OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ALLENTOWN MACK SALES AND SERVICE, INC., v. NATIONAL LABOR RELATIONS BOARD

CASE NO: 96-795

PLACE: Washington, D.C.

DATE: Wednesday, October 15, 1997

PAGES: 1-57

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IN THE SUPREME COURT OF THE UNITED STATES

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ALLENTOWN MACK SALES AND :

SERVICE, INC., :

Petitioner :

v. : No. 96-795

NATIONAL LABOR RELATIONS BOARD :

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Washington, D.C.

Wednesday, October 15, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

STEPHEN D. SHAWE, ESQ., Baltimore, Maryland; on behalf of the Petitioner.

JONATHAN E. NUECHTERLEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-795, Allentown Mack Sales and Service v. National Labor Relations Board.

Mr. Shawe.

ORAL ARGUMENT OF STEPHEN D. SHAWE

ON BEHALF OF THE PETITIONER

MR. SHAWE: Yes, Mr. Chief Justice, and may it please the Court:

Picking up on the commentary in Curtin Matheson, this case brings to the Court's attention the issue of whether deference to the board is owing when the board applies the same standard to three different approaches to challenging a union's continuing majority status.

In Curtin Matheson this Court acknowledged the board's oft-articulated standard that an employer can withdraw recognition from an incumbent union if 1) the union has in fact lost its majority status, or 2) the employer has, based on objective considerations, reasonable grounds to doubt the union's continued majority status.

The second test supposedly can be satisfied by a lower threshold of proof, although the board typically requires clear, cogent, concise articulations by

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individual employees disaffected totalling a majority, or a head count.

But conducting a secret ballot poll is not the same as withdrawing recognition. Obviously, in the withdrawal of recognition the employer has preempted any vote. In contrast, a secret ballot poll assuming fairness consistent with the board's Struksnes standards permits of the possibility that a majority will vote in favor of continued union representation, and the board in Texas Petrochemicals and its brief disclaims any interest or desire to do away with employer polls.

The board's standard for permitting an employer to take the grave and precipitous step of withdrawing recognition should not at the same time be applied in the contradictory context of secret ballot polling.

QUESTION: Well, why is it contradictory? I mean, I thought there was a rational structure for all of this along the following lines:

The board says, we're at the point at which the presumption is no longer absolute. The employer in effect is going to be given three options, subject to the same condition, probable cause to believe.

The three conditions, the three options, however, have varying risks. If the employer simply withdraws recognition and turns out to be wrong, the

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repercussions are presumably going to be very great.

If the employer asks for an election, perhaps the repercussions may not be so great, but they're going to be serious.

If the employer decides to take a poll, the repercussions -- and loses, the repercussions perhaps will not be quite so great. That's not quite so disruptive.

What is irrational about saying, subject to the same fact premise, the employer is going to be given an option of going A, B, or C, depending on the degree of risk that the employer wants to run if the employer turns out to be wrong?

MR. SHAWE: Well, I don't --

QUESTION: How is that irrational?

MR. SHAWE: No, I don't -- I think it's not rational, given the predisposition of the board -- the court, me, the -- everyone, that a poll or an election is a much, much better preferred test to measure employee sentiment than what is -- what has been for 40 years the board's articulated standard in Celanese that an employer can withdraw without a poll.

QUESTION: I understood your claim to be here -- if -- perhaps it's a claim of irrational -- that the board's requirements for taking a poll are so stringent that they almost make a poll unnecessary.

MR. SHAWE: Well, they make it irrelevant, a legally irrelevant act, the board's regulatory scheme that accepts as valid a secret ballot poll only, and only if the employer has so much evidence before taking the poll that it could have withdrawn recognition without it.

QUESTION: Well, are you saying that if the -- if the standard of cause that were applied to each of these three options were something less than what you characterize as the head count, that there would be nothing irrational, nothing to -- nothing really to object to in having the three options subject to the same factual condition?

MR. SHAWE: Well, I suppose a reasonable doubt, if it were different from a head count and, indeed, it were applied as if it were the totality of the circumstances, perhaps the complaint wouldn't be so vehement, but --

QUESTION: Well, but would it be -- would the scheme be irrational?

MR. SHAWE: Yes, I think it would be irrational to mandate the same requirement --

QUESTION: Okay.

MR. SHAWE: -- for a withdrawal of recognition without a poll, because --

QUESTION: But isn't --

MR. SHAWE: Because what the board has elevated, has valued in allowing an employer to withdraw recognition with or without a poll because the same standard applies, or even processing the favored RM petition, the management petition, is a head count, and --

QUESTION: But suppose the same standard didn't apply, isn't your real complaint here that reasonable doubt, that the agency says reasonable doubt, but that you had reasonable doubt here, but that would not suffice without --

MR. SHAWE: Without a head count.

QUESTION: Without a head count.

MR. SHAWE: That's clearly a complaint, yes, sir.

QUESTION: Well, isn't it the essential complaint, because if they -- if they treated reasonable doubt as reasonable doubt, you would have the three-stage process that Justice Souter is talking about, the three different ways.

MR. SHAWE: Well --

QUESTION: Reasonable doubt, the head count, or --

MR. SHAWE: But I don't think the test should determine the -- should be dependent on the risk factor. I don't think the risk factor is --

QUESTION: Well, but you may have a gripe with the board that they set it up that way, but that's a very different thing from saying that it's irrational to the point that a court would be authorized to strike it down.

MR. SHAWE: Well, the reason that it's irrational, I suggest, is that it is internally inconsistent. It is -- it encourages conduct that should be discourages. It encourages conduct to withdraw recognition without any poll, board or employer-conducted, and --

QUESTION: But it does that because they, as you put it they are insisting on a head count. Isn't that the reason?

MR. SHAWE: No. I think that the reason that the board is insisting on it is that they are nervous about withdrawals of recognition, appropriately so, and would prefer, as they have acknowledged, and all would agree, that the RM petition be utilized as the standard, and what they have done is, I think mistakenly in U.S. Gypsum, after 20 years of not doing it in 1966 said we are going to have the same elevated standard for processing an RM petition as we have to permit an employer to withdraw recognition without any poll whatsoever, and --

QUESTION: Do you have to say it's irrational before this Court can rule in your favor, or can you say

that it's inconsistent with the board's precedents?

MR. SHAWE: I think inconsistent with the board precedent. I think either one.

QUESTION: Why -- can you tell me why this is inconsistent with the board's precedents? Is it primarily because of the definitional content that we ought to give to the reasonable doubt standard?

