

**United States of America
Before the National Labor Relations Board**

ASARCO LLC and SILVER BELL MINING LLC,

Employer / Petitioner,

and

Case 28-RM-255301

UNITED STEEL, PAPER AND FORESTRY, RUBBER
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION,
LOCAL 937,

Union.

Opposition to Request for Review

The United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 937 (“the Union”) submits this opposition to ASARCO LLC and Silver Bell Mining LLC (“the Employer”)’s Request for Review, dated March 18, 2020. The Employer is seeking review of the Regional Director’s decision, dated March 5, 2020, dismissing the RM Petition filed by the Employer.¹ However, the Employer has failed to establish any basis under Rule 102.67(d) for the National Labor Relations Board (“the Board”) to grant review of the Regional Director’s Decision.

Under the Board’s Rules and Regulations, a request for review should only be granted if: (1) a substantial question of law or policy is raised because the Regional Director has departed from, or failed to apply, Board precedent; (2) the Regional Director’s factual findings are clearly erroneous on the record and prejudicially affect the rights of a party; (3) there was prejudicial

¹ For the purpose of this Statement in Opposition, citations to the Regional Director’s Decision will be “RD Dec.” followed by a page number, and citations to the Employer’s Request for Review will be “Er. RFR” followed by a page or exhibit number.

error arising from the conduct of the hearing; or (4) there are compelling reasons for reconsideration of an important Board rule or policy. *See* 29 CFR § 102.67(d). None of these factors are present here.

Still, the Employer argues that the Regional Director misapplied *Allentown Mack Sales & Service, Inc. v. NLRB*² and *Levitz Furniture Co. of the Pacific, Inc.*³ and made factual determination that were clearly erroneous and prejudiced the Employer. For the reasons described below, these arguments are unpersuasive. In short, the Regional Director applied the correct Board precedent to the relevant facts, and reached a predictable conclusion: the Employer's Petition was deficient. Accordingly, the Union respectfully requests that the Board refrain from issuing a Notice to Show Cause, deny the Employer's Request for Review, and give finality to the Regional Director's Decision.

Argument

I. The Regional Director Did Not Depart from Board Precedent Before Dismissing the Employer's Petition.

The Employer begins by arguing that, in effect, the Regional Director applied a higher standard for considering whether the Petition was supported by sufficient evidence. *See* Er. RFR, at 4-7. That is not so. The Regional Director applied the proper standard articulated under *Allentown Mack* and *Levitz*, and the Regional Director's Decision is fully consistent with existing Board law. Accordingly, there is no basis for granting review under the Board's Rules and Regulations. *See* 29 CFR § 102.67(d)(1).

² 522 U.S. 359 (1998) ("*Allentown Mack*").

³ 333 NLRB 717 (2001) ("*Levitz*").

A. The Regional Director Properly Applied the Correct Standard.

The Regional Director correctly recognized that, under the framework articulated by the Board in *Levitz*, an “employer representation petition must be supported by evidence that the employer possesses a good-faith reasonable uncertainty concerning the union’s continued majority status.” *See* RD Dec., at 1 (*citing Levitz*, 333 NLRB at 717). In *Levitz*, the Board interpreted the Supreme Court’s decision in *Allentown Mack*, and determined that “regional offices should determine whether good-faith uncertainty exists on the basis of evidence that is objective and that reliably indicates employee opposition to incumbent unions – i.e., evidence that is not merely speculative.” *Id.* at 729.

The Employer here only submitted non-Board affidavits from its own supervisors. These supervisors asserted that: (1) most bargaining unit employees elected not to participate in an on-going strike called by the Union; (2) some employees resigned from the Union or requested not to pay dues; and (3) less than ten percent of the bargaining unit purportedly made statements indicating dissatisfaction with the Union. *See* RD Dec., at 1-2. The Employer did not present any affidavits, statements, or petitions directly from employees to support its belief that the Union had lost majority status.

