

J Z E ELECTRIC, INC., d/b/a HILLIARD ELECTRIC

EMPLOYER

and

CASE NO. 8-RC-16583

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL NO. 38, AFL-CIO

PETITIONER

REPORT ON OBJECTIONS

Pursuant to a Stipulated Election Agreement approved by me on January 5, 2004, an election was held on February 18, 2004 among the employees in the following described unit:

All full-time and regular part-time employees employed by the Employer at its 68 Depot Street, Berea, Ohio facility, including crew leaders, helpers, journeymen electricians, apprentice electricians, communication workers, fire alarm and security installers, and service technicians, but excluding all driver – warehousemen and office clerical employees and all professional employees, guards and supervisors as defined in the Act, and all other employees.

The tally of ballots issued after the election shows that of approximately 32 eligible voters, 32 cast ballots, 22 of which were cast for and 9 against the Petitioner. There was one challenged ballot, a number insufficient to affect the outcome of the election.

Thereafter, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was duly served upon the Petitioner. A copy of the Employer's Objections is attached.¹

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the Objections has been conducted, and I make the following findings and conclusions.

PREFATORY NOTE

I have concluded that the issues raised by the Employer in its Objections Nos. 1, 2 and 4 are without merit and therefore recommend that they be overruled. To the extent that Objection

¹ The petition was filed on December 12, 2003. I have considered only conduct occurring during the critical period, which begins on and includes the date of the filing of the petition and extends through the election. **The Ideal Electric and Manufacturing Company**, 134 NLRB 1275 (1961).

No. 5, the “catch all” objection, encompasses Objections 1, 2, 4, or any other conduct, I also recommend that it be overruled.

I have concluded that Objection 3 and a portion of Objection 5 raise issues of fact and credibility that cannot be resolved by an *ex parte* proceeding.² Therefore, by separate document issued this date, I ordered that Objection 3 and a portion of Objection 5 be resolved at hearing before a duly designated hearing officer.

THE OBJECTIONS

Objections Nos. 1 and 2

In Objection 1, the Employer alleges that the Petitioner sent a letter to the National Labor Relations Board, Region 8, claiming that rumors had spread throughout the Employer’s employees that the Employer had obtained signed authorization cards from the National Labor Relations Board. Objection No. 2 alleges that in response to the Petitioner’s letter, the Regional Director for Region 8 communicated solely with the Petitioner.

The Employer alleges that by not allowing the Employer to respond to the concerns of the Petitioner, the Region interfered with the rights of the Employer in the campaign. Inasmuch as these two Objections raise similar issues, I shall address them together.

In support of these Objections the Employer submitted copies of the correspondence between the Petitioner and the Region. Attached hereto as Exhibits A and B are copies of the correspondence that the Employer asserts are objectionable.

Section 102.130 of the Board’s Rules and Regulations specifies the types of *ex parte* communication not prohibited between an interested party outside the Agency and a Board Agent.

I find that **Sections 102.130 (b) and (e)** are of particular significance in analyzing the allegations contained in Objections Nos. 1 and 2. **Section 102.130 (b)** provides that *ex parte* communications prohibited by **Section 102.126** shall not include “oral or written requests for information solely with respect to the status of a proceeding.” **Section 102.130 (e)** provides that *ex parte* communications prohibited by **Section 102.126** shall not include “oral or written communications which concern matters of general significance to the field of labor-management relations or administrative practice and which are not specifically related to pending on-the-record proceedings.”

The Petitioner’s correspondence at issue and the response of the Region clearly falls within the specific exceptions of prohibited *ex parte* communication as outlined by **Section 102.130**. A review of the correspondence between the Petitioner and the Region discloses that the Petitioner’s letter is a common information request that the Region would receive in the normal course of business. My response was appropriate in that it recited the Region’s policy regarding its use of authorization cards. Nothing contained in either the Petitioner’s letter or my

² The Order granting a hearing on Employer’s Objection No. 5 will limit the inquiry to the extent that Employer’s Objection No. 5 relates specifically to Employer’s Objection No. 3 only.

response could reasonably be construed as making reference to any on-the-record proceeding. Instead, the letters merely address questions of general significance to the field of labor – management relations or administrative practice, the types of communications that are specifically provided for in the Rules and Regulations as not constituting a prohibited *ex parte* communication.

