BEFORE THE
NATIONAL LABOR RELATIONS BOARD

MULTIBAND EC, INC.,	)	
	)	
Employer,	)	
	)	
and	)	CASE NO. 25-UD-079779
	)	
ORLANDO CANTU,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 135,	)	
	)	
Union.	)	

BRIEF OF UNION IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Introduction/Background

Pursuant to a petition filed on April 27, 2012 and a Stipulated Election Agreement, a mail ballot election was conducted on May 25, 2012 to determine whether Employer's employees represented by the Union herein wished to withdraw the authority of the Union to require payments to defray the cost of Union representation. Ballots were counted at the office of Region 25 on June 12, 2012 which showed that of the 963 eligible voters, 524 (approximately 54.4%) cast ballots in favor of cancelling the contractual union security provision voluntarily agreed to by the Union and Employer and included in the currently effective collective bargaining agreement (Joint Ex. 1) ("CBA"). The Union filed timely objections to that election, and on July 11, 2012 the Regional Director of Region 25 ordered that a hearing be held to resolve the issues of fact and credibility raised by those objections. A hearing was subsequently held on August 1, 2012 before Hearing Officer Michael Beck. The Hearing Officer issued his report on objections and recommendations to the Board on September 7, 2012.

The Hearing Officer recommended to the Board that all three of the Union's objections be overruled.[1] Upon the granting of motion for extension of time, exceptions are due on September 28, 2012.

> Objection No. 1: "In written and verbal communications to bargaining unit employees during the laboratory period, the Employer, through its agents, supervisors and representatives, made both implied and express promises to its

[1] The Union did not present evidence with respect to Objection No. 2 and hereby withdraws that objection.

employees that they would receive certain benefits the Employer provides only to its non-union employees at its non-unionized locations if employees would vote to de-authorize the contractual union security provisions and then later decertify the Union as their exclusive bargaining representative."

Statement of the Evidence Relevant To Objection No. 1

The parties stipulated (Tr. 9-10) that the Employer distributed to all employees eligible to vote in the UD election a letter dated May 23, 2012 (Joint Ex. 2), consisting of four (4) pages and containing twenty-three (23) questions and answers purportedly "given at the various meetings that were held at the nine (9) sites that are currently represented by [the Union]" during the critical period just prior to the election. The Employer distributed this letter, which was mailed two (2) days before ballots were mailed to eligible voters on May 25, 2012, as part of its campaign to persuade employees that they should support the deauthorization of the union security provision in the CBA. (Tr. 115). As part of that campaign during the critical period prior to the election, the Employer held a series of captive audience meetings at all nine (9) locations covered by the CBA. Those locations are widely geographically disbursed in a five (5) state area. Union representatives were excluded from those meetings and denied access to the interior of the facilities while they were being conducted.[2]

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[2] Although captive audience meetings have become a regular and even pervasive tactic of employers seeking to influence the outcome of NLRB elections, *2 Sisters Food Group, Inc.,* 357 NLRB No. 168 (2011), at *20, fn. 1(referring to a recent survey showing that in 89% of campaigns employers required employees to attend captive audience meetings), "one searches Board precedent in vain for a colorable rationale for the current rule's critical importance in representation elections." *Id.* at *20. (Member Becker, dissenting in part).

A. The Employer's campaign in support of deauthorization.

It is clear from the record that the Employer forcefully advocated at these captive audience meetings that employees should vote to deauthorize the union security provision in the current CBA. Indeed, these meetings were described to a Union representative by employees in attendance as "union busting" meetings. (Tr. 50-51). The Employer also hired a "union consultant" to attend and conduct those meetings (Tr. 119), and presumably because it did not want any message contrary to the Employer's message to be heard by eligible employees, it excluded Union representatives from those meetings. This was in sharp contrast to its past practice of permitting Union representatives, almost without exception during the parties' nearly four-year bargaining history (see discussion with respect to Objection No. 3, *infra*), virtually unlimited access to the Employer's facilities and to the regularly-scheduled mandatory weekly or monthly technicians' meetings and end-of-month inventories. These meetings were the only occasions a sizeable number of employees could be found gathered in one location at the same time. When counsel for the Union asked the Employer's only witness at the hearing, Regional Vice President Roy Henry, to state the position the Employer was advocating for relative to the UD election, Henry acknowledged that the Company had urged its employees at those meetings to vote "yes" to deauthorize. (Tr. 115).

