Allentown Mack v. NLRB: Is the Board's "Good Faith Reasonable Doubt" Standard in Its Twilight?

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Employers sometimes use in-house employee polls to gauge employees' continuing support for an incumbent union, to verify that the employer's good faith reasonable doubt of the union's majority status was in fact accurate, and to justify the employer's unilateral withdrawal of recognition from the union. However, the National Labor Relations Board has applied the good faith reasonable doubt standard to require that employers only poll when they already have sufficient evidence of employee rejection of the union that would allow the unilateral withdrawal of recognition without polling. Thus, employers can only use employee polls when they have no need to. This article addresses the Supreme Court's recent decision in Allentown Mack v. National Labor Relations Board, *in which the Court addressed this "puzzling policy" and chastised the Board for enunciating one legal standard while, in fact, applying another, much stricter standard. This article also discusses what the Supreme Court's decision means for employers in the reasonable good faith doubt polling and withdrawal of recognition contexts. Equally important, this article examines those unanswered questions raised by the language of the Court's decision.*

The National Labor Relations Board (NLRB) has a long-standing rule that requires an employer to have "a good faith reasonable doubt" as to whether a majority of its employees continue to support an incumbent union before it may take any one of the following steps: (1) petition for a Board-supervised "RM" election; (2) withdraw recognition from, and refuse to bargain with, the union; or (3) conduct an internal poll of employee support for the union. This rule has been strenuously criticized for requiring the same "good faith reasonable doubt" for these three distinct employer actions. For example, although the Board clearly prefers

Board-supervised RM elections, with their attendant procedural safeguards, it refuses to lower the evidentiary showing needed to secure this government-sanctioned device. Rather, it requires the employer to demonstrate the exact same "good faith reasonable doubt" regardless of whether the employer desires to secure an election, to poll employees as to their union sentiments, or to simply withdraw recognition and refuse to bargain with the union.

The United States Supreme Court in *Allentown Mack Sales and Service, Inc. v. National Labor Relations Board*, ____ U.S. ____, 139 L. Ed.2d 797, 118 S. Ct. 818 (1998), recently addressed this issue and while the Court found the Board's adoption of this unitary standard to be "puzzling," it held that the good faith reasonable doubt test is facially rational and consistent with the National Labor Relations Act (NLRA). On the other hand, the Court held that the Board's factual finding that the company lacked a good faith reasonable doubt before it polled its employees was not supported by substantial evidence on the record as a whole. In reaching the latter conclusion, the Court exposed the Board's exercise in "doublethink,"[1] and reprimanded the Board for articulating a standard of "good faith reasonable doubt," while, in practice, applying another, much stricter standard.

This article reviews the facts behind and the analysis supporting the Supreme Court's decision in the *Allentown Mack* case. It then addresses those lessons that employers may glean from the Court's decision and Board's Orwellian position. Finally, the authors briefly discuss those questions raised and left unanswered by the language of the Supreme Court's decision.

THE FACTUAL SETTING IN *ALLENTOWN MACK*

Mack Trucks sold its truck dealership and repair shop in Allentown, Pennsylvania to a company formed by three former Mack dealership managers. In December 1990, the former managers named the new company Allentown Mack Sales and Services ("Allentown Mack"). For many years prior to the Mack sale, Local Lodge No. 724, of the International Association of Machinists and Aerospace Workers, AFL-CIO (the "Union"), represented Mack's dealership's parts and service employees.

Prior to the sale, in July 1989, the Union and Mack reached an agreement modifying the terms of their 1989-1992 collective bargaining agreement, so as to provide that the agreement would become null and void on December 21, 1989. After the sale, when Allentown Mack took

over, it dismissed all 45 members of the bargaining unit. Allentown Mack then interviewed and rehired 32 of the 45 former Mack employees.