MR. SHAWE: Yes. I think the reasonable doubt standard, as articulated by the board in Celanese, and reiterated even in the 1990's cases --

QUESTION: But doesn't --

MR. SHAWE: -- is a totality of circumstances test, which they fail to apply.

QUESTION: But doesn't the reasonable doubt standard also apply to withdrawal of recognition?

MR. SHAWE: Yes, of course, and indeed the board's general counsel --

QUESTION: Well then -- then shouldn't --

MR. SHAWE: Shouldn't we have

QUESTION: -- the standard for a poll and withdrawal of recognition be the same?

MR. SHAWE: No. They should be different.

QUESTION: Okay. Why?

MR. SHAWE: Because a poll presumes that employees will fairly express their sentiments. The

withdrawal of recognition, the poll, the secret ballot, which is certainly the truest test of employee sentiments, has been preempted completely.

QUESTION: Are you saying that reasonable -- are you saying that reasonable -- excuse me. Are you saying that reasonable doubt must be given a different definition in the context of a poll than in the case of withdrawal of recognition?

MR. SHAWE: It should, but it hasn't been. It surely should because of the -- the withdrawal of recognition is --

QUESTION: What do you mean, be given different content? Shouldn't you use different words? I mean, do words have no meaning? Reasonable doubt's going to mean one thing here and something else there? I mean, I take your complaint to be rested upon the fact that reasonable doubt ought to mean reasonable doubt.

MR. SHAWE: I agree.

QUESTION: But now you're saying reasonable doubt could mean two different things.

MR. SHAWE: Well, I'm -- I'm --

QUESTION: It's going to mean one thing for this and one thing for --

MR. SHAWE: Right. I'm afraid that if the reasonable doubt standard that the board has applied is

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accepted by the Court as a head count, that I won't prevail in this case.

QUESTION: Are you making two distinct arguments, and is -- one, as I hear it, seems to be purely comparative. That is, suppose the board said, we're simply not going to allow unilateral withdrawal. That's too risky. So all we have is the poll and what's been called the RM election.

Suppose we took out what you say is a glaring inconsistency in no more --

MR. SHAWE: No more withdrawals?

QUESTION: Yes. Then what would your case be, if we had only the poll?

MR. SHAWE: Well, if the board continued to adhere to its elevated standard to process an RM petition, then I would continue to insist on the employer's right to conduct the poll.

If, however, the board accepted its own general counsel's recommendation in the Chelsea Industries case -- that was one of the cases lodged by the board in opposition to our cert petition.

The board's general counsel, who's obviously much more familiar with this process than currently anyone else, has himself indicated -- and I have the lodging where he says that, on page 9, the board's current policy,

which applies the triple standard to the RM petition, to the poll, and to the withdrawal of recognition without any election, the board's current policy does little to encourage employers to act in accordance with what the Supreme Court has long thought to be the board's own view, namely that even after the certification year has passed, the better practice is for the employer with doubts to keep bargaining and petition -- the RM petition -- the board for a new election, citing the Ray Brooks case, the 1954 case that the Supreme Court heard after the -- after reading the Celanese decision.

So rather, says the general counsel to the board, rather the Celanese rule, which he is proposing be eliminated -- that's your suggestion -- encourages employers to engage in self-help measures, and thereby to engage in potentially unlawful withdrawal of recognition rather than the, quote, better practice of proceeding to a board vote with the injuries to industrial peace and protracted litigation, which is always the result --

QUESTION: But I still don't have a clear answer from you to my question.

To the extent that you're complaining about a comparison being irrational, isn't that objection at least taken away if, say, the board was to respond, they said, fine, we've always been nervous about these unilateral

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withdrawals. We just won't allow them any more.

Suppose you didn't have that in your case, and all you had was the poll and the RM election governed by the same standard, would you have any complaint?

MR. SHAWE: No. I'd have a lot less complaint, but in my view the RM petition, in order to make it available, must be subscribed to in a much lower standard than the one that's currently in place, which does require still a head count in order for the board --

QUESTION: I'm sorry, now you're losing me. You --

MR. SHAWE: Right.

QUESTION: I thought I understood your first argument that if they didn't permit unilateral withdrawal, you would not have a complaint, but now you seem to be saying even if they didn't --

MR. SHAWE: If they do not honor what's called a good faith doubt, which is a totality of the circumstances, still required a head count applicable to the RM petition, and the conduct of a poll before the poll would be validated, yes, I would still object because the good faith doubt would be obliterated within the meaning of what those words mean, at least what the Court has always assumed the board to have meant when it registers good faith doubt.

QUESTION: Then why couldn't the board say, this is our test and we want it to be a tight one because it's important to give the union a chance to operate, and that's why we have the 1-year free, and then we have the rebuttable presumption.

So to keep that tight we have to have a stringent standard of what we must show before we'll let you get an election or take a poll. What would be illogical about that?

MR. SHAWE: Well, the reason for that is that it seems to me the best way to resolve a doubt is to have a poll rather than to require the employer to submit evidence in advance --

QUESTION: But the board's rule is you have to have more than a doubt. Is that what -- tell me what -- you seem to be saying that that would not be a permissible construction of the statute.

MR. SHAWE: That would not be a permissible construction of good faith doubt, correct.

QUESTION: But the good faith doubt doesn't come from the act.

MR. SHAWE: No, it comes from the board, and if the board says that a good faith doubt standard will apply to RM petitions and to polls, then the head count would be impermissible as the test to determine whether or not

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either the poll or the RM petition's processing should go forward.

QUESTION: What was the good faith reasonable doubt in this -- you assert that there was here --

MR. SHAWE: Yes, sir.

QUESTION: -- a good faith reasonable doubt.

MR. SHAWE: Yes.

QUESTION: Based on what?

MR. SHAWE: Based on the six or seven employees credited by the board claiming disaffection from the union, several other statements from other employees not accepted by the board, but nonetheless indicating a lack of interest or support for the union, the statement of a night shift employee who said, all five or six night shift employees do not favor the union and, most importantly, the comment by Ron Mohr, the shop steward and union committeeman, who says to the employer that, with you as the boss, the new company, if a vote were taken, the people would not support the union. I don't think the people want the union with you as the boss.

QUESTION: Is there any theory you can advance to tell us that that should constitute good faith doubt in the context of taking the poll, even though it might not be for withdrawal of recognition?

