UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASTE MANAGEMENT RECYCLING OF NJ Employer and FRANK VELAZQUEZ, an individual Petitioner and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 863 Union	CASE NO. 22-RD-1568

BRIEF IN SUPPORT OF IBT LOCAL 863'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT & RECOMMENDATION ON OBJECTIONS

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PRELIMINARY STATEMENT

This is the classic case of an employer withdrawing a benefit enjoyed by members of the bargaining unit during the critical period prior to a decertification election. The employer, Waste Management Recycling of New Jersey ("Waste Management" or "employer") discontinued its practice of paying employees for attending International Brotherhood of Teamsters (IBT), Local 863 ("Local 863" or "union") meetings after employees' first shift ended but before their second shift started, i.e., between 4:30pm and 5:30pm, during the critical period after the decertification petition was filed. Simultaneously, Waste Management began paying employees for attending company meetings during which the election was discussed. Local 863 submits that the employer's act of withdrawing an employee benefit during the critical period violated well-established Board policy and disrupted the laboratory conditions of the election. The employer's unlawful conduct tainted the election results, which was decided by a margin of only one (1) vote.

The Hearing Officer conceded that the employer withdrew this employee benefit during the critical period. This was not disputed. However, the Hearing Officer simultaneously concluded that the benefit provided was not a past practice because it did not occur over an extended period of time. Therefore, according to the Hearing Officer, the employer's conduct was not objectionable.

Local 863 respectfully submits that the Hearing Officer erred in the conclusions she reached in her Report and Recommendation of Objections (hereinafter "Report"). Ironically, the Hearing Officer's factual findings and conclusions of witness credibility generally supported Local 863's position. Indeed, the Hearing Officer did not credit much of the testimony of the employer's key witness, Plant Manager Henry Angelini. Yet she simultaneously overruled Local

863's objection. Local 863 respectfully submits that the Hearing Officer committed reversible error which warrants that the NLRB reverse the decision, set aside the election and order that a new election be conducted.

EXCEPTION I

THE HEARING OFFICER ERRED IN HOLDING THAT THE EMPLOYER DID NOT VIOLATE THE ACT BY TERMINATING A PAST PRACTICE IN WHICH THE EMPLOYER PAID EMPLOYEES TO ATTEND AFTER-HOURS MEETINGS HELD BY THE UNION DURING THE CRITICAL PERIOD.

Local 863 excepts to the Hearing Officer's conclusion that Local 863 did not establish a past practice in which the employer paid employees to attend union-conducted meetings outside of regular working hours during the critical period. The existence of this past practice was clearly established in the record. Accordingly, employer's elimination of this past practice during the critical period violated Board policy and invalidated the election results.

At the outset, it may be helpful to state what is not at issue in this appeal. It is not Local 863's position that an employer is required to pay employees to attend union-conducted meetings after hours during the critical period.[1] Nor is it Local 863's position that an employer cannot pay its employees to attend employer-conducted meetings after hours during the critical period. This case involves an entirely different scenario because the employer terminated a benefit of paying employees to attend after-hour union meetings called by Local 863 during the critical period, but simultaneously began to pay employees to attend its meetings.

The employer's conduct here is all the more egregious because it did not start conducting its after-hours meetings until after the decertification petition was filed. Local 863, on the other

[1] The issue in this case does not involve the Business Agent's weekly visits to the employer's facility, generally on Mondays, when he would talk with employees in the break room during lunch. Employees were not paid for their lunch breaks and, therefore, they were not paid when they met with the Business Agent on their lunch breaks.

hand, had conducted after hours meetings on several occasions, mostly concerning the status of negotiations, before the petition was filed. The Hearing Officer found that these meetings, both before and after the petition was filed, occurred. They formed the basis of the past practice on which Local 863's objection is based. The Hearing Officer erred in finding that no such practice existed.

The Hearing Officer concluded that if she had found that a past practice of paying employees for attending union meetings existed, then she would have rejected the employer's argument that its elimination of the practice did not change or affect the outcome of the election. (Report at 23). She then would have been compelled to find in favor of the union. Id. The Hearing Officer found as fact that the employer paid employees to attend union meetings on company time during the 4:30pm-5:30pm shift-change period on October 19, 2010, January 18, 2011, March 10, 2011, and March 16, 2011. (Report at 22). The Hearing Officer further found that on March 28, 2011, the employer announced that it would no longer pay employees to attend these meetings, and employee attendance at union meetings drastically declined as a result. (Report at 19).

