

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

JAMESTOWN FABRICATED STEEL AND SUPPLY, INC.,

Respondent,

Case 03-CA-119345

and

Shopmen's Local Union No. 470 of the International Assn. of
Bridge, Structural, Ornamental & Reinforcing Iron Workers,

Charging Party.

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS
EXCEPTIONS AND IN OPPOSITION TO THE GENERAL
COUNSEL'S CROSS-EXCEPTION TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

I. PRELIMINARY STATEMENT

Respondent Jamestown Fabricated Steel and Supply, Inc. (“JFSS”) submits this reply brief in further support of its exceptions and in opposition to the General Counsel’s cross-exception to the decision of the Administrative Law Judge (“ALJ”). JFSS had a good faith reasonable doubt about the union’s majority status before it refused to bargain with the union. The oral statement of the union’s representative that he was delivering a demand for recognition was not a valid demand because it did not convey that the union represented a majority of JFSS’s employees and that the union desired to meet and bargain. JFSS’s learned of the disaffection of its two employees before it knew of the union’s written demand to bargain and it properly relied on its employees’ expressions of disaffection because they were freely and voluntarily made. The ALJ’s conclusion that the expression of disaffection by JFSS’s employees was tainted is not supported by the evidence. Therefore, the ALJ’s decision should be reversed and the complaint dismissed.

II. ARGUMENT

POINT I

JFSS HAD A GOOD-FAITH REASONABLE BELIEF THAT THE UNION LACKED MAJORITY SUPPORT.

A. The Statements of Mr. Tkach and Mr. Marsh Provided A Good-Faith Reasonable Doubt That The Union Lacked Majority Support.

The General Counsel does not contest that that Mr. Tkach’s and Mr. Marsh’s statements to Mr. Ives were sufficient to create a good-faith reasonable doubt about the union’s majority status. *See Allentown Mack Sales and Service, Inc.*, 522 U.S. 359, 367-68, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998). Thus, their statements must be accepted as being sufficient to support Mr. Ives’s belief that the union lacked majority status.

B. The Union Representative’s Oral Statement Was Not A Valid Bargaining Demand.

The General Counsel’s assertion that Mr. Ehrie’s statement to Mr. Ives that he was delivering a demand for recognition constituted a proper demand for bargaining is not supported by the Board’s own case law. The Board has held that to constitute a valid demand for recognition and bargaining a demand must at a minimum “clearly indicate[] a desire to negotiate and bargain on behalf of the employee in the appropriate unit concerning wages, hours, and other terms and conditions of employment.” *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 10 (2007). To do so the union must indicate in some fashion that it represents a majority of the employer’s employees and desires to meet and negotiate. *Rural Electric Co., Inc.* 130 NLRB 799, 800 (1961).

The General Counsel’s repeated statement in its brief that Mr. Ehrie told Mr. Ives that he was delivering a “demand for recognition and bargaining” is a clear misstatement of the record. *See, e.g.*, GC Brief, p. 3.¹ Upon direction examination by the General Counsel Mr. Ehrie testified that he was merely “delivering a letter of recognition.” (Tr. 130-31.)² Mr. Ehrie never uttered the word bargaining to Mr. Ives. (*See id.*)

Mr. Ehrie’s statement to Mr. Ives that he was delivering a demand for recognition fails to meet even the Board’s standard for a valid demand for bargaining. Nothing Mr. Ehrie said to Mr. Ives conveys that the union claimed to represent a majority of JFSS’s employees or that the union intended to bargain on their behalf. Mr. Ehrie’s statement was merely a description of the

¹ References in the form “GC Brief, p. ___” refer to the cited page of the General Counsel’s Brief in Support of Cross-Exception and Answering Brief to Respondent’s Exceptions to Administrative Law Judge’s Decision.

² The following references are used throughout this reply brief: “Tr. ___” for transcript page(s); “R. ___” for Respondent’s exhibit; and GC ___ for General Counsel’s exhibit.

message he was delivering and not the message itself, which was contained in the letter that he handed to Mr. Ives.

