

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

CHICAGO VENDOR SUPPLY, INC.,  
Employer

and

Case 13-RC-103542

INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, LOCAL 710  
Petitioner

**HEARING OFFICER'S REPORT ON OBJECTIONS**

**APPEARANCES:**

For the Employer:

Kenneth F. Sparks, Esq.

James R. Glenn, Esq.

Vedder Price, P.C.

222 North LaSalle Street

Chicago, Illinois 60601

For the Petitioner:

Michelle N. Cotrupe, Esq.

Ashler, Gittler & D'Alba, Ltd.

200 West Jackson Boulevard, Suite 1900

Chicago, Illinois 60606

**BEFORE:**

Maria G. Guerrero, Hearing Officer

National Labor Relations Board, Region 13

209 S. LaSalle Street, Suite 900

Chicago, Illinois 60604

## I. PROCEDURAL BACKGROUND

Pursuant to a petition filed on April 24, 2013, and a Stipulated Election Agreement approved by the Regional Director on May 3, 2013<sup>1</sup>, a secret-ballot election<sup>2</sup> was conducted on May 31 under the direction and supervision of the Regional Director for Region 13 of the National Labor Relations Board in the stipulated unit of employees.<sup>3</sup>

On June 6, Petitioner filed timely objections to conduct it alleges affected the results of the election.<sup>4</sup> The Regional Director issued a Report on Objections and Notice of Hearing in this matter on June 26, in which he ordered a hearing be conducted before a duly-designated hearing officer for the purpose of receiving testimony to resolve the issues of fact and credibility raised by Petitioner's Objections 4 – 12.

Accordingly, a hearing was held before the undersigned on June 12 and 15. At the hearing, all parties were afforded a full and complete opportunity to be heard, to examine and cross-examine witnesses, and to present evidence pertinent to the issues raised by the objections. On the basis of my observations of the witnesses while testifying under oath, and the record in its entirety, including the exhibits and arguments of the parties, I make the findings of fact, resolutions of credibility and recommendations set forth herein.

Although each iota of evidence or argument of counsel is not individually discussed, all matters have been considered. Omitted matter is considered either irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict findings of fact, that evidence has not been overlooked. Instead, it has been rejected as incredible or of little probative value.

In resolving credibility issues, I have taken into consideration such factors as the relative demeanor of the witnesses, partisan interest, guarded or indirect answers, conclusory and conflicting testimony, argumentativeness, ability to recall with accuracy and specificity, consistency, corroboration, inherent probabilities and reasonable inferences in view of the record as a whole. All witness testimony has been considered even though I may not detail all potential conflicts in testimony. *Walker's*, 159 NLRB 1159, 1161 (1966).

---

<sup>1</sup> Unless otherwise noted, all dates refer to 2013

<sup>2</sup> The tally of ballots issued on May 31 shows that of approximately 12 eligible voters, 6 ballots were cast against the participating labor organization and 5 ballots were cast in favor of the participating labor organization. There were no void ballots. There was 1 challenged ballot, but the challenged ballot was not sufficient to affect the results of the election.

<sup>3</sup> The unit is: "All full-time and regular part-time drivers and swing drivers employed by the Employer at its facility currently located at 7000 W. 60<sup>th</sup> Street, Chicago, Illinois; but excluding all other employees, employees working exclusively in the warehouse, office clerical employees and guards, professional employees and supervisors as defined by the Act."

<sup>4</sup> The petition was filed on April 24, 2013. In considering the merits of Petitioner's objections, I confined my review to the alleged interference that occurred during the critical period, which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962).

## II. BURDEN OF PROOF

Representation elections are not lightly set aside. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000). A Board-run representation election is presumed valid and the burden is on the objecting party to prove that the election is invalid. *NLRB v. Mattison Mach. Works*, 365 U.S. 123, 124 (1961) (per curiam); *Delta Brands, Inc.*, 344 NLRB 252, 252-53 (2005). The objecting party must show that the conduct in question affected the employees in the voting unit and that the conduct had a reasonable tendency to affect the outcome of the election. *Delta Brands, Inc.*, 344 NLRB at 253. The Board will only interfere when the registration of free choice is shown by all circumstances to have been unlikely. *The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954). In applying that objective standard, the Board considers the following factors: (1) number and severity of the incidents and whether they would likely cause fear among the employees; (2) the number of employees subjected to the conduct; (3) whether the incidents occurred close to the election date; (4) the extent to which the conduct was disseminated among employees; and (5) the closeness of the final vote. *Big Ridge, Inc.*, 358 NLRB No. 114, slip. op. at 9 (Aug. 31, 2012) (citing, inter alia, *Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157, 158 (2001)).

As the objecting party, the Petitioner bears the burden of proving that the alleged conduct warrants setting aside the election.

