SUPREME COURT OF THE UNITED STATES

No. 96–795

ALLENTOWN MACK SALES AND SERVICE, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 26, 1998]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS join, concurring in part and dissenting in part.

I concur in the judgment of the Court and in Parts I, III, and IV. However, I disagree that the Board's standard is rational and consistent with the National Labor Relations Act, and I therefore dissent as to Part II.

The Board's standard for employer polls requires a showing of reasonable doubt, based on sufficient objective considerations, that the union continues to enjoy majority support. *Texas Petrochemicals Corp.*, 296 N. L. R. B. 1057, 1061 (1989), enf'd as modified, 923 F. 2d 398 (CA5 1991); *Auciello Iron Works, Inc.* v. *NLRB*, 517 U. S. 781, __ (1996); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 778 (1990). While simply stated, what this rule means in practice is harder to pin down. As suggested by the Court's opinion, *ante* at 11–13, despite its billing as a "good-faith reasonable doubt" standard, this test appears to be quite rigorous. The Board so concedes: "It is true that the Board's 'reasonable doubt' standard is sufficiently rigorous and fact-specific that employers often cannot be certain in advance whether their evidentiary basis either for taking a poll or for withdrawing recognition will ultimately be

deemed to have met that standard." Brief for Respondent 38.

The Board's standard is sufficiently stringent so as to exclude most circumstantial evidence (and quite a bit of direct evidence) from consideration and therefore to preclude polling except in extremely limited circumstances– ironically, those in which a poll has almost no practical value. It requires as a prerequisite to questioning a union's majority support that the employer have information that it is forbidden to obtain by the most effective method. See *Curtin Matheson, supra,* at 797 (C. J., concurring) ("I have considerable doubt whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments."); 494 U. S., at 799, and n. 3 (Blackmun, J., dissenting). The Board's argument that polls are still valuable in ensuring that the union lacks majority support *in fact*, effectively concedes that polls will have only extremely limited scope. The Board's standard also leaves little practical value for employers in polling, since a losing union can *ex post* challenge a poll on the same grounds as a withdrawal of recognition, as happened here.

The Board argues first that its employer polling standard is authorized by, and consistent with, the Act because it promotes the overriding goal of industrial peace. Polling purportedly threatens industrial peace because it "raises simultaneously a challenge to the union in its role as representative and a doubt in the mind of an employee as to the union's status as his bargaining representative." *Texas Petrochemicals, supra,* at 1061–1062; Brief for Respondent 27. This threatened disruption to the stability of the bargaining relationship and the unsettling effect on employees, it is argued, impair employee rights to bargain collectively. The Board also asserts that its employer

polling standard may be the same as the standard for unilateral withdrawals of recognition, and yet be rational, because it still allows the employer to use polls to confirm a loss of majority support for the union before withdrawal of recognition. And the same standard for RM elections is valid, the Board claims, because RM elections and polling have common practical and legal consequences. See *Texas Petrochemicals, supra,* at 1060; Brief for Respondent 36–37, n. 12.

I think the Board's reasoning comes up short on two counts. First, there is no support in the language of the Act for its treatment of polling, and second, its treatment of polling even apart from the statute is irrational.

The Act does not address employer polling. The Board's authority to regulate employer polling at all must therefore rest on its power to prohibit any practices that "interfere with, restrain, or coerce employees in the exercise" of their right to bargain collectively under §8(a)(1), 29 U. S. C. §158(a)(1).[1] The Board fails to demonstrate how employer polling, conducted in accord with procedural safeguards and with no overt coercion or threats of reprisal, violates the terms of the Act. Such polling does not directly restrain employees' rights to bargain collectively or affect the collective bargaining relationship. If the union loses the poll, its status as collective bargaining representative would certainly be affected, but that outcome is not necessarily one the Act prevents. That a poll may raise "doubts" in the minds of employees as to the union's support would not appear to interfere with employees'

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[1]The Board argues in the alternative that its standard is authorized by §8(a)(5), even though a violation of that section was not alleged in this case. But the Board provides no explanation as to how the authority it is granted or the protection extended employees under §8(a)(5) differs from that of §8(a)(1). Section 8(a)(5) states, "It shall be an unfair labor practice for an employer– (5) to refuse to bargain collectively with the representatives of his employees . . . ." 29 U. S. C. §158(a)(5).

rights, particularly since a poll is permissible only once the presumption of majority support becomes rebuttable. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U. S. 27, 37–38 (1987) (recognizing the nonrebuttable presumption of majority support for one year after certification). And such "doubts" hardly appear so unsettling for employees or so disruptive of the bargaining relationship as to warrant severe restrictions on polling.

