UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CHEM RX PHARMACY SERVICES, LLC Employer	)	
and	)	Case Nos. 29-RC-114881 29-RC-115184
CHEM RX EMPLOYEES UNION Petitioner	)	
and	)	
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 2013 Intervenor	)	

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

This report contains my findings and recommendations regarding the Intervenor's objections to the election in the above referenced cases. For the reasons contained herein, I recommend sustaining the Intervenor's objections.

Procedural History

On October 18, 2013,[1] Chem RX Employees Union, herein called the Petitioner, filed two petitions in these matters seeking to represent certain employees employed by Chem RX Pharmacy Services LLC, herein called the Employer. United Food and Commercial Workers Union, Local

[1] All dates hereinafter are in 2013 unless otherwise indicated.

2013, herein called the Intervenor or Local 2013, intervened in both cases on the basis of collective bargaining agreements.

Pursuant to a Decision and Direction of Election, issued by the Regional Director on November 18, an election by secret ballot was conducted on December 16 among the employees in the following units, which are referred to as Unit A and Unit B, respectively:

Unit A

> All full-time and regular part-time drivers, maintenance, warehouse and production employees employed by the Employer at 750 Park Place, Long Beach, New York, and at 4041 Hadley Road, Building M, South Plainfield, New Jersey, but excluding all pharmacy employees, management employees, clerical employees, confidential employees, guards, and supervisors as defined by the Act

and

Unit B

> All full-time and regular part-time pharmacy employees employed by the Employer at 750 Park Place, Long Beach, New York, and at 4041 Hadley Road, Building M, South Plainfield, New Jersey, but excluding all drivers, maintenance, warehousemen, production employees, management employees, clerical employees, confidential employees, guards and supervisor as defined by the Act

The Tally of Ballots for Unit A made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	346
Number of void ballots	0
Number of ballots cast for Chem RX Employees Union	158
Number of ballots cast for United Food and Commercial Workers, Local 2013	92
Number of votes cast against participating labor organizations	5
Number of valid votes counted	255
Number of challenged ballots	1
Number of valid votes counted plus challenged ballots	256

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has been cast for the Chem RX Employees Union.

The Revised Tally of Ballots[2] for Unit B made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	69
Number of void ballots	0
Number of ballots cast for Chem RX Employees Union	18
Number of ballots cast for United Food and Commercial Workers, Local 2013	15
Number of votes cast against participating labor organizations	1
Number of valid votes counted	34
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	34

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has been cast for the Chem RX Employees Union.

The Intervenor filed timely objections to conduct affecting the results of the election, alleging objectionable conduct by the Employer, the Petitioner, and the Regional Office. Pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director caused an investigation to be conducted and on January 23, 2013, issued and served on the parties a Supplemental Report on Objections and Notice of Hearing, in which he directed that a hearing be held by a duly designated Hearing Officer regarding the Intervenor's first and third objections

[2] After the election, there was one determinative challenge in Unit B. Pursuant to a stipulation signed by all parties, that ballot was opened and counted on December 23, 2013.

against the Employer. The Regional Director overruled the remainder of the Intervenor's objections.

A hearing was held before the undersigned on February 18, 2014, in Brooklyn, New York. The Petitioner, the Intervenor, and the Employer appeared at this hearing.

At the hearing, all parties were represented by counsel and afforded full opportunity to participate, be heard, examine and cross-examine witnesses, present evidence pertinent to the issues and present oral argument.

In accordance with the Notice of Hearing, and upon the entire record of this case, consisting of the transcript of the hearing and exhibits, including my observation of the demeanor of the witnesses who testified, and the specificity of their testimony, the undersigned issues this Report and Recommendations with respect to the Intervenor's objections. [3]

A. Objection No. 1

In its first objection against the Employer, the Intervenor alleges that the Employer prevented Local 2013 from accessing and posting material on its designated bulletin boards on the Employer's premises and removed material posted by Local 2013 on the bulletin boards.

The facts regarding Objection No. 1 are undisputed.

Ben Traslavina, a Union representative for the Intervenor, testified in support of this objection. In August 2013, Traslavina was assigned as the Union representative for the unit employees located at the Employer's Long Beach facility. Tr. at 71.

