

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of)	
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ASSOCIATES AND LEISURE ACTIVITIES, LLC,)	
)	
Employer,)	
)	
and)	Case 01-RC-087226
)	
INTERNATIONAL ALLIANCE OF THEATRICAL)	
STAGE EMPLOYEES, MOVING PICTURE)	
TECHNICIANS, ARTISTS AND ALLIED CRAFTS)	
OF THE UNITED STATES AND CANADA,)	
LOCAL 11,)	
)	
Petitioner.)	
)	

**BRIEF IN SUPPORT OF EMPLOYER'S EXCEPTIONS
TO HEARING OFFICER'S REPORT AND
RECOMMENDATION ON OBJECTIONS AND CHALLENGES**

The Employer, Associates and Leisure Activities, LLC, hereby offers its brief in support of its exceptions to the Hearing Officer's Report and Recommendation on Objections and Challenges. Because the Employer merely advised its employees of the possible consequences of unionization on the basis of objective fact beyond its control, the Hearing Officer erred in concluding that the Employer made threats that interfered with employees' free choice regarding their representation. As such, the Report and Recommendation on Challenges and Objections should be rejected and the election certified.

STATEMENT OF THE CASE

On September 23, 2012, a representation election was conducted among all full-time and regular part-time and on-call stagehands employed by Associates and Leisure Activities, LLC ("Employer"). Decision at 4.^{1/} The Tally of Ballots cast in the election shows that of the six eligible voters, two votes were cast in favor of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists And Allied Crafts Of The United States And Canada, Local 11 ("Union"), and two votes were cast against the Union. Decision at 4.

On September 28, 2012, the Union filed objections to the election.^{2/} Decision at 4. A hearing on the objections was conducted on November 5, 2012 before Hearing Officer Emily Goldman. Id. at 5.

On or about November 20, 2012, the Hearing Officer issued her Report and Recommendation on Objections and Challenges ("Decision"). The Hearing Officer recommended that the Region

^{1/}References to particular pages of the Recommended Decision and Order on Objections are herein designated as "Decision at ___," while references to the formal papers in this matter, admitted into evidence at hearing as Board Exhibit 1, are designated as "B-1." References to pages of the transcript of the hearing are herein designated as "Tr. ___."

^{2/}The Union initially made four objections. After voluntarily withdrawing Objection No. 1, three were left for hearing: 1) Objection No. 2 (the Employer threatened to lock out the stage hands if the Union prevailed); 2); Objection No. 3 (the Employer threatened to reduce the number of shows to only comedy performances if the Union were successful in the election); and Objection No. 4 (the Employer posted the Notice of Election for only one full working day prior to the election). See Decision at 4-5, 12-17.

overrule Union Objection Nos. 2 and 4 and sustain Objection No. 3 - that the Employer threatened to reduce the number of shows to only comedy performances if the Union were successful in the election. Decision at 5-12. The Hearing Officer recommended that a new election be conducted. Id.

The Hearing Officer erred in recommending that Union Objection No. 3 be sustained. Based on the evidence adduced at hearing and applicable Board precedent, Objection No. 3 should be overruled and the September 23rd election certified. As the facts and law show, the Employer did not make threats that interfered with the stagehands' free choice regarding their representation.

RELEVANT FACTS

The Employer owns and operates the nearly 100 year-old Wilbur Theatre in Boston.^{3/} Decision at 3. The theater was purchased approximately four years ago by its current owner, Bill Blumenreich. Id. The theater employs six stagehands, who are responsible for setting up the theater for shows, including loading gear in and out of the theater, focusing lighting, monitoring sound and running cables. Id. at 8.

^{3/}The Employer does not contest the Hearing Officer's factual findings as far as they go. Rather, the Employer asserts that there were significant undisputed facts that the Hearing Officer improperly minimized or ignored altogether. As such, the facts stated herein come directly from the Decision, with supplementation from the undisputed record.

Historically, the Wilbur Theatre was a venue for Broadway shows and plays. Decision at 3. However, during Mr. Blumenreich's ownership, the theater has offered mostly comedy shows, supplemented by some musical concerts. Id.

The reason for this change is financial. Decision at 8. Unlike theatrical shows and concerts, comedy performances require very little labor to produce. Id. Comedy performances typically involve substantially less "gear" than shows and concerts, requiring fewer stagehands. Id. at 8-9. Comedy shows are therefore much more inexpensive to put on and more lucrative for the theater. Tr. 71-73.

However, there are not enough comedy acts to fill the theater's calendar. Decision at 8. Thus, the Wilbur supplements its comedy show presentations with musical concerts. Id. Mr. Blumenreich does not at this juncture expect to make money on music shows - in fact, the theater loses money on the more-expensive-to-produce concerts - but does it to build up the theater's customer base and its reputation as a concert venue. Decision at 8; Tr. 40, 73-74.

