Metaldyne Corporation *and* Teamsters Local Union 507, AFL–CIO, Petitioner. Case 8–RC–16460

June 20, 2003

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held October 31, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 54 for and 110 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations with respect to Objection 11,[2] and finds that the election must be set aside and a new election held.

In rejecting the Employer's argument that its discriminatory enforcement of its solicitation/distribution rule was de minimis and did not warrant setting aside the election, the hearing officer relied on *Airstream, Inc.*, 304 NLRB 151 (1991), appeal dismissed as moot 963 F.2d 373 (6th Cir. 1992), in which the Board stated, relying in part on *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962), that "[a] violation of Section 8(a)(1) found to have occurred during the critical election period is, a fortiori, conduct which interferes with the results of the election unless it is so de minimis that it is 'virtually impossible to conclude that [the violation] could have affected the results of the election.'" *Airstream*, supra at 152 (quoting *Enola Super Thrift*, 233 NLRB 409 (1977)).

The Board has applied the "virtually impossible" standard in consolidated unfair labor practice and representation cases in which conduct found to violate Section 8(a)(1) is also alleged in election objections.[3] That standard does not apply in the instant representation proceeding where there has been no unfair labor practice allegation or finding.[4] We rely instead on the standard set forth in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995), and find that the misconduct here, taken as a whole, warrants a new election because it had "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election."

[Direction of Second Election omitted from publication.]

[1] 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 the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In light of our finding that the election must be set aside on the basis of Objection 11, we find it unnecessary to pass on the hearing officer's findings and recommendations with respect to the portion of Objection 1 relating to alleged promises of 401(k) benefit improvements. In the absence of exceptions to the part of Objection 1 relating to the alleged threat of plant closure, we adopt pro forma the hearing officer's recommendation that that aspect of Objection 1 be overruled.

Objection 11 alleges that, during the critical period, the Employer solicited grievances and promised to remedy them. We agree with the hearing officer's recommendation, for the reasons set forth in her report, to sustain this part of Objection 11. Objection 11 also alleges that the Employer engaged in objectionable conduct by promulgating and enforcing an overly broad solicitation/distribution rule. The hearing officer did not find the rule overly broad, but she found the Employer engaged in objectionable conduct by discriminatorily enforcing an "otherwise lawful" solicitation/distribution rule. We agree with the hearing officer that the discriminatory enforcement of the policy was objectionable. We note that no exceptions were filed to the hearing officer's finding that the rule was "otherwise lawful."

[3] See, e.g., *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 (1996), enfd. in part 123 F.3d 899 (6th Cir. 1997).

[4] Because Chairman Battista and Member Schaumber find that the "virtually impossible" standard is inapplicable in this case, they need not pass on *Dal-Tex* or its progeny holding that an unfair labor practice will warrant setting aside an election except where "it is virtually impossible to conclude that the misconduct could have affected the election results." See, e.g., *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

While Member Walsh agrees with his colleagues that the "virtually impossible" standard does not apply in this case, he will apply that standard in appropriate circumstances.