

**Superior Truss & Panel, Inc. and Chicago & Northeast Illinois District Council Of Carpenters, AFL-CIO, Local Union 1027, Petitioner.** Case 13-RC-20518

August 2, 2001

DECISION AND CERTIFICATION OF  
REPRESENTATIVE

BY MEMBERS LIEBMAN, TRUESDALE,  
AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on February 21, 2001, and the hearing officer's report (pertinent portions of which are attached as an appendix) recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 15 for and 12 against the Petitioner, with 1 challenged ballot, a number insufficient to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings<sup>1</sup> and recommendations,<sup>2</sup> and finds that a certification of representative should be issued.

The hearing officer, relying on *Novotel New York*, 321 NLRB 624 (1996), recommended overruling the Employer's objection that the Union provided the employees with an impermissible benefit during the critical period before the election. We adopt the hearing officer's recommendation for the reasons stated by her. Further, we find this case distinguishable from the District of Columbia Circuit Court's decision in *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999), which called into question the Board's rationale in *Novotel*, supra. In *Freund*, the union's attorney, 1 week before the election, filed a lawsuit on behalf of the employees against the employer alleging violations of state wage and hour laws. The court found this to be an impermissible benefit during the critical preelection period.

<sup>1</sup> The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359 (1957). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> The Employer contends that the Spanish translation of the Notice of Election is deficient. We have reviewed the Employer's offer of proof concerning the alleged deficiencies and conclude, contrary to the Employer's contentions, that the notice is understandable. *Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180 (2d Cir. 1989) (finding that translations on ballots need only be understandable, not flawless). We further find, in agreement with the hearing officer, that there was no confusion among the voters regarding the election because of the use of English-only ballots or the use of the translated notice.

In this case, according to the Employer's witness, whose credibility as a witness the hearing officer found to be "compromised," Hispanic employees complained at a union meeting 2 weeks before the election about a supervisor's treatment of them. The Union's attorney told them that if "we had problems like that or discriminatory remarks from these individual supervisors or if they changed anything at the company that we wasn't already doing, to write this stuff down on a piece of paper, date it, and they, you know, they'd file suit afterwards, you know, after the election." In addition, the Union's attorney, after the election, in a letter to the Employer dated March 14, 2001, objected to the Employer's threatened discharge of employees because of their alleged incorrect social security numbers, and stated that it had filed an unfair labor practice charge against the Employer alleging that it had unlawfully threatened employees with layoff and termination and that it would take additional action against the Employer if it followed through with the threatened layoff.

Clearly, the union attorney's letter to the Employer, sent *after* the election, cannot serve as grounds for a valid objection. *Head Ski Co.*, 192 NLRB 217, 218 (1971). In any event, even if the letter had been sent during the critical period or could be considered as relevant to the Union's conduct during the critical period, the court in *Freund*, supra, recognized that the filing of unfair labor practice charges against an employer by a union during an organizational campaign, which occurs "frequently (and uncontroversially)" is permissible because it is "litigation necessary to protect the electoral process." 165 F.3d at 934.

Further, with regard to the union attorney's conduct at the union meeting, there was no evidence, as the hearing officer noted, that a lawsuit was filed before the election. Even if, as the Employer contends, the Union promised employees that it would take legal action, there is no evidence that the Union ever contemplated the filing of a lawsuit similar to that in *Freund*. To the contrary, the subsequent letter from the Union's attorney to the Employer, on which the Employer relies, clearly reveals that the Union contemplated the filing of unfair labor practice charges. Under these circumstances, we find that, even applying the rationale of *Freund*, the Employer did not meet its burden of establishing that the Union provided an impermissible benefit to the employees.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Chicago & Northeast Illinois District Council of Carpenters, AFL-CIO, Local Union 1027 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time production and maintenance employees, including working foremen, employed by Superior Truss & Panel, Inc. at the Markham facility currently located at 2204 W. 159th, Markham, Illinois; excluding all truckdrivers, office clerical employees and guards, professional employees and supervisors as defined in the Act.

APPENDIX

HEARING OFFICER’S REPORT ON OBJECTIONS

Pursuant to a petition filed on January 10, 2001, and a Stipulated Election Agreement approved on January 24, 2001, an election by secret ballot was conducted on February 21, 2001, under the supervision of the Regional Director for Region 13 of the National Labor Relations Board in the following unit of employees:<sup>1</sup>

All full-time and regular part-time production and maintenance employees, including working foremen, employed by Superior Truss & Panel, Inc. at the Markham facility currently located at 2204 W. 159th, Markham, Illinois; excluding all truckdrivers, office clerical employees and guards, professional employees and supervisors as defined in the Act.