The employer's practice of paying employees to attend these meetings constituted a past practice, and the Hearing Officer erred in holding to the contrary. The cases upon which the Hearing Officer relied in holding that the practice did not occur over a long enough period of time to constitute a "past practice" are distinguishable from this case because none of those cases involved pre-election conduct (Report at 21, citing Philadelphia Coca-Cola Bottling Co., 291 N.L.R.B. 349 (2003); Golden State Warriors, 334 N.L.R.B. 651 (2001); Wyndham International, Inc., 330 N.L.R.B. 691 (2000)). The question of whether a past practice exists for the purpose of holding that a term and condition of employment is a mandatory subject of bargaining, or

holding that its unilateral elimination constitutes an unfair labor practice, is a different inquiry than whether a past practice exists such that its elimination during the critical period violates Board policy and disrupts the laboratory conditions of an election. In the latter case, the length of time a benefit was provided should not be the determinative factor. To the contrary, the critical question should be whether the benefit was provided and whether its elimination could have reasonably affected the results of the election.

During the critical period in this case, it is undisputed that the union-conducted meetings took place with sufficient frequency such that the elimination of the payment constituted an elimination of a benefit that employees had come to expect. As result of the employer's discontinuation of this benefit, employees complained to Shop Steward Robert Holmes about no longer being paid to attend union meetings. (T42:13-18). Perhaps more significantly, the Hearing Officer found that the number of employees attending union meetings during the critical period drastically declined as a result. (Report at 19).

The Hearing Officer's conclusion that the employer's decision to pay its employees to attend afternoon meeting is "irrelevant" misses the point. (Report at 23). As discussed above, Local 863 does not take issue with the principle of an employer's right to conduct mandatory meetings with employees without offering the same access to the union. But, that is *not* what happened here. Here, the employer allowed Local 863 to conduct meetings with employees after hours both before and after the petition was filed, and before the petition was filed it paid the employees to attend those meetings. It did not start conducting its own meetings until after the petition was filed, and it then discontinued paying its employees to attend the union meetings. For this reason, the Hearing Officer's reliance on Beverly Enterprise- Hawaii, Inc., 326 N.L.R.B. 335 (1998) is misplaced. (Report at 23).

Accordingly, the Hearing Officer's holding that the union did not establish a past practice of paying employees for attending union meetings during the shift-change period was in error, and the Board must reverse that decision and hold that the employer violated Board policy and disrupted the laboratory conditions of the election by eliminating the past practice during the critical period.

EXCEPTION II

THE HEARING OFFICER ERRED IN HOLDING THAT THE EMPLOYER'S ELIMINATION OF THE EMPLOYEE BENEFIT DURING THE CRITICAL PERIOD DID NOT VIOLATE BOARD POLICY AND INVALIDATE THE ELECTION RESULTS.

The Hearing Officer held that "[t]he undisputed evidence shows, and I find, that the Union held afternoon meetings starting at about 4:30pm in the Employer's cafeteria on October 19, 2010, January 18, 2011, March 10, 2011, March 16, 2011, March 28, 2011, April 11, 2011, and April 19, 2011." (Report at 16). She also found that the employer had contemporaneous knowledge that each of these meetings took place. (Report at 17). And prior to March 28, 2011, the employer, with full awareness, paid employees for attending these meetings. (Report at 16). The Hearing Officer discredited Mr. Angelini's testimony to the contrary. Id. She then found that on March 28, 2011, Henry Angelini, the Plant Manager, advised Stop Steward Robert Holmes and Local 863 Business Agent Antonio Sociedade that "[h]e could not pay employees for attending the Union meetings any longer." (Report at 18). As a result, she found that attendance at the union meetings was drastically reduced. (Report at 19).

The Hearing Officer observed that

> [t]he Board has held that the unlawful withdrawal of a benefit during the critical period may sustain an objection if it would tend to influence the outcome of the election. *See B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991). The unilateral elimination of an

> economic benefit could send a message to employees that the Employer wields exclusive control over wages, whereas the Union is weak and ineffectual, thus causing employees to vote against the Union. *See Lake Mary Health Care Associates*, 345 NLRB 544 (2005).

(Report at 21).

