

**SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO**

Case No. CV-2008-04698

NEW MEXICO TRANSPORTATION UNION,

Appellants,

vs.

**AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, COUNCIL 18
AND LOCAL 624,**

Appellees.

STATEMENT OF APPELLATE ISSUES

Pursuant to Rule 1-074 of the New Mexico Rules of Civil Procedure, Appellant New Mexico Transportation Union (NMTU) presents the following Statement of Appellate Issues:

I. Statement of the Issues

The issue in this appeal is whether the City of Albuquerque's Labor-Management Relations Board acted arbitrarily, without substantial evidence in the record, and not in accordance with law when it approved and ordered the holding of a representational election and certified the results of that election without holding any hearing(s) of evidence and testimony.

II. Summary of Proceedings

A. Nature of the Case

This is an appeal of an administrative decision of the City of Albuquerque's Labor Board. The New Mexico Transportation Union (NMTU) appeals orders of the City Labor-Management Relations Board ("Labor Board") setting a representational election between the incumbent

NMTU, representing City Transit Department bus and van drivers, and another union, the American Federation of State, County, and Municipal Employees (AFSCME), Council 18 and Local 624, (R. 003–005) and certifying results of that election in favor of the AFSCME unions. (R. 006).

Throughout the proceedings, the City Labor Board simply granted each and every request made by the AFSCME union with the support of the City and ignored every objection and argument made by the NMTU. The Labor Board never heard any witnesses or testimony, never entered evidence into the record, and failed to issue rulings based on evidence or testimony.

B. Course of Proceedings

On March 3, 2008, AFSCME, Council 18, filed a Prohibited Practices Complaint against the City of Albuquerque charging that the City “has provided assistance and support to the New Mexico Transportation Union (NMTU) in its effort to discourage Albuquerque City bus drivers from designating AFSCME as its collective bargaining agent.” (R. 243-247).¹ The NMTU attempted to intervene in that case. (R. 082-086). To this date the Labor Board has neither ruled on the NMTU’s Motion for Intervention and a Hearing, nor has the Labor Board ever heard the AFSCME case, even though it has been scheduled for hearing several times.²

On March 11, 2008, at a meeting of the City Labor Board at which the NMTU was not represented, AFSCME Council 18 Director Lawrence Rodriguez advised the Board that

¹ The AFSCME Prohibited Practices Complaint against the City was originally numbered LB-08-06. (R. 241, 243). It was subsequently changed to LB-08-07, the same number that was given to the AFSCME Petition for Representation. (R. 248). It is unknown who changed the case number, or when or why it was changed.

² It was scheduled as Case No. LB-08-06, which was recently revealed on the scheduled hearing date to be a duplicate case number; the hearing was then postponed indefinitely.

AFSCME would be filing a representation petition. Remarkably, Rodriguez told the Board that the “City and the (AFSCME) unions are working together” on the campaign to remove the NMTU. (Tr. 3/11/08, Disc 2, at 4' 47"). The Labor Board members, after first questioning whether AFSCME was “seeking to decertify” the NMTU, provided advice in support of the AFSCME unions’ effort, advising them to look to the Labor Board’s prior rulings in the Teamster’s organizing campaign against the NMTU and recounting their past experiences with a previous attempt to remove the NMTU as bargaining agent. (Disc 2, at 4' 50" to 7' 55").

Also on March 11, 2008, AFSCME submitted their Petition requesting the representation election. (R. 248-290). AFSCME attached a copy of the NMTU’s then-current collective bargaining agreement to the Petition and submitted, in a sealed envelope, what purported to be AFSCME membership cards of over 30% of the employees in the bargaining unit as a “showing of support.”³

The NMTU subsequently, on March 26, filed a Motion for Disclosure of AFSCME Membership Cards. (R. 186-190). Although AFSCME submitted a Response to the NMTU’s Motion for Disclosure (R. 090-093),⁴ the Labor Board neither heard nor decided the motion, but implicitly ruled against the NMTU by refusing to allow access to the AFSCME membership cards. A copy of a blank membership card states:

³ The sealed envelope is not a part of the record on appeal, as the City attempted to file it as a separate and sealed “Part II.” The Court did not accept the sealed envelope, and the City subsequently attached it to a Motion to File Part II which is scheduled to be heard by the Court on August 19, 2008. To this date the NMTU has not been permitted to view, question, or challenge the AFSCME purported “showing of support.”

