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Hollingsworth Management Service and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Case 7-RC-22535

July 21, 2004

**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 10, 2003, 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 100 for and 71 against the Union, with 8 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction of Second Election, and finds that the election must be set aside and a new election held.

We agree with the hearing officer that the Employer's Objections 1, 4, and 5 should be overruled.¹ However, we find that the hearing officer erred in overruling the Employer's Objection 3, which alleged that electioneering at or near the polling area interfered with the election. We sustain Objection 3 and set aside the election.²

**I. OBJECTION 1: UNION'S ALLEGED THREAT
OF JOB LOSS**

Objection 1 alleges that the Union "threaten[ed] and coerc[ed] employees with reprisals and threats of discharge, either to support or vote for the [Union]" For the following reasons, we agree with the hearing officer that Objection 1 should be overruled.

The only evidence in support of Objection 1 is the testimony of employee Willie Clark. Clark testified that a

¹ Objection 5 alleges that the Union "attempted to defraud the election process by knowingly bringing non-employees to vote in the election." We overrule Objection 5 for the reasons stated in the hearing officer's report. Therefore, that objection is not separately discussed below.

² Member Schaumber agrees that Employer's Objection 3 should be sustained and a new election directed. Thus, he need not and does not pass on whether the hearing officer correctly overruled Employer's Objections 1, 4, and 5.

union representative told him that eventually he would lose his job if the Union did not get in. The record contains no context for the statement. Clark testified only that the statement was made during a conversation "that was mainly about voting yes for the union." He did not recall anything else about the conversation.

Clark, a temporary employee, was not an eligible voter. He was eventually hired by the Employer, but not until after the cutoff date for eligibility to vote in the election.

The hearing officer found that the union representative's statement was not a threat of action to be taken by the Union, but merely a prediction of action that would be taken by the Employer. The hearing officer further reasoned that the Union had no authority to make the prediction a reality. Finally, the hearing officer emphasized that the statement was isolated. Accordingly, he recommended overruling Objection 1.

As the objecting party, the Employer has the burden of proving interference with the election. See, e.g., *Jensen Pre-Cast*, 290 NLRB 547 (1988). The test, an objective one, is whether the Union's conduct has the tendency to interfere with the employees' freedom of choice. See *Harsco Corp.*, 336 NLRB 157, 158 (2001). Here, the Employer failed to adduce evidence establishing the context for the union representative's statement. In addition, Clark was not an eligible voter, and there is no evidence that the union representative's statement was disseminated to any unit employees. The Union won the election by a substantial margin. See, e.g., *Amveco Magnetics*, 338 NLRB No. 137 (2003) (evidence insufficient to show that employer's campaign document containing implied threat could have affected election, where union lost election by substantial margin and record failed to show that the document was seen by any unit employees); *M.B. Consultants, Ltd.*, 328 NLRB 1089 (1999) (insufficient evidence that employer's promise of benefits could have affected election, where promise was made to two employees, there was no evidence it was disseminated to others, and union lost election by six votes). Therefore, we find that the Employer has failed to prove that the statement would reasonably tend to interfere with employees' free choice in the election. Accordingly, we overrule Objection 1.

**II. OBJECTION 3: ELECTIONEERING AT OR NEAR
POLLING AREA**

Objection 3 alleges that "[t]he [Union], by its officers, agents and representatives engaged in active campaigning at and near the polling area prior to and during the election." As explained in more detail below, witnesses testified that employee members of the Volunteer Organizing Committee (VOC), as well as other unidentified

persons, engaged in electioneering directed at employees waiting in line to vote. The Employer argues that the VOC members were union agents, and that their electioneering therefore violated the rule in *Milchem, Inc.*, 170 NLRB 362 (1968), that the Board will set aside an election if a party engages in sustained conversation with prospective voters waiting to cast their ballots. Alternatively, the Employer argues that even if the VOC members were not agents, the election should be set aside under the Board's standard for third-party electioneering.

The hearing officer found that the VOC members were not union agents and therefore were not "parties" subject to the *Milchem* rule. Accordingly, he recommended overruling Objection 3. The hearing officer did not consider whether the conduct was sufficient to require a new election under the third-party standard.