MR. SHAWE: Yes, because the -- what the board

has articulated as elevated, as favored, are individual names. Had Mr. Mohr said, and here are the names of the people that I think would vote against the union, the board would prefer that. They'd like that.

But that's a remarkable elevation when everyone would agree that a better resolution of true employee sentiment would not be Mr. Mohr's articulation of here's the list over here, and here's the list over here, but rather to allow all the people vote in secret, and that's what happened here.

They voted in secret. There is a specific finding that there was a noncoercive setting, that the union had notice, the union lodged no protest over the vote, nor made any comment concerning it. All the employees participated. I can't imagine a better test of true employee sentiment --

QUESTION: Mr. Shawe --

MR. SHAWE: -- than the poll that was conducted here.

QUESTION: I'm sorry. Mr. Shawe, isn't one answer to the objection that you're making -- which I have to say in the Mohr example is I think a very serious objection, but isn't one answer to it this:

Sure, the best way to find out what's really going on is to have an election. We agree. But we want

the standard for calling the election to be high.

We want the standard of doubt to be a high one because there's another value involved, and the fact is the promotion of industrial peace and the promotion of stability is going to be served over the long haul by fewer elections rather than more elections, and that's why we're going to have a high standard, maybe not to the point of requiring Mohr to say, A, B, C, D, and E told me, but at least to the point of requiring Mohr to say, I have actually talked to the men, not naming them, and I find that they are affirmatively disclaiming any desire at this point to continue with the union. We want the high standard because we've got this other interest that's being served.

That may be a good policy, it may be a bad policy, but isn't it a permissible policy choice?

MR. SHAWE: Yes, and as a matter of fact this Court's acknowledged it in the Fall River case.

QUESTION: Yes. Isn't --

MR. SHAWE: That industrial stability is an important policy so long as it doesn't unduly interfere with employee choice.

QUESTION: Yes, and what is unduly interfering is the problem here, what unduly means, and whether it would have been your policy choice or my policy choice,

isn't it within the realm of reason for the board to have made the policy choice that it made in requiring a starchier standard than perhaps would have been necessary from the literal meaning of the words?

MR. SHAWE: Well, you know, one of the things that's -- constantly crops up in the board's brief is the issue of remand, because both you and Justice Ginsburg now assume, let's assume we don't have withdrawals of recognition for the moment, without a poll, which is clearly not the rule.

It may be a wise rule, but it's not the rule, and when they apply, the board applies to the polling standard and the RM standard the same standard that they would apply to an employer without any election, to do exactly the same thing, and just litigate the case for a couple of years, is exactly the reason why the board's current standard -- I don't want to suggest you set it -- needs rethinking, relooking, not inconsistent with its own general counsel's approach --

QUESTION: And maybe it does, but that's a step away from the kind of irrationality upon which invalidity has to be predicated, isn't it?

QUESTION: Mr. Shawe, may I ask you, in judging you claim that there was inadequate evidence to -- that there was plenty of evidence to show good faith doubt, you

relied in part on the testimony of this man Mohr.

MR. SHAWE: Yes, sir.

QUESTION: In judging the case, should we do so in view of the fact that the hearing examiner discredited him, and the board discredited him, and the -- said it was not -- his testimony was not reliable and not entitled to much weight, as did the court of appeals?

MR. SHAWE: No, I think -- I beg to differ. I don't think they discredited it at all. I think they believed --

QUESTION: They said it was not entitled to much weight.

MR. SHAWE: Yes.

QUESTION: Yes.

MR. SHAWE: Yes, so that the fact that he said it --

QUESTION: The fact that he said it --

MR. SHAWE: Has been credited.

QUESTION: Yes, but whether or not --

MR. SHAWE: But the weight that's to be attached to it --

QUESTION: Whether or not his recounting of what other people had said to him was entitled to weight is a matter that we should exercise our own independent judgment on, or just --

MR. SHAWE: Absolutely. If you're going to weigh what a good faith doubt is, I cannot imagine that you would ignore that.

QUESTION: And we should just sort of ignore the reasons why the board, the hearing examiner, and the court of appeals gave less weight to that testimony than you think it should have.

MR. SHAWE: Oh, no, I don't mind arguing with those reasons. The reason -- one reason that the board gave is that there was no way to verify what he said.

QUESTION: You're not sure whether he was referring to a majority of the predecessor employer or this employer.

MR. SHAWE: Well, number 1 -- as for that, as to the predecessor business, this Court --

QUESTION: Because he was --

MR. SHAWE: -- and the board says, we presume the same degree of sentiment for the union to a successor as we do a predecessor, or lack of sentiment, I suppose.

QUESTION: Yes.

MR. SHAWE: The same rule applies.

Number 2, as I remarked on before, it is true that I didn't know -- no one would know with certainty that Mr. Mohr was accurate.

QUESTION: Hasn't the board held in other cases

that the employer or that the board itself should rely on statements of shop stewards?

MR. SHAWE: Sure. Absolutely.

QUESTION: What are your best cases?

MR. SHAWE: J&J Drainage is the best case that I can find. It's one cited by them, and the only distinction between --

QUESTION: Why would they have treated this steward's testimony differently than they do in other cases?

MR. SHAWE: There's no --

QUESTION: Well, he only --

MR. SHAWE: The only reason they advanced is, that shop steward was talking about the successor's employees. Mr. Mohr had not yet come over, so they were talking about the predecessor's employees.

QUESTION: Plus the fact that he only supervised one portion of the work force.

MR. SHAWE: He was the shop steward for some, but he was on the union's negotiating committee, and again, I think what's going on is a splitting of, you know, hairs. It's a real strain to say, when the owner of the company hears from the union committeemen and shop steward that I don't think that the employees with this new company would want a union, if we had a vote I think

they'd reject it --

QUESTION: But what -- when you get --

MR. SHAWE: -- for him to parse that out and say, that's not good enough, especially when it's accompanied by all the other individual statements and the commentaries of others that says, we don't want the union.

QUESTION: We're talking here only about a doubt. Is it enough to raise in the employer's mind a good faith, reasonable doubt --

MR. SHAWE: In my opinion --

QUESTION: -- about whether there was majority support?

QUESTION: I don't know if we're supposed to go into the record and make this court of appeals type determination, so --

MR. SHAWE: That's --

QUESTION: -- leaving that to the side, is it the case that a group of workers, a union who has been in business a long time, 10 years representing the workers, am I right that if 30 percent of the workers want to have a new election, they can go do it?

