UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Fort Wayne, IN

SHAMBAUGH & SONS, L.P.
Employer

and

Case 25-RC-062774

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 103 and LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 213
Joint Petitioners

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1393
Intervenor

HEARING OFFICER'S REPORT ON OBJECTIONS AND RECOMMENDATIONS TO THE BOARD

Pursuant to Stipulated Election Agreement, an election was conducted on February 13, 2012, among certain employees of the Employer to determine whether or not they desired to be represented by Joint Petitioners or Intervenor for purposes of collective bargaining.[1]

On February 21 Joint Petitioners timely filed an objection to conduct affecting the results of the election. Following an investigation of the issues raised by the Objection, on March 21

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[1] The appropriate unit, as set forth in the Stipulated Election Agreement, is as follows:

> All equipment operators, groundmen, groundmen truck drivers, signal technicians and signal foremen employed by the Employer; BUT EXCLUDING all office clerical employees, professional employees, employees currently employed under a collective bargaining agreement, guards and supervisors as defined in the Act, and all other employees.

The Tally of Ballots at the conclusion of the election showed the following results:

Approximate number of eligible voters	23
Number of void ballots	0
Number of votes cast for the Joint Petitioners	8
Number of votes cast for the Intervenor	12
Number of votes cast against participating labor organization	0
Number of valid votes counted	20
Number of challenged ballots	1
Number of valid votes counted plus challenged ballots	21

A majority of the valid votes counted plus challenged ballots have been cast for the Intervenor

the Regional Director of Region Twenty-five issued his Report on Objections, Order Directing Hearing, and Notice of Hearing. In his Report, the Regional Director ordered a hearing be conducted before a hearing officer to resolve the issues of fact and credibility raised by Joint Petitioners' Objection. Pursuant to this order, a hearing was conducted before me on April 17 in Fort Wayne, Indiana. Joint Petitioners, Intervenor, and Employer were present at the hearing, with representatives of their choosing, were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues.

The findings, conclusions, and recommendations herein are based upon the undersigned's consideration of the record as a whole and observation of the demeanor of the witnesses.[2] Joint Petitioners' Objection alleges that representatives of Intervenor promised employees employment as training instructors or business representatives of Intervenor in return for the employees' support of the Intervenor.[3] Based upon the record as a whole, and for the reasons discussed more fully below, I recommend that Joint Petitioners' Objection be overruled.

I. BOARD LAW

In considering objections to an election, the burden is on the objecting party to prove its case. A Board-conducted representation election is presumed to be valid. See, e.g., NLRB v. WFMT, 997 F.2d 269 (7th Cir. 1993); NLRB v. Service American Corp., 841 F.2d 191, 195 (7th Cir. 1988); Progress Industries, 285 NLRB 694, 700 (1987). Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election. As the Board has noted:

> It is well settled that "[r]epresentation elections are not lightly set aside." Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." Accordingly,

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[2] While I may have addressed the credibility of specific witnesses with regard to certain matters more fully herein, the absence of a statement of resolution of a conflict in specific testimony, or the absence of an analysis of such testimony, does not mean that such analysis and resolution did not occur. See, e.g., ABC Specialty Foods, Inc., 234 NLRB 475 (1978); Walker's, 159 NLRB 1159 (1966); Trumbull Asphalt Co. v. NLRB, 314 F.2d 382, 383 (7th Cir. 1963) (citing as authority U.S. v. Pierce Auto Lines, 327 U.S. 515, 529 (1946)). The Board has long held that the failure of the trier of fact to detail completely all conflicts in the evidence does not mean that this conflicting evidence was not considered and he is not compelled to annotate each such finding. See, e.g., Borman, Inc., 273 NLRB 312 (1984); Walker's, supra. To the extent that the particular testimony of a witness does not conform to the facts recounted herein, that testimony is discredited and found unreliable.

[3] At hearing, Joint Petitioners moved to present evidence of additional objectionable conduct bearing upon the conduct of the election, namely a conversation between one of Intervenor's representatives and an employee on the day of the election. I denied Joint Petitioners' request to present such evidence, noting that it was not included within the scope of the original objection nor the Regional Director's Report setting this matter for hearing. Similarly, some evidence was presented that Intervenor had, during meetings with employees, discussed filing lawsuits if the Employer was denied contracts because the employees chose to be represented by Intervenor. To the extent Joint Petitioners are arguing that such conduct is objectionable, I would note that such conduct was apparently never alleged to be objectionable prior to the start of the hearing, is beyond the scope of the matter set for hearing before me by the Regional Director, and therefore I am not passing on such evidence in reaching my recommendation.

> "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'"

Safeway, Inc., 338 NLRB 525 (2002) (quoting NLRB v. Hood Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991) and Kux Mfg. Co. v. NLRB, 890 F.2d 804, 808 (6th Cir. 1989)).

With regard to an alleged promise of benefits, either express or implied, the Board looks not only at the statement itself, but also considers "the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise." G&K Services, Inc., 357 NLRB No. 109, slip op. at 2 (Nov. 7, 2011). The Board has found promises of employment by a union who effectively controlled the labor market to be objectionable conduct. See Alyeska Pipeline Serv. Co., 261 NLRB 125 (1982). Similarly, the gift of immediate benefits, such as a life insurance policy, to those employees who "signed up" with the union in advance of the election is also objectionable. See Wagner Elec. Corp., 167 NLRB 532 (1967). In contrast, a union is generally free to publicize existing benefits that are incidental to union membership, such as eligibility to receive strike benefits or free legal assistance. See Dart Container of California, 277 NLRB 1369 (1985). In Dart Container, the union distributed two leaflets to employees, one indicating that once the union won the election employees would be eligible for benefits which included access to a strike fund, and the second indicating that a benefit of membership in the union was free legal help. In overruling the employer's objections, the Board noted that neither benefit required employees to support the union before the election. Id. at 1369. And in particular regard to the free legal help, the Board noted that "[w]e do not believe that a union interferes with an election when it promises to extend an existing incident of union membership to new members." Id. at 1370.