We need not decide whether the VOC members were union agents. As explained below, even assuming they were not agents, we find merit in the Employer's alternative argument that the election should be set aside under the standard governing third-party electioneering.³

A. Evidence of Electioneering

The election was conducted in a company breakroom. As employees waited to vote, they lined up along a yellow guardrail in a corridor leading to the breakroom. The polls were open from 1:30 to 5 p.m.

Employee James Ostwald arrived at the polling area between 1:30 and 2 p.m. When he arrived, there were about 10–15 employees in line in the corridor along with him. The door to the breakroom was open the entire time Ostwald was in line. Ostwald testified that three individuals wearing union T-shirts and buttons arrived and began moving up the line from back to front talking to voters in Arabic.⁴ Some of the voters looked angry or upset during these conversations. The three individuals talked to the voters for the entire time Ostwald stood in line, which he estimated was 15–20 minutes. Ostwald

did not see any of the three individuals get in line to vote themselves. At one point, one of the individuals grabbed the shirt of a voter behind Ostwald and physically moved the voter ahead of Ostwald in line. One of the three individuals also approached Ostwald while Ostwald was in line. The individual specifically asked Ostwald, in English, how he was going to vote. Ostwald replied that he had not made up his mind. The individual then had a 10–15 minute conversation with Ostwald, during which Ostwald was urged to vote for the Union. The individual told Ostwald that if the Union got in, employees would have more power and receive more overtime, their seniority would be recognized, and their working conditions would improve.

Employee Ahmed Al-Ghrani arrived at the polling area at 2 p.m. Somewhere between 10 and 30 voters were in line at the time. Al-Ghrani saw an individual wearing a union T-shirt standing by the line, although the individual was not in the voting line himself. The individual approached Al-Ghrani, physically shoved him, and had about a 3-minute conversation with Al-Ghrani, during which Al-Ghrani was told to vote for the Union. The individual remained by the voting line for the entire time Al-Ghrani was in line, about 15–20 minutes. Al-Ghrani never saw the individual get in line to vote himself.

Employee Ghassan Muzhim arrived at the polling area between 1:30 and 2 p.m. He saw three individuals wearing union T-shirts, hats, and buttons, standing "before the voting place," greeting employees, and telling them to vote yes. He recognized these individuals as employees "Midhat," "Jibra," and "Ali."⁵

Employee Milad Alam also arrived to vote around 1:30 p.m. He saw an employee named Yosif wearing a union T-shirt and button systematically greeting the employees in the voting line and shaking their hands. Yosif told Alam something to the effect of "I am for you." Yosif was not in line to vote himself.

Between 2 and 2:30 p.m., employee Ismeia Hussain went to vote. When he arrived at the polling area, about 25–30 people were in line. Hussain testified that there were people talking to the employees in line about the Union and about how employees were going to vote. Specifically, Hussain said that employee Midhat was telling the voters to vote yes. Midhat and two other employees, Jibra and Ali, appeared to be "hanging around" the voting line but not waiting to vote themselves. Midhat, Jibra, and Ali were in the voting area off and on during the 15 minutes Hussain was there.

³ The Union argues that third-party conduct is outside the scope of Objection 3, because Objection 3 refers to electioneering by "[t]he [Union], . . . its officers, agents and representatives . . ." However, the Board "may consider an objecting party's allegations that 'do not exactly coincide with the precise wording of the objections,' if the new matters are 'sufficiently related' to the objections set for hearing." *Precision Products Group, Inc.*, 319 NLRB 640 fn. 3 (1995) (quoting *Fiber Industries*, 267 NLRB 840 fn. 2 (1983)). We find that the allegation of third-party conduct is sufficiently related to Objection 3. Furthermore, we find that third-party conduct was fully litigated at the hearing, and we note that the Union does not argue otherwise.

Chairman Battista and Member Schaumber do not pass on the hearing officer's finding that the VOC members were not union agents. They concur that, even under the third-party standard applied here, the electioneering constitutes objectionable conduct sufficient to set aside the election.

