

**De Jana Industries, Inc. and Local 813, International Brotherhood of Teamsters, AFL-CIO,<sup>1</sup> Petitioner.** Case 29-RC-7443

September 30, 1991

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held December 22, 1989,<sup>2</sup> and the attached supplemental report issued by Administrative Law Judge James F. Morton on December 31, 1990, recommending disposition of them.<sup>3</sup> The election was conducted pursuant to a Stipulated Election Agreement. After resolution of the determinative challenges, a revised tally of ballots shows 9 of 14 valid votes were cast for, and 5 against, the Petitioner.

The Board has reviewed the record in light of the exceptions and briefs and adopts the judge's findings<sup>4</sup> and recommendations, and finds that a certification of representative should be issued.<sup>5</sup>

The judge found that statements made by union agents to employees concerning the reduction or waiver of union initiation fees were lawful under the standards articulated in *NLRB v. Savair Mfg. Co.*<sup>6</sup> and *Molded Acoustical Products*,<sup>7</sup> and did not constitute improper inducements to sign authorization cards or to join the Union.<sup>8</sup> For the reasons stated by the judge, we agree with his findings.<sup>9</sup>

<sup>1</sup> The name of the Charging Party has been changed to reflect the new official name of the International Union.

<sup>2</sup> All dates are in 1989.

<sup>3</sup> The instant representation case had been consolidated for hearing with unfair labor practice Cases 29-CA-14349 et al. At the close of the hearing, the judge severed this case.

<sup>4</sup> The Employer has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>5</sup> In agreeing with the judge that the Petitioner's initiation fee reduction offer was lawful, we do not rely on his discussion of *Cata-ract, Inc.*, 274 NLRB 741 (1985), a case we find factually distinguishable. Rather, we rely on *NLRB v. Semco Printing Center*, 721 F.2d 886 (2d Cir. 1983), in which the court affirmed the Board's decision that the union's conduct was not objectionable even where it specifically excluded certain employees from the meetings in which the promise of a fee waiver was made, because such exclusion did not effectively exclude those employees from participation in the offer.

<sup>6</sup> 414 U.S. 270 (1973).

<sup>7</sup> 280 NLRB 1394 (1986), affd. 815 F.2d 934 (3d Cir. 1987), cert. denied 484 U.S. 925 (1987).

<sup>8</sup> The authorization cards state:

I hereby designate [the Union] as my collective bargaining representative, hereby revoking any and all applications for mem-

ber-ship or collective bargaining authorizations which I may have heretofore given any labor organization or anyone else. Some of the cards contained the following additional language: I understand that if enough cards are signed the Union may seek and become the collective bargaining agent at the plant without an election.

Additionally, although the judge did not expressly address them in his decision, we find that certain statements made by Needham and related in his testimony concerning initiation fees are not objectionable by reason of ambiguity, as the Employer asserts. Specifically, in answer to a question about what he told employee Diaz,<sup>10</sup> Needham testified (albeit not responsively):

Well, like I said, when I get the [E]xcelsior list to visit, make home visits during the organizational drive, what I generally do I have a package like with benefits . . . and during the conversation I would point out to them that--During the organizational drive, as an incentive, what we usually do is after, if the men vote for the union and we won the election then, you know, there would be a reduction in initiation fees for those guys who were present during the organizational drive. Any other member that comes after would have to pay like the full initiation fee.

Needham subsequently reaffirmed a portion of his pretrial affidavit that was read into the record:

In checking . . . Diaz' status as a member, I discovered he had paid approximately \$500.00 towards the \$900.00 initiation fee while at Dono (ph). I told him, however, that since the union was only charging [the Employer's] employees \$500.00 as an incentive reduced from \$900.00, if they joined the union and voted for the union that he too would not have to pay any initiation fee

bership or collective bargaining authorizations which I may have heretofore given any labor organization or anyone else.

Some of the cards contained the following additional language:

I understand that if enough cards are signed the Union may seek and become the collective bargaining agent at the plant without an election.