The Wilbur Theatre competes for musical acts with three other Boston theaters - the House of Blues, the Royale and the Paradise. Decision at 3; Tr. 73-74. These theaters, which are non-union, are larger and have held concerts for years. Tr. 74.

As such, the Wilbur has to pay bigger guarantees (i.e., risk more money) in order to book musical acts, which are more comfortable with the more established concert venues. Id. This situation has caused the Wilbur to consistently lose money on concerts. Id. Indeed, Mr. Blumenreich feared that if he had to pay much higher union pay rates for labor at music shows, it would put him out of business. Decision at 8.

The Wilbur's stagehands are well aware of the theater's financial realities. For example, stagehand crew chief Robert McEvoy, already a Union member, who regularly views the theater's profit and loss statements, has often told Mr. Blumenreich that he needs to stop putting on musical concerts, which will cause him to "go broke" because they lose too much money.^{4/} Tr. 27, 74, 76-77. Another stagehand, Alberto Carballo, "absolutely" knows that musical shows require that the theater employ more labor, resulting in much higher costs and lost money. Tr. 56.

On September 23, 2012, prior to the election, Mr. Blumenreich had conversations with three stagehands: Mr. Carballo, Mr. McAvoy and Corey Moses. Decision at 6. Mr.

^{4/}Mr. Blumenreich testified to this fact. Mr. McAvoy, a witness at the hearing, did not dispute it.

Blumenreich stated to each^{5/} that the theater was already losing money on music shows and that if he had to pay much higher union rates for such shows, he simply could not afford to do as many of them. Id.; Tr. 77.

THE LEGAL STANDARD

It is well-settled that if an employer discusses the effects of potential unionization, any "prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control" NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). "If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion" Id.

The test of whether a statement is a lawful prediction or a retaliatory threat is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made. Flying Food Group, Inc., 345 NLRB 101, 106 (2005);

^{5/}While acknowledging that he had such a conversation with Mr. Carballo, Mr. Blumenreich denied having similar conversations with Mr. McAvoy and Mr. Moses. See Tr. 75-77; 80. Nevertheless, the Hearing Officer concluded that "in all likelihood" he had similar conversations with all three. Decision at 12.

Electrical Workers Local 6 (San Francisco Electrical Contractors), 318 NLRB 109, 109 (1995). In this regard, the context of statements can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. Debbie Reynolds Hotel, 332 NLRB 466, 466 (2000); Joseph Chevrolet, Inc., 343 NLRB 7, 9 (2004).

"Mere references to the possible negative outcomes of unionization . . . do not deprive [employer speech] of the protections of Section 8(c)." Uarco, Inc., 286 NLRB 55, 58 (1987). Indeed, an employer's "general references to 'possibilities' are inadequate to establish" an unlawful threat where the employer's statements "clearly indicate that these possibilities would be based on the [employer] having no alternative in the face of either a union initiative or some other economic circumstance," unless specific evidence "provide[s] a reliable basis for concluding that [the employer] was making a threat." Miller Industries Towing Equipment, Inc., 342 NLRB 1074, 1075 (2004).

In short, "an employer may advise employees, in a manner which is moderate in tone, of the possible consequences of unionization." American Girl Place, Inc., 355 NLRB No. 84, 2010 WL 3220070, *17 (2010) (citing Tri-Cast, Inc., 274 NLRB 377, 378 (1985)).

ARGUMENT

Objection No. 3 Should Be Overruled Because the Employer's Statement Was A Lawful, Noncoercive Prediction About The Possible Consequences Of Unionization Based On Objective Fact.

Here, Mr. Blumenreich's statement - that the theater was already losing money on music shows and that if he had to pay much higher union rates for such shows, he simply could not afford to do as many of them - can be only be reasonably viewed as a lawful prediction based on objective fact. The statement, objectively true and well known as such by the stagehands, did nothing more than convey Mr. Blumenthal's well-founded belief about possible negative consequences of unionization. Gissel Packing Co., 395 U.S. at 618; Uarco, Inc., 286 NLRB at 58.

The statement in no way implies a result that would be undertaken "solely on [the Employer's] own initiative for reasons unrelated to economic necessities and known only to him." Id. Rather, as every employee knew, the theater was already losing money on music shows.^{6/} In asserting that higher union labor rates would cause the theater to lose even more money on such shows, Mr. Blumenreich was merely stating an obvious fact already known to the stagehands. Similarly obvious was his conclusion that as a result of losing more money, the

^{6/}Indeed, Mr. Blumenreich's undisputed testimony was that he only did music shows to try to build up the theater's customer base and reputation. Decision at 8; Tr. 40, 73-74.

theater might not be able to afford to put on as many music shows.

As such, there is no basis to conclude that Mr. Blumenreich's statement was a threat of reprisal based solely on factors known only to him, or that it would be undertaken on his own initiative, unrelated to economic circumstances. Rather, the statement was merely an assertion, moderate in tone and based on objective fact, of the possible consequences of unionization. See American Girl Place, Inc., 2010 WL 3220070, *17.