⁴ The Record prepared and filed by the Labor Board is not arranged chronologically, and responses frequently proceed and are separate from the motions to which they respond.

I authorize AFSCME Council 18 as my exclusive collective bargaining representative and I accept membership in AFSCME, Council 18.

(R. 150).⁵

At the time AFSCME submitted its purported “showing of support” the NMTU was the sole and exclusive bargaining and grievance representative for the bargaining unit made up of City Transit Department bus and van drivers. A Collective Bargaining Agreement, between the City and the NMTU was in effect and did not expire until June 30, 2008. (R. 253-290).

On March 12, 2008, the City filed a “Request for Expedited Hearing” before the Labor Board and a “Request for Order Establishing Process for Election.” (R. 202-205 and R. 236-239).⁶ The City’s “Request” stated that the City “cannot proceed with negotiating a new contract with NMTU until the pending petition by AFSCME (for a representational election) is resolved.” The City “request(ed) that the labor board schedule this request for order establishing process for election as the first order of business on March 18, 2008.” (R. 203 and 237, para. 8). The City falsely claimed that if the Labor Board:

does not address the petition for representation on an expedited basis, whatever union is ultimately determined by this board to be the agent for the bargaining unit defined in the current NMTU CBA with the city may be unable to complete negotiations with the city prior to expiration of the CBA on June 30, 2008. . . . Failure to negotiate a new CBA could result in injury to city employees who could be deprived of potential salary increases pending identification of the agent for (the) bargaining unit.

(R. 203 and 237, paras. 11 and 12).

⁵ The blank membership card is labeled “Exhibit E” in the record, but it is not attached or connected to any document.

⁶ Two copies of the same document are in the record, one showing it was filed on March 12, 2008, the other showing it was filed the next day, March 13, 2008.

Without hearing from the NMTU or issuing a written order, the Labor Board granted the City's Motion and scheduled the "request for order establishing process for election" for March 18, 2008. The City's "motion" erroneously assumed that there should and would be a representational election, a proposition to which the NMTU strongly objected. (R. 160-185). Despite the NMTU's written objections and subsequent argument there is no indication the members of the Labor Board ever heard or considered the possibility that the representational election sought by AFSCME and the City was either improper, illegal, or unwarranted.

On March 14, 2008, the NMTU filed a Petition:

asking the Mayor and the City Labor Board to acknowledge and continue the NMTU's status as the exclusive bargaining representative of the employees in the Transit Drivers' Bargaining Unit.

(R. 210-232). The NMTU's Petition included proof, in the form of a dated membership list and city dues deduction records, that the NMTU had at that time current membership in excess of 70% of the bargaining unit employees. Although it is in the record, the Labor Board never heard, considered, or decided the NMTU Petition.

A successor Collective Bargaining Agreement between the NMTU and the City for July 1, 2008, to June 30, 2011, was subsequently agreed to (R. 191), ratified by the membership of the NMTU, and signed by the City and the Union. The NMTU had about 200 Union members, comprising between 70% and 75% of the employees in the bargaining unit. The new contract was submitted to the membership for a vote, and was ratified. The Mayor and other City officials then signed the contract.

On April 7, 2008, AFSCME organized a presentation to the Albuquerque City Council alleging that the Transit Department was firing AFSCME supporters solely to discourage support

for AFSCME. One City Councilor stated that it sounded to him “like the union busting of the ‘50s.” (R. 087). The NMTU again asked the Labor Board to hold a hearing prior to the representational election:

to resolve and remove the cloud of allegations over favoritism and discrimination and either prove or disprove the allegations . . . as provided by the City’s Labor-Management Relations Ordinance . . .