The Regional Director applied the *Levitz* standard, and found this evidence to be deficient. Specifically, the Regional Director concluded that the Employer failed to “present such evidence” to establish a good-faith, reasonable uncertainty about the Union’s continued majority status. *See* RD Dec., at 1.

In reaching this finding, the Regional Director did not depart from Board precedent. The Employer argues that, since the Regional Director used the phrase “not necessarily,” he effectively abandoned the *Levitz* framework and instead held the Employer to higher standard.

This is not the case. *Compare* RD Dec., at 3 (after “considering all of the evidence,” the Regional Director found that the Employer failed to establish a “good faith reasonable uncertainty as to the Union’s continued majority status.”) *with Tri-State Health Services, Inc. v. NLRB*, 374 F.3d 347 (5th Cir. 2004) (finding that the Board has inappropriately rejected certain evidence because it “may be attributable to many other factors other than opposition to the union, and inappropriately required the employer to show disbelief, rather than good faith uncertainty, that the union continued to enjoy majority status). The Regional Director considered “all of the evidence submitted by the [Employer] as a whole,” and concluded that it was insufficient. *See* RD Dec., at 3. When the Regional Director found that certain evidence did “not necessarily” indicate a loss of support, the Regional Director used that language to indicate that the evidence provided was neutral, and in the aggregate, failed to establish a good-faith uncertainty under *Levitz* and *Allentown Mack*. As described below, this is entirely consistent with the existing Board law.

Despite the Employer’s contentions, the Regional Director clearly applied the *Levitz* framework to all relevant evidence provided by the Employer before concluding that the Employer had failed to establish a good-faith uncertainty regarding continued majority status for the Union.

B. The Regional Director Properly Considered the Relevant Facts.

Next, the Employer contends that the Regional Director disregarded evidence it presented, including employee non-participation in the strike and supervisor’s statements about employee statements. *See* Er. RFR, at 7-14. However, the Regional Director did consider this evidence, gave it the appropriate weight in accordance with applicable Board precedent, and concluded that the Employer failed to present sufficient objective evidence to support a good-

faith reasonable uncertainty. This conclusion was wholly consistent with the relevant precedent, and the Regional Director's underlying findings of fact were not clearly erroneous.

The Regional Director did not disregard the Employer's evidence of decreases in union membership or increases in requests to revoke dues checkoff authorization. Rather, the Regional Director found that this evidence alone was not sufficient to meet the necessary threshold under *Levitz*.⁴ The Employer points to no cases in which declining membership alone was sufficient to support good-faith uncertainty. More to the point, in each of the cases relied upon by the Employer in its Request for Review, the employer had presented additional, objective evidence that the Employer here failed to provide. *See, e.g., McDonald's Partners, Inc.*, 336 NLRB 836, 841-42 (2001) (employer also relied on direct statements from two union stewards reporting a lack of employee support for the union); *Tri-State Health*, 374 F.3d 347, 355-56 (2004) (employer also relied upon individual employee statements about other employees' dissatisfaction with the union). The Regional Director considered the evidence provided by the Employer and concluded that, in the totality, it was insufficient to support a good-faith uncertainty about the Union's continued majority status.

In much the same way, the Regional Director did not disregard the evidence of non-participation in the strike. To the contrary, the Regional Director simply found it to be neutral and insufficient to establish a good-faith uncertainty with more objective evidence. *See* RD Dec., at 2 ("employees' non-participation in a strike or abandonment of a strike does not necessarily indicate that the employees no longer want to be represented by their union.") (*citing Alexander Linn Hospital Assoc.*, 288 NLRB 103 (1988), *enfd. NLRB v. Wallkill Valley General Hospital*,

⁴ *See* RD Dec., at 2 (finding that evidence of employee non-membership, resignation, or opting out of dues check-off authorizations has a neutral interpretation).