## III. FACTUAL BACKGROUND

The Employer, Chicago Vendor Supply, Inc., maintains an office and place of business in Chicago, Illinois, which is the only facility involved in this proceeding. Functions of the Chicago facility include selling pre-packaged candies, snacks and beverages to the vending and concession industries (customers), loading products on trucks and delivering and unloading products at the customers' facilities. (Tr. 176) Petitioner is seeking to represent the employees in the bargaining unit described in footnote 1, above. Among other duties, the duties of the drivers include making deliveries to various customers on various routes. The routes consist of areas in Michigan, Indiana, Wisconsin, Iowa, Ohio and Illinois. (Tr. 175, 263) The drivers may also at times conduct pickups on their way back to the Chicago facility. (Tr.176)

Jerry Hoffstetter is the Vice President and part-owner of the company. Debbie Blum is the Office Manager and Dan Wilson is the Traffic Manager. The parties stipulated to Hoffstetter, Wilson and Blum's status under Section 2(11) of the Act. The developed record established that Len Mahler is the Employer's President and Chief Financial Officer and Bryant Tiardovich is the Warehouse Manager.

## IV. THE OBJECTIONS

### *a. Petitioner's Objection 4*

**Since in or around May 13, 2013, and continuing to present, the Employer has informed drivers that driver Brian Reed was terminated.**

### *i. Withdrawal of Petitioner's Objection 4*

Prior to adjourning on June 12, the Petitioner withdrew objection 4 from consideration. At that time, I approved withdrawal of Petitioners Objection 4. (Tr. 164)

*b. Petitioner's Objection 5*

**Since in or about May 2013 and continuing to present, the Employer has decreased the hours of certain drivers and increased the hours of certain other drivers.**

The amount of hours a driver works on any given day is dependent on their scheduled route(s). Some routes generate more hours than others. (Tr. 41) There is no seniority or bid system for scheduling routes and no guarantee of hours. (Tr. 41, 49) Routes are assigned by Dan Wilson, Traffic Manager. (Tr. 191)

Only two of the Petitioner's three employee witnesses testified regarding their work hours during the critical period, employees David Schmitt and Kenyatta Newson. Schmitt testified that during the critical period he noticed that Traffic Manager Dan Wilson, Warehouse Manager Brian Tiardovich and Split Driver Dan McLain were driving routes daily<sup>5</sup>. (Tr. 44) Schmitt testified he was also getting more hours after the filing of the petition. (Tr. 44) Newson testified that after April 24, Tiardovich and Wilson were getting more routes. (Tr. 102). Newson initially testified that after April 24 he was being given shorter routes and thus receiving fewer hours. (Tr. 104). However on cross-examination, after reviewing Petitioner's Exhibit 4, Newson testified that his hours remained consistent before, during and after the critical period. (Tr. 124) A review of Petitioner's Exhibit 4 demonstrates that Newson and Schmitt did not suffer a material change in work hours during the critical period. Similarly, the evidence shows that there was no material change in the hours worked or the type of routes driven by the supervisors and split driver. (Employer Exhibit 9; Petitioner Exhibit 4) While there is some fluctuation in work hours, Schmitt testified that driver hours can fluctuate from day-to-day for a variety of reasons, such as order size, the type of truck used, seasonality of the business, customer requests and driver vacations. All of these factors would impact all employees' hours equally. (Tr. 50-54) Wilson, who makes all of the routing assignments, credibly testified that nothing changed regarding his method of assigning routes after the filing of the representation petition on April 24. (Tr. 268) Wilson went through all of the route sheets he maintained from February 2013 to June 2013, to illustrate his point that nothing had changed in his route assignment method, before, during or after the critical period. (Employer's Exhibit 9) Wilson's testimony was left un-rebutted by the Petitioner.

*i. Legal Analysis of Petitioner's Objection 5*

The Union failed to provide evidence that the Employer changed employees' work hours. The record established that by the nature of the job the routes and hours of the drivers vary from day-to-day and some fluctuation in work hours is to be expected. The Petitioner failed to demonstrate that the Employer purposely increased or decreased hours for employees because of their union sympathies or activities. Even if a change had been shown the Petitioner failed to present evidence that would suggest that changes were based on union support or were intended to impinge upon the employees' freedom of choice for or against unionization. As the Petitioner correctly points out, records were submitted into evidence showing the payroll hours paid to

---

<sup>5</sup> McLain was an eligible voter. (Tr. 187 -188, 265)

employees for the time periods of March 1 - June 30, for the years 2011, 2012 and 2013. (Petitioner Exs. 2-4) The Petitioner argues that those exhibits do not demonstrate what amount of the time was spent by swing drivers or supervisors performing driver duties. (Tr. 159-161) While the Petitioner's observation may or may not be correct the point is irrelevant because the objection, as filed, directly points to an increase or decrease in work hours and not to a diversion of routes or driver duties to certain employees. Based on the forgoing, Objection 5 should be overruled because the Petitioner did not show any material change in driver hours during the critical period.

