

Aladdin Hotel Corp. d/b/a Aladdin Hotel and Professional, Clerical, Ground Maintenance, Parking Lot Attendants, Car Rental Employees, Warehousemen & Helpers Local 995, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioner. Case 31-RC-3292

May 9, 1977

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted under the direction and supervision of the Regional Director for Region 31 on October 23, 1975, among the employees in the unit described below. Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Board's Rules and Regulations.

The tally of ballots shows that of approximately 37 eligible voters 18 ballots were cast for, and 13 against, the Petitioner. There were six challenged ballots. The challenged ballots were sufficient in number to affect the results of the election and timely objections to the election were filed by the Employer.

On November 28, 1975, the Regional Director issued his Report on Objections and Challenged Ballots, recommending that three of the challenges be sustained, three be overruled, the overruled ballots not be opened and counted, a revised tally of ballots be issued, and a hearing set to resolve issues of fact and law raised in the Employer's objections. No exceptions were filed to the Regional Director's report, and the Board adopted his recommendations. On December 17, 1975, the Board issued an Order Directing Hearing for the purpose of receiving evidence to resolve the issues raised by the objections.

On January 20, 1976, a hearing was held before Hearing Officer Sheri E. Ross. The Hearing Officer's Report and Recommendation, pertinent parts of which are attached hereto as an appendix, was issued on February 25, 1976, to which the Employer filed exceptions and a supporting brief.

The Board has reviewed the record in light of the exceptions and briefs¹ and hereby adopts the Hearing Officer's findings and recommendations.

We agree with the Hearing Officer that the Petitioner's organizing policy of requiring the prepayment of a reduced initiation fee and a month's dues from a majority of prospective unit employees was not objectionable. For its organizing campaign,

the Petitioner's policy was, upon receiving the advanced payments from a majority of prospective unit employees, to file a representation petition. If a majority did not pay the advance, all moneys were refunded and no petition filed. Should a petition be filed and the Petitioner lose the election, all funds advanced by employees are forfeited in order to defray campaign expenses. If the Petitioner wins the election, the dues payments are applied for the first month after the collective-bargaining agreement is signed. The reduced initiation fee remains open to all employees until the contract is signed.

The Petitioner's forfeiture policy, as set out above, imposes no unlawful obligation or hindrance upon employees' freedom of choice in the election. A union has no legal obligation to seek to represent employees desiring organization. Thus, if a majority of unit employees choose not to prepay and the union withdraws, the employees are denied no rights. Should a majority choose to prepay, those who elected not to do so are in no way prejudiced because they may still pay the reduced initiation fee after the election.

However, our dissenting colleagues would find that those employees who choose voluntarily to prepay become obligated to the union so as to lose their freedom of choice in the election. We cannot agree. The Supreme Court in *Savair*² would not allow a union to waive initiation fees for those who signed recognition slips before the election. The Court, stating that the Board's election standards must "honor the right of those who oppose a union as well as those who favor it," found that the union's policy in *Savair* permitted it "to buy endorsements and paint a false portrait of employee support during its election campaign."

Contrary to our dissenting colleagues, the principles of *Savair* are clearly not applicable here but, in fact, the Petitioner's policy in this case is quite the opposite of that of the union in *Savair*. In asking employees for "up front" money, the Petitioner offered no special inducements nor employed any device to coerce employees. There was no offer of an unlawful inducement because the possibility of forfeiture conferred no benefit but was, if anything, a disadvantage for employees. However, since the Petitioner had no legal obligation to represent these employees, it denied them no rights nor coerced them by seeking, prior to filing a petition, payments to guarantee that—win or lose the election—its organizing expenses would be met. Unlike the union in *Savair*, the Petitioner did not discriminate against prospective unit employees on the basis of whether they supported the Union before rather than after the

¹ The Employer has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

² *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973).

election. Thus, when employees, despite the forfeiture possibility, chose voluntarily to prepay the reduced initiation fee and a month's dues, they were not acting pursuant to any unlawful inducement or coercion but were freely exercising their right to support a labor organization.