The Intervenor's collective bargaining agreements with the Employer contain an access provision which provides: "Authorized representatives of the Union shall have access to the plant during working hours to ascertain whether the Agreement is being properly observed, providing

[3] References to the transcript are identified as Tr. __. References to the Board, Petitioner, Intervenor, and Employer's exhibits will be cited as Bd. Ex. __, Pet. Ex. __, Int. Ex. __, and Er. Ex. __, respectively.

there is minimum interruption of the normal course of operation in the plant." Int. Ex. 8 at Article XXVI.[4]

The Employer maintains a bulletin board in the employee break room. This bulletin board contains a number of notices, including wage and hour notices, Employer notices about its policies, and some Union notices posted by the Intervenor. Tr. at 74. The Intervenor typically posts notices in the lower left corner of the bulletin board. Id. The access provision in the collective bargaining agreements does not reference the bulletin board.

When Traslavina first visited the Long Beach facility in August 2013, there was a union shop card ("shop card") posted, an 8½ by 11 inch notice which advised employees that this was a union shop represented by the Intervenor and provided employees with the name and contact information for the Union representative. Id. On his first or second visit to the facility, Traslavina removed the previous shop card and replaced it with a copy of the same notice containing his name and telephone number. Tr. at 74-75; Int. Ex. 5.

On October 21, during the critical period, Traslavina received an e-mail from Randy McCarthy, a labor representative for the Employer, stating that the Petitioner had requested to post a notice on the bulletin board. The e-mail stated that there was "no campaigning allowed on Company property, for either Union."[5] Int. Ex. 6. Later that day, McCarthy sent Traslavina a second e-mail which included a letter from McCarthy to Samuel Marshall, an employee of the Employer who is president of the Petitioner, denying the Petitioner's request to post notices on the bulletin board. The letter, on which the Intervenor was copied, stated: "please be advised that neither [the Petitioner] or Local 2013, UFCW, is allowed to post notices on the Company's bulletin board, or to otherwise campaign on the company's property, unless otherwise entitled to do so by

[4] The parties stipulated that the access provision is identical in the collective bargaining agreements for Unit A and Unit B. Tr. at 90.

[5] The issue here is not one of the right to campaign. There is no allegation that the Employer's prohibition on campaigning on the premises was, by itself, objectionable.

law. By copy of this letter to Local 2013, UFCW, I am advising it of the Company's position in this regard." Int. Ex. 7. The second e-mail also stated, "please be advised that Chem RX has taken down a notice that was unknowingly posted by Ben on the Company's bulletin board." Id.

After receiving these e-mails, Traslavina visited the Long Beach facility on or about the following day and saw the shop card had been removed from the bulletin board. Traslavina posted another shop card. Tr. at 76-77. He also gave the Intervenor's shop steward copies of the shop card and advised him to post another copy if the shop card was removed again. Tr. at 77. On several visits over the next two weeks, Traslavina saw that the shop card had again been removed and he again posted a new notice. He estimates that he reposted the shop card at least three times in the following two weeks. Tr. at 77.

Approximately two weeks after receiving the October 21 letter from McCarthy, Traslavina visited the Long Beach facility during the night shift. Tr. at 78. Diane Carcich-Sokolowski, the Employer's director of Human Resources, let Traslavina into the facility.[6] Tr. at 78. When he arrived, Traslavina saw the shop card had again been removed from the bulletin board. Traslavina went over to the bulletin board to repost the notice. According to Traslavina, Carcich-Sokolowski said, "you know, we're just going to take it down again." Traslavina said that he would repost the notice anyway. Id.

Carcich-Sokolowski admits that during the critical period, she removed the Intervenor's shop card from the bulletin board two or three times. Tr. at 108. Carcich-Sokolowski further admits that she told Traslavina that if he reposted the shop card, she would remove it again. Tr. at 106. Carcich-Sokolowski testified that she did not view the shop card as relevant to contract enforcement in accordance with the parties' collective bargaining agreement. Tr. at 107. Carcich-

[6] When visiting during the night shift, Traslavina frequently had to be let into the facility by a manager or a shop steward. Tr. at 78.

Sokolowski further testified that she thought the shop card was a declaration that sent an inappropriate message to the employees. Tr. at 112.

Carcich-Sokolowski testified that she had not noticed the shop card posted on the bulletin board before October 21, but conceded that she does not visit the employee break room regularly, stating that it is out of her way. Tr. at 109. Carcich-Sokolowski started working with the Employer at the Long Beach facility in September 2013. At that time, she had reviewed the notices on the bulletin board, but testified that she was checking to make sure the Employer was in compliance with posting legally mandated notices, such as wage and hour, workers' compensation, and Family and Medical Leave Act. Tr. at 111. Samuel Marshall, the Petitioner's president, admitted that the shop card had been posted prior to the critical period. Tr. at 132.

During the critical period, Traslavina also posted a notice on behalf of the Health and Welfare Fund advising employees that the open enrollment period would be staying open longer than had originally been advertised. The Employer did not remove this notice during the critical period. Tr. at 78-79.

