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Teamsters Locals 386 & 853
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8 **UNITED STATES OF AMERICA**
9 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**
10

11 TEAMSTERS LOCALS 386 & 853,

Petitioner,

12 and
13

14 SYSCO CALIFORNIA, INC.,

Employer.
15

Case No. 32-RC-066049

**PETITIONER'S ANSWERING BRIEF IN
OPPOSITION TO EMPLOYER'S
EXCEPTIONS TO REPORT AND
RECOMMENDATIONS ON OBJECTIONS**

16
17 **STATEMENT OF THE CASE**

18 This matter is before the Board pursuant to the Employer's Exceptions to the Acting Regional
19 Director's June 11, 2012, Report and Recommendations on Objections. The Employer's Exceptions
20 contest several, but not all, of the Objections the Acting Regional Director set for hearing before a
21 hearing officer. The hearing on Petitioner's Objections is currently scheduled for July 24, 2012.

22 We show below that the Employer's Exceptions are without merit and should be dismissed by
23 the Board.

24 **ARGUMENT**

25 **A. The Regional Director's Partial Dismissal of Related Unfair Labor Practice**
26 **Charges Does Not Mandate Dismissal of Objections 4-6 or 23-24**

27 The Employer argues that the Region is precluded from setting for hearing the objection
28 allegation that the Employer on November 16 and 17, which was the day of the election, called the

1 County Sheriff on Petitioner’s organizers and the objection allegation that the Employer made
2 changes in its work rules, policies and practices regarding the conversion of temporary employees to
3 permanent employees, including conversion of four temporary employees to permanent positions
4 within the critical period.

5 We address each of these arguments below, and show that neither has merit.

6 1. Calling the Sheriff

7 Petitioner’s Objections Nos. 23 and 24 read as follows:

8 **Objection No. 23**

9 On election day, the Employer, through its managers and agents,
engaged in unlawful electioneering at and around the polling locations.

10 **Objection No. 24**

11 The Employer, by its managers and agents, interfered with the
laboratory conditions necessary for a free and fair election by
12 repeatedly calling the police on the Union representatives, by
instigating altercations with the Union representatives, and by playing
13 Disney songs, Christmas and other music throughout the polling period
that was loud enough to be heard in the entire Employer facility,
14 including the election booth.

15 In her Report, the Acting Regional Director noted: “In support of Objections Nos. 21, 22, 23
16 and 14, Petitioner’s witnesses testified that on November 16 and November 17, which was the day of
17 the election, the Employer ... called the County Sheriff on Petitioner’s organizers.”

18 In its Exceptions, the Employer notes that the Regional Director on May 30, 2012, dismissed
19 Petitioner’s unfair labor practice allegation in Case 32-CA-070397 that the Employer violated the Act
20 by “hiring security guards and repeatedly calling law enforcement in order to denigrate the Union,
21 intimidate Union supporters and erode support for the Union.” More specifically, the Regional
22 Director found insufficient evidence to support the Union’s unfair labor practice allegations that the
23 Employer “hired security guards or allowed law enforcement personnel and their dogs into the
24 facility in order to intimidate Union supporters or that it called law enforcement personnel to remove
25 a Union truck parked outside the employer’s facility on the evening before a Board election in order
26 to interfere with the employees’ Union activities or to erode support for the Union.”

27 The Employer argues that the dismissal of these allegations necessarily precludes setting for
28 hearing the Objection allegation that the Employer on the day of the election “called the County

1 Sheriff on Petitioner’s organizers.” But the unfair labor practice allegations are not necessarily one
2 and the same as the Objection allegation. Indeed, Petitioner submitted evidence in support of
3 Objections 23 and 24 demonstrating that on the day of the election the Employer called the County
4 Sheriff to surround the Union’s organizers as they entered and left the Employer’s facility before the
5 poll opened and after it closed. This type of conduct, while not necessarily 8(a)(3) or even 8(a)(1) ,
6 could certainly constitute the type of unlawful electioneering that interferes with laboratory
7 conditions. Thus, the Employer has incorrectly assumed a total parallel between the dismissed unfair
8 labor practice allegations and the Objection allegation set for hearing.¹

9 2. Change in Policy for Converting from Temporary to Permanent Status

10 Petitioner’s Objections Nos. 4, 5 and 6 read as follows:

11 **Objection No. 4**

12 During the critical election period, the Employer, through its managers
13 and agents, made changes to work rules in retaliation for employees’
14 protected Union activities and in order to influence employees to vote
15 against the Union.

16 **Objection No. 5**

17 During the critical election period, the Employer, through its managers
18 and agents, made promises of and granted better pay and/or benefits to
19 employees in order to influence their support for the Union.

20 **Objection No. 6**

21 During the critical election period, the Employer, through its managers
22 and agents, granted benefits in order to influence employees to vote
23 against the Union.

24 In her Report, the Acting Regional Director noted the Petitioner’s witnesses “testified that,
25 shortly after the Petition was filed on October 4, the Employer changed its work rules, polices and
26 practices regarding the ... conversion of temporary employees to permanent employees, and that the
27 Employer subsequently promoted four temporary employees to permanent positions.”