B. The Employer's May 23, 2012 letter to employees.

The May 23 letter at issue states, in pertinent part, as follows:

Q. **How soon after we de-certify will we get the non-union benefits?**

A. We can't say you will or will not get additional benefits if this union is ever de-certified. . .

Q. **We heard there was a De-Certification election in Paducah, KY last year. Is that true, and if so, did those technicians receive all of the extra benefits given to associates in Multi-band's non-union markets?**

A. Yes, it is true that last June the associates in Paducah, KY de-certified the Communication Workers of America ("CWA") and *those associates are receiving the same benefits as those of Multiband's non-union associates in our non-union markets.* (Joint Ex. 2) (emphasis added).

The "non-union" benefits referred to in this letter were widely known among employees as consisting of the Direct TV premium package, tenure bonuses, and the payment of $20.00 stipends to technicians for attending weekly technicians' meetings.[3] None of those benefits has been made available or offered to employees represented by the Union at the facilities covered by the CBA. (Tr. 56).

Henry denied having any role in either authorizing or authoring the May 23 letter. (Tr. 117). The Employer did not produce the letter's purported author, Chief Operating Officer Kent Whitney, to testify at the hearing. On cross-examination by the Union's counsel, Henry repeated the claim made in the letter that each of the twenty-three (23) questions set forth in the letter was asked by an employee in attendance at one of the

[3] Technicians represented by the Union currently do not receive any additional pay for attending those meetings. (Tr. 110-111).

Employer's captive audience meetings. (Tr. 118). However, Henry's testimony in that respect was notably lacking in specifics or details, and implausible on its face. Henry acknowledged that he was not present at every captive audience meeting held at the Employer's nine (9) facilities represented by the Union. (Tr. 118). Further, he acknowledged that by the date the May 23 letter was mailed, not all of the captive audience meetings had yet been held (though again, Henry provided no specifics in terms of where and when those meetings were held). (Tr. 118) The Employer did not produce or call any employees who attended any of those meetings. When Union counsel sought to inquire at which of these meetings any of those 23 questions was asked, Henry was unable or unwilling to provide specific answers as to the dates, locations, or the identity of the employee who had allegedly posed the questions at issue. (Tr. 119). Moreover, although Henry claimed that he along with the Employer's "union consultant" were keeping track of those questions asked by employees at these meetings (Tr. 119), he provided no documentary evidence, such as the notes he took, to support that assertion. The Employer also did not call its "union consultant" to testify at the hearing.

The Board should take notice that each of the 23 questions in the May 23, 2012 letter demonstrates a level of sophistication and knowledge few employees are likely to have possessed, and that the questions are worded in a manner as to lead a reasonable person to the conclusion that they were composed by the same individual. Henry offered no testimony regarding who first brought up the subject of the Paducah de-certification

election or the "non-union benefits" the Paducah employees received after decertifying their union. He also offered no specifics as to where, when or by whom this subject was first raised.

Argument

A. The reference in the May 23 letter to the Paducah election and the subsequent conferring upon those employees of additional benefits was objectionable as an implied promise of additional benefits to employees for voting against the Union's interests and in favor of the result desired by the Employer.

Although an employer may express its views concerning an upcoming Board-conducted election, and urge employees to vote against the union's interests, an employer may not make either express or implied promises of future benefits to employees during the critical period prior to such an election. Doing so will result in destroying the laboratory conditions required for a fair and free election and the setting aside of election results upon the filing of timely objections.

In *G&K Services, Inc.,* 357 NLRB No. 109 (2011), a decision which bears many similarities to the facts of the instant case, the Board was also confronted with an employer's similar statements contained in a written communication to all eligible employees just prior to a decertification election. After analyzing the surrounding facts and circumstances, the Board reversed the contrary recommendations of a hearing officer and concluded certain statements in that letter were in fact objectionable as an implied promise of benefits for voting in the manner preferred by the employer. The Board thus

set aside the election the union had lost. In *G&K Services*, the employer had mailed a letter to all eligible employees during the critical period prior to a decertification election, which stated in pertinent part, as follows:

> Most recently, the production employees in Memphis, TN voted to get rid of their union (the same union that currently represents you here in Portsmouth). The employees in Memphis used to bargain their contract with the employees in Portsmouth so they were covered under a contract that contained the exact same wages, benefits and terms and conditions of employment that your contract provides. While by law I can't make any promises about what will happen in Portsmouth if the union is de-certified, I can share with you that just last week the production employees in Memphis were able to sign up for health insurance that covers their spouses and children for the first time ever.