A poll conducted in accord with the Board's substantial procedural safeguards would not coerce employees in the exercise of their rights. In *Struksnes Constr. Co.*, 165 N. L. R. B. 1062, 1063 (1967), the Board, in addressing the validity of an employer poll during a union's organizing drive, held that polling does not violate the Act if "(1) the purpose of the poll is to determine the truth of the union's claim to majority, (2) this purpose is communicated to employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere." In *Texas Petrochemicals*, 296 N. L. R. B., at 1063–64, the Board imposed an additional requirement of advance notice of the time and place of the poll. These substantial safeguards make coercion or restraint of employees highly unlikely.[2]

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[2]The Board contends the *Struksnes* standard is not appropriate where the union is already established and enjoys a presumption of majority support, as opposed to the organizing phase where the union must establish its majority support. Brief for Respondent 28. But the safeguards protect against the potentially disruptive or coercive effects of polls equally in both situations. If anything, polling would seem more unsettling before the union is established. And in both situations, a poll serves the purpose of providing a neutral determination of the employees' support for the union, where such information is clearly relevant to employers in making legitimate decisions regarding their bargaining obligations under the Act. Moreover, to raise the bar to polling on the basis of the presumption of majority support would in effect make that presumption unassailable by denying employers the

Additionally, the Board's rationale gives short shrift to the Act's goal of protecting employee choice. *Auciello Iron Works*, 517 U. S., at 790–791. By ascertaining employee support for the union, a poll indirectly promotes this goal. Employees are not properly represented by a union lacking majority support. Employers also have a legitimate, recognized interest in not bargaining with a union lacking majority support. *Texas Petrochemicals, supra,* at 1062. The ability to poll employees thus provides the employer (and the employees) with a neutral and effective manner of obtaining information relevant to determining the employees' proper representative and the employer's bargaining obligations. See *Curtin Matheson*, 494 U. S., at 797 (C. J., concurring); see also *id.*, at 799 (Blackmun, J., concurring). Stability, while an important goal of the Act, see *Fall River, supra*, at 37, is not its be-all and end-all. That goal would not justify, for example, allowing a nonmajority union to remain in place (after a certification or contract bar has expired) simply by denying employers any effective means of ascertaining employee views. I conclude that the Board's standard restricts polling in the absence of coercion or restraint of employee rights and therefore is contrary to the Act.

Quite apart from the lack of statutory authority for the Board's treatment of polling, I think this treatment irrationally equates employer polls, RM elections, and unilateral withdrawals of recognition. The Board argues that having the same standard for polls and unilateral withdrawals is reasonable because the employer can still use polls to confirm a loss of majority support. As a practical matter, this leaves little room for polling, *supra*, at 2. But even conceding some remaining value to polling, the Board's rationale fails to address the basic inconsistency of

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most effective, and least coercive, way to obtain information on the actual level of union support.

imposing the same standard on two actions having dramatically different effects. Surely a unilateral withdrawal of recognition creates a greater disruption of the bargaining relationship and greater "doubts" in the minds of employees than does a poll. Consistent with the Board's reliance on such disruption to justify its polling standard, the standard for unilateral withdrawals should surely be higher.

The Board also asserts that having the same standard for RM elections and employer polls is justified by common practical and legal consequences, *i.e.*, the risk of the union's loss of its position as bargaining representative. But this argument fails as a factual matter. As the Board admits, a RM election is binding on a losing union for one year, 29 U. S. C. §159(c)(3), while a union losing a poll may petition for a Board election at any time.[3] Brief for Respondent 40, n. 12. These differing consequences suggest the standard for polling should be lower. The Board's "avowed preference for RM elections," without some further legal or factual grounds for support, would not appear to justify a higher standard for polling. See *ante*, at 6. But in any event, that the Board *could* perhaps justify a higher standard for polling does not mean that it is rational to have the two standards equal, especially since doing so results in RM elections and unilateral withdrawals of recognition having the same standard as well. The Board thus irrationally equates the standard for polling with the standards for both unilateral withdrawals of recognition and RM elections.