Further, the fact that the Petitioner's policy led to a majority of employees making an early—though not binding—commitment to favor the Petitioner did not render the policy objectionable. Once an employee had prepaid and a petition was filed, there was no way—no matter what his vote on election day—that he could receive a refund. By prepaying voluntarily, employees accepted the predictable consequence that the money—regardless of the outcome of the election—would go into the Petitioner's coffers. Employees were fully aware of the possibility of forfeiture (there is no contention that they were in any way misled), but nonetheless a majority chose of their own free will to make the advance payments.

One might well question the wisdom of a union organizing policy that offers nothing to prospective members but instead seeks their financial support for the unionization effort. However, in deciding whether or not to set aside an election, the Board's concern is whether or not a party's policy prevented employees from exercising a free and untrammelled choice in the election. One could speculate—as do our colleagues in this case—that many voluntary actions taken by employees might influence their vote on election day. For example, employees frequently, likely at the union's urging, become inplant organizers, open and vocal advocates, or simply union observers on election day. By thus positioning themselves, they might be reluctant to vote against the union, perhaps for fear of later facing a hostile employer without a union's support. Similarly, an employee who voluntarily opposes the union early on might be reluctant later to vote for the union for fear of encountering a hostile union regime. Nonetheless, an employee's open, voluntary, and early support for or opposition to a union—where the employee's actions are not a result of any party's unlawful inducements or coercion—does not create a situation warranting setting aside the election. In such circumstances, no party has bought endorsements or coerced employees into being for or against any other party.³

The Petitioner's forfeiture policy fits this pattern of a policy that entails neither bribes nor coercion but allows employees to voluntarily make their own

decisions. Creating no "false portrait of employee support"⁴ nor any other misconceptions, the policy fully honors the rights of both prounion and antiunion employees. Therefore, as the Petitioner created no hindrance or obligation to the employees' freedom of choice in the election, it did not contravene the principles of *Savair* or otherwise engage in objectionable conduct.

Of course, essential to our above finding is our affirmance of the Hearing Officer's conclusion that the Petitioner's reduced initiation fee (\$25 rather than the usual \$50) was available to employees both before and after the election and up until a contract was signed. Viewing the totality of the situation herein, we agree with the Hearing Officer that the term "organizing campaign" meant, and was explained to employees to mean, that the reduction in initiation fees was available both before and after the election. Unlike *Inland Shoe Manufacturing Co., Inc.*, 211 NLRB 724 (1974), where the Board found that the use of the term "charter member" created an ambiguity regarding when and for how long the reduction applied, the term "organizing campaign" does not create any similar ambiguity. In *B. F. Goodrich Tire Company, a Division of the B. F. Goodrich Company*, 209 NLRB 1175 (1974), the Board found legitimate a union offer to waive initiation fees to employees joining "at anytime during the organization stage of representation, prior or subsequent to the election." Here, the term "organizational campaign" would reasonably be understood by employees to refer to the periods both before and after the election. We would not—as do our colleagues—rely on the subjective determinations of a few employees to reach our conclusion. Rather, viewed objectively, the term "organizational campaign" created no ambiguity warranting the setting aside of the election.

As we have overruled all the objections and as the tally shows that the Petitioner has received a majority of the ballots cast, we shall certify it as the exclusive bargaining representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Professional, Clerical, Ground Maintenance, Parking Lot Attendants, Car Rental Employees, Warehousemen & Helpers Local 995, International Brotherhood of Teamsters,

³ We do not agree with our dissenting colleagues' assertion that monetary payments by employees, as opposed to other forms of employee support, somehow create an almost unalterable obligation to the union, thereby preventing a free and fair election. Further, in determining whether the union's policy was objectionable, the real issue, as stated above, is not what form did the support take but rather was the support a result of unlawful inducements or coercion.

⁴ Indeed, when an employee is solicited to "put his money where his mouth is," it cannot be said that his agreeing to pay creates any false or inflated showing of support for the union. Rather, a policy requiring prepayment likely serves to give an accurate, or even understated, display of union support.

