

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

STATE PLAZA, INC., a wholly owned
subsidiary of R.B. ASSOCIATES, d/b/a
STATE PLAZA HOTEL

Employer

and

Case 5-RC-15599

HOTEL AND RESTAURANT EMPLOYEES
UNION, LOCAL 25, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election¹ issued by the undersigned on August 8, 2003,² a secret-ballot election was conducted under my supervision on September 5, with the following results:

Approximate number of eligible voters	68
Void ballots	0
Votes cast for Petitioner	44
Votes cast against participating labor organization	21
Valid votes counted	65
Votes challenged	1
Valid votes counted plus challenged ballots	66

Challenges were not sufficient in number to affect the results of the election. On September 11, the Employer filed timely objections to the conduct affecting the results of the election.³

¹ The unit is: "All full-time and regular part-time employees, including cooks, prep cooks, dishwashers, pantry, utility, waiters, busers, hosts, bartenders, room servers, servers, housekeepers, room attendants, lobby attendants, housemen, turn-down attendants, laundry attendants, guest service agents, bellmen, bell captains, mini-bar attendants and restaurant cashiers, employed by the Employer at the State Plaza Hotel in Washington, D.C, excluding all reservation sales representatives, office clericals, engineers, painters, guards, and supervisors as defined by the Act."

² All dates are in the year 2003 unless noted otherwise.

THE OBJECTIONS

1. During the vote, Petitioner's observer during the morning session (9 a.m. until 11 a.m.) engaged in prohibited electioneering conduct during her hours of duty and engaged in conversation with voters in Spanish on subjects material to the vote.
2. During the critical period of the election, the Petitioner, through its officers, agents and representatives, orally promised a wage increase and free medical care and other benefits to eligible employees as an inducement to vote for petitioner.
3. During the critical period of the election, the Petitioner, by its officers, agents and representatives, distributed a leaflet guaranteeing free medical care, including no cost dental and eye care, to all employees as an inducement to vote for the Petitioners.

The Employer provided affidavits of employees in support of its objections within the time period set forth in Section 102.69(a) of the Board's Rules and Regulations. In addition, the Region conducted an administrative investigation pursuant to Section 102.69 of the Board's Rules and Regulations as well as Section 11391, *et. seq.*, of the Board's Representation Proceedings Casehandling Manual.⁴ In the following summary, the individual affidavits will be referred to as A(Evidence Provided by Employer), A(Affidavit Taken By Region), B(Employer), B(Region), etc.

Objection One

The morning session of the September 5 election was held during the hours 9:00 a.m. to 11:00 a.m. The Employer provided statements of Employee A and B in support of Objection one; additionally the Region took an affidavit from Employee A. Employee A(Employer) stated that when she came to the polling place to vote, the observer told her to vote "yes" in Spanish. Employee A(Board) stated that when she came into the voting area, a

³ The petition was filed on July 11. The undersigned will consider on its merits only that alleged interference that occurred during the critical period that begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Company*, 138 NLRB 453, 455 (1962).

⁴ Board sworn affidavits may not be relied upon to dismiss objections where these affidavits contradict evidence or affidavits provided by an Objecting Party in support of its objections. *River Walk Manor, Inc.*, 296 NLRB 831 (1984). However, where evidence gathered during an administrative investigation merely explains or elaborates upon evidence provided by the parties, this Board-gathered evidence may be used to resolve investigations. See Sec. 102.69 of the Boards Rules; see also Casehandling Manual Sec. 11391 *et. seq.*

Spanish speaking woman with long hair read the ballot to her in Spanish. After reading it aloud, the woman told A in a soft voice “yes” in English. No evidence was provided that any other voters were in the polling area at the time.

Employee B(Employer), who does not understand Spanish, said that during the morning session of the election, several Spanish-speaking voters came to the polling place to vote. At one point, when a group of Spanish-speaking voters were at the polling area, one of the other individuals who was present in the room [B did not identify this individual by name, or physical description, nor did B say whether she was a voter, a Union observer, or a Board Agent] began speaking in Spanish to the voters. One of the Board Agents present then told everyone to stop talking, and they did so.

The testimony of B can not be construed to describe objectionable conduct. The evidence provided does not explain what was said while the group of Spanish-speaking voters was in the room. Assuming *arguendo* the Union observer talked with the voters during the election, this fact, without more, does not constitute objectionable conduct. See, e.g., *Sir Francis Drake Hotel*, 330 NLRB 638 (2000).

The evidence provided by A, both in the statement provided by the Employer and in the Board-sworn affidavit, similarly does not support a theory of objectionable conduct. Assuming for the purposes of analysis that the Union observer did say “yes” to the voter, I find the remark would not have significantly impaired the election process. In any event, evidence was adduced that any other voter witnessed the incident; thus, even assuming the voter’s ballot was affected, the alleged conduct would not affect the outcome of the election. See *Pacific Grain Products*, 309 NLRB 690, 691 (1992).