<sup>9</sup> The judge rejected employee Barry Zippelius' testimony that Union Business Agent Sylvester Needham advised him in May or June that "if [he] would cooperate with [Needham] and help get the other guys to join to the union [sic], that [Needham] could help [him] out with the initiation fees." In part, the judge reasoned that it was "unlikely that the subject of initiation fees would be introduced by a union at the outset of an organizational drive." He noted that the Court, in *Savair*, recognized that the subject of initiation fees is an impediment to a union in organizing. Despite the absence of a demeanor-based credibility resolution as to this part of Zippelius' testimony, we find that the preponderance of evidence supports the judge's rejection of it. We note that Zippelius' testimony about other conversations is imprecise and unreliable, and that the judge generally credited Needham, who denied telling employees that the initiation fees would be reduced if they joined the Union and the Union won the election. Needham also testified that he did not speak to Zippelius concerning the reduction in initiation fees, that the reduced initiation fee offer was first made to employees late in the campaign, after the Union filed the election petition and ceased soliciting authorization cards, and that under the Union's policy, employees could not join until 30 days after the Union was certified as their collective-bargaining representative.

<sup>10</sup> Diaz was one of two of the Employer's employees who had already joined the Union and paid initiation fees in excess of the reduced offer while employed elsewhere.

because he had already paid more than \$500.00 in initiation fees while employed at Dono (ph).

Another employee, Anchelowitz, who was not a member of the Union, was present while Needham spoke with Diaz.

For the reasons set forth below, we find that neither statement contravenes *Savair*. Thus, even if Needham's first statement could be interpreted as extending the offer only to employees supporting the Union during the organizational drive, as opposed to being interpreted in its seeming literal sense as an offer to all employees employed during the drive regardless of their support of the Union, the support it solicits is a vote for the Union. *Savair* indicates that the employees must be required to make some "outward manifestation of support," such as signing authorization cards or joining the Union, and that this support is the quid pro quo which unfairly pressures employees. This, Needham's statement does not do. Further, the courts have rejected the argument that a secret vote can be used to pressure employees. In *Molded Acoustical Products v. NLRB*, 815 F.2d at 939, the court stated:

The contention is that employees, faced with a perceived, albeit nonexistent, possibility that they may forfeit the fee waiver if they do not vote for the Union, may improperly feel compelled to vote for Union representation. We reject this argument for two reasons. First, we believe that such an argument greatly exaggerates the extent to which unions and employers must maintain "laboratory conditions" . . . Second, we do not choose to ascribe the level of ignorance to employees that acceptance of this argument would necessarily require. No reasonable employee would view a vote for Union representation in a secret ballot election as the quid pro quo for a waiver of initiation fees.

Needham's second statement, directed as it was to an employee who had joined the Union while employed elsewhere, merely indicates that Needham, in recognition of Diaz' having already paid the Union an amount at least the equivalent of the reduced fee, was simply reassuring Diaz that he would not have to pay any more initiation fees. In these circumstances, we find that Needham was not offering, and neither Diaz nor Anchelowitz could reasonably have believed he was offering, Diaz reduced fees as a quid pro quo for joining the Union; that at most Needham made the statement in the hope of soliciting Diaz' support in the election—a solicitation that under the principles of *Molded Acoustical Products* cannot be said to be objectionable.

On the basis of all of the foregoing, we overrule the Employer's objection and find that a certification of representative should be issued.

## CERTIFICATION OF REPRESENTATION

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 813, International Brotherhood of Teamsters, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers and helpers employed by the Employer in its solid waste removal operations.

*Craig Lawrence Cohen, Esq.*, for the Regional Director  
*Stanley Israel, Esq. (Israel & Bray)*, of New York, New York, for De Jana Industries, Inc.

*Stuart Bochner, Esq.*, of New York, New York, for Teamsters Local 813.

