

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

METCALFE FOODS – WEST, INC.

Employer

and

Case 30-RC-079306

**UFCW (UNITED FOOD AND COMMERCIAL WORKERS),
LOCAL 1473**

Petitioner

**REPORT AND RECOMMENDATION ON OBJECTIONS TO
CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to a petition filed on April 23, 2012 and a Stipulated Election Agreement approved by the Regional Director on May 2, 2012, on June 1, 2012 an election was conducted among employees in the following unit:

All full-time and regular part-time employees of the Employer at its 7455 Mineral Point Road, Madison, Wisconsin location, who work in the meat department and are involved in the handling and selling of meat products, excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.

The results of the election, as set forth in the tally of ballots served on the parties on the day of the election, show that there were approximately eight eligible voters, five cast ballots for, and three cast ballots against Petitioner. There were no challenged ballots to affect the results of the election.

On June 8, 2012, the Employer filed timely objections, a copy of which was served on the Petitioner, and is attached as Appendix A.

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has investigated the issues raised by the objections and reports as follows:

THE OBJECTIONS

Objections 1 and 2

The Employer's first two objections relate to alleged misrepresentations regarding pension benefits made to two employees.¹ The Employer provided no evidence as to when these alleged misrepresentations occurred but for the purposes of this Report, I will assume they occurred during the critical period. In support of its contentions, the Employer provided a copy of the applicable articles of the United Food and Commercial Workers Unions and Employers Pension Plan ("the Plan") and submitted Employer-prepared affidavits from certain of its managers or supervisors.

According to the Employer's evidence, one employee told one of the managers or supervisors that based on his conversation with a retired member of Petitioner, he understood that he could not work more than 20 hours per month and collect pension benefits at the same time and that employees may not work at a non-union shop while collecting pension benefits. Another employee reported to one of the managers or supervisors that he had called the Petitioner's Milwaukee office and spoke with an unidentified woman who told him that he had to work in a union shop in order to collect his pension benefits and still work and that he could not work more than five hours per week and collect pension benefits at the same time. The Employer asserts that both statements misrepresent the Plan's terms which allow employees to

¹ Both employees had previously been employed by Cub Foods, which closed prior to the Employer's opening, and were participants in the United Food and Commercial Workers Unions and Employers Pension Plan.

work up to forty hours per month for a non-union shop, without being disqualified from receiving pension benefits.² Petitioner denies that any such misrepresentations took place and that had anyone called its office inquiring about pension benefits, they would have been directed to the United Food and Commercial Workers Unions and Employers Pension Fund office, given the complex nature of the Plan.

It is well settled that representation elections are not lightly set aside. *Affiliated Computer Services, Inc.*, 355 NLRB No. 163 (2010). The burden is on the objecting party to show by specific evidence that there has been prejudice to the election. *Id.* citing *NLRB v. Mattison Machine Works*, 365 U.S. 123, 123-124 (1961). As a preliminary matter, there is no contention or evidence that the retired member of Petitioner acted as an agent of the Petitioner or that he was speaking on behalf of Petitioner. Regardless, I do not find that the alleged misstatements, made by the retired member and the unidentified woman, rise to the level of objectionable conduct. The Board “will no longer probe into the truth or falsity of the parties’ campaign statements,” and “will not set elections aside on the basis of misleading campaign statements.” *Midland National Life Insurance Co.*, 263 NLRB 127 at 133 (1982). In this matter, both statements allegedly made by the unidentified woman and the retired member are akin to the misrepresentation which the Board held in *Midland National Life Insurance Co.*, would not be sufficient to set aside an election. For this reason, I recommend that these objections be overruled.

² The Plan provides in Article 5.7 entitled “Entitlement to Pension Benefits Upon Continued Employment or Reemployment” that “Pension payments shall be suspended for any month a Participant or former Participant engages in Prohibited Employment.” Amendment No. 15 of the Plan, states that “Prohibited Employment” means “...completion of 40 hours or more of service...in a month in employment or self-employment of the type described below... [d] for an employer which does not have a collective bargaining agreement with a Union.”

