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

ASSOCIATED MATERIALS / D.B.A. ALSIDE SUPPLY

Employer

and **Case 13-RC-122175**
Stipulated

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 705

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

This report contains my findings and recommendations regarding the objections to the election filed by the Employer. Pursuant to a petition filed on February 7, 2014[1], and a stipulated election agreement approved by the Regional Director on February 18, 2014 a secret-ballot election[2] was conducted on March 19, 2014, under the direction and supervision of the Regional Director for Region 13 of the National Labor Relations Board in the stipulated unit of employees.[3]

On March 26, 2014, the Employer filed timely objections to conduct it alleges affected the results of the election. Pursuant to Paragraph 12 of the election agreement and Section 102.69 of the Board's Rules and Regulations, under the direction and supervision of the Regional Director, the Region conducted a preliminary investigation of the objections. On April 10, the Regional Director issued a Report on Objections and Notice of Hearing, in which he ordered a

[1] Unless otherwise noted, all dates refer to 2014.

[2] The tally of ballots issued shows that of approximately 11 eligible voters, 6 ballots were cast for the Petitioner, 5 ballots were cast against the participating labor organization, no ballots were void, and there were no challenged ballots.

[3] The unit as described in the stipulated election agreement approved on February 18, 2014:

> All full-time and regular part-time drivers and warehouse foreman, managers, and supervisors employed at the Employer's supply centers located at 4915 West 122nd Street, Alsip, Illinois; 3557 Butterfield Road, Unit 102, Aurora, Illinois; 5565 North Lynch Avenue, Chicago, Illinois; and 2500 Vantage Drive, Elgin, Illinois; but excluding managerial employees, confidential employees, clerical employees, supervisors and guards as defined by the Act.

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 Employer's Objections.

Accordingly, a hearing was held before the undersigned on May 1, 2014. 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. The Employer and Union were both represented by legal counsel at the hearing. 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 following findings of fact, resolutions of credibility, and recommendations.

A. CREDIBILITY

Although all evidence or every argument of counsel is not individually discussed, all matters have been considered.[4] 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).

B. 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 Machine Works*, 365 U.S. 123, 124 (1961) (per curiam); *Delta Brands, Inc.*, 344 NLRB 252, 252-253 (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. *Id.* at 253. Further, if the conduct of either party creates an atmosphere which renders improbable a free choice, it will warrant invalidating an election even if the conduct does not constitute an unfair labor practice. *Detroit Medical Center Corp.*, 331 NLRB 878 (2000); *General Shoe Corp.*, 77 NLRB 124 (1948). A party's conduct cannot be the basis for setting aside the election unless it reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). In applying these objective standards, 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

[4] It should be noted that the Union filed a post-hearing brief, but the Employer did not file a brief. In their brief, the Union raised the issue of the sufficiency of the pleadings of the Employer's objections. I have considered the issue raised by the Union, but I find that the objections were filed appropriately.

NLRB No. 114, slip op. at 9 (2012), citing, among other things, *Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157, 158 (2001).

Objection #1

During the critical period, a Union official promised a job, job placement assistance, preferential job, and/or hiring assistance, and other impermissible, tangible benefits to the spouse of eligible voter Jaime Zaragoza (the spouse was unemployed during the critical period).

I recommend that Objection 1 be overruled because there is no evidence to show that a Union official or agent promised a job, job placement or hiring assistance, or any other impermissible benefit to the spouse of eligible voter Jaime Zaragoza. The evidence showed Union representative/agent San Juanita Gonzalez visited the Zaragoza household on several occasions prior to the election. In their testimony, Mr. Zaragoza and his wife confirmed that Ms. Gonzalez never offered a job, job placement assistance, preferential job, and/or hiring assistance to either of them. Both Gonzalez and Mrs. Zaragoza testified that their conversations were brief and cursory. For the most part, Ms. Gonzalez was only questioning Mrs. Zaragoza about the whereabouts of Mr. Zaragoza. Thus, there is no evidence in the record to establish that Ms. Gonzalez made any promises to Mrs. Zaragoza.

With regard to Mr. Zaragoza's conversations with Ms. Gonzalez, the evidence showed that Mr. Zaragoza did mention to Ms. Gonzalez that his wife was employed by a union employer. When Mr. Zaragoza explained to Ms. Gonzalez that his wife was losing her job, Ms. Gonzalez replied that she had read in a newspaper advertisement that they were hiring at Toyota Park. Ms. Gonzalez's statements to Mr. Zaragoza certainly do not constitute a promise of benefit as there was no evidence in the record that Local 705 represented any employees at Toyota Park. Furthermore, there was no evidence adduced at the hearing that either Ms. Gonzalez or anyone else from the Local 705 could have procured a job for Mrs. Zaragoza at Toyota Park.

