

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21**

AMBUSERVE AMBULANCE

Employer

and

Case 21-RC-081393

NATIONAL EMERGENCY MEDICAL SERVICES
ASSOCIATION/NAGE LOCAL 2

Petitioner

REPORT ON OBJECTIONS

This Report¹ contains my recommendations regarding the Employer's Objections to the election in the above-captioned matter. As set forth below, I recommend that Employer's Objection Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 be overruled in their entirety and that a Certification of Representative be issued to the Petitioner.

Procedural History

The petition in this matter was filed on May 18, 2012.² Pursuant to a Stipulated Election Agreement approved on May 30, 2012, an election by secret ballot was conducted on June 22, among the employees of the Employer, in the unit agreed appropriate for the purposes of collective bargaining.³ The tally of ballots, which was served upon the parties at the conclusion of the election, showed that of approximately 97 eligible voters, 35 cast ballots for, and 32 against the Petitioner. There were two void ballots and six challenged ballots, which were sufficient in number to affect the results of the election.

¹ This report has been prepared under Section 102.69 of the Board's Rules and Regulations, Series 8, as amended.

² Unless otherwise specified, all dates herein are in 2012.

³ The collective-bargaining unit agreed appropriate in this matter is composed of: "Included: All full-time, regular part-time, and per diem EMTs, Paramedics, Dispatchers, Call Takers, Vehicle Technicians, and Supply Clerks working in and out of the Employer's facility located at 15105 South Broadway, Gardena, California; Excluded: All other employees, office clerical employees, administrative employees, professional employees, guards and supervisors as defined by the Act."

Subsequently, the parties entered into a written agreement that the challenges to the six determinative challenged ballots be overruled, opened, and counted. Thereafter, on July 6, such ballots were opened and counted, and a Revised Tally of Ballots was served upon the parties showing that of approximately 97 eligible voters, 39 cast ballots for, and 34 against the Petitioner, with no challenged ballots remaining.

On June 28, the Employer timely filed objections to conduct affecting the results of the election, a copy of which was duly served upon the Petitioner. A copy of the Employer's Objections is attached hereto as Exhibit A. After reasonable notice to the parties to present relevant evidence, I have completed an investigation of the Employer's Objections, considered all evidence submitted by the parties and otherwise disclosed by the investigation, and hereby issue this Report thereon.

The Objections and Analysis

Objection No. 1

The Union and/or its agents during the course of the election promised the employees they could get them a \$5.00 increase in wages and benefits if they voted for the union. Said conduct adversely affected the results of the election.

Objection No. 2

During the course of the election, the Union and/or its agents made promises to the employees that they could prevent the Respondent from making any changes to their hours or by implementing more 24 hour shifts and other time changes if they voted for the Union. Said conduct adversely affected the results of the election.

Objection No. 5

During the course of the election, the Union and/or its agents misrepresented to the employees the type of wages and benefits it would receive under union conditions. Said conduct interfered with the results of the election.

Objection No. 6

During the course of the election, the Union and/or its agents told the employees that they would get a contract at the Respondent that would improve their working conditions, wages and benefits. The Union stated they would get the same contract as they have at other Ambulance Companies. This conduct interfered with the results of the election.

Objection No. 9

During the course of the election, the Union and/or its agents made promises to the employees that negotiations would start immediately after the election and their [sic] could be no objections filed by the Company for any wrongful conduct by the Union if they voted for the Union. The union stated the company would automatically agree to the union's demands. Said conduct adversely affected the results of the election.

Inasmuch as they are related, I will consider Employer's Objection Nos. 1, 2, 5, 6 and 9 together. The Employer provided a signed declaration from Employer Owner/President Melissa Harris in support of its Objections.

Regarding Objection Nos. 1 and 6, the Employer provided a copy of a one-page flyer titled "The NEMSA Difference Is FIVE" (herein "FIVE"), that the Petitioner distributed to unit employees, and which discusses improving employees' wages and benefits. A copy of the flyer is attached hereto as Exhibit B. Harris asserts that unidentified Petitioner representatives told unidentified employees "that they could receive \$5.00 more an hour and other employees were told that they may receive .50 less an hour."