866 F.2d 632 (3d Cir. 1989); *Curtin Matheson Scientific*, 287 NLRB 350, 352 (1987) *enf. denied* 859 F.3d 362 (5th Cir. 1988), *rev'd and remanded*, 494 U.S. 775 (1990), *enfd. on remand* 905 F.2d 871 (5th Cir. 1990)). The Regional Director's conclusion that this evidence did "not necessarily" suggest that a majority of employees no longer support the Union does not mean that the evidence was disregarded. Instead, the Regional Director considered this evidence and concluded that, without more direct evidence, it was insufficient to establish a good-faith uncertainty regarding continued majority status of the Union. As described below, this is entirely consistent with guidance from the Board, the Casehandling Manual, and memoranda from the General Counsel. *See* NLRB Casehandling Manual Part 2, at Sec. 11042.1 (*citing Levitz, supra* at 728, 729); *see also* GC Memo 02-01, at 9, 10.

Finally, the Regional Director did not disregard the Employer's evidence of purported employee statements. However, put most simply, the Employer failed to present objective, direct evidence from employees regarding dissatisfaction with the Union. While the Employer argues in its Request for Review that 92% of the employees have not participated in the strike, that a large number of employees have resigned from the Union or revoked the dues check-off authorization, and statements from supervisors in affidavits prepared by the Employer assert that some employees have complained about the Union, the Employer has nonetheless failed to present even one statement from an employee supporting its contentions. In every one of the cases referenced by the Employer in support of this argument, the employer provided direct evidence from the employees in question. *See, e.g., Henry Bierce Co.*, 328 NLRB 646 (1999) (testimony from one nonmember, bargaining unit employee); *Sceptor Ingot Castings, Inc.*, 331 NLRB 1509 (2000) (testimony from an employee about other employees' dissatisfaction with the incumbent union); *Horizon House Development Services, Inc.*, 337 NLRB 22 (2001) (first hand

statements from employees about their own negative opinions of the union); *Transpersonnel, Inc.*, 336 NLRB 484 (2002), *enfd* 349 F.3d 175 (4th Cir. 2003) (written statements signed by employees). Here, the Employer only presented evidence from its supervisors that showed that, at best, no more than 10%⁵ if the bargaining unit employees had expressed any form of dissatisfaction with the Union. *See* Er. RFR, at 11-14. Consistent with the applicable case law, the Regional Director concluded that, in the absence of more direct evidence from employees, “the testimony of the Petitioner’s supervisors only establishes that a very small minority of unit employees have made statements about their dissatisfaction with the Union.” *See* RD Dec., at 2.

In short, the Regional Director applied the proper standard and considered the relevant facts before concluding that the Employer had failed to meet its burden of production necessary to establish that it had a good-faith uncertainty necessary to support its petition. There is no basis for granting review of the Regional Director’s Decision under the Board’s Rules and Regulation. As a result, the Union respectfully requests that the Request for Review be denied.

II. The Employer Failed to Identify Any Substantial Factual Issues that Were Clearly Erroneous.

An employer-petitioner has an obligation to support its RM petition with sufficient objective evidence to establish that there is a good-faith uncertainty as to the union’s continued majority status. If the employer-petitioner fails to do so, the Regional Director should administratively dismiss the petition. *See* NLRB Casehandling Manual, Part 2, at 11042.5. Here,

⁵ The Employer’s supervisors testified to a total of 12 statements from employees purportedly expressing dissatisfaction with the Union. *See* Er. RFR, at 14; Er. RFR at Exh. 3. Assuming each of these statements are attribute to different employees, this amounts to statements from about 8.3% of the bargaining unit. This is significantly fewer than *Allentown Mack*, for example, where the employer presented employee statements from more than 20% of the bargaining unit. 522 U.S. at 368-371.

the Employer failed to present sufficient evidence, and the Regional Director administratively dismissed its petition, as required.

The Employer objects to the factual findings of the Regional Director, and argues:

...the Regional Director found the employee expressions of dissatisfaction submitted in support of the RM petition to be ‘vague.’ This factual finding is clearly erroneous and prejudicially affected ASARCO, as it led to the dismissal of its RM Petition.