*c. Petitioner's Objection 6*

**On or about May 1, 2013, the Employer granted an unscheduled pay increase to driver Jose Murillo.**

The Employer does not maintain a set policy on wages or wage increases. (Tr. 40) Wage increases are not directly tied to employee anniversary dates. (Tr. 59) The Employer does not conduct annual performance evaluations. (Tr. 60 and 102) Newson testified that he received a wage increase in 2011 and 2012. The 2011 increase was given to Newson because he was offered another job. In a successful effort to retain him, Newson was granted a wage increase. In 2012, Newson became qualified to drive a combination vehicle (tractor – trailer). As a result of his new skills, Newson received a wage increase. (Tr. 127)

On or about March 23, 2013, the Employer granted a pay increase of 50 cents per hour to driver Jose Morillo. (Pet. Ex. 1; Tr. 179-181) Hoffstetter explained that the wage increase was given to Morillo because he received compliments about Morillo's work performance from major customers. (Tr. 179-181) Hoffstetter further testified that wage increases are given on the basis of merit and performance. (Tr. 180) Moreover, the record established that the wage increase was given to Morillo almost a month before the critical period.

*i. Legal Analysis of Petitioner's Objection 6*

There was no evidence presented to indicate that the increase, which was given before the critical period, was meant to influence employee free choice. There is no evidence that the Employer knew that the Union was organizing its employees at the time of the wage increase. In *Ideal Electric Mfg. Co.*, 134 NLRB 1275, 1278 (1961), the Board noted that absent unusual circumstances only conduct that occurs during the critical period is objectionable. I certainly cannot point to any *unusual* circumstances in this case. It is the Petitioner's burden to show that the conduct occurred during the critical period. *Accubuilt, Inc.*, 340 NLRB 1337 (2003). It has not met this burden. The Petitioner points out that in *Dresser Industries*, 242 NLRB 74 (1979), the Board stated that, "the *Ideal Electric* rule does not preclude consideration of conduct occurring before the petition is filed where ... such conduct adds meaning and dimension to related post petition conduct." There is no evidence that the wage increase added meaning or dimension to other Employer conduct. There are no other objections related to a promise of benefit, including the granting of wage increases.

Even if the benefit would have been granted during the critical period, the inquiry is whether the benefits were granted for the purpose of influencing employee votes. The Union failed to present any evidence of that. The Petitioner failed to call Jose Morillo as a witness even

though this objection was centered on his wage increase. The Petitioner also failed to present any evidence on how many employees actually knew that Morillo received a wage increase. In addition, there is no evidence to show that Morillo received a wage increase because of his anti or pro union activities. It is unclear what, if any, union involvement Morillo had, and so it is difficult based on the evidence to tie the wage increase to the Union's organizing activity. There is simply no evidence that the Employer had knowledge of the union activity at the time the wage increase was given. For these reasons, Objection 6 should be overruled.

*d. Petitioner's Objection 7*

**On or about May 10, 17 and 24 of 2013 during mandatory meetings with drivers, the Employer through owner Jerry Hoffstetter, threatened drivers with layoffs if the Petitioner (Union) was voted in.**

First of all, Objections 7 – 10 arise from a series of mandatory meetings that the Employer held for its employees on May 10, 17 and 24. The record establishes that Jerry Hoffstetter was the spokesperson at the meetings and the objections relate only to comments made by the Employer through Jerry Hoffstetter. In addition, the record established that Hoffstetter for the most part read from prepared scripts at each meeting. Hoffstetter was observed by the employees reading from the scripts at the meetings. (Tr. 83 -84, 129) Office Manager Debbie Blum was also present as a note taker for all of the meetings. (Tr. 196)

With regard to Objection 7 the Petitioner presented three employee witnesses, David Schmitt, Kenyatta Newson and Calvin Eubanks. The only employee witness who recalled a statement about layoffs being made at the May 10 meeting was Calvin Eubanks who recalled that Hoffstetter stated that he “wouldn’t lay nobody off” even if the Union came in. (Tr. 138) Besides the statement at the May 10 meeting, Eubanks had no recollection of any layoff statement made at the May 17 and 24 meetings. (Tr. 143, 145) Kenyatta Newson had no recollection about any layoff statements at any of the three meetings. (Tr. 95, 98, 101) Schmitt recalled that at the May 17 meeting, Hoffstetter stated that “whether the union comes in or doesn’t come in, he wasn’t going to be firing or laying people off, but if the union, you know, there could be layoffs at one point.” (Tr. 29) Schmitt also recalled that at the May 24 meeting Hoffstetter mentioned there *could be* a layoff if the union came in. (Tr. 38) Schmitt later clarified that Hoffstetter described the reasons layoffs could be necessary and that layoffs were only a “possibility”. (Tr. 65-68) Schmitt testified that Hoffstetter described to employees the potential impact of the union demanding too much at the bargaining table and having to raise prices for customers. (Tr. 66) Schmitt recalls that Hoffstetter explained that a raise in prices could result in the loss of customers which would result in the possibility of layoffs because the company could lose business and lose volume. (Tr. 67) Schmitt further testified that he is unaware of any policy on layoffs and he has never seen a layoff by the Employer. (Tr. 30, 39) The most recent layoffs have been in January 2008 and 2013. (Tr. 353 -354)

