

Gaylord Bag Company and Production and Maintenance Union Local 101, an affiliate of Chicago Truck Drivers Union, Petitioner. Case 13-RC-18529

November 23, 1993

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The National Labor Relations Board has considered objections to an election held October 15, 1992, and the Regional Director's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 33 for and 18 against the Petitioner with 8 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the entire record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations, and finds that the election must be set aside and a new election held.

In its objections, the Employer alleged that the Petitioner "unlawfully solicited union cards and support for the Union by making promises and threats . . . that fees would be waived or reduced for those employees who supported the Union and signed Union cards before an election." The Employer contended that the "objectionable conduct . . . materially affected the results of the . . . election and warrants and requires that those results be set aside." The Regional Director recommended sustaining this objection and directing a second election. The Employer has excepted to the Regional Director's failure to find that the Union's conduct "fundamentally tainted the showing of interest" such as to require dismissal of the petition. We deny the Employer's exceptions, for the reasons set forth below.¹

The Regional Director's investigation disclosed the following. Within approximately 2 weeks following the October 15 election the Employer raised questions, for the first time, about whether the Petitioner's initial showing of interest was tainted. It provided to the Regional Director unsworn statements from five employees in which they reported being approached during the preelection campaign and informed by members of

¹The allegations contained in the Employer's objections were also included in an unfair labor practice charge filed by the Employer against the Petitioner in Case 13-CB-13889. The Regional Director approved a unilateral settlement of that case on December 30, 1992, and dismissed the charge. The Union complied with the settlement agreement, which required that it post an appropriate notice to employees. We take administrative notice that on March 10, 1993, the General Counsel denied the Employer's administrative appeal of the Regional Director's action.

the Union's organizing committee² that they would or might be required to pay an initiation fee if they did not sign union authorization cards before the election. One member of the organizing committee admitted making such a statement to employees, and the others denied having done so. The Petitioner did not establish that it had disseminated a lawful fee waiver policy before employees signed authorization cards.³

As a preliminary matter, we note that in its objections the Employer sought only to have the election result set aside. Now, in its exceptions, it seeks for the first time to have the petition dismissed. Assuming, without deciding, that the Employer's attempt to have the petition dismissed at the exceptions stage of the proceedings was timely and otherwise in compliance with the requirements of Section 102.69 of the Board's Rules and Regulations, we address the merits of the Employer's exceptions. First we address the Employer's contentions regarding the showing of interest. In that regard, we shall treat the exceptions, in part, as an administrative appeal of the adequacy of the Petitioner's showing of interest, and in part as a postelection challenge to the Regional Director's administrative determination regarding the adequacy of the showing of interest. We will then address the Employer's argument that the appropriate remedy for the Petitioner's misconduct is to dismiss the petition.

(1) The Board consistently has held that the showing of interest is a matter for administrative determination,

²By letter of August 10, 1992, the Petitioner informed the Employer that three employees—Michael Leveille, Michael Zmuda, and Dwayne Lee—constituted the union organizing committee at the Employer's facility. The Petitioner's field representative, Burton, gave the committee members cards and explained how to solicit signatures. Burton, in an August 17 letter to card signers, identified the committee members as having taken on a leadership role in the campaign. We agree with the Regional Director that these employees were special agents of the Petitioner for the purpose of obtaining authorization cards and that their unlawful fee-waiver statements are imputed to the Petitioner. There is also evidence that John Green, acting in concert with members of the organizing committee, passed out authorization cards and made unlawful fee-waiver statements. We find, in that regard, that Green was acting as the Petitioner's agent and that his conduct is imputed to the Petitioner. The Employer also contends that John Williams was the unidentified employee, referred to in the Regional Director's report, who solicited cards and made unlawful fee-waiver statements to Witness E. We find the evidence insufficient to support this contention. In his statement Witness E described Williams as "a Union supporter who solicited card signatures . . . during the campaign"; but he did not claim that Williams solicited his signature or that he actually witnessed Williams soliciting cards from any employee. There is no other evidence showing that Williams engaged in card solicitation or otherwise acted as the Petitioner's agent and no basis for imputing his conduct to the Petitioner.

³On September 13 and 27, 1992, over a month after the petition and showing of interest were filed, the Petitioner held meetings and explained its lawful fee-waiver policy—that no fee or dues obligation would arise until a contract had been ratified, and only employees hired after the ratification date would be required to pay an initiation fee.

and is not litigable by the parties. See, e.g., *Barnes Hospital*, 306 NLRB 201 fn. 2 (1992); *Globe Iron Foundry*, 112 NLRB 1200 (1955); *Potomac Electric Power Co.*, 111 NLRB 553, 554 (1955). It is exclusively within the Board's discretion to determine whether a party's showing of interest is sufficient to warrant processing a petition. *S. H. Kress & Co.*, 137 NLRB 1244, 1248 (1962). The purpose of a showing of interest is to determine whether the conduct of an election serves a useful purpose under the statute—that is, whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election. *NLRB v. J. I. Case Co.*, 201 F.2d 597 (9th Cir. 1953); *Stockton Roofing Co.*, 304 NLRB 699 (1991), and cases cited there. Whether the employees desire representation is determined by the election, not by the showing of interest. *NLRB v. J. I. Case Co.*, supra.