Id. at *1. The hearing officer overruled the union's objection. The Board disagreed, and ordered the election be set aside, finding that the above-quoted portion of the employer's letter contained an "implied promise of benefits" that had interfered with employees' free choice in that election.

As the Board explained, determining whether a statement made to employees during the critical period is an implied promise of benefit involves consideration of the surrounding circumstances and whether, in light of those circumstances and the Board's experience with and knowledge of industrial realities, employees would reasonably construe the statement as a promise of a benefit. *G&K Services, Inc.,* at *2 (citing, *inter alia, Viacom Cablevision*, 267 NLRB 1141 (1983), and *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979)). The Board announced that it will infer that an employer which

during the critical period prior to an election makes an implied promise of an increase in existing benefits or grant of additional benefits has done so to influence the election, and that the employer making such an implied promise of future benefits has thus interfered with employee free choice. This inference may be rebutted, but to do so the employer must make an affirmative showing that a legitimate purpose for the timing of the promise existed. *G&K Services, Inc.,* at *2 (citing *Sun Mart Foods*, 341 NLRB 161, 162 (2004) (employer found to have engaged in objectionable conduct where a decision to remodel the store in which employees worked was announced just two days before the election, and the employer failed to show the presence of any other factors that prompted the announcement at such a critical time).

Although an employer may compare union and non-union benefits and make statements of historical fact, the Board has long held that such comparisons, depending on their precise wording and their timing and the context in which they are communicated, may convey an implied promise of benefits in exchange for voting against the union's interests. *G&K Services, Inc*., at *3 (citing *Grede Plastics*, 219 NLRB 592, 593 (1975); and *Westminster Community Hospital, Inc.*, 221 NLRB 185, 185 (1975), *enf'd* 566 F.2d 1186 (9th Cir. 1977)). The Board will find an implied linkage between those benefits and voting against the union's interests in the upcoming election. *G&K Services, Inc.,* at *5, fn. 9.

1. The Hearing Officer improperly distinguished *G&K Services* solely because the Employer offered meager evidence that the questions in the May 23 letter were merely responsive to employee questions.

The Hearing Officer distinguished *G&K Services* on the grounds that the May 23 letter purported to contain responses only to questions that were asked by employees at captive audience meetings (Report, p. 5), and because the Union did not offer any evidence to contradict Henry's testimony that the questions originated with employees. (Report, p. 7). However, Henry's testimony in that respect was completely lacking in detail or providing context. He offered only the vaguest of testimony--and then only in response to cross-examination questions rather than in the form of direct testimony--to support the assertion in the May 23 letter that these particular questions were asked by employees rather than being contrived by the Employer to influence the election results. The Employer failed to provide any specific meeting dates or locations where the questions were asked, and it did not provide the names of any employees who purportedly asked the questions. In the face of such vague generalities, and particularly given the size and geographic disbursement of unit employees, it was a practical impossibility for the Union to rebut Henry's vague and uncorroborated testimony. With Henry offering only the vaguest of generalities, it was impossible for the Union to call each of the over 900 employees to testify they never heard such questions being asked of employees during any captive audience meeting.

Moreover, even if the Board were to accept the Employer's vague and conclusory assertion that the inclusion of questions concerning the Paducah election and the subsequent conferring upon those employees of the benefits available to employees in the Employer's "non-union associates in our non-union markets" was merely in response to some employee's question at one of the nine captive audience meetings, this would not necessarily excuse the making of an implied promise of future benefits to all 963 eligible voters just as the ballots were being mailed. The Board has held that an employer is not excused from making an implied promise of benefits during the critical period leading up to an election even if such a promise is made in response to an employee's question. *G&K Services, Inc.,* at fn. 5 ("Even if the employer had brought up the Memphis events in response to specific employee questions, this consideration would not necessarily excuse an actual implied promise," (citing *California Gas Transport*, 347 NLRB 1314, 1318 (2006)); *see also Coca-Cola Bottling Co. of Dubuque,* 318 NLRB 1275, 1276, fn. 4 (1995) (finding implied promise where employer offered no direct evidence that employees had requested the information, since the employer gave no indication "of the occasion on which questions were asked and by whom").