Hoffstetter admitted to stating that if the Union was voted in and it caused the company to raise its operational costs it could potentially affect sales and if sales were affected the Employer could potentially lose jobs. (Tr. 199, 242 – 243, 330 – 331; Employer Ex. 3) Hoffstetter also stated that he *could not predict* the future or what would happen because *no one knows the future*. (Tr. 222, 225)

i. *Legal Analysis of Petitioner's Objection 7*

The Board has not found objectionable conduct when an employer describes what *could* happen as opposed to what *would* happen in the event of unionization. *Manhattan Crowne Plaza Town Park Hotel*, 341 NLRB 619, 620 (2004) The evidence fails to establish that Hoffstetter's comments went beyond the realms of what *could* happen if the union was voted in as the collective-bargaining representative. It is well established law that an employer has the right to express opinions or predictions of unfavorable consequences which he believes may result from unionization. Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), an employer may make a prediction as to the precise effect he believes unionization will have on the company. The prediction must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control." Such predictions or opinions are not violations of the National Labor Relations Act if they have some reasonable basis in fact and provided that they are in fact predictions or opinions rather than veiled threats on the part of the employer. The record testimony did not reveal any evidence of veiled threats. Through Hofstetter's testimony and scripts, he made it clear that he conveyed to employees that he could not predict the future or what customers would think or do.

The Petitioner in its brief points out that the comments made by Hoffstetter are more analogous to those found to be unlawful in *DTR Industries, Inc.*, 350 NLRB 1132 (2007), *enf. granted*, 297 Fed. Appx. 487 (6th Cir.2008), in which a manager gave a speech to employees concerning the employer's "sole source supplier status."<sup>6</sup> During that speech, the manager stated that if employees select the union, "our customers will most likely reevaluate [sic] our position with them in relation to the sole source supplier status." *Id.* However the Board found that the manager also made statements such as, "customers *would* look for other sources" and the company "would lose the sole supplier status". *Id.*

The Board concluded that these were conclusory statements phrased in terms of what "*would*" happen with no objectively-based rationale and distinguished its finding from the conclusions reached by the Sixth Circuit's decision in *DTR Industries v. NLRB*, 39 F.3d 106 (6th Cir. 1994), finding remarks about sole source status to be protected by Section 8(c). The Board reasoned that the case was distinguishable because the manager failed to explain the reasons why customers were likely to leave for an alternate supply source and did not reference the speaker's experience or customer base knowledge.

In this case, the employees knew about Hoffstetter's industry experience and customer base knowledge and about the competitive nature of the business. In fact, in the spring of 2012, the Employer lost a major customer, Canteen Compass, which had six locations throughout Michigan and Indiana. (Tr. 187) Further, no evidence was presented to suggest that Hoffstetter did anything beyond offer his perspective. Hofstetter made it clear that he was not making predictions. Hoffstetter spoke in terms of if and could – if costs increase, if prices increase and if customers were lost then there could be layoffs. At no time did he state layoffs *would* result from unionization. Rather, his speeches were scripted in terms of possibilities. In *Miller Indus. Towing Equip.*, 342 NLRB 1074, 1075 (2004) the Board found statements made by a manager too vague to constitute a threat because the record revealed

---

<sup>6</sup> DTR Industries, 350 NLRB at 1148.

that the statements made were worded as “it could be a possibility” or “it depends”. The Board concluded that general references to possibilities were inadequate to establish a blanket threat that unionization *would* lead to layoffs because the statements lacked detail as to how or why the Union would force layoffs. In sum, the Employer in this case simply described what *could* happen; it was not predicting what would happen and this falls within the range of permissible campaign conduct. See also *Novi American, Inc.*, 309 NLRB 544 (1992); *Caradco Corp.*, 267 NLRB 1356 (1983).

Even if the layoff statements could arguably be objectionable, I would not find sufficient evidence that this conduct considered individually or cumulatively, could have affected the outcome of the election. Only one witness remembered that Hoffstetter made layoff statements at the May 17 and 24 meetings. Even then his testimony was muddled, at best, stating: “whether the union comes in or doesn’t come in, he wasn’t going to be firing or laying people off, but if the union, you know, there could be layoffs at one point.” (Tr. 29) He further clarified that he understood this was only a possibility if certain other factors were met such as raised prices and the loss of customers. (Tr. 65) Another witness recalls Hoffstetter stating that he “wouldn’t lay nobody off”. (Tr. 138) Based on the forgoing, Objection 7 should be overruled.

*e. Petitioner’s Objection 8*

**On or about May 10, 17 and 24 of 2013 during mandatory meetings with drivers, the Employer through owner Jerry Hoffstetter, told drivers that the Employer can follow them and watch what they are doing every minute of every day with the use of GPS**

