

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WARREN UNILUBE, INC.,

Employer,

and

Case No. 26-RC-8616

TEAMSTERS LOCAL 667,

Petitioner.

PETITIONER TEAMSTERS LOCAL 667'S BRIEF IN RESPONSE
TO EMPLOYER'S EXCEPTIONS TO REPORT ON OBJECTIONS

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I. Introduction

Pursuant to Section 102.69(c)(4) of the Board's Rules and Regulations, Teamsters Local 667 ("Union") hereby submits its Brief in Response to Employer's Exceptions to Report on Objections. Teamsters Local 667 respectfully submits that the Exceptions of Warren Unilube ("Employer") are without merit, and that the recommendations of the Regional Director's Report on Objections should be affirmed and adopted in full by the Board.

II. Statement of Facts

On August 19, 2010, the Union filed its Petition under Section 9(b) of the National Labor Relations Act. An election was set for October 8, 2010. The pre-election "laboratory conditions" period was marked by considerable tensions between the Employer and the Union. Shortly after filing its Petition, the Union engaged in handbilling outside the Employer's facilities on Eighth Street. This led to a confrontation between an Employer security guard and the handbillers; the city police were called; and the Employer engaged in open surveillance of the employees being handbilled. These actions were the basis for the Union's initial unfair labor practice charge against the Employer.

Subsequently, only two days prior to the scheduled election, the Union became aware that the West Memphis newspaper had published an editorial harshly critical of the possibility that Warren Unilube employees might exercise their right to choose to be represented by the Union. The editorial, with no attributed author, did not cite any sources for its information, instead stating that:

We have learned just recently of efforts by Teamsters Local 667, Memphis, Tenn., of trying to take control of a major Employer right here in West Memphis. We're told this Friday this union will try to take control of employees at this local West Memphis company, a move that may have dire consequences. From [sic] all we know, if this union succeeds this company's management could very easily close shop and cause every worker to loose [sic] their jobs.

(Exhibit A, Editorial).

Naturally, this caused significant concern for the Union, coming at the end of a contentious pre-election period and two days prior to the election. Unable to determine what, if any, responsibility the Employer might have had for the content or tone of the editorial, which amounted to a threat of plant closure, and with very little time available before the election, the Union had no choice but to file another unfair labor practice charge and seek the aid of the Board in investigating whether this was, in fact, a threat attributable to the Employer. On the same date, the Employer circulated a letter to all of its employees, purportedly disclaiming knowledge or responsibility for the editorial, but having the effect of ensuring that all employees were aware of the editorial.

Because of the extremely serious nature of the charge and the temporal proximity to the scheduled election, the Union determined that it would not immediately file a "request to proceed" with the election. However, it did so on October 20, 2010 and the election was held on November 5, 2010. The results of the election were as follows:

Approximate number of eligible voters	135
Number of void ballots	0
Number of votes cast for Petitioner	69
Number of votes cast against participating labor organization.....	56
Number of valid votes counted	125
Number of challenged ballots	5
Number of valid votes counted plus challenged ballots	130

On November 12, 2010 the Employer filed four objections which it characterized as “conduct affecting the election.” Subsequently, on January 7, 2011, the Regional Director issued his Report on Objections, recommending On January 21, 2011 the Employer filed its Exceptions to Report on Objections and a Brief in support thereof. The Union now submits its Response to the Employer’s Exceptions.

III. Argument

A. The Regional Director’s Determination that the Employer’s Objections Regarding the Postponement of the Election Were Without Merit Should be Adopted by the Board.

The Employer centers its Exceptions and argument largely on the Regional Directors determination that the evidence submitted in support of its first objection was insufficient and his recommendation that it be overruled by the Board. The Employer’s argument boils down to its assertions that the charge was “baseless” and that it was filed “for the purpose of delaying the election.” Nothing could be further from the truth.

As described *supra*, the editorial was published a mere two days prior to the scheduled election – less than 48 hours, as the newspaper publishes in the afternoon. The Union had very limited time to determine the appropriate action to take under the circumstances. The Regional Director’s Report clearly sets out the Board’s “blocking charge policy,” under which elections do not generally proceed while unfair labor practice charges are pending. *U.S. Coal Co.*, 3 NLRB 398 (1937); *Big Three Industries*, 201 NLRB 197 (1973); *Bally’s Park Place*, 338 NLRB 443 (2002).

1. Blocking Charge Policy and the Discretion of the Regional Director

The *National Labor Relations Board Case Handling Manual (Part One)* contains details of the Board’s blocking charge policy. The charge of concern in this case is known as a “Type One”

charge, alleging "conduct that, if proven, would interfere with employee free choice in an election."

