

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

## Advice Memorandum

DATE: January 16, 1998

TO : Richard L. Ahearn, Regional Director  
Region 9

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

SUBJECT: Atlas Concrete Const. Co.                   530-4080-5084-5000  
Case 9-CA-35198-2                                 530-8027-8300

This Section 8(a)(5) case was submitted for advice on whether the Employer unlawfully refused to execute an agreed-upon contract under the rationale of Auciello.<sup>1</sup>

We conclude, in agreement with the Region and for the reasons set forth in its Request for Advice, that the Employer violated Section 8(a)(5). It seems clear that the Employer had only a "good faith doubt" of the Union's majority, because it had insufficient evidence that the Union had in fact suffered an "actual loss" of majority status.<sup>2</sup>

We note that after the Employer received the employee petition giving the Employer a "good faith doubt", the Employer advised the Union that it was thereafter continuing to bargain conditionally, based only upon its legal ability to do so. We agree with the Region that the Employer's conditional bargaining is no defense. First, as the Region notes, the Supreme Court in Auciello set forth several alternative courses of action available to an Employer with a "good faith doubt," and bargaining conditionally was not one of those options. More importantly, however, the Employer's own bargaining condition was fully satisfied here. Given only a "good faith doubt" of the Union's majority status, the Employer had the legal ability to bargain to a complete contract.

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<sup>1</sup> Auciello Iron Works, Inc. v. NLRB, 116 S. Ct. 1754 (1996).

<sup>2</sup> Cf. Four Flags Motors, Case 14-CA-24794, Advice Memorandum dated December 19, 1997, where we distinguished Auciello and dismissed a Section 8(a)(5) allegation because the union there in fact had lost its majority status.

Case

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B.J.K.