David Schmitt, who only attended the last 10 minutes of the May 10 meeting, recalls that Hoffstetter mentioned that there was a global positioning system (GPS) in the company trucks. Kenyatta Newson and Calvin Eubanks corroborate that at the May 10 meeting, Hoffstetter mentioned that the company trucks were equipped with GPS. (Tr. 94-95, 138) Schmitt recalls that the subject of GPS was also raised at the May 17 meeting. At that meeting, Schmitt contends that Hoffstetter told employees that the company monitored the GPS and knew when employees have idle time, if they are taking too long on breaks, stops or pickups, and that they do not want drivers gathering. (Tr. 28) Newson has no recollection of the GPS system being mentioned at the May 17 meeting. Eubanks’ recollection of what was said at the meeting is quite muddled. Eubanks testified that Hoffstetter told employees that the trucks have GPS and also that Hoffstetter did not say anything about the GPS in the trucks. (Tr. 142-143) It became clear that Eubanks is uncertain of what, if any, statement about GPS was made at the May 17 meeting. (Tr. 143) With regard to the final meeting, Schmitt is the only employee with a recollection of the GPS system being raised. Schmitt recalls that Hoffstetter said the company with the use of GPS knew where employees were at all times, breaks, lunches and if they are gathering. (Tr. 37) Newson and Eubanks have no recollection of these statements. (Tr. 101, 145)

While there is *some* recollection that *a* statement about GPS was made there is no corroboration about what *specifically* was said and when. The employee witnesses agree that prior to the meeting they already knew that the company trucks were equipped with GPS. (Tr. 95, 142-143) In fact, Schmitt testified that the systems have been there as long as he has been employed and that it is openly known to employees that they are subject to monitoring at all times. (Tr. 46-47) This is not the only time that GPS has been mentioned at a meeting, the subject has also been brought up at DOT meetings which are held annually for the drivers. (Tr.

47) Additionally, employees have received memos from time to time about the GPS to remind them that their breaks are being monitored and to make certain drivers are not taking too long at stops. (Employer Ex. 5; Tr. 47-48)

While the issue of GPS is not addressed in any of the scripts, Hoffstetter agreed that the subject was brought up in the May 17 meeting in connection with explaining costs recently incurred by the company. (Employer Ex. 6; Tr. 227) Hoffstetter stated that the GPS system had been upgraded over the last year (2012) to replace the old system so that it would work properly. (Tr. 227 - 228)

*i. Legal Analysis of Petitioner's Objection 8*

The record testimony establishes that the company has maintained a GPS system. The GPS allows the Employer to monitor delivery times and routes, break times, idle times, and of course location of their property and employees. The GPS may also help the Employer determine who they will send for a pickup on the way back to the office or determine delivery windows for customer orders.

It is abundantly clear that the Employer did not establish the GPS in an effort to track unionization efforts. The system was established in 1998 or earlier. (Tr. 46-47) Board law has long held that "an employer has the right to maintain security measures necessary to the furtherance of legitimate business during the course of union activity." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 201 (1997). The Petitioner presented no evidence to show that use of the GPS differed during the critical period. Besides telling employees what they have been told about the GPS in the past, there is no evidence that the Employer threatened to increase monitoring because of the unionization efforts. Based on the foregoing, Objection 8 should be overruled.

*f. Petitioner's Objection 9*

**On or about May 10, 17 and 24 of 2013 during mandatory meetings with drivers, the Employer through owner Jerry Hoffstetter, referenced past personal favors the employer and its owners have done for employees and stated that if the Petitioner comes in, employees will get no favors from the Employer.**

Eubanks recalled that at the May 10 meeting, Hoffstetter told employees that if the Union came in the favors would stop. (Tr. 139) Schmitt testified that on May 17 and 24, Hoffstetter told employees that favors would come to an end if the union came in. (Tr. 28, 30, 38) While Newson had no personal knowledge of the favors that Hoffstetter had done for employees, he testified that Calvin Eubanks told him about the favors he (Eubanks) had received. (Tr. 96) On cross-examination, Counsel for the Employer attempted to clarify if the statement regarding favors was made in connection with describing the collective-bargaining process. Schmitt testified that favors were not discussed as part of the bargaining process. (Tr. 63) Similarly, Newson testified that Hoffstetter did not say that employees would have to go through the union if the union came in. (Tr. 112) However, Newson did testify that Hoffstetter told employees that if the union came in the favors would stop and that employees would no longer be able to talk with him one-on-one. (Tr. 95)

Hoffstetter testified that he told employees there were no guarantees in negotiations. (Employer's Ex. 6) Specifically, in discussing bargaining Hofstetter told employees that "even the favors we have done for employees in the past don't automatically get guaranteed." (Employer Ex. 6; Tr. 218-219) Hoffstetter also told employees he did not understand why employees would want to put their personal affairs in the hands of someone they did not even know when the employees have always come to him. (Tr. 226, 243)

*i. Legal Analysis of Petitioner's Objection 9*

At the onset of the hearing and on numerous occasions throughout the hearing, Counsel for the Petitioner was cautioned that general conclusory statements would not be sufficient to uphold an objection. While three employees agreed that the same statement, telling employees the favors would stop if the union came in, was made at the May 17 and May 24 meetings, none of the employees were able to provide the context of how the statements were made. (Tr. 28, 30, 38, 99, 101,144) Given the other statements on which the witnesses are shown to have a less than complete recollection, I find it difficult to credit them here. Hoffstetter on the other hand, provided consistent testimony and testified that he never told employees the favors would come to an end. Rather he equated the favors to being something that the Union and Employer would have to bargain about and are not automatically guaranteed. In *Wild Oats Mkt.*, 334 NLRB 717 (2005) the Board found the following statement in a flyer to employees not objectionable, "in collective bargaining you could lose what you have now," because the statement merely related a possible consequence of bargaining and did not indicate there was an intention of taking away benefits prior to negotiations. Based on the preponderance of the credible evidence, the record established that Hoffstetter discussed favors at the meetings in connection with the give and take process of bargaining, noting to employees that "even the favors we have done for employees in the past don't automatically get guaranteed". Such a statement does not amount to objectionable conduct. The statement was a factually accurate observation regarding a possible negative outcome of collective bargaining, which is protected speech under Section 8(c). In addition, the Employer's comment did not tend to indicate that it would take away benefits (favors) prior to negotiations. Accordingly, Objection 9 should be overruled.