In support of Objection No. 5, Harris states that several employees on unspecified dates told her that if they were represented by a union, the Employer "would have to offer dental vision and 401k" benefits. The Employer identified no witnesses to testify to these statements.

Other than repeating the allegations in Objection No. 9, the Employer presented no evidence in support of Objection No. 9. The Employer asserts that the conduct alleged in Objection Nos. 5 and 9 also constitutes misrepresentations of facts.

In support of Objection No. 2, Harris states that the Employer was turning down approximately 15 calls a day by not utilizing 24 hour shifts as there were not enough resources to

handle the volume of calls. According to Harris, the Employer utilizes a system called “Resource Planner” to have a flexible schedule and determine the types of shifts to use for coverage prior to the petition being filed.

Harris further states that “the Union prevented me from complying with my past practice of changing shifts on a weekly basis to meet the scheduling needs of the employees.” Harris states that on an unspecified date and time she asked the Petitioner “for an unlimited amount of 24 hour shifts to handle the call volume and were (sic) only allowed to put in 3 by the Union agent, Jason Herring.”

Harris further asserts in support of Objection No. 2 that the “Union tried to shut down the Company.” Harris states that during this time “many” unnamed employees were calling off and not showing up for work. Unnamed employees were “disgruntled and intentionally trying to sabotage AmbuServe as they wanted their 24’s back.” Harris states that she recalled a “Saturday during the election campaign on which the Employer had no Paramedic Cars on the road.” Harris did not specify which Saturday is in question, did not identify the employees who allegedly called off on the Saturday, and did not submit any documentation to establish the problem of employees not coming in for work. While Harris states that “several employees” told her that this was intentional and planned, none of the “several employees” were identified. There is no assertion that the “several employees” were acting as agents of the Petitioner.

Harris further contends that several unidentified employees told her that unidentified Petitioner representatives told employees that it could prevent the Employer from implementing more 24 hour shifts or making other changes to their hours. Harris further contends that unspecified misrepresentations were made by unidentified Petitioner representatives regarding Employer scheduling practices.

The Employer further argues the Union's denial of Harris' request to use her past practice of changing shifts on a weekly basis is a threat which "interfered with the free atmosphere of the election" and is a promise to employees that it could stop the Employer from implementing 24 hour shifts or "other time changes" if they voted for the Union.

For its part, the Petitioner denies that it engaged in any objectionable conduct or made any objectionable misrepresentations. Regarding Objection Nos. 1 and 6, the Petitioner denies that it promised employees a \$5.00 increase in wages and benefits if they voted for the Petitioner, that it would improve their wages, benefits and working conditions, or that it would get employees the same contract that the Petitioner has with other ambulance companies. In this regard, the Petitioner proffered a four-page flyer, including Exhibit B, which it distributed to employees, and each of which explains that wages and benefits are subject to negotiations with employers. The Petitioner notes that none of the flyers promised a \$5.00 increase in wages and benefits, but the flyers do explain that union-represented employees are generally better compensated than their non-union counterparts. Additionally, the Petitioner contends that it informed employees that it would fight for them to obtain the best contract possible through the collective-bargaining process, but could not promise them any wage or benefit increases or better working conditions. Regarding contracts which the Petitioner has at other ambulance companies, the Petitioner encouraged employees to review other Petitioner contracts to see what might be attained through bargaining, and provided some of those details in one of the flyers. A copy of page three of this flyer is attached hereto as Exhibit C.

With regard to Objection No. 5, the Petitioner denies that it misrepresented the type of wages and benefits employees would receive under union conditions. The Petitioner states in one of its flyers, "There is NO law that an employer is required to provide health insurance to employees ... [or] pay vacation time, sick time, or paid time off." A copy of page four of this flyer is attached hereto as Exhibit D.