⁴ About 80 percent of the Employer's work force speaks Arabic.

⁵ The hearing officer found that the employees were in line to vote when Midhat, Jibra, and Ali were talking to them, and no party contests that finding.

At about 3:30 p.m., employee Jibra Faraj went to vote. About 10 people were in line to vote when he arrived at the polling area. Faraj admitted that he talked in Arabic to other voters about the Union while he was in line, saying that the Union could “guarantee my rights, work for my rights, defend my rights.”

B. Analysis

“It is the province of the Board to safeguard its elections from conduct which inhibits the free choice of the voters, and the Board is especially zealous in preventing intrusions upon the actual conduct of its elections.” *Claussen Baking Co.*, 134 NLRB 111, 112 (1961); see also *Star Expansion Industries Corp.*, 170 NLRB 364, 365 (1968). “In furtherance of this responsibility, the Board prohibits electioneering at or near the polls.” *Claussen*, supra at 112; *Star*, supra at 365; cf. *Milchem, Inc.*, supra at 362 (“The final minutes before an employee casts his vote should be his own, as free from interference as possible.”). In evaluating electioneering by nonparties, the standard is “whether the conduct at issue so substantially impaired the employees’ exercise of free choice as to require that the election be set aside.” *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992); *Southeastern Mills*, 227 NLRB 57, 58 (1976). Considering the incidents described above cumulatively, we find that that standard has been met in the present case.

First, at least two employees were physically manhandled, one of them in front of as many as 30 voters. Employee Al-Ghrani was shoved and instructed to vote yes. Employee Ostwald watched as one voter was physically grabbed by the shirt and moved ahead of Ostwald in line. These are serious acts of physical coercion that cannot be dismissed as mere campaign bravado or overzealous partisanship. Not only were the two employee victims likely to be intimidated by the misconduct, but so also were the numerous other voters who were present when it occurred.

Second, the electioneering was not limited to brief or isolated remarks made in passing. Ostwald was specifically asked how he was going to vote and then had to endure a 10 to 15 minute exhortation to cast his ballot in favor of the Union. After being shoved, Al-Ghrani was subjected to a solicitation on behalf of the Union that lasted for 3 minutes. Jibra’s discussion of the Union with other voters was substantial enough to set forth his view that the Union would work for, defend, and guarantee his rights.

Third, most of the electioneering was not done by employees who were in line to vote themselves, but by individuals who came to the voting area for the apparent purpose of systematically targeting voters with last-minute campaigning. While waiting in line to exercise

their right to vote, the employees essentially had no ready means of escaping the prounion solicitations specifically directed at them.

Finally, the electioneering was not isolated. Multiple persons were involved, and they appeared to methodically canvass the line of waiting voters. Although most (but not all) of the electioneering took place during the first hour of a 3-1/2-hour election, the record shows that a substantial number of employees were in line at that time and thus were exposed to the improper conduct.⁶

Therefore, under the particular circumstances of this case—the persistent campaigning by multiple persons, the physical manhandling of voters, the extended conversations with voters about the Union and about how they intended to vote, and the large number of voters subjected to the conduct while waiting in the voting line—we find that the electioneering so substantially impaired the employees’ exercise of free choice as to require that the election be set aside.⁷ Accordingly, we reverse the hearing officer, sustain Objection 3, and direct a second election.

III. OBJECTION 4: UNION’S OFFER TO WAIVE INITIATION FEES

Objection 4 alleges that the Union interfered with the election by offering a “waiver of . . . initiation fees to eligible employees contingent upon joining the [Union] prior to the election.” In support of Objection 4, the Employer offered the testimony of employees James Ostwald and Willie Clark. Ostwald testified that an uniden-

⁶ In determining whether an election should be set aside for third-party electioneering, the Board considers the closeness of the election as an important factor. See, e.g., *Pepsi-Cola Bottling Co.*, 291 NLRB 578, 579 (1988). In the present case, the Union won the election by a tally of 100 to 71, a substantial margin. We emphasize, however, the large number of voters who were in line at the time of the improper electioneering and therefore were subjected to it.

