

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

Advice Memorandum

DATE: August 24, 2005

TO : Ronald K. Hooks, Regional Director
Region 26

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

SUBJECT: Grenada Manufacturing
Acquisition Corporation 512-5048-0100-0000
Cases 26-CA-22031, 512-5048-0160-0000
26-CA-22041, and 26-CA-22077 530-4080-0125-0000
530-4080-5012-5000
530-4825-6700-0000

This polling case was submitted for advice as to whether the Employer: (1) had a good faith uncertainty, consistent with Allentown Mack Sales & Service v. NLRB,¹ as to the Union's majority status when it conducted an employee poll; (2) complied with procedural safeguards for employer conducted polls required by Struksnes Construction Co.² and provided the Union with reasonable advance notice of the poll as required under Texas Petrochemicals Corp.;³ and (3) was privileged to withdraw recognition from the Union based on the results of the employee poll.

We conclude that a Section 8(a)(1) and (5) complaint should issue, absent settlement, alleging that the Employer's poll was unlawful because it was procedurally deficient under Struksnes and Texas Petrochemicals and therefore, the Employer was not privileged to rely on the results of the poll to withdraw recognition from the Union. In light of the procedural deficiencies of the poll, it is unnecessary to decide whether the Employer had the requisite good faith uncertainty of the Union's majority status when it polled its employees.⁴

¹ 522 U.S. 359 (1998).

² 165 NLRB 1062 (1967).

³ 296 NLRB 1057 (1989).

⁴ The Charging Party's request for interim injunctive relief under Section 10(j) of the Act will be addressed in a separate memorandum.

FACTS

During its operations as a stamp metal factory, the employees of Grenada Manufacturing LLC ("Grenada") were represented by the United Steelworkers of America, Local 202A (Union) which had been the employees' exclusive bargaining agent for the past 30 years. In January of 2004,⁵ Grenada began negotiations with Grenada Manufacturing Acquisition Corporation (Employer) for the sale of its assets. At the time of the negotiations, a collective bargaining agreement between Grenada and the Union was in effect and was set to expire on January 31. The collective bargaining agreement provided for dues checkoff and allowed employees to revoke their dues deduction authorizations upon written notice to the Employer during the thirty (30) calendar day period starting with the last pay period of the fiscal year.

On January 27, Grenada and the Union agreed to extend the collective bargaining agreement through March 1 while negotiations were underway. On February 23, Grenada and the Employer entered into an asset purchase agreement and the Employer began its operations shortly thereafter.⁶ On March 4, the Employer met with the Union to discuss the future of the company and entered into a temporary agreement which essentially extended the collective bargaining agreement up through October 31 (Agreement). On April 5, Grenada filed for Chapter 11 bankruptcy relief in the United States Bankruptcy Court for the Northern District of Mississippi. In light of the pending bankruptcy proceeding, the Employer granted a further extension of the Agreement to January 31, 2005⁷ and again later to February 23. On February 24, still pending the bankruptcy court's entry of an order approving and finalizing the sale of Grenada's assets to the Employer, the Union President contacted the Employer and requested a further extension of the Agreement. The Employer did not grant the Union's request for an extension. On March 10, the bankruptcy court entered an order approving and finalizing the sale of Grenada's assets to the Employer. Pursuant to the order, the Agreement between the Employer and the Union had been terminated as of February 23, 2005.

⁵ Dates hereafter occurred in 2004 unless noted otherwise.

⁶ The Employer concedes it is a successor employer because it hired all of Grenada's employees and there was no cessation in operations when it took over.

⁷ Dates hereafter occurred in 2005 unless noted otherwise.

The afternoon of March 23, the Employer's HR Manager and General Manager met with both the Union President and Treasurer in the HR Manager's office where they informed them of a poll the Employer intended to conduct the following day to determine if the employees still wanted to be represented by the Union. At the meeting, the Employer provided the Union President and Treasurer with a copy of a notice it planned to post at the facility's front entrance. The notice read in relevant part:

NOTICE

Since the [U]nion membership is so low, [the Employer] wants to determine the workforce's desire for union representation. In accordance with that wish on Thursday, March 24, 2005, [the Employer] will conduct a poll to determine that level of interest....After all employees who wish to vote have, an independent 3rd party will count votes.

After reviewing the notice, the Union Treasurer responded that he thought the poll was unlawful and that the Union should have the opportunity to contact its attorney or the International, however, it would be difficult to do so since the Employer intended to conduct the poll the following morning. After the meeting, the Employer posted the notice at the front entrance. The Employer did not otherwise meet or further discuss with the employees the details of the poll.

