

House of Raeford Farms, Inc. and United Food and Commercial Workers International Union, Local 204, AFL-CIO, Petitioner. Case 11-RC-5522

April 26, 1995

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

The National Labor Relations Board, by a three-member panel, has considered objections to an election held October 21, 1994, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision, Order, and Direction of Second Election issued by the Board on August 31, 1992. The tally of ballots shows 411 for and 365 against the Petitioner, with 44 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions¹ and briefs, has adopted the hearing officer's findings² and recommendations,³ and finds that a Certification of Representative should be issued.

The hearing officer recommended overruling the Employer's Objection 12, which alleged that the Union unlawfully attempted to influence votes by promising to obtain "working papers" for some presumably undocumented Hispanic employees that would allow them to work legally in this country. In so ruling, the hearing officer relied on *Nestle Dairy Systems*, 311 NLRB 987 (1993), which held that a union's preelection filing of a Federal Racketeer Influenced

and Corrupt Organizations Act (RICO) lawsuit on behalf of unit employees did not constitute objectionable conduct. We note that *Nestle* was denied enforcement by the Sixth Circuit, 46 F.3d 578 (1995), subsequent to the hearing officer's report in this case. The Board in *Nestle* found that the objecting party did not meet its burden to show that the filing of a RICO lawsuit was a benefit that was tangible, substantial, direct, and had a reasonable tendency to interfere with the employees' free choice in the election. *Nestle*, 311 NLRB at 987-988. The Sixth Circuit disagreed with the Board and concluded that the union's election eve announcement to approximately one-third of the unit employees that it had filed a lawsuit on their behalf against the employer seeking \$20 million in damages constituted a substantial, direct, and tangible conferral of free legal services that were sufficiently valuable to influence the employees' votes. *Nestle*, 46 F.3d at 583-584.

In any event, we find that the instant case is distinguishable from *Nestle*.⁴ Here, the only evidence adduced in support of the Employer's Objection 12 is the hearsay testimony, albeit not objected to by the union attorney, of two employee witnesses. One employee testified that a union representative told her coworker that the Union could get "legal papers" for the coworker's husband, who was also an employee, if the coworker's husband voted for the Union. The second employee testified that she explained to an unspecified number of Hispanic employees that they should disregard any union promise regarding the provision of "legal papers" because the Union was unlikely to deliver on such promises. Employing the well-settled grant-of-benefits analysis utilized in *Nestle*, we agree with the hearing officer that the Employer has clearly failed to carry its burden to show that these vague and relatively isolated remarks in a unit of approximately 1000 eligible voters constitute the conferral of a substantial, direct, and tangible benefit on employees such that their votes would be influenced.⁵ The record is devoid of any specific evidence concerning the scope of

¹The 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.

²In recommending overruling Objection 6 regarding allegations of prouion electioneering in the hallway adjacent to the voting area, the hearing officer relied on *Firestone Textiles Co.*, 244 NLRB 168, 173 fn. 12 (1979), and rejected the Employer's argument that the ballots challenged by the Union should be counted as votes against the Union, thus narrowing the Union's margin of victory and making the alleged electioneering potentially more serious. We find it unnecessary to rely on *Firestone* because even if the Employer's argument was accepted and the union-challenged ballots were credited to the Employer's vote tally, the alleged electioneering would still not constitute objectionable conduct. We agree with the hearing officer that *Pepsi-Cola Bottling Co.*, 291 NLRB 578 (1988), is distinguishable. In *Pepsi*, the nature of the conduct was far more coercive than that depicted here and resulted in the formation of a gauntlet through which employees had to pass in order to cast their votes. See *Rheem Mfg. Co.*, 309 NLRB 459 (1992), *affd.* in the summary judgment proceeding, 310 NLRB No. 116 (Mar. 15, 1993) (not reported in Board volumes), *enfd. mem.* 28 F.3d 1210 (4th Cir. 1994).

³In the absence of exceptions, we adopt *pro forma* the hearing officer's recommendations to overrule the Employer's Objections 13 and 17.

⁴In view of the fact that *Nestle* is distinguishable, Chairman Gould finds it unnecessary to decide whether he agrees with the Board's holding in *Nestle*. Member Stephens, who dissented in *Nestle*, does not rely on the Board's decision in that case. He agrees with his colleagues, however, that this case is distinguishable. Given the nature of the sketchy hearsay testimony, it is impossible to know whether the unnamed persons described as "union representatives" were in fact agents of the Union or whether the statements actually made could have been reasonably construed as a promise that immigration work permits or similar documents would be obtained for the employees by the Union.

Member Browning adheres to the Board's decision in *Nestle*.

⁵See *NLRB v. VSA, Inc.*, 24 F.3d 588, 595 (4th Cir. 1994), *cert. denied* 115 S.Ct. 635 (Dec. 5, 1994) ("it is the degree of pressure or inducement that is crucial in determining whether a representation campaign is valid . . . [a]nd in order for pressure or inducement to warrant setting aside the election, it must lead to the 'failure of those in the bargaining unit to make their collective desires effective.'").

the dissemination of the alleged promise or the proportion of undocumented workers in the Employer's work force that would stand to benefit from, and thus be influenced by, the promise. Accordingly, we find the evidence insufficient to warrant setting aside the election and we adopt the hearing officer's recommendation to overrule Objection 12.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Food and Commercial

Workers International Union, Local 204, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including truck drivers, retail store employees and cafeteria employees employed by the Employer at its Raeford, North Carolina facility, excluding all office clerical employees, guards and supervisors as defined in the Act.