(R. 082-087; R. 085 at para. 16). Again, without any review, consideration, or order the Labor Board ignored the NMTU’s motion and failed to hold a hearing.

On April 11, 2008, the NMTU’s counsel e-mailed objections to the election arranged by the Labor Board, stating that:

. . . there is no written order and, most importantly, in this case there has been no hearing. We strongly object to both the absence of a written order and the Labor Board’s failure to reach any decision or conclusion based on findings and law. This is not a trivial matter;’ we consider it of great importance that there has been no hearing: i.e., no opportunity for presentation of evidence and testimony, no right to examination and cross-examination of witness(es), no findings of fact, and no compliance with any of the other basic rights of due process which we believe the City, acting through its Labor Board, is required to provide. We have repeatedly stated these concerns, but the Labor Board has always either ignored or rejected them.

(R. 020 and 024). The Labor Board and City officials to whom the April 11 e-mail was directed again ignored the NMTU’s objections, and still without holding any hearing issued the Decision “finding” that “A representation election should be ordered by the Board” (R. 017-019) and set the Rules to Govern Representation Election For the Motorcoach Operators and Chauffeurs. (R. 028-031).

C. Disposition of the Agency

Over the NMTU’s objections, the “election” was held on April 25, 2008 (R. 011) and on April 30, 2008, the Labor Board issued its “final order” finding that:

The Mayor should certify petitioner as the exclusive bargaining representative for the bargaining unit consisting of Motor Coach Operators and Sun Van Chauffeurs employed by ABQ Ride, City of Albuquerque Transit Department.

(R. 008). On May 14, 2008, the Mayor wrote to the Labor Board certifying “AFSCME Local 624 as the exclusive bargaining representative for all full-time, permanent and non-probationary Motor Coach and Sun Van Operators.” (R. 007).

III. Argument and Authorities

A. Failure to Hold Evidentiary Hearings

From the start of the process to the end, the Labor Board never held even a single hearing. If the Labor Board had complied with its obligations and held a hearing it would have heard and allowed NMTU to enter into the record substantial evidence concerning the impropriety of the representational election and certification of the AFSCME as exclusive bargaining and grievance agent for bus and van drivers in the Transit Department’s bargaining unit.

The AFSCME unions introduced their Petition to the Labor Board at the Board’s meeting on March 11, 2008. Because nothing on the agenda indicated that this issue would be raised, no representative of the NMTU was present. Nonetheless, Council 18 Director Lawrence Rodriguez addressed the Board during “public comments” and gave them a “heads up” about the AFSCME campaign. The AFSCME Director admitted to the Board that the AFSCME unions and the City were “working together” on the Petition. (Tr. 3/11/08, Disc 2, at 4' 47").

The Labor Board then engaged in discussion of its prior experience with unions attempting to raid the NMTU. One Board member stated that what they went through a few years before was “messy.” Another Board member advised AFSCME as to how it should proceed, telling the union to review the prior Board proceedings and discussing how the election would be managed. (Id., Disc 2, at 4' 50" to 7' 55").

With that inauspicious start, the Labor Board never provided any more meaningful process at its subsequent meetings on the subject, routinely denying each and every effort by the NMTU to be heard. Nor did the City do anything but support the AFSCME efforts to secure a representational election.

On March 18, 2008, the Labor Board granted the City's "Request for Expedited Hearing" and "Request for Order Establishing Process for Election." Even though no order was issued that day, it was apparent that the granting of the representational election was a foregone conclusion, and that there was no possible way the Board would be deterred from that course. What was truly remarkable was the so-called "neutral" City's outright support for the election process, as demonstrated by its false contentions and threats about the damaging effect on employees if an election was not held promptly, in time to allow for bargaining with the successful union. (See, R. 202-205). There was no "hearing" on March 18, but even more damaging, all of the NMTU's arguments were ignored.