The Union sought to continue to represent the Allentown Mack employees. On January 2, 1991, the Union sent Allentown Mack a letter, which was received on January 7, requesting that Allentown Mack recognize and bargain with it for a new agreement. By letter dated January 25, 1991, Allentown Mack refused, until it further investigated whether there was a good faith doubt as to the Union's majority status among the service and parts employees. Allentown Mack also informed the Union that it had arranged for an independent poll by secret ballot of the bargaining unit employees to be conducted under Board guidelines. The poll was conducted by a Catholic priest and taken on February 8, 1991. In that poll, 13 employees voted that they wanted to be represented by the Union, while 19 employees voted that they did not want to be represented. The Union filed unfair labor practice charges, and the Board issued a complaint alleging that Allentown Mack violated Sections 8(a)(1) and (5) of the NLRA by failing to recognize and bargain with the Union, and by unlawfully polling employees when it did not have a good faith reasonable doubt of the Union's continuing majority status.

THE ALJ'S DECISION

The Administrative Law Judge (ALJ) found that Allentown Mack was a successor to Mack and had a duty to bargain with the Union. While noting that the February 8 poll results supported its position that the Union did not enjoy majority status, the ALJ found that Allentown Mack failed to demonstrate that it had a good faith reasonable doubt, based upon objective considerations, of the continuing majority status of the Union before it conducted the poll. Allentown Mack had submitted evidence which was comprised of statements from bargaining unit employees to various management employees that expressed, to various degrees, the employees' dissatisfaction with the Union. These statements were made to branch manager Robert Dwyer, service manager David Worth, and parts manager Hamershock. The ALJ found that there were six employee statements of dissatisfaction which constituted objective considerations that could properly be relied upon to support Allentown Mack's asserted good faith reasonable doubt. These six employee expressions included statements that current employees did not want the Union, were against the Union, "would rather not have" the Union, and had no use for the Union.

Although the ALJ counted one employee's (employee Bloch's) personal statement of his own opposition to the Union, the ALJ did not accept Bloch's representations regarding the other night shift employees' Union opposition because neither Bloch nor the other night shift workers testified. The ALJ also found that there was no evidence that the other night shift workers made independent representations regarding their Union sympathies to Bloch.

Significantly, the ALJ found that the following six employee statements of asserted opposition to the Union's representation could not be properly relied on by Allentown Mack to support its good faith reasonable doubt.

> Mike Ridgick, in a 1986 conversation with Dwyer, noted that there had been a number of decertifications at other Mack facilities and inquired as to what he could do in this regard. Following the sale of Mack to Allentown Mack, Ridgick interviewed for a position with Allentown Mack. During the interview he was told that the new company would be non-union. Ridgick replied that as long as the new company would treat them right, there would be no need for a union.

The ALJ dismissed this evidence, finding that the conversation between Dwyer and Ridgick was too remote in time to properly assess Ridgick's sympathies in early 1991. The ALJ also found Ridgick's conversation at his job interview to be "at best equivocal."

> Union steward, Dennis Wehr, told Dwyer that we didn't have to have a union, because we don't need one. Wehr was hired by Allentown Mack in December, but quit on January 23, 1991.

The ALJ found that Wehr's statement would properly cause an employer to doubt Wehr's support for the Union. However, because Wehr quit his employment with Allentown Mack prior to Allentown Mack's reply to the Union's request for recognition, the ALJ discounted Wehr's testimony.

> When Dennis Marsh interviewed for the job, he stated that he was not being represented for the $35.00 he was paying the Union.

The ALJ found that although Marsh's statement expressed dissatisfaction with the Union, it did not amount to a clear statement that Marsh did not want to be represented by the Union. It seemed, to the ALJ, more an expression of a desire for better representation than one for no representation at all.

> Milt Solt, in his job interview stated that he did not feel comfortable with the Union and thought that it was a waste of his $35.00 a month.

The ALJ thought Solt's statement was not a clear expression of opposition to the Union and that it was weakened because it was given in his job interview.

> Randy Zoltack, who was hired in February just before the poll, told Hamershock that the Union was a waste of $35.00.

The ALJ found that because Zoltack was hired after Allentown Mack responded to the Union in its January 25th letter, that Zoltack's statement could not have been part of Allentown Mack's good faith doubt on that day.

> In December, before the interview process began, Dwyer and Union steward Ron Mohr, discussed the Union. Mohr told Dwyer that if a vote was taken at the new company, that the Union would lose and that it was his feeling that the employees did not want a Union.