Objection 3

In its third objection, the Employer asserts that a prospective voter brought a camera into the voting area and told Petitioner's observer that he had some fishing pictures to show him. At that time, the NLRB agent conducting the election told the prospective voter that Petitioner's observer was not allowed to speak with him or to look at any pictures and that he should put the camera away. The prospective voter persisted in trying to get Petitioner's observer to look at the pictures and the NLRB agent again instructed the prospective voter to put the camera away a second time, which he did. The Employer argues that this violated the "laboratory conditions" for an election. Petitioner, while confirming that an employee did approach its observer in an attempt to show him pictures, asserts the brief interaction between its observer and voter did not interfere with a free and fair election. There is no evidence that any other voters were present during this interaction.

In deciding whether the "laboratory conditions" of an election were violated, the standard is whether "the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place, Inc.*, 268 NLRB 868, 868 (1984). The objecting party has the burden of proving interference with the election. See *Jensen Pre-Cast*, 290 NLRB 547 (1988). Because there is no evidence that the voter attempting to show Petitioner's observer his fishing pictures had a tendency to interfere with the employees' freedom of choice, I recommend that this objection be overruled.

Objection 4

The Employer supplied no evidence in support of this "catch all" objection. I therefore recommend that it be overruled.

CONCLUSIONS AND RECOMMENDATIONS³

Based on the foregoing, I recommend that the Employer's objections be overruled in their entirety. I further recommend that a Certification of Representative issue.

Signed at Milwaukee, Wisconsin on June 27, 2012.



Irving E. Gottschalk, Regional Director
National Labor Relations Board
Thirtieth Region
310 West Wisconsin Avenue, Suite 700W
Milwaukee, WI 53203

³ Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, DC. Exceptions must be received by the Board by July 11, 2012. Under provisions of Section 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 which are not included in the Report, are not a part of the record before the Board unless appended to the exceptions or opposition thereto which 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 Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. *Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

NATIONAL LABOR RELATIONS BOARD
REGION 30

<p>Metcalfe Foods-West, Inc. ("Metcalfe West"), Employer, vs. United Food & Commercial Workers, Local 1473, AFL-CIO, Union.</p>	<p>Case No. 30-RC-079306</p> <p>2012 JUN - 8 PM 13 MILWAUKEE, WI REGION 30</p>
---	--

RECEIVED
NLRB

**METCALFE WEST'S OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF
THE ELECTION**

The Employer, Metcalfe West, objects to conduct affecting the results of the election held on June 1, 2012 by the Union ("Local 1473"), its officers, agents, employees, or affiliates.

Metcalfe West's objections are as follows:

1. A representative of Local 1473 or of the Trustees of the United Food and Commercial Workers Unions and Employers Pension Fund ("the Fund") falsely told Metcalfe West employees (Mr. David Taylor and possibly Mr. Daniel Palzkill) that they were required to work in a unionized workplace in order to collect their pension from the Fund. To the contrary, Mr. Taylor and Mr. Palzkill could work at Metcalfe West in the absence of a collective bargaining agreement covering that location and still refrain from engaging in "Prohibited Employment" that would otherwise bar them from collecting pension benefits from the Fund.
2. Metcalfe West also objects that a representative from either Local 1473 or the Fund falsely told Mr. Taylor and possibly Mr. Palzkill that they must work no more than five (5) or ten (10) hours per week to collect pension benefits. To the contrary, regardless of whether Metcalfe West was covered by a collective bargaining agreement, Mr. Taylor and Mr. Palzkill could work up to forty (40) hours in a month and still refrain from engaging in "Prohibited Employment" that would otherwise bar them from collecting pension benefits from the Fund.
3. Metcalfe West also objects that on the day of the election, June 1, 2012, and while the balloting was being conducted, the union observer was engaged in conversations and contact with eligible voters.

4. Any and all other objectionable acts by Local 1473, its officers, agents, employees, or affiliates that has not yet been discovered and evidence of which is currently unavailable to Metcalfe West.

Based upon the foregoing objectionable conduct, the Employer believes that the Union's threats and misconduct herein affected the results of the election held on June 1, 2012. Metcalfe Foods-West, Inc. respectfully requests that the Board set aside the results of the June 1, 2012 election; issue any and all orders to correct the objectionable conduct described above; and rerun the election.

Dated this 8th day of June, 2012.

MICHAEL BEST & FRIEDRICH LLP

By: 

Robert W. Mulcahy, SBN 1017022
Charles B. Palmer, SBN 1001322
Steven A. Nigh, SBN 1081346
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108

Attorneys for Employer
Metcalfe Foods-West, Inc.