On March 26, 2008, the date of the next Labor Board hearing, the AFSCME "showing of support" was "reviewed" by the Labor Board, which carefully precluded the NMTU from seeing or having any knowledge of the so-called "membership cards" which were "reviewed" by the Labor Board secretly, albeit at a public meeting. This took place, of course, over the strong objections of the NMTU, but the Labor Board again simply ignored the incumbent union's objections.

On April 7, 2008, AFSCME representatives, including an "Interfaith Ministry" that is paid and supported by AFSCME, attended and advised the Albuquerque City Council that the City was acting in collusion with the NMTU. The AFSCME respondents claimed at the Council meeting that the NMTU was an ineffective and incompetent "company union" which did not

support its members or members of the Transit Department drivers' bargaining unit. The City did not deny the false AFSCME claims.

At the City Council meeting the AFSCME supporters stated that the NMTU is a "company union;" one of the City Councillors stated that the actions of the City sounded to him like "union busting," implying that the City was acting against AFSCME and in support of the NMTU. The City Councillors, without hearing any response from either the Transit Department or the NMTU, assumed that there was some basis for the AFSCME allegations and were solidly in agreement that the conduct alleged by AFSCME should not and could not be allowed to continue.

Rather than being favorable to the NMTU, the AFSCME allegations against the City of Albuquerque's Transit Department, i.e., that the Transit Department management is working closely with the NMTU and that the City is favoring the NMTU over AFSCME, created an invidious prejudice against NMTU that actually favored AFSCME by portraying it as a strong union that can stand up to the City in representing Transit Department drivers. All of the AFSCME allegations against the City and the NMTU were in the form of unsworn statements in a political context. Without any hearing or sworn testimony the NMTU was subjected to unreasonable and defamatory allegations, exploited by AFSCME to secure an unfair advantage, which again denied due process.

Even after the unreasonable and erroneous decision to hold a representational election, the final blow to fairness and reasonableness was the Labor Board's refusal to hear evidence concerning AFSCME's pre-election claims of collusion against the NMTU and the City. It was essential to NMTU's chances for success to first resolve and remove the cloud of allegations of

favoritism and discrimination against the City's Transit Department and its Director, Greg Payne by either proving or disproving the allegations.

At the next Board meeting, on April 14, 2008, the Labor Board "ordered" the election and again refused the NMTU's vigorous objections and requests for an evidentiary hearing. By that time it was essential to the NMTU that it have an opportunity to counter the false allegations of "collusion" and "company union" that had been leveled against it by AFSCME.

At the same time, the NMTU needed to show that the AFSCME unions, rather than being the strong force they falsely represented themselves to be, were actually engaging in minority representation, in violation of law, with respect to nearly all of the other AFSCME City local unions, notably Local 2962, Local 1888, and Local 3022. All of those locals have only minority support of members of their bargaining units, in at least one case as low as 25% of the bargaining unit. Instead of providing the opportunity for an evidentiary hearing, the Labor Board rejected every NMTU request and demand.

The only way to resolve and remove the cloud of allegations over favoritism and discrimination and either prove or disprove the allegations was to hold a hearing of evidence and testimony, as provided by the City's Labor-Management Relations Ordinance, on the Prohibited Practice Complaint filed by AFSCME, LB-08-06 (or -07). Nonetheless, the Labor Board refused to hold its required hearing, and that case has still not been heard or decided.

The record of this case and recordings of Labor Board meetings conclusively demonstrate the Labor Board's failure to hold any evidentiary hearings. With respect to Prohibited Practices Complaints submitted to the Labor Board, it is required that:

within five work days after service of the answer the Board or its designee shall schedule a hearing to be conducted as soon as possible, and at such hearing, the

parties shall be permitted to be represented by counsel and to summon witnesses and submit evidence.