Inexplicably, the Hearing Officer then held that even though the employer unilaterally withdrew an economic benefit during the critical period, and even though that resulted in a drastic decline in the number of employees attending union meetings during the critical period, and even though the union then lost the election by one (1) vote, Board policy was not violated because the union did not establish that paying employees for attending these meetings was a past practice that took place over an extended period of time. (Report at 21). Respectfully, the Hearing Officer erred in rendering her decision.

The law is well-settled that an employer, in this case Waste Management, is prohibited from disturbing the laboratory conditions of an election in the critical period between the filing of a petition and the election. The Board has summarized this principle as follows:

> [i]n election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.

General Shoe Corp., 77 N.L.R.B. 124, 127 (1948), enf'd, 192 F.2d 504 (6th Cir. 1951), cert. denied, 343 U.S. 904 (1952). Yet that is the exact principle that the employer violated in this case, regardless of whether the union established the existence of a "past practice" or not.

And the employer's violation of this principle was evidenced not only by the employer terminating an economic benefit during the critical period. It is important to note that the union conducted after hours-meetings with employees for which they were paid *before* the petition was ever filed. It was only after the decertification petition was filed that the employer stopped

paying employees to attend union meetings and started to conduct its own meetings with employees, for which they were paid. (Report at 22-23).

The employer has a legal obligation during a preelection campaign period "[t]o proceed with the granting of benefits that would otherwise have been granted to employees in the normal course of the employer's business, just as it would have done had the union not been on the scene." ABA SECTION OF LABOR AND EMPLOYMENT LAW, DEVELOPING LABOR LAW 160-161 (John E. Higgins, Jr. ed., BNA Books 2006) (1971). When the employer violates this rule such that the circumstances and conduct surrounding an election drops below acceptable standards, "[t]he requisite laboratory conditions are not present and the experiment must be conducted over again." General Shoe Corp., supra. at 127. This is true whether or not the benefits provided constituted a "past practice" as a matter of law. What is critical, therefore, is not whether the benefits were a "past practice," but whether those benefits were provided to employees and then withdrawn during the critical period. And that is exactly what happened here.

In the seminal case, N.L.R.B. v. Exchange Parts Co., 375 U.S. 405 (1964), the employer violated the Act by granting economic benefits to employees while a representation election was pending, which influenced employees to vote against the union. While that case involved a violation of the Act, the Board has long held that the rationale of Exchange Parts also applies to objections cases. See B & D Plastics, Inc., 302 N.L.R.B. No. 33 (1991) (citing United Airlines Services Corp., 290 N.L.R.B. No. 114 (1988)).

In Lake Mary Health Care Associates, 345 N.L.R.B. 544, 545 (2005), the Board set aside decertification election results and ordered a second election because the employer announced just two (2) days prior to the election that it was eliminating its practice of paying a $25 extra

shift bonus to employees for each extra shift they worked after 40 hours. The Board held that the employer violated Board policy by interfering with the laboratory conditions of the election, as

> [t]he Employer was placing its finger on one of the employees' most vulnerable spots—wages—and, in effect, indicating "Here is where we can hurt you and your union is powerless to do anything about it." We conclude that the unilateral elimination of a longstanding economic benefit 2 days before the election would reasonably send a message to unit employees that the seeming inability of the incumbent Union to protect them from the Employer's detrimental actions made the Union's continued presence as a bargaining representative pointless. . . .
>
> The use of carrots and sticks can upset the atmosphere in an election campaign. With respect to the former, the Supreme Court said in NLRB v. Exchange Parts, 375 U.S. 405 (1964):
>
>> The danger inherent in well-time[d] increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.
>
> With respect to the latter (the stick), the benefit here has in fact dried up, and the timing suggests that this was tied to the campaign.

Lake Mary, 345 N.L.R.B. at 544-545.

The message sent by the employer in Lake Mary, i.e., that the employer could and would reduce employees' benefits if they did not vote against the union, was critical to the Board's conclusion that the employer interfered with the laboratory conditions of the election. The Board also observed that the election was extremely close – the union lost by a mere three (3) votes – and more than three (3) employees had heard about the employer's elimination of the bonus just prior to the election. Therefore, the vote could have certainly been affected by the employer's announcement, thus warranting a new election.