The Employer's evidence with respect to this objection appears to be based primarily on rumors reported to Mr. Kyle Yeske, the Employer's Regional Sales Vice President, by Mr. Rob Pilney, the operations manager at the Employer's Alsip facility. It should be noted that this is all hearsay evidence.[5] No eligible voters testified that they heard a rumor that the Union offered Mr. Zaragoza's wife a job. Thus, there was no evidence presented at the hearing directly from any of the eligible voters that this alleged rumor was circulating among them. Under questioning by the Employer's Counsel, Mr. Zaragoza admitted that the first time that he heard about the alleged rumor regarding the Union's assistance to his wife with her job search was when Maria Komoroska, his immediate supervisor, brought it to his attention after the election. Thus, I find that there was insufficient evidence to show that this alleged rumor was disseminated among the eligible employees. The objecting party must establish dissemination of statements allegedly interfering with preelection conditions, dissemination will not be presumed. *Kokomo Tube Co.*, 280 NLRB 357, 358 fn. 9 (1986).

[5] Thus, I cannot credit this hearsay evidence.

The Employer also elicited testimony that Mr. Zaragoza had a conversation with warehouse employee known as "Bogie" whose full name is Stefan Bogdan.[6] Specifically, Mr. Zaragoza testified that he spoke to Bogie about his wife's unemployment status. This testimony was elicited by the Employer's attorney using leading questions. Under this type of questioning, Mr. Zaragoza kept changing the substance of his testimony. For example, at one point Mr. Zaragoza testified that he did tell Bogie that a union was providing assistance to his wife with finding a job. I note that under further questioning by the Union's Counsel, Mr. Zaragoza admitted that the union that was assisting his wife was the United Food and Commercial Workers Union Local 1546. Assuming *arguendo* that Mr. Zaragoza did tell Bogie that a union was assisting his wife with her job search and that Bogie concluded that it was Teamsters Local 705, I find this conduct did not constitute objectionable interference with the election.

First, it is unclear which union Mr. Zaragoza was referencing when he spoke to Bogie. This confusion was highlighted when under questioning by Union's Counsel, Mr. Zaragoza testified that he had never told anyone that Teamsters Local 705 was helping his wife obtain a job. This is a direct contradiction of the testimony he gave in response to questions posed by the Employer's Counsel. In light of these glaring contradictions in his testimony, I find there is insufficient evidence to establish that Mr. Zaragoza actually told Bogie that Teamsters Local 705 was providing job assistance to his wife. I further note that Bogie did not testify at the hearing nor is there any evidence adduced at the hearing that the Employer attempted to subpoena Bogie. Thus, there is no evidence to establish Bogie understood from his conversation with Mr. Zaragoza that Teamsters Local 705 was providing job assistance to Mr. Zaragoza's wife.

Second, there is no evidence to show that Mr. Zaragoza was an agent of the Union. The law is clear that an agent must be cloaked with authority if their actions are to be imputed to an entity. The burden of proving an agency relationship is on the party asserting its existence. *Millard Processing Services*, 304 NLRB 770, 771 (1991)(citing *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948)). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party. *Cornell Forge Co.*, 339 NLRB 733 (2003)(Summary of agency law as it relates to unit employees as agents of the union). The Employer presented no evidence at the hearing that Mr. Zaragoza was an agent of the Union with either actual or apparent authority. In fact, there was no evidence adduced at the hearing that Mr. Zaragoza was even a supporter of the Union or that he was involved in the election in any capacity with Union's campaign. There is no evidence in the record to demonstrate that Mr. Zaragoza was anything other than an eligible voter in the election. Thus, Mr. Zaragoza's conduct cannot be imputed to the Union under the Board's extant agency theory. *Cornell Forge*, 339 NLRB 733(2003).

Third, even if Mr. Zaragoza told Bogie that a union was assisting his wife in obtaining a job, I do not find that this is an objectionable promise of benefit. With regard to promises of benefits made by a union, the Board has held that "employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises… are easily recognized by employees to be

[6] The evidence developed at the hearing confirmed that neither Bogie nor Mr. Zaragoza are native English speakers. It should further be noted that Mr. Zaragoza testified at the hearing with the assistance of a Spanish interpreter. While Bogie did not testify at the hearing, Mr. Zaragoza testified that Bogie speaks English with a heavy Polish accent.

dependent on contingencies beyond the union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises of benefits." *Smith Co.*, 192 NLRB 1098, 1101 (1971). On the contrary, in *Alyeska Pipeline Service Co.*, 261 NLRB 125 (1982), the Board found a limited exception which was tied to the special facts in the case. Specifically, in *Alyeska* the Board found an unlawful promise of benefit where the union controlled "all access to construction jobs in Alaska for the employees participating in the election. Therefore, when the union suggested that the only way employees could obtain a union card was by voting for the union in the upcoming elections and that "those fortunate enough to possess a Local 1547 membership cards would be in an extremely favorable priority position [when it came to hiring] compared with those lacking a card, it was clear not only that the union was promising to grant members an advantage over nonmembers in obtaining jobs, but also that the union had the power to effectuate that promise." These limited circumstances are not present in this case. Moreover, there is no evidence that Mr. Zaragoza was speaking on behalf of the union and there is no evidence that the union had any power to obtain a job for Mrs. Zaragoza. For these reasons, I am recommending that Objection #1 be overruled.

