

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

FIRST STUDENT, INC.

Employer
and

CYNTHIA CUMMINGS, an Individual

Case 14-UD-073216

Petitioner
and

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 509

Union

**HEARING OFFICER'S REPORT ON OBJECTIONS
AND RECOMMENDATIONS**

I. Introduction

This report contains my findings and recommendations regarding three objections to conduct allegedly affecting the results of the election filed by the Petitioner, Cynthia Cummings ("Petitioner"). The Petitioner's objections allege that the Union's conduct, through conversations and flyers, in the days prior to the election warrants setting aside the election. The facts are largely undisputed.

As described below, based on the record evidence and testimony, I find statements in the Union's conversations and flyers do not amount to objectionable conduct affecting the election results. Accordingly, I recommend the objections be overruled in their entirety.

II. Procedural History

Pursuant to a petition filed on January 26, 2012,¹ and a Stipulated Election Agreement approved by the Regional Director on February 3, an election by secret ballot was conducted on February 23, to determine whether employees desired to withdraw the authority of the Union to require, under its agreement with the Employer, that employees make certain lawful payments to the Union in order to retain their jobs in the following appropriate unit:

All drivers and monitors employed at the Employer bases with the St. Louis School District, Charter Schools, All Headstart programs and St. Louis Desegregation Program excluding all supervisors, office clerical employees, professional employees, mechanics, guards and all other employees.

The tally of ballots made available to the parties at the conclusion of the election revealed that of the 485 eligible voters, there were 4 void ballots, 194 votes cast in favor of withdrawing the union's authority to require, under its agreement with the Employer, that employees make certain lawful payments to the Union in order to retain their jobs, 118 votes cast against the proposition, and no challenged ballots. The tally of ballots further revealed that the required majority of eligible voters did not cast valid ballots in favor of the proposition. On February 29, the Petitioner filed timely objections to conduct affecting the results of the election.

On March 15, after a preliminary investigation of the objections, the Regional Director issued a Report on Objections, Order Directing Hearing and Notice of Hearing, (the "Regional Director's Report") in which he determined that the allegations of objectionable conduct raised substantial and material questions of fact best resolved by a hearing.

¹ All dates hereafter are in the year 2012 unless otherwise specified.

On March 27, 2012, a hearing was held in St. Louis, Missouri, before the undersigned, a duly designated hearing officer of the National Labor Relations Board. The Employer was represented by its Labor Counsel and the Union was represented by its Field Representative at the hearing. The Petitioner entered an appearance on behalf of herself on the record. The Counsel for the Regional Director appeared on behalf of the Regional Director. All parties present at hearing were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to offer evidence relevant to the issues to be heard.²

III. Legal Standard and Burden

It is well settled that representation elections are not lightly set aside. *Colgate Scaffolding & Equipment Corp.*, 354 NLRB 544, 546 (2009). To the contrary, there is a strong presumption that ballots cast under specific Board procedural safeguards accurately reflect the wishes of employees. *Id.* A party seeking to overturn the results of an election bears a heavy burden. *Safeway, Inc.*, 338 NLRB 525 (2002), quoting *Kux Mfg. Co., v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To sustain its burden of showing grounds for setting aside an election, an objecting party must show that the conduct complained of was coercive and that it was so related to the election as to have had a probable effect upon employees' choices at the polls. *CBS Records Div.*, 223 NLRB 709, 718 fn. 19 (1976). At all stages of the post-election proceedings, the burden of proof rests with the Petitioner as the party filing the objections. *Frontier Hotel*, 265 NLRB 343 (1982).

² This report does not contain resolutions as to credibility, as I find that the flyers distributed by the Union encompass the entire scope of the Petitioner's objections.

IV. Scope of the Hearing

A. Objections 1 and 2

Objections 1 and 2 are being considered together, as they arise from similar conduct and two similar flyers distributed by the Union in the days leading up to the election.

In the first objection, the Petitioner alleges that, subsequent to the filing of the petition and prior to the election, the Union through its “representative and organizers pervasively and falsely told members of the bargaining unit that the loss of their health insurance would be automatic or tantamount to automatic as a direct consequence of voting Yes to stop paying dues. This was communicated in face to face conversations between the Union agents and bargaining-unit members and printed literature delivered by hand to the bargaining unit. Moreover, the Union’s staff/agents falsely told many members of the bargaining unit that their wages would be reduced to \$7.25 an hour (or other very similar claims) automatically or essentially automatic as a direct result of voting Yes to stop dues.”

In the second objection, the Petitioner alleges that “the Union’s staff/agents told many members of the bargaining unit that they will no longer have a contract (collective bargaining agreement) and no representation automatic as a direct consequence of voting Yes to stop dues. This was communicated verbally face to face and printed literature delivered by hand to the bargaining unit. Moreover, the Union’s staff/agents falsely told many members of the bargaining unit that this election was to get rid of the contract and their union. This was conveyed verbally and in face to face conversation.”