The ALJ dismissed this evidence, noting that Mohr did not indicate any personal dissatisfaction with the Union. Regarding Mohr's statement that the Union would lose in a vote, the ALJ found that it did not provide a sufficient basis for Allentown Mack's asserted good faith doubt because there was no evidence as to how Mohr knew that the Union would lose in an election, or whether he was talking about a large or small majority. Moreover, the ALJ noted that Mohr was referring to the then-existing service employees of the Mack unit, which had 32 service employees (out of a total of 45), whereas Allentown Mack hired only 22 of those 32 service employees (for a total of 32 Allentown Mack employees).

In summary, the ALJ found that Allentown Mack could properly rely on, as objective considerations that supported a good faith doubt of the Union's majority status, the statements of only six employees out of 32 employees. The ALJ, however, observed that even if Solt's statement was counted, it would only give Allentown Mack seven properly counted employee statements of dissatisfaction with the Union. The ALJ concluded that seven statements of employee opposition to the Union, out of 32 total employees (or roughly 20 percent of the bargaining unit), was not a sufficient level of employee opposition to constitute an objective reasonable doubt for the conducting of a lawful employee poll.

Accordingly, the ALJ found that Allentown Mack could not rely

on the results of the poll as an objective consideration to support the good faith reasonable doubt required for its withholding of recognition, because the poll itself was an unfair labor practice. Finally, the ALJ held that Allentown Mack's refusal to extend recognition and bargain with the Union within a reasonable time on and after receipt of the Union's request on January 7, 1991, violated the NLRA.

THE BOARD'S DECISION

Allentown Mack appealed the ALJ's decision to the Board. Allentown Mack challenged the ALJ's findings that, inter alia, Allentown Mack lacked a reasonable doubt and could not properly rely on union steward Mohr's statement that the Union would lose an election. The Board, in its decision, 316 NLRB 1199 (1995), adopted the ALJ's finding that Allentown Mack had not demonstrated that it held a good faith reasonable doubt, based on objective considerations.

The Board also adopted the ALJ's finding that Allentown Mack could not rely on Mohr's statement as a basis for doubting the Union's majority status. The Board noted that because Mohr's statement was made before Allentown Mack's job interview process had begun, that the ALJ properly inferred that Mohr was referring to Mack's employee unit, and not Allentown Mack's. The Board refused to give Mohr any more credence than any other employee, regardless of Mohr's position as a union steward. Further, the Board noted that Allentown Mack bore the burden of establishing its doubt was reasonable, and failed to carry this burden.

Finally, the Board ruled that the ALJ erred in finding that Allentown Mack did not violate the NLRA when it refused to bargain with the Union until it received the results of its February 8th poll of the unit employees. The Board noted that because Allentown Mack did not have a reasonable doubt, it was not entitled to take the poll at all. Moreover, its duty was to bargain without delay, not to wait for the outcome of an unlawful poll before it decided to comply with its statutory obligations. The Board concluded that because the poll itself was an unfair labor practice, Allentown Mack could not rely on the results of the poll in refusing to recognize the Union. In reaching its conclusions, the Board noted that six or seven employees opposing the Union would be even insufficient to meet the less stringent standard the Fifth Circuit applies for polling.

THE FIFTH CIRCUIT'S "LOSS OF SUPPORT" STANDARD

The Fifth Circuit, in *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981), rejected the Board's reasonable doubt rule. In *Thompson,*

the court questioned the validity of a prohibition against an employer polling its employees until the employer had sufficient objective evidence to justify an outright withdrawal of recognition, without the need for a poll. The court found that if polling is to be a "useful and legitimate tool" for employers that have sincere doubts about the Union's continuing majority support, the evidentiary standard for polling should be lower than the standard for withdrawing recognition.

To its credit, the court then fashioned its own employer polling rule. The court held that when an employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere, it may, in accordance with Board guidelines as delineated in *Struksnes*,[2] poll employees regarding their continued support for the union if there is substantial, objective evidence of a loss of union support, even if that evidence is not sufficient to justify a withdrawal of recognition. The court found this test to be a reasonable accommodation of both the employer's interest in testing the union's support and the Board's interest in preventing repeated polls which themselves may be coercive. The court stressed that in order to justify a poll, there must be substantial, objective evidence of a loss of at least some support for the union, although not necessarily a loss of majority support.

