

**BCI Coca-Cola Bottling Company of Los Angeles  
d/b/a Yuma Coca-Cola Bottling Company and  
United Industrial, Service, Transportation, Pro-  
fessional & Government Employees of North  
America, SIUNA, AFL-CIO.** Case 28-RC-6066

May 23, 2003

**DECISION AND DIRECTION OF SECOND  
ELECTION**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 15, 2002, 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 10 for and 11 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's findings<sup>1</sup> and recommendations,<sup>2</sup> only to the extent consistent with this Decision and Direction of Second Election.

The hearing officer found merit in the Petitioner's Objection 4, which alleged that the Employer threatened employees with the loss of 401(k) benefits if the Union won the election. We agree with the hearing officer's recommendation to sustain the Petitioner's Objection 4, but only for the following reasons.

*A. Factual Background*

The underlying facts are not in dispute. During the Union's organizing campaign, but approximately 1-1/2 months prior to its filing the election petition, Tom Cook, an employee at the Coca-Cola Bottling plant in Yuma, Arizona (Employer), approached Branch Manager Jon Pitts and inquired about the effects of unionization on the employees' current 401(k) benefit plan. Branch Manager Pitts told Cook that "with the Union, there is no 401(k)." Cook repeated this statement to other employees in the 21-employee unit "that were looking at joining the Union," and the employees became concerned about the potential loss of their benefits program if they chose un-

<sup>1</sup> The 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.

<sup>2</sup> In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations that the Petitioner's Objections 1 through 3, 5, and 7 be overruled. The Petitioner withdrew Objection 6 at the hearing.

ionization. The employees voiced these concerns at several mandatory meetings held by the Employer.

Employee disquiet over the 401(k) issue continued after the Union filed its petition for representation on April 17, 2002. In response, the Employer made three additional statements concerning the petitioned-for employees' continued ability to participate in the 401(k) program if the Union prevailed in the election. First, the Employer posted a flier containing the following "question and answer":

Is it illegal for the company to take away your 401k (MESIP) if it is no longer the same benefit provided in a union contract?

Any funds you currently have in the Company (401k) MESIP would remain. However, you would no longer be eligible to neither contribute to this MESIP program nor receive matching company contributions.

The Employer took this posting down after one-half day, and later admitted that it was "confusing."

One week before the election, the Employer sent a letter to each employee stating that if the Union won the election, the MESIP would be a subject for negotiations but that, to date, no union/company contract included it, and Yuma "would be the first among hundreds of company contracts across the country to get" such benefits. Finally, in a mandatory meeting held the morning before the election, the Employer again informed unit employees that it would negotiate with the Union about the 401(k) plan if the Union were elected, but noted that, if the Union were to succeed in getting such a plan, "your contract would be the very first one in the country between any union and a CCE Bottling Company" to include such benefits.

*B. Analysis*

This case is governed by the principle that while a pre-election threat alone is insufficient to overturn an election, such a threat can be considered insofar as it adds "meaning and dimension" to postpetition statements. *Dresser Industries*, 242 NLRB 74 (1979). At the start of the union organizing campaign, but before a petition was filed, the Employer made a direct threat that employees' 401(k) benefits would be lost, if the Union won the election. Predictably, that statement was widely disseminated among employees and triggered concerns, voiced at management meetings. Once the critical period began, in turn, the Employer made statements that employees reasonably could construe—in light of the original threat—as effectively reaffirming the original threat. Those statements, as we will explain, reasonably tended to interfere with employees' freedom of choice in the election.

The original statement made by Branch Manager Pitts was that “with the Union, there is no 401(k).” After that threat was made and disseminated, the Employer’s actions during the critical period did not clearly disavow that threat and reassure employees that selection of the Union would not result in the immediate loss of benefits. Instead, the Employer made statements that, under the circumstances, were likely to exacerbate employees’ fears.

For example, in its posting to employees, the Employer made a broad statement that employees “would no longer be eligible to neither contribute to this MESIP [401(k)] program nor receive matching company contributions.” Employees reasonably could have viewed this statement as a restatement, during the critical period, of Pitts’ threat that an existing benefit would no longer be available to employees if they selected the Union as their representative. The Employer has presented no evidence that persuades us to the contrary.