Section 3-2-9(D), R.O. Albq. Specifically with respect to a representational proceeding, the

Rules of the Labor Board state that:

No party shall have the burden of proof in a representation or fact-finding proceeding. The Board shall have the responsibility of developing a fully sufficient record for a determination to be made, and may request any party to present evidence or arguments in any order.

Labor-Management Relations Board Rules and Regulations No. 4.10.

An organizing campaign and representational attack by a large public sector labor union against a small, independent union is unprecedented in City of Albuquerque history. The approval of a representational election by a City Labor Board, under these circumstances, in the absence of any opportunity for the objecting union to be heard, absent any genuine “question concerning representation,” and contrary to the provisions of the City’s LMRO, was erroneous and subject to reversal on appeal.

B. Wrong as a Matter of Law

In this case the NMTU’s membership has remained above 70% and there is no provision in the LMRO addressing or allowing a representation election under these circumstances. The Ordinance provides for only two possible scenarios: a representation election when there is no incumbent bargaining representative and a decertification election when there *is* an incumbent representative whose support has fallen below 50%.

1. The Labor-Management Relations Ordinance

Section 3-2-4 (A), Labor-Management Relations Ordinance (LMRO) provides that a union which has been certified as the exclusive bargaining representative for an appropriate

bargaining unit may bargain collectively with the City concerning hours, salary, wages, working conditions, and all terms and conditions of employment. The NMTU and its predecessor union, the UTU, had been the recognized representative for many years. With the Collective Bargaining Agreement between the City and the NMTU in effect and set to expire on June 30, 2008, the AFSCME unions filed a petition asking for representational rights. The petition purportedly included membership cards authorizing AFSCME “to represent me in negotiations for better wages, hours and working conditions.”

The following day, the Director of the City’s Human Resources Department posted a notice of the challenge and the City “referred” the matter to the Labor Board, informing the Board that an election was “required,” and asking the Labor Board for an expedited hearing. It is the contention of the NMTU that under the express language and intent of the LMRO, no representation election should have been ordered and held in this case.

There are numerous reasons that holding a representational election and subsequently certifying the results of that election were incorrect and should be reversed on appeal. First, the City’s LMRO provides that *decertification* is the only way of removing an incumbent union. No provisions exist for a representational election when there is a majority incumbent union. Nor is posting of a challenge notice allowed, when there is already a union representing the bargaining unit employees. Thus, the election was improper as a matter of law.

Second, the AFSCME challengers did not submit a valid showing of support by means of membership cards, as the membership cards themselves document membership in AFSCME’s Council 18, rather than a local qualified as a Transit Department employee bargaining representative. Council 18 is an umbrella organization, not one that exists for the purpose of representing

employees in bargaining or grievances. It appears that at some time an AFSCME local, Local 624, which represents City “blue collar” employees became the Transit drivers’ representative union. However, Local 624 has its own elected officers, its own Executive Board, and its own contract with the City, none of which include the Transit Department drivers.

Furthermore, many or most of the employees “supporting” the AFSCME unions are (and were at the time) actually NMTU members. It should also be noted that these are factual issues that could not be determined for at least two reasons. First, because the “memberships” were kept secret and were not disclosed. And second, because the Labor Board never conducted any evidentiary inquiry into the membership status of the Transit Department employees.

The City’s Labor-Management Relations Ordinance (LMRO) provides that if a majority of the employees in the bargaining unit desire representation by one union, then they are entitled to representation by that Union. The Ordinance provides that when there is no incumbent union and a majority of employees in a bargaining unit want representation by an employee organization, “the Mayor shall certify the employee organization as the exclusive representative of the bargaining unit.” Sec. 3-2-6 (C), LMRO and Sec. 3-2-6(D)(1), LMRO.

The AFSCME Petition stated that it was filed (with the Mayor) under Sections 2-3-6(C) and (D) of the City’s Labor-Management Relations Ordinance. Section 2-3-6(D)(3) of the City’s Labor-Management Relations Ordinance states that:

Neither an election nor certification by a showing of interest shall occur if (a) there is currently in effect a lawful written agreement between the public employer and an exclusive bargaining representative for the bargaining unit.