Chauffeurs, Warehousemen & Helpers of America, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

All office clerical employees employed by the Employer at its facility located at 3667 Las Vegas Boulevard South, Las Vegas, Nevada; excluding all other employees, professional employees, supervisors and guards as defined in the Act.

MEMBERS PENELLO and WALTHER, dissenting:

We cannot agree with our colleagues' adoption of the Hearing Officer's recommendations. This case presents a novel question concerning union campaign funding procedures, and in our opinion the majority's decision, approving a policy of forfeiture of prepaid union initiation fees and dues in the event a union loses the election, undermines the Board's and the courts' standards for election campaigns. Further, we disagree with the Hearing Officer and our colleagues that the Union did not violate the Supreme Court's holding in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), by the manner in which it offered reduced initiation fees during the organization campaign.

The Union's policy during initial organization provides that it offer to the employees a reduction of the initiation fee, and that it solicit advance payment of the reduced fee plus 1 month's dues from unit employees prior to the election. Should less than a majority advance these sums, the Union does not file for an election, and the money is refunded. If a majority does pay the advance sums, an election petition is filed. During the initial organization stage, the Union informs the employees that, should the Union win the election, the collected money will be applied to the initiation fee and the first month's dues after the signing of a collective-bargaining agreement. The employees are also told, however, that if the Union loses the election, the money is forfeited.

The Union advances two reasons for its forfeiture policy. First, by requiring forfeiture, the employees who prepay are certain to continue to support the Union and are not simply "window shopping." Secondly, the forfeiture helps defray any campaign expenditures for lost elections. Out of its own mouth the Union admits, in our view, that its forfeiture

policy interferes with the employees' freedom of choice, in direct violation of the Supreme Court's holding in *Savair*.

The forfeiture policy puts a price on freedom of choice by violating the Board's prohibition against the "buying" of votes by parties to an election. In *Savair* the Supreme Court would not allow a union to waive initiation fees for those who had signed authorization cards before the election. The Court said it would not allow any party to buy or sell "endorsements" in such a fashion.⁵ The typical case of buying votes usually involves money or gifts being given to employees for their support.⁶ In the present case, however, money has been given to the Union, but the same principle is involved as when money is given to voters. An obligation is created which effectively hinders an employee's freedom of decision. The Union characterizes this freedom of choice as "window shopping." In our judgment, however, such freedom of choice is the very purpose for which the Board conducts representation elections. Since under the Union's policy the only way an employee can avoid losing his prepaid money is to vote for the Union regardless of how his sentiments may have changed during the course of the election campaign, this policy clearly undermines the freedom of choice which the Board seeks to foster. Indeed, our colleagues, by suggesting that Union's policy creates no more of an obligation than various forms of nonmonetary support, are being far less candid, and show considerably less insight into the Board's election process, than the Union. For, the Union itself admits that its forfeiture policy, in large part, is designed to insure the continued support of employees who have paid their moneys to the Union. The Union, unlike our colleagues, thereby recognizes the meaningful impact of an obligation based on a monetary investment.

Heretofore an employee has not been considered obligated to a union in any way until after a collective-bargaining agreement is signed. An employee has certainly not been considered obligated to the union in the event it *lost* an election.⁷ But in the instant case, the Union's express purpose for its forfeiture policy is to obtain from the voters in advance a paid obligation which will defray campaign costs. If such is the Union's intent, it would be more legitimate to simply charge all unit supporters a flat fee for the Union's conducting an election campaign.

We also do not agree with the Hearing Officer's finding, adopted by our colleagues, that the Union

⁵ *Savair*, *supra* at 277.

⁶ *Teletype Corporation*, 122 NLRB 1594 (1959); *Wagner Electric Corporation, Chatham Division*, 167 NLRB 532 (1967); *Collins & Aikman Corporation v. N.L.R.B.*, 383 F.2d 722 (C.A. 4, 1967); *N.L.R.B. v. Commercial Letter, Inc.*, 455 F.2d 109 (C.A. 8, 1972).

