

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

**CARE ONE AT MADISON AVENUE, LLC
D/B/A CARE ONE AT MADISON AVENUE,**

Employer,

And

Case No. 22-RC-072946

**1199 SEIU, UNITED HEALTHCARE WORKERS
EAST,**

Petitioner.

Employer's Opposition to Petitioner's Exceptions to the Regional Director's Report on Objections

The Employer, Care One at Madison Avenue, LLC d/b/a Care One at Madison Avenue ("Employer"), by and through its attorneys and pursuant to Section 102.69(c) of the National Labor Relations Board's Rules and Regulations, files this opposition to Petitioner's Exceptions to the Regional Director's Report on Objections in the above-captioned matter. Petitioner's Application for Exceptions was filed on or about May 15, 2012.

The election at Care One at Madison Avenue was held on March 23, 2012. The Union, 1199 SEIU United Healthcare Workers East ("Petitioner" or "Union") lost the vote, 58 to 57, with one challenged ballot. On or about March 30, 2012, the Union filed Objections to Conduct Affecting the Results of the Election, which included twenty (20) objections. On or about April 6, 2012, the Union provided further evidence in support of the objections.

On or about May 1, 2012, the Regional Director for Region 22 issued a determination on the Union's objections, finding that a hearing should be scheduled on seventeen (17) of the objections. One of the objections rejected by the Regional Director was Objection 18, in which Petitioner argues that the Employer threatened employees that it would (1) shut down its

business, (2) discharge employees, and (3) lock out employees if the employee selected the Petitioner as their bargaining representative.

In support of this objection, Petitioner submitted a so-called “Vote No” campaign leaflet, which it wrongfully attributes to the Employer, arguing that it was posted throughout the facility and distributed by a supervisor during the campaign. Other than these general statements, Petitioner provides no specifics with respect to the time, date or manner in which this leaflet was posted, or the names of any employees that would testify as to these facts. Moreover, the Petitioner has set forth absolutely no evidence that this leaflet was drafted by, endorsed, distributed, or within the knowledge of the Employer.

Additionally, the Petitioner submits a second leaflet, “Get the Facts!” in which Petitioner argues that the Employer “threatens that voting for the Union will put employees’ jobs in jeopardy.” Despite its assertion that the Regional Director received this leaflet prior to his Report on Objections, Petitioner sets forth no evidence that it was submitted within the required time limitations set forth in the Board’s Rules and Regulations, or that it was actually received by the Regional Director. Regardless, the Petitioner has failed to prove that the language set forth in this second leaflet is unlawful.

In his ruling, the Regional Director properly held, “The leaflet in question (“Vote No”), attached hereto as Attachment 3, does not contain any identification indicating that it was from the Employer. The Petitioner did not submit or offer to provide any evidence to show that the Employer prepared, distributed or posted it. Although it contains an anti-Union campaign message, I conclude that the Petitioner’s offer of proof is insufficient to conclude that the leaflet can be attributed to the Employer or that the Employer interfered with the election as alleged.” The Regional Director did not include a discussion of the “Get the Facts!” leaflet in his Report.

For the reasons set forth in the Regional Director's May 1, 2012 Report, the Petitioner's Exceptions to the Regional Director's Report on Objections should be properly denied.

I. Petitioner Has Presented No Evidence That The "Vote No" Leaflet is Attributable To The Employer Either Directly Or Through Third Party Conduct

In its May 15, 2012 submission, Petitioner challenges the Regional Director's finding that the evidence set forth in Objection 18 as to the "Vote No" leaflet does not rise to the level necessary to submit this issue to a hearing. Specifically, Petitioner argues that the leaflet is attributable to the Employer because it contains a message similar to other employer-drafted communications and was allegedly distributed around the facility, including by a supervisor. As a result, Petitioner argues a hearing on this issue should be granted because the language in the leaflet is specifically prohibited by Section 8(c) of the National Labor Relations Act and under *Laidlaw Corp.*, 171 NLRB 1366 (1968).

The problem with this argument is that both in its Objections' evidence, and again in the Exceptions to the Regional Director's Report, the Petitioner has utterly failed to present any evidence that the Employer drafted, endorsed, distributed, or had any knowledge of this leaflet. In fact, the first line of the May 15 submission, states clearly that, "[T]he 'Vote No' leaflet does not contain any identification that it was produced by the Employer." Nonetheless, Petitioner attempts unsuccessfully to argue that it should be held against the Employer.

Furthermore, Petitioner provides absolutely no specifics with respect to the time, date or manner in which this leaflet was posted, or the names of any employees that would testify as to these facts. Petitioner's blind assertions are simply not persuasive and were rightfully rejected by the Regional Director.

In the alternative, Petitioner argues that the Board should allow a hearing on whether the leaflet constitutes objectionable third party conduct. In support of this argument, Petitioner cites

Westwood Horizons Hotel, 270 NLRB 802 (1984), for the appropriate test in determining whether the actions of a third party warrant a new election.

In a recent case, the Board discussed the requirements of *Westwood*. *Mastec North America, Inc., d/b/a Mastec Direct TV and Communications Workers of America, Local 3871*, 2011 NLRB Lexis 73 (March 11, 2011). In *Mastec*, the Board held “[I]t is settled that the Board will not set aside an election based on third-party threats unless the objecting party proves that the conduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” Citing *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); see also *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). In assessing the seriousness of an alleged threat, the Board considers the following factors: (1) the nature of the threat itself; (2) whether it encompassed the entire unit; (3) the extent of dissemination; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *Westwood*, 270 NLRB 803.