2. The Hearing Officer also improperly distinguished *G&K Services, Inc*. based on his view that the Employer did not imply that the Paducah employees received the non-union benefits immediately after decertifying the Union.

The Hearing Officer distinguished *G&K Services* because the Employer in that case indicated that the benefits were provided to employees "shortly" after the

decertification election in that case. (Report, p. 7). Though the Board held in *G&K Services* that the implied promise of benefits was more direct because the employer stressed that the benefit was received "shortly after" the employees voted to decertify the union, it did not define what "shortly after" an election means. The Paducah employees decertified in June and the Employer made clear that the employees were receiving the non-union benefits when the letter was written less than one year later. First, any ambiguities in the Employer's May 23 letter should be construed against the Employer which authored it. Second, it would be reasonable under all the circumstances to infer that employees would understand the message to be that voting the way the Employer was advocating in the UD election would be a prelude to the Union's eventual decertification, and that the Employer would reward them by granting them the same non-union benefit package the Employer had conferred on its employees at the Paducah facility shortly after they decertified their union.

3. It is immaterial that the language used in the May 23 letter was not identical to the language used by the employer in *G&K Services.*

The Hearing Officer also distinguished *G&K Services* based on the language used to describe the benefits in question and because of the disclaimer it contained, noting that the May 23, 2012 letter did not include a discussion of the non-union benefits the employees received or "how they are better or worse than the benefits received by the employees represented by the Union." (Report, p. 7). To the contrary, the letter specifically mentioned the Direct TV premium package as a benefit that would eventually

be given them if the Employer's employees were to vote the Union out. One of the questions in the letter is as follows: "If this passes will we get the DirecTV Premium Package free like they do in non-union markets?" (Joint Ex. 2). Moreover, the Union's witnesses offered un-rebutted testimony that the "non-union" benefits were widely known among employees to consist of tenure bonuses, and the payment of $20.00 stipends to technicians for attending weekly technicians' meetings in addition to the DirecTV Premium Package. (Tr. 56). The fact that the May 23 letter did not specifically list all of the non-union benefits it referred to is immaterial, as employees had clear understanding of what they consisted of.

The Hearing Officer also looked at the disclaimer language and concluded that it was stronger than the disclaimer in *G&K Services*. (Report, p.7). The May 23 letter conveyed an unmistakable message that if its employees represented by the Union were to vote to de-authorize and later to decertify the Union, they too would receive the "non-union benefits" the Paducah employees had received after they decertified their union, and any disclaimer is immaterial regardless of how worded. *G&K Services, Inc.*, at *4 (citing *Michigan Products,* 236 NLRB 1143, 1146 (1978) (a disclaimer is "immaterial...if in fact [an employer] expressly or impliedly indicates specific benefits will be granted")). Even if the letter contained truthful information, the Board may "draw reasonable inferences regarding the unstated messages or impressions that even a letter consisting of truthful and accurate factual statements are intended to convey." *G&K Services, Inc.*, at

*5 (citing *Crown Electrical Contracting*, 338 NLRB 336, 337 (2002); and *Grede Plastics, supra*, 219 NLRB at 592-93).

The Hearing Officer also incorrectly found *Viacom Cablevision*, 267 NLRB 1141 (1983), to be controlling. Looking at a series of letters comparing the wages at the employer's union and non-union facilities, the Board in *Viacom* concluded that the letters made statements of historical fact rather than promises of benefit. *Viacom* involved union versus non-union wage comparisons. The Board there held that "the Employer made – in regard to wage comparison – no 'extraordinary efforts' that would constitute an implied promise of benefit should the employees vote out the Union." *Viacom Cable Vision*, 267 NLRB 1141, 1142 (1983). *Viacom* is simply inapposite to the facts of this case, as here the Employer's letter explicitly informed employees that after the Paducah employees had decertified their union, they received the non-union benefits package, leaving employees with the clear implication that the same thing would happen at the Employer's locations represented by the Union. This statement clearly invited employees represented by the Union to do the same and provided them with the expectation that if they did so, they too would also receive the benefits the Employer bestows on its non-union employees.[4]

4. <u>The Hearing Officer incorrectly attached significance to the fact that this was a deauthorization rather than decertification election</u>.