Finally, with respect to the assertion in Objection 1 that the rumor that the Employer obtained signed authorization cards in and of itself warrant a new election, I disagree.

In the first instance, there is no evidence regarding the responsibility for such rumors. Without evidence attributing such conduct to agents of the Union, I must evaluate the issue under the third party standard. Under this standard, conduct by employees must be so egregious as to create a general atmosphere of fear and coercion before the election will be set aside. **Cal-West Periodicals, Inc., 330 NLRB 599 (2000); Westwood Horizon Hotel, 270 NLRB 802 (1984).** Clearly, a rumor of this type does not warrant setting aside the election under that standard.

To the extent that the Employer claims the Union’s recitation of this rumor in its letter to me constitutes a misrepresentation, it is also not objectionable on that basis.

In **Midland Life Insurance Company, 263 NLRB 127 (1982)**, the Board returned to the standard established in **Shopping Kart Food Markets, Inc., 228 NLRB 1311 (1997)**, with regard to the allegedly objectionable nature of misrepresentations made in the course of representation election campaigns. In **Midland Life**, the Board maintained that it would no longer probe the truth or falsity of campaign statements, and elections would no longer be set aside on the basis of misrepresentation.

In determining that the Union’s letter does not warrant setting aside this election, I have also considered the decisions of the United States Court of Appeals for the Sixth Circuit in **NLRB v. Hub Plastics, Inc., 52 F.3d 608, 149 LRRM 2203 (6th Cir. 1995); Dayton Hudson Department Store Co. v. NLRB, 987 F.2d 359, 142 LRRM 2647 (6th Cir. 1993); and Van Dorn Plastics Machinery Co. v. NLRB, 736 F.2d 343, 116 LRRM 267 (6th Cir. 1984)**, since this case arises within the Court’s jurisdiction. Even under the court’s more stringent standard this letter does not constitute objectionable conduct

I therefore find that the Employer’s Objections Nos. 1 and 2 are without merit and shall recommend that they be overruled.

Objection No. 4

Objection 4 alleges that in the days immediately prior to the election, employee supporters of the Petitioner engaged in objectionable conduct by stating or intimating threats against employees should they decide to vote against the Petitioner.

In support of this Objection, the Employer submitted as evidence statements from two employee witnesses who indicated that in the days leading up to the election, employee supporters of the Petitioner contacted employees and told them: “the man inside won’t protect you, you have to go with who will protect you.” No evidence was presented to establish that

anyone officially connected with the Petitioner made any statements similar to those made by the employee supporters of the Petitioner.

The Petitioner denies that its agents ever threatened employees in the days immediately prior to the election.

The Board has held, with court approval, that the evidence must establish that an employee's statements and conduct were known to, authorized, or, at least, subsequently condoned by a union before agency status can be imputed to the individual. Absent such evidence, the conduct of employees is considered under the third party standard. As noted above, under this standard, conduct by employees must be so egregious as to create a general atmosphere of fear and coercion before the election will be set aside. **Cal-West Periodicals, Inc.**, 330 NLRB 599 (2000); **Westwood Horizons Hotel**, 270 NLRB 802 (1984).

With regard to the alleged threats by coworkers, neither the statements submitted by the Employer in support of its Objections nor the additional investigation disclosed any evidence to establish that the employees making the statements were acting as agents of the Petitioner.

In the instant manner, assuming *arguendo* that the events transpired as stated, the allegedly threatening, coercive and intimidating comments were made by employees who were not agents of the Union. Applying the third party conduct standard, I find and conclude that these statements did not create an overall atmosphere of fear and coercion.

CONCLUSIONS AND RECOMMENDATIONS

I conclude that the issues raised by the Employer in its Objections Nos. 1, 2, 4 and 5, to the extent that they involve conduct other than that alleged in Objection No. 3, are without merit. I, therefore, recommend that they be overruled.³

Dated at Cleveland, Ohio this 2nd day of April 2004.

/s/ Frederick J. Calatrello

Frederick J. Calatrello, Regional Director
National Labor Relations Board
Region 8

Attachments

³ Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, N.W., Washington, D. C. 20570. Exceptions must be received by the Board in Washington by April 16, 2004. Under the provisions of Section 102.69(g) of the Boards Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and/or challenges and which are not included in this report, are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to attend to the submission of the Board copies of evidence timely submitted to the Regional Director and not included in the report shall preclude a party from relying upon the evidence and any subsequent related unfair labor practice proceeding.