⁷ *Savair*, *supra* at 287; see also *DIT-MCO, Incorporated*, 163 NLRB 1019, 1021 (1967).

did not violate *Savair* by the manner in which it offered the reduced initiation fee prior to the election. *Savair* prohibits waiving an initiation fee only for employees who sign recognition slips before an election. The Board has subsequently recognized that that rationale embraces reduction of initiation fees prior to an election. *B. F. Goodrich Tire Company, a Division of the B. F. Goodrich Company*, 209 NLRB 1175 (1974). But a union's reduction or waiver of initiation fees must clearly be offered to all employees before, during, and after an election, and any ambiguity as to whom and when the special offer applies could make the offer an invalid one. *Inland Shoe Manufacturing Co., Inc.*, 211 NLRB 724 (1974).

In the present case, the Union offered the fee reduction in a letter which said that the reduction lasted during the "organizing campaign." But no explanation of how long the organizing campaign lasted was contained in that letter. Indeed, one employee who was a union supporter took the opportunity to tell other employees that the fee would go up after the election. Other voters were confused by the letter, and some thought that the reduction lasted only until the election. The Union's argument that it clarified any confusion by comments at the union hall that the reduction lasted until the signing of the collective-bargaining agreement is undermined by the fact that it is unclear exactly how many employees were present at the hall and how many heard the Union's explanation. Furthermore, after the election, the Union sent a second letter explicitly stating that the fee reduction lasted until a collective-bargaining agreement was signed. If the Union's intent had been clear with the first letter, there would have been no need for a second letter. Quite obviously, the Union fully realized the ambiguity of its first letter. But by waiting until after the election had been conducted to issue the clarifying letter, the Union already had the advantage of the impact from the ambiguous fee reduction offer. By sanctioning such a postelection correction of a vague fee-reduction offer, the majority is allowing the Union to skirt the requirements of *Savair* and is establishing a legal principle which we find invalid.

Unlike our colleagues, therefore, we would sustain the Employer's objections based on the Union's forfeiture policy and fee-reduction offer. Accordingly, we would set aside the election.

APPENDIX

This matter was heard at Las Vegas, Nevada on January 20, 1976, pursuant to the above-referenced Order Directing Hearing and a Notice of Hearing issued by the Regional Director for Region 31 on January 5, 1976.

The Employer's objections in their entirety are set forth below:

1. In solicitation of authorization cards before and after the date of filing the petition herein, Petitioner required those employees of the Employer who executed same to pay certain sums to them with the representation that Petitioner would not go forward until the money was paid and further, that if the Union was unsuccessful in the representation election, the money would be forfeited.

2. On or about September 9, 1975, the Union in a letter addressed to the employees, a copy of which is enclosed herewith, advised the employees that the initiation fees were being reduced from \$50 to \$25 for the purposes of this organizing campaign. In addition, the Union required that upon execution of the authorization cards, the employees were requested to remit \$25 plus \$12 dues.

3. Again in reiterating its previous representations to the employees, it provided that if the Union was unsuccessful in the election, the moneys submitted would be forfeited.

By the foregoing and other acts, Petitioner destroyed the laboratory conditions necessary for the conduct of a fair election.

All parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to present evidence pertinent to the issue, and to argue orally at the conclusion of the taking of evidence.

Upon the entire record of the hearing and from my observations of the witnesses, I make the following findings of fact, conclusions, and recommendations:

FINDINGS OF FACT

Petitioner's policy regarding dues and initiation fee in its organizing campaigns is to reduce the initiation fee from 50 to 25 dollars and to solicit payment from prospective unit employees of the reduced initiation fee plus 1 month's dues of 12 dollars in advance. If a majority do not pay in advance, no petition is filed and the advance payments received from the minority are returned to them. Once the petition is filed, however, if the Petitioner loses the election, all funds advanced by unit employees are forfeited. If the Petitioner wins the election, the dues become applicable for the month after the collective-bargaining agreement is signed. Also, the reduced initiation fee remains available to all employees until the contract is signed.