All right. So we're only talking about a case in which 30 -- there's no 30 percent of the workers that asked to get rid of the union. So if 30 percent of them want to get rid of it, they can get rid of it. They can

have their election. So we're talking about cases, the union's been there a long time, and there isn't some group of workers who were so disaffected that they called for an election.

Now, under those circumstances, what's unreasonable about the board saying, we don't want management to try to throw out a well-established union?

MR. SHAWE: Because --

QUESTION: They have to have a very, very good reason.

MR. SHAWE: The --

QUESTION: A very good reason. Now, if they have that very good reason, called tough reasonable doubt, they can then do it, and as far as we're concerned we don't care whether they disrupt labor relations by having a poll, by calling for an election, by refusing to bargain. That's up to them. We're indifferent. Some will want to do the one, some will want to do the other.

But what we are interested in is, they don't get into the union disruption business in a situation where the workers haven't tried to do that unless they have a very good reason.

Now, I either may or may not agree with that reasoning. What I don't want to -- what I want to know is, what's unreasonable about it?

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MR. SHAWE: Well, what's unreasonable about it is that the employer is required to bargain with a majority union under section 9(a) and, as a result, a whole litany of cases have come out about how you test the union's majority status in a successor case like mine.

A reasonable good faith doubt of the union's majority status is supposedly -- that's articulated by the board and this Court as the standard, and it does not require a head count if the good faith doubt is to have any common-sense meaning, or commonplace meaning of what those words are.

QUESTION: It's possible that a good faith reasonable doubt is required to be the standard by law, is it not?

MR. SHAWE: Yes.

QUESTION: I mean, it's possible that if the agency enunciated a more than tough doubt, probable certainty standard, that that would be unlawful under the act, isn't it?

MR. SHAWE: Yes, it's possible.

QUESTION: But the board doesn't have to confront that problem because it continues to enunciate the good faith reasonable doubt standard.

MR. SHAWE: That's right, and doesn't give me the benefit of it.

QUESTION: And part of your complaint is that it enunciates it so that it can't be challenged in principle, but that on the facts, it doesn't apply it.

MR. SHAWE: That's correct, and commentator Joan Flynn, who's been cited by both parties as, you know, a person who's written extensively on this subject and who was cited by the Court in the Curtin Matheson case, says exactly that, that they do not -- do not apply the good faith reasonable doubt standard in any way, in any common sense way, and apply it to a head count standard.

QUESTION: Though they continue to enunciate it.

MR. SHAWE: Exactly. Exactly.

But in response to your question, what -- it seems to me internally inconsistent if you continue to allow a withdrawal of recognition without a vote.

QUESTION: I mean, there we have Justice Souter. So he says, well, you know, they don't care, the board, which route of the three you take. They don't care. They find them all disruptive to labor relations, and some employers will want to do the one, some will want to do the other.

MR. SHAWE: But if --

QUESTION: Each route has different consequences for the employer. Some employers would think, we'll take a poll first. We want to be very careful. We don't want

to get the union to hate us. Others will think, I'm just going to bargain. I don't care whether they hate us or not. That's up to the employer.

MR. SHAWE: Well, let me tell you what the board explains as -- in its own brief, which is that many employers, as you said, acting in good faith, and wishing to convey that good faith to their employees, would not wish to withdraw recognition from a union unless they could first confirm whether or not the union in fact lacks majority support, and -- right, and polling is one method of making that determination.

That's exactly what I did here. It's exactly what I did.

QUESTION: So your real complaint is, you had the good faith reasonable doubt, and they found that you didn't.

MR. SHAWE: They didn't --

QUESTION: That's your complaint.

MR. SHAWE: They didn't find I didn't have good faith doubt. They found that I didn't have -- I found six people that said individually I don't want the union, or seven.

QUESTION: All right.

MR. SHAWE: And ignored -- crediting but ignoring any weight --

QUESTION: But are we supposed to in this Court, even assuming the lower courts were all wrong and so forth, simply conduct a review of the record to decide whether that finding is or is not justified on the basis of the record?

I thought in Universal Camera Justice Frankfurter said two cases on something, two lower courts on cases like that, that's enough, even if they're wrong.

MR. SHAWE: I think -- I think this Court has the right and the obligation to say that good faith doubt articulated by the board must be applied --

QUESTION: Would we then have --

MR. SHAWE: -- fairly.

QUESTION: -- we have to overturn Justice Frankfurter in Universal Camera, who says on substantial doubt questions you get two -- you get the court of appeals, they're going to forever make these kinds of determinations, we're not?

MR. SHAWE: No, of course not.

QUESTION: Mr. Shawe, maybe I don't remember the record right, but I thought that the ALJ had said, but even if it's that lower standard that the other courts --

MR. SHAWE: You wouldn't find enough.

QUESTION: That -- I don't even find that low threshold.

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MR. SHAWE: Correct, and the reason that he didn't find a low threshold, and the board articulated the same thing, is that they only considered it in conjunction with the six or seven that were specific articulations of union disaffection, and in either case, the high threshold or the low threshold, no one is contending that six or seven is enough for anything, and what they've done in the high threshold and the low threshold, the board and the ALJ, is to ignore completely what weight to attach to Mr. Mohr or to the other statements to --

QUESTION: Thank you, Mr. Nuechterlein. I think you've answered the question.

MR. SHAWE: Thank you.

QUESTION: Not Mr. Nuechterlein, Mr. Shawe.

Mr. Nuechterlein, we'll hear from you.

ORAL ARGUMENT OF JONATHAN E. NUECHTERLEIN

ON BEHALF OF THE RESPONDENT

MR. NUECHTERLEIN: Mr. Chief Justice, and may it please the Court:

As Justice Breyer has suggested, once employers have decided to engage in collective bargaining and have settled on a union to represent them, the National Labor Relations Act prescribes only two ways of testing whether that union continues to command majority support.

First, the employees themselves whose interests

are most directly at stake here may, upon a showing of interest by 30 percent of the bargaining unit, petition the board to hold a decertification election.

Alternatively, the employer may itself petition the board to hold an election if it can present a reasonable, solid basis for believing that the union has lost --

QUESTION: Yes, but the board also allows an employer to call an election, call a -- take a poll if the employer has a reasonable doubt --

MR. NUECHTERLEIN: That is correct.

QUESTION: -- about the employee support. I think that's what we're talking about. The board seems to articulate as its standard here, and maybe it doesn't have to set that standard, but it purports to say a reasonable doubt will suffice.

MR. NUECHTERLEIN: I --

QUESTION: But in fact it is in practice asking for something more than that. That's what troubles me, and there is an unbroken line of cases where the board, although mouthing some reasonable doubt standard is, in fact, calling for something more.