I generally credit the testimony of Traslavina, Carcich-Sokolowski, and Marshall regarding Objection No. 1.

Discussion

It is well settled that an employer need not maintain strict neutrality between an incumbent union and a challenging union. In RCA Del Caribe, Inc, 262 NLRB 963 (1982), the Board found that an employer violated Section 8(a)(5) of the Act by refusing to bargain with an incumbent solely because a rival union had filed a petition, stating that "an employer in an existing collective-bargaining relationship cannot observe strict neutrality." RCA Del Caribe, 262 NLRB at 965. In so finding, the Board noted that "even though a valid petition has been filed [by a rival union], an incumbent will retain its earned right to demonstrate its effectiveness as a representative at the

bargaining table. An outside union and its employee supporters will now be required to take their incumbent opponent as they find it – as the previously elected majority representative." Id. at 966. The Board also noted a withdrawal from bargaining with an incumbent while a petition is pending may "signal repudiation of the incumbent" by the employer. Id. at 965.

The Board applied these principles to access by an incumbent in West Lawrence Care Center, Inc., 308 NLRB 1011 (1992). In that case, the Board held that an employer may not truncate an incumbent union's contractual access rights because a rival union has filed a petition. The incumbent in West Lawrence Care Center enjoyed a broad access provision which provided: "The Union Business Representative or the Union's designee shall have admission to all properties covered by this Agreement to discharge his duties as representative of the Union. The Employer shall make available to the Union locked glass enclosed bulletin boards in the establishment for Union notices. The Union shall be permitted to conduct Union meetings on the Employer's premise." West Lawrence Care Center, 308 NLRB at 1013. The Board found that given the broad access provision in the collective bargaining agreement, the employer could not attempt to restrict the union's access solely to matters of grievance or contract administration.

In the instant case, it is undisputed that prior to the critical period, the Intervenor had been allowed to post notices on the bulletin board in the employee break room of the Long Beach facility. It is undisputed that prior to the critical period, the Intervenor posted its shop card, which stated that Chem RX was a union shop and provided contact information for the employees' union representative, on that bulletin board in the Long Beach facility.[7] It is undisputed that the Employer

[7] I do not rely on Carcich-Sokolowski's testimony that she did not notice the shop card before October 21. By her own testimony, Carcich-Sokolowski was rarely in the employee break room and could only describe one occasion on which she examined the bulletin board, when she was reviewing notices to make sure the Employer was in compliance with applicable laws regarding the posting of notices. Both Traslavina and Marshall testified that the shop card had been posted prior to the critical period.

removed the Intervenor's shop card from that bulletin board on multiple occasions during the critical period.

Diane Carcich-Sokolowski, the Employer's director of human resources, testified that she removed the shop card during the critical period because she viewed it as a declaration to the employees and sent an inappropriate message. The message that employees are and remain represented by an incumbent, however, falls squarely within the holding of RCA Del Caribe. In attempting to level the playing field and remain neutral between the incumbent Intervenor and the rival Petitioner in this case, the Employer, perhaps unknowingly, disregarded the Board's precedent on this issue. The Employer may not undermine the Intervenor's incumbent status.

With regard to the Intervenor's right of access to the facility, as the Regional Director suggested in his Report on Objections, the Intervenor's contractual access provision does not provide for access to a bulletin board as does the provision at issue in West Lawrence Care Center. However, it is undisputed that the established past practice has been for the Employer to allow the Intervenor to post notices on bulletin boards on the Employer's premises, including its shop card. In removing the shop card, the Employer abridged a right of access previously enjoyed by the Intervenor. Moreover, the shop card advised employees on how to contact their union representative, who was relatively new to the shop. If employees are hindered from contacting their representative in a way they had enjoyed prior to the critical period, this change could affect the Intervenor's ability to police its collective bargaining agreement in keeping with its contractual access provision.

I note that the Employer did not remove a notice posted on behalf of the Intervenor's Health and Welfare Fund during the critical period. The Health and Welfare Fund is distinct from the Intervenor. The fact that the Employer did not remove a notice posted by a different party does not cure its objectionable conduct.

For the reasons stated above, I recommend sustaining the Intervenor's first objection. See ATC/Vancom of California, L.P., 338 NLRB 1166 (2003) (setting aside an election after an employer had removed an incumbent's notices from a bulletin board to which the incumbent enjoyed contractual access).

B. Objection No. 3

In its third objection filed against the Employer, the Intervenor alleges that the Employer engaged in objectionable conduct by failing to make timely payments to the Local 2013 Health and Welfare Fund, which resulted in delays in the processing and payment of unit members' health and medical claims during the critical period.