The court's stated preference for its test over the Board's was predicated upon the desire to prevent unfair labor practices and reduce the need for Board and court involvement in labor disputes, by avoiding an employer's premature or unlawful withdrawal of recognition. Under the Fifth Circuit's test, an employer faced with substantial evidence of a loss of some support for the union could lawfully conduct a poll to determine the union's actual level of support, without withdrawing recognition. The Fifth Circuit's loss of support standard was subsequently adopted by the Sixth and Ninth Circuits, respectively, in *Thomas Industries v. NLRB*, 687 F.2d 863 (6th Cir. 1982), and *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir. 1984).

D.C. CIRCUIT COURT OPINION

Allentown Mack appealed the Board's decision to the Court of Appeals for the District of Columbia, in *Allentown Mack v. NLRB*, 83 F.3d 1483 (D.C. Cir. 1996). On appeal, Allentown Mack argued that the Board's standard for polling was too strict and that the loss of support standard should be applied in the case. Further, they argued that if the loss of support standard had been applied, the Board would not have found that

Allentown Mack's poll was illegal and the results of the poll would then have supported its refusal to bargain.

The D.C. Circuit took notice of the fact that the Fifth, Sixth, and Ninth Circuits rejected the Board's standard as rendering employee polls useless. However, the D.C. Circuit court found neither the Fifth Circuit's, nor the Board's analysis, compelling. The court observed that the Fifth Circuit's loss of support standard creates the anomaly that it is easier for an employer to conduct its own unsupervised poll than to have a Board-conducted RM election. Moreover, even though the NLRA does not specifically govern employee polling, the Board, based upon its expertise, could reasonably limit the time and place of such conduct. Thus, between the Board's and the Fifth Circuit's standards, the court decided to defer to the Board's expertise rather than impose a judicially-created lower standard for polling.

The D.C. Circuit found that under Board precedent, the ALJ properly discounted the statements of Ridgick and Marsh. The court noted that employee sentiments of opposition to a union expressed during a job interview when the employer has indicated that there will not be a union are unlikely to be sincere. Similarly, the court found that, under Board precedent, expressions of dissatisfaction with the quality of a union's representation may not be relied upon as a statement of opposition to union representation. The statements of Bloch and Mohr concerning other employees' dissatisfaction with the Union had to be discounted pursuant to Board precedent minimizing the reliability of reports by one employee concerning the sentiments of another employee. Consequently, the court found that the Board's decision was supported by substantial evidence on the record as a whole and sustained the Board's decision.

In a strong dissent, J. Sentelle noted that the Board's decision resulted not only in the unfair labor practice for refusing to bargain with the Union (which had only 13 votes of support out of 32 total votes), but also placed Allentown Mack under a bargaining order that amounted to a bar against decertification of a Union that lacked majority support. While noting that judicial decision making should not be results driven, Sentelle thought the Board's rule that an employer cannot conduct a poll to determine majority support unless it already had enough evidence of a lack of majority support as to render the poll meaningless, had become "divorced from logic and the common sense of the people who live under it."[3] Sentelle also noted that the Allentown Mack bargaining unit had never been sampled for union support because it comprised only a portion of the prior bargaining unit from Mack. Sentelle concluded by finding it arbitrary

and capricious for the Board to find that Allentown Mack committed unfair labor practices in the "face of overwhelming unrefuted evidence that the union lacked majority support."

SUPREME COURT MAJORITY DECISION

On appeal, the Supreme Court, with Justice Scalia writing the majority (5-4) opinion, held that the Board's good faith reasonable doubt test for employer polling was facially rational and consistent with the NLRA. The Court, however, also held that the Board's factual finding that Allentown Mack lacked a reasonable doubt was not supported by substantial evidence on the record as a whole.

Allentown Mack argued that the Board irrationally permits employers to poll only when it would be unnecessary to do so, because the Board's reasonable doubt standard for employer polls is the same as its standard for a unilateral withdrawal of recognition and for an employer petition of a Board-supervised RM election. Further, Allentown Mack argued that the record evidence clearly demonstrates that it did, in fact, have a good faith reasonable doubt about the Union's claim to majority support.