MR. NUECHTERLEIN: Justice --

QUESTION: They have to know the answer by a head count before they say it will justify polling the

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employees, and it's just such a bizarre case here, where, in fact, the poll shows of course there was a reasonable doubt. There was more than that. There wasn't any support.

So I mean, it's just a very strange posture.

MR. NUECHTERLEIN: Justice O'Connor, I have a couple of answers to your question. First, I think it's important to recognize that the term, reasonable doubt, does not mean here what it would mean in the criminal law context. The board develops its policies and process --

QUESTION: The board is using it like beyond a reasonable doubt.

(Laughter.)

QUESTION: I thought the standard was, a reasonable doubt.

MR. NUECHTERLEIN: To the contrary, Justice O'Connor. The board's standard means the employer must have a solid, reasonable basis for believing that the union has lost majority support. The board is not using the term doubt here to mean uncertainty. It is using that term to mean disbelief.

QUESTION: I see. The words mean whatever the board chooses them to mean.

MR. NUECHTERLEIN: I -- I'd be -- the board --

QUESTION: I mean, a reasonable doubt means he

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is doubtful for good reason whether the board -- whether the union has majority status. What else could it possibly mean?

MR. NUECHTERLEIN: Justice Scalia, the board has to develop its policies in the course of adjudication, and in the course of adjudication I think the board has been quite candid that this is a tough standard and is difficult to meet.

QUESTION: So it is not a reasonable doubt standard, then.

QUESTION: The board speaks English, doesn't it?

(Laughter.)

MR. NUECHTERLEIN: Justice -- Mr. Chief Justice, the term doubt does have two different meanings. One of them means vague uncertainty, and that is the way in which we use it in the criminal law context. I think the board has been quite clear that that's not what it means when it uses the term.

Here, doubt means disbelief, and what the employer has to show is a solid basis for believing --

QUESTION: Doubt -- I simply don't understand the -- your statement that doubt means disbelief. Doubt may lead to a state of mind that further investigation would produce disbelief, but doubt I don't think anywhere is equated with disbelief.

MR. NUECHTERLEIN: I -- I -- this is how the board uses the term --

QUESTION: Well --

MR. NUECHTERLEIN: -- and, to the extent it's become a term of art, it's not confusing to anyone because the board is quite candid about the rigor of the standard that it applies here.

QUESTION: All right, well, even if we accepted that, that doubt means disbelief, good faith, reasonable disbelief, is the only way you can have good faith, reasonable disbelief to conduct a head count?

MR. NUECHTERLEIN: Justice Scalia --

QUESTION: Good faith and reasonable. You have the shop steward who comes in and says, jeez, you know, I don't think there's majority support for you. I disbelieve whether this union has majority support. It seems to me it is in good faith. It seems to me it is entirely reasonable, and yet the board says, no, that's no good, you have to do a head count.

MR. NUECHTERLEIN: What the board requires --

QUESTION: Disbelief doesn't get you to that, it seems to me.

MR. NUECHTERLEIN: It does in the following sense. What the board requires is the employer to show good, hard evidence, whether through a head count or

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through probative circumstantial evidence that the union has, in fact, lost majority support.

QUESTION: Then you're talking about something other than good faith, reasonable disbelief. I think the employer in this case surely -- surely must have had good faith reasonable disbelief on the basis of the evidence that was introduced here, but you say no, we cannot use this evidence, because the only evidence we'll use is a head count.

Well, maybe we've got to do a different standard. Stop calling it good faith reasonable disbelief, and maybe -- or, even worse, good faith reasonable doubt, and maybe that new standard you come up with will be litigated in court to see whether the policies of the National Labor Relations Act allow a union to continue in place on the basis of your new standard.

MR. NUECHTERLEIN: I've two responses, Justice Scalia. First, the board does not require a head count. We've enumerated a number of cases in our brief in which the board has relied upon probative --

QUESTION: Well, give me any case since 1984 where the evidence, other than express repudiations by a majority of the employees, supported a reasonable doubt standard in the board's view. Any case since '84.

MR. NUECHTERLEIN: Well, in 1993 the board again

reaffirmed its prior precedent and continues to reaffirm those pre-1985 cases. I'm not personally aware of any cases since 1984 in which that has happened, but the --

QUESTION: In fact, it just applies some other standard. It -- that's not -- that's not reasonable.

MR. NUECHTERLEIN: I --

QUESTION: The board has to be up front about what it's doing, and it's not. It adheres to this reasonable doubt standard but applies a different standard.

What purpose at all would employer have to try to conduct an employee poll if the standard is exactly the same in practice as for unilateral withdrawal of recognition by the employer? That in fact is what's going on.

MR. NUECHTERLEIN: The -- there are two answers to that. One is, first, acknowledging that this is a term of art, just as actual malice is a term of art. The board I think has been quite candid over time about how tough the standard is to meet, but remember that the important question here is whether the board's standard is rational, and all that it takes for the standard to be rational is that there be circumstances in which some employers might profit from taking a poll even if they did meet the evidence for a standard for withdrawal.

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QUESTION: But the board --

QUESTION: Well, why -- what is it that gives the board the authority to prevent an employer from taking a poll unless it meets his conditions? I mean, aren't there First Amendment problems there?

MR. NUECHTERLEIN: Well, the board has determined that polling is sufficiently disruptive that it is --

QUESTION: So the employer cannot -- is forbidden from asking his employees whether they want to continue to support a union?

MR. NUECHTERLEIN: That is something that the National Labor Relations Act places principally on the employees. It is their principal role to look after their own interests, and if they want to throw off the union, they themselves have --

QUESTION: Well, does the National Labor Relations Act supersede the First Amendment?

MR. NUECHTERLEIN: I don't understand there, first of all, to be a First Amendment issue in this case, because petitioners have never raised it at any point in these proceedings.

QUESTION: Well --

MR. NUECHTERLEIN: But beyond that, in Gissel Packing this Court pointed out there are special concerns

that exist in the workplace that forbid --

QUESTION: Well, the free -- the commercial free speech doctrine was a good deal different in 1968, or whenever it was that Gissel Packing came down, and the way it is today.

MR. NUECHTERLEIN: Well, I think that the basic premise of Gissel continues to be true. In the workplace certain forms of speech may be subject to Government regulation that could not be subject to such regulation in the outside world.

