

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

EAST-WEST UNIVERSITY, INC.

Employer

and

13-RC-22017

**UNITED ADJUNCT FACULTY ASSOCIATION
AT EAST-WEST UNIVERSITY, IEA-NEA**

Petitioner

SUPPLEMENTAL DECISION

Pursuant to a petition filed on March 23, 2011, and a Decision and Direction of Election issued on April 21, 2011, a mail ballot election¹ was conducted on May 19, 2011, under the direction and supervision of the Regional Director for Region 13 of the National Labor Relations Board in the following unit of employees:

All regular part-time faculty employees employed by the Employer at its faculty presently located at 816 S. Michigan Avenue, Chicago, Illinois; excluding all full-time faculty, non teaching staff, office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act²

On February 4, 2010, the Employer filed a timely objection to conduct affecting election. A copy was served upon the Union. A copy is also attached to this report. Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the undersigned, after reasonable notice³ to all parties to present relevant evidence, has completed the investigation of the objections, carefully considered all evidence submitted by the parties, and issues this Report.

¹ The Tally of Ballots issued June 8, 2011 shows that there were approximately ninety eligible voters. Thirty-three ballots were cast for the Petitioner and twenty-four ballots were cast against the participating labor organization. There were no void ballots or challenged ballots. Thus, challenged ballots did not affect the result of the election.

² The payroll period ending date was March 30, 2011.

³ By letter of June 21, 2011, the Regional Director of Region 13 advised the parties of the obligation to submit timely evidence concerning the objections consistent with Section 102.69(a) of the Board's Rules and Regulations.

After careful consideration of the evidence submitted by the Employer and the applicable case law, the statements contained in the Union's flier do not appear coercive in nature. Instead, they merely appear to be an outline of the Union's objectives in bargaining, if it prevailed in the election. Furthermore, the Employer fails to present evidence demonstrating that the Union had any direct involvement in drafting the letter written by Spitzberg or disseminating Spitzberg's letter to eligible voters. Therefore, the documentary evidence, when analyzed in the context of the relevant Board law, does not support the Employer's assertion that both the content of the Union's flier and conduct of a pro-union employee unduly influenced eligible voters; thus rendering a rational choice impossible.

THE OBJECTION

Only one objection was filed, as follows:

The Employer objects on the basis that the United Adjunct Faculty Association at East-West University (hereinafter "the Union") unfairly influenced the voting by during the time the balloting was taking place circulated among those eligible to vote a statement containing misstatements of fact. The statement circulated is attached hereto as Employer's Exhibit A.

The Employer argues that the statements contained in the Union's flier "directly misstates the facts for the express purpose of unfairly influencing the vote." In addition, it contends that the Union's promises of job security, salary increases, a grievance procedure, and improvement in student learning are without basis and unfairly influenced the election. Furthermore, the Employer denies that the Union's assertion that management questioned employees regarding their union sympathies, noting that the Board permits the Employer to conduct "captive audience" meetings.

To support its claim that the Union attempted to unduly influence voters, the Employer submits a letter written by former adjunct professor Suzan Spitzberg. According to management, Spitzberg sent Dr. M.W. Khan, Chancellor of East-West University an e-mail after she received letters from him (dated May 9 and 13) regarding the upcoming election in which he stated "I prefer to deal directly with all colleagues as individuals..." Spitzberg rebutted this remark and cited two incidents in which management failed to support her. At the conclusion of her letter, Spitzberg wrote:

"Had there been union representation, I would have reported both incidents and asked for hearings with administration so that all sides of the incidents could be presented.

After the first incident, I declined to teach further at East-West because I felt that administration did not follow the rules that they themselves had set up. Had I not declined at that point, I definitely would have after the second incident because I then feared for my safety.

I truly believe that unions do not come into existence unless there is a need. What surprises me is that the adjunct faculty has waited so long to band together. I will be voting YES when I receive the secret ballot and I hope that all other adjunct faculty members will do so also."

The Employer contends that Spitzberg mischaracterized these incidents and attempted to “slant certain events in order to influence the election.” It argues that these “misstatements go beyond campaigning to falsehoods.” However, it fails to provide evidence demonstrating that (1) Spitzberg and/or the Union disseminated this letter to eligible voters or (2) that the Union had any involvement in drafting/sending this document. Furthermore, the Union denies that it solicited Spitzberg to draft this letter and/or distributed the document to Union. Instead, it asserts that management denied employees access to their Employer-issued e-mail accounts after Spitzberg used e-mail to communicate with her co-workers.

In *Taylor Wharton Division*, 336 NLRB 157 (2001), the Board outlined the test to evaluate whether a party’s conduct “has the tendency to interfere with the employees’ freedom of choice.” See also *Cambridge Tool Mfg.*, 316 NLRB 716 (1995). In determining whether a party’s misconduct has the tendency to interfere with employees’ freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

With regard to campaign literature and propaganda issued by unions and employer, the Board held in *Midland National Life Insurance Co.*, 263 NLRB 127, 130 (1982) that it would “no longer probe into the truth or falsity of the parties’ campaign statements.” In fact, in *AWB Metal, Inc.*, 306 NLRB 109 (1992), the Board distinguished between a document that allegedly misrepresented wage rates and forgery. See also *Care Enterprises*, 306 NLRB 491 (1992). Furthermore, it addressed the issue of third party misrepresentations in *Phoenix Mechanical*, 303 NLRB 888 (1991), finding no basis for setting aside elections in such circumstances.