*g. Petitioner's Objection 10*

**On or about May 10, 17 and 24 of 2013 during mandatory meetings with drivers, the Employer through owner Jerry Hoffstetter, told drivers that a strike would result in drivers being permanently replaced.**

Schmitt testified that on May 10, the subject of replacement employees was brought up by Hoffstetter in describing what could happen in the event of a strike. Schmitt recalled that Hoffstetter stated that the Employer in an event of a strike had a right to service their customers and employees could be permanently replaced. (Tr. 22) Eubanks did not have any recollection about the subject of strikes and permanent replacements at the May 10 meeting. Newson testified that at the May 10 meeting Hoffstetter talked about strikes, however, Newson's testimony did not contain any reference to drivers being permanently replaced. (Tr. 93 -94) The same is true for Newson's testimony about the May 17 and 24 meetings, while he testified that the subject of strikes was raised, his testimony did not contain any reference to drivers being permanently replaced. (Tr. 97, 101) After further questioning, Newson recalled that employees were told, on a meeting date uncertain, that if the employees engaged in a strike the company

could hire replacement drivers and if employees wanted their jobs back, employees could get their jobs back but the company did not have to rehire the employees. (Tr. 130) Schmitt recalled that at the May 17 meeting, employees were told that the company had a right to do certain things and employees could be permanently replaced and that they would not be called back until there was an opening. (Tr. 24, 27) Eubanks' testimony was less than clear. He testified that Hoffstetter, at the May 17 meeting, said something about permanent replacements if the union came in. (Tr. 142) With regard to the May 24 meeting, Schmitt recalled that Hoffstetter again told employees that they could be permanently replaced if there was a strike. (Tr. 37) Eubanks recalled that on May 24, Hoffstetter told employees that if there was a strike the company would have to get replacement workers and there was no guarantee that employees would get their jobs back. (Tr. 145)

On cross examination, Schmitt and Eubanks agreed that the comments made at the meeting were the same as what was in a letter sent to employees. (Employers Ex. 1; Tr. 64-65, 150-151) Newson did not have a recollection of receiving a letter from the Employer. The letter to which Schmitt and Eubanks referred to (Employer's Ex. 1) states:

You should also remember that we have a right to continue operating during a strike, and that we will try to serve our customers even if you don't. What would our customers do if they can't get what they need from us? To keep operating, we can permanently replace employees who go on strike to get better contract terms. Permanently replaced employees may not come back when the strike ends. Instead the replacements keep working, and the replaced strikers come back only when a replacement leaves or there is a new opening.

Additionally, Schmitt and Eubanks testified that the subject of strikes came up in the context of bargaining and specifically that a strike could happen if the parties could not reach an agreement. (Tr. 61-62, 70, 152) Finally, Schmitt agreed that Hoffstetter's discussion of the possibility of strikes was focused on economic strikes not unfair labor practice strikes. (Tr. 82) Schmitt recalled that if a strike was economic then the employer has a right to bring in replacement workers. (Tr. 82)

*i. Legal Analysis of Petitioner's Objection 10*

Board law is clear on the issue of replacement workers as it relates to economic strikes and unfair labor practice strikes. In *Eagle Comtronics*, 263 NLRB 515 (1982), the Board held that "an employer may address the subject of striker replacements without fully detailing the protections enumerated by *Laidlaw*<sup>7</sup>, so long as it does not threaten as a result of strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*." Thus an employer's statements about permanent replacements that also specifically references "job loss" are generally deemed to be unlawful because ordinary employees would

---

<sup>7</sup> *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enf'd. 414 F.2d 99 (7<sup>th</sup> Cir. 1969), cert denied 397 U.S. 92 (1969)

not interpret such statements to mean they have a *Laidlaw* right to return to work. *Baddour, Inc.* 303 NLRB 275 (1991) (finding unlawful the following statements: “union strikers can lose their jobs” and “you could end up losing your job by being replaced with a new permanent worker”).