QUESTION: Sure, and maybe -- maybe a court would hold that it is reasonable, given the need for industrial peace and so forth, not to let an employe conduct a poll, although normally you would think people can ask people questions and get answers. That's the way this society works, by virtue of the First Amendment.

But it's reasonable to prevent the employer from disrupting industrial peace unless he has a good faith reasonable doubt about the union's majority status. That's quite possible, and perhaps for that reason the board has gone along with this, but in fact it is not using a good faith reasonable doubt. If it is using another standard, it ought to enunciate that standard so we can see whether that standard complies with the necessity for industrial peace and with the First

Amendment.

MR. NUECHTERLEIN: Again, Justice Scalia, the substance of the standard has to be understood in the context of how it's applied, and I don't think the board has --

QUESTION: Can you give us the board, in the board's own words, something more than this formula, good faith reasonable disbelief, some place, some statement by the board where it spells out what it means?

MR. NUECHTERLEIN: The board has in past cases described its standard as rigorous, as stringent.

QUESTION: Just by using those words, not telling us in any more detail, what exactly those words mean.

MR. NUECHTERLEIN: Well, to be sure, I mean, in this context no matter what the standard the board picks, that standard is going to be fact-specific in its application, and it's not possible to give a global explanation for how it's applied in every case.

Sometimes a head count is enough, sometimes it's required because the employer has no especially probative circumstantial evidence in order to make its case, but the board has also reaffirmed circumstantial evidence is available as a basis for establishing this evidentiary predicate in some cases.

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QUESTION: Why was --

QUESTION: The board has recognized the utility of informal polls, has it not?

MR. NUECHTERLEIN: It has.

QUESTION: Well, it seems to me somewhat inconsistent to say that you can't conduct a poll until you know the answer.

MR. NUECHTERLEIN: First --

QUESTION: And then it seems to me that's the way that you've been applying it.

MR. NUECHTERLEIN: I want to address the premise of your question, because I think it's very important here. Even if the board's standard is quite high, it is nonetheless the case that often an employer, even if he thinks he has a head count, will nonetheless want to take a poll to confirm what he believes he knows.

Remember that -- this case is a good illustration of that.

QUESTION: Well, just as an evidentiary matter to protect himself against the board?

MR. NUECHTERLEIN: Not just that. I think the board is entitled to believe that many employers act in good faith and want to know truly what their employees believe, and also want to give those employees a sense of involvement in that employer's unilateral decision whether

or not to withdraw recommendation later.

QUESTION: So this is kind of a purging exercise. It's not an informative exercise.

MR. NUECHTERLEIN: No, I think it's --

QUESTION: It's just a way for the employer to objectively demonstrate that it has goodwill toward the employees. Is that the point?

MR. NUECHTERLEIN: I think --

QUESTION: I thought the point was that it is a truly informative one so that the employer is not subjected to unfair labor practice when it takes the further step of withdrawing recognition, which --

MR. NUECHTERLEIN: Justice --

QUESTION: -- it ought to do if, in fact, the union does not represent a majority of employees.

MR. NUECHTERLEIN: Justice Kennedy, I think polling serves both of those purposes when it's cabined to the narrow circumstances in which it's particularly likely to reveal a loss of majority support for the union.

It is -- it both gives employees a sense of involvement in the employer's later decision, but also it serves an informational purpose. Think of this case. The information that this employer got about the views of his employees came in over time through weeks and months through disparate sources, sometimes second or third hand.

Also, employers realize that employee support for a union is not static, and employee support for a union may fluctuate over time. That employer, if he's acting in good faith and wants to know what his employees really believe, will want to schedule polls so that they can think about the issue with cooler heads and then get together on one day and decide whether or not they want to keep the union. That is so even if the board's requirement requires a head count, which is something that we claim it does not do.

QUESTION: Well, I suppose I am troubled by the idea that the standard is the same for a poll and withdrawal of recognition. Petitioner's counsel doesn't seem to give me much help there. It does seem to me that, from the standpoint of a sensible interpretation of the act, when we're concerned with having the least disruption of the employee-union relation, that the polls are not treated differently.

MR. NUECHTERLEIN: Well, remember the act says nothing about either polling or unilateral withdrawals of recognition.

QUESTION: Well, but we've established that the board has found -- I think you've indicated that there is a utility to that device.

MR. NUECHTERLEIN: There is utility to the

device, but the employer also if he wants to avoid litigation is free on the same showing to request what's called an RM election, which is a board-sponsored election that the employer requests, but the backdrop of all of this is that the act places on the employees and not on the employer the primary responsibility to take the initiative to decide whether they still support the union that they themselves have chosen. That is what industrial stability requires.

It's the employees who picked this union and, over time, it's the employees who have the primary responsibility for determining whether or not they should stick with it. It is --

QUESTION: Well, that may be, but the board has nonetheless articulated this policy, and we have to determine whether it's being applied rationally or not.

MR. NUECHTERLEIN: That is correct, and my --

QUESTION: Now, what is the status of the Chelsea Industries case that's pending before the board?

MR. NUECHTERLEIN: It's my understanding that that's still pending.

QUESTION: How many months --

QUESTION: And we were hearing quotes read from the general counsel's --

MR. NUECHTERLEIN: That is correct.

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QUESTION: -- representations to the board in that case, which do seem somewhat contrary to what you're telling us here.

MR. NUECHTERLEIN: Well, the general counsel has asked the board to abolish the policy permitting employers to unilaterally withdraw recognition from the union, and so what's he's proposing is an altogether different scheme.

What petitioners are proposing is that the board keep its current standard and also be subject to a different substantive standard for polling, but our submission is that so long as the board permits both unilateral withdrawals of recognition and polling, the only requirement is that there be some marginal utility to polling. It is true that the board could altogether abolish polling if it wanted to do that, but I acknowledge that --

QUESTION: Which is what has been recommended, and how long has this Chelsea case been pending before the board, where this rethinking in this area has been proposed?

MR. NUECHTERLEIN: I'm not sure of the answer to that question.

QUESTION: It's over a year.

MR. NUECHTERLEIN: I know that it's been pending

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since last spring when we filed for opposition. I don't know how long before then.

QUESTION: And you have no indication of when it would be decided.

MR. NUECHTERLEIN: I do not, Justice --

QUESTION: You said in your brief that if the Court disagrees with your position that this is all right just to approve what the board has ruled, that we should remand to let the board do what? What would happen in this case? That's what -- I didn't follow your argument.

MR. NUECHTERLEIN: Well, ordinarily when a court determines that an agency's administrative scheme is irrational, the proper course is to remand to the agency to determine what would be a rational scheme in the first instance.