On March 24, around 7:00 a.m., the Plant Manager contacted the department supervisors and instructed them to release their employees to the cafeteria to vote. A local attorney greeted the employees as they arrived. The employees were asked to sit in chairs lined up against one side of the cafeteria while he introduced himself and explained the voting procedures. To each of the employee groups, which numbered anywhere from 2 to 15 employees, the attorney stated he was there to oversee the voting process, to make sure that everything ran smoothly, that he was not affiliated with the company, and that he did not care how the vote turned out. He further stated that he was there to ensure that it was "an honest voting process and so no one was harassed or intimidated to vote in any way." The attorney did not read from a script when introducing himself or explaining the voting procedures. After the introduction, the attorney entertained questions before escorting three voters at a time to the voting area and handing them ballots which had been previously provided by the Employer. The ballot read, "Do you wish to be represented by the [Union]?" and underneath were two boxes,

"Yes Union" and "No Union." The voting area in the cafeteria was sectioned off by tables and consisted of three voting tables and a table with a ballot box. Seated at the table with the ballot box were the payroll assistant and the HR Manager. The payroll assistant checked off names of employees from an employee list as they voted. The closest voting table from the table with the ballot box was 10 to 15 feet away and the furthest was 30 feet away. The employees were told to fold the ballot after they voted and to place the ballot in the ballot box. The morning voting session lasted approximately one and one-half hours and 78 employees voted during this time.

The afternoon session began at 2 p.m. and was identical in procedure as the morning session.⁸ During both voting sessions, when the HR Manager was not sitting at the table with the ballot box, he was in and out of the cafeteria. The afternoon voting session lasted approximately one hour and 36 employees voted during this time.

After there were no employees left to vote, the polls were closed and the attorney counted the ballots in the presence of the payroll assistant and the HR Manager. No one from the Union was present during the counting of the ballots. One hundred and fourteen employees voted and the final tally was 67 votes against the Union, 46 votes for the Union, and one unmarked ballot.⁹ Both the payroll assistant and the HR Manager counted the ballots to confirm the attorney's results. Later that day, the HR Manager informed both the Union Treasurer and President of the poll results.

On March 24, the Union sent a letter to the Employer demanding recognition and requesting information regarding the terms and conditions of employment for the bargaining unit. By letter dated March 30, the Employer responded that the results of the March 24 poll indicated that 60% of the bargaining unit no longer wished to be represented by the Union and because of this and other reasons, it declined to recognize the Union as the exclusive bargaining representative of its employees.

⁸ Between the morning and afternoon sessions, the attorney taped the ballot box, locked it with a padlock provided by the Employer, and placed the box in an unused locked office downstairs. The attorney kept the keys to the ballot box at all times.

⁹ At the time of the poll, there were 122 employees in the bargaining unit.

The Employer asserts it had a good faith reasonable uncertainty consistent with Allentown Mack as to the Union's majority status when it conducted the poll. In forming its purported good faith uncertainty, the Employer relied on the following factors: 1) the Union's December 16, 2004 meeting notice informing employees of an upcoming Union meeting to discuss "the future of the Union";¹⁰ 2) oral statements made by 12 employees expressing discontent about the Union which were overheard by the Employer's managers during the period of August 2004 to March 2005; 3) 9 dues cancellations accompanied by either written or oral statements by employees expressing disaffection from the Union; 4) 2 written statements from employees recounting their statements of dissatisfaction with the Union made to the Employer's managers prior to the poll; and 5) a total of 20 dues checkoff cancellations from employees submitted from December 28, 2004 to March 22, 2005, which the Employer contends represented a "precipitous decline." Of the 20 dues cancellations, 7 did not include any expression, either written or oral, regarding Union sentiment; 7 cancellations were accompanied by oral anti-Union statements made to the Employer's managers; and 2 included anti-Union language in writing.¹¹ Overall, the 20 dues cancellations represented a drop from 61 employees authorizing dues deductions, or 50% of the unit, to 48 employees or 39% of the unit, during the three month period from December 28, 2004 to March 22, 2005.¹²

¹⁰ After the meeting notice was posted, the General Manager approached the Union Treasurer and asked him about the meeting. The Union Treasurer responded that the posting was intended to motivate employees to attend the meeting to discuss, among other things, the decline in Union membership. From this discussion, the General Manager inferred that the Union was holding the meeting to let employees know what the Union was doing for them and to "justify its existence."