Petitioner conducted previous organizing campaigns among the Employer's office clerical employees in 1972, 1973, and 1974. In 1974 a petition was filed and an election held. However, in 1974, no payment of dues and/or initiation fee was required in advance. The advance payment was waived at that time because the Petitioner wanted an election as soon as possible in light of the fact that a majority of the employees had signed cards and there would not have been time to collect the money. Nevertheless, Petitioner lost the 1974 election.

Early in September 1975, Clifford Norton, president of Local 995, received a call from an Aladdin employee requesting another organizing campaign. Norton was told

the employees didn't want any meetings on either side — just an election. For the 1975 organizing campaign the Petitioner decided to follow its normal dues and initiation fee policy. Norton testified as follows regarding the reasons for the return to the normal policy at the Aladdin:

We had an experience in '74 where over a majority had signed up and they voted against the Union at the election.

So, this year we wanted to, or I wanted to make sure that the people that had come to me were representing a majority of the people and that I wanted it clearly understood going in that if the people were hesitant or weren't for the union, I didn't want them to sign a card and I figured that if they put their moneys up front that it would be an indication to themselves that they were going to stay with the program and that is what they wanted.

That they weren't just window-shopping, per se.

Richard Thomas, the Local's secretary-treasurer, described the purpose in requiring the advance payment in 1975 being:

As a matter, again, of normal policy, we would have gotten the money in '74 and we would have had the same position of the moneys up front and the money being forfeited in the event that the employees had a change of mind and succumbed to, you know, voting against the union for whatever reason they might make that determination.

We made a decision at that point not to do that and to go without any moneys up front which proved not to be a successful and very wise decision.

As I recall, we only got a handful of votes and I wasn't very happy with the situation at all.

So, very obviously, it wasn't a question of having the money forfeited or not having the money forfeited.

Again, it was done for, in my mind, two reasons, to determine the seriousness of the employees in their bargaining unit at the Aladdin Hotel and the second reasoning that if they did the same thing they had done a year ago and turned around and voted against the Union, that those moneys put up by being forfeited would help to offset the costs that the Union incurred in the organizing drive and the election.

On September 9, 1975, between eight and fifteen unit employees went to the Union hall to sign authorization cards and pay the thirty-seven dollars. During their visit Norton spoke to them for about five minutes in his office. Norton was asked if the Union would make the same fee offer as it had the previous year. He replied that it would be the same, except that the employees would have to put their money up front. He explained that the money would be returned if an insufficient number of employees to file a petition paid up and that if the Union lost the election, the

money would be forfeited. Norton and employees Ruth Kurlytis and Janet Smith state that Norton further explained that the reduced initiation fee would be in effect until after the contract was signed. The above-related testimony is uncontradicted.

On or about September 9, the Petitioner also mailed a letter to employees, a copy of which is attached hereto, stating in part that "Our Executive Board has authorized a reduction of the \$50.00 initiation fee to \$25.00 for this organizing campaign. When you send in your forms be sure to send \$25.00 plus \$12.00 dues. These monies will be held in escrow and the dues will apply to the first month after you approve your first labor agreement. If less than a majority send in monies, they will be refunded. If we go to an election and it proves unsuccessful, the monies are forfeit."

On September 24 the only meeting of the campaign was scheduled at the union hall for 4 p.m. Both Norton and Thomas attended. Ten to twelve unit employees were present including Mary Beth Gilbreath and Kathy Kidner. All were seated in the first three rows in front of Thomas. The meeting was conducted as a question-and-answer session with Thomas responding to the questions. Joan Brown and Ruth Kurlytis were discussing among themselves how unfair it was for them to be sticking their necks out in risking forfeiture of the 37 dollars while those who hadn't paid could still get in at the discount rate after the election. Thomas heard them and stated that the reduced initiation fee had to be open until the contract was signed and that it was not allowable to raise it after the election. Kidner states Thomas encouraged them to get their money in, but never mentioned the duration of the discount offer.

