

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

WASTE MANAGEMENT RECYCLING
OF NEW JERSEY, LLC

Employer,

FRANK VELAZQUEZ, Petitioner

and

INTERNATIONAL BROTHERHOD
OF TEAMSTERS, LOCAL 863

Charging Party.

Cases 22-RD-1568

RESPONDENT'S ANSWERING BRIEF TO UNION'S EXCEPTIONS

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PRELIMINARY STATEMENT

The Employer, Waste Management Recycling of New Jersey (“Employer”), files this Answering Brief to respond to the erroneous legal assertions and statements regarding the record evidence contained in the Exceptions and supporting Brief filed by IBT Local 863 (“Union”).

On March 10, 2011, Frank Velazquez, an employee of Waste Management Recycling, filed a Petition to decertify the Union as the collective bargaining representative of the Company’s employees at its St. Charles Street recycling facility. A secret ballot election was conducted by Region 22 on April 21, 2011. A majority of the ballots cast were opposed to continued representation by the Union.¹

The Union filed Objections to the election. Only one of those Objections was referred for a hearing, namely the Union’s contention that during the critical period (March 10, 2011 to April 21, 2011), the Employer discontinued its practice of allowing employees to be paid while attending meetings with a Union representative after work, while paying employees to attend after-work meetings that were held by the Employer. (Report at 2). The Hearing Officer overruled the Union’s objection, finding that the Union failed to establish a past practice of

¹ The Employer and Union were party to a collective bargaining agreement which expired October 8, 2010. The parties continued negotiations after expiration without reaching an agreement. As the entirety of the record reflects, no unfair labor practice charges were filed at any time in connection with the negotiations.

paying employees to attend Union meetings and failed to show that the Employer engaged in any objectionable conduct. (Report at 3).

The Union filed exceptions to the Hearing Officer's finding. The arguments raised by the Union in its exceptions are based on mischaracterizations of the record evidence and erroneous legal analysis. Therefore, for the reasons set forth herein, the Board should overrule both of the Union's exceptions and certify the results of the election.

ARGUMENT

I. The Hearing Officer Correctly Concluded That The Company Did Not Engage In Objectionable Conduct And The Election Should Not Be Set Aside

The Board has repeatedly emphasized that representation elections conducted under the auspices of the Board are not lightly set aside. *Suburban Journals of Greater St. Louis, LLC*, 343 NLRB 157 (2004) citing *NLRB v. Hood Furniture*, 941 F.2d. 325, 328 (5th Cir. 1991); *NLRB v. Arthur Sarnow Candy Company*, 40 F.3d. 552 (2nd Cir. 1994). Therefore, "there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Id.* Accordingly, "the burden of proof on a party seeking to have a Board-supervised election set aside is a heavy one." *Kux Manufacturing Company v. NLRB*, 890 F.2d. 804, 808 (6th Cir. 1999) (internal citations omitted). Here, the Hearing Officer properly concluded, (a) the Union failed to meet its heavy burden to prove the Employer withdrew a binding past practice during the critical period and, (b) that the Employer did not otherwise engage in any objectionable conduct. Where either party has filed exceptions to a Hearing Officer's report and recommendation on objections in a stipulated election, as is the case here,

the Board will review the record made on the hearing and issue a final determination. (N.L.R.B. Rules and Regulations 101.19 (b)).

A. The Hearing Officer Correctly Concluded That The Union Failed To Establish The Company Terminated A Past Practice As Alleged In Its Objection

The Union's only objection at the time of the hearing was whether "during the critical period, the Employer discontinued its *practice* of paying unit employees to attend meetings with a Union representative after work..." (Report at 3) (emphasis added). Thus, the question before the Hearing Officer was whether there was a practice of paying employees to attend Union meetings; and if so, whether the Employer improperly eliminated that past practice. In order for the Board to sustain a post-election objection, the Union is required to "present specific evidence that the alleged unlawful act occurred, and that it interfered with the employees' exercise of free choice to such an extent that the results of the election were materially affected." *Suburban Journals of Greater St. Louis, LLC*, 343 N.L.R.B. 157, 159 (2004), citing *N.L.R.B. v. Hood Furniture*, 941 F.2d 325, 328 (5th Cir. 1991). The Hearing Officer found the Union failed to prove a central part of its objection—that there was a past practice of paying unit employees to attend meetings with a Union representative. (Report at 22). The Hearing Officer's conclusion on this issue was not error.