Our dissenting colleague analyzes the Employer’s campaign literature in isolation from the prepetition threat to eliminate a benefit. By doing so, he would effectively allow the Employer to capitalize on its prior threat, by ambiguously renewing it. He acknowledges that what the Employer actually meant by stating that employees “would no longer be eligible to neither contribute to this MESIP program” is confusing. But he dismisses the possibility of a threatening implication by observing that the statement “clearly does *not* say that the eligibility to participate in the 401(k) MESIP plan would automatically be lost upon unionization.” What matters, however, is not the absence of a second unequivocal threat, but rather the absence of any clear assurance, following the first threat, that employees would not automatically lose the right to continued participation in the 401(k) program. It was the Employer who resurrected the subject of Pitts’ original threat, which had caused such widespread employee apprehension. Thus, it was incumbent on the Employer not to exacerbate the situation. Its confusing statement could reasonably have had that effect, because the Employer never clearly explained that it was legally obligated to maintain the status quo with respect to the 401(k), unless and until a different arrangement was negotiated.<sup>3</sup>

Further, although the Employer did state its intent to bargain with the Union over the 401(k) benefits (in its

<sup>3</sup> Our dissenting colleague misunderstands our analysis here which relies on the critical-period posting as being a restatement of the earlier threat. Our reference to there being an “absence of any clear assurance” by the employee that no benefits would be lost relates solely to why this critical period posting was confusing and could reasonably be seen as exacerbating the situation.

letter to employees and at the mandatory meeting on May 14), these general statements about the bargaining process were insufficient to cure its earlier threat. See *Noah’s New York Bagels*, 324 NLRB 266, 267 (1997). Against the backdrop of Pitts’ blanket threat and its wide dissemination among unit employees, employees reasonably could construe the Employer’s references to bargaining as meaning simply that the Employer would be willing to bargain over restoring the 401(k) benefit after it was eliminated upon unionization. An employer’s general explanations of the bargaining process—even explanations more comprehensive than those here—are insufficient to dispel the lasting impression that a benefit lost upon unionization would remain lost unless and until it was restored through negotiations. See *Hertz Corp.*, 316 NLRB 672 fn. 2 (1995).<sup>4</sup> Indeed, the Employer’s statements following its initial threat clearly sent the message that bargaining efforts would be futile, by uniformly emphasizing that no such benefit had ever been previously negotiated between the Employer and the Union.<sup>5</sup>

In sum, given the employee apprehension created by the Employer’s prepetition threat, the employees reasonably could construe the Employer’s critical period statements as implying that they would lose their right to participate in existing benefit programs upon the selection of the Union as their bargaining representative. This is particularly true given the economic dependency of employees on their employer and the tendency for the former to “pick up intended implications” from the latter “that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S.

<sup>4</sup> We recognize that the facts in this case are different from those in *Hertz*, but not in crucial respects. There, the Board found objectionable the employer’s distribution to employees of a summary of its 401(k) benefits, which included a provision excluding union members from the company’s 401(k) plan. 316 NLRB 420 (1982); *Hahn Property Management Corp.*, 263 NLRB 586 (1982); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962). More to the point, if an employer uses factual information as a means to convey an objectionable message, the Board traditionally has not allowed this “brinkmanship” to undermine employee free choice. See, e.g., *Turner Shoe Co.*, 249 NLRB 144, 146–147 (1980).

<sup>5</sup> We find no merit in our dissenting colleague’s suggestion that the Employer’s three statements during the critical period are protected under Sec. 8(c) of the Act. The Board has long maintained that Sec. 8(c) was intended by Congress to apply only to unfair labor practice cases and is not, by its terms, applicable to representation cases. See, e.g., *Rosewood Mfg. Co.*, 263 NLRB 420 (1982); *Hahn Property Management Corp.*, 263 NLRB 586 (1982); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962). More to the point, if an employer uses factual information as a means to convey an objectionable message, the Board traditionally has not allowed this “brinkmanship” to undermine employee free choice. See, e.g., *Turner Shoe Co.*, 249 NLRB 144, 146–147 (1980).

575, 617 (1969). The Employer's failure to directly disavow or correct its prepetition statement (by explicitly informing employees that election of the Union would not result in automatic loss of benefits), combined with its repeated reminders that it was extremely unlikely that the 401(k) benefit would be continued were the Union selected, only served to reinforce the Employer's earlier direct threat.

Under these circumstances, and particularly noting that the election was decided by a single-vote margin, we sustain Petitioner's Objection 4, set aside the election, and direct that a second election be held.

[Direction of Second Election omitted from publication.]

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues, I find no merit in the Union's Objection 4. I would therefore overrule that objection and certify the results of the election.

I agree with my colleagues' statement of the facts. In my view, the Employer's prepetition statement ("with the Union, there is no 401(k)") could be construed as a threat to take away benefits immediately upon unionization, *or* as a prediction that the union would not be able to obtain a 401(k) plan in bargaining. In any event, the statement, being outside the critical period, cannot form the basis for objectionable conduct. See *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961).<sup>1</sup>

My colleagues say that the posting in the critical period was a "restatement of the earlier threat." Clearly, it was not. Although the posting dealt with the same subject matter, it was not a repetition of what was said before.

My colleagues then suggest that a threat made outside the critical period is objectionable if the threat is not affirmatively disavowed within the critical period. For example, they say that the posting "did not clearly disavow" the earlier statement, and that there was an "absence of any clear assurance" that no benefits would be lost. This argument has no merit. For, as my colleagues concede, a threat uttered prior to the critical period is not objectionable, even if the employer says *nothing* about it during the critical period. And yet, my colleagues say that statements made within the critical period, not in and of themselves objectionable, become objectionable by reason of what they *fail* to say. There is no case support for this position.

<sup>1</sup> See also *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1567 (D.C. Cir. 1984) (finding prepetition conduct will not warrant a new election "absent extremely unusual circumstances," and finding prepetition verbal threats do not warrant a second election).

My colleagues then assert that the Employer's statements within the critical period exacerbated the situation. In truth, as set forth below, these employer statements, taken as a whole, make it clear that: (1) 401(k) benefits are negotiable; and (2) the Employer was predicting that the Union would not be able to achieve them in bargaining.

Concededly, the postpetition flyer, viewed in isolation, did not make these matters clear. It is a response to a hypothetical situation in which there is a union contract that does not contain the 401(k) MESIP benefit. The first sentence of the response is that any funds in the 401(k) MESIP account would remain. The second sentence of the response is confusing as to what it says. However, there is no confusion as to what it does *not* say. It clearly does *not* say that eligibility to participate in the 401(k) MESIP plan would automatically be lost upon unionization. That reading of the response would be true only if the words "neither" and "nor" were ignored. Rather, the response seems to indicate that, at present, employees have the option to decline participation in the MESIP program (and its concomitant company contribution). The statement then suggests that this option would be lost.

In any event, whatever the meaning of the response, that response was removed after 1/2 day. Significantly, the subsequent communications clarified the situation. They made it clear that (1) the MESIP plan would be the subject of negotiations with the Union, and (2) the Union had thus far not been able to get MESIP at any company facility.

These remarks were true and relevant. That is, the true facts are that 401(k) plans are subject to negotiations; such negotiations can result in the continuation of the company plan, modifications of that plan, or no plan at all; and the Union has thus far been unsuccessful in achieving the continuation of the Employer's plan.

Clearly, a message that is true and relevant is not objectionable. It is protected free speech. I recognize that Section 8(c), on its face, refers to unfair labor practices and not objections. However, the same policy considerations (favoring free speech) that lie behind Section 8(c) also lie behind the instant case. That is, a true and relevant statement, not containing threats or promises, should not be condemned as objectionable.<sup>2</sup>

<sup>2</sup> The Board has held that while Sec. 8(c) is not by its terms applicable to representation cases, "the strictures of the [F]irst [A]mendment, to be sure, must be considered in all cases." *Allegheny Ludlum Corp.*, 333 NLRB 734, 737 fn. 20 (2001), *enfd.* 301 F.3d 167 (3d Cir. 2002) (quoting *Dal-Tex Optical*, *supra*, 137 NLRB 1782, 1787 fn. 11 (1962)). See also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

My colleagues suggest that the Employer's reference to the Union's historical inability to obtain the benefits in a contract renders such statements objectionable. However, the Board has previously found that an employer's statements containing historical references to a union's prior failure to secure such benefits are not objectionable. See, e.g., *TCI Cablevision of Washington, Inc.*, 329 NLRB 700, 701 (1999).

Further, and contrary to the assertion of my colleagues, the Employer did not simply make "general statements about the bargaining process." The Employer made particular statements about the Employer's 401(k) plan and

expressed doubts about the Union's ability to retain it in bargaining with the Employer.

Finally, I find that *Hertz Corp.*, 316 NLRB 672 (1995), relied upon by the majority, has no application to this case. In *Hertz*, the Board found objectionable conduct based solely upon written exclusionary language contained in the employer's summary of its benefits. 316 NLRB at 672 fn. 2. Here, there has been no such explicit and exclusionary language.

Accordingly, I would find that the Employer's conduct does not warrant setting aside the election.