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NLRB Overrules 50 Years of Precedent

On March 29, 2001, the National Labor Relations Board issued one of its most significant decisions in years. In *Levitz Furniture*, 333 NLRB No. 105, 166 LRRM 1329, overruling fifty years of precedent, the Board held that an employer may not withdraw recognition from a union without proof that the union actually no longer represents a majority of bargaining unit employees. Prior to this, to withdraw recognition an employer only needed to show a "good faith doubt, based on objective considerations, of the union's continued majority status."

An employer facing the possibility that an incumbent union has lost the support of a majority of bargaining unit employees has three options: (1) poll the employees; (2) file a petition for an RM election; or (3) withdraw recognition from the union.[1] Since 1951, when the Board decided *Celanese Corp.*, 95 NLRB 664, 28 LRRM 1362, it has consistently applied the same "good faith doubt" standard to all three options, and defined "doubt" as "disbelief, not merely uncertainty." Moreover, employers could not rely on hearsay statements to establish such disbelief. (See generally *Levitz Furniture*, 166 LRRM at 1336; 1342 and cases cited therein.) That began to change in 1998, with the Supreme Court's unanimous decision in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359.

After Allentown Mack purchased the assets of Mack:

> a number of Mack employees made statements to the prospective owners of Allentown Mack Sales suggesting that the incumbent union had lost support among employees in the bargaining unit. In job interviews, eight employees made statements indicating, or at least arguably indicating, that they personally no longer supported the union. Ron Mohr, a member of the union's bargaining committee and shop steward ... told an Allentown manager that it was his feeling that the employees did not want a union, and that "with a new company, if a vote was taken, the Union would lose." Bloch ... a mechanic on the night shift, told a manager that the entire night shift (then 5 or 6 employees) did not want the union.

(Id. at 362.) Based on these statements, Allentown Mack refused to recognize the union and polled the employees.

The Board found these actions unlawful because the employer did not demonstrate a good faith doubt of the union's majority status.[2] The Court reversed, ruling that the Board's traditional definition of "doubt" as "disbelief" was flawed. Instead, the Court held the question was whether the employer lacked a genuine, reasonable "*uncertainty*" about the union's continuing majority support. " 'Doubt' is precisely that sort of 'disbelief' (failure to believe) which consists of an uncertainty rather than a belief in the opposite." (Id. at 367 (emphasis added).)

The Board also erred by disregarding critical evidence of employee statements that demonstrated the existence of such uncertainty.

> Unsubstantiated assertions that other employees do not support the union certainly do not establish the fact of that disfavor with the degree of reliability ordinarily demanded in legal proceedings. But under the Board's enunciated test for polling, it is not the fact of disfavor that is at issue (the poll itself is meant to establish that), but rather the existence of a reasonable uncertainty on the part of the employer regarding that fact. On that issue, absent some reason for the employer to know that Bloch had no basis for his information, or that Bloch was lying, reason demands that the statement be given considerable weight ....
>
> It must be borne in mind that the issue here is not whether Mohr's statement clearly establishes a majority in opposition to the union, but whether it contributes to a reasonable uncertainty whether a majority in favor of the union existed.

(Id. at 369-71. But see *Levitz Furniture*, 333 NLRB No. 105 (discussed infra) (adopting actual loss of support standard for withdrawal of recognition).)

> The same is true of the Board precedents holding that an employee's statements of dissatisfaction with the quality of union representation may not be treated as opposition to union representation, and that an employer may not rely on an employee's anti-union sentiments, expressed during a job interview in which the employer has indicated that there will be no union. It is of course true that such statements are not clear evidence of an employee's, opinion about the union — and if the Board's substantive standard required clear proof of employee disaffection, it might be proper to ignore such statements altogether. But that is not the standard, and, depending on the circumstances, the statements can unquestionably be probative to some degree of the employer's good-faith reasonable doubt.

(Id. at 379-80 (internal quotes and citations omitted).)

The Court also laid the ground work for *Levitz Furniture*, calling the Board's policy of requiring the same good faith doubt (disbelief) for unilateral withdrawal of recognition, polling, or filing an RM petition "puzzling."

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(Id. at 364.) Nevertheless, the Court upheld the unitary standard as not arbitrary or capricious. Three years later, however, the Board abandoned that standard vis-à-vis withdrawing recognition.

'Levitz Furniture'

Acting upon a petition signed by a majority of employees stating that they no longer desired representation, Levitz Furniture informed the union that it would withdraw recognition when its contract expired.[3] The union responded that it possessed evidence that it continued to represent a majority of the employees, but the employer declined to examine the evidence.

Although the Board ultimately held that the withdrawal of recognition was lawful, it overruled Celanese Corp., and imposed a higher burden upon employers seeking to withdraw recognition because:

> there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition unless it can prove an incumbent union has, in fact, lost majority support.

(166 LRRM at 1337.)[4]

> We overrule *Celanese* and its progeny insofar as they hold that an employer may lawfully withdraw recognition on the basis of a good faith doubt (uncertainty or disbelief) as to the union's continued majority status.