As with Objection No. 1, the facts regarding this objection are undisputed.

Jacqueline Dowling, an employee of Tri State Administrators, a third party administrator that administers the Intervenor's Health and Welfare Fund (herein called the Fund), testified in support of this objection. The Fund also contracts with Empire Blue Cross-Blue Shield which provides administrative services for processing claims. Tr. at 17-18.

During the third week of every month, the Fund mails employers invoices for fund payments, which are due by the 10th of the following month. Tr. at 11-12. For example, during the third week of September, the Fund sends out invoices and payments are due to the Fund by October 10. Tr. at 12. If an employer does not make its Fund contributions in a timely manner, the Fund will suspend processing claims until it receives contributions from the employer. Tr. at 17. The Fund does this because until it receives payment from that employer, the Fund does not know who was employed during that month or if there are any eligibility issues with specific employees. Tr. at 17. In these cases, Empire sends an explanation of benefits to medical providers stating that the patient is not eligible at that time. Tr. at 19. Upon receipt of contributions from an employer, the

Fund will reprocess any claims that had been suspended after the 10th of the month. Tr. at 17. At this point, the Fund will advise Empire that it can pay providers for covered services. Tr. at 20. Payment of claims that had previously been suspended typically take longer to process than claims processed in a timely manner. Tr. at 20.

The parties stipulated that the Employer did not send the Fund its payment for the month of October 2013, which was due on November 10, until December 2, 2013. The Fund deposited this payment on December 6, 2013. Tr. at 8-9. The Petitioner presented a chart showing that the Employer has frequently remitted its Fund contributions after the tenth of the month, but usually paid within a matter of weeks. It is evident that the October payment was paid after a much longer delay than usual, accounting to a delay of more than one month. Int. Ex. 2. The Employer does not dispute that the October payment was paid unusually late.

As a result of this late payment, approximately forty participants had their claims suspended. Tr. at 24. The claims were reprocessed after the Employer remitted the contributions in early December. Tr. at 25.

Dowling testified that she was approached by Rosemary Kammerer, an employee of the Employer, regarding a claim from November 2013 which had been suspended due to the late contribution payment. On December 12, Dowling visited the Long Beach facility to conduct enrollment. In the lunch room, Kammerer approached Dowling and was upset because her claims had not been paid. Dowling told Kammerer that claims had been suspended because the Fund had not received contributions. Kammerer said she would speak to Human Resources. Tr. at 26. Other employees were in the lunch room eating lunch and could hear this conversation. Tr. at 27.

Kammerer also testified at the hearing. Kammerer had major surgery on November 5, 2013 for which she had been pre-approved. On November 27, Kammerer received a phone call from the hospital at which she had the surgery stating that she had no active insurance coverage and that her

insurance had been suspended. Tr. at 121. Kammerer was also contacted by the surgeon's office and a specialist's office telling her that she had no active insurance coverage. Tr. at 122. She was told that she was responsible to pay for her care. Tr. at 122. Kammerer was called again by at least two doctors in January 2014 seeking payment for her medical services. Tr. at 124. As of the date of the hearing, Kammerer did not know if her bills had been paid. Tr. at 125.

Traslavina also testified that several unit employees complained to him about their medical coverage during the critical period. An employee named Sandra Hosein spoke with Traslavina during the critical period and told him that her medical claims were not being paid. Traslavina inquired with the Fund and was told that her bill was not processed because the Employer had not paid contributions. Hosein asked Traslavina how she could vote for the Intervenor when they were not paying her bills. Tr. at 80.

Traslavina also spoke to unit employee Juan Arce on the shop floor multiple times during the critical period. Arce repeatedly inquired about his medical claims and Traslavina advised him that the Employer had not made contributions to the Fund. Tr. at 80-81.

Traslavina also spoke to unit employee Sivasambu Sivanesathasan in the shop during the critical period. He followed up with her and her husband during a visit to her home on December 8. Traslavina explained to Sivanesathasan that the Employer had not made contributions to the Fund, which was delaying the processing of claims. Sivanesathasan and her husband both had claims that were affected by the delay. Tr. at 81.

Traslavina testified that he spoke to other unit employees during the critical period as well, but could not identify them by name. Tr. at 82. In addition, he advised the shop stewards as to what was happening with medical claims so they could answer unit members' questions. Tr. at 82.

On the day of the election, Traslavina was handing out flyers outside the Long Beach facility at approximately 10 a.m. Karen Beleram, a unit employee, approached Traslavina and

complained that the Intervenor was not paying her bills. At least four or five other employees were present when she made these comments. Tr. at 83-84.