Allentown Mack also complained that the Board has silently abandoned the good faith reasonable doubt standard in favor of an actual proof of a loss of majority support—that is, a head-count. Allentown Mack argued that the Board has virtually eliminated the value of circumstantial evidence and employee statements regarding union opposition views of coworkers. Instead, the Board will only consider direct statements by individual employees that demonstrate a clear intent not to be represented by the union. Allentown Mack noted, however, that employers are prohibited from asking individual employees whether they support the union.

The Board opined that even though an employer that meets the reasonable doubt standard could lawfully withdraw recognition, there would still remain in the employer an inherent uncertainty whether the union has actually lost its majority support. Thus, such an employer would still find it advantageous to poll its employees to obtain more certain, reliable information on the level of employee support for the union. Further, the Board found it "anomalous" to require an employer to show a good faith reasonable doubt about an incumbent union's majority support for a Board-supervised RM election, while on the other hand allowing that same employer to conduct its own informal poll for the same purpose, with the same potential consequences, on the basis of a less stringent evidentiary standard.[4]

Reasonable Doubt Standard Is Rational

In the first part of its decision, the Court held that while the Board's unitary standard for polling, RM elections, and withdrawals of recognition is "puzzling," it was not "so irrational as to be arbitrary or capricious" under the Administrative Procedures Act. The Court acknowledged that the Board's unitary standards make polling useless as a means of protecting an employer that is contemplating a withdrawal of recognition against an unfair labor practice charge. However, the Court noted that "there is more to life and even to business" than avoiding unfair labor practice charges.

The Court then cited as an example, a situation where the employer polls employees before withdrawing recognition, rather than abruptly withdrawing recognition, in order to avoid antagonizing union supporters and alienating employees who are on the fence. Further, the Court noted that an employer whose evidence meets the Board's good faith reasonable doubt standard may want to verify, by polling, that it does have conclusive evidence that the union actually lacks majority support, rather than spending the time and money in an unfair labor practice hearing for a short-lived benefit that will last only until the next election. Finally, the Court reasoned that although the standard for polling is the same as the standard for withdrawal of recognition, the chances are less likely that an employer will have an unfair labor practice charge filed for polling than for withdrawing recognition.

The Court recognized that the Board's preference for RM elections rather than polls does not fit with the Board's unitary standard applied to RM elections, polls, and withdrawals of recognition, because this preference should result in a more rigorous standard for polling and withdrawals than for RM petitions. The Court also acknowledged the reasons that the standard for polling could be less rigorous than for RM petitions; if the union loses an employer poll it can still request a Board-conducted RC election, but if the union loses a formal RM election it is barred from seeking another one for a year. Consequently, the Court held that if it would be rational for the Board to set the pooling standard either higher or lower than the standard for an RM election, then it is rational for the Board to set the same standard for polling as for petitioning for an RM election.

Board's Factual Finding Is Not Supported by the Evidence

The Court next decided whether Allentown Mack demonstrated that it held a reasonable doubt, based on objective considerations. This question goes to the sufficiency of the evidence that Allentown Mack

relied upon to support its conclusion that it did, in fact, hold a reasonable doubt of the Union's continuing majority support.

In reaching its conclusion here, the Court first established a definitional baseline. The Board argued during oral argument that the word "doubt" means either "uncertainty" or "disbelief," and that its position was that the polling standard only used the word "doubt" in the latter sense of "disbelief." The Court flatly rejected the Board's position, and stated that doubt is precisely that sort of disbelief which consists of an uncertainty, rather than a belief in the opposite.

The Court held that it was reasonable to find that Allentown Mack did hold a genuine, reasonable uncertainty about whether the Union enjoyed the continuing support of a majority of the employees. The Court noted that the Board's factual finding to the opposite was premised on the Board's refusal to credit probative circumstantial evidence, and because the Board's evidentiary demands went beyond the substantive standard the Board claims it applies.

For example, the Court questioned why the ALJ and the Board disregarded the statement of Dennis Marsh, who said that he was not being represented for the $35 he was paying. The ALJ thought Marsh's statement seemed more an expression of a desire for better union representation than one for no union at all. The Court thought that Marsh's statement was simply an expression of dissatisfaction with the Union's performance, which could either mean that the Union should represent him more effectively or could mean that Marsh wanted to get rid of the Union altogether. The Court found that Marsh's statement should not have been ignored because it clearly reflected an uncertainty regarding his support for the Union.