Additionally, the Employer contends that Ruth Kurlytis, an employee, told employees that the reduced initiation fee would last only until the election and presented three witnesses in support of this contention. Linda Rogers states that another clerical mentioned to Kurlytis that in another hotel an unnamed union had reduced the fee and then after the election the employees had to pay a higher fee. Then Kurlytis told Rogers that she should pay her fee because it would go up after the election. The conversation occurred at Rogers' and Kurlytis' desks, which are adjacent to each other. Kidner and Gilbreath both state that Kurlytis stated that the discounted initiation fee would last only until the election. Neither recalls when the statement was made, who was present, the exact words used, or the context of the statement. Kidner states she heard the statement two to three times; Gilbreath states she heard it three to four times. There is no evidence that Rogers, Kidner, or Gilbreath made any attempt to ascertain the truthfulness of these statements.

Kurlytis then testified that she did tell Rogers that she had to get her money in before the election, "Because some of the other girls kept prompting me about trying to get her to put her money in, because she was holding back. They felt that everybody should get their money in or be penalized later." Kurlytis also testified that when Kidner signed her card, she didn't have the 37 dollars to give Kurlytis, but said she would give it to her on a specified date. When that date arrived Kurlytis went and asked Kidner for the money. Kidner didn't have it so Kurlytis

told her, "Well, you'd better, you know, get your money in before it is too late." Kurlytis denies stating to anyone other than Rogers that the money had to be paid before the election. Kurlytis was not paid by the Petitioner, held no position in the Union or on an organizing committee, and was never authorized by the Petitioner to make statements regarding the duration of the reduced initiation fee. Other employees would usually go to Kurlytis if they had questions about the Union. She would then either answer the questions or call Norton, get the information requested, and repeat it to the employees. Other employees, however, were questioned about the Union prior to the election.

CONCLUSION

The Forfeiture of Dues and Initiation Fees

No labor organization can be forced to represent or attempt to represent any group of employees. Here Petitioner had several organizing experiences with the Employer's employees in which it had expended its energies on their behalf with unsuccessful results. Instead of refusing to make another attempt to organize them, however, Petitioner made clear that it needed certain money up front to cover the costs of organizing. If the organizing campaign were successful, those sums would cover the initiation fee and 1 month's dues, but if unsuccessful, the money would cover the organizing costs. Each employee who made the advance payment was clearly aware of the possibility of forfeiture. Nonetheless, at least a majority voluntarily made these payments. If they had objected, they could have sought representation elsewhere, formed their own labor organization, or refrained from seeking representation. I find no case law which prohibits unions from seeking to meet organizing costs in this way.

In *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270, the Supreme Court found that in allowing a union to waive its initiation fees for employees signing authorization cards before the election, the Board was permitting the union "to buy endorsements and paint a false portrait of employee support during its election campaign." The Court reasoned that while employees had no legal duty to vote for the union, they would feel obligated to do so by accepting the waiver of initiation fees and signing the authorization card. In waiving initiation fees prior to the election only, those employees who had not signed cards would have to pay an initiation fee and be penalized for their nonsupport prior to the time of election. Thus, *Savair* overruled *DIT-MCO, Incorporated*, 163 NLRB 1019, insofar as it relates to the discrimination between employees regarding the waiver of initiation fees on the basis of whether they signed the authorization cards before or after the election. In *DIT-MCO* the Board reasoned that conduct is not inducement or coercion where employees can avoid the alleged inducement without penalty. The rationale behind the decision in *DIT-MCO* is applicable to the instant situation and has not been overruled by *Savair* in cases where no disparate treatment conditioned on the outcome of the election results.

