

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

METCALFE FOODS-WEST, INC.,

Employer,

and

Case 30-RC-079306

UFCW (United Food and Commercial
Workers), Local 1473,

Petitioner.

**PETITIONER'S ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS TO
REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION ON OBJECTIONS
TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Petitioner, UFCW Local 1473, by its attorneys, Sweet & Associates, LLC, pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, files this answering brief in opposition to the exceptions filed by the Employer to the Regional Director's Report and Recommendation on Objections to Conduct Affecting the Results of the Election.

BACKGROUND

On June 1,¹ pursuant to a stipulated election agreement, an election was conducted among employees in the meat department at the Employer's west Madison, Wisconsin facility. The tally of ballots showed that of approximately eight employees, five cast ballots for, and three cast ballots against the Petitioner. Thereafter, the Employer filed timely objections which were investigated by the Regional Director for Region 30. On June 27, the Regional Director issued a Report and Recommendation on Objections to Conduct Affecting the Results of the Election in which he recommended that the objections be overruled and that a Certification of

¹ All dates are 2012 unless otherwise indicated.

Representative be issued. On July 11, the Employer filed exceptions to the Regional Director's report and recommendation. Petitioner opposes the Employer's exceptions.

ARGUMENT

A. The Employer's Objections 1 and 2 Lack any Factual or Legal Basis.

As the Regional Director noted, the Employer's objections 1 and 2 related to alleged misrepresentations made to two employees concerning pension benefits. The Regional Director also noted the Employer had presented no evidence that the statements were made during the critical period. The affidavits of managers submitted to support the objections related to certain statements made to the managers by employees in the unit concerning conversations they had with others about pension benefits set forth in the United Food and Commercial Workers Employers and Union Pension Plan. The Regional Director found that the statements "allegedly made by an unidentified woman [at the Petitioner's office] and retired member are akin to the misrepresentation which the Board found in *Midland National Life Insurance Co.*, [263 NLRB 127 (1982)] which would not be sufficient to set aside an election."

The Employer asserts to the Board that the members of the voting unit could not recognize the statements as "propaganda" and properly evaluate them. The Employer also asserts that deliberate misrepresentations about pension plans warrant setting aside an election in light of *The Cleveland Trencher Co.*, 130 NLRB 600 (1961). Based on *Cleveland Trencher*, the Employer stated in its exceptions that the Board has held that material misrepresentations of fact regarding pension plans "are sufficient to set aside an election." In *Cleveland Trencher*, on the evening before the election, the union distributed a leaflet to voters about benefits the union had achieved for employees at four other facilities which the Board found sufficient under the circumstances to warrant a second election. The fallacy of the Employer's reliance on *Cleveland*

Trencher is that it was decided when *The Gummed Products*, 112 NLRB 1092 (1955), set the standard for evaluating election misrepresentations and only some 22 months before *Hollywood Ceramics, Co.*, 140 NLRB 221 (1962), and appears to presage some of its standards for evaluating election misrepresentations.

Hollywood Ceramics was, of course, the first in a tortuous line of cases decided by the Board regarding its treatment of election misstatements culminating in the Board's current policy found in *Midland National*. Under *Midland National*, elections are not to be set aside solely because of misleading campaign statements or misrepresentations of fact. The Board announced in *Midland National* that it "will no longer probe into the truth or falsity of the parties' campaign statements." 263 NLRB 133. Thus, it appears that outcome regarding the "misrepresentations" in *Cleveland Trencher*, upon which the Employer bases its exceptions to the Regional Director's recommendations regarding Objections 1 and 2, would not be the same had *Midland National* been the law in 1961 when *Cleveland Trencher* was decided. Reliance on a case more than a half-century old and which did not use the current standard for evaluating alleged misrepresentations is not a sufficient basis for rejecting the Regional Director's recommendations on Objections 1 and 2.

B. The Employer Did Not Except to the Regional Director's Recommendations Regarding Objection No. 3 or to Objection No. 4.

The Employer had claimed that one voter's attempts to show the Union's election observer some pictures of the voter's fishing trip somehow interfered with the election's laboratory conditions. The Regional Director recommended that this objection be overruled because the attempt to show fishing pictures when no other voters were present had not interfered with employees' free choice. Because the Employer did not except to this recommendation and in light of the dearth of any evidence the actions of the voter regarding his

fishing pictures interfered with the election, the Board should adopt the Regional Director's recommendation regarding Objection No. 3. Similarly, the Employer did not except to the Regional Director's recommendation regarding the Employer's "catch-all" objection as the Employer submitted no evidence to support it. Because no exception was filed to this recommendation and because there is nothing in the record to support it, the Board should adopt it.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Board adopt the Regional Director's Report and Recommendation on Objections to Conduct Affecting the Results of the Election. Petitioner further requests that the Board issue the appropriate Certification of Representative.

Dated: July 18, 2012

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CERTIFICATE OF SERVICE

I certify that on this date I filed the foregoing by electronically filing with the National Labor Relations Board pursuant to Section 102.114(i) of the Board's Rules and Regulations. I further certify that this date I telephonically notified Attorney Robert W. Mulcahy of the substance of the transmitted document before filing. I further certify that I served a copy on the following persons by e-mailing a copy to them and by overnight delivery service to the addresses below:

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Dated: July 18, 2012

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