The results of the election were as follows:<sup>2</sup>

Approximate number of eligible voters.....	28
Void ballots.....	0
Votes cast for the Petitioner.....	15
Votes cast against the participating labor organization.....	12
Valid votes counted.....	27
Challenged ballots.....	1
Number of valid votes counted plus challenged ballots.....	28

Challenged ballots were not sufficient in number to affect the results of the election.

On March 19, 2001, the Employer filed timely objections to conduct affecting the results of the election (attached hereto as Emp. Exh. 1) [omitted from publication], a copy thereof having been served on the Petitioner (the Union). Pursuant to Section 102.69 of the Board’s Rules and Regulations (the Rules), the Regional Director conducted an investigation of the objections. Following investigation of the objections, the Regional Director, on April 4, 2001, issued a Report on Objections and Notice of Hearing, ordering, pursuant to Section 102.69 of the Rules, that a hearing be held before a designated hearing officer to resolve the issues raised by the objections. The Notice of Hearing further provided that the hearing officer prepare and serve on the parties a report containing resolutions of the credibility

<sup>1</sup> The payroll period for eligibility was the period ending January 23, 2001.

<sup>2</sup> The ballots were impounded after the election on February 21, 2001. The ballots were counted and the tally of ballots was issued to the parties on March 12, 2001.

of witnesses, findings of fact, and recommendations to the Board as to the disposition of the objections.

On April 11 and 12, 2001, in Chicago, Illinois, a hearing in this matter was conducted by Lisa Friedheim-Weis, hearing officer. At this hearing, counsel for the Union, the Employer, and the Regional Director appeared and fully participated. All parties were afforded an opportunity to be heard, to examine and cross-examine witnesses, to produce all relevant evidence bearing on the issues of this case, and to thereafter submit briefs.

After careful consideration of the entire record in this case, including my observations of the manner and demeanor of the witnesses as well as the arguments and contentions of the parties made at the hearing and in posthearing briefs, I make the following credibility resolutions, findings of fact, and recommendations to the Board as to the disposition of the issues.<sup>3</sup>

The Objections

Objection 1: Unauthorized Individuals Voted in the Election

The Employer’s first objection reads as follows:

Employees who are apparently not authorized to work in the United States voted in the election.

As a preliminary matter, I find that the Employer failed to put any evidence into the record to substantiate that any of its employees are not authorized to work in the United States. To the contrary, Bryce Welty, the Employer’s vice president of manufacturing, testified that he had “no knowledge that any of our employees are illegal.”

Furthermore, as stated in its brief, the Employer’s admitted choice in permitting “questionable” employees to vote and later objecting to their inclusion necessarily forecloses the objection itself. Pursuant to the Board’s Casehandling Manual, Representation Proceedings (the Casehandling Manual), Section 11362.1, challenges to voters “must have been made before the questioned ballots were dropped into the ballot box. . . . [t]he merits of postelection challenges, whether filed as such or in the guise of objections, should not be considered.” See also Section 11392.5. Since the Employer knew prior to the election that some of its employees had questionable social security documentation, as will be discussed below, it had the opportunity to challenge each voter prior to the election or during the election before the employee dropped his ballot in the box. Since it did not do so, the Employer is barred by the Casehandling Manual, Sections 11362.1 and 11392.5 from raising the issue as a postelection objection.

Even assuming arguendo that the Employer did prove that the disputed employees were undocumented alien workers, or that the Casehandling Manual was inapplicable to the instant

<sup>3</sup> The factual findings herein are based on the record as a whole, including Friedheim-Weis’ observation of witnesses and examination of exhibits received into evidence. All testimony has been reviewed and evaluated in light of the demeanor of witnesses, the logical probability of testimony, and the record as a whole. Where any single witness has testified in contradiction to the findings contained herein, his testimony has been discredited as being either in or of itself not worthy of credence or because it conflicted with the weight of other credible evidence. *Walker’s*, 159 NLRB 1159 (1966).

facts, I would still recommend overruling the Employer's objection based on Supreme Court and Board law.

