Mandalay Corp., d/b/a Mandalay Bay Resort & Casino *and* International Union, Security, Police and Fire Professionals of America (SPFPA). Case 28–RC–6596

August 17, 2010

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 13, 2008,[1] and the administrative law judge's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 110 for and 123 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the judge's findings[2] and recommendations[3] only to the extent consistent with this Decision and Direction of Second Election.

For the reasons set forth below, we find merit in the Petitioner's Objection 16, which alleged that during the critical period, the Employer solicited grievances and expressly or impliedly promised to remedy them. Consequently, we shall direct a second election.

The relevant facts are as follows. The Employer operates a resort and casino in Las Vegas, Nevada. In April, the Petitioner filed a petition to represent the Employer's security officers. Shortly before the June 13 election, the Employer convened a series of meetings with the security officers. At these "focus meetings," the Employer's high-ranking representatives discussed the union campaign and asked the officers about their work-related concerns. Officer Barry Gropp testified that managers told the officers that the purpose of the meetings was "so they could understand problems that we encountered and our working conditions . . . they were in answer to the concerns and problems we had expressed," and that "senior management was talking to us about our desire to form a union." There is no evidence that the Employer had conducted similar meetings in the past.[4]

At one focus meeting, Bill Hornbuckle, the Employer's CEO, addressed the officers' concerns about overtime. The previous January, the Employer had greatly reduced full-time officers' overtime opportunities when it hired part-time officers to work the extra hours. The full-time officers had immediately complained about this change at preshift briefings and had continued their complaints, with no response from management, in the months that followed.[5] Gropp testified that Hornbuckle told the employees at the focus meeting that "it was a failed strategy to bring in a large number of part-time officers and it was being addressed and looked at." At a later focus meeting, Chuck Bowling, the Employer's executive vice president, repeated this comment. The Employer subsequently reinstated overtime opportunities for the full-time officers, though it is unclear whether this occurred prior to the election.

The judge recommended overruling the objection, finding that Hornbuckle's and Bowling's statements did not amount to an implied promise to restore overtime in order to influence the election outcome. We disagree.

The Board has long held that, in the absence of a previous practice of doing so, an employer's solicitation of grievances during an organizational campaign is objectionable when the employer expressly or impliedly promises to remedy those grievances. See, e.g., *Majestic Star Casino, LLC,* 335 NLRB 407, 407 (2001), citing *Maple*

[1] All dates are in 2008.

[2] The judge was sitting as a hearing officer in this representation proceeding. The Petitioner 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 have carefully examined the record and find no basis for reversing the findings.

[3] The Petitioner filed 19 objections. After the hearing, but before the judge issued his Report on Objections, the Petitioner withdrew Objections 6–11 and 17. The judge recommended that the Board overrule all of the Petitioner's remaining objections. Absent exceptions, we adopt pro forma the judge's recommendations concerning Objections 2, 3, and 13. We also adopt the judge's recommendation to overrule Objections 1, 4, 5, and 18, although we disavow the judge's finding that union observer Barry Gropp's "YES" sticker was not an "insignia" and that the wearing of it constituted improper electioneering. As explained below, we will sustain Objection 16 to the extent that it alleges that the Employer improperly solicited grievances about a change in its overtime policy and implicitly promised to remedy them.

Although we find it unnecessary to pass on Objections 12, 14, 15, 19, and the remaining allegations encompassed by Objection 16, we disavow the judge's broad statement that changes to an employer's grooming policy could not influence the outcome of a union representation election.

[4] These meetings differed from the Employer's preshift briefings, where shift managers issued daily assignments and provided employees with news and relevant information. The preshift meetings predated the petition.

[5] This was the only evidence of employee grievances presented to the Employer at preshift briefings or any other forum prior to the filing of the petition.

Grove Health Care Center, 330 NLRB 775 (2000); *Uarco, Inc.*, 216 NLRB 1, 2 (1974). An employer may rebut the inference of an implied promise by, for example, establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by clearly establishing that the statements at issue were not promises. See *Maple Grove Health Care Center*, supra at 775. While an employer that has had a past practice and policy of soliciting grievances may continue to do so during an organizational campaign, an employer cannot rely on past practice if it "significantly alters its past manner and methods of solicitation during the union campaign." *House of Raeford Farms*, 308 NLRB 568, 569 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994). Further, "the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary." *Majestic Star Casino*, supra at 407–408, citing *Uarco*, supra at 1–2.

Applying these principles, we find that Hornbuckle and Bowling solicited grievances and implicitly promised to remedy them at the preelection focus meetings that addressed the full-time security officers' overtime concerns. Contrary to the dissent, the burden was on the Employer to rebut the inference of an implied promise by establishing that, prior to the critical period, it had a past practice of soliciting grievances and implicitly promising to remedy them, or by clearly establishing that its "failed strategy" statements were not promises. See *Maple Grove Health Care Center*, supra at 775. Here, the Employer had been aware of the officers' dissatisfaction with the overtime policy for months, yet there is no evidence that high-level managers met with them to discuss their complaints about overtime or any other issue prior to the critical period. Unlike the pre-shift briefings, where shift managers communicated news and assignments to employees, the Employer's top officials convened the focus meetings for the purpose of answering employee concerns, soliciting complaints, and addressing issues pertaining to the Union's campaign.[6] Hornbuckle's and Bowling's statements referencing "a failed strategy" that "was being addressed and looked at" constituted a promise to look into a specific grievance that the Employer knew was of great importance to a large number of employees.[7] Contrary to the Employer's argument, these statements were not generalized expressions within the limits of permissible campaign speech or, as argued by the dissent, non-coercive expressions of opinion. See *Majestic Star Casino*, supra at 408 fn. 4. We therefore find that the Employer's conduct in this regard was objectionable and a new election is warranted.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, Security, Police and Fire Professionals of America (SPFPA).