[4] To the extent *Viacom* is in any material way inconsistent with *G & K Services,* the Union submits it has been implicitly overruled by that case.

The Hearing Officer found "nothing in the May 23 letter that ties the deauthorization vote to any future decertification vote" (Report, p. 8), but this finding ignores the language of that letter conflated deauthorization and decertification petitions and assumed that another RD petition would be filed in the window period in 2013. The May 23 letter posed the question, "When should we start collecting signatures for the De-Certification vote next year?" (Joint Ex. 2). Another question included in the May 23 letter asks, "If we vote YES and it passes will those of us that don't pay dues be able to vote in next year's De-Certification election?" (Joint Ex. 2). This language explicitly invited employees to decertify the Union and tied their ability to receive the "non-Union" benefits to both deauthorizing and decertifying the Union, and made clear that employees would need to both deauthorize and decertify the Union to obtain these benefits.

There was no reason for the Employer to mention the Paducah decertification in the May 23 letter, or the fact that after that decertification the Employer had given those Paducah employees the "non-union benefit package," other than to convey a clear and unmistakable message to eligible employees that by voting in the deauthorization election against the Union's interests and in the manner being advocated by the Employer they, too, would also receive the "non-union benefit package" if and when the Union were later removed from the picture altogether, as had the Employer's Paducah employees.[5]

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[5] The Board should take notice that the instant UD petition was preceded by the filing of an RD petition by the same petitioner, a petition that was untimely by virtue of the contract bar rule and ultimately withdrawn.

B. Conclusion

The Board should sustain the Union's exception and reverse the Hearing Officer's recommendation that Union Objection No. 1 be overruled, and order the Regional Director to direct and conduct a new election.

> Objection No. 3: "Beginning just prior to the laboratory period and continuing at least through the date of the ballot count, the Employer unilaterally changed its policies regarding granting access to Employer facilities sought by Union officials, notwithstanding both contractual provisions requiring it to grant such access and its longstanding practice of permitting Union official such access upon request or notice."

Statement of the Evidence Relevant to Objection No. 3

A. The nature of the Employer's business and its widely- disbursed locations.

The Employer employs technicians, trackers, and warehouse employees to install satellite TV in customers' homes and businesses. (Tr. 12). The Union represents some 900 to 1000 employees at the Employer's warehouses located in Evansville and Indianapolis, Indiana; Louisville and Lexington, Kentucky; Bloomington, Illinois; Davenport, Iowa: and Akron, Cincinnati and Cleveland, Ohio. (Tr. 12, 14), the vast majority of whom are service technicians. The initial three-year collective bargaining agreement negotiated in 2008 was extended to May 2013 when the contract was reopened after 18 months as is provided for in the CBA. (Tr. 14).

The number and geographic disbursement of employees eligible to vote in the election, along with the nature and location of the work, most of which is performed away from the Employer's premises, created unique communications challenges for Union

agents who wish to communicate with employees it represents. (Tr. 95). Technicians, who comprise approximately 80% of unit employees (Tr. 107), are paid by the job rather than hourly. (Tr. 92). When access is restricted to the parking lot or Union agents are barred from attending mandatory meetings, they typically can speak to only one or two employees before the remaining technicians depart the facility to perform their daily assignments. (Tr. 99-100). However, the Employer agreed in the CBA to allow Union agents access to its private property and, at least prior to the critical period, had allowed Union agents even broader and nearly unfettered access to its premises and permitted them to attend mandatory employee meetings on its premises.

Every team of technicians at each of the nine (9) unionized facilities has regular mandatory meetings at each respective warehouse once a week, so a team is meeting nearly every day of every week at some facility. (Tr. 15). Usually fifteen (15) to (20) twenty technicians are present at each team meeting. (Tr. 92). Because they are otherwise occupied during the remainder of the workday in customers' homes and businesses away from the Employer's warehouses, these meetings, as well as the once-monthly inventory meetings, are the only time technicians at each of the nine (9) facilities covered by the CBA assemble at one time in a group. (Tr. 15-16, 91).