¹¹ The remaining 4 dues cancellations have been discredited because 2 were made the day of the poll and 2 others were included in the group of 12 employees that made oral anti-Union statements to the Employer's managers.

¹² The Employer also presented evidence showing the decline in employees paying dues since 2002. These figures reflect the number of dues authorizations in January of each year. In 2002, 61 out of 79 employees authorized dues deductions or 77%; in 2003, 59 out of 81 employees authorized dues deductions or 73%; and in 2004, 67 out of 125 employees authorized dues deductions or 54%.

During the first week of April, the Employer unilaterally implemented an increase in health insurance coverage and a 401(k) plan. The Employer also notified employees that it would no longer be deducting Union dues from their paychecks and refunded employees the amount that had been deducted beyond March 24, the date of the poll.

ACTION

We conclude that a Section 8(a)(1) and (5) complaint should issue, absent settlement, alleging the Employer failed to comply with the procedural requirements for an employer conducted poll under Struksnes or to provide the Union with reasonable advance notice of the poll under Texas Petrochemicals, and that accordingly, the Employer was not privileged to rely on an unlawfully conducted poll to withdraw recognition from the Union. Given that the Employer's poll was unlawful due to procedural deficiencies and therefore, its withdrawal of recognition was also unlawful, it is unnecessary to determine whether the Employer had a good faith uncertainty of the Union's majority status consistent with Allentown Mack when it polled its employees.

I. Employer's Poll was Procedurally Deficient under Struksnes and Texas Petrochemicals

In Struksnes, the Board held that an employer may only lawfully conduct an employee poll if certain procedural safeguards are satisfied: (1) the employer's purpose was to determine the truth of the union's claim of majority support; (2) this purpose was communicated to the employees; (3) assurances against reprisals were given; (4) the poll was conducted by secret ballot; and (5) the employer committed no other unfair labor practices and did not create a coercive atmosphere.¹³ Failure to comply with any one of the Struksnes safeguards is sufficient to render the poll unlawful and constitutes a violation of Section 8(a)(1).¹⁴ In Texas Petrochemicals, where the Employer withdrew recognition based on a poll, the Board added the requirement that the employer provide the union with

¹³ 165 NLRB 1062, 1063 (1967).

¹⁴ Lackawanna Electrical Construction, Inc., 337 NLRB 458, 465 (2002), citing American National Insurance Co., 281 NLRB 713, 713 n.3 (1986); Ravenswood Electronics Corp., 232 NLRB 609, 616 (1977).

reasonable advance notice of the time and place of a poll.¹⁵ Failure to provide reasonable advance notice constitutes an independent violation of Section 8(a)(1).¹⁶ Any subsequent withdrawal of recognition based on a procedurally deficient poll is tainted and violates Section 8(a)(5).¹⁷

We conclude that the Employer's poll violated Section 8(a)(1) because it did not comply with all of the Struksnes safeguards and it did not provide the Union with reasonable advance notice of the poll as required by Texas Petrochemicals. Accordingly, because the Employer's procedurally deficient poll is unlawful, its reliance on the results of the poll to subsequently withdraw recognition from the Union was also unlawful under Section 8(a)(1) and (5).¹⁸

The Employer fulfilled the first two Struksnes requirements because the purpose of the poll - to determine the level of interest in the Union - was communicated to the employees in the notice and there is no evidence that the Employer conducted the poll for a reason other than its stated purpose. However, the Employer failed to fulfill the remaining Struksnes requirements. First, the Employer failed to provide employees with assurances against reprisals. The only communication the employees received directly from the Employer regarding the poll was the March 23 notice which did not provide any assurances. After posting the notice, the Employer did not meet with employees to discuss the ensuing poll or otherwise advise employees that voting was voluntary.¹⁹ Further, while the attorney who oversaw the voting process introduced himself and described his role as ensuring that "no one was harassed or intimidated to vote in any way" he did not

¹⁵ 296 NLRB 1057, 1063 (1989), enfd. in relevant part and remanded 923 F.2d 398 (5th Cir. 1991), rehearing denied 931 F.2d 892 (5th Cir. 1991).

¹⁶ Id.

¹⁷ Texas Petrochemicals, 296 NLRB at 1065; Roanwell Corp., 293 NLRB 20, 23 (1989).

¹⁸ Texas Petrochemicals, 296 NLRB at 1064 (the employer could not rely on the results of the poll as an objective consideration because the poll itself was an unfair labor practice).