It was undisputed that the Employer was not required under the Act to pay for employees to attend Union meetings, and the expired collective bargaining agreement contained no

provision authorizing union-conducted meetings on Company time. (Report at 21).² Therefore, the Union was required to establish that through a binding past practice the Employer had granted such a benefit to employees. *Id.* For a past practice to exist, the action must occur “with such regularity and frequency, e.g. over an extended period of time, that employees could reasonably view the bonuses as part of their wage structure and that they would reasonably be expected to continue.” *Philadelphia Coca-Cola Bottling Co.*, 340 N.L.R.B. 349, 353 (2003). The Hearing Officer concluded that four sporadic meetings (and only two before the Petition was filed) did not constitute a past practice, particularly in light of the fact that the Union held *regularly* scheduled meetings every Monday during lunch time and the Employer’s longstanding practice was not to pay employees to attend these meetings. (Report at 22). The Hearing Officer found that there was “no reasonable expectation that the after-work meetings would become a permanent part of the employees’ wage structure, since they were held for short-term purposes...” such as discussing a decertification petition, “...that had definite ending points.”³ *Id.* Additionally, as made clear in the Hearing Officer’s report, the evidence adduced at the hearing did not show employees had been paid to attend Union meetings in the past. *Id.* The

² While the Union does not directly raise the issue in its exceptions, the Union makes several references to the Employer paying employees to attend “meetings” in its Brief in support of the Union’s exceptions. As the Hearing Officer properly concluded, the Employer is not required to pay for employees to attend Union meetings and may hold mandatory meetings with employees during working time without also offering working-time access to the Union. (Report at 20 & 23). Therefore, these allegations are irrelevant to a determination of whether the Employer engaged in objectionable conduct.

³ The Union plainly misstates the Hearing Officer’s conclusion by claiming that “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.” (Union’s Brief In Support of Exceptions “Union Brief” at 6). Actually, the Hearing Officer found the opposite is true: the employees had *no* reasonable expectation of payment to attend meetings. (Report at 22).

Hearing Officer reasoned that the “fact that the Employer did not pay employees to attend ongoing, regularly-scheduled meetings, or require the Union to seek pre-authorization to hold them, strongly suggests that the afternoon meetings were intended to be provisional.” *Id.* This analysis is completely in line with Board precedent. *Philadelphia Coca-Cola*, 340 N.L.R.B. at 353; *Golden State Warriors*, 334 N.L.R.B. 651, 653 (2001).

The Union has provided no legal authority to support its claim that the Hearing Officer’s finding was error. The Union seeks to distinguish the long-standing Board precedent in *Philadelphia Coca-Cola Bottling Co.*, *Golden State Warriors*, and *Wyndham International, Inc.*, relied upon by the Hearing Officer. (Union Brief at 5). The Union claims these cases apply only to situations where the Board is conducting the “past practice” analysis in the context of an unfair labor practice charge for failure to bargain over the withdrawal of a benefit, and not in the context of pre-election conduct. *Id.* The Union fails, however, to provide an explanation as to why a different standard for establishing a past practice should control in these circumstances, and cites no legal authority for the alternative, self-serving standard it proposes. *Id.* at 6.

The Union created its own hoop to jump through when it objected to the election on the grounds that the Company discontinued a “practice” of paying unit employees to attend meetings. The Union failed to establish that a past practice existed, and its exception to the Hearing Officer’s conclusion that no past practice existed fails to present any compelling explanation of how the Hearing Officer erred.

B. The Hearing Officer Correctly Concluded That The Employer's Conduct Did Not Violate Board Policy, And The Union Provided No Legal Authority To Support Its Exception To This Finding

The Employer's conduct did not violate any relevant Board precedent or policy, and does not warrant invalidating the election results. Congress "entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 328, 91 L.Ed. 322 (1946). Pursuant to that discretionary authority, the Board formulated a standard by which to judge the fairness of elections: "Whether the election was conducted under such circumstances and under such conditions as were conducive to the sort of free and untrammelled choice of representatives contemplated by the Act." *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953). Here, there was no interference with the employees' free choice because the Employer did not change the status quo during the critical period. Additionally, the cases the Union supplied to attempt to illustrate its argument are distinguishable from the instant case.