(Underlining added). Since there surely was a “lawful written agreement” between the City and the NMTU, no representation election was allowed under the Ordinance.

The Labor-Management Relations Ordinance also provides that:

The decertification of any employee organization which has been recognized as the exclusive bargaining representative of employees in an appropriate bargaining unit may be affected (sic) by the filing of a written request for decertification supported by . . . a showing that 30% of the employees in the bargaining unit seek to have a decertification election. . . .

Sec. 2-3-6(H). Although there was no decertification effort, AFSCME was able to convince the Labor Board that sub-section (D)(3) was overridden by the inclusion of a “window period” for challenges to representation that is based on the date of expiration of a contract, or collective bargaining agreement. See, LMRO, Section J; (R. 117-122; Labor Board’s April 25, 2006, Decision, pp. 2, 3.). While this provision creates an internal contradiction in the Ordinance, the Labor Board’s choice of the AFSCME’s demand for an election was contrary to all the other provisions of the Ordinance that support the current and exclusive bargaining representative, and should have been resolved differently.

The Ordinance provides for only two possible scenarios: a representation election when there is no incumbent bargaining representative (sub-section E) and a decertification election when there is an incumbent representative. (sub-section H). It is apparent in Section D and almost all the rest of the Ordinance that no representational election may occur if there is an incumbent union with a collective bargaining agreement in place; it is obvious that the provisions for any such election were not met by the challengers in this case.

2. Private Sector Law

The “filing of a representation petition by an outside, challenging union” does not “require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union.” *RCA Del Caribe, Inc. v. Local 2333, IBEW*, 262 NLRB 963, 965 (1982). “Upon the

expiration of a collective bargaining agreement, an incumbent union is entitled to a rebuttable presumption of continued majority status.” *NLRB v. Katz’s Delicatessen*, 80 F.3d 755, 764 (2nd Cir. 1996), *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 137 (2nd Cir. 1982).

It must be noted that although this is an entirely public sector case, all the cases found on the subject of employee representation by competing labor unions come from the private sector. There are different provisions and procedures in the private sector. In particular, private sector employees enjoy the right to strike, public sector employees are not allowed to strike; also, private sector employee labor relations are governed by the National Labor Relations Act (NLRA) and are subject to findings and determination by the National Labor Relations Board. (NLRB).

Both the absence of any guidance from the courts in the form of public sector decisions on the important issues presented here, and the unique scheme for governing Labor-Management relations set out in the City’s LMRO strongly suggest that this situation called for far more legal and evidentiary consideration by the City’s Labor Board than it provided.

a. *Midwest Piping to Katz’s Deli*

Under the provisions of the NLRA, an employer may only recognize a union as the exclusive bargaining agent for its employees if the union has the support of a majority of the employees in the bargaining unit. 29 U.S.C. Sections 159(a), 158(a)(2); *Katz’s Delicatessen*, at 767. The NLRA prohibits an employer from recognizing a union as the bargaining agent while a “genuine question concerning representation” is pending before the NLRB. *Katz’s Deli*, at p. 768. *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945).

In *Midwest Piping*, the NLRB held that an employer committed a prohibited practice when it entered into a collective bargaining agreement with one of two rival unions when there was a

genuine question concerning which union represented the majority of employees in the bargaining unit. The *Midwest Piping* doctrine still holds true when the issue is one of initial representation (i.e., there is no incumbent union) and there are two or more competitors for the exclusive bargaining agent position.

When there is an incumbent, or previously certified, union, however, the filing of a representation petition does not in itself create a real question of representation so as to prevent an employer from entering into a bargaining agreement with the incumbent union. *NLRB v. Swift & Co.*, 294 F.2d 285 (3rd Cir. 1961). When there is an agreement and a certified representative, the matter turns on the issue of whether there was a “real question of representation.”