¹⁹ See e.g., Lackawanna Electrical Construction, Inc., 337 NLRB at 465 (the employees were not told that the voting was voluntary).

otherwise assure employees that they would not face discipline if they voted a certain way or abstained from voting altogether. Next, the presence of the HR Manager at the polling site violated the fourth and fifth Struksnes requirements.²⁰ Here, the HR Manager was seated at the table with the ballot box which was located approximately 10-15 feet from the closest voting table. From his position, he could observe voters at all three voting tables and each voter had to confront him when dropping his or her ballot in the ballot box. That the HR Manager is a high-level manager who is responsible for the hiring and firing of employees and payroll administration is also relevant on the issue of whether his presence tended to create a coercive environment.²¹ Thus, under Struksnes the Employer's poll was unlawfully conducted because the Employer failed to give proper assurances and the HR Manager's presence in these circumstances was not conducive to a secret ballot election and tended to create a coercive environment.

In Texas Petrochemicals, the Board adopted the ALJ's summary of the rationale behind requiring an employer to give reasonable advance notice to a union before conducting an employee poll. The ALJ explained, and the Board agreed, that the notice requirement is important because it allows the union the opportunity to ensure that as many eligible voters as possible are available to vote "[o]therwise, an employer, either by design or through oversight, could exclude a department full of union supporters."²² Further, advance notice allows an incumbent union an opportunity to review the polling arrangements with the employer and be present when the ballot box is opened and the votes tallied.²³ In addition, the Board itself noted that advance notice is particularly important in situations where a successor employer seeks to poll its employees shortly after taking over because an incumbent union may be

²⁰ See e.g., Helnick Corporation, 301 NLRB 128, 128 n.1 and 135 (1991) (presence of the employer/owner during the polling tends to create a coercive environment for employees); Eagle Comtronics, Inc., 263 NLRB 515, 515 n.3 (1982) (presence of the employer's labor relations manager and president during the voting created a coercive environment and was not conducive to secret ballot election).

²¹ Eagle Comtronics, Inc., 263 NLRB at 515 n.3.

²² 296 NLRB 1057, 1074.

²³ *Id.*

legitimately stripped of recognition based on the results of such a poll.²⁴

Here, the Employer first notified the Union of its intent to conduct a poll at the March 23 meeting when it showed the Union President and Treasurer the notice of the poll it had arranged for the following morning. Although the Union Treasurer protested that the poll was unlawful and stated that it would be difficult to consult with its attorney or the International about the poll given the short notice, the Employer nonetheless proceeded to post the notice after the meeting. The evidence demonstrates that the Employer had made all the polling arrangements prior to the March 23 meeting and therefore could have given the Union more than a half day's notice. Before its meeting with the Union on March 23, the Employer had already: prepared the notice of the poll; arranged for an attorney to oversee the polling; prepared the ballots and purchased the lock for the ballot box; sectioned off and arranged the cafeteria for voting; and prepared an employee list to be used by the payroll assistant during the voting. By completing the polling arrangements beforehand and giving the Union such short notice of the poll, the Employer essentially presented the Union with a fait accompli and foreclosed all discussion regarding the poll. The Union was thus given no opportunity to review the polling arrangements with the Employer or to give input such as designating Union observers at the poll or being present during the tallying of the ballots. Thus, the Employer's notice to the Union of the poll was insufficient and inconsistent with the Board's policies as articulated in Texas Petrochemicals and violated Section 8(a)(1).

II. Employer's Good Faith Uncertainty under Allentown Mack

In Allentown Mack, a polling case, the Supreme Court held that an employer must have a "good faith reasonable uncertainty" based on objective considerations regarding a union's majority status before it may poll its employees.²⁵

²⁴ Id. at 1064.

²⁵ Allentown Mack, supra, 522 U.S. at 365 (Court held that Board's adoption of the "good faith uncertainty" unitary standard for polling, RM elections, and withdrawals was rational under the Act). See Allentown Mack Sales & Service, Inc., 316 NLRB 1199, 1199-2000 (1995, enfd. 83 F.3d 1483 (D.C. Cir. 1991)). See also Levitz Furniture Co. of the Pacific, 333 NLRB 717, 723 (2001) (Board established "actual loss" standard for withdrawal of recognition, however, declined to address whether the good faith

The evidence here presents a close question on whether the Employer had sufficient good faith uncertainty to justify conducting the poll. On the one hand, it is arguable that the Employer did not have a good faith uncertainty when it conducted its poll. The Employer had direct evidence that only 18% of the unit no longer supported the Union.²⁶ The Employer could not rely on the additional evidence of employees' cancellations of dues checkoff because the Board has traditionally rejected the use of such evidence to support an employer's good faith uncertainty.²⁷ Further, to the extent the Board has relied on a "precipitous decline" in dues authorizations to support an employer's good faith uncertainty,²⁸ here, the

uncertainty standard should be changed for employer polling).