The burden of making a valid demand for bargaining rests with the union. The General Counsel disingenuously cites Mr. Ives's testimony that Mr. Ehrie "asked me to collective (*sic*) bargain" as evidence that Mr. Ehrie's made a demand for bargaining. By making this claim the General Counsel is now contradicting, for its own expedient purposes, the unequivocal testimony of Mr. Ehrie that he merely stated he was delivering a demand for recognition. In light of Mr. Ehrie's testimony of what he told Mr. Ives, Mr. Ives's testimony of what Mr. Ehrie said is properly understood as nothing more than his understanding of the union's ultimate goal. That Mr. Ives was sufficiently astute to understand the union's ultimate goal cannot relieve the union of its burden to make a valid demand by magically transforming Mr. Ehrie's statement into something that it was not. Nor does Mr. Ehrie's and Mr. Ives's discussion about the relative merits of unions satisfy the requirement that the union's burden of having to indicate that is represented a majority of JFSS's employees and wanted to bargain for them. It is not the employer's responsibility to divine the union's intent.

C. JFSS Was Aware Of Its Employees' Disaffection With The Union Before It Learned Of The Union's Bargaining Demand.

The General Counsel does not contest the ALJ's finding that JFSS was not aware of the contents of the union's demand letter until *after* Mr. Tkach and Mr. Marsh expressed their lack of support for the Union. *See* Decision, p. 11, lines 31-33 ("The evidence establishes that the Respondent did not have knowledge of the Union's written demand for recognition and bargaining until after Tkach and Marsh had made statements suggesting that they no longer supported the Union.").

D. The Union's Bargaining Demand Was Not Effective Until After JFSS Learned Of Its Employees' Disaffection With The Union.

As it is the union's burden to make a valid demand for bargaining that burden necessarily includes making the employer aware of the substance of the demand. The Board's decision in *Regal Aluminum*, 171 NLRB 1403 (1968), *enfd.* 436 F.2d 525 (8th Cir. 1971), is consistent with this requirement and does not stand, as the General Counsel implies, for the proposition that mere delivery of a written demand satisfies the union's burden. In *Regal Aluminum*, 171 NLRB 1403, the union's letter to the employer was found to be an effective demand not simply because it had been delivered to the employer, but because under the circumstances, including the employer's prior communications with the union, the employer had reason to *know* that the letter from the union contained a demand to bargain. *Id.* at 1410-12. For example, the decision states that in "light of the foregoing facts" (those being the employer's prior communications with the union), "it is inferable that when [the union's] letter arrived at the plant . . . the purport of that communication was at once apparent to the addressee." *Id.* at 1412. Emphasizing that it was the employer's knowledge of the contents of the letter that satisfied the union's burden and not the employer's mere receipt of the letter, the decision states that: "It is will settled that the refusal to accept registered or certified mail under the circumstances present here provides no support for the contention that the Employer had no knowledge of the Union's request set forth in such mail." *Id.* Accordingly, it was the employer's knowledge of the union's demand contained in the letter on which the finding that the employer had notice of the union's demand for bargaining was based. *Id.*

Subsequent to *Regal Aluminum*, the Board in *Stevens Pontiac-GMC, Inc.*, 295 NLRB 599, 601 (1989), stated that its prior decisions "indicate that finding a violation [of refusal to bargain] would require a conclusion that the employer knew, or at least should have known, the

contents of the refused letter.” *Id.* (citing *Circle K Corp.*, 173 NLRB 713, 724 (1969) and *Filler Products*, 376 F.2d 369, 380-91 (4th Cir. 1967). Other Board and circuit court cases support the requirement that the employer know or have reason to know of the contents of the union’s demand for a bargaining obligation to arise. *See Circle K Corp.*, 173 NLRB 713, 722 724 (1969) (no refusal to bargain where employer had strict policy of refusing registered mail and refusal of union letter was not because of knowledge or suspicion of its contents); *Quick Shop Markets*, 416 F.2d 601, 606 (7th Cir. 1969) (unopened registered letter containing bargaining demand that was refused pursuant to policy was insufficient to convey clear demand to bargain); *Dow Chemical Co.*, 171 NLRB 902 (1968), *enfd.* 420 F.2d 480 (5th Cir. 1969) (no refusal to bargain found even though employer had given instructions that mail from the union not be accepted); *Filler Products*, 376 F.2d 369, 380-391 (4th Cir. 1967) (no refusal to bargain where employer, on advice of its attorney, refused letter from union where employer had received copy of union’s petition for election and had no reason to assume letter was a request for recognition).