QUESTION: But if -- but as far as this particular employer is concerned, if that employer was subjected to an irrational scheme, then there is no unfair labor practice. Am I missing something?

MR. NUECHTERLEIN: I'm not sure that's true in the context of adjudication, as this Court pointed out in Bell Aerospace. It is permissible for the board to adopt its policies through the vehicle-specific cases, and it would be the board's role in the first instance, as this Court pointed out in Food Store Employees, to determine

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whether any new policy could fairly be applied retrospectively to these petitioners.

QUESTION: May I just go back to something specific for a second? I -- now, the petitioner's Exhibit A is the treatment of Mohr's testimony here. I meant to ask this question to your colleague. At the time Mohr made his statement, which the board discounted, was there a question as to whether Mohr would be hired, whether he would be among the 32, or whether he would be let go?

MR. NUECHTERLEIN: The record is unclear on that. I think that the answer is yes, there is a question about that. As I understand the sequence of events there were two different conversations that the ALJ relied on when discussing Mohr's statements.

The first was his conversation with petitioner's president, Mr. Dwyer. The second was a conversation Mr. Mohr had with the supervisor in the course of an interview. I think that is the correct order. It was in the course of that first conversation that Mr. Mohr gave what petitioners claim was the evidentiary showing that reached the standard.

QUESTION: Yes. Of course, the board didn't discount it on that basis though, did it?

MR. NUECHTERLEIN: It did not, although I think it is fair to say that the board pointed out that with

respect to Mohr's statements in the second interview it was important to consider both that this was, in fact, a successorship situation where employees may in fact feel insecure about their future state, status in the company, and also in the job interview that Mohr had he was told by the supervisor that the company would be nonunion. That is in the ALJ's opinion.

QUESTION: Yes.

QUESTION: Can an employer -- in this period of time after the contract bar is over and so forth, can an employer ask an employee whether he favors the union or not?

MR. NUECHTERLEIN: The -- as a general matter the board's policy would prohibit an employer from walking up to employees point blank and asking them directly whether they still support the union. There is a case law on this, and in some circumstances the board will not find that to be an unfair labor practice if there are particular reasons to think that, for example, it's just a casual remark and no harm is done.

QUESTION: So the only way in which the employer can, in fact, take any action is if he has objective evidence, objective evidence that what, that a majority of employees no longer support the union, but they haven't asked the board anything about it. Is that what the test

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is?

MR. NUECHTERLEIN: The --

QUESTION: What is the test, actually? I'm a little worried. What is the test?

MR. NUECHTERLEIN: Well, again, the test --

QUESTION: Good faith reasonable doubt.

(Laughter.)

QUESTION: Thank you.

MR. NUECHTERLEIN: What the employer must have is a solid basis for believing the union has lost majority support. They can establish that either through a head count or through --

QUESTION: I thought the board said they had to have a good faith reasonable doubt. You keep articulating the standard as something else.

MR. NUECHTERLEIN: Well, like actual malice --

QUESTION: I really thought, and I want you to answer whether I'm correct, that the board's standard is a good faith reasonable doubt. Now, are those the words that we use?

MR. NUECHTERLEIN: Those are the words that the board uses.

QUESTION: Yes.

MR. NUECHTERLEIN: And it is the board's shorthand --

QUESTION: So why do you keep answering as though it's something else?

MR. NUECHTERLEIN: Because what the standard is is determined by how the board applies that standard through the process of adjudication --

QUESTION: And, in fact, the board is in practice applying a different standard. That's what you're telling us.

MR. NUECHTERLEIN: No. The -- I -- in other words, the board is not making any pretense of using a liberal standard when, in fact, it has confirmed that this is a rigorous standard and difficult to meet.

Just like actual malice, the term that the board uses for this test is a shorthand, and people in the industry know what the shorthand means and know how to satisfy it.

QUESTION: Actual malice came from, you know, 3 or 400 years of common law judges, and it's been cleared up now by a lot of revised statutes, but the board surely can't depend on that sort of an accretion for simply changing the meaning of something.

MR. NUECHTERLEIN: I agree with that, but these are not statutory words. They are the board's own words and, like other shorthands, they have to be understood through the lens of the board's application of the

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standard.

QUESTION: I think --

QUESTION: What were you going to say? Are -- you were going to say about -- assuming -- or, it's like predatory intent or something. The -- it's a fiction. And then they say that this fiction means doubt, reasonable doubt, but based on -- with certainty on objective evidence, so I got that far. It sounds a little difficult, but --

MR. NUECHTERLEIN: No, I don't believe I said certainty.

QUESTION: Well, but there's some word, certainty in one of their cases, too, but I'm not picking at the standard for a moment. I'm trying to figure out how they go about meeting the standard, and you kept talking about a head count. What is a head count if it's not a poll?

MR. NUECHTERLEIN: A head count as petitioners describe it would be evidence that comes in through -- perhaps for a long period of time through many disparate sources, sometimes second or third hand, that suggest that particular employees were, at the particular moment that they said something about the union, inclined not to support the union.

QUESTION: So you have to -- if you have 18

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employees, 10 of them would have to have said, without the employer asking them, we don't want a union any more, but nonetheless there were not even seven of them, or six, that were willing to go to the board to say that.

MR. NUECHTERLEIN: That is correct, and I think that --

QUESTION: That's basically the standards. That's a very, very tough standard.

MR. NUECHTERLEIN: It is a tough standard. It's not the same as --

QUESTION: All right. Now, then the question would be, if it's that tough a standard, what sense does it make to say you have to know that your majority of your employees really have terrific reason for not wanting the union, but you can't ask them for a poll until after you already know it. That's the question I think that some people are asking.

MR. NUECHTERLEIN: Here's why it makes sense. If there's one principle that this Court has observed continuously over the years, it is that we should rely on the employees themselves rather than on their employers to take the initiative in second-guessing whether or not the union that the employees have chosen should continue to exist in the workplace, and it is true that --

QUESTION: Excuse me. We've said that?

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MR. NUECHTERLEIN: Yes, you have. You -- in Auciello and Fall River, in Brooks, this Court has pointed out that the people that we principally rely on to rebut the presumption of continuing majority status are the employees who have chosen this union.

In some circumstances the employer may have evidence that would give him the right either of withdrawal recognition, take a poll or conduct an RM election, but there is nothing in the National Labor Relations Act that confers on the employers an additional collateral right to go out and seek more evidence to try to withdraw recognition from a union.