28 In its Exceptions, the Employer notes that the Regional Director on May 30, 2012, dismissed
29 Petitioner’s 8(a)(3) allegation in Case 32-CA-068288 that the Employer “converted four temporary
30 employees to permanent employees based on their known or perceived Union sympathies.” The
31 Employer argues that the dismissal of this 8(a)(3) allegation necessarily precludes setting for hearing

¹ The Union, in any event, has appealed the Regional Director’s dismissal of these unfair labor
practice allegations.

1 the Objection allegation regarding the Employer’s pre-election liberalization of its policy for
2 promoting employees from temporary to permanent status and its pre-election granting of this new
3 benefit to four employees.

4 The Employer’s argument makes no sense. To prove that the Employer violated 8(a)(3) by
5 discriminatorily selecting four employees for promotion “because of their known or perceived Union
6 sympathies” entails evidence quite different from that which would prove that the Employer during
7 the critical pre-election period adopted and applied a new method for determining how employees are
8 promoted to permanent status and thus interfered with the election. Indeed, the Regional Director in
9 his May 30 partial dismissal letter expressly noted the distinction between the proof necessary to
10 demonstrate an 8(a)(3) violation with regard to the Employer’s selection of which employees were to
11 be promoted versus that necessary to demonstrate a violation of the Act in the implementation of a
12 new employee benefit; he noted that while he was dismissing the 8(a)(3) allegation regarding the
13 conversion of the four temporary employees to permanent status, he was *not* dismissing the Union’s
14 charge that the Employer granted benefits to employees in order to erode their support for the Union
15 and/or in order to influence their vote during a Board representation election. Thus, the Employer
16 has erroneously conflated the allegation of a discriminatory selection of employees for promotion
17 with the allegation that the Employer implemented a new benefit in violation of Board election rules.
18 Accordingly, the Employer’s argument must be dismissed.²

19
20 **B. The Acting Regional Director Has Not Set for Hearing Objection Allegations that
Fall Outside the Scope of Petitioner’s Objections**

21 The Employer next argues that two of the Objection allegations the Acting Regional Director
22 has set for hearing fall outside the scope of the Objections timely filed by Petitioner and are therefore
23 not appropriate for hearing. Specifically, the Employer alleges that: (1) the Objection allegation,
24 supported by Petitioner’s witnesses, that the Employer on the day of the election “played loud music,
25 including Christmas music, that evoked one of the Employer’s campaign themes regarding strikes
26 and could be heard in the polling area during voting sessions” is beyond the scope of Petitioner’s

27 ² The Union, in any event, has appealed the Regional Director’s dismissal of the 8(a)(3) charge
28 regarding the selection of the four employees for promotion.

1 Objections Nos. 21-24; and (2) the Objection allegation, supported by Petitioner’s witnesses, that the
2 Employer’s agents made statements “indicating that the selection of Petitioner as their collective
3 bargaining representative would be futile and/or depicting strikes and loss of jobs as the inevitable
4 consequence of unionization” is beyond the scope of Petitioner’s Objections Nos. 7, 8 and 15. An
5 examination of the Objections and the allegations set for hearing reveals that the allegations set for
6 hearing are sufficiently related to the Objections actually filed and that the Employer’s argument thus
7 has no merit.

8 The “loud music” allegation arises in the context of Objections Nos. 21-24. Objections Nos.
9 23 and 24, as noted above, read as follows:

10 **Objection No. 23**

11 On election day, the Employer, through its managers and agents,
12 engaged in unlawful electioneering at and around the polling locations.

13 **Objection No. 24**

14 The Employer, by its managers and agents, interfered with the
15 laboratory conditions necessary for a free and fair election by
16 repeatedly calling the police on the Union representatives, by
17 instigating altercations with the Union representatives, and by playing
18 Disney songs, Christmas and other music throughout the polling period
19 that was loud enough to be heard in the entire Employer facility,
20 including the election booth.

21 Thus, Petitioner’s Objections generally allege that the Employer engaged in unlawful electioneering
22 in the vicinity of the polling locations, and more specially allege that the Employer’s election-day
23 conduct that interfered with the laboratory conditions included the playing of loud music that
24 included Christmas songs.

25 The “strikes are the inevitable result of unionization” allegation arises in the context of
26 Objections Nos. 7, 8 and 15. Objections Nos. 7 and 15 read as follows:

27 **Objection No. 7**

28 During the critical election period, the Employer, through its managers
and agents, impliedly and actually made threats of the loss of benefits
and/or other acts of reprisals against the employees if they voted for the
Union to become their collective bargaining representative.

Objection No. 15

During the critical election period, the Employer, through its managers
and agents, threatened and coerced employees by stating that if the
employees selected the Union as their collective bargaining
representative, bargaining would be futile.

1 Thus, Petitioner’s Objections generally allege that the Employer during the critical pre-election
2 period both threatened employees with reprisals in the event of unionization and warned that
3 unionization would be futile.