In addition, the Petitioner distributed multiple campaign flyers during the critical period which criticized the Intervenor for not paying unit members' claims. Int. Ex. 4; Tr. at 69. For example, one flyer states "They do not pay our claims! Many of us are in collection because they can't pay the $12 million in claims that they are holding." Another flyer states, "does the UFCW and management of Chem RX even care that your health claims are not paid, potentially ruining your credit and lives?" Int. Ex. 4.

I generally credit the testimony presented in support of Objection No. 3. The testimony is consistent and unrebutted. There is no issue of fact regarding this objection.

Discussion

The Board has held that unilateral changes made by an employer during a critical period before an election may serve as the basis for meritorious objections. In Lake Mary Health Care Associates, LLC, 345 NLRB 544 (2005), the Board found that the employer engaged in objectionable conduct by unilaterally discontinuing its practice of paying unit employees a monetary bonus for working an extra shift. The Board noted that "the unilateral elimination of a longstanding economic benefit [which occurred] two days before the election would reasonably send a message to unit employees that the seeming inability of the incumbent [u]nion to protect them from the [e]mployer's detrimental actions made the [u]nion's continued presence as a bargaining representative pointless." Lake Mary Health Care, 345 NLRB at 545; see also Double J Services, Inc., 347 NLRB No. 58 (2006) (in which the Board set aside an election after an employer announced several new work rules which were detrimental to employees shortly after the filing of the petition). The Board stated that the test to be applied is an "objective determination of whether the conduct of a party to an election has the tendency to interfere with the employees' free choice."

Lake Mary Health Care, 345 NLRB at 545. In this regard, the Board considered the seriousness of the conduct, the timing of the change, the dissemination of the announcement of the change, the closeness of the vote, and the employer's failure to inform employees that it had restored the bonus. The Board rejected the Employer's argument that its conduct was not purposeful, stating that the Board does not examine whether an employer's actions are intentional. Id.

In this case, there is no question that the Employer did not remit its October 2013 Fund contribution in a timely manner and that there was a substantial delay before the Fund received that contribution. Nor is there any question that this delay resulted in the suspension of processing claims for approximately forty employees during the critical period, which was not resolved until after the election. Although the Employer made its October Fund remittance before the election, the evidence shows that employees' claims were not paid by the December 16 election. In fact, Rosemary Kammerer testified that as of the hearing on February 18, 2014, she did not know if her claims from her November surgery had been paid. There is no doubt that this delay resulted in serious problems for the Intervenor and for many employees. Moreover, the evidence shows that the delay in processing unit members' claims was disseminated through the unit. Dowling and Traslavina both testified that employees complained about the Intervenor's inability to pay their health claims.[8] In several instances, this was done in the presence of other employees. Further, the Petitioner concedes that it disseminated this information to the unit in its campaign materials.[9] I further note that the Tally of Ballots in Unit B was very close with only three votes separating the two labor organizations. The Tally of Ballots in Unit A was not as close with approximately sixty votes separating the labor organizations. Given the number of people affected by the Employer's

[8] I recognize that the Fund is a separate entity from the Intervenor. This distinction, however, may not be a meaningful one for most employees.

[9] I do not suggest that the Petitioner's materials were inappropriate. The evidence simply demonstrates that the Intervenor's inability to pay health claims during the critical period was disseminated to the units. The Petitioner's materials do not reference the Employer's late Fund contribution.

late contribution and the wide dissemination of the Intervenor's inability to pay medical claims through the unit during the critical period, however, I find that the delay in remitting the October 2013 Fund contribution could have the tendency to interfere with employees' free choice in both units. Accordingly, I recommend sustaining the Intervenor's third objection.

The Employer argues that its conduct here was not intentional. Indeed, the Intervenor does not contend that the Employer acted with any animus and has not produced evidence to that effect. However, as noted above, the intent of the employer is not relevant to the inquiry into whether the conduct had the tendency to interfere with employees' free choice in this election. See Lake Mary Health Care, 345 NLRB at 545.

RECOMMENDATION

I have recommended sustaining the Intervenor's objections. Accordingly, I further recommend that the election held on December 16, 2013 be set aside and a new election held.

RIGHT TO FILE EXCEPTIONS

Pursuant to the provisions of Sections 102.69 and 102.67 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.

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 March 20, 2014, 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. 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.nlrb.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 Brooklyn, New York, on March 6, 2014.

Rachel Mead Zweighaft
Hearing Officer
National Labor Relations Board, Region 29
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Brooklyn, New York 11201