In support of the first and second objections, the Petitioner introduced two flyers distributed by the Union. The first flyer (“the Wage Flyer”) stated under the Union’s LiUNA heading: “Voting The UNION SECURITY CLAUSE out of your contract, Is Putting Your Current Wages At-Risk! Can You Support Your Family On A Minimum Wage Salary? Your Wages Can Be Reduced to as low as \$7.25 per hour without a Union Contract. VOTE NO On February 23, 2012.” The bottom of the flyer contained the contact information for a Union representative for employees to contact with questions. (A copy of this flyer is attached as Exhibit 1).

The second flyer distributed by the Union (“the Caution Flyer”) was printed in color with a large yellow symbol with the word “CAUTION” printed underneath it. Above the symbol were the words “NO DUES” and below the symbol were the words “NO UNION.” The flyer also contained the following printed information: “If you vote to remove the ‘Union Security Clause’ in your current agreement, Local 509 will not be able to afford to represent you. Local 509 has the right to terminate its’ [sic] agreement with First Student Inc. St. Louis Metro Locations by submitting a letter of ‘Disinterest’. Don’t lose your Union at First Student Inc., St. Louis Metro Locations. The day you vote out the union security clause NO CONTRACT/NO REPRESENTATION.” The flyer had similar contact information for a Union representative at the bottom. (A copy of this flyer is attached as Exhibit 2).

In *Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB 247, 248-49 (1999), the Board held that a union may disclaim its role as the collective-bargaining agent for a group of employees and may do so in apparent retaliation to the employees’ filing of a deauthorization petition. The Board further held that the union may inform

employees that it will disclaim its role as collective-bargaining representative without providing employees with objective evidence that its continued representation of them would be unfeasible. *Id.* at 248. *Bake-Line Products* involved alleged 8(b)(1)(A) pre-election conduct of union representatives after an employee filed a UD petition. In that case, the union informed employees during its campaign that if it lost the election by a decisive margin, it would consider disclaiming its recognition, its action would leave the employees unrepresented, and would void the collective-bargaining agreement. In holding that the union did not violate the Act, the Board noted:

It is an economic reality that a union needs to be assured payment of dues from at least some employees in order to afford continuing to represent them. A union that loses a deauthorization election has no assurance that a sufficient number of employees will make regular payments on a voluntary basis. Thus, when a union says it may disclaim representation if it loses a deauthorization petition, this is a statement based on objective reality of representation...[T]here is a full symmetry between cessation of representation statements and the decision to cease representation in the deauthorization context. *Id.* at 249.

Based on the above, the Board held that the union lawfully informed employees that it would consider disclaiming recognition if it lost the election. The Board further found that the union lawfully informed employees of the possible consequences of its potential disclaimer of recognition, including the removal of union representation and collective-bargaining agreement. The union did not inform employees that it would remain the representative and fail to properly represent employees, and thus did not engage in conduct that warranted setting aside the election. *Id.*

Using the analysis and holding in *Bake-Line Products*, the Board subsequently affirmed two joint unions' ability to inform employees that it has the right to disclaim representation and that employee benefits would not be guaranteed absent representation

in *Trump Taj Mahal*, 329 NLRB 256 (1999). In that case, the petitioner objected to the unions' conduct in the week before a UD election. The Petitioner alleged that the unions threatened employees regarding what would occur if the employees voted in the favor of deauthorization, including two alleged threats made to employees: (1) that their continuation in the unions' pension plan might be sacrificed and (2) that the unions would cease representing employees. In fact, the unions sent letters to employees regarding the deauthorization election. One letter was sent to employees and stated that removing the union security clause from the collective-bargaining agreement could sacrifice the employees' continuation in the union's pension fund and could jeopardize a secure pension fund with a monthly guarantee of \$1,748 per month. Another letter sent to employees stated, "It would not be economically feasible for [the union] to continue to serve as your collective-bargaining representative in the absence of a union security provision." *Id.*

The Board held that the unions did not threaten to retaliate against the employees when they informed employees that their pensions may be at risk. The Board viewed this letter sent to employees as a "permissible statement about the consequence of a termination of the collective-bargaining relationship" between the unions and the employer, holding that without the relationship, the employer could no longer contribute to the pension fund. *Id.* Using the analysis in *Bake-Line Products*, the Board also held that the unions did not interfere with the conduct of the election when they informed employees of their right to disclaim recognition, as *Bake-Line Products* no longer requires that unions give objective evidence that it would be economically infeasible to

continue to represent that group of employees absent the union security clause. *Id.* Therefore, the Board declined to set aside the election.