Regarding Objection No. 9, the Petitioner denies that it told employees that the Employer would automatically agree to the Petitioner's demands. Rather, as noted above, the Petitioner informed employees that terms and conditions of employment are subject to negotiation through the collective-bargaining process. Regarding the start of bargaining and post-election objections, the Petitioner points out that one of its flyers states, in relevant part:

“After Ambuserve EMS Professionals Vote NEMSA, NEMSA will hit the ground running! NEMSA Attorneys will immediately begin preparing for contract negotiations by requesting bargaining dates with Ambuserve and filing appropriate notices with the federal government.”⁴

The Petitioner contends that Petitioner Organizer Shelley Hudelson told employees that there is a seven-day period following the election during which parties can file objections to the election, and if objections were filed, it could take several weeks for the NLRB to investigate and resolve them. Hudelson also told employees that if the Petitioner won the election, and no objections were filed, after the election was certified, the Petitioner would begin the process of selecting and training shop stewards, surveying the work force for purposes of contract negotiations, and scheduling dates with the Employer for contract negotiations. The Petitioner denies that it told employees that a demand to bargain would be made before the Petitioner was certified.

The Petitioner denies making the promises alleged in Objection No. 2. Rather, the Petitioner asserts that Hudelson told employees that while shift configurations and work hours are negotiable and would be addressed through the collective-bargaining process, employers in the ambulance transportation industry generally retain considerable flexibility in

⁴ A copy of page two of this flyer is attached hereto as Exhibit E.

this area. The Petitioner asserts that after the petition was filed, the Employer resumed the use of 24 hour shifts which the Employer had previously cancelled.⁵

Regarding Objection Nos. 2, 5, and 9, the Employer alleges that the Petitioner made comments to employees which were misrepresentations. The Board does not regulate misrepresentations in election campaigns. In *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), the Board held that it would “no longer probe into the truth or falsity of the parties’ campaign statements....” Further, a misstatement of the law is not objectionable. See *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988).

It is well established that “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.”⁶ Furthermore, employees are generally able to understand that a union cannot obtain most benefits automatically by winning an election but must seek to achieve them through collective bargaining. *Burns Security Services*, 256 NLRB 959, 962 (1981), citing *Smith Co.*, 192 NLRB 1098, 1101 (1971).

Regarding Objections Nos. 1 and 6, the investigation has revealed no evidence that the Petitioner promised employees any increase in wages or benefits or schedule changes. Rather, comments to employees were phrased as possible outcomes of collective bargaining with the Employer – not guarantees. *Lalique N.A., Inc.*, 339 NLRB 1119 (2003). In this regard, Petitioner flyers presented statistical information from other unionized employers and explained that terms and conditions of employment are set through collective bargaining between unions and employers. Similarly, evidence of employee comments about dental, vision, and 401(k) benefits do not constitute promises by any party. Additionally, the Petitioner clearly informed employees that the law did not require the Employer to provide employees such benefits.

⁵ In its flyer which mentions 24-hour schedules, the Petitioner appears to support the Employer’s resumption of the use of such schedules. A copy of page three of this flyer is attached hereto as Exhibit F.

⁶ *Safeway, Inc.*, 338 NLRB 525 (2002) (internal quotes omitted), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989), quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974).

Regarding Objection No. 2, no evidence has been proffered regarding how the Petitioner affected employees' work shifts, which the Employer scheduled during the critical period before the election, or that any Petitioner statement regarding work schedules constituted objectionable threats or interference. *Burns Security Services*, supra. The evidence fails to establish the Petitioner made any threats concerning schedules or promises to the employees about shift schedules. The evidence, furthermore, fails to establish the Petitioner attempted to shut the Employer down by refusing to permit the Employer to use flexible schedules. I note that assuming the Employer's argument that it had a past practice of utilizing flexible schedules, it did not have to seek permission from the Union to utilize these schedules during the critical period.

The Employer submitted no evidence in support of Objection No. 9, which alleges that the Petitioner made certain promises to employees about bargaining and election objections. The Board has long held that parties filing objections must present specific and timely evidence in support of their objections. *Star Video Entertainment L.P.*, 290 NLRB 1010 (1988); and *Goody's Family Clothing*, 308 NLRB 181 (1992). Moreover, the statements alleged in Objection No. 9 do not constitute any promise of benefit. *Lalique N.A., Inc.*, supra. Further, regarding Objection Nos. 1, 2, 5, 6 and 9, the Employer failed to provide the names of any witnesses who would testify about the alleged objectionable conduct. Regarding Harris' own testimony, hearsay evidence cannot be relied upon to set aside an election.