⁷ The Board found third-party electioneering insufficient to warrant a new election in *Rheem Mfg.*, 309 NLRB 459, 463 (1992), and *Southeastern Mills*, 227 NLRB 57, 58 (1976). Those cases are distinguishable. In *Rheem*, two employees (at different times) urged employees in the voting line to vote yes. One of the employees also asked voters if they knew that a white female had been promoted to a supervisory position over more senior African-American men. In declining to set aside the election, the Board emphasized that at any given time, there was only one employee engaged in improper electioneering. In the present case, three employees at a time systematically targeted voters in line. Furthermore, *Rheem* did not involve physical intimidation or shoving. In *Southeastern Mills*, a single employee sat in an area from which employees entered and exited the polls. As voters exited the polls, he attempted to predict how they had voted or stated that he hoped they had voted “right” (that is, for the union). Thus, unlike the present case, only one employee engaged in improper conduct, his remarks were directed at employees who had already voted, there was no physical contact, and the Board emphasized that he made only “brief prounion remarks” and did not engage in “sustained electioneering.” 227 NLRB at 58.

tified person approached him in the parking lot 2 weeks before the election and told him that if he signed an authorization card, he would not have to pay an initiation fee, but if he did not sign a card he would have to pay the fee. Clark testified that Union Representative Derek Moore “flashed a card” at him a couple of weeks before the election, but did not ask him to sign it. Instead, Moore said that if Clark “voted yes,” he would not have to pay an initiation fee.⁸ The Employer alleges that these incidents violated the principle of *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), that a union may not offer to waive an employee’s initiation fee on the condition that he sign an authorization card before the election. We agree with the hearing officer that Objection 4 should be overruled, but we do so for the following reasons.

Under *Savair*, a union may offer to waive initiation fees if the waiver is “available not only to those who have signed up with the union before an election but also to those who join after the election.” 414 U.S. at 274 fn. 4. However, a union may not offer to waive an employee’s initiation fee on the condition that he sign an authorization card before the election. See *id.* at 277. Employees who solicit authorization cards are “deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting.” *Davlan Engineering*, 283 NLRB 803, 804 (1987). Nevertheless, “[a] union may avoid responsibility for the improper fee-waiver statements of its solicitors . . . by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards. Such publicity may take any number of forms including, for example, an explanation of the fee-waiver policy printed on the authorization card itself.” *Id.* at 805.

In the present case, we will assume arguing that the fee waiver statements made to Ostwald and Clark were objectionable under *Savair*. However, under the principle of *Davlan*, *supra*, we find that the fee waivers do not warrant a new election under *Savair*. The Union clearly publicized a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they signed cards. Both the authorization card itself and a campaign flyer distributed at the plant gates 3 weeks before the election made clear that a waiver of initiation fees would be available to all employees, regardless of whether they signed authorization cards or otherwise manifested support for the Union before the election.⁹

⁸ As explained above in our discussion of Objection 1, Clark was not an eligible voter.

⁹ The back of the authorization card stated: “It is the policy of the UAW to waive initiation fees for ALL employees who join the union

Moreover, Clark was not an eligible voter, and there is no evidence that the offer made to him or to Ostwald was disseminated to any other unit employees. Cf. *M.B. Consultants, Ltd.*, 328 NLRB 1089 (1999) (insufficient evidence that employer’s promise of benefits could have affected election, where promise was made to two employees, there is no evidence it was disseminated to others, and union lost election by six votes).

Accordingly, we agree with the hearing officer that Objection 4 should be overruled.

IV. CONCLUSION

For the foregoing reasons, we overrule Objections 1, 4, and 5. We sustain Objection 3 and find that the election must be set aside and a new election held.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board’s Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be

before thirty (30) days after the signing of an initial collective bargaining agreement.” The campaign flyer stated: “The truth about Initiation Fees: There are no initiation fees for us because we will be newly organized workers. The only worker who will pay an initiation fee is the person that is hired after we have a contract in place here at Hollingsworth; it can be as low as \$10.00 no higher than \$50.00 we will determine that as a local UNION. NOBODY WORKING HERE NOW PAYS INITIATION FEES.”

used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. July 21, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD