

University Towers, Inc. and International Brotherhood of Firemen, Oilers, Maintenance Mechanics, Production Workers and Hospital Employees, Local No. 1, AFL-CIO, Petitioner. Case 17-RC-9509

31 July 1987

**DECISION AND DIRECTION OF
SECOND ELECTION**

**BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN, BABSON, AND STEPHENS**

The National Labor Relations Board has considered the objections to an election held 27 May 1983, 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 31 for and 23 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings¹ and recommendations only to the extent consistent herewith.

In its Objections 1 and 2 the Employer alleges that agents of the Petitioner, while soliciting signatures on union authorization cards, told employees that waiver of initiation fees was conditioned upon signing a union authorization card before the election. In this regard, the hearing officer found that a small group of employees contacted Butkovich, the Petitioner's business representative, who spoke with this group and gave them authorization cards to distribute to their fellow employees. Without any further instructions concerning the manner in which the cards were to be solicited, Butkovich simply told the group to get as many cards signed as possible. Butkovich relied exclusively on the employees to solicit the authorization cards.

The Petitioner did not distribute any written materials to employees during the campaign regarding initiation fees. On the cards that Butkovich initially gave to the employee-solicitors was printed "Initiation \$" followed by a blank space in which Butkovich had written a zero. Butkovich testified that when employees asked about initiation fees at two meetings he conducted, he told them that the initiation fees would be suspended until after the contract was negotiated but then all employees would have to pay. Somewhat later in his testimony, however, Butkovich said he told at least the employee-solicitors that the "original group" would not have

to pay a fee, and that the "original group" were "the ones that organized the unit, that are employed at the time the unit is organized. That anybody that would become members of the Union or employees after the agreement is negotiated, signed and agreed to, that those people would then pay."

The hearing officer found that employee-solicitors were not union agents for the purpose of soliciting cards and that therefore their statements could not be attributed to the Union. Citing, *inter alia*, *Davlan Engineering*, 262 NLRB 850 (1982), the hearing officer found there was no record evidence that employees Zamora, Florez, Cascone, and Renfro engaged in any activity other than solicitation of authorization cards which could be construed as making them agents of the Union. She further found that even if employee-solicitors were union agents, their statements did not violate the prohibition in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), against waiving fees for only those employees who sign authorization cards before an election. Thus, she found there was no indication in the credited testimony of employees Gant, Henges, Cascone, or Rios that they were told that waiver of initiation fees was conditioned upon signing cards prior to the election; that employee Kirtrel's testimony, discussed below, was an insufficient basis for a finding of prohibited conduct; that employee Nicolli testified that nothing was said to her about initiation fees at the time she signed a card; and that employee Hill's credited testimony tended to corroborate the Petitioner's assertion that the waiver extended to all employees in the unit.

We have recently reconsidered and vacated the Board's earlier decision in *Davlan Engineering*, relied on by the hearing officer. In our supplemental decision in *Davlan*,² we held that when a union makes authorization cards available to employees with the understanding that they will solicit other employees to sign them, it thereby vests the solicitors with actual authority to obtain signed cards on its behalf. Additionally, when a union permits or acquiesces in employees' soliciting on its behalf without indicating to third parties that statements made by the card solicitors are not to be taken as the policies of the Union, it thereby vests the solicitors with apparent authority to make statements related to the subject matter of the cards. In both cases, whether by action or inaction, the union has created a special agency relationship for the limited purpose of card solicitation. Accordingly, the union will be deemed responsible for representations concerning its fee-waiver policies made by its special agent solicitors, whether or not they have

¹ 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

² 283 NLRB 803 (1987)

been specifically authorized or instructed to speak on this subject.

Applying the supplemental decision in *Davlan Engineering* to this case, we conclude that the employer-solicitors here were special agents of the Petitioner for the limited purpose of card solicitation. We further conclude that, contrary to the hearing officer, statements made by certain of the employee-solicitors violated the prohibition in *Savair*.

The evidence in this case shows, as noted, that Butkovich gave employees authorization cards and told them to get as many signed as possible. Employees Zamora, Cascone, and Renfro were part of the group that initiated the contact with the Petitioner and they later solicited authorization cards on the Petitioner's behalf. While the record is not entirely clear on this point, it is likely that they received those cards from Butkovich. In any event, the Petitioner utilized the cards obtained by these employees to support the filing of the petition herein. Applying the principles of *Davlan* to these facts, we conclude that, by permitting or acquiescing in the solicitation activities of Zamora, Cascone, and Renfro, the Petitioner vested the three employees with at least apparent authority to solicit cards and thus rendered the employees its special agents.³ These employees made improper fee-waiver statements as discussed below. By virtue of their status as special agents of the Petitioner, we find that their statements were imputable to the Petitioner.⁴

In concluding that certain statements made by employee-solicitors violated the prohibition in *Savair*, we note first the following excerpt from employee Rios' credited testimony about employee-solicitor Zamora:

Q. What did Helen Zamora tell you about initiation fees?

A. She said if I signed the card—well first of all, she told me if I wanted to vote for the Union, then here's a card, send it in if I want to get into the Union. And following that, she told me if I signed it, if the union did get into the corporation, that I wouldn't have to pay initiation [sic] fee. But the people that don't sign one and the union is voted in, they would have to later.

Q. They would have to pay an initiation fee?

A. Yes, sir.

The hearing officer found that the phrase "they would have to later" might have referred to either paying a fee or signing a card. She further found that if the statement referred to signing a card, then

there was no *Savair* violation because the waiver was not limited to employees who signed before the election. We find, however, that when Rios' credited testimony is read *as a whole*, the phrase "they would have to later" in its proper context means that employees who did not sign now would have to pay an initiation fee later. According to Rios' credited testimony, Zamora compared what would happen to those who did not sign with those who did sign. Such a conclusion is further supported by the clarifying answer elicited by the Employer's counsel when he asked if Rios was quoting Zamora as stating that nonsigners would have to pay an initiation fee. Rios said: "Yes, sir."

The second statement supporting the conclusion that the prohibition in *Savair* was violated comes from a portion of employee Kittrel's uncontroverted testimony, which was not quoted by the hearing officer. Kittrel testified that employee-solicitors Cascone and Renfro, while soliciting her signature, told her "I should sign the card before the election. If I don't, they will take it out of my check for the initiation fee." The hearing officer found that Kittrel's testimony in general was less than a clear statement that the employee-solicitor conditioned initiation fee waiver on signing a card prior to the election. In so finding, the hearing officer observed that Kittrel's testimony was not a coherent paraphrase of the employee-solicitors' statements. In reviewing the record, however, we find that Kittrel was not asked to repeat the whole conversation and that her testimony consisted of coherent responses to the questions asked. We further find that the employee-solicitors' statement quoted above means that an initiation fee waiver was conditioned on signing an authorization card prior to the election.

In the face of this evidence, we additionally find that the Petitioner failed to establish that it adequately informed the unit employees of a lawful fee-waiver policy. Thus, there is no evidence that Butkovich gave the employee-solicitors any instructions concerning the manner in which the cards were to be solicited. Most significantly, there is no evidence that the Petitioner distributed any written materials explaining its fee-waiver policy to employees, and the cards themselves had no clear statement of its policy.⁵ We note that the record shows that Butkovich discussed the subject of initiation fees in response to employee questioning at union meetings. While we find that Butkovich's confusing statements on the subject were not them-

⁵ As noted above, Butkovich had written a zero next to the printed portion "Initiation \$" on the cards which he initially gave to the employee-solicitors. The cards, however, did not indicate when the employees would have to sign the cards in order to avoid an initiation fee.

³ See Restatement 2d, Agency §§ 3(2) and 27 (1958).

⁴ *Davlan Engineering*, above.

selves objectionable, we further conclude that they were insufficient to neutralize the effects of the statements of employee-solicitors Zamora, Cascone, and Renfro which reasonably tended to interfere with employees' free choice in the election. In this regard, we note that in any event Butkovich's comments on initiation fees were heard only by those employees who attended the meetings and that

there is no showing that his comments were communicated generally to the bargaining unit employees. We therefore set aside the election and shall direct a second election.⁶

[Direction of Second Election omitted from publication.]

⁶ Should the Petitioner not wish to proceed to an election, it may withdraw its petition without prejudice to filing a new petition.