In *Westwood Horizon Hotel*, 270 NLRB 802 (1984), the Board described the standards for assessing the nature of third-party conduct. See also *PPG Industries*, 350 NLRB 225 (2007). Third party conduct becomes actionable not only as a basis for objections filed by unions but also for those filed by employers where the latter allege conduct rendering impossible a rational, uncoerced choice in a Board election. The conduct of prounion employees who have no actual or apparent authority to act for the union is evaluated under third party conduct standard. *Corner Furniture Discount Center*, 339 NLRB 1122 (2003). In fact, in *Owens-Corning Fiberglas Corp.*, 179 NLRB 219, 223 (1969), the Board recognized that heated statements may be made by individual employees and that such conduct should be considered in determining whether employees were precluded from exercising a free choice, even absent employer or union responsibility, consideration should be given as to whether the conduct complained of was committed by the parties as distinguished from third persons, as

conduct by the latter “tends to have less effect.” See also *Lamar Advertising of Janesville*, 340 NLRB No. 14 (2003).

In the instant case, the statements by Spitzberg do not appear to be sufficiently coercive to affect voter choice; there is no evidence that the Union assisted in drafting or disseminating this document; and there is no evidence that the majority eligible voters received this document. Instead, the evidence provided by the Employer fails to demonstrate any unlawful interference by the Union or any third party during the critical period. Even if the Employer argues that the literature was unlawful campaigning during the election, its witness states that the mailing was postmarked on June 20, 2011, well after the election had concluded. There are no material facts or evidence at issue warranting a hearing. Crediting all of the Employer’s evidence it offers in support of its alleged objections, there is no evidence to suggest objectionable conduct occurred.

SUMMARY DETERMINATION

Based on the foregoing and the record as a whole, the Employer’s Objection is overruled.⁴

Dated at Chicago, Illinois, this 5th day of July, 2011



Gail Moran, Acting Regional Director
National Labor Relations Board
Region 13
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604-1219

Attachment: Objection By Employer to Election

⁴ Under the provisions of Section 102.69 and 102.67 of the Board’s Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, DC. The request for review must be received by the Board in Washington D.C. by July 19, 2011. Under the provisions of 102.69(g) of the Board’s Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

EAST-WEST UNIVERSITY)	
)	
Employer)	Case No. 13-RC-22017
AND)	
)	
UNITED ADJUNCT FACULTY)	
ASSOCIATION AT EAST-WEST)	
UNIVERSITY, IEA-NEA)	
)	
Petitioner)	

OBJECTION BY EMPLOYER TO ELECTION

Comes now East-West University and objects to the election held in this matter.

The Employer objects on the basis that the United Adjunct Faculty Association at East-West University (hereinafter "the Union") unfairly influenced the voting by during the time the balloting was taking place circulated among those eligible to vote a statement containing misstatements of fact. The statement circulated is attached hereto as Employer's Exhibit A.

Dr. M.W. Khan is the Chancellor of East-West University. He would testify in this matter that unknown faculty members left multiple envelopes in the office of his assistant Carolyn Fowlkes. That there were 3 envelopes postmarked June 20, 2011 and each envelope contained Exhibit A.

The cover page captioned "Why Vote Yes" makes the following statement:

"East-West University is violating federal laws in its campaign against the Union. Questioning employees about the Union is illegal."

Dr. Khan would testify that no one on behalf of the University questioned employees about the Union. "Captive audience" meetings are permitted by the employer. This statement directly misstates the facts for the express purpose of unfairly influencing the vote. The cover page further promises job security, regular salary increases, grievance procedures and improvement in student learning. These are all represented as if these issues went with a vote for the Union. These promises are without basis in fact and again meant to unfairly influence the election.

Spitzberg then states "While teaching at East-West, I found this to be untrue in a number of situations."

Dr. Injoo Jeong would testify that Winter quarter of 2011, she was Suzan Spitzberg's direct supervisor. On February 27, 2011 Spitzberg sent an e-mail to Dr. Jeong inquiring about policy on cheating. Dr. Jeong referred her to the school policy.

In Spitzberg's e-mail of March 8, 2011, Spitzberg questions Dr. Jeong about giving the student makeup work and states "I will continue to teach this class through the completion date of March 25. However I will not be returning to East-West to teach future classes."

Spitzberg in her letter circulated by the Union complains she was never advised if anything had been done.

Spitzberg's letter is misleading in that the second incident involving a student e-mail occurred after Spitzberg had already resigned. Spitzberg blames the administration for not responding to her without mentioning the quarter had already ended.

Dr. Jeong will testify as to the e-mails as a business record.

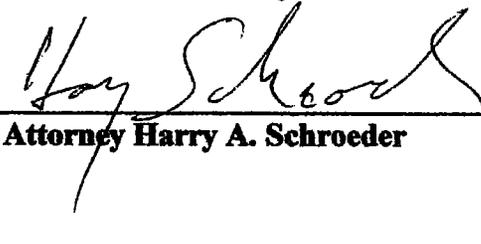
Spitzberg's letter was an attempt to slant certain events in order to influence the election. This is clear from the following excerpts from the letter.

"Had there been Union representation, I would have reported both incidents and asked for hearings."

Clearly these misstatements go beyond campaigning to falsehoods.

In addition to the foregoing, the Employer also objects to including on the voting list past employees whose contracts were not renewed but who taught in 2 of the last 3 years.

for East-West University

by 
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