## SUPPLEMENTAL REPORT ON OBJECTIONS

JAMES F. MORTON, Administrative Law Judge. This case had been consolidated for hearing with Cases 29-CA-14349, 29-CA-14352, 29-CA-14583, and 29-CA-14504. At the conclusion of the hearing, I granted an unopposed motion to sever this case.

On February 16, 1990, the Regional Director issued a Report Objections and Challenges in this case and consolidated this case with the first two of the above unfair labor practice cases. In the Report, determinative challenges were resolved. Thereafter, a revised tally of ballots showed that 9 of 14 valid votes were cast for Petitioner, Local 8, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, in the election which had been held on December 22, 1989.

The Report also pertained to two objections, filed by the Employer, De Jana Industries, Inc., to conduct affecting the results of the election. One of those objections was overruled. A hearing was ordered as to the other objection. In that objection, the Employer claimed that Petitioner had advised certain unit employees that it would waive or reduce its initiation fee to induce them to vote for and/or sign authorization cards for Petitioner.

The hearing was held in Brooklyn, New York, on June 5, 6, 7, and 8 and July 5, 1990. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the Employer and the Petitioner, I make the following

## FINDINGS OF FACT

In support of its objection, the Employer called two witnesses.

The first, Barry Zippelius, has worked for the Employer as a driver-loader for about 1-1/2 years; he was promoted to a supervisory position on January 1, 1990. The Employer adduced the following testimony from Zippelius in furtherance of the arguments it advanced in its brief. Zippelius had several conversations, beginning about September 1989, with a short man with greyish hair and a beard and mustache who identified himself as a representative of Petitioner. In the last conversation with him a few days before the election, Zippelius was asked how he intended to vote and, when he replied that he was not interested as he did not have the money to be laying out to the Petitioner, "the man with the

beard then said that they could do something about the initiation fees if [Zippelius] would vote for [Petitioner].” That same individual spoke with Zippelius in November 1989 and ask him to sign a card for Petitioner; Zippelius refused. The subject of initiation fees came up only at the last meeting described above. Zippelius did not mention that discussion to any of the other unit employees.

The Report on Objections appears to refer to Zippelius<sup>1</sup> in its discussion of a conversation between a unit employee and two business agents of Petitioner. That discussion is more detailed than the account Zippelius gave at the hearing respecting his conversations with business agents in late 1989. In view of the analysis, *infra*, it is unnecessary to pass on the veracity of Zippelius’ testimony recounted in the preceding paragraph. Were it necessary to do so, I would find that testimony unpersuasive.

The Employer’s other witness, called to support its objection, was a business agent of Petitioner, Sylvester Needham. He testified that it was after the petition in this case had been filed and after Petitioner had ceased soliciting unit employees to sign authorization cards that Petitioner talked to these employees about the waiver of its initiation fee. Needham testified that he first talked to the employees after he received the *Excelsior* list<sup>2</sup> from the Employer which contained the names and addresses of the unit employees. Needham talked to all but three of the unit employees respecting the initiation fee waiver. He testified that two other business agents were assigned to talk to the other three employees.

Needham described Petitioner’s general policy as one by which employees do not apply for membership until after Petitioner has been selected and certified as collective-bargaining representative. On that point, it noted that the authorization cards, received in evidence in connection with the unfair labor practice cases being heard concurrently with this case make no mention of the employees applying for membership in, or joining, Petitioner. Those cards simply state that the employees have designated Petitioner to represent them for collective-bargaining purposes. These cards were dated 3 months before the election.

The Employer contends that Petitioner’s conduct runs afoul of the rule governing preelection conduct set forth in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). There, the Court held that a labor organization’s offer to waive initiation fees for all employees who signed authorization cards before an election impinges on the rights of employees to freely decide whether or not they want that union to represent them. The Court reasoned that such a waiver allows a union to buy or coerce endorsements and thereby present a false portrait of employee support which could too readily influence an employee to vote for representation. The Court stated, in addition, that an employee who signed an authorization card in order to avoid possible liability for an initiation fee may very well still feel obliged to honor the written commitment on the card authorizing the union to be the designated representative. Further, the Court observed that a card so obtained may be misused to taint a bargaining order under the principle set out in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1968). The Court did note, however, that a union, to induce employees to sign authorization cards, can

waive initiation fees so long as the waiver applies to employees who join the union after the election as well as to those who have signed up to join the union before an election. In making the observation the Court stated that a union has a legitimate interest in being concerned with the reluctance of employees to pay out moneys to it before it had done anything for them.