The Employer cited numerous cases in support of these and its other Objections,⁷ but all such cases are inapposite to the allegations and facts presented herein.

⁷ *Wagner Electric Corp.*, 167 NLRB 532, 533 (grant of life insurance policy to those who signed with union before representation election 'subjects the donees to a constraint to vote for the donor union'); *S & C Security, Inc.*, 271 NLRB 1300 (1984) (election was set aside where the payment to observers of a rate substantially in excess of their employment wage); *Teletype Corp.*, 122 NLRB 1594 (payment of money by rival unions to those attending pre-election meetings); *General Cable Corp.*, 170 NLRB 1682 (\$5 gift certificates given to employees by union before election, not to encourage attendance at a meeting, but rather as an inducement to cast ballots favorable to union); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973) (union's offer to waive initiation fees can be grounds for setting aside an election); *Steak House Meat Co.*, 206 NLRB 28 (1973) (election set aside where death threats and

Accordingly, I recommend that Objection Nos. 1, 2, 5, 6 and 9 be overruled in their entirety.

Objection No. 3

During the course of the election, the Union and/or its agents stated that if they did not vote for the union the Respondent would sell their business and terminate the employees' jobs. The Union agent told the employees this statement approximately 2 days before the election.

Objection No. 7

During the course of the election the Union and its agents threatened the employees that if all the employees did not vote for the Union the employees would be fired by the Respondent by selling the business approximately two days prior to the election due to this threat. [sic] The employees voted for the Union in the Election. Said conduct interfered with the results of the Election.

Objection No. 8

During the course of the election the Union contacted a third party broker and asked him if the Respondent's business was for sale. The third party broker stated the Respondents business was for sale and had pending buyers when the third [sic] had no agreement with the Respondent for the sale of the business. Also, said conduct by the Union was a material misrepresentation to the employees since the Union agent or agents were not purchasers of the business but used this confidential information to adversely affect the results of the election. Said conduct by the Union interfered and threatened

brandishing of knife constituted aggravated misconduct which creates an atmosphere of fear and reprisal rendering a free expression of choice impossible); *Vickers, Inc.*, 152 NLRB 793 (1965) (IAM accountable for threats by IAM shop committeemen that employees who supported the Teamsters ran the risk of losing their jobs, where committeemen were the responsible representatives of IAM in the plant and play a central role in the election campaign); *National Gypsum Co.*, 133 NLRB 1492 (1961) (election set aside due to threats of violence made between employees); *Caroline Poultry Farms, Inc.*, 104 NLRB 255 (1953). (objectionable where competing unions threatened that they would force the employer to close if the rival union won); *Chillicothe Paper Co.*, 119 NLRB 1263 (1961) (election set aside where an unknown party distributed to employees a forged document made to appear that the union favored reducing hours worked by employees, increased dues for more hours worked, a disfavored person would be the union representative, and workers would be training in picketing and strike conduct); *James Lees & Sons, Co.*, 130 NLRB 290 (1961) (threats contained in newspaper articles and ads that the plant would close if the union was elected created a general atmosphere of fear and confusion which precluded the holding of a free election); *P. D. Gwaltney, Jr., & Co.*, 74 NLRB 371 (1947) (the Board examines whether third party conduct created an atmosphere not conducive to the kind of free and untrammelled choice contemplated by the Act); and *Meridan Grain & Elevator Company*, 74 NLRB 900, (1947) (objections overruled where shots were fired by unknown persons into church where union meeting was being held, and where there was a change of company ownership after the election).

the employees that the business would be sold if they did not vote for the union.