See Er. RFR, at 14.

But this is simply not accurate. Despite what the Employer has argued, the Regional Director did *not* find that the employees’ purported expressions of dissatisfaction submitted by the Employer were “vague.” Instead, he found that the evidence was insufficient in number. Specifically, the Regional Director stated:

Finally, **limited** *or* vague statements of dissatisfaction are not sufficient to support an RM petition if, **based on the number of statements made** or the nature of the statements, they do not reliably establish good-faith uncertainty as to a union’s continued majority status. *Levitz*, 333 NLRB at 729, citing *Henry Bierce Company*, 328 NLRB 646 (1999), *aff’d* and remanded 234 F.3d 1268 (6th Cir. 2000), and *Sceptor Ingot Castings, Inc.*, 331 NLRB 1509 (2000); *see also* *Horizon Health Developmental Services, Inc.*, 337 NLRB 22, 23-26 (2001); *Transpersonnel, Inc.*, 336 NLRB 484 (2001), *enfd.*, 349 F.3d 175 (4th Cir. 2003). The testimony of the Petitioners’ supervisors **only establishes that a very small minority** of unit employee have made statements about their disaffection with the Union.

See RD Dec., at 2 (emphasis added).

The Regional Director found that the Employer’s own evidence only established that a “very small minority” of the unit employees had even potentially expressed their dissatisfaction with the Union. *Id.* The Regional Director did not make any findings about the substance of the statements. Nothing in this paragraph can possibly be read as a finding that the employee statements were insufficient because they were too vague.

But even if the Regional Director had found that the evidence relied upon by the Employer was insufficiently vague, that finding would have been supported by substantial evidence and not clearly erroneous.

The evidence provided by employer-petitioners in support of their petitions must objectively and reliably establish that a majority of the bargaining unit employees oppose the incumbent union. In order to assist employer-petitioners in this production, the Board has provided examples of what this evidence could include. For example: “antiunion petitions signed by unit employees, firsthand employee statements indicating a desire to no longer be represented by the incumbent union, employees’ unverified statements regarding other employees’ antiunion sentiments, and employees’ statements expressing dissatisfaction with the union’s performance as bargaining representative.” *See* NLRB Casehandling Manual Part 2, at Sec. 11042.1 (*citing Levitz, supra* at 728, 729); *see also* GC Memo 02-01, at 9, 10.

The Employer provided none of the necessary, objective evidence here. Instead, the Employer elected to present only third-party, non-Board affidavits from its supervisors that contained purported hearsay statements from a few employees. *See* Er. RFR, at Exhs. 2 and 3. None of the statements were first-hand from employees. In fact, there was no evidence presented directly from any employees showing any form of dissatisfaction with, or opposition to, the Union.

Yet the Regional Director still provided the Employer with an opportunity to cure its petition with more specific, objective, or first-hand evidence. *See* Er. RFR, at Exh. 5. The Employer failed to do so, and instead, simply reiterated its legal argument to the Region. *See* Er. RFR, at Exh. 6. The Employer cannot now claim to have been prejudiced if its failure to cure a known defect became fatal to the petition.

Under the Board's Casehandling Manual, applicable memoranda from the General Counsel's office, and relevant Board law, the Employer's showing was deficient. Accordingly, the Regional Director's finding that the purported statements of dissatisfaction were insufficient – whether because of volume, vagueness, or both – was not clearly erroneous, and could not have been prejudicial to the Employer.

As such, the Union respectfully requests that the Request for Review be denied.

Conclusion

As demonstrated by the foregoing, the Employer has failed to articulate any grounds under the Board's Rules and Regulations to support its Request for Review of the Regional Director's Decision. The Regional Director correctly applied existing Board precedent and none of his factual determination were clearly erroneous. The Employer has not suffered any prejudice. Accordingly, the Union respectfully requests that that the Board deny the Employer's Request for Review.

Dated: March 24, 2020

Respectfully submitted,

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