QUESTION: Can you --

QUESTION: Assuming --

QUESTION: -- in order to retain that option of the unilateral withdrawal and treat it the same way as a poll.

MR. NUECHTERLEIN: I -- what -- the primary question, as I understand your question, is why does the board still permits unilateral withdrawals of recognition, given that you have the RM election device, or is your question something else?

QUESTION: And -- why does it permit it, and under the same standard as the poll?

Number 1, why does it permit it at all, and

second, if it permits it, why doesn't it have a much tighter standard for that?

MR. NUECHTERLEIN: Well, the answer to your first question is, it's largely a question of historical evolution of the labor laws.

It was not until the Taft-Hartley Act of 1948 that there were RM elections and/or that there were decertification elections. Those were added by that.

Before then, effectively the only way that a union could ever get decertified was if an employer withdrew recognition, and because of that, the board --

QUESTION: Gee, I thought it was an unfair labor practice for an employer to continue to bargain with a union that he knows no longer represents the majority. Can he continue to deal with a union that he knows is not supported by a majority of the --

MR. NUECHTERLEIN: I'm not aware of a single case in which any employer has been found guilty of a violation of section 882 by virtue of that, because in fact what he has to have is incontrovertible evidence.

If he has a doubt about that, though, the important thing is that he can go to the board and seek an RM election if he wants to preserve his rights. He doesn't have to have unilateral action.

Congress has provided the specific remedy for

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him. The fact that the board hasn't foreclosed altogether alternative unilateral remedies that the employer might also take doesn't require the board to give a wide birth to those unilateral remedies.

QUESTION: But he -- but the employer could not have done this on this record.

MR. NUECHTERLEIN: That is correct. On this record, the proper --

QUESTION: He couldn't have -- the employer couldn't do anything.

MR. NUECHTERLEIN: That is correct. On this record the proper people to challenge --

QUESTION: Well, you seem to take the position that what's required for unilateral nonrecognition of the union and calling for a poll of the employees is virtually the same thing, and yet in the Auciello case from this Court, which isn't that old, this Court said that the evidence required to demonstrate that a union has lost majority support is greater than that required to assert good faith doubt.

We purported to Auciello to lay out what this tripartite framework is and, in fact, it's being applied as a two-part framework.

MR. NUECHTERLEIN: Justice O'Connor, the -- this Court in Auciello didn't address the difference between

the standards required in the withdrawal context and the polling context. What it addressed are the two standards that permit an employer to take any action, any unilateral action at all, and those are a demonstration of actual loss of majority support, and what the board has called reasonable doubt.

No one's arguing about the first of those in this case. What we're arguing about is whether it's rational for the board to apply the same reasonable doubt standard in the polling context as it is in the withdrawal context, and the reason it's rational is because there are some contexts in which a good faith employer might benefit from taking a poll even if he thinks he has some sketchy information suggesting the majority of employees no longer support the union.

In that context, it makes a lot of sense for him just to maintain workplace goodwill to take the poll before going the extra yard and withdrawing recognition.

QUESTION: Are there restrictions on the holding of elections that are more severe or more onerous than on taking of polls? There's a contract bar rule, for instance. Aren't -- can you take a poll more often than you can have an election?

MR. NUECHTERLEIN: There are not the same formal restrictions on repeated polls, but, of course, if the

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employer takes a poll and it takes out that the union wins, it will require some new development in the workplace for an employer to develop a new reasonable basis --

QUESTION: What are the formal restrictions on elections that do not apply to the informal polls?

MR. NUECHTERLEIN: The primary one is the one that you just identified, which is that --

QUESTION: Contract --

MR. NUECHTERLEIN: -- as a statutory matter you may not take a -- you may not conduct a new election within 1 year of the prior election.

QUESTION: What would the board's result have been if in this case Mohr had said, I have personally and specifically talked to 12 employees. They all say that they would vote against the union today, and I've been around long enough so that I am satisfied that if an election were held today, the majority support for the union would be gone.

Would that have been enough for the board -- would have have been enough for reasonable doubt --

MR. NUECHTERLEIN: It's hard for me to speak for the board.

QUESTION: -- good faith reason?

MR. NUECHTERLEIN: That would be a different

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case.

QUESTION: Based on what it has said, could you answer my question with assurance one way or the other?

MR. NUECHTERLEIN: I'm not sure that I could answer your question with assurance one way or the other.

I do know that the board requires a particularly strong showing of nonsupport for a union, and the board is naturally skeptical to rely on certain kinds of evidence, and reports of colleagues' views in the workplace, and the reason it is is that often when these views trickle up to the employer they are the result of a concerted effort by some of the employees to throw out the union. Remember that --

QUESTION: Well, if the employer can't go out and ask himself, and if the board is skeptical of views retailed by third parties, then what kind of evidence can the employer use?

MR. NUECHTERLEIN: Well, again, there will often be the case -- there will often be circumstances in which the employer will not have a sufficient evidentiary basis, and that that's the circumstance in which the board has put the burden on the employees to look after their own rights in filing a decertification --

QUESTION: Yes, but the board has said we will allow a poll if there's a -- the reasonable doubt showing,

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but certainly there's got to be some counter to it. That can't just be an empty thing, and yet it seems that the board -- if it won't allow the employer to go out and ask, and it doesn't accept the kind of evidence that you just referred to, it's almost a fiction to say the employer can ever meet that standard.

MR. NUECHTERLEIN: No, I think it reflects the board's empirical understanding that no union will ever have majority support. In an initial organizing context elections are held and sometimes a sizeable minority of employees don't support the union.

Those may, in fact, be the very same employees who are -- who 1 year later, 2 years later, give reports to the employer that the union has lost majority support, and the board is naturally quite skeptical about the --

QUESTION: Well, skepticism can go so far, but I doubt, frankly, whether the board could totally say, union cannot be eliminated unless you get 30 percent of the employees to come in and throw it out. I think there is at least doubt whether, under the National Labor Relations Act the employer does not have a right to the assurance that at least there's a reasonable probability that the union represents the majority of his employees. Don't -- is that not a consideration?

MR. NUECHTERLEIN: I think, as this Court has

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pointed out, that it is appropriate to be skeptical about employer efforts to act as a worker's champion, and that is the board's position.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nuechterlein. The case is submitted.

(Whereupon, at 12:05 p.m., the case in the above-entitled matter was submitted.)

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CASE NO: 96-795

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BY Ann Marie Federico

(REPORTER)