Objection No. 12

During the course of the election, the union and its agents called the former broker who was hired to sell the company and stated they were a possible investor. The Union used this confidential information to find out about a possible sale and told the employees that the Respondent was going to sell its business. However, the Respondent terminated the broker. The Union and its agents used this confidential information to threaten the employees approximately two days prior to the election to threaten to terminate the employees. Said conduct adversely affected the results of the election.

Inasmuch as they are related, I will consider Employer's Objections Nos. 3, 7, 8 and 12 together. This series of objections involved the Employer's use of a broker to sell its business. In her declaration, Owner Harris states that the Employer had hired Leo Keligian, a business broker, to sell the business, but the business was taken off the market on April 22,⁸ and the Employer "terminated the broker in May 2012."

The Employer proffered an email to Harris from an individual,⁹ dated June 22, asserting that on June 21 the individual telephoned Keligian who stated that the Employer had been purchased for about \$7 million, which sale was in escrow and should close in about two weeks, after the receipt of an Employer profit and loss statement. In the email, the individual notes that Keligian offered this information without the individual having to identify him/herself. Harris asserts that unidentified Petitioner representatives sent texts and emails to unidentified employees encouraging them to contact Keligian about the sale of the Employer.¹⁰ The

⁸ In a letter to Keligian dated April 22, Harris wrote, in relevant part, "Please be advised that we would like to suspend our listing of Ambuserve for sale. We are currently in the process of some management changes and are discussing our future plans. We will contact you in the event that we decide to re-activate our plans to solicit potential buyers."

⁹ The individual sending the email to Harris was neither on the voter eligibility list nor one of the challenged ballots that have been resolved by agreement of the parties. Harris identifies the individual as a paramedic. The individual does not identify anyone else who contacted Keligian.

¹⁰ No such texts or emails have been proffered by the Employer. The Employer did proffer a page of what appears to be a series of instant messages from Google. Participants in the instant messaging were not identified nor were the names of any other people mentioned in the instant messaging identified.

Employer also presented identical prepared declarations from 16 individuals,¹¹ which state, in relevant part:

“On June _____, 2012 at approximately _____ prior to the election on June 22, 2012, the Union agent, named _____ told employees that they may lose their job if Melissa Harris is not the owner and the employee’s [sic] might need the Union for protection. Employees were told that they could be fired at will or that salaries could be reduced to minimum wage. The Union agent stated she spoke to the Broker and the Union agent was an investor. The Union agent, _____ wanted to have everyone call the Broker if they had any questions if the business was for sale. The Union agent of NEMSA told the Broker that they represented themselves and did not reveal their name to the Broker. The Union represented themselves as investors looking for a business in Gardena in order to obtain this information. All the employees including myself were scared by the Union’s threat and we could lose their [sic] jobs.”

Most of the declarants inserted that Organizer Hudelson made the alleged comments on June 20, 21, or 22. The Employer contends that such comments were also made by unidentified Petitioner representatives at unspecified meetings with unspecified employees.

Harris states that a named unit employee told her that, approximately 36 hours before the election, an unidentified Petitioner representative told employees that if they did not vote for the Petitioner, Harris would sell the Employer and terminate the employees. Harris further contends that unidentified persons told unidentified employees that she was selling the Employer in four or five days and they needed to vote for the Petitioner in order to be protected, and that two named unit employees received emails¹² with this same message; however, the Employer did not provide copies of the emails or identify the senders.

¹¹ It appears that 13 of the witnesses are unit employees. The Employer identified the other three witnesses as a non-unit dispatcher, a supervisor, and a manager. One witness lined-out a portion of his/her declaration.

¹² The instant messaging submitted by the Employer contains a statement from an unidentified person that, “She sold the f***ing company, she just found out she lost and came out the room and said out loud ‘I don’t care because I’m outta here in 4 days.’” Another comment from an unidentified person said “supposedly she called (name deleted) crying saying she was going to get sued and how she has like 4 days left before escrow closes.”