Objection Two

The Employer presented statements from Employees C and D. C(Employer) attended two union meetings, one in June and one in July. C states that during the meetings, two union officials, an Hispanic male name Miguel and an African-American male, told everyone that the Union would give them free insurance, paid vacation and sick days, and pay them \$13.50 or \$13.85 per hour. C(Board) states that the first of the two meetings she attended was in June. During the meeting, Miguel told employees they would have a better salary -- \$13.85 to \$14.00 per hour after the union and management negotiated. He said the employees would have medical insurance, paid sick leave and paid vacations, and the union could get these benefits for employees after the union negotiated with the Employer if the union won the election. Miguel also said the employees would have free family medical insurance and better wages and benefits than they had now if they were part of the Union. Another union representative named Olga repeated Miguel. At the second meeting, which occurred in three days before the vote, Miguel said with the union the employees would have better benefits, but did not mention any specifics. Again, Olga repeated Miguel.

D(Employer) states that she attended two Union meetings in July. During those meetings, a Union representative named Miguel told the employees the Union would give them free benefits and insurance and the employees would earn \$13.00 per hour and get their birthdays off, with pay, if the Union was elected. D(Board) said she attended a single meeting, in May. Miguel told employees that with the Union, they would have free medical insurance, paid holidays, and would be paid \$12.80 per hour.

As a general rule, the period during which the Board will consider conduct objectionable is known as the 'critical period' between the filing of the petition and the election; in this case, July 11 and September 5. *Ideal Electric Mfg Co.*, 134 NLRB 1275 (1961). Two of the three

meetings described herein appear to have occurred in May and June, before the petition was filed. However, the Board will consider pre-petition conduct where it “adds meaning and dimension to related post-petition conduct.” *Dresser Industries*, 242 NLRB 74 (1979). Accordingly, the undersigned will consider conduct alleged at all of the meetings described above.

In general, the Board has found that when unions promise benefits during organizing campaigns, these promises are not objectionable. “Employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises...are easily recognized by employees to be dependant on contingencies beyond the union’s control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises of benefits.” *Smith Co.*, 192 NLRB 1098, 1101 (1971); see also, e.g., *Burns International Security Services*, 256 NLRB 959 (1981); *El Fenix Corporation*, 234 NLRB 1212 (1978). The Board has further held that in determining whether campaign statements are objectionable, the statements must be considered not in isolation, but in the context of other relevant facts, including other statements made by the Union. *Lalique N.A., Inc.*, 339 NLRB No. 145 (2003). In *Lalique*, for example, the Board found that a statement by the Union promising free medical care to all union members was not objectionable when considered in the context of other statements by the union explaining that these benefits would be contingent on negotiations with the employer.

In this case, the only evidence establishing that union representatives made specific promises of benefits without reminding employees these benefits would only come after bargaining places this statement as being made at a meeting in May 2003, outside the critical period. Accordingly, the events at this meeting are insufficient to warrant setting the election

aside. *Ideal Electric Mfg. Co.* moreover, as described above, even had the conduct alleged occurred within the critical period, it wouldn't have been objectionable under Board law. *Smith Co.* and its progeny stand for the proposition that even the statements at the May meeting do not constitute objectionable conduct, because employees could easily recognize that these promises depend on contingencies beyond the Union's control. Compare *Savair Industries*, 414 U.S. 270 (1973)(objectionable where Union offers to waive initial fees for only those employees joining prior to the election – the benefit promised was exclusively in the Union's power to provide, and “employees were not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.”), also compare *Gregg Industries*, 274 NLRB 603 (1985)(same conduct found objectionable). However, even assuming arguendo that the statements at the May meeting may reasonably have caused confusion among employees, the evidence reveals that subsequent statements by the Union clarified any ambiguity regarding this matter by clearly indicating that employees could only gain free medical benefits, better salaries and paid holidays/vacation through the Union's negotiations with the Employer for a collective-bargaining contract. See, e.g., *Lalique* slip. op. at 3. Accordingly, I conclude that this is not the type of behavior which would warrant setting aside an election.

Objection Three

In support of the third objection, the Employer provided a flier distributed by the Union during the campaign. The flier is a testimonial from a doorman at the Hyatt on Capitol Hill who discusses the reasons he is glad he belongs to the Hotel and Restaurant Employees Local 25. He says the Union negotiated with the Hotel for free medical care, dental benefits, and eye care, as well as a pension plan, and talks about how much better off he is because of it.

The flier does not constitute a promise of benefits, much less one that rises to the level of objectionable conduct. The flier says nothing about State Plaza Hotel or its employees, and it specifically says that the Union and the Hyatt negotiated the benefits the doorman currently receives. The flier represents a hallmark of privileged campaign propaganda, and does not approach objectionable conduct. See, e.g., *Acme Wire Products Corp.*, 224 NLRB 701 (1976).

CONCLUSION

In summary, I overrule the Objections in their entirety and issue the following Certification of Representative.

It is hereby certified that a majority of valid votes has been cast for HOTEL AND RESTAURANT EMPLOYEES UNION, LOCAL 25, AFL-CIO and that said Union is the exclusive collective-bargaining representative of the employees in the unit involved herein, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Dated at Baltimore, Maryland this 19th day of November 2003.

(SEAL)

/s/ WAYNE R. GOLD

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
Appraiser's Store Building
103 S. Gay Street, 8th Floor
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Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision, if filed, must be filed with the Board in Washington, D.C. Pursuant to Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of challenges and which are not included in the Supplemental Decision, are not a part of the record before the Board unless appended to the request for review of opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding. The request for review must be received by the Board in Washington by December 3, 2003.