(Id. at 1339.)[5]

The Board specifically reaffirmed the traditional, less burdensome showing required for the filing of an RM petition, i.e., a good faith doubt (uncertainty) that the union no longer represents the majority of employees, because the Board views RM elections as the "preferred" way to resolve these issues. (See id. at 1337; 1341.) For some reason, the Board chose not to address the standard for polling, thereby leaving in place — for the moment — the good faith doubt standard. (See id. at 1337.)[6]

Heeding the Supreme Court's words in *Allentown Mack*, the Board reversed its long-standing rule that employers cannot rely on hearsay statements to establish the existence of a good faith uncertainty. Now, hearsay statements will be considered among various other factors.

> Prior to *Allentown Mack*, the Board consistently declined to rely on certain kinds of evidence to establish a good-faith doubt. For example, the Board did not consider employees' unverified statements regarding other employees' anti-union sentiments to be reliable evidence of opposition to the union. Similarly, the Board viewed employees' statements expressing dissatisfaction with the union's performance as the bargaining representative as not showing opposition to union representation itself.
>
> We therefore hold that statements of the type described above should be considered by the regional offices when processing RM petitions.

(Id. at 1342-43.)

Employers may continue to act upon "anti-union petitions signed by unit employees and firsthand statements by employees concerning personal opposition to an incumbent union could contribute to employer uncertainty." (Id. at 1341-42.) Inaction by the union, unaccompanied by employee complaints, however, still will not constitute evidence of loss of support. (Id. at 1342 n.60.)

Whichever option an employer chooses, any action must take place in a context free of "serious" unfair labor practices.

> [W]hen an employer unlawfully fails or refuses to recognize and bargain with an incumbent union, any employee disaffection from the union that arises during the course of that failure or refusal results from the earlier unlawful conduct.

(*Lee Lumber*, 322 NLRB No. 14, 153 LRRM 1158, 1161-62 (1996), aff'd in part, rev'd in part, 117 F.3d 1454, 155 LRRM 2748 (D.C. Cir. 1997).)[7]

Additionally, there is a presumption of continuing majority status for one year following the union's certification as collective bargaining representative (the "certification year"), which prohibits employers from withdrawing recognition. After the certification year, that presumption becomes rebuttable. (See, e.g., *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Brooks v. NLRB*, 348 U.S. 96 (1954); *Levitz Furniture*, 149 LRRM at 1145 n.70.)

Moreover, an employer may not rely upon evidence received during the certification year to withdraw recognition after the certification year. (*United Supermarkets*, 287 NLRB 119, 127 LRRM 1210 (1987), enf'd, 862 F.2d 549 (5th Cir. 1989).)

There is also a presumption of continuing support during the term of a collective bargaining agreement, which becomes rebuttable upon expiration of the contract. (See, e.g., *NLRB v. Curtis Matheson*, 494 U.S. 775 (1990); *Quazite Corp.*, 323 NLRB No. 80, 155 LRRM 1049 (1997); note 3 supra.)[8]

Conclusion

When defending against a charge of unlawful withdrawal of recognition, an employer must now prove that at the time of withdrawal the union had, in fact, lost the support of a majority of bargaining unit employees. Failure to meet this burden will result in an affirmative (*Gissel*) bargaining order. (*Caterair Int'l*, 322 NLRB No. 11, 153 LRRM 1153-54 (1996) (bargaining order is appropriate remedy for unlawful recognition; no need to engage in case-by-case factual analysis).)

(1) Under appropriate circumstances, the employees themselves can file a petition for a decertification election.

(2) As a successor to Mack, Allentown Mack had to recognize and bargain with the union. For a discussion of a successor employer's bargaining obligations, see generally *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27 (1987); *NLRB v Burns Int'l Security Services*, 406 U.S. 272 (1972); *Dupont Dow Elastomers*, 332 NLRB No. 98, 166 LRRM 1206 (2000).

(3) The employer could not lawfully withdraw recognition until the contract expired. See id. at 1343; 29 U.S.C. §158(d) ("the duty to bargain collectively shall also mean that no party to such a contract shall [unilaterally] terminate or modify such contract.")

(4) The Board chose to apply the decision prospectively only, thus it found the withdrawal lawful because the employer had a good faith uncertainty about the union's majority status at the time it announced its intended withdrawal. The employer's failure to examine the union's purported evidence of majority support did not undermine that uncertainty. See id. at 1343-44.

(5) An employer that knows the union has lost the support of a majority of employees violates the NLRA by continuing to recognize the union, unless the employer files an RM petition. See, e.g., *Levitz Furniture*, 166 LRRM at 1338.

(6) The Board specifically stated that it was not addressing polling. (Id.) For a discussion of polling issues, see generally *Allentown Mack*, 522 U.S. at 365; *Texas Petrochemicals Corp.*, 296 NLRB No. 136, 132 LRRM 1279 (1989); *Struknes Construction Corp.*, 165 NLRB 1062, 65 LRRM 1385 (1967).

(7) See also *Rock-Tenn Co.*, 319 NLRB 1139, 153 LRRM 1041, enf'd, 101 F.3d 1441, 154 LRRM 2021 (D.C. Cir. 1996); *Levitz Furniture*, 166 LRRM at 1331 n.1.

(8) Cf. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996) (employer may not disavow CBA and withdraw recognition, even with good faith doubt, if the doubt arises from facts known before union accepts employer's contract offer); *Bridgestone/Firestone Inc.*, 331 NLRB No. 24, 164 LRRM 1153 (2000) (union's invoking automatic renewal clause while simultaneously requesting bargaining on certain subjects meant contract did not automatically renew for contract bar purpose, so employer could withdraw recognition based upon petition signed by majority of employees).