Owner Harris states that, according to a named unit employee and other unidentified employees, the Petitioner conducted a meeting with unit employees at a Starbucks in Gardena, California, commencing at 6:00 p.m., on June 21.¹³ Harris asserts that unidentified Petitioner representatives told employees (1) that voting for the Petitioner would provide job security because the Employer was being sold, (2) Harris wanted employees to vote against the Petitioner because the new owners of the Employer would sue her for not informing them about the Petitioner, (3) Harris would be sued if she refused to complete the sale of the Employer, and (4) made comments about Harris and her private life.

The Employer also contends that the comments noted above were misrepresentations.

With regard to Objection Nos. 3 and 7, the Petitioner denies that it told employees that the Employer would sell the business, or terminate or otherwise retaliate against employees. Rather, the Petitioner contends that Hudelson explained to employees what can happen in a successor employer situation with a unionized workforce compared to a workforce that is not represented by a union. The Petitioner asserts that on one occasion, an employee asked Hudelson if they would be protected by the Petitioner if it lost the election, to which Hudelson replied that if employees rejected the Petitioner, they would remain “at will” in their employment and would have no protection from unilateral changes to their wages, benefits and working conditions. Hudelson also told employees that some employers violate the Act by discharging or retaliating against employees. The Petitioner notes that it cannot cause the sale of the Employer or the termination of any of its employees, and it denies that Hudelson threatened or coerced employees or interfered with employees’ free choice in the election.

Regarding Objections Nos. 8 and 12, the Petitioner denies that it made any misrepresentations or threats regarding information about the sale of the Employer. The

¹³ The election commenced at 11:00 a.m., on June 22.

Petitioner contends that employees told the Petitioner that Owner Harris had discussed with employees her plan to sell the Employer. The Petitioner conducted an Internet search which revealed Keligian's listing of the Employer for sale. A Petitioner representative inquired with Keligian, who readily provided details, including that the sale of the Employer was nearly complete and that the parties were merely waiting for a profit and loss statement from the Employer. The Petitioner denies that it told Keligian that it was a possible investor, and notes that Keligian asked for no identifying information. The Petitioner shared this information about the sale of the Employer with three employees who were involved in the Petitioner's organizing campaign, who, in turn, shared this information with other employees. The Petitioner believes that several of those employees independently contacted Keligian to confirm the information.

It is the Petitioner's position that the Employer and Keligian freely provided information to employees about the possible sale of the Employer, and that the Petitioner made no misrepresentations or threats regarding such information.

Regarding these objections, the investigation revealed that the Employer was for sale until about April 22, but thereafter broker Keligian continued to tell callers that the Employer was for sale or was in the process of being sold.¹⁴ The investigation also revealed that the Petitioner mentioned some of this information to a few employees. The Petitioner acknowledges explaining to employees that union-represented employees may have more protections than non-represented employees, when a company is sold.

As with the earlier Objections, the Board will not consider the truth or falsity of the parties' statements regarding the sale of the Employer. *Midland National Life Insurance Co.*, *supra*.

¹⁴ Neither party contends the business was actually sold.

As the objecting party, the Employer has the burden of proving interference with the election. The test, an objective one, is whether the Union's conduct has the tendency to interfere with the employees' freedom of choice. See *Harsco Corp.*, 336 NLRB 157, 158 (2001). Here, the Employer has failed to prove that any statement by the Petitioner was any sort of threat or would reasonably tend to interfere with employees' free choice in the election.

Parties are free to communicate views and predictions on the effects of unionism, so long as the communications do not contain a threat of reprisal or force or promise of benefit. *Gissel Packing Co.*, 395 U.S. 575 (1969). In the case at hand, the Petitioner has no control over whether or not the Employer is sold, changes in wages, benefits or employment status of non-union-represented employees, or if employees would be rehired by any successor, but the Petitioner did offer to employees the lawful support which union representatives may provide in such situations. The evidence is insufficient to establish that any threat or promise of benefit was made by the Petitioner in this regard.¹⁵

Accordingly, I recommend that Objection Nos. 3, 7, 8 and 12 be overruled in their entirety.

Objection No. 4

During the course of the election, the Union and/or its agents induced employees to sign union authorization cards by representing that if they signed an authorization card before the election, the Union would waive payment of initiation fees and reduce the dues of the employees. Said conduct interfered with the results of the election.