Forfeiture of certain payments which could be avoided by simply electing not to make those payments cannot be

considered improper inducement. Cf. *EFCO Corporation*, 185 NLRB 220; *Hughes & Hatcher, Inc.*, 176 NLRB 1103; *Primco Casting Corp.*, 174 NLRB 244. Here, the forfeiture of dues and initiation fees was entirely avoidable. The \$7-dollar payment was at all times voluntary. No employee could expect any reward or advantage for her prepayment. Moreover, the instant forfeiture policy is distinguishable from *Savair* in that no employees here were penalized by awaiting the outcome of the election before paying the dues and the initiation fee. Therefore, I find that no disparate treatment between employees resulted and the possibility of forfeiture did not constitute a constraint on employees to vote for Petitioner.

Where an employer promises benefits to employees who vote against the union, the Board has set aside the election because the grant of benefits was calculated to influence the choice of employees in the selection of their bargaining representative. See *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405; *The Borden Manufacturing Company*, 193 NLRB 1028; *The Baltimore Catering Company*, 148 NLRB 970, 973. Similarly; a threatened loss of benefits for failure to support an employer in an election is sufficient to set aside an election. *Shovel Supply Co.*, 121 NLRB 1485; *Hercules Motor Corp.*, 73 NLRB 650. In considering the limitations on a union's conduct, I note that in organizing campaigns the Board has historically accorded unions a different status from employers because it has viewed employers as having absolute control over the work environment during the campaign. In this case, the forfeiture policy did not give Petitioner any greater control over the work environment than it would have without the policy. If an employer threatens loss of benefits, the employees' only recourse to avoid the loss is securing other jobs. In order to avoid the forfeiture of dues and initiation fees, however, employees simply did not have to pay them. The forfeiture had no impact on their employment. I find, therefore, a difference between an employer threatening loss of benefits for voting for the union and Petitioner's imposition of its policy providing for forfeiture of dues and the initiation fee. In these circumstances the Petitioner was still a mere "outsider seeking entrance to the plant." *N.L.R.B. v. Golden Age Beverage Co.*, 415 F.2d 26, enfg. 167 NLRB 151. Accordingly, I find that the forfeiture policy does not contravene the spirit of *Savair* nor otherwise constitute objectionable conduct.

The Duration of the Reduced Initiation Fee Offer in the Petitioner's September 9 Letter

Since *Savair* the Board has concluded that any waiver of initiation fees, where the waiver is not limited to the period before the election, but is available until the signing of a contract, is permissible. *Irwindale Division, Law Industries*, 210 NLRB 182; *B. F. Goodrich Tire Co.*, 209 NLRB 1175. In *Jefferson Food Mart*, 214 NLRB 225, the Board expanded its rules under *Savair* to include reductions of fees as well as waiver of fees. In *Smith Company of California, Inc.*, 215 NLRB 530, an organizer told employees that initiation fees would be "waived during a new organization," that "anyone who would come in after the plant became union" would have to pay the \$30 initiation fee and that "any employee that is coming in after signing

the contract, is subject to an initiation fee." The Board, in finding that the Petitioner's conduct was not objectionable, stated that when the whole situation was taken into consideration and the statements were not viewed in isolation, the organizer made clear the position that initiation fees were waived for all those who joined before a contract was signed.

In the instant case, the Petitioner's September 9 letter states that the duration of the reduced fee offer is for this organizing campaign. No explanation of the meaning of organizing campaign was set forth in the letter. No evidence was adduced at the hearing that either Thomas or Norton ever stated or indicated that the reduction in fees was limited to the period prior to the election. On the contrary, both Thomas and Norton told the employees that the offer had to remain available until the contract was signed at both the September 9 and 24 meetings.

While the Employer contends that "organizational campaign" refers to that period prior to the election, in *B. F. Goodrich Tire Co.*, the Board stated:

... where a union offered to waive its initiation fees for all the employees in the unit who joined *at anytime during the organizational stage of representation prior or subsequent to the election*, such waiver was legitimate and did not affect the election.

