

Trump Taj Mahal Associates, a New Jersey Limited Partnership d/b/a Trump Taj Majal Casino and International Union of Operating Engineers, Local 68-68A-68-B, AFL-CIO and International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators of the U.S. and Canada, Local 917 and Leslie Sander, Petitioner. Case 4-UD-342

September 28, 1999

DECISION AND CERTIFICATION OF RESULTS
OF ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

The National Labor Relations Board has considered an objection to an election held July 31, 1995, and the Acting Regional Director's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement.

The tally of ballots shows that there were approximately 109 eligible voters and that 59 ballots were cast, of which 45 were in favor of withdrawing the authority of the joint bargaining representative (the Unions) to require, under its agreement with the Employer, that employees make certain lawful payments to the Unions in order to retain their jobs. There were 12 votes against the proposition, 2 void ballots, and no challenged ballots.¹

The Board has reviewed the record in light of the exceptions and briefs filed by Joint Representative IUOE Local 68 and the Petitioner. For the reasons stated below, we find merit in the Joint Representative's exception to the Acting Regional Director's report and we also adopt that aspect of his report to which the Petitioner has excepted.

In her objection, the Petitioner alleged that the Unions coerced employees by making threatening statements about what would ensue if the unit employees voted in favor of deauthorization, including a threat that the Unions would cease to represent the employees and a threat that their continuation in the union pension fund might be sacrificed. The Acting Regional Director found that the threat to cease representation was objectionable conduct and recommended setting aside the election on that ground; however, he found unobjectionable the statement concerning the pension plan. Joint Representative IUOE Local 68 has excepted to the finding of objectionable conduct, and the Petitioner has excepted to the failure to find that the pension plan statement was also objectionable.

¹ A majority of the employees eligible to vote must vote in favor of deauthorization in order to withdraw a union's authority to make and enforce a union-security clause. *Romac Containers*, 190 NLRB 238 fn. 1 (1971).

1. In support of her objection regarding a threat to cease representing unit employees, the Petitioner proffered letters sent by Joint Representative Local 68 that stated: "It would not be economically feasible for Local 68 to continue to serve as your collective-bargaining representative in the absence of a union security provision." In ruling on the Petitioner's objection, the Acting Regional Director relied on *Hospital 1115 Joint Board (Pinebrook Nursing Home)*, 305 NLRB 802 fn. 1 (1991), which held that a union's statement in connection with a deauthorization election that it would no longer represent the unit employees if they voted to deauthorize the union-security clause of the collective-bargaining agreement coerces employees in violation of Section 8(b)(1)(A) of the Act and constitutes objectionable conduct unless the union provides the unit employees with objective evidence that it would be economically infeasible to represent them in the absence of the clause. The Acting Regional Director found that the Unions had not provided such information to the unit employees here, and therefore had engaged in objectionable conduct. Accordingly, he sustained the Petitioner's objection.

The Board has revisited this question and has decided to overrule the holding in *Pinebrook*. See *Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB No. 29 (1999). In accordance with the reasoning set forth fully therein, we reverse the Acting Regional Director's finding and hold that the Union's statements concerning cessation of representation did not interfere with the conduct of the election.

2. In support of her objection that the Unions had threatened loss of pension coverage, the Petitioner cited the following paragraph from a letter sent by Joint Representative Local 68 to unit employees during the week before the election:

The select group who is intent on removing the union-security clause fails to advise you that by *jumping over the dollars to get to the pennies* could sacrifice your continuation in the union's pension fund and could jeopardize a secure retirement pension with a maximum level of participation and a monthly guaranteed pension of \$1,748. The Trump Taj Mahal retirement savings plan has no guarantees and the money is always at risk based on their investments on the Wall Street market. [Emphasis in original.]

We agree with the Regional Director that this is not a threat to retaliate against employees but a permissible statement about the consequence of a termination of the collective-bargaining relationship between the Joint Representative and the Employer. Without such a relationship, the Employer could no longer lawfully contribute to the contractual pension plan on behalf of the employees, and their "continuation" in the plan would therefore cease. This could well jeopardize their entitlement to a full pension under that

plan when they reach retirement age. Contrary to the Petitioner's claim, this is not a threat to cancel previously vested benefits and the failure to spell out the distinction between vested sums and continued contributions in fuller detail does not make it so.

This is clearly distinguishable from *Bell Security*, 308 NLRB 80 (1992), on which the Petitioner chiefly relies. There, an incumbent union threatened that if the employees voted for a petitioner union, their health and welfare coverage under the incumbent's contractual plan with the employer would terminate and they would have no benefits under any plan sponsored by the petitioner union for at least 2-1/2 years, since it would take at least that long for the Board's certification to become final. An affidavit by an incumbent representative submitted in the objections investigation said the affiant did not "expect" the employer to continue contributing to the incumbent's plan. There was no evidence that such coverage would cease by operation of law upon the petitioner's success in the election, however, and as the Acting Regional Director found, the employees could reasonably infer that the incumbent was threatening to terminate the coverage during the hiatus between the election result and a final certification, if the petitioner won.

The other cases on which the Petitioner relies are also distinguishable. In *Willey's Express*, 275 NLRB 631 (1985), a week before the representation election, an agent of the petitioner union actually took steps towards termination of dental and vision insurance benefits of employees under a union plan that had been extended from one of the employer's trucking terminals that already had union representation, and he advised the employees that they could retain such benefits only if they voted for the union. The Board found this objectionable because of the timing of the investigation into the propriety of the coverage for non-represented employees.² No

² The Board cited *Sure Tan, Inc.*, 234 NLRB 1187 (1978), enf'd. 672 F.2d 592 (7th Cir. 1982), aff'd. in relevant part 424 U.S. 351 (1984), holding it a violation of the Act for an employer to report his employ-

such actions were taken here. Joint Representative Local 68 was merely describing a consequence of an action that, as we have found above, it was permitted to take. In *Springfield Jewish Nursing Home*, 292 NLRB 1266, 1275 (1989), the Board found that an employer violated Section 8(a)(1) of the Act by threatening that employees would lose their current pension plan if the union were voted in, where the evidence showed nothing more than that the petitioning union had agreed to a less generous pension plan in bargaining with a different employer. That clearly could be seen as a threat to withdraw benefits rather than, as here, a description of consequences that would necessarily follow from a lawful action.

Having concluded that all aspects of the objection filed by the Petitioner are without merit, we find that the election results should be certified.

CERTIFICATION OF RESULTS OF ELECTION

It is certified that a majority of employees eligible to vote have not voted to withdraw the authority of International Union of Operating Engineers, Local 68-68A-68B, AFL-CIO and International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators of the U.S. and Canada, Local 917 to require, under their agreement with the Employer, that employees make certain lawful payments to the Union as a condition of employment, in conformity with Section 8(a)(3) of the National Labor Relations Act.

MEMBER HURTGEN, dissenting in part.

For the reasons set forth in my dissenting opinion in *See Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB No. 29 (1999), I find the Joint Representative Union's threat to cease representation if the unit employees voted in favor of deauthorization to be objectionable conduct sufficient to set aside the election results. I therefore need not pass on the statement concerning the pension plan.

ees as illegal aliens in response to their involvement in a union organizing campaign.