¹⁵ The cases cited by the Employer in support of these Objections are among those listed at footnote 7 above, and are inapposite to the allegations and facts presented herein.

In support of Objection No. 4, in her declaration, Owner Harris states that a named unit employee told her that an unidentified Petitioner representative on an unspecified date “told the employees that they did not have to pay dues or initiation fees during the election process. However, if a contract was signed by the parties then all the employees would have to pay union dues ...”

For its part, the Petitioner denies that it offered any waiver of initiation fees or reduced dues to employees who signed union authorization cards before the election or to employees who actively supported the Petitioner. Rather, the Petitioner notes that one of the flyers it distributed to employees states, “**NO INITIATION FEES are charged to any current employee.** Only **AFTER** a contract is voted in by your workforce, do **newly hired employees** get charged a \$100 initiation fee.” (Emphasis in original.) A copy of page four of this flyer is attached hereto as Exhibit G.

It is objectionable for a union to offer to waive initiation fees for employees who sign a union authorization card before the election. Where, however, the offer is not so limited and is also available to those who sign up after the election, such an offer would not be objectionable. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *Irwindale Division Lau Industries*, 210 NLRB 182 (1974); and *L. D. McFarland Co.*, 219 NLRB 575, 576 (1975). *Savair* requires that objectionable conduct in this regard is that which requires an “outward manifestation of support” such as signing an authorization card or joining the union.

In the case at hand, no evidence was presented that any waiver was conditioned upon any employee signing an authorization card, joining the Petitioner, or any other outward support for the Petitioner. The Employer’s evidence only contends that the Petitioner told employees that they would not be required to pay dues or initiation fees during the election process, but after a contract was signed all the employees would have to pay dues. Such evidence does not even suggest that any inducement was offered for pre-election support for the

Petitioner. Moreover, Petitioner flyers informed employees that no current employees would be charged an initiation fee, and such would only be charged to employees hired after a contract is ratified.

Accordingly, I recommend that Objection No. 4 be overruled in its entirety.

Objection No. 10

During the course of the election, the Union and/or its agents stated that if they did not vote for the union the employer would terminate their jobs or other retaliatory action against the employees. Said conduct adversely affected the results of the election.

In support of Employer Objection No. 10, the Employer submitted the declarations discussed above in support of Objections Nos. 3, 7, 8, and 12. In addition, the Employer submitted the declaration from Ms. Harris in which she deals with the termination and reinstatement of employee Jason Johnson.¹⁶ Owner Harris states that after Johnson was reinstated, unidentified employees sent a blast of emails identifying this “as an example of Union negotiation and protection” rather than as an act of Ms. Harris doing what she thought of as “morally right.”

For its part, the Petitioner denies that it engaged in any conduct alleged in Employer Objection No. 10.

With regard to Case 21-CA-081568, pursuant to the Board’s Rules and Regulations, Section 102.9, any labor organization may file charges with the NLRB alleging unfair labor practices. In the instant matter, the Petitioner filed a charge which was subsequently withdrawn. The right of a labor organization to file an unfair labor practice charge, and publicize about the outcome of such, cannot be construed as objectionable conduct. If a union states that the Employer was found guilty of an unfair labor practice without such a finding by the Board, the Board will find objectionable conduct. *Formco, Inc.* 233 NLRB 61, 62 (1977). In the instant

case the Employer presented no evidence that the Union stated anything improper concerning the outcome of case 21-CA-081568.

The Employer argues that the Union used the termination of Mr. Johnson to establish that the Company would terminate their employees without legitimate business reasons and just because they were pro-Union. I cannot conclude that the proffered evidence supports such argument.

Witness declarations submitted by the Employer state that a “Union agent, named Shelly (Huddleston) told employees that they may lose their job if Melissa Harris is not the owner.” In addition, employees were told they “might need the Union for protection” and “they could be fired at will.” (emphasis added) The alleged conduct is attributed to unidentified employees, not the Petitioner. I cannot conclude that the statements are a threat or an implied threat made by the Union or a third-party. Furthermore, as noted in *Foxwoods Resort Casino*, 352 NLRB 771, 781 (2008), threats of job loss or discharge made by union representatives are “considered to be noncoercive since employees can reasonably evaluate such comments as being beyond the union’s control, and are, at most, a prediction of action to be taken by the Employer.”