The Court also disagreed with the Board regarding statements of two employees who expressed not only their own feelings regarding the Union but also expressed other employees' feelings of dissatisfaction. Kermit Bloch, who worked on the night shift, had told an Allentown Mack manager "that the entire night shift did not want the union." The ALJ disregarded Bloch's statement because he did not testify at the hearing. The Court found that under the Board's stated reasonable good faith standard, it is the existence of a reasonable uncertainty on the part of the employer that matters, and accordingly absent some reason for the employer not to believe Bloch, the Board should not have ignored the statement.

Similarly, Ron Mohr had told Allentown Mack managers that the Union would lose if a vote was taken and that he thought that the employees did not want a union. The ALJ disregarded Mohr's statement because there was no evidence regarding how Mohr knew what his

coworkers' sentiments were on the Union. The ALJ also disregarded Mohr's statement because the ALJ believed Mohr was referring to the former bargaining unit employees, not to the Allentown Mack employees. However, the Court found the ALJ's basis for disregarding Mohr's statements was irrational because the Union had never even won in an informal poll at Allentown Mack, let alone won in an election. Criticizing the Board's reasoning in light of its preliminary successorship finding, the Court stated that the "Board cannot rationally adopt that presumption for purposes of imposing the duty to bargain, and adopt precisely the opposite presumption (i.e., contend that there is no relationship between the sentiments of the two work forces) for purposes of determining what evidence tends to establish a reasonable doubt regarding union support." The Court cautioned that the issue 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 exists." Consequently, the Court found that Mohr's statement "has undeniable and substantial probative value on the issue of reasonable doubt."

The Court also found that a seventh employee's statement (Solt's) that he did not feel comfortable with the Union and thought it was a waste of $35 a month supported a good faith reasonable doubt. The Court then observed that:

> The Board did not specify how many express disavowals would have been enough to establish reasonable doubt, but the number must presumably be less than 16 (half of the bargaining unit) since that would establish reasonable certainty. Still, we would not say that 20% first-hand-confirmed opposition (even with no countering evidence of union support) is alone enough to require a conclusion of reasonable doubt.

After wondering what percentage the Board requires for reasonable doubt,[5] the Court addressed Allentown Mack's argument that the Board has in practice eliminated this standard in favor of a strict head-count. Noting that the Board must engage in logical and "[r]easoned decision making, in which the rule announced is the rule applied," the Court concluded that decisionmaking that consistently applies a standard other than the one stated has negative consequences for courts and judges trying to apply those standards.

As an example, the Court reviewed the reasoning behind the Board's decision in *Laidlaw Waste Systems, Inc.*, 307 NLRB 1211 (1992). In *Laidlaw*, the ALJ concluded that the Board had in practice abandoned

the preponderance of the evidence standard and, instead, required "clear, cogent, and convincing" evidence to justify an employer's assertion of a union's loss of majority status. The Board, on review, rejected this conclusion by the ALJ, and restated its often enunciated standard that an employer must show "by a preponderance of the evidence . . . objective factors sufficient to support a reasonable and good faith doubt of the union's majority." At the same time, however, the Board acknowledged that "the terms clear, cogent, and convincing" have some significance in withdrawal cases, and attempted to clarify its seemingly contradictory position. The Court found the Board's explanation made the "waters impenetrably muddy." Significantly, Justice Scalia stated that the Board's reasoning was "nonsense." Because of this nonsense, the Court also wondered what an ALJ would be able to do with the next case.

The Court noted that when it reviews Board decisions on questions of fact, it will give the Board the benefit of the doubt, but will set aside the Board's decision if it is not supported by substantial evidence on the record as a whole. This is an objective test, the Court noted, with no room for an "agency's eccentric view of what a reasonable factfinder ought to demand." The Court allowed that the Board may adopt evidentiary presumptions, that in practice are substantive rules of law, in order to further its policy goals. The Court further allowed that the Board may "forthrightly" adopt rules of evidence that exclude certain categories of testimony on policy grounds. However, the issue in *Allentown Mack* had nothing to do with furthering stated policy goals, but rather involved the Board's alleged "systematic undervaluation of certain evidence, or allegedly systematic exaggeration of what the evidence must prove."