Although the NLRB had adhered to the *Midwest Piping* doctrine, in *RCA Del Caribe, Inc. v. IBEW*, 262 NLRB 963, the NLRB changed its position:

As the *Midwest Piping* doctrine has been applied over the years in cases involving rivalries between incumbent and outside labor organizations, it has become increasingly evident that the Board’s efforts to promote employee free choice have been at a price to the stability of collective-bargaining relationships. . . . The recognition of the special status of an incumbent union indicates a judgment that, having once achieved the mantle of exclusive bargaining representative, a union ought not to be deterred from its representative functions . . . The Board has accordingly developed the doctrine of the presumption of continuing majority status in order to give a majority representative (either recognized or certified) some reasonable degree of insulation and freedom to fulfill its mandate from employees in its dealings with the employer.

RCA Del Caribe, at 965. As for the effect of filing a representational Petition, as AFSCME filed here:

While the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent and should not serve to strip it of the advantages and authority it could otherwise legitimately claim.

Id. According to the NLRB, “This new approach affords maximum protection to the complementary statutory policies of furthering stability in industrial relations and of insuring employee free choice.” *Id.*, at 966.

Katz’s Delicatessen is the most recent case involving these representational issues. There the Deli’s management recognized an outside union over the incumbent union that had previously represented its employees. On review of the decision of the NLRB, the Second Circuit Court of Appeals held that “an incumbent union is entitled to a rebuttable presumption of continued majority status.” *Katz’s*, at 764. In that case:

an employer may rebut the presumption and withdraw recognition from an incumbent union by introducing objective evidence that (1) the incumbent union has in fact lost its majority support, or (2) the employer’s withdrawal was founded on a reasonably based “good faith doubt” of the union’s continued majority status. The employer has the burden of producing “clear and convincing evidence of loss of union support;” or under the “good faith doubt” alternative it “must come forward with easily verifiable and unambiguous evidence supporting [its] belief that [its] employees have rejected the incumbent union as a bargaining agent.”

Katz’s, quoting *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 137 (2nd Cir. 1982). The same standard that permits an employer to reject its incumbent union should be held to apply to the existence of “a real question” about the majority status of the incumbent union in this case.

Certainly, the NMTU was entitled to the presumption of majority status unless and until there is “objective evidence” that it had “in fact lost its majority support.” Similarly, any “real question” should be based on “easily verifiable and unambiguous evidence supporting [a] belief” that the incumbent union has been rejected by its employees.

In this case the NMTU not only consistently represented the employees in its bargaining unit and submitted a demonstration of ongoing support in the form of records of dues deductions for about 200 members, but it additionally negotiated a new collective bargaining agreement that

was ratified by a majority of the membership. Despite such conclusive evidence of NMTU support among bargaining unit members, the Labor Board failed to acknowledge or consider the NMTU's showing of support, and with the support of the City's labor negotiators, advanced AFSCME's Petition for Representation to a representational election, all without holding any evidentiary hearing or considering any evidence.

b. A "Real Question of Representation"

Under the *Midwest Piping* doctrine the NLRB held that an employer could not favor one union or its rival (when there was no incumbent) "where a real question concerning representation exists." *NLRB v. Swift and Co.*, 294 F.2d 285, 286, 287 (3rd Cir., 1961). It was the responsibility of the Labor Board "within the prescribed procedures of the Act, ultimately to determine *after full litigation of the issue*, whether a real question concerning representation existed under particular circumstances." *Swift*, at 287, citing *William Penn Broadcasting Co.*, 93 NLRB 1104, 1105 (1951).

This consideration comes again, of course, in the context of private sector unfair practices claims resulting from recognition (or non-recognition) of a challenged union. The doctrine must be interpreted and applied carefully because:

That doctrine, necessary though it is to protect freedom of choice in certain situations can easily operate in derogation of the practice of continuous collective bargaining, and should, therefore, be strictly construed and sparingly applied.