II. APPLICATION OF BOARD LAW TO THIS CASE

In general, I found that all of the witnesses testified in an honest and forthright manner. Recollections of a particular shared event can often vary between witnesses and memories can degrade over time, but such variance does not mean that a conversation did not occur or that the witnesses' testimony was somehow tainted by subsequent conversations. I do note that some of the testimony presented at the hearing, particularly from witnesses Charlie Pavelec and Matthew Hosford, amounted primarily to hearsay; while such evidence is in the record, I place very little reliance upon it in making my recommendation.

Based upon the record evidence and my observation of the various witnesses, I conclude that Intervenor held a meeting with employees on December 12, 2011. During the course of that meeting, the subject turned to training and Intervenor's apprenticeship program. In discussing the signal technician classification, Intervenor's Business Agent, Randy Gardiner, asked the assembled employees who the most qualified signal technician was. The employees identified two individuals, and of those two they indicated that Dan Connelly was the most qualified in that position. After ascertaining Connelly's skills, qualifications, and past experience, Gardiner indicated that Connelly would be qualified under Intervenor's apprenticeship program as a journeyman signal technician. Gardiner then went on to explain, in talking about advancement opportunities with Intervenor, that a journeyman such as Connelly would be eligible to become a part-time "Saturday School" instructor with Intervenor's affiliated American Line Builders

Apprenticeship Training ("ALBAT") program.[4] As the meeting was concluding, Connelly approached Gardiner and asked for additional information about the Saturday School instructor position, and during that discussion Gardiner mentioned a further opportunity for advancement within ALBAT would be for Connelly to move from a Saturday School instructor into a full-time area coordinator position. It was during this subsequent conversation that the area coordinator's salary (in excess of $90,000) was mentioned.

With regard to the first part of Joint Petitioners' Objection, Intervenor's alleged promise of employment as a training instructor, I find no such promise of employment was made by Gardiner. In making his statements, Gardiner did not actually offer Connelly, or any of the other employees, the Saturday School instructor position. Rather, Gardiner explained to the assembled employees one career path that could be pursued by members of Intervenor, namely becoming a Saturday School instructor through ALBAT and perhaps ultimately an area coordinator. To the extent that such a statement by Gardiner could be perceived as a "promise" of benefits, I find it to be a permissible description of a benefit incidental to membership akin to the Dart Container line of cases. Nothing in Gardiner's statement limited the Saturday School instructor position to only those employees who "signed up" for or otherwise supported Intervenor prior to the election. Nor was the Saturday School trainer position created just to entice Employer's employees to support Intervenor. Rather, Gardiner's statement indicated that the Saturday School instructor position was an existing position open to anybody who had achieved Connelly's level of experience. Further, the statement arose in the context of explaining Intervenor's apprenticeship program and how any employee in that apprenticeship program could advance to the level of journeyman signal technician, which would then make them eligible to apply for the Saturday School instructor position. I therefore find that Joint Petitioners have failed to carry their burden of showing that Gardiner's statement interfered with the conduct of the election and recommend overruling the first aspect of the Objection.

Joint Petitioners' Objection also includes an allegation that Intervenor offered employees a position as a business representative with Intervenor if the employees supported Intervenor. However, the record reflects no evidence of any such promise made by Gardiner or any other representative of Intervenor. In fact, the only discussion of the "business representative" position in the record is Gardiner's own testimony about the requirements for appointing such an official. I therefore find no support for that portion of the Objection and would overrule it.[5]

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[4] Although Intervenor and ALBAT are separate entities, I believe the employees could easily have misunderstood the relationship between Intervenor and ALBAT and assumed that the two were closely related and/or that Intervenor had control over positions within ALBAT.

[5] I note that some testimony did indicate that employee Kent Love was elected as a steward for Intervenor at the meeting that occurred on December 12. Although not specifically set out as objectionable conduct, either in Joint Petitioners' Objection or the Regional Director's Report setting this matter for hearing, I would not find such conduct to be objectionable. The record reflects that no compensation was offered for the steward position, Love was suggested as a viable candidate since he had previously been in contact with Gardiner, and the employees present at the meeting agreed that Love would be a good candidate. The steward position was not presented as a prestigious or even necessarily desirable position but rather was more of a contact person to assist in the organizing, was not tied to the outcome of the election, and I do not find that the events, as described in the record, amounted to a promise of benefits that would sway employees' votes in the election.

III. RECOMMENDATION TO THE BOARD

Based upon the foregoing and the record as a whole, I recommend that the Joint Petitioners' Objection to the election be overruled and that an appropriate certification issue.

IV. APPEAL PROCEDURE

Right to File Exceptions: Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W, Washington, D.C. 20570-001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on May 24, 2012, at 5:00 pm (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically. If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 pm Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board my grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

ISSUED at Indianapolis, Indiana, this 10th day of May 2012.

Derek A. Johnson
Hearing Officer
National Labor Relations Board
Region Twenty-Five
Minton-Capehart Federal Building, Room 238
575 North Pennsylvania Street
Indianapolis, Indiana 46204