Thus, the duration of the reduction of initiation fees is not ambiguous. Cf. *Inland Shoe Manufacturing Co., Inc.*, 211 NLRB 724. Moreover, when viewed in the totality, as in *Smith*, the two meetings and the letter make clear Thomas' and Norton's position of leaving the reduction of initiation fees open to all employees until the contract was signed. Additionally, the subjective state of mind of employees is not relevant to the issue, the test for objectionable conduct is an objective one where the consideration is based on representations made to employees and not their beliefs or misunderstandings. *Jefferson Food Mart, Matter of G. H. Hess*, 82 NLRB 463, fn. 3. Thus the absence of objective evidence that any designated agents conditioned the reduction of initiation fees on employees joining the Union prior to the election either orally or in writing, I conclude that the September 9 letter is not violative of the guidelines set forth in *Savair*.

The Duration of the Reduced Initiation Fee Offer Per Kurlytis

There is no evidence that Kurlytis acted as an agent of Petitioner at any time. Her conduct is not attributable to the Petitioner without proof that it was authorized by, participated in, condoned by, ratified by, or adopted by officials of the Petitioner. *N.L.R.B. v. Dallas General Drivers Warehousemen and Helpers Local 745*, 264 F.2d 642, 648. Kurlytis never told employees that she was an agent of the Petitioner or was speaking on its behalf. *Assuming, arguendo*, that Kurlytis was an unpaid employee organizer, the mere fact that an employee prominent in the organizing campaign may have engaged in unlawful conduct, is not alone sufficient to establish agency. *Owens-Corning Fiberglass Corporation*, 179 NLRB 219; *Electric Wheel Company*,

120 NLRB 1644. I conclude that Kurlytis was not an agent of the Petitioner.

The Board has considered conduct of third parties and rank-and-file employees in determining whether an election will be set aside; however, less weight is accorded such conduct. *Cross Baking Company, Inc.*, 191 NLRB 27, reversed on other grounds 453 F.2d 1346; *Orleans Manufacturing Company*, 120 NLRB 630, 633. The test to be applied in determining whether an election will be set aside on the basis of third-party conduct is whether the character of the conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a choice of free expression impossible. *Central Photocolor Co. Inc.*, 195 NLRB 839. In *Allied Metal Hose Company, Inc.*, 219 NLRB 1135, several employees, as in the instant case, were told by another employee that the initiation fees would be waived only until the election. The Administrative Law Judge noted that almost all elections set aside on the basis of third-party conduct involve violence, threats of mass terminations, or highly inflammatory racial remarks and found the third-party conduct on the initiation fee issue insufficient to set aside the election. In affirming the Administrative Law Judge's conclusions the Board stated:

... we do not read *Savair* to require either the Board or the parties to police the preelection conduct of third parties with the same vigilance and rigor that they are required to exercise in policing their own conduct. Under the circumstances of this case, we are satisfied that the statements circulated by various employees about the Union's waiver of initiation fees did not rise to the level of impropriety that the Board has previously relied on in setting aside elections because of third-party conduct. In this respect, we fully agree with the Administrative Law Judge that such rumors and misinformation as might have existed did not create an atmosphere of fear, coercion, and confusion among Respondent's employees which could reasonably have interfered with the employees' free choice. Nor do we find convincing reasons to hold the Union culpable and/or responsible for such rumors or misinformation especially where, as here, the circulating statements incorrectly reflected the Union's initiation fee policy and the employees made no attempts to ascertain the truthfulness of such rumors.

Based upon *Allied Metal Hose*, I conclude that Kurlytis' conduct was not so aggravated as to create an atmosphere of fear and reprisal. Assuming, *arguendo*, she told all three employer witnesses that the reduction offer ended at the time of the election, the statements did not correctly reflect Petitioner's initiation fee policy and the employees so informed made no attempt to discuss the matter with the Petitioner. Therefore, I find no reason to hold Petitioner responsible for these statements.

Accordingly, I conclude that the Employer's objections should be overruled in their entirety.

RECOMMENDATION

Based on the discussion above and the record as a whole, I recommend that the Employer's objections be overruled and a Certification of Representative be issued.

Pursuant to Section 102.69(e) of the Board's Rules and Regulations, Series 8, as amended, and the Board's Order Directing Hearing, within 10 days from the issuance of this

report, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no such exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.