On January 30, 2001, the Employer submitted its *Excelsior* list with 28 names to Region 13 of the National Labor Relations Board (the Board) pursuant to the Parties' stipulated election agreement. William Welty, president of the Employer, testified that when he submitted the Employer's *Excelsior* list, he knew that some of the employees had social security numbers that, according to the Social Security Administration (SSA), did not match their names. Welty<sup>4</sup> stated that this knowledge did not prevent him from listing those employees as employees of the Employer who would be eligible to vote in the upcoming NLRB election.<sup>5</sup> In fact, Welty testified that he knew about some of the employees' undocumented or mismatched social security numbers as early as May 1999.

The record evidence shows that the Employer received a letter from the SSA dated May 18, 1999, in which the SSA informed the Employer that more than ten percent of its 1998 employee tax forms did not show social security numbers that matched SSA records. Welty testified that, upon receiving the May 18, 1999 letter from the SSA, the Employer contacted the affected employees and told them to provide updated information, including social security cards or alien cards and new I-9 forms.

Welty testified that one year later, however, the problem with unmatched social security numbers submitted by some employees was not yet solved. By letter dated June 1, 2000, the SSA informed the Employer that more than ten percent of its 1999 employee tax forms did not show social security numbers that matched SSA records. Welty testified that the Employer again promptly contacted the affected employees and had them provide updated social security information. Welty testified that, despite the receipt of these letters from the SSA notifying the Employer that some of its employees did not have proper resident documentation, he chose to allow all 28 employees to vote in the NLRB election.

The Employer contends for the first time that undocumented alien workers cannot be considered employees within the meaning of the NLRA. However, the Supreme Court has already considered and rejected this argument, expressly determining that undocumented alien workers are "employees" within the meaning of the NLRA. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).<sup>6</sup> The Board has consistently upheld this

<sup>4</sup> William Welty will herein be referred to as Welty to distinguish him from witness Bryce Welty.

<sup>5</sup> In response to a question from the hearing officer regarding whether Welty's knowledge of the problems with some employees' social security numbers had affected his compilation of the *Excelsior* list, Welty testified: "No. No. We had no conflict with the Union on the voting standpoint. . . . And, we agreed upon the names of the 28 guys. There was no dispute. No argument. No one was kicked out."

<sup>6</sup> Despite the assertions of Employer's counsel to the contrary, the courts have enforced the Board's Order, holding that *Sure-Tan* has not been altered by the passage of the Immigration Reform and Control Act of 1986 (IRCA), and that IRCA does not alter the definition of "employee" for the purposes of determining who is eligible to vote in an election. *Kolkka Tables & Finnish-American Saunas*, supra.

mandate. See *Kolkka Tables & Finnish-American Saunas*,<sup>7</sup> 323 NLRB [958] (1997), enfd. 170 F.3d 937, 940-941 (9th Cir. 1999) (holding that the participation of undocumented aliens in a union representation election was valid, even if their employee status may have been subject to challenge under IRCA, because the individuals in question were employed in the bargaining unit during the eligibility period and on the date of the election); see also *Country Window Cleaning Co.*, 328 NLRB 190 (1999) (holding that undocumented aliens are employees under Sec. 2(3) of the Act and are therefore entitled to protections and remedies of the Act); *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 411-415 (1995), enfd. 134 F.3d 50, 56 (2d Cir. 1997) (citing IRCA Congressional Judiciary report that IRCA was "not intended to limit in any way the scope of the term 'employee'" under the Act). Even the one case cited by the Employer in its brief, *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992), confirms *Sure-Tan's* dictate that undocumented aliens are "employees" within the meaning of the National Labor Relations Act (the Act). The Board has thus clearly and uniformly applied the principle that individuals who are employed during the eligibility period before and on the date of a representation election are "employees" under the Act and are, therefore, eligible to vote in the election. See *Sure-Tan*, supra; *Kolkka*, supra; *County Window Cleaning*, supra; and *APRA Fuel*, supra.

The Employer did not provide any evidence to prove that any of its employees are undocumented aliens. Even if it had provided such evidence, the Casehandling Manual, as well as Supreme Court and Board law, foreclose the objection. See *Sure-Tan*, supra; *Kolkka*, supra.

Accordingly, I recommend overruling Employer's Objection 1.

#### Objection 2: Region's Refusal to use Bilingual Ballots

The Employer's second objection reads as follows:

The Regional Director of the National Labor Relations Board refused to use Spanish ballots for Superior Truss & Panel employees who were literate only and spoke only in Spanish.