Swift, at 287, quoting *Ensher, Alexander & Barsoom, Inc.*, 74 NLRB 1443, 1445 (1947).

Whether, in this case, AFSCME's 30% showing of "membership" weighed against the NMTU's 73% incumbency presents a "real question" of majority representation was a matter for the Labor

Board to decide. Accordingly, an evidentiary hearing was required prior to the Labor Board's decision to order a representational election.

c. Dual Memberships

Although they remain "sealed" and have not yet seen the light of day, the membership cards submitted by AFSCME as their showing of support are believed to be primarily cards of employees who are still, to this day, members of NMTU. These employees were all sworn in as NMTU members and they authorized and had not rescinded authorization for the deduction of NMTU dues from their paychecks.

When they signed AFSCME membership cards these employees may have been told or believed that they were merely voicing their support for the AFSCME unions and the right to an election. Regardless of their intent, however, they signed a membership application and were accepted as members of a different union than the union they were already in. The effect of this is that the second membership is null and void, and accordingly AFSCME could not show even a minimal 30% level of support. Again, the Labor Board's refusal to hold an evidentiary hearing unreasonably compromised the due process rights of the NMTU.

In *NLRB v. Algoma Plywood & Veneer Co.*, 121 F.2d 602 (7th Cir. 1941) employees who signed a petition circulated by one union and then signed authorization cards issued by another union were considered to have selected neither union. In *Posner, I., Inc.* 133 NLRB 1573 (1961) authorization cards signed by employees who also signed cards distributed by another union were invalid. Cards signed by employees for the Textile Workers' Union were considered invalid when the same employees also signed cards for another union. *Crest Containers Corp.*, 223 NLRB 739 (1976). And in *Unit Train Coal Sales, Inc.*, 234 NLRB 1265 (1978) the National Labor Board

discussed the “dual card” rule that when an employee signs authorization cards for two unions the cards cannot be counted for establishing the majority status of either union.

d. Blocking Charge Rule

Another factor that should have precluded a representational election is termed the blocking charge rule. Under this “rule:”

a Regional Director may decline to direct an election during the pendency of unfair labor practice charges which affect the unit involved in the representation proceeding. The blocking charge rule reflects “a general policy of holding in abeyance any representation case . . . Where pending unfair labor practice charges filed by a party to the . . . case are based upon conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, were one to be conducted. . . .” NLRB Casehandling Manual, para. 11730 (March 1983).

Briggs Plumbingware, Inc., v. NLRB, 877 F.2d 1282, 1290 (6th Cir. 1989).

Again, the City Labor Board should have heard and considered not only how this rule translates to the public sector, but how applicable it is when a union such as the NMTU, has numerous outstanding and undecided Labor Board complaints, particularly those which affect and influence the rights, procedural and substantive, of members of the bargaining unit and the process and procedures for collective bargaining.

C. Insufficient Evidence in the Record

An administrative ruling will be overturned if there is insufficient evidence in the record to support the ruling. Here, because the Labor Board and the City of Albuquerque refused to permit any hearing of evidence or testimony, there is no evidence in the record to support the ruling of the Labor Board. The NMTU was denied the basic due process right to present evidence and to examine and cross-examine witnesses. Without substantial evidence in the record to support the ruling, the Court should grant the relief requested by the NMTU.

IV. Statement of Relief Sought

The Court is respectfully requested to overturn the Labor Board's decision in this matter, finding it arbitrary, contrary to law, and not supported by substantial evidence in the record. The Court is further requested to quash the decision certifying AFSCME Local 624 as the exclusive bargaining representative of the Transit Department drivers' bargaining unit and return the case to the Labor Board for further proceedings and the award of such relief as is fair, appropriate, and in compliance with the City's Labor-Management Relations Ordinance.

Respectfully submitted,

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I hereby certify that a copy of the foregoing was sent by fax and/or e-mail to opposing counsel on July 28, 2008.

Paul Livingston