NLRB Case Handling Manual § 11730.2. Although the Regional Director may proceed with the election if the charging party so requests, he need not do so. *Id.*

The *Case Handling Manual* gives guidance regarding the Regional Director's available responses when an unfair labor practice charge arises prior to a scheduled election:

When an election has already been scheduled and thereafter a Type I or Type II unfair labor practice charge is filed too late to permit adequate investigation before the scheduled election, the Regional Director may, in his/her discretion:

- (a) Postpone the election pending disposition of the charge; or
- (b) Hold the election as scheduled and impound the ballots until after disposition of the charge; or
- (c) Conduct the election, issue the tally of ballots and, in the absence of objections, issue a certification; and then proceed to investigate the charge.

Factors:

The following are among the factors to be considered under this exception:

- (1) The extent to which substantial evidence in support of the allegations is submitted by the charging party with its charge
- (2) The passage of time between the alleged conduct and the filing date of the charge
- (3) The seriousness of the allegations and the evidence submitted with the charge as to its dissemination.

Relevant factors recited in Exception 2 (Sec. 11730.2)(*sic*: actually refers to Sec. 11731.2) may also be considered.

NLRB Case Handling Manual § 11731.6. The factors listed in Sec. 11731.2 are:

Factors: The following are among the factors to be considered under this section.

- (a) The character, scope, and timing of the conduct alleged in the charge, and the conduct's tendency to impair the employees' free choice
- (b) The size of the work force relative to the number of employees involved in the events or affected by the conduct alleged in the charge
- (c) Whether the employees were bystanders to or the actual targets of the conduct alleged in the charge
- (d) The entitlement and interest of the employees in an expeditious expression of their preference regarding representation

- (e) The relationship of the charging parties to labor organizations involved in the representation case
- (f) The showing of interest, if any, presented in the R case by the charging party
- (g) The timing of the charge.

NLRB Case Handling Manual § 11731.2.

While the Employer attempts to confuse the issue by noting that it could not find the Regional Director's exact language in the Manual, the statement "In this situation, the Regional Director has the discretion to postpone the hearing or election; conduct the hearing or election and impound the ballots; or conduct the election, issue a tally and determine the validity of the election if objections are filed," is clearly and obviously a rephrasing of 11731.6.

The Regional Director appropriately utilized his discretion, under the circumstances, to delay the election. While the Employer may argue that the charge was ultimately dismissed after the election was held, the Union has appealed the dismissal of the charge. Delay of the election was the only appropriate thing to do under the circumstances, and the Union acted to file a request to proceed as soon as possible, in order not to delay the process unnecessarily.

2. The Employer's Memorandum

The Employer also takes the position that, as it circulated a memo the day after the editorial disclaiming the contents of the editorial, the Union should have been aware that it was not responsible for the editorial and should not have filed the charge. This argument fails for several reasons. First, the Union had little time to investigate the issue itself, but needed to prepare a charge due to the urgent situation with the upcoming election and the clear impact on the employees of threats alluded to in the editorial. The memorandum was circulated while the Union was in the process of preparing the charge. Second, the fact that the Employer stated that

it had nothing to do with the editorial does not necessarily mean that this is the truth. Finally, the memorandum acted more to ensure that all employees were aware of the editorial than it did to dispel any employee fears.

3. The Evidence Submitted by the Employer is Not Sufficient.

The Regional Director correctly noted that the statements submitted regarding any possible effect the delay of the election may have had were “mere speculation.” The Employer’s cherry-picked statements from a handful of employees stating that they thought the delay in the election affected the outcome simply cannot rise to the level of showing that the delay “reasonably tended to interfere with employee’s free and uncoerced choice in the election.” *Report* at p. 6. Were a delay, in and of itself, found to reasonably tend to interfere with employee choice in elections, then the Board’s blocking charge policy could never be applied where an election is scheduled.

Quite simply, the charge was not baseless, but the allegations of the Employer that the Union filed the charge for the impermissible reason of delaying the election are what are baseless in the instant case.

B. The Employer’s Objections Regarding Allegations of Rumors Are Also Without Merit.

The Employer’s remaining exceptions relate to Objections 2-4. These Objections centered around the Employer’s allegations that the Union spread rumors that the Employer was engaging in what would be unfair labor practices – threats to terminate employees that voted for the Union, for example. As noted by the Regional Director, the Employer’s sole form of evidence of this was statements by employees stating that they had *heard* rumors, statements which are mere hearsay and not attributing any statements directly to any Union officer, agent or representative. As properly held by the Regional Director, these unattributed rumors do not suffice as a basis to set aside the election.

IV. Conclusion

For the foregoing reasons, the Employer's Exceptions to the Regional Director's Report on Objections are without merit. The well-reasoned Report on Objections should be upheld by the Board.

Respectfully submitted,



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