The Employer requested the use of bilingual (English/Spanish) ballots on January 31, 2001. Region 13 denied the Employer's request, noting that Spanish notices with sample Spanish ballots would be sufficient to apprise employees in the voting unit how to make their voting intentions known on the English ballot. The Employer appealed this decision to the Board on February 9, 2001. The Board denied the Employer's appeal on March 9, 2001.

Among the voting unit of 28 employees, the evidence shows that several speak Spanish as their primary language. In fact,

<sup>7</sup> The facts of *Kolkka* parallel those in the instant case. In *Kolkka*, the union prevailed in a representation election, after which the employer filed objections. The employer argued that certain employees were ineligible to vote because they were undocumented aliens. The court upheld the Board's motion for summary judgment and overruled the employer's objection based on *Sure-Tan's* mandate that undocumented alien workers are employees within the meaning of the Act and thus eligible to vote in a representation election. See Ninth Circuit discussion, supra at 170 F.3d at 940-941.

the evidence shows that between 10 and 15 of the employees who voted in the election do not understand, speak, read, or write English.

Welty testified that, at least 1 week before the election, he received from Region 13 Notices of Election in both English and Spanish. Welty immediately posted these notices in three break areas where they would most easily be seen by the unit employees. Employees Manuel Hernandez Espinoza (Espinoza), Arturo Sierra (Sierra), and Ramon Gonzalez (Gonzalez) testified that they saw and read these notices in Spanish with the sample Spanish ballot posted in the break areas prior to the election.<sup>8</sup>

Welty further testified that he held several mandatory meetings for the employees prior to the election. Welty testified that he displayed the sample English and Spanish ballots at these meetings, and that he explained how the employees should mark the ballot if they did not want to vote for the Union. Welty testified that he had bilingual receptionist (and nonunit member) Martha Ayala translate these instructions to the employees in Spanish after he announced them in English.

In its brief, the Employer argues that the employees who do not understand English were confused at the election. This position is wholly unsupported by the record evidence. Employee Diaz, who was called as an employer witness, testified that he does not speak, read, or write English. However, Diaz testified credibly that he understood the “YES” and “NO” on the ballot and he explained that the purpose of the ballot was to mark down whether he wanted the Union or not. Diaz understood complicated questions about the ballot and the election posed to him by Employer’s counsel:

Q. If you don’t want the Union do you mark yes?

A. No. . . . If I don’t want the Union I put down no. If I want the Union I mark yes.

Q. Without telling me how you voted, tell me are you supposed to put a mark like a check in the box?

A. Well, I put down an X.

Q. What did you do after you put down an X, without telling me how you voted?

A. I folded the paper and I deposited it in the box.

Q. How would you spoil the ballot?

A. Well, perhaps by making some other sort of marks.

Q. If you spoiled the ballot what would you do?

A. Well, I would ask for another one.

Diaz testified that he knew exactly what to do with his ballot because he had seen a sample ballot in the employee’s lunchroom prior to the election and because he had attended the meetings held by Welty where the ballot was reviewed in English and Spanish.

Similarly, employees Espinoza, Sierra,<sup>9</sup> and Gonzalez testified that they were not confused by the English ballot despite their limited understanding of English. They each testified that

<sup>8</sup> Employee Augustin Diaz (Diaz) testified that he saw notices posted only in English prior to the election.

<sup>9</sup> Contrary to the assertions of Employer’s counsel, I find that employee Sierra did know the name of the Union attempting to represent him. When asked by the hearing officer if he knew the kind of union trying to represent the employees, Sierra responded, “[C]arpenters.”

they would mark “YES” to vote for the Union and mark “NO” to vote against the Union.<sup>10</sup> Espinoza, Sierra, and Gonzalez each testified that he had been well informed about the English ballot and the voting procedure from reading the notices posted in the break areas and from attending the mandatory meetings held by the Employer where the voting procedure and the English ballot were explained in Spanish.