The Board has also made clear that an employer may not “tell employees, without explanation that they could lose their jobs to permanent replacements in the event of a strike.” *Virginia Concrete Corp.*, 334 NLRB 796 (2001). For example, in *Larson Tool and Stamping Co.*, 296 NLRB 895 (1989) an objections case, the Board concluded that the employer violated Section 8(a)(1) and engaged in objectionable conduct by including the following statement in its pre-election literature: “During [an economic] strike, you could lose your job to a permanent replacement.” The Board reasoned that the employer's *unqualified* statement about job loss in the event of a strike “may fairly be understood as a threat of reprisal.” *Id.* at 896. Similarly, in *Wild Oats Markets, Inc.* the Board reasoned that the phrase “lose your job” conveys to the ordinary employee that employment will be terminated and that message is reinforced when the employee is further told that their job will be lost to a permanent replacement. 344 NLRB 717,740 (2005) (finding unlawful the following statement “when Unions go on strike, wages can be lost and many have lost their jobs because striking workers are replaced”).

In this case, I find that Hoffstetter’s testimony was nothing more than a summary of what could occur if the employees went out on an economic strike. Unlike the cases cited above, the employees were told that they could return to work when positions became available. This is not inconsistent with their rights under *Laidlaw*. The Employer never used the phrase “lose your job” in connection with describing permanent replacements. Therefore, I recommend Objection 10 be overruled.

*h. Petitioner’s Objection 11*

**In or about May 2013, Jerry Hoffstetter followed driver Calvin Eubanks to a stop in Carol Stream, Illinois. At that stop, Mr. Hoffstetter questioned Mr. Eubanks about his support for the Petitioner referenced past favors the Employer has done for him and threatened that the favors will stop if the petitioner (union) is voted in.**

Sometime in May 2013, Hoffstetter met with employee Calvin Eubanks at a route stop for a customer by the name of Falco in Carl Stream, Illinois. (Tr. 146) Initially, Eubanks only recalled that Hoffstetter approached him and brought up that he (Hoffstetter) had done a lot of favors for him but that he (Hoffstetter) was not going to tell him which way to vote. This was the end of the conversation. (Tr.147) It was only after further questioning by Petitioner’s counsel when Eubanks recalled that Hofstetter also said that he would not do favors for anyone if the union came in. (Tr. 148 -149). On cross-examination, Eubanks again failed to recall if Hofstetter said anything beyond stating that he had done a lot of favors for Eubanks. (Tr. 153)

The Employer presented Hoffstetter as a witness for this objection. Hofstetter testified that he decided to meet Eubanks at the stop in Carol Stream because the day before Eubanks had been evasive by walking away from him. This bothered Hoffstetter. Therefore, he drove to Eubanks’ stop to meet with him. Hoffstetter approached Eubanks regarding the previous day. Eubanks informed Hoffstetter that he walked away from him the day prior to go to a gas station because they were giving away free hotdogs. (Tr. 244 -245) Before leaving, Hoffstetter spoke to Eubanks about their relationship, stating that they had know each other for a long time,

18 years, and hoped that Eubanks understood he did not know what would happen if the union got in and that he did not understand why anybody would want to put any of their issues in the hands of some third party. Hoffstetter reminded Eubanks that he had done favors for him in the past and ended the conversation with a hand shake and telling Eubanks that he hoped he would vote no. (Tr. 245-246)

With regard to dissemination of his conversation among other co-workers, Eubanks testified that he simply told three other co-workers that Hofstetter met him at Falco. He told his co-workers nothing else. (Tr. 155)

*i. Legal Analysis of Petitioner's Objection 11*

It is unclear from Eubanks' testimony if Hofstetter actually stated that he would not do any more favors for the employees if the union came in. Eubanks' testimony was shaky, at best. Eubanks twice confirmed that the only thing that Hoffstetter said during the conversation about favors was that he had done a lot of favors for him in the past. As noted above, it was not until after Petitioner's counsel prompted Eubanks to specifically recall the comments about favors when Eubanks responded: "Well, he said that he wouldn't do no favors for no one if the Union came in." (Tr. 148) It was the Petitioner's burden to show by the preponderance of the *credible* evidence that the statement was made. The Union has not met its burden. Based on the overall demeanor of both Eubanks and Hoffstetter, and the credibility considerations previously described, I credit Hoffstetter's testimony about this conversation over Eubanks'. For these reasons, Objection 11 should be overruled.

*i. Petitioner's Objection 12*

**On or about May 17, 2013, after a mandatory meeting with drivers Jerry Hoffstetter approached drive David Schmitt and again referenced past favors the Employer has done for drivers. Mr. Hoffstetter further stated to Mr. Schmitt that the drivers come to the Employer for money not him.**

Schmitt testified that after the May 17 meeting he stayed behind to speak with Jerry Hoffstetter. To be clear, the Petitioner's own evidence showed that Hoffstetter did not approach Schmitt as noted in the objection. Schmitt approached Hoffstetter and asked him – how they had gotten to "this point", having anti-union meetings and "all the issues." (Tr. 33-34) Schmitt picked the issue of power equipment to ask about. Hoffstetter responded that it had been looked into. (Tr. 34) Schmitt testified that during the interaction Hoffstetter got upset and asked "at what time he had to start answering to" Schmitt (Tr. 34). Hoffstetter told Schmitt that drivers come to him (Hoffstetter) for money and not Schmitt. (Tr. 34) After Schmitt's initial testimony Petitioner's counsel attempted to clarify Schmitt's testimony on the topic of favors being discussed. Even then the testimony was unclear:

- Q. Now, you mentioned earlier in your testimony about the topic of favors was discussed in that conversation.
- A. Yes. Yes.