In those cases where the Board has found that delivery of a letter constituted a valid despite the employer not being aware of the contents of the letter, the Board has done so only where the evidence indicated that the employer intentionally avoided receipt of the letter or had reason to know that it contained a bargaining demand. *See Midway Golden Dawn*, 293 NLRB 152 (1989) (valid request to negotiate found when the employer knowingly refused communications from the union because it had refused to believe that the communications were in regard to the expiration of the collective-bargaining agreement); *Honda of San Diego*, 254 NLRB 1248, 1268 (1981) (refusal to bargain found where employer refused to accept union’s certified letter, containing recognition and bargaining request, pursuant to recent policy intended to prevent delivery of correspondence from the union); *Wayne Trophy Corp.*, 236 NLRB 299,

309-310 (1978), *enfd.* 595 F.2d 1213 (3d Cir. 1979) (refusal to bargain found where employer refused to accept letter with the union's name and address on the envelope because it “reasonably suspected what was contained therein”); *City Electric Co.*, 164 NLRB 844, 848 (1967) (employer could not claim that bargaining demand was not made “where it refused to receive communications from the Union”).

Here, JFSS did not refuse to accept the union’s demand letter. Nor did Mr. Ives know or have reason to know when he accepted the letter from Mr. Ives that the letter contained a demand to bargain because Mr. Ives specifically told Mr. Ives the letter was merely a demand for recognition. Mr. Ives also did not unreasonably delay in opening the letter but started to do so in his office moments after meeting with Mr. Ehrie. It was not until Mr. Ives read the letter that he learned that the union was demanding to bargain.

The General Counsel’s assertion that Mr. Ives was aware of the contents of the letter before he learned of Mr. Tkach’s and Mr. Marsh’s disaffection is just not supported by the record. It is undisputed that Mr. Tkach and Mr. Marsh expressed their disaffection while Mr. Ives was opening the letter and before he read it. The ALJ properly concluded regarding this issue that: “The evidence establishes that the Respondent did not have knowledge of the Union’s written demand for recognition and bargaining until after Tkach and Marsh had made statements suggesting that they no longer supported the Union.” (Decision, p. 11, lines 31-33.)

Thus, the union’s bargaining demand was not effective until Mr. Ives read the union’s letter, which occurred after he learned of Mr. Tkach’s and Mr. Marsh’s disaffection with the union. Accordingly, JFSS had a good faith reasonable doubt about the union’s majority status before it learned of the union’s bargaining demand and, therefore, lawfully refused to bargain with the union.

POINT II

MR. TKACH'S AND MR. MARSH'S STATEMENTS WERE NOT TAINTED.

A. Mr. Tkach's Statement Of Disaffection With The Union Was Not Tainted.

The cases cited by the General Counsel in support of its assertion that the statements of Mr. Tkach and Mr. Marsh expressing disaffection with the union are distinguishable on their facts and inapposite. First, the decisions in *Advanced Stretchforming Int'l, Inc.*, 323 NLRB 529 (1997) and *Massey Energy Co.*, 358 NLRB No. 159, concern the effects of coercive statements on the ability of a successor employer to set new initial terms and condition of employment, an issue that is not present here.