Here, the Union distributed two flyers and had conversations with employees wherein Union representatives allegedly informed employees that it could disclaim its recognition of the bargaining unit and that their wages could be decreased without a union contract to as low as minimum wage. Although alleged in the objections, no evidence was presented that the Union told employees that their health insurance would be lost if they voted for the deauthorization proposition. Like *Trump Taj Mahal*, the Union here used the Wage Flyer to provide information to employees regarding the possible consequences of not having a collective-bargaining agreement in effect which sets out wages, hours and other terms of employment. The Union did not threaten employees in the Wage Flyer, as it did not threaten to withdraw benefits, but only described the possible consequences that would follow from its disclaimer of representation. The Caution Flyer sets forth the Union's right to disclaim the representation of the unit. The Union, by distributing a flyer that said "NO DUES NO UNION" was "merely describing a consequence of an action that...it was permitted to take:" i.e. disclaiming representation thereby voiding the terms of the collective-bargaining agreement with the Employer. See *Trump Taj Mahal*, 329 NLRB at 330.

Based on the above, I find that the Union did not engage in objectionable conduct when it distributed the Wage Flyer and the Caution Flyer to employees in the days before the election. The Union informed employees of its right to disclaim its representation and informed employees of the possible consequences of continued employment without a collective-bargaining agreement. Under *Bake-Line Products* and *Trump Taj Mahal*, the

Union was permitted to distribute these flyers and I recommend that Objections 1 and 2 be overruled in their entirety.

B. Objection 3

The third objection relates to a double-sided flyer printed in color that the Union passed out in the days prior to the election (“the Ballot Flyer”). The Petitioner alleges that 2 days before the election, the Union distributed the Ballot Flyer to employees, containing a “defaced/counterfeit” ballot with an X in the No box, “giving the impression that the NLRB (the Board) favors or endorses a choice in the election.” This flyer contained a reproduction of the notice of election provided to each of the parties prior to the election. Although the official Board notice is tri-folded, the reproduction made by the Union included only the middle section with the sample ballot. Therefore, some of the header and footer of the notice were cut off. In the sample ballot, the Union marked an “X” in red in the “NO” square. On the back of the flyer, directly underneath the Union’s “LIUNA MIDWEST REGION” header is the sentence, “On February 23, 2012 VOTE NO.” (A copy of this flyer is attached as Exhibit 3).

In *Ryder Memorial Hospital*, 351 NLRB 214, 216 (2007), the Board modified the official ballot to include the following language: “The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.” This language appears on both the actual ballot cast by employees and the sample ballot distributed to the parties prior to the election. Therefore, the Board required that the disclaimer language appear on any altered ballots distributed by parties to an election because, “[w]hen the Board’s complete disclaimer language does not appear on

separately distributed altered sample ballots...employees might perceive the ballots to be official Board documents that endorse one party of another.” Id. at 215. Thus, the Board held that the appearance of this language on an altered ballot removes the concern that employees would be misled into believing that the Board supports a particular party.³ Id.

In holding the disclaimer language to be sufficient, the Board in *Ryder* determined that it would decline to set aside elections where a party distributed an altered ballot provided that the altered sample ballot is an actual reproduction of the Board’s sample ballot and contains the Board’s disclaimer language. Id. at 216. An “actual reproduction of the Board’s sample ballot” refers to the official sample ballot shown on the notice of election which includes the disclaimer language on the ballot. In this case, the Union distributed an actual reproduction of the Board’s sample ballot with a red “X” in the “NO” box. The Board’s disclaimer language appeared on the altered ballot. In applying the principles found in *Ryder*, I find that the Union did not engage in conduct that would warrant setting aside the election when it distributed the Election Flyer.

In *Foster Poultry Farms*, 352 NLRB 1147, 1147 (2008), the Board ordered a new election after the union distributed altered sample ballots in three separate languages where the union did not use the Board’s sample ballot and the *Ryder* disclaimer language did not appear. That is not the case here. The Union’s altered ballot included the *Ryder* disclaimer language. Any confusion that employees may have had regarding the origin of the sample ballot would have been quelled if the employee flipped the flyer over, as the Union placed its logo on the back side of the flyer so it covered about one-quarter of the page. The back of the Election Flyer stated: “LiUNA! MIDWEST REGION On

³ The Board has yet to require any proof that bargaining unit employees actually read the disclaimer language.

February 23, 2012 VOTE NO.” Although the Board in *Ryder* held that the altering of a reproduction of an actual ballot is not objectionable conduct if it includes the disclaimer language, the Union’s addition of this back side removed any doubt regarding where the Election Flyer originated. Based on the above, the Union’s conduct does not warrant setting aside the election, and I recommend that Objection 3 be overruled in its entirety.