The Court then returned to the specific employee statements that the Board prohibited Allentown Mack from relying on for its asserted reasonable good faith doubt of the Union's continuing majority status. The Court declined to follow the Board precedent that the ALJ, the Board, and the D.C. Circuit court relied on to disregard, for example, Mohr's statement of other employees' dissatisfaction with the Union. The Court found that those prior Board cases provided no justification for the Board's factual inferences in this case, and resulted in the "arbitrary" disregard of the employer's evidence. While acknowledging that the statements expressing union disaffection were not clear evidence of the employees' union sentiments, they were probative of the Board's enunciated standard of the employer's good faith reasonable doubt. The Court reversed the Court of Appeals for the D.C. Circuit and denied enforcement of the Board's Order.

THE DISSENT'S ANALYSIS

Chief Justice Rehnquist wrote a dissent in which he disagreed with the majority's conclusion that the Board's standard was rational and consistent with the NLRA. Rehnquist thought the Board's standard irrational because the Board failed to demonstrate how employer polling violated the Act. Rehnquist noted that the Board already has safeguards in place to ensure that employer polling would not coerce employees in the exercise of their statutory rights, and its reasoning did not properly consider the employees' right of choice under the Act. To Rehnquist, imposing the same standard on two actions having entirely different results is irrational. This is because the results of an RM election are binding on a losing union for one year, while the results of an employer poll do not prohibit a union from petitioning the Board for an election at all. In light of these differences, the standard for polling logically should be lower than for an RM election, particularly in light of the Board's expressed preference for the latter.

Justice Breyer, also writing in dissent, disagreed with the majority's conclusion that the Board's factual findings were not supported by substantial evidence. First, Breyer thought the question was not before the Court. Nevertheless, Breyer thought the Board's decision was entitled to deference.

THE MEANING FOR EMPLOYERS

Employers can take little satisfaction from now knowing that the less strident Fifth Circuit "loss of support" standard for polling has been rejected. In fact, the Supreme Court's *Allentown Mack* decision, despite its questioning of the Board's "puzzling policy," does not change the fact that, at least for the present, employers may only use polling if they have the same evidence sufficient to allow them to withdraw recognition without polling, or to petition for an RM election.

And while the Board prefers RM elections over polling or withdrawal, because of the elections' perceived increased fairness, employers are reluctant to choose an RM election rather than an in-house poll because of the time and resources needed to run an RM election campaign and deal with post-election litigation. Consequently, out of the three options associated with the good faith doubt standard, two of them, polling and RM elections, are comparatively unsatisfactory from an employer's standpoint.

One of the few lessons to be drawn from *Allentown Mack* is that if an employer has a good faith reasonable doubt, he or she should use it to

withdraw recognition and not waste time with a poll. Despite the sharp tone of the Supreme Court's decision, and the glee that some may take from the Board's dressing-down, the decision itself does nothing to aid practitioners. Employers are better off unilaterally withdrawing, rather than asking employees how they feel about the union in a poll.

Although the Board has professed an aversion to employer unilateral withdrawals of recognition, the Board's unitary standard—and the Supreme Court's sanction of it—for all three types of employer action gives employers little incentive to poll before unilaterally withdrawing recognition. The ostensible reason for employer polling is to minimize the risk of litigating an unlawful withdrawal of recognition. However, an employer that puts off withdrawing recognition until after polling its employees has done little, if anything, to improve its position. The union will still likely litigate.

The union will likely challenge an employer poll on any one or more of the following grounds: (1) that the employer did not, in fact, hold a reasonable doubt of the union's continuing majority status; (2) that the poll was not conducted properly under the applicable Board guidelines; and/or (3) that the polling results were unreliable and subsequently cannot form a lawful basis for withdrawing recognition. In fact, one often-quoted commentator has observed that an employer that polls and then withdraws recognition "practically invites litigation" and that polling before withdrawing recognition does not avert litigation but only "shifts the focus" and would likely expand litigation.[6] Rather than poll, an employer is better off to simply withdraw recognition and defend itself against one probable unfair labor practice charge, rather than two or more charges.