Likewise, although *Phoenix Pipe & Tube, L.P.*, 302 NLRB 122 (1991), upheld the ALJ's determination that the employer could not rely on employee expressions of disaffection because of the employer's coercive comments made during the hiring process, it does not establish a *per se* rule that an expression of disaffection is automatically invalid simply because the employer has made coercive statements. Indeed, Chairman Stephens's comments in footnote 2 of the decision underscores that the decision whether an expression of disaffection is valid where the employer has made coercive statements must be assessed in light of all of the circumstances of the particular situation at issue, as he stated that: "Under the circumstances here, this is a far cry from a forthright rejection of union representation." *Id.* at 122 n. 2.

The factors considered in determining whether an expression of disaffection is "a forthright rejection of union representation," and is thus valid, include: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful

conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984). An employer properly relies on an expression of disaffection that is “a free and voluntary choice on the part of the employees to withdraw their support of a labor organization.” *Pittsburg & New England Trucking Co.*, 249 NLRB 833, 836 (1980).

Here, Mr. Ives’s statement was a one-time statement made over a month before Mr. Tkach expressed his disaffection. When Mr. Tkach expressed his disaffection he was not in a situation or under any coercive pressure that would have made him believe that it was expected that he would express disaffection with the union. Rather, the context shows that Mr. Tkach’s expression of disaffection was free and voluntary. Mr. Tkach left the shop floor and sought out Mr. Ives of his own accord after the union representative spoke with him and upon seeing Mr. Ives return to the plant. Upon entering Mr. Ives’s office Mr. Tkach immediately expressed his disaffection to Mr. Ives’s before Mr. Ives said anything to him. Mr. Ives and Mr. Tkach were both unaware at the time that Mr. Ehrie had spoken to the other and Mr. Tkach was unaware that Mr. Ives had received a letter from the union demanding bargaining. The forcefulness and conviction with which Mr. Tkach’s expressed his disaffection by stating “Fuck the Union” further shows the free and voluntary nature of his act.

Thus, Mr. Tkach’s expression of disaffection was valid and JFSS properly relied on it in refusing to bargain with the union.

B. The ALJ’s Conclusion That Mr. Marsh’s Expression Of Disaffection Was Tainted Is Not Supported By the Evidence.

Although the ALJ may draw reasonable inferences from the available evidence, the evidence here does not support a reasonable inference that Mr. Marsh’s expression of disaffection was tainted. The General Counsel does not dispute that Mr. Ives never made any

statement to Mr. Marsh about the Union. (Tr. 60-61.) Neither the ALJ nor the General Counsel cite any evidence in the record indicating that Mr. Tkach ever told Mr. Marsh about Mr. Ives's statement to Mr. Tkach during his interview that JFSS was going to be a non-union shop because no such evidence exists. Although it would have been reasonable for the ALJ to infer in that Mr. Tkach and Mr. Marsh engaged in conversation in general while working, it was not reasonable for him to infer that Mr. Tkach conveyed to Mr. Marsh JFSS's desire to operate without a union because there is no evidence in the record indicating that Mr. Tkach did so or even any evidence about the nature of their conversations. There simply is nothing on which to base the inference that the ALJ made. The ALJ admitted as much by stating that he reached his conclusion simply because "I find it hard to believe that he would have done so without passing along the Respondent's stated position with regard to union representation of the employees it hired."

(Decision, 12.)

Mr. Marsh's expression of disaffection was made under the same circumstances as Mr. Tkach's and, therefore, was equally freely and voluntarily made and properly relied on by JFSS in refusing to bargain with the union. Because Mr. Tkach and Mr. Marsh were JFSS' only two employees, an expression of disaffection by Mr. Marsh alone would have been sufficient for JFSS to have had a good-faith reasonable doubt that the Union lacked majority status. Thus, even if Mr. Tkach's expression of disaffection was tainted by Mr. Ives' statement (which it was not), JFSS had a good-faith reasonable doubt about the Union's majority status based solely on Mr. Marsh's expression of disaffection.

III. CONCLUSION

JFSS properly refused to bargain with the Union because it had a good-faith reasonable belief that the union lacked majority support before it learned of the union's demand to bargain. Therefore, the complaint should be dismissed in its entirety.

Dated: December 31, 2014
Buffalo, New York

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