Applying the *Westwood* factors, the Board in *Mastec* found that the Employer has failed to show that the employees' conduct created a general atmosphere of fear and reprisal rendering a free election impossible. With regard to certain physical threats, the Board held that the *Westwood* factors weigh against finding them sufficiently serious to be objectionable. Initially, there was no evidence that the third party individuals alleged to be making the threats were capable of carrying them out. Additionally, the threats did not encompass the entire unit, nor were they disseminated beyond the employees present. Finally, while the threats were made close in time to the election, the other *Westwood* factors weighed against sustaining the

objection. As a result, the Board held that the third party conduct was not sufficient to suppress employee free choice.

Similarly, the evidence presented on the “Vote No” leaflet is insufficient to make a finding that employee free choice was suppressed. Petitioner has not presented any evidence that the leaflet was distributed to any employee, let alone the entire bargaining unit. Petitioner only makes vague allegations that the leaflet was distributed around the facility, and in one instance, by a supervisor. The Petitioner has failed to set forth the name of the supervisor, how many people the supervisor allegedly distributed the leaflet to, or the circumstances surrounding the distribution. Additionally, since the identity of the supervisor and the witnesses is unknown, there can be no finding that the supervisor was capable of carrying out any threats contained in the leaflet. Finally, there has been no evidence or testimony presented regarding the time period by which this leaflet was allegedly distributed.

What has been presented is a leaflet with no markings to indicate ownership and a few unsupported allegations made by Petitioner. This is simply not enough to warrant a hearing. Accordingly, the Employer respectfully requests that the Board confirm the Regional Director’s determination with respect to Objection 18.

II. Petitioner Has Presented No Evidence That The “Get the Facts!” Leaflet Was Properly Served Or That It Contains An Unlawful Threat of Job Loss

Pursuant to 29 C.F.R. §102.69(a), “[W]ithin 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.” On or about April 6, 2012, Petitioner filed a supplemental document purporting to be evidence available to support its Objections, which had been filed on or about March 30, 2012. In its May 15, 2012 submission, Petitioner admits that the “Get the Facts!” leaflet was submitted “prior to the Regional Director’s

issuance of his Report,” but made no argument that it was submitted within the appropriate time limitations, or pursuant to an extension of time granted by the Regional Director. Thus, as an initial matter, because the “Get the Facts!” leaflet was untimely filed, the Regional Director properly ignored it in his Report issued on May 1, 2012.

Regardless, Petitioner has failed to prove that the contents of the leaflet were unlawful in anyway. It is well-established that an employer’s statement that a strike could put an employee’s job in jeopardy is lawful. *Extendicare Health Services, Inc.*, 350 NLRB 184 (2007). In *Extendicare Health Services, Inc.*, the employer operated a nursing home and took over a new facility, which had an existing collective-bargaining relationship with a union. The employer voluntarily recognized the union and engaged in contract negotiations. When the negotiations fell apart, the union sent a strike notice to the employer. In response to the strike notice, the employer issued a letter to its employees which stated, *inter alia*, “[i]n a strike the Company would be forced to hire replacements to be sure we can take of residents. This puts each striker’s continued job status in jeopardy.” *Id.* The Union argued that this statement constituted a threat of termination in violation of the Act. The Board disagreed, finding that this statement did not constitute an unlawful threat, and thus did not restrain or coerce employees under the Act.

In making its determination, the Board examined cases which discussed this very issue. For example, in *Unifirst Corp.*, 335 NLRB 706, 707 (2001), the Board, *citing Eagle Comtronics*, 263 NLRB 515 (1982), held that Section 8(c) of the Act "permits an employer to make predictions about the consequences of union representation, provided its remarks are not accompanied by a threat of reprisal or force or promise of benefit." Additionally, in *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988), the Board found that it was unobjectionable for the employer to advise employees that "strikers can lose their jobs[;] . . . [h]owever, they are not

discharged, technically speaking. But they're not working" The Board reasoned that "the statement may leave some employees puzzled about how economic strikers can return to work, but it does not imply that they are discharged."

Conversely, the Board held that cases relied on by the ALJ and the dissent are distinguishable because in each one the employer exceeded the scope of permissible speech delineated in *Eagle Comtronics* by threatening employees with permanent job loss. For example, in *Wild Oats Markets, Inc.*, 344 NLRB No. 86, slip op. at 24-25 (2005), the employer stated that "when Unions go on strike, . . . many have lost their jobs because striking workers are replaced." Similarly, in *Kentucky River Medical Center*, 340 NLRB 536, 546 (2003), the employer stated that replaced strikers would be reinstated only if the employer had openings when the strike was over, "but if the [r]espondent did not then have such openings the employees would lose their jobs." Finally, in *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 462 (2003), the employer posted campaign literature that included the assertion that the law "does not require the Company to rehire you if you have been permanently replaced."

Here, the challenged question in the "Get the Facts!" leaflet -- "Do you want to give outsiders the power to jeopardize your job by putting you out on strike," is lawful under *Extindicare*, *Eagle Comtronics* and *John W. Galbreath & Co*, as it is akin to a prediction about the consequences of union representation, and in no way can be interpreted as a threat of reprisal or force or promise of benefit. Simply stated, the language in the leaflet is not prohibited by the relevant case law.

Based on the foregoing, there is absolutely no legal or factual basis supporting the Petitioner's allegations. Accordingly, the Employer respectfully requests that the Board reject Petitioner's arguments with respect to the "Get the Facts!" leaflet and not permit this issue to be

explored any further at hearing.

Respectfully submitted,

s/Jedd Mendelson

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of May, 2012, the foregoing Opposition to Petitioner's Exceptions to the Regional Director's Report on Objections was served on:

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