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

Advice Memorandum

DATE: January 4, 2005

TO : Victoria E. Aguayo, Regional Director
Region 21

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

SUBJECT: Whittier Hospital Medical Center
Case 21-CA-36404

California Nurses Assoc.
Case 21-CB-13701

518-4025
518-4040-5000
530-2050-0100
530-2050-1200
530-2050-2500
536-2563-0100

The Region submitted these Section 8(a)(2) and 8(b)(1)(A) cases for advice on whether the Employer unlawfully recognized the Union and the Union unlawfully accepted recognition based on a private election where the Union obtained a majority of votes cast, but the votes did not amount to a majority of employees in the bargaining unit.

We conclude that the Employer and the Union violated the Act by granting and accepting recognition, respectively, absent a showing of majority support for the Union.

FACTS

Whittier Hospital Medical Center is one of about 36 hospitals owned by Tenet Healthcare, Inc. ("Employer") in California. The California Nurses Association ("Union") represents registered nurses at several Tenet hospitals. Most recently, the Union was certified at San Ramon Regional Medical Center in May 2003.

In late 2003 the Employer and the Union had multiple labor disputes including negotiations for a first contract at San Ramon, organizing drives by the Union at other Tenet hospitals, and several unfair labor practice charges filed by the Union against Tenet. In December 2003, the parties negotiated a comprehensive settlement agreement that included a model contract to be applied in San Ramon, an application-of-contract agreement under which that model contract would be applied to other Tenet facilities in which the Union obtained majority support, and an "Election Procedure Agreement" ("EPA") setting forth procedures for the Union to prove its majority support at other Tenet facilities.

The EPA regulates the parties' conduct during Union organizing campaigns at Employer facilities. It defines the bargaining unit of RNs, provides the Union with access to employees for organizing purposes, restricts what the Employer can say to employees about the Union and unionization, and establishes a secret-ballot election process for determining if the Union has obtained majority status at a particular facility. The EPA's private election process mimics NLRB election procedures. For example, it requires a showing of interest of 30% to trigger the election process, requires the posting of a pre-election notice similar to ones used in Board elections, requires the production of a list of eligible voters, provides for election observers, and describes procedures to challenge ballots, resolve challenges, and file and resolve post-election objections. The EPA calls for the election to be conducted, and disputes resolved, by a named third party, apparently an arbitrator, or an alternate selected by the parties through the American Arbitration Association. Finally, the EPA requires that the Employer recognize the Union if "a majority of employees casting valid ballots vote to be represented" by the Union, rather than a majority of employees in the unit.

Around April or May 2004,[1] the Union began organizing the RNs at Whittier Hospital under the terms of the EPA. On May 2, employees received an "Official Notice of Election" notifying employees that a private election was scheduled for June 3 where RNs could decide if they wanted to be represented by the Union.

The private election was held as scheduled. Out of 242 eligible voters, 182 votes were cast. There were 93 votes for the Union, 85 against the Union, and 4 non-determinative challenged ballots. The election officer certified the results. No objections were filed to the election. Based on the certification, the Employer recognized the Union and extended the model contract to the RNs at Whittier.

In July, Janet Woodward, a unit RN, filed the instant charges alleging that Union recognition was unlawful because the Union did not have majority support.[2]

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[1] All other dates are in 2004 unless otherwise indicated.

[2] The application-of-contract agreement and the EPA have been applied at other Tenet facilities. Their legality has been challenged on other grounds in pending Cases 32-CA-21266-1 and 32-CB-5769-1. In this Memorandum we do not address those other challenges to the legality of the

ACTION

The Region should issue complaint, absent settlement, alleging that the Employer's recognition of the Union violated Section 8(a)(2) and the Union's acceptance of recognition violated Section 8(b)(1)(A). We conclude that although the Union obtained a majority of votes cast in the private election, the Employer could not lawfully recognize the Union, nor the Union accept that recognition, because the votes cast for the Union did not amount to a majority of the bargaining unit.

An exclusive bargaining relationship between an employer and a union can be established either through the Board's election and certification procedures under Section 9(a) of the Act, or through voluntary recognition based on a showing of majority support. It is long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations as a means of furthering harmony and stability of labor relations.[3] However, it is also long-recognized that Board-conducted elections provide the most reliable basis for determining whether employees desire representation by a particular union because employees cast their votes "under laboratory conditions and under the supervision of a Board agent."[4]

There are no such guarantees of laboratory conditions or impartiality when voluntary recognition is extended based on some other showing of majority support. For this reason, the Board and the courts have long held employers and unions to a strict showing of actual majority support when recognition is granted privately, rather than based on a Board-conducted election. Voluntary recognition of a minority union is simply not allowed under the Act. Minority recognition is unlawful even if the parties had a good-faith belief in the union's majority status.[5] It is

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agreements, only the Charging Party's claim of minority recognition.