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[3]On the other hand, if the union wins an employer poll, the employer apparently must recognize the union, *Nation-Wide Plastics, Inc.*, 197 N. L. R. B. 996, 996 (1972), which is then entitled to a conclusive presumption of majority support for a reasonable time to permit bargaining. If an agreement is reached, a contract bar will apply. *Auciello Iron Works, Inc.* v. *NLRB*, 517 U. S. 781, __ (1996). A losing employer thus would be barred for some time from conducting another poll.

The conclusion that the Board's standard is both irrational and without support in the Act is reinforced by longstanding decisions from this Court. In *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 616–617 (1969), an employer challenged the Board's determination that the employer's communications to its employees attempting to dissuade them from supporting the union violated §8(a)(5). While upholding the finding of a violation on the facts presented, the Court noted that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, §8(c), 29 U. S. C. §158(c), merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of §8(a)(1). 395 U. S., at 617. See also *Thomas* v. *Collins*, 323 U. S. 516, 537 (1945) (union solicitation of employees is protected by First Amendment); *NLRB* v. *Virginia Elec. & Power Co.*, 314 U. S. 469, 477–478 (1941) (employer's attempts to persuade employees with respect to joining or not joining union are protected by First Amendment). The Court thus concluded that First Amendment rights, codified in §8(c), limited the Board's regulatory authority to cases where the employer's speech contained a threat of reprisal or coercion.

Under *Gissel*'s reasoning, employer solicitation of employee views is protected speech, although such solicitation can constitutionally be prohibited where it amounts to coercion or threats of reprisal. There is no logical basis for a distinction between soliciting views, as in the instant case, and communicating views. Our decisions have concluded that First Amendment protection extends equally to the right to receive information, *Kleindienst* v. *Mandel*, 408 U. S. 753, 762–763 (1972), and to the right to solicit information or responses, *Edenfield* v. *Fane*, 507 U. S. 761,

765–766 (1993); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 761 (1976). More specifically, we concluded in *Thomas, supra,* at 534, that *union* solicitation of employee views and support is protected First Amendment activity. In finding union solicitation protected, *Thomas* relied on *Virginia Electric & Power, supra,* as establishing that *employer's* attempts to persuade employees were protected First Amendment activity. 323 U. S. at 536–37.

It is not, however, necessary to resolve whether the Board's standard violates the First Amendment in this case. It is sufficient that the Board's interpretation of §8(a)(1) to limit sharply employer polling raises difficult constitutional issues about employers' First Amendment rights. We have held that when an interpretation raises such constitutional concerns, the Board's interpretation of the Act is not entitled to deference. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 574–577 (1988); *NLRB* v. *Catholic Bishop of Chicago,* 440 U. S. 490, 506–507 (1979); see also *Rust* v. *Sullivan,* 500 U. S. 173, 190–191 (1991).

In *DeBartolo,* we held that the Board's interpretation of the Act to proscribe peaceful handbilling by a union was not permissible. The Court acknowledged the Board's special authority to construe the Act and the normal deference it is therefore accorded. The Court nevertheless concluded that the Board's interpretation was not entitled to deference because, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." 485 U. S., at 575. See also *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U. S. 731, 742–743 (1983) (the Board's interpretation of the Act is untenable in light of First Amendment concerns and state interests, even though its interpretation is a rational construction of the Act). As in *DeBartolo,* I conclude that §8(a)(1) "is open to a con-

struction that obviates deciding whether a congressional prohibition of [employer polling] on the facts of this case would violate the First Amendment." 485 U. S., at 578.

In my view, cases such as *Gissel*, *supra*, *Thomas*, *supra*, and *Virginia Elec. & Power Co.*, *supra*, mean that the Board must allow polling where it does not tend to coerce or restrain employees. The Board must decide how and when in the first instance, but its decision must be rational, it must have a basis in the Act, and of course it may not violate the First Amendment.

The Court, however, concludes that the Board's standard is lawful. Accepting that conclusion *arguendo*, I agree that the Board's findings are not supported by substantial evidence. I therefore join Parts I, III, and IV of the Court's opinion.