4 The issue raised by the Employer’s exceptions regarding these two Objection allegations is
5 whether the allegations set for hearing are “sufficiently related” to the Objections timely filed by
6 Petitioner. The Board has made clear that allegations the Regional Director may consider, and set for
7 hearing, need not “exactly coincide with the precise wording of the objections” filed by a party;
8 rather, the allegations set for hearing need only be “sufficiently related” to the wording contained in
9 the objections timely filed. *Fiber Industries, Inc.*, 267 NLRB 840, 840 n.2 (1983); *Best Western*
10 *Executive Inn*, 272 NLRB 135, 1315 n.1 (1984); *Fred Meyer Stores, Inc.*, 355 NLRB No. 93, at n.7
11 (2010).

12 Under this test, it is readily apparent that the allegation that the Employer’s election-day
13 playing of loud Christmas music would remind employees of one of the Employer’s campaign
14 themes - namely, that the unionization would result in a Christmas-time strike - is “sufficiently
15 related” to Petitioner’s Objections alleging the Employer engaged in unlawful electioneering and,
16 specifically, interfered with laboratory conditions by playing loud Christmas music while the election
17 was underway. Indeed, the Acting Regional Director’s Report with respect to this allegation simply
18 fleshes out in more detail the more general allegations contained in the Objections, and thus provides
19 the Employer with notice of what it is the Employer should be prepared to respond to at hearing.

20 Also unfounded is the Employer’s complaint about the allegation, set for hearing, regarding
21 the Employer’s campaign theme that strikes are the inevitable result of unionization. Again, it is
22 enough that this allegation be “sufficiently related” to the wording of the Objections themselves.
23 Here the Objections include general allegations that the Employer threatened employees with
24 reprisals if they unionized and warned them that unionization would be futile. The allegation set for
25 hearing simply gives more detail to these allegations and puts the Employer on notice that its
26 campaign theme linking inevitably strikes to unionization - *i.e.*, a form of reprisal and a type of
27 futility - will be addressed at hearing.

1 Even assuming *arguendo* these allegations set for hearing are not “sufficiently related” to
2 Petitioner’s timely Objections, the Acting Regional Director has the authority, indeed the
3 responsibility, to set for hearing allegations that would overturn the election based on evidence the
4 Region uncovers during the course of its investigation of Petitioner’s timely Objections or related
5 unfair labor practice charges. *American Safety Equipment*, 234 NLRB 501 (1978) *enf.* denied on
6 other grounds, 643 F.2d 693 (10th Cir. 1981); *Alandco Development Corp.*, 341 NLRB No. 130
7 (2004). There is no dispute here that the Acting Regional Director set these allegations for hearing
8 based on evidence the Region obtained during its investigation of the Objections and/or unfair labor
9 practices. Thus, the Employer has no cause to complain that the Acting Regional Director set them
10 for hearing.

11 **CONCLUSION**

12 For the reasons stated above, Petitioner respectfully requests the Board to deny the
13 Employer’s Exceptions to the Acting Regional Director’s Report and Recommendations on
14 Objections.

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16
17 Dated: June 29, 2012

BEESON, TAYER & BODINE, APC

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19 By: /s/Andrew H. Baker

ANDREW H. BAKER

Attorneys for Teamsters Locals 386 & 853

1 **PROOF OF SERVICE**

2 **NATIONAL LABOR RELATIONS BOARD**

3 I declare that I am employed in the County of Alameda, State of California. I am over the age
4 of eighteen (18) years and not a party to the within cause. My business address is Ross House, 2nd
Floor, 483 Ninth Street, Oakland, CA 94607. On this day, I served the foregoing Document(s):

5 **UNIONS' ANSWERING BRIEF IN OPPOSITION TO EMPLOYER'S**
6 **EXCEPTIONS TO REPORT AND RECOMMENDATIONS ON OBJECTIONS**

7 By Mail to the parties in said action, as addressed below, in accordance with Code of Civil
Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area
8 for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that
designated area is given the correct amount of postage and is deposited that same day, in the ordinary
9 course of business in a United States mailbox in the City of Oakland, California.

10 By Personal Delivering a true copy thereof, to the parties in said action, as addressed
below in accordance with Code of Civil Procedure §1011.

11 By Overnight Delivery to the parties in said action, as addressed below, in accordance
with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a
12 sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail.
13 Mail placed in that designated area is picked up that same day, in the ordinary course of business for
delivery the following day via United Parcel Service Overnight Delivery.

14 By Facsimile Transmission to the parties in said action, as addressed below, in accordance
with Code of Civil Procedure §1013(e).

15 By Electronic Service. Based on a court order or an agreement of the parties to accept
16 service by electronic transmission, I caused the documents to be sent to the persons at the electronic
17 notification addresses listed in item 5. I did not receive, within a reasonable time after the
18 transmission, any electronic message or other indication that the transmission was unsuccessful.

19 William E. Hester, III, Esq.
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20 P.O. Box 60118
New Orleans, LA 70160
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22 I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland,
23 California, on this date, June 29, 2012.

24 /s/Esther Aviva
25 Esther Aviva, Secretary to Andrew H. Baker