B. <u>The Employer's prior practice of granting broad access to Union representatives.</u>

Prior to the activity leading to the election in this case, Union business representatives had regularly and consistently been granted access to the interior of the

Employer's warehouses to attend and even to speak at and interact with employees during or immediately following the conclusion of those meetings. Union agents before the instant petition was filed thus had the opportunity to have technicians' full attention while they were assembled in a group when communicating with them, as contrasted to speaking to individual members in the parking lot while they are loading their trucks, focused on their job-related duties, and anxious to begin and complete their workday. (Tr. 70-71).[6] Every tech is also required to attend end-of-the month inventory counts, which have historically provided Union agents with an additional opportunity to speak to employees the Union represents at the respective warehouses they work from. (Tr. 25-26). These mandatory meetings are essentially the only meaningful way the Union has to access the employees it represents, since the Employer does not provide employee phone numbers or email addresses and has never provided such information either to the Union (Tr. 28-29) or to other employees. ("**Q. Can we get a list of voter's phone numbers?** A. ....we can't give you that information") (Joint Ex. 2).

The CBA includes an access provision in Article 10, Section 2, which was not altered after the contract was renegotiated after 18 months. (Tr. 14). That provision states, as follows:

> "Union officers may visit and have access to the facilities covered by this agreement at reasonable times during regular business hours for the purpose of reviewing records or files in connections with the investigation of a

[6] The sooner a technician completes his daily assignments the sooner his workday ends, as technicians do not have established shift hours or quitting times. (Tr. 93).

> grievance, attending grievance meeting with management and/or conferring generally with management officials and/or bargaining unit employees pertaining to the terms and conditions of the Agreement. Union officers shall not enter the interior of the Employer's facilities without the express authorization and approval of the designated management representative, in advance. The Union will use its best efforts to give the Employer as much advance notice as possible of any visit to the company premises. In addition, should the Union officers desire to conduct union business with unit employees, they may do so only on the employees non-work time and in non-work areas. Union officers shall not interfere with the performance of work by employees. The Union shall not conduct general membership meetings in the Employer's facilities or parking lot."

Notwithstanding the contractual provision requiring Union representatives to request advance authorization to visit facilities and receive Employer approval, the Employer early on established a practice of not requiring Union agents to give notice or receive permission prior to accessing its facilities. (Tr. 15, 20, 33, 78, 90). The Employer subsequently began requiring Union agents to give notice, and Union agents thereafter began doing so. (Tr. 20). Until the filing of the instant petition and during the critical period prior to the election in this case, Union representatives had also never been denied permission to access the technician meetings or end-of-the month inventory counts. (Tr. 19, 26, 47, 81, 90). Indeed, the Employer freely allowed Union agents to attend those meetings, answer employee questions, and discuss pending grievances affecting the entire unit. The Employer sometimes extended invitations to Union business agents to speak to employees and answer their questions at those meetings and end-of-the month inventory counts regarding a variety of matters, including questions regarding Union dues. (Tr. 16, 31, 46, 47, 72, 79, 83, 91). Earlier in the parties' bargaining relationship the Employer

even allowed the Union to conduct internal elections to choose its stewards on its premises at the conclusion of those mandatory meetings. (Tr. 92, 100-101).

C. The Employer unilaterally changes its access policy and practices.

During the critical period beginning in mid-April, 2012, and lasting until shortly before the ballots were counted on June 12, the Employer unilaterally changed its longstanding practice of giving Union representatives broad access to mandatory meetings conducted with groups of technicians inside Employer facilities. Abruptly, the Employer regularly began to deny Union representatives permission to access technician meetings to which they had always theretofore had liberally been given access. Indeed, Union agents had never been denied permission to attend those meetings prior to the beginning of the decertification and subsequent deauthorization activity. (Tr. 19, 21, 47, 70, 81, 90).[7] During the critical period prior to the election, the Employer used the technicians meetings as captive audience meetings at which the Employer urged that employees vote to deauthorize the Union.[8](Tr. 115).

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[7] The only time a Union agent was not promptly granted access to those meetings was a single occasion when the Employer asked Union agent Jerod Warnock if he would be opposed to rescheduling a scheduled visit due to an AT&T audit, a request Warnock did not consider to be a denial of access since it was in the nature of a request. (Tr. 87).

[8] The Employer also claimed that it used these meetings to explain the election process, assist with ballot language, and to encourage employees to participate in the election. (Tr. 116). Allowing Union agents to attend those meetings would not have been inconsistent with any of those objectives.