Accordingly, I recommend that Objection No. 10 be overruled in its entirety.

Objection No. 11

During the course of the election, the Union and/or its agents had a group meeting during the critical period or 24 hours prior to the election. Said conduct adversely affected the results of the election.

In support of Objection No. 11, in her declaration, Owner Harris states that, according to a named unit employee and other unidentified employees, the Petitioner conducted

¹⁶ Petitioner filed a charge in Case 21-CA-081568 concerning Johnson’s termination on May 21 and withdrew the charge on June 13.

a meeting with unit employees at a Starbucks in Gardena, California, commencing at 6:00 p.m., on June 21. The statements made during this meeting were dealt with in the discussion above with regards to Objections Nos. 3, 7, 8, and 12. This objection deals solely with the Union holding a meeting within the 24-hour time period prior to the opening of the polls.

For its part, the Petitioner denies that it conducted any meeting in violation of *Peerless Plywood Co.*, 107 NLRB 427, 429 (1955), or which was otherwise objectionable. The Petitioner detailed that on June 21, Organizer Hudelson made herself available to employees, at a Starbucks, to in order to answer any last minute questions. One off-duty employee of the Employer stopped by. The Petitioner notes that attendance was entirely voluntary and the location was away from the Employer's facility.

The Board has long held that employers and unions may not make "election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood*, 107 NLRB 427 (1953). The Board has also explained that the rule does not prohibit employers and unions from making campaign speeches during the 24-hour period if employee attendance is voluntary and on their own time. *Foxwoods Resort Casino*, 352 NLRB 771, 780-781 (2008) and cases cited therein. This meeting clearly was voluntary, not on Employer property, and on the employees' own time.

Accordingly, I recommend that Objection No. 11 be overruled in its entirety.

Objection No. 13

During the course of the election the Union purchased meals and other benefits for the employees if they voted for the union. Said conduct interfered with the free atmosphere of the election.

In support of Objection No. 13, in her declaration, Owner Harris states that a named unit employee and other unidentified employees told her that an unidentified Petitioner

representative offered coffee and food to employees who attended the meeting at Starbucks the day before the election to “induce Union conversation.” No other details were provided.

For its part, the Petitioner denies that it gave meals or benefits to employees in exchange for their support or vote in the election. The Petitioner detailed that several times in June, at or near a Starbucks, Organizer Hudelson offered coffee, tea, or water to employees, of which a total of about eight employees accepted.¹⁷

Clearly, employees would reasonably view the purpose of a beverage provided during conversation as cordiality, not an inducement to secure employee support. In *Joe’s Plastics, Inc.*, 287 NLRB 210 (1987), the Board found that an employer offering “coffee and doughnuts...is a legitimate campaign device.” In *Chicagoland Television News, Inc.*, 328 NLRB 367 (1999), the Board reiterated that campaign parties are legitimate campaign devices, absent special circumstances, and it will not “set aside an election simply because the union or employer provided free food and drink to the employees.”

Accordingly, I recommend that Objection No. 13 be overruled in its entirety.

Conclusion

Having recommended that Employer’s Objection Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 be overruled in their entirety, inasmuch as the Petitioner received a majority of the valid votes cast, I further recommend that a Certification of Representative be issued to the Petitioner.

¹⁷ The most expensive beverage at Starbucks is approximately \$5.

Right to File Exceptions: Pursuant to the provisions of Section 102.69 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. 20570-0001. Under the 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 or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that 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 on that evidence in any subsequent related unfair labor practice proceeding.

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 **August 21, 2012** at 5 p.m. (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 p.m. 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 may grant special permission for a longer period within which to file.¹⁸

¹⁸ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

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.

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, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. 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.

Dated at Los Angeles, California on August 7, 2012.

/s/Olivia Garcia
Regional Director
Region 21
National Labor Relations Board