Here, the showing of interest was administratively determined to be adequate at the time it was submitted. There is no indication that, at that time, the Regional Director was presented with evidence that cards were invalid. See *Goldblatt Bros., Inc.*, 118 NLRB 643 fn. 1 (1957). Thereafter, an election was conducted and the Petitioner won. Pursuant to the Board's established policy, after the election the adequacy of the showing of interest is irrelevant.

Nonetheless, even considering the adequacy of the Petitioner's showing of interest in light of the Employer's evidence, we are satisfied that it was adequate to support the petition. The Petitioner submitted 40 authorization cards to support its petition for an election in a unit containing approximately 62 employees, well in excess of the 19 cards needed for a 30-percent showing. See Section 101.18(a) of the Board's Rules. Even without reliance on the cards of the five Employer witnesses who may have succumbed to the alleged fee-waiver promises, the showing was still greater than that we require. The Employer presented unsworn statements and affidavits from five employees, referred to as Witnesses A through E. Only Witnesses B and C stated that they had signed authorization cards. Witness C later asked for information about how to retract his card, but the record does not show whether he actually did so. In apparent contradiction of the Employer's claim that the union promises of fee-waiver fatally tainted the showing of interest, Witnesses A and D stated that they did not sign authorization cards. Witness E did not say whether or not he signed a card. Although the Employer appended to its supporting brief only these five affidavits, it adverts to "seven instances [of promises or threats of fee waivers] relied on by the Regional Director in determining that Gaylord's [parallel] unfair labor practice charge was meritorious" (emphasis added). Even if seven au-

thorization cards were rejected as tainted, there would still have been an adequate showing of interest.

(2) In its exceptions, the Employer also contends that the Regional Director's failure to dismiss the petition, in view of the Petitioner's *Savair*⁴ violations, is contrary to Board precedent, which, it contends, requires a petition's dismissal and the submission of a new petition supported by a new showing of interest, gathered only after the Petitioner's unfair labor practices have been fully remedied. The Employer relies on the Board's decision in *Nu-Aimco, Inc.*, 306 NLRB 978 (1992), as further explicated in *Canter's Fairfax Restaurant*, 309 NLRB 883 (1992), and *Jefferson Hotel*, 309 NLRB 705 (1992). To the extent that the Employer reads *Nu-Aimco* and related cases as requiring dismissal of the petition, it has misconstrued the Board's holdings. In *Nu-Aimco*, *Canter's Restaurant*, and *Jefferson Hotel*, the petitions were in fact processed after the unfair labor practice charges had been remedied.⁵ In its brief the Employer has failed to cite, nor have we found, any cases to support its argument for outright dismissal of the petition. These cases are otherwise distinguishable.

(3) We also find misplaced the Employer's concern that the General Counsel's settlement of the Employer's parallel unfair labor practice charges against the

⁴ *NLRB v. Savair Mfg., Co.*, 414 U.S. 270 (1973).

⁵ *Nu-Aimco* and the related cases cited by the Employer involved the processing of individuals' decertification petitions following compliance with agreements in settlement of union unfair labor practice charges against employers that blocked the processing of the petitions. The issue in *Nu-Aimco* was whether the Regional Director erred in processing a decertification petition after a blocking charge had been resolved by the execution of a settlement agreement. After considering the nature of a settlement agreement and related policy considerations, the Board concluded that the execution of a settlement agreement alone was insufficient to require the dismissal of the petition. The Board went on to observe that, after there had been full compliance with the settlement agreement, nothing in its decision precluded the Regional Director, prior to reinstating the petition, from examining the showing of interest pursuant to the usual principles applicable to that administrative inquiry, e.g., whether the "decertification petition has been circulated and signed by employees, met all of the Board's technical showing of interest requirements, and was otherwise timely filed." *Id.* at 978. However, in contrast to the facts presented here, the settled charges in *Nu-Aimco* were filed prior to the election. As noted above, once the election has been held, there is no occasion for the Board to revisit the issue of whether a question concerning representation exists.

In *Jefferson Hotel*, the Board clarified its holding in *Nu-Aimco* by stating its intent that a decertification petitioner should be included in settlement discussions to allow for the possibility that the petitioner could agree to a settlement conditioned on dismissal of the petition. The Board explained, however, that without the petitioner's agreement, the Board would not find that the petitioner had waived its right to have the petition processed. As noted above, once the election has been held, there is ordinarily no occasion for the Board to revisit the issue of whether a question concerning representation exists. (The Board, may, however, treat the election as a nullity when an employer has engineered the filing of a decertification petition and thereby abused the Board's electoral processes. *Ron Tirapelli Ford v. NLRB*, 987 F.2d 433, 443 (7th Cir. 1991).)

Petitioner,⁶ in conjunction with the operation of the Board's policy regarding showing of interest, effectively denies the Employer the opportunity to establish that the Petitioner's conduct warrants the dismissal of the petition. This contention misconstrues both the policies which underlie the Board's showing-of-interest requirement in representation cases, as discussed

⁶See fn. 1, supra.

above, and the policies regarding settlement of unfair labor practice charges. These policies address independent matters and cannot be piggybacked to make a case where there otherwise is none.

Accordingly, we adopt the Regional Director's recommendation and order that the election be set aside and that a new election be held.

[Direction of Second Election omitted from publication.]