In Fred Meyer Stores, 355 N.L.R.B. No. 93 (2010), the NLRB addressed a similar situation. The union lost a decertification election by three (3) votes. The Board set aside the election results and ordered a new election because the employer interfered with the laboratory conditions of the election. Specifically, the employer was having problems with its payroll functions, and it did not make scheduled union dues and medical coverage deductions from employees' salaries. To make up for its failure to take the appropriate deductions, the employer took double the union dues and medical deductions from employees' paychecks without explanation one (1) week prior to the decertification election. The Board held that even though the employer did not intentionally disrupt the election, the laboratory conditions had been disturbed:

> [w]e agree with the Union that a free election was rendered impossible here, where employees on the day of and week preceding the election unexpectedly found themselves without enough takehome pay to meet their needs and then blamed the Union for their hardship. In arriving at this conclusion we are sensitive to the fact that the election was an extremely close one, and a change in just a few votes would have resulted in a different outcome. The unusual, substantial, and unexplained paycheck deductions may well have affected employee sentiment. Accordingly, we find that this election was one of those rare cases where the "requisite laboratory conditions" were so disturbed that the election must be set aside and a new election held.

Fred Meyer Stores, 355 N.L.R.B. No. 93, at 4; see also Double J. Services, 347 N.L.R.B. No. 58 (2006) (Board set aside election results and ordered a new election when employer announced work rule changes, including a decrease in the number of employee breaks, five (5) days after representation petition was filed; union lost election by two (2) votes).

Similarly, in Lutheran Home of Northwest Indiana, Inc., 315 N.L.R.B. 103 (1994), the Board invalidated decertification election results and ordered a second election when the employer held a meeting two (2) days prior to the election, advising employees that it was

looking into getting employees a pension, which would have been a new benefit that the union had been unable to obtain. The Board held that the employer's comments constituted an implicit promise of benefits to persuade employees to vote against union, and thus disturbed the laboratory conditions of the election.

Like the employers in the above-cited cases, Waste Management disturbed the laboratory conditions necessary for a fair election. The message the employer sent to employees via this benefit withdrawal was that the employer controlled employees' wages and benefits, and the union was powerless to protect them, thereby encouraging employees to vote against the union in the upcoming decertification election. The employer's act of simultaneously paying employees to attend company meetings while discontinuing its practice of paying employees to attend union meetings would understandably have the effect of encouraging employees to vote in favor of the employer, the source of employee wages and benefits, and vote against the union.

The Hearing Officer summed up this case best when she held that

> [a]fter March 10, when the decertification petition was filed, the Union sought to meet on a much more frequent basis, at least weekly. The meetings then became dual-purposed, and discussions naturally encompassed issues surrounding the petition and the upcoming election. *After the frequency and purpose of the meetings changed, the Employer then refused to allow employees to attend them, on company time*. (emphasis added).

(Report, p. 22). Put another way, the employer disturbed the laboratory conditions of the election, and the results of the election did not demonstrate the uninhibited desires of employees.

Even if the issue of paying employees to attend the union meetings after hours does not rise to the level of a past practice (and Local 863 submits that it does), the employer's withdrawal of the benefit is still objectionable conduct. This was highlighted by the Hearing Officer's finding that attendance at union meetings drastically declined as a result of the

employer's discontinuation of paying employees to attend these meetings. (Report at 19). This was as destructive to the laboratory conditions as the withdrawal of a "past practice."

During the critical period, the employer was required to continue providing employees the same benefits it provided prior to the filing of the decertification petition. It chose not to do that. It chose instead to reduce employees' benefits instead of maintaining the status quo, and its interference tainted the election results. Local 863 excepts to the Hearing Officer's conclusion that Waste Management did not disrupt the laboratory conditions by unilaterally eliminating an employee benefit during the critical period.[2]

CONCLUSION

Waste Management violated well-established Board policy by disrupting the laboratory conditions of the election during the critical period. The Hearing Officer erred in holding that the union did not establish a past practice and that the employer did not disrupt the laboratory conditions of the election when it withdrew an employee benefit during the critical period. Local 863 respectfully requests that the NLRB reverse the Hearing Officer's Report and Recommendations on Objections, set-aside the election results and order that a new election be held.

[2] The Hearing Officer also erred in concluding that the closeness of the election was not a factor because she did not find any wrongdoing. (Report at 24). If the NLRB reverses the Report on any ground, the one vote margin in the election is a very significant factor and justifies a new election.

Respectfully submitted,

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