The Union repeatedly argues that the Employer's conduct disturbed laboratory conditions because it "withdrew an economic benefit" and attendance at Union meetings decreased after the filing of the decertification petition. The Hearing Officer found no economic benefit was "withdrawn" because no practice of granting an economic benefit was established. (Report at 22). There was no evidence of a precedent for paying employees to attend Union meetings to discuss a decertification petition because no such meetings had occurred before and no afternoon meetings had occurred on a regular basis. *Id.* Thus, the employer's refusal to pay employees for time it was not bound legally, contractually, or by past practice to pay was not objectionable.

The Union suggests the standard for determining whether the Employer engaged in objectionable conduct should be whether the Employer “during the preelection campaign period [proceeded] 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.” (Union Brief at 9 *citing* ABA SECTION OF LABOR AND EMPLOYMENT LAW, DEVELOPING LABOR LAW 160-61 (John E. Higgins, Jr. ed. BNA Books 2006) (1971) (emphasis added)). As the Hearing Officer concluded, the Union failed to show that the Employer violated this standard. The Hearing Officer found that the Employer did not pay employees to attend Union meetings in the normal course of their business, and the record supports this finding. (Report at 22). Prior to the filing of the Petition, there were only two afternoon meetings, one held on October 19, 2010 and one held on January 18, 2011. Two meetings which occurred three months apart, even if the employees did not clock out prior to the meetings and were therefore paid to attend, does not establish a “benefit” granted to employees in the normal course of the employer’s business. This is particularly true here, where the meetings after the decertification petition were held on a regular basis while the meetings prior to the decertification petition were not. The Union cannot claim that the laboratory conditions have been upset if the laboratory conditions it wishes to maintain as the status quo never existed.

The Union references four cases it believes to be analogous to the instant case, and claims that these decisions support its argument that despite the absence of a past practice, the Employer’s conduct here nonetheless should be deemed objectionable. However, each of the cases cited by the Union either involves a deviation from an established past practice or is otherwise inapposite. In *Lake Mary Health Care Associates*, the Board found that the laboratory conditions in the critical period were disturbed, based on the “unilateral elimination of a

longstanding economic benefit 2 days before the election.” 345 N.L.R.B. 544-45 (2005) (emphasis added). In the instant case, no “longstanding economic benefit” was established, let alone eliminated.

Fred Meyer Stores is distinguishable because it involved conduct which disturbed the laboratory conditions when the employer failed to make *regularly scheduled* Union dues and medical benefits deductions, causing the employees deductions to double on their paychecks immediately prior to the election. 355 N.L.R.B. No. 93 (2010). Again, that case is distinguishable because here, the payments at issue were not “regularly scheduled.” Moreover, here there is no record evidence of any financial hardship such as that at issue in *Fred Meyer Stores*, and there is no allegation nor evidence the Employer’s conduct resulted in the employees “blaming the Union” such that it affected the outcome of the election.

Lutheran Homes of Northwest Indiana, Inc., 315 N.L.R.B. 103 (1994) also is inapposite. There, the Board found a promise of a significant economic benefit — a pension — two days prior to the election, where the union had previously been unable to provide the benefit, to be objectionable. A similar situation occurred in *N.L.R.B. v. Exchange Parts Company*, where the employer made guarantees of economic benefits for employees and explicitly used the benefits as inducements to vote against the union. 375 U.S. 405 (1964). Those cases present a substantially different situation than the instant case because they both involve a disruption to the status quo by the employer in the form of granting inducements to the employees as a way to influence the election. Here, the status quo has not been disrupted and the Employer did not offer benefits to employees that the Union had been unable to provide.

The Union has failed to show the Employer had any obligation to pay the employees to attend Union meetings. The Employer's action did not interfere with the employees' free choice, and the Union has failed to present any compelling evidence on the record to support that it did.

CONCLUSION

For the foregoing reasons, the Board should reject the exceptions filed by the Union in their entirety, and should affirm the Hearing Officer's legal conclusions and recommendation that the Union's objection be overruled.

Respectfully submitted,

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Dated: September 6, 2011

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2011, I caused to be served a true and correct copy of *Respondent's Answering Brief to the Union's Exceptions* upon the persons listed below via electronic filing or electronic mail. Counsel for the Union has been notified that the original of this document is being filed electronically.

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