The Board has made it clear that it has no policy requiring the use of ballots in multiple languages. *Northwest Products, Inc.*, 226 NLRB 653 (1976); *Precise Castings*, 294 NLRB 1164 (1989), *enfd.* 915 F.2d 1160 (7th Cir. 1990), *cert. denied* 499 U.S. 959 (1991). The Board has even changed its Casehandling Manual to reflect this policy. Section 11314 of the 1984 Casehandling Manual read, “If a foreign language notice is used, that language *must* also be used on the ballot” (emphasis added). The 1989 version of Section 11314 read, “If a foreign language notice is used, that language *may* also be used on the ballot” (emphasis added). The current version of the pertinent section, now Section 11315.2(c), states that translated notices of election may be provided, while English-only ballots are provided to the voters at the election.

Pursuant to *Precise Castings*, *supra*, and the Casehandling Manual, there is no uniform policy mandating that every Region of the NLRB use foreign language ballots. To the contrary, the Board and the court held in *Precise Castings*, noting that Region 13 *never* uses bilingual ballots, that nothing in the Act prevents the Board from giving the Regions discretion in matters of this kind. *Precise Castings*, *supra* at 1164. Therefore, the Employer’s argument addressing other Regions use of foreign language ballots is simply irrelevant. Region 13 is within its discretion to use English-only ballots, and this decision has been upheld by the Board and the courts. *Precise Castings*, *supra*.

Moreover, as in *Precise Castings*, the record contains no evidence of actual confusion. Contrary to the Employer’s assertions and as discussed above, employees Diaz, Espinoza, Sierra, and Gonzalez testified credibly that they understood and were not confused by the English ballot. The failure to provide a bilingual ballot is not objectionable and did not interfere with the right of voters who are literate only or speak only in Spanish to cast an informed ballot.

Accordingly, I recommend overruling Employer’s Objection 2.

### Objection 3: Union Interference with the Election

The Employer’s third objection reads as follows:

The Union interfered with the election by providing employees an attorney who promised to represent the employees in a lawsuit against the employer, and took statements from employees/voters during a Union sponsored campaign meeting.

It is undisputed that an attorney for the Union attended a meeting with some employees of the Employer at the union hall approximately 1–2 weeks prior to the election. Employee Robert Harrison testified to the events that transpired at this

<sup>10</sup> Each of these employees independently testified that he would mark “NO” if he did not want the Union and “YES” if he did want the Union despite difficult questioning by Employer’s counsel.

meeting.<sup>11</sup> According to Harrison, several of the Hispanic employees attended the meeting because they were upset with one of the supervisors, Richard Glowaki. Harrison testified that Glowaki had been “riding” the Hispanic employees at work and had made racial slurs against them. Harrison testified that the Hispanic employees commented on Glowaki’s treatment of them to the union officials and the union attorney at this meeting. After listening to the Hispanic employees’ complaints, Harrison testified that the union attorney told them that if “we had problems like that or discriminatory remarks from these individual supervisors or if they changed anything at the company that we wasn’t already doing, to write this stuff down on a piece of paper, date it, time it, and they, you know, they’d file suit afterwards, you know, after the election.”

No evidence was presented during the hearing that any statements were taken from any employees during the meeting (or at any other time). Although the Employer states in its brief that the union attorney discussed the possibility of filing a discrimination lawsuit on behalf of the employees, Harrison testified that the union attorney did not specify what type of suit he intended to file. Furthermore, in his affidavit, Harrison did not refer to a lawsuit of any kind. Rather, Harrison’s affidavit states that the Union would file “charges” of discrimination along with other charges after the election.

In addition, Harrison testified that the union attorney never stated he would only file charges against the Employer if the Union won the election, or that only the employees who voted for the Union would get the services of the Union or the union attorney. Harrison also testified that there was never any discussion with the union attorney or union officials about an exchange of money regarding the election.

Harrison recorded his recollection of this meeting<sup>12</sup> on March 21, 2001, 1-1/2–2 months after the meeting took place, at the urging of Bryce Welty. I note that right before Harrison recorded this sworn affidavit, Bryce Welty promoted him out of the bargaining unit to a management position with a significant raise and the ability to hire and fire employees. Given these circumstances, I find his credibility as a witness to be compromised. However, even if Harrison’s version is credited, I do not find his account of the union attorney’s interaction with the employees prior to the election objectionable.

The Board recognizes the historical role unions play in assisting employees in improving their terms and conditions of employment. *Novotel New York*, 321 NLRB 624, 630–635 (1996).

Unions engage in this broad range of activity on behalf of both employees they represent, as well as employees they are seeking to organize. Unions engage in this conduct, moreover, to demonstrate to employees their suitability to serve, or to continue to serve, as the employees’ collective bargaining representative.