In addition to denying Union agents permission to access technicians meetings, the Employer also denied Union agents other opportunities for interactions and communications with employees during the critical period by for the first time cancelling the May, 2012 end-of-the month inventory counts at all nine locations, which the Employer acknowledged was done solely because of the pending election activity. (Tr. 28, 111). Although the Employer cancelled the May 2012 end-of-month inventory count at all of its nine (9) unionized warehouses solely due to the pending election, it chose not to cancel any of the mandatory technicians' meetings. (Tr. 112-113). After the ballots were counted, end-of-the month inventory counts resumed. (Tr. 29).

Argument

A. The Hearing Officer misapplied and improperly distinguished applicable Board precedent.

The Board recently revisited the issue of the legality of an employer changing established practices relative to union representatives' access to employer property in *Oaktree Capital Management,* 355 NLRB No. 207 (2010). There, the Board upheld an administrative law judge's findings that the joint employers had violated the Act by unilaterally discontinuing their prior practice of validating parking for union business agents who were present at the employers' resort for organizational purposes. *Id.* at *1. Observing that a unilateral change in an employer's policy permitting access by union representatives to its premises is a unilateral change in the employees' terms and conditions of employment and is ordinarily unlawful, the Board broadly announced that

"if an employer makes unilateral changes that impair a representative's ability to represent employees effectively....the employer violates Section 8(a)(5)." *Id.* Contrary the Hearing Officer's apparent views, it is not necessary that such a unilateral change makes it impossible for a union to communicate with employees it represents. Rather, an employer violates the Act when it makes unilateral changes which complicate or make more difficult a bargaining representative's ability to represent those employees "or that *impair* employees' ability to effectively support their representative." *Id.* (emphasis added).

The change in access policy found by the Board to be unlawful in *Oaktree* was more subtle than the change the Employer made in the present case. As the administrative law judge found, in *Oaktree* the employer had long maintained a practice of validating parking for union agents who routinely visited a hotel and resort to meet with members, discuss union-related matters, process grievances, and collect union dues. *Id*. at *5. After the collective bargaining agreement had expired in November of 2003 both parties continued to observe its terms. However, in a letter dated January 25, 2005, the employers informed the union that its representatives would no longer receive free parking, without offering the union any opportunity to bargain over this change. The judge examined the employers' unilateral decision to cease providing free parking in the context of other interactions between the employer and the union, noting that the union had recently begun campaigning for a new contract when the old agreement expired in

November by organizing rallies, picketing, and a boycott of the resort. In February of 2004 the employers began issuing trespass orders, "shadowing," and taking photos of licenses of union business agents to restrict their access and ability to represent employees. The judge further observed that the employer had known of and facilitated the practice of validating parking for several years before it had unilaterally changed that practice. *Id*. at *8.

To determine whether this unilateral change was a material one, the judge considered the context of the employers' other actions and found that changing the parking terms was one among other ways the employer was attempting to restrict interactions between its employees and their collective bargaining representatives, and thus discredit and weaken the union in the eyes of its members. *Id*. at *9. The Board affirmed each of the judge's findings and recommendations.

The evidence in this case shows that the Employer had granted Union representatives, both by contract and practice, virtually unlimited access to technicians' mandatory weekly meetings and to the end-of-the month inventory checks. Four different Union business agents testified at the hearing that before the instant petition was filed, with a single exception when the Employer had a scheduling conflict and asked the agent if he would as a courtesy agree to reschedule his visit (Tr. 87), the Employer had never denied them permission to attend any mandatory meeting or to access the interior of the Employer's facilities. The nature and scope of this access regularly was more generous

than but premised upon the access rights the parties had negotiated and included in the CBA. However, almost immediately after the decertification and later deauthorization activities had commenced the Employer began to regularly deny Union agents permission to access the technicians' meetings. It also cancelled the end-of-the-month inventories at all of its unionized warehouses, not due to any claimed business reason but solely because the election was imminent. These unilateral changes effectively deprived the Union one of its only effective means of communicating its message opposing the forthcoming deauthorization election to the nearly 1,000 employees it represents at nine (9) facilities in a five-state area stretching across over 500 miles from Davenport, Iowa to Cleveland, Ohio, employees who spend nearly all of their workdays away from the Employer's warehouses installing and servicing DirectTV at customer establishments.