VI. Conclusions and Recommendations

Based on the above, I recommend that Petitioner’s Objections be overruled in their entirety and a Certification of Results issue certifying that a majority of employees eligible to vote have not voted in favor of the proposition on the ballot.

Any party may, within 14 days of issuance of this Report, file with the Board in Washington, D.C., an original and seven (7) copies of exceptions thereto. A copy of such exceptions shall immediately be served on the other parties and a copy with the Regional Director of Region 14. If no exceptions are filed, the Board may adopt the recommendations of the Hearing Officer or make other disposition of this case.

April 6, 2012



Rochelle K. Balentine, Hearing Officer
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63103-2829

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Hearing Officer's Report on Objections and Recommendations was served regular mail on this 6th day of April, 2012 on the following parties:

Ms. Aimee Sides, Senior Contract Manager
First Student, Inc.
5300 Hall Street
Saint Louis, MO 63147-2920

Mr. Todd R. Logan, Senior Labor Counsel
Firstgroup America, Inc.
600 Vine Street, Suite 1400
Cincinnati, OH 45202-2426

Ms. Cynthia M. Cummings
5322 Englewood Place, Apt A
Saint Louis, MO 63121-1517

Mr. John A. Chambers, Business Manager
Laborers' International Union of North
America, Local 509
536 N Taylor Ave., Fl 2
Saint Louis, MO 63108-1811

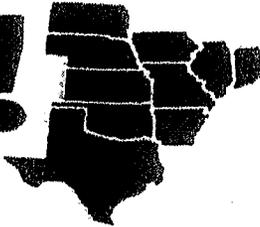
Mr. Rodney Masterson, Field Representative
Southern & Central Illinois Laborers' District
Council
5100 Laborers' Way, Suite A
Marion, IL 62959



Rochelle K. Balentine, Hearing Officer

LiUNA!

MIDWEST REGION

A stylized map of the Midwest region, showing the outlines of Illinois, Indiana, Michigan, Ohio, and Wisconsin.

Voting The **UNION SECURITY CLAUSE** out of
your contract,

Is Putting Your Current Wages At-Risk!

Can You Support Your Family On A
Minimum Wage Salary?

Your Wages Can Be Reduced to as low as
\$7.25 per hour without a Union Contract.

VOTE NO

On February 23rd 2012

EXHIBIT

1

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QUESTIONS? Contact MATT SMITH at 314-531-4669

If you vote to remove the "Union Security Clause" in your current agreement, Local 509 will not be able to afford to represent you.

NO DUES



NO UNION

Local 509 has the right to terminate its' agreement with First Student Inc. St. Louis Metro Locations by submitting a letter of "Disinterest".

Don't lose your Union at First Student Inc., St. Louis Metro Locations. The day you vote out the union security clause

NO CONTRACT / NO REPRESENTATION

Questions? Contact Matt Smith @ 314-531-4669



NATIONAL LABOR RELATIONS BOARD

ELECTION



VOTING UNIT

Those eligible to vote are: All drivers and monitors employed at the Employer bases within the St. Louis School District, Charter Schools, All Headstart programs and St. Louis Desegregation Program, excluding all supervisors, office clerical employees, professional employees, mechanics, guards and all other employees, who were employed by the Employer during the payroll period ending January 28, 2012.

DATE, TIME AND PLACE OF ELECTION

Thursday, February 23, 2012	8:30 a.m. to 10:30 a.m. and 11:30 a.m. to 1:30 p.m.	Conference Room 700 S Spring Ave, Saint Louis, MO
Thursday, February 23, 2012	8:30 a.m. to 10:30 a.m. and 11:30 a.m. to 1:30 p.m.	Training Room #2 Union Seventy Drive, Saint Louis, MO
Thursday, February 23, 2012	8:30 a.m. to 10:30 a.m. and 11:30 a.m. to 1:30 p.m.	Interior Room Located On the 2nd Floor 5300 Hall St, Saint Louis, MO

IMMEDIATELY UPON THE CONCLUSION OF THE LAST VOTING SESSION AT #2 UNION SEVENTY DRIVE, ALL BALLOTS CAST DURING ALL VOTING SESSIONS WILL BE COMINGLED AND COUNTED.

EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

	UNITED STATES OF AMERICA National Labor Relations Board	
OFFICIAL SECRET BALLOT		
For certain employees of FIRST STUDENT, INC.		
Do you wish to withdraw the authority of LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 509 to require, under its agreement with the employer, that employees make certain lawful payments to the union in order to retain their jobs?		
MARK AN "X" IN THE SQUARE OF YOUR CHOICE		
YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>	
DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box. If you spoil this ballot, return it to the Board Agent for a new one.		
<small>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</small>		

EXHIBIT

3

ELECTION AND MUST NOT BE DEFACED BY ANYONE

LIUNA!

MIDWEST REGION



On February 23, 2012

VOTE

NO