Objection # 2

During the critical period, the Union's self-indentified lead employee organizer (Matthew Lavelle), on behalf of the Union, promised a job, job placement assistance, preferential job and/or hiring assistance, and other impermissible, tangible benefits to the spouse of eligible voter Jaime Zaragoza (the spouse was unemployed during the critical period).

I recommend that Objection 2 be overruled because the Employer presented no evidence to demonstrate that Matthew Lavelle made any promise of a job; offered any job placement assistance; or other impermissible tangible benefit to either Jaime Zaragoza, his wife Christina Zaragoza, or any other eligible voter. Jaime Zaragoza testified that his conversations with Lavelle were brief and only consisted of exchanging mutual salutations. Moreover, Jaime Zaragoza confirmed that his conversations with Lavelle were not about the Union, his wife, or her employment status. Therefore, there is no evidence established by the record to find that Lavelle made any unlawful promises to Jaime Zaragoza. There was no evidence that Matthew Lavelle ever met Mrs. Zaragoza, thus, there is no basis for finding that Lavelle ever promised any benefit to her. There was no evidence presented by the Employer that Lavelle promised any job or other benefit to any other eligible voter.

Moreover, there was no evidence in the record to establish that Matthew Lavelle was an agent of the Union. The burden of proving an agency relationship is on the party asserting its existence. *Millard Processing Services*, 304 NLRB 770, 771 (1991)(citing *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948)). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party. *Cornell Forge Co.*, 339 NLRB 733 (2003). Here there is no evidence that the Union said or did anything that would give Matthew Lavelle actual authority to act as an agent of the Union. Moreover, there was no evidence that Lavelle had apparent authority

because the Employer did not demonstrate that the Union's conduct gave other employees at the facility reason to believe that Lavelle was acting on the Union's behalf.[7]

The Board has long held that pro-union employees do not constitute union agents merely on the basis of their "vocal and active union support." *United Builders Supply Co.*, 287 NLRB 1364, 1364 (1988); see also *Tuf-Flex Glass v. NLRB*, 715 F. 2d 291, 296 (7th Cir. 1983). Further, employee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of the union. *Advance Products Corp.*, 304 NLRB 436, 436 (1991); *Uniroyal Technology Corp. v. NLRB*, 98 F.3d 993, 999-1000 (7th Cir. 1996). Generally, in-plant organizers are found to be agents of the union only when they serve as the primary conduits for communication between the union and other employees or are substantially involved in the election campaign in absence of union representatives. *United Builders Supply*, supra at 1365.

There is no evidence that Lavelle was the Union's primary employee contact at the Employer's facility. There is no evidence that Lavelle was substantially involved in the election campaign in the absence of a union representative. The Employer presented no evidence that Lavelle solicited cards on behalf of the Union; spoke to employees about the Union; participated in home visits; or did anything else in furtherance of the Union's campaign. Rather, the evidence showed Ms. Gonzalez was the Union organizer making the house calls on behalf of the Union. In short, there is no record evidence to show that Lavelle was anything other than a pro-union employee supporter. Thus, I find that Lavelle was not an agent of the Union. The Employer did not present any additional evidence, and therefore, failed to meet its burden to show that the alleged objectionable conduct occurred and that Matthew Lavelle was an agent of the Union.

Even under the Board's standard for objectionable third-party conduct, I find there is insufficient evidence to show that Lavelle engaged in any conduct that would warrant setting the election aside. The Board has set out the standards for assessing the nature of third-party conduct in *Westwood Horizons Hotel*, 270 NLRB 802(1984). The Board affirmed these standards in *PPG Industries*, 350 NLRB 225 (2007). However, as I noted above, there is no evidence established by the record that Lavelle made any promises or engaged in any other actions that can be considered objectionable conduct to an election. Therefore, I am recommending that Objection #2 be overruled in its entirety.

RECOMMENDATIONS

Based on the above, I recommend that election results be upheld and that a Certification of Representative should issue.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this report, any party may file with the Board in Washington, DC, exceptions to such report with or without a 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

[7] At the hearing, there was letter submitted into evidence dated January 25, 2014 which identified Lavelle as an employee member of the organizing committee. ER Ex. #1. The Union's letter only identifies Lavelle as a union supporter, but does not state that Lavelle is authorized to act on the Union's behalf in any manner.

brief to the exceptions. If no exceptions are filed to the Hearing Officer's Report, the Board may decide the matter upon the record or make other disposition of the case.[8]

Dated at Chicago, Illinois this 2nd day of June, 2014.

Vivian Perez Robles, Hearing Officer
National Labor Relations Board, Region 13
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[8] Filing exceptions may be accomplished by accessing the E-filing system on the Agency's website. To file such exceptions electronically, go to www.nlrb.gov and select the E-File Document tab, enter the NLRB Case Number, and follow the detailed instructions. Exceptions may also be filed by mail to National Labor Relations Board, Attn: Executive Secretary, 1099 14th St NW, Washington, DC 20570-0001. 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.