The Hearing Officer failed to consider the impact of these changes to the Employer's access policy in their totality on the Union's ability to effectively communicate with the employees it represents. For instance, the Hearing Officer focused on the Employer's single denial of access to Business Representative Neil Matthews and concluded that single change did not signal a material change in the Employer's access policies and practices. (Report, p. 10). However, the evidence reveals a far broader impact. Matthews did visit facilities after he was formally denied on April 16 but did not "try to push the issue to try to physically force ourselves into the meeting" because management had asked the union agents to leave. (Tr. 24). Other evidence the Hearing

Officer apparently failed to consider demonstrated that the Employer also denied several other Union agents access to employees at each of its nine locations during the critical period, with those agents testifying to at least twelve (12) denials of permission to access technicians' meetings. (Tr. 21, 24, 25, 48, 49, 51, 53, 54, 83). Additionally, although it is true that the Employer cancelled only one monthly inventory meeting (the only one scheduled during the laboratory period), that meeting was canceled at each of its nine (9) unionized facilities.

By these actions, measures that were clearly designed to restrict Union agents from gaining access to and communicating with the employees they represent at the same time the Employer was busily conducting a serious of captive audience anti-union meetings at all of its locations, the Employer materially impaired the Union's access to the nearly 1000 employees it represents. Conversely, these actions also materially affected and impaired employees' ability to access and obtain information from the Union, by denying them any opportunity to hear a message different from what the Employer was communicating to them both in person at captive audience meetings and through written communications such as the May 23 letter. The changes in its access policies and practices implemented by the Employer during the critical period are in stark contrast to the unrebutted testimony of Union representatives at the hearing who testified that on at least 154 specific occasions Union agents were without question or precondition granted access or permission to attend technicians' meetings and end-of-month inventories before

the critical period began. (Tr. 17, 18, 19, 46, 47, 72, 80, 92, 101).

B. The Employer's unilateral changes to its access policies and practices were material.

The Employer's unilateral change to its practice of granting Union representatives broad rights to access the interior of its facilities and to attend mandatory meetings of employees was a material change, since it actually impaired Union agents' access to unit employees and denied employees the ability to hear a message contrary to that being communicated regarding the pending election. *Ernst Home Centers, Inc.,* 308 NLRB 848, 849 (1992) (finding that employer change to access policy limiting union agent's access to employees on the sales floor, which afforded him the means to communicate with as many employees as necessary during his visit to the store, was a "material" change). The Board has consistently on numerous occasions held that an employer's unilateral changes to rules or practices governing union agents' access to employees which impair that access are unlawful. *LA Film School, LLC,* 358 NLRB No. 21, at *15-16 (2012) (finding that employer violated Section 8 (a) (1) by discriminatorily adding additional, unwritten restrictions to prevent union-related access or speech); *Frontier Hotel & Casino*, 323 NLRB 815 (1997) ("*Any* change that actually interferes with contractually agreed employee access to the unit collective-bargaining representatives for representational purposes is a material change") (emphasis added), *enf'd. in relevant part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

In recommending that Objection No. 3 be overruled the Hearing Officer noted the Union's continued access to the Employer's parking lot during the critical period. (Report, p. 10). However, as the evidence reveals (Tr. 95), parking lot access offers nowhere near the same type or quality of access, nor does it provide an even remotely equivalent opportunity to interact and communicate with employees as does access to the interior of the warehouses to attend mandatory weekly technicians' meetings and monthly inventory meetings. It is nearly impossible for Union agents to meaningfully communicate with a single employee in the parking lot when his attention is focused on loading his truck and get on the road to begin performing his scheduled assignments. (Tr. 95). By for the first time restricting Union agents' access to the parking lots and withholding from them permission to attend mandatory employee meetings, the Employer was able to severely limit the number of employees Union representatives could interact and personally communicate with. By withholding access permission that had always before been freely granted, the limited the Union's ability to communicate by restricting its audiences to a small fraction of the bargaining unit as compared to the much larger number of employees it had before been able to reach by being allowed to attend the mandatory meetings occurring inside the Employer's warehouses. In so doing the Employer thus materially interfered with the Union's access to unit employees, and those employees' access to Union representatives during the critical period.

C. Conclusion

The Board should sustain the Union's exception and reverse the Hearing Officer's recommendation that Union Objection No. 3 be overruled, and order the Regional Director to direct and conduct a new election.

Respectfully submitted,

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