Id. at 630.

<sup>11</sup> Harrison also provided a sworn affidavit regarding his recollection of this meeting. This affidavit was entered into evidence by Employer’s counsel.

<sup>12</sup> See fn. 10, supra.

The Board in *Novotel* and other similar decisions distinguished a union’s permissible grant of benefit during the critical period prior to the representation election and a union’s objectionable grant of benefits. Giving cash payments to employees during the critical period would be clearly objectionable as it would be “totally unrelated to any effort to improve employee conditions of employment and constitutes nothing less than an attempt to corrupt the election process.” Id. at 635. Offering to waive employees’ initiation fees to employees who sign union recognition slips as a show of preelection support constitutes an impermissible inducement. Id.; *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). Other objectionable conduct was found when a union conferred on potential voters a financial benefit to which they would otherwise not be entitled, such as free medical screenings or preelection life insurance coverage. *Novotel*, supra at 635.

In *Novotel*, the union offered legal services to unit employees during the critical period prior to a representation election to investigate, prepare and file a lawsuit asserting their wage claims under the Fair Labor Standards Act. The Board found that the employer did not present any evidence in support of its claim that the union conditioned the receipt of legal representation on a favorable result in the election, and concluded that the essential role of union conduct to assist workers in the exercise of their Section 7 rights to better their working conditions was fundamental to the statutory scheme of the Act. Id.

In the instant case, as in *Novotel*, the Employer did not present any evidence to support its claim that the Union conditioned the receipt of legal representation on a favorable result in the election. In fact, there was no established evidence that there was to be any legal representation of any kind. In *Novotel*, there was an actual lawsuit filed prior to the election. In the instant case, no evidence of a lawsuit was entered into the record. The only evidence showed that a union attorney told some of the Employer’s employees who had complained about their treatment by a supervisor to record any such future treatment. Harrison testified that the union attorney did not condition his advice or services on the outcome of the election or limit his services to those who voted for the Union. None of the employees testified that they felt compelled to vote for the Union because the Union was offering them legal services. I find that the Union was at most assisting these employees in the exercise of their Section 7 rights, which is fundamental to the statutory scheme of the Act. *Novotel*, supra.

Nor do I find the union attorney’s conduct objectionable under *Nestle Ice Cream Co.*, 46 F.3d 578 (6th Cir. 1995), which was relied on by the Employer in its brief. In *Nestle*, the court fashioned a two-part test for determining whether a grant of benefits warrants the setting aside of an election: (1) “Are the articles sufficiently valuable and desirable in the eyes of the person to whom they are offered to have the potential to influence that person’s vote;” and (2) “Also, the potential to influence must be to purchase or unduly influence votes, that is, influence votes without relation to the merits of the election.” Id. at 583. Under the *Nestle* test, I am unable to find in this case that the provision of legal services or the potential provision of legal services (whether for the filing of charges and/or a lawsuit) is sufficiently valuable to have the potential to influ-

ence voter choice because the Employer did not present any evidence on this issue. The Employer did not ask any of its employee witnesses who testified at the hearing questions concerning the impact this alleged “suit” or “charges” would have on their votes. There is simply no evidence in the record to support the Employer’s claim that the union’s attorney made improper promises prior to the election such that the election should be overturned. Therefore, even under *Nestle*,<sup>13</sup> I do not find that the Union’s actions constitute objectionable grounds to set aside the election.

The Board has never held that a union may not provide legal services during an organizing campaign, even during the critical period before the election, provided that it is striving to improve employees’ working conditions. The Board has long

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<sup>13</sup> The Employer relies substantively on court cases, rather than Board law, in its third objection. Therefore, I included an analysis of the *Nestle* court case herein.

recognized this role for unions. The Union in this case was playing its role in protecting and advancing the rights of the Employer’s employees. See *Novotel*, supra at 635.

Accordingly, I recommend overruling Employer’s Objection 3.

#### Conclusions and Recommendations to the Board

Based on my findings and conclusions set forth herein, I recommend that the Employer’s objections be overruled and a Certification of Representative issue.<sup>14</sup>

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<sup>14</sup> As provided in Sec. 102.69 of the Board’s Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. within 14 days from the date of the issuance of this report. Immediately on filing such exceptions, the party filing same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director for Region 13. If no exceptions are filed, the Board may adopt the recommendations of the hearing officer.