Briefly put then, *Savair* holds that a union may not, to induce an employee to sign an authorization card or membership application, offer to waive its initiation fee as a quid pro quo. It is perfectly proper for a union, however, in soliciting authorization cards, to waive its initiation fee in order to dispel any reluctance an employee may have in voting for the union based on the possibility that he may later have to pay an initiation fee. See *NLRB v. Whitney Museum of American Art*, 636 F.2d 619, 621–622 (2d Cir. 1980).

The evidence put forth by the Employer does not bring the *Savair* rule into play. When Petitioner’s representatives talked to the unit employees in December, just before the election, about their voting for it, Petitioner was not offering them a quid pro quo for signing authorization cards. The card soliciting had ended some time previously.<sup>3</sup> See *Dyna-Fab Corp.*, 270 NLRB 394 (1984).

The gravamen of the Employer’s aim is that Petitioner improperly promised employees a reduction in its initiation fee if Petitioner won the election. A *Savair* footnote makes it clear that a union lawfully can do this. For a further explanation of the rationale that such a promise by a union is not improper, see *Molded Acoustical Products*, 273 NLRB 156 (1984), in which the Board emphasized the secrecy of the Board’s voting procedures. In affirming that holding, the U.S. Court of Appeals for the Third Circuit held<sup>4</sup> that no reasonable employee would view a vote for representation as a quid pro quo for a waiver of initiation fees.

The Employer also contends that Petitioner’s waiver offer was improper in that it was not conveyed to all unit employees. On that point, it noted that the Employer, as the objecting party, bears the burden of proving this contention. It has not met that burden. The evidence discloses that Needham spoke to all but three of the unit employees and that Petitioner assigned two other representatives to talk to those other three employees about its waiver offer. Moreover, I am not sure that the Board would require that a waiver offer, otherwise valid, becomes invalid because one or more unit employees were not aware of it. In *Cataract, Inc.*, 274 NLRB 741 (1985), the Board considered whether the union there had cured an earlier invalid waiver offer by having clarified it at a later union meeting. It held that the attempt to correct the error was unsuccessful because only 15 of the employees of the unit attended the meeting. It is obvious that, if it were improper for the union to waive its initiation fee simply because only employees attended the meeting, the Board could have simply sustained the objection there on

<sup>1</sup> Various representations made by counsel at the hearing so indicate.

<sup>2</sup> Referring to *Excelsior Underwear*, 156 NLRB 1236 (1966).

<sup>3</sup> Zippelius had testified that Needham, in urging him during the summer of 1989 to help organize the other employees said that he could help Zippelius with the initiation fee. The Employer, in its brief, did not refer to that aspect of Zippelius’ testimony and it seems unlikely that the subject of initiation fees could be introduced by a union at the outset of an organizational drive. *Savair*, the Court recognized that the subject of initiation fees is an impediment to a union in organizing. I reject Zippelius’ testimony thereon.

<sup>4</sup> 815 F.2d 934 (1987).

that point alone and that it need not have given consideration to whether the union there had corrected its earlier mistake.

Based on the foregoing and the record as a whole, insofar as it pertains to this case, I find that the Employer has failed to establish that Petitioner, in having informed employees of a waiver of part of its initiation fee, interfered with their right

to choose freely whether or not they desired Petitioner to represent them for purposes of collective bargaining. Accordingly, it is recommended that the Board issue to Petitioner a Certification of Representative.<sup>5</sup>

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<sup>5</sup>Sec. 102.46 of the Board's Rules and Regulations governs the filing of exceptions to this Supplemental Report.