A prudent employer will also withdraw recognition, rather than poll, because if the employer loses a poll, it will no longer have a good faith reasonable doubt, and will thereafter have to recognize and bargain with the union. This risk of uncertainty is inherent in any election or poll, and is not attendant to the outcome when withdrawing recognition. Consequently, although the Board and the Court in *Allentown Mack* indicated that polling can be a means of minimizing risks, employers are likely to view polling as increasing associated risks.

THE DECLINE OF GOOD FAITH REASONABLE DOUBT?

The Allentown Mack decision may be more significant for the questions that it raises but does not answer, leading one to speculate whether the Board's good faith reasonable doubt doctrine, as we know it, is

in its twilight. In light of the Court's sharp rebuke in *Allentown Mack* for applying an evidentiary standard different than the one articulated, the Board will likely, at a minimum, reassess the way in which it treats evidence under its articulated substantive standard. Or the Board may invoke a higher burden, requiring proof of actual loss of majority support, by clear and convincing evidence.

As it now stands, the Board's enunciated standard for a withdrawal of recognition requires an employer to show either: (1) the union in fact lacked majority support or (2) the employer had a reasonable good faith doubt of the union's majority status. As Allentown Mack made clear in its Brief, however, the Board has in practice collapsed the good faith doubt branch into the First branch and requires employers to show, not a doubt of the union's majority status, but a certainty of the union's minority status. It was, of course, this Orwellian semantic nonsense that raised the ire of the Court in *Allentown Mack*. The Board's exercise in doublethink makes little sense, except in light of the Board's desperate search for justification to cling to its transparent claim that it applies a preponderance of the evidence test for assessing reasonable doubt when in practice it consistently uses a clear and convincing test. Given the Supreme Court's criticism in *Allentown Mack*, the Board may altogether abandon the good faith reasonable doubt branch in the withdrawal of recognition context, and allow instead, only a showing of actual loss of majority support that is supported by clear and convincing evidence. Moreover, given the Board's positions as articulated in *Allentown Mack*, and as criticized by the Court, the Board should abandon the good faith reasonable doubt standard in the RM election polling contexts as well—although it should be abandoned for a lesser rather than stricter standard.

Although any action the Board takes in this regard will have its critics, the Board is obligated, as the Court points out in *Allentown Mack*, to, at a minimum, apply the same standard as the announced standard. Because of the anticipated increased judicial scrutiny in the circuits, practitioners should expect that this means the end of the good faith reasonable doubt standard as we currently know it. In the mean-time, however, the Board should expect the number of employer withdrawals of recognition to increase, the number of employer polls to decrease, and the number of RM petitions to remain insignificant.

NOTES

1. “Doublethink” is the ability to hold two contradictory opinions at the same time. George Orwell, *1984*.

2. The court, in addition to the *Struksnes* test below, also added the additional requirement of sufficient notice to both the union and employees. In *Struksnes Constr. Co*., 165 NLRB 1062 (1967), the Board set forth the following guidelines for precertification polling. The *Struksnes* test requires an employer to take the following actions prior to polling: (1) the purpose of the poll is to determine whether the union enjoys majority support; (2) the purpose is communicated to the employees; (3) assurances against reprisals are given; (4) the employees are polled by secret ballet; and (5) the employer has not engaged in unfair practices or otherwise created a coercive atmosphere.

3. In this regard, J. Sentelle, citing to the Dickens character Mr. Bumble, who stated that "the law is a ass," thought the Board's rule was just such an application that made Mr. Bumble's statement believable.

4. See also, *Texas Petrochemicals Inc.*, 296 NLRB 1057, 1061-63 (1989), remanded as modified 923 F.2d 398 (5th Cir. 1991).

5. Contrary to the Court's above-quoted language of disbelief as to what is sufficient to establish reasonable doubt, it is clear that "half of the bargaining unit" or a "reasonable certainty" is exactly what the Board requires. As Allentown Mack makes clear in its Brief, the Board has silently adopted a strict head-count rule wherein the employer must clearly demonstrate (50 percent of the unit employees must disavow the union) that in fact the union has lost majority (51 percent) support.

6. Flynn, "A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union, 1991 *Wis. L. Rev*. 653, 665-66 (1991).