- Q. Can you just describe what was said with respect to favors?
- A. That if the Union was voted in, the favors would come to an end.
- Q. And this was separate from what was said during the meeting with all drivers?
- A. No, that was said during the meeting with all drivers. When we were having a conversation after the meeting, it was that when it came to favors is what I'm assuming –  
(Tr. 35)

Hofstetter recalled that Schmitt approached him and asked "How did we get here" (Tr. 230 - 231) When asked to explain what he meant Schmitt brought up an electric pallet issue. Hoffstetter told Schmitt that the issue had been looked into "several times prior". It was then when Schmitt stated that drivers were coming to him with issues. Hoffstetter responded that he did not understand why drivers would go to Schmitt "when they come to me whether it be business or personal." Schmitt then repeated that "you don't listen." (Tr. 230-231) According to Hoffstetter the meeting ended shortly after this comment. The details of this conversation were also recorded in a corroborating document titled "Schmitt's Contact Report" (Employer's Exhibit 7; Tr. 231). Debbie Blum, who observed the conversation, also corroborated Hoffstetter's testimony. ( Employer Ex. 11 p.3; Tr. 340-341)

*i. Legal Analysis of Petitioner's Objection 12*

Even if Hoffstetter told Schmitt that employees come to him for money, it is unclear from Schmitt's testimony if Hofstetter connected this statement with a threat to end favors if the union came in. Schmitt may have "assumed" this is what Hoffstetter meant when he said employees come to him and not Schmitt for money (or with issues). Schmitt's recollection of the conversation was somewhat sketchy and he may have simply misinterpreted Hoffstetter's statements. As with Eubanks' testimony, it was not until after Petitioner's counsel prompted the witness to specifically recall the comments about favors when testimony was received. It was the Petitioner's burden to show by the preponderance of the *credible* evidence that the statement was made. The Union has not met its burden. Based on the overall demeanor of both Schmitt and Hoffstetter, and the credibility considerations previously described, I credit Hoffstetter's record testimony, which is supported by documentary evidence and corroborated by another witness, Debbie Blum. Even if Schmitt's version of events is credited there is no evidence that he disseminated the information to his co-workers. For these reasons, I recommend Objection 12 be overruled.

## **V. CONCLUSIONS & RECOMMENDATION**

Based on my findings, I recommend that the Petitioner's Objections be overruled in their entirety and that a Certification of Results issue.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within fourteen (14) days from the date of issuance of this report, any party may file with the National Labor Relations Board, Attn: Executive Secretary, 1099 14th St. NW,

Washington, D.C. 20570-0001, an original and eight (8) copies of exceptions to such report with or without supporting brief. Immediately upon filing of such exceptions, the filing party shall serve a copy, together with any brief filed, upon the other parties and upon the Regional Director and simultaneously submit to the Board a statement of such service. See Section 102.69(f) as to the time limit for filing and answering brief to the exceptions. If no exceptions are filed to the Hearing Officer's Report, the Board may decide the matter forthwith upon the record or make other disposition of the case.<sup>8</sup>

Dated at Chicago, Illinois, this Friday, August 23, 2013.

*/s/ Maria G. Guerrero*

---

Maria G. Guerrero, Hearing Officer  
National Labor Relations Board, Region 13  
209 South LaSalle Street, Suite 900  
Chicago, Illinois 60604

---

<sup>8</sup> Filing exceptions may be accomplished by accessing the Efiling system on the Agency's website electronically. To file such exceptions electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the E-File Document tab, 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 offline or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website. A request for an extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request 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 each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the exceptions with the Board.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true copies of the attached **Hearing Officer's Report on Objections** have been served upon the following in the manner indicated this 23rd day of August, 2013.

**VIA U.S. FIRST CLASS MAIL:**

Gary Shinnars, Executive Secretary  
National Labor Relations Board  
Office of Executive Secretary  
1099 14<sup>th</sup> Street, N.W., Room 11602  
Washington, DC 20005-3419

Kenneth F. Sparks, Esq.  
James R. Glenn, Esq.  
Lawrence J. Casazza, Esq.  
Vedder Price, P.C.  
222 North LaSalle Street, Suite 2600  
Chicago, IL 60601-1104

Michele Cotrupe, Esq.  
Asher, Gittler & D'Alba, Ltd.  
200 W. Jackson Blvd., Suite 1900  
Chicago, IL 60606-6942

Bryan Tiardovich  
Chicago Vendor Supply, Inc.  
7000 W. 60<sup>th</sup> St.  
Chicago, IL 60638-3102

Mike Rossow  
Matthew Flynn  
Teamsters Local 710  
9000 187<sup>th</sup> St.  
Mokena, IL 60448-7700

/s/ Maria G. Guerrero

Maria G. Guerrero, Hearing Officer  
National Labor Relations Board, Region 13  
209 South LaSalle Street, Suite 900  
Chicago, Illinois 60604