good faith doubt determination. Id. at 825.

In this regard, the Board has repeatedly found that where an employer is faced with such "dueling evidence" at the time it withdraws recognition, i.e., where the evidence to support a "good faith doubt" is undercut or offset by evidence showing that the union enjoys majority support, the employer cannot selectively choose to rely alone on the evidence supporting a loss of majority. This proposition is supported by the Safe-Way Door¹², Rock-Tenn Co.¹³ and LaVerdiere's¹⁴.

¹¹ Allentown Mack, 118 S. Ct. at 823.

¹² 320 NLRB 849 (1996) (by the time employer withdrew recognition based on decertification petition signed by 19 of 31 unit employees, four signatories had left and one had become active in union; therefore, by the time of withdrawal, petition no longer supported by majority).

¹³ 315 NLRB 670, 672-73 (1994), enf'd. 69 F.3d 803 (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 majority authorization cards supporting union which were more recent than decertification petition).

In light of the above analysis and the cases cited, the Region should argue that, even in light of Allentown Mack, it was not reasonable for the Employer to selectively resolve conflicting evidence against the Union and to refuse to accord recognition based thereon. Unlike Allentown Mack, here there was strong evidence "on the other side" that the Employer conveniently ignored in choosing to credit the Supervisor's views alone. Therefore, the Employer's resolution of any uncertainty against the presumption of continued majority support for the Union was not a "reasonable" good faith doubt.

Lastly, the Region should argue in the alternative that the Employer could not refuse to accord recognition under the General Counsel's argument in the brief in Chelsea, supra. In this regard, although the Union here was not certified by the Board, it was certified by the state. Thus the underlying rationale in Chelsea is applicable.

B.J.K.

¹⁴ NLRB v. LaVerdiere's Enterprises, 933 F.2d 1045, 1053 (1st Cir. 1991), enf'g. in rel. part 297 NLRB 826 (1990) (employer "took a risk when it withdrew recognition in the midst of mixed signals" where antiunion petition signed by 40 of 70 unit employees was followed a month later by prounion petition signed by 50 employees). See also the Park Associates d/b/a/ Hill Park Health Care, Case 3-CA-20898, Advice Memorandum dated April 23, 1998.