²⁶ The 18% direct evidence consists of: (1) 12 statements made by employees expressing Union disaffection that were overheard by the Employer's managers; (2) 9 employees' dues cancellations were accompanied by either written or oral statements of Union disaffection; and (3) 2 employees provided written statements recounting anti-Union statements made to the Employer's managers prior to the poll.

²⁷ Hospital Metropolitano, 334 NLRB 555, 562 (2001) enfd. 49 Fed.Appx. 320 (D.C. Cir. 2002) (unpublished decision) (Board has long held that the fact that less than a majority have authorized dues checkoffs is immaterial to the issue of majority status); The Henry Bierce Company, 328 NLRB 646, 649 (1999) (that some employees did not authorize dues checkoff does not establish that they were not union members and is irrelevant on the issue of whether they did or did not support the union).

²⁸ The Board and some circuit courts have considered a "rapid decline" in dues authorizations as an element in determining whether an employer had a valid good faith uncertainty. See e.g., People's Gas System, Inc., 238 NLRB 1008, 1010 (1978) enforcement granted in part, denied in part 629 F.2d 35 (D.C. Cir. 1980), on remand to 253 NLRB 1180 (1981) (holding a large drop in the percentage of employees authorizing dues deductions may be a relevant factor along with various objective considerations in appraising union's strength); Bolton-Emerson, Inc., 293 NLRB 1124, 1127 (1989) enfd. 899 F.2d 104 (1st Cir. 1990) ("The Board will consider such things as changes in the composition of a bargaining unit or a sharp decrease in dues checkoffs in assessing the objective basis for a good faith uncertainty"). See also Tri-State Health Service,

Employer's historical evidence demonstrates a steady decline of employees authorizing dues deductions which appears in line with previous years. Finally, the fact that the 20 cancellations occurred over a short period of time between December 28, 2004 to March 22, 2005, may be explained by the checkoff provision that allowed employees to only revoke their dues authorizations during a 30-day window period beginning after December 25, 2004, or the last pay period of the fiscal year and not a "mass exodus".

On the other hand, it is also arguable that the Employer had a good faith uncertainty when it conducted its poll. In the face of the direct evidence that 18% of the unit no longer supported the Union, it was reasonable for the Employer to view the decrease in checkoff authorizations as an indication that even more employees no longer supported the Union. Even though the Board normally will not consider dues cancellation as evidence of loss of support,²⁹ the evidence suggests that the Union and the Employer viewed Union membership and dues authorizations as synonymous and, in fact, that some of the dues cancellations were accompanied by statements voicing dissatisfaction with the Union. Also, for the first time, the number of dues paying employees fell below majority. All of this, coupled with the Union notice that the Union admits was posted because of a concern over a decline in membership, arguably validates the Employer's contention that it had a good faith uncertainty of the Union's majority support.

However, because the procedural deficiencies relating to the conduct of the poll taint the Employer's withdrawal of recognition, it is not necessary to decide whether the

Inc. v. NLRB, 374 F.3d 347, 354 (2004); McDonald Partners, Inc. v. NLRB, 331 F.3d 1002, 1006 (D.C. Cir. 2003) (court found reliable evidence, especially testimony from union steward, "suggesting the erosion of union support" sufficient to make acute decline in checkoffs highly probative); Bickerstaff Clay Products Co. v. NLRB, 871 F.2d 980, 988 (11th Cir. 1989) cert. denied 493 U.S. 924 (1989) (rapid decrease in dues deductions and resignations may be considered by employer in assessing loss of union support); and Thomas Industries, Inc. v. NLRB, 687 F.2d 863, 868 (6th Cir. 1982) (a rapid or large decline in the number of checkoffs may be indicative of loss of support).

²⁹ The Henry Bierce Company, 328 NLRB at 649 (number of employees authorizing dues deductions is "irrelevant", and nonmembership in a union "does not establish that those employees do not want the Union to be their collective bargaining representative"). Citations omitted.

Employer had a good faith uncertainty consistent with Allentown Mack when it conducted its poll.

Accordingly, we conclude that a Section 8(a)(1) and (5) complaint should issue, absent settlement, for the reasons set forth above.

B.J.K.