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[6] Moreover, contrary to the dissent, there is no evidence that shift managers actually discussed the overtime policy or any other matter of concern with employees during preshift briefings, much less promised to remedy or reconsider those policies. Additionally, noting the unprecedented participation by the Employer's high-level managers at the focus meetings, we find that the Employer has failed to establish a consistent past practice of soliciting employee grievances. See, e.g., *Evergreen America Corp.*, 348 NLRB 178, 215–216 (2006), enfd. 531 F.3d 321 (4th Cir. 2008).

[7] The dissent notes that the judge, in discussing the allegation that the Employer changed its grooming policy to improperly influence the election, stated that Gropp was "far from an ideal witness in terms of his recall of events." Relying on this statement, the dissent suggests that the judge found all of Gropp's testimony to be unreliable, including that related to the alleged solicitation of grievances. We disagree. Gropp clearly testified that Hornbuckle and Bowling each told employees that "it was a failed strategy to bring in a large number of part-time officers and it was being addressed and looked at." Rather than discrediting this uncontroverted testimony, the judge implicitly credited it by overruling the objection on the basis that Hornbuckle's and Bowling's statements were not implied promises.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. August 17, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Unlike my colleagues, I would not reach out to reverse the judge's determination that the Petitioner, which lost the election by a vote of 123 to 110, failed to prove that certain indefinite and ambiguous remarks about overtime policy made to employees at two meetings on indeterminate dates constituted objectionable solicitations and implied promises to remedy grievances.

First, there is no dispute that the Employer had an established past practice that predated the filing of the election petition of conducting regular shift meetings with employees. Moreover the record clearly shows that employees could, and in fact did, raise concerns relating to their employment with management at those meetings. Indeed, as the judge found, employees began complaining to management during shift meetings about the change in overtime policy "almost immediately" after implementation of the policy in January 2008, long before the critical period. Moreover, employees reiterated those complaints and concerns "at just about every shift briefing thereafter." So my colleagues plainly err in attempting to characterize the preexisting shift meetings as narrow, one-sided employer recitations of daily assignments, and the "focus meetings" as unprecedented opportunities for the solicitation of employee grievances. In such circumstances, the burden was on the Petitioner to establish that the Employer instituted a new practice of entertaining employee grievances at meetings with management or significantly altered that practice of solicitation during the union organizing campaign. As the judge properly found, the Petitioner failed to satisfy that burden here.[1]

Second, the line between permissible campaign speech and an implied promise to remedy a grievance is a very fine one that turns upon the specific words used and the surrounding context. In reversing the judge and finding that the Employer's statements constituted implied promises, my colleagues rely solely on the testimony of employee Gropp. However, the judge described Gropp as "far from an ideal witness in terms of his recall of events." As to specific words, when asked what employees were told about the purpose of the "focus meetings," Gropp conceded that "I don't remember specifically how they communicated to us. I don't remember the specific words used." Further, while Gropp allegedly recalled Hornbuckle saying "it was a failed strategy to bring in a large number of part-time officers and that it was being addressed and looked at," the judge noted that Gropp "could not remember anything else that Hornbuckle said about the issue." Under the circumstances, I agree with the judge that it is difficult to characterize Hornbuckle's alleged statement and others to the effect that "they had made mistakes" as implied promises to restore the old overtime policy. On this spare record, and in light of the judge's characterization of Gropp's testimony and faulty recall, my colleagues err in supplanting their judgment for that of the trier of fact.

Finally, even assuming Gropp accurately recalled Hornbuckle's words, I still would not find the existence of objectionable conduct warranting a new election. As noted above, listening to employee complaints at meetings was an established management practice. And characterizing a change in policy that drew vociferous and continued opposition from numerous employees long before the petition was filed as a "failed strategy" strikes me as a permissible and noncoercive expression of opinion protected by Section 8(c). To the extent Hornbuckle suggested the problem was being "looked at," there is no evidence that the "looking" had not been initiated prior

[1] The only apparent possible difference between the discussions that occurred at the shift meetings and "focus meetings" is the presence of senior executives at the latter. I say "apparent" because there was no evidence that senior executives had never attended shift meetings, and the burden of proof, of course, rests with the objecting party. Even assuming the presence of executives was novel, the airing of grievances with management at meetings clearly was not, and there is no evidence to show that the presence of executives significantly altered that practice.

to the Union presence. In any event, the statement was at best ambiguous and the judge was precisely right in concluding that finding objectionable conduct based on Gropp's muddled testimony "would be a reach." I therefore respectfully dissent.

Dated, Washington, D.C. August 17, 2010

Peter C. Schaumber, Member

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