[3] See, e.g., San Clemente Publishing Corp., 167 NLRB 6, 8 (1967), enf'd 408 F.2d 367, 368 (9th Cir. 1969); NLRB V. Lyon & Ryan Ford, Inc., 578 F.2d 238, 241 (7th Cir. 1981) (voluntary recognition is a "favored element of national labor policy").

[4] Dana Corp., 341 NLRB No. 150, slip op. at 1 (2004)(citing Linden Lumber v. NLRB, 419 U.S. 301 (1974). See also, NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

[5] Int'l Ladies Garment Workers Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 738-39 (1961).

unlawful even where the parties act on seemingly reliable assertions of majority, such as a state agency certification,[6] an arbitrator's decision,[7] or informal private elections.[8]

Here, it is undisputed that the Union's recognition was based on private election results that do not establish majority support in the unit; the Union received only 93 votes in a 242-employee unit. The Charged Parties contend that their private election followed Board election procedures, including the Board's "majority of ballots cast" rule. They argue that, because the Board certifies a union on the basis of a majority of ballots cast, even if those ballots are not a majority of the unit, the same rule should apply to their private election.

We acknowledge that the Board, with court approval, has long applied to Board elections the "'political principle of majority rule'" by which a majority of votes cast is determinative and "'those not voting are presumed to acquiesce in the choice of the majority who do vote.'"[9] This "political majority rule," however, is premised on a long-standing interpretation of election laws calling for public, government-run elections.[10] The extension of this rule to Board elections is based on the language of Section 9 and its legislative history.[11] The political majority

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[6] See, e.g., Intalco Aluminum Corp., 169 NLRB 1034, 1034 (1968), enf'd in rel. part 417 F.2d 36 (9th Cir. 1969).

[7] See,e.g., Sprain Brook Manor, 219 NLRB 809, 809-811 (1975), enf'd 532 F.2d 877 (2d Cir. 1976).

[8] Autodie Int'l, Inc., 321 NLRB 688, 691 (1996)(recognition unlawful where votes cast for labor organization were not a majority of the unit); Komatz Construction, Inc. v. NLRB, 458 F.2d 317, 322-23 (8th Cir. 1972)(unlawful recognition where union won majority of votes cast but not majority of total unit).

[9] R.C.A. Mfg. Co., Inc., 2 NLRB 159, 174 (1936)(quoting Virginian Ry. Co. v. System Federation No. 40, 84 F.2d 641, 653 (4th Cir. 1936)). See also NLRB v. Deutsch Co., 265 F.2d 473, 478-80 (9th Cir. 1959); Community Hospital, Inc., 251 NLRB 1080, 1081 (1980).

[10] Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 560 (1937)(applying the political majority rule to elections conducted under the Railway Labor Act, citing cases involving public elections).

[11] NLRB v. Standard Lime and Stone Co., 149 F.2d 435, 436-37 (4th Cir. 1945)(applying Virginian Ry. to Board elections, noting the Act's legislative history and similarities in

rule applies to elections conducted under statutory authority and guarantees, such as a Board election, with its "solemn" character and statutory "safeguards to voluntary choice."[12]

The "political majority rule" of statutory elections has not been extended to informal, private representation elections.[13] The Board, while following the political majority rule in its own elections, has always required a showing of actual majority in the unit for voluntary recognition, regardless of the means used by the parties to verify union support.[14] Even if the Charged Parties intended their private election to closely follow Board election procedures, their election lacked the statutory safeguards, laboratory conditions, and Board-agent supervision of a Board election. Simply put, it was not a Board-supervised election conducted under Section 9 and cannot be treated as such.

The private election here did not establish that the Union had the support of a majority of employees in the bargaining unit. Accordingly, we conclude that the Employer and the Union violated the Act by granting and accepting recognition at a time when the Union did not represent a majority.

The Region should issue complaint, absent settlement, alleging violations of Section 8(a)(1) and 8(b)(1)(A).

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the Act's election provisions to those of the RLA). Unlike the Board, the National Mediation Board no longer follows the Virgininan Ry. presumption. Instead, under altered election rules, the NMB considers a failure to vote as a vote against representation. See Bhd. of Railway and Steamship Clerks v. Nat'l Mediation Bd., 380 U.S. 650, 668-70 (1965).

[12] Brooks v. NLRB, 348 U.S. 96, 99 (1954).

[13] Autodie Int'l, Inc., 321 NLRB at 691; Komatz Construction, Inc. v. NLRB, 458 F.2d at 322-23. Accord: L&B Cooling, Inc., 267 NLRB 1, 1-2 (1983), enf'd 757 F.2d 236 (10th Cir. 1985)(in 8(a)(5) context, Board agrees with ALJ's premise that if seasonal employees were part of unit union would not have obtained majority in private election, but concludes that seasonal employees were not part of unit and vote established majority support).

[14] See cases cited at nn. 6-8, supra.