This case is therefore akin to those in which the Board concluded that employers' predictions about unionization were lawful statements based on objective fact. In TNT Logistics North America, Inc., 345 NLRB 290 (2005), for example, the employer predicted that if the union were voted in, the employer would lose the Home Depot account, the sole account on which its delivery drivers worked. The Board found that the statement - "if the Union comes in we wouldn't have job with Home Depot" - was based on the testimony of employer representatives that was uncontroverted by the union: 1) Home Depot does not like using unionized carriers; 2) Home Depot does not use any unionized carriers; and 3) the employer's contract with Home Depot was set to expire within 15 months of the election. 345 NLRB at 291.

The Board concluded that these "unrefuted facts furnished ample basis for a reasonable prediction that Home Depot would so act," emphasizing that in making its prediction the Employer "made no threats, nor were [its] comments interspersed with comments against the Union." Id.

Just like in TNT Logistics, the Employer here testified to facts that were unrefuted by the Union and, therefore, should be deemed as objective fact: 1) the Wilbur Theatre was already losing money on music shows; and 2) if the theater had to pay higher union labor rates for such shows, it would lose even more money. Just like in TNT Logistics, these unrefuted facts "furnished ample basis" for Mr. Blumenreich's reasonable prediction that the theater would not be able to afford to put on as many music shows. Finally, just like in TNT Logistics, Mr. Blumenreich made no threats, nor was his statement interspersed with comments against the Union.

The Board's decision in Tri-Cast, Inc., 274 NLRB 377 (1985), is similarly instructive. In that case, on the day of the election, the employer distributed a letter to employees stating that: 1) if the union were voted in the informal, person-to-person relationship the employer and its employees have enjoyed would change; 2) as a young company fighting for new business, if the company has to bid higher or customers feel threatened

because of delivery cancellations due to strikes, the company will lose business and jobs; and 3) the company cannot stay healthy with union restrictions because of its small size. Id. at 377-78.

The Board found the employer's statements to be lawful because they constituted "nothing more than the Employer's permissible mention of possible effects of unionization." Id. at 378. The Board found:

Higher bids or customer feelings of dissatisfaction because of problems caused by union strikes can lead to lost business and lost jobs. There is no dispute that the Employer is a young company and that higher wages demanded by a union could mean ultimately higher bids which might, in turn, affect the amount of business garnered by the Employer. Making these reasonable possibilities known to employees does not constitute objectionable conduct.

Id. (emphasis in original).

Likewise, here, Mr. Blumenreich, on the day of the election,^{2/} merely reminded stagehands what they already knew about the possible effects of unionization. There is no dispute that the theater was already losing money on music shows and that, therefore, "higher wages demanded by a union" could make music shows lose even more money. Such a circumstance "could mean ultimately" that the theater would be able to afford fewer

^{2/}In light of Tri-Cast, Inc., the Hearing Officer placed unwarranted negative weight on the fact that Mr. Blumenreich's statements came on the day of the election. See Decision at 11-12.

music shows. Quite simply, "[m]aking these reasonable possibilities known to employees does not constitute objectionable conduct." Id. at 378.

Finally, Board decisions in In re Edw. C. Levy Co., 351 NLRB 1237 (2007), and Valerie Manor, Inc., 351 NLRB 1306 (2007), bolster the conclusion that Mr. Blumenreich's statement was lawful. In Levy Co., the Board rejected the argument that the employer, in a decertification election, impliedly threatened replacement workers' jobs by informing them of the union's desire to return striking workers into those jobs. 351 NLRB at 1238-39. The Board concluded that the employer merely:

provided its current work force – all of whom were striker replacements – concrete information about the possible outcome for them should the Union prevail in its desire to continue to represent employees and achieve its contract demands. . . . The Employer did not threaten employees with job loss. Rather, it explained to them the consequences of the Union's demands that could result in their replacement by striking employees. That the Employer did not explain every possibility to employees does not transform its lawful statements into objectionable threats.

Id. at 1239-40.

In Valerie Manor, Inc., the admissions coordinator of the employer, a nursing care facility, commented to unit members that "the first thing a loved one asks her is whether the facility is a union facility because they don't want to put their loved one in a union home because they felt they wouldn't

get proper care." 351 NLRB at 1309. The Board rejected the General Counsel's argument that was an implied threat of loss of jobs, concluding that it was "based upon objective considerations, and upon a reasonable prediction." Id. at 1310.

As in these cases, Mr. Blumenreich's statement to stagehands can only be viewed as "concrete information about the possible outcome for them should the Union prevail," based on "objective considerations" that the Union did not dispute. Such a reasonable prediction of potential future events based on objective fact, made without threat and without anti-Union hyperbole, falls well within acceptable Employer speech under Gissel Packing Co.

CONCLUSION

For all of the foregoing reasons, the Hearing Officer's Report and Recommendation on Challenges and Objections should be rejected and the September 23, 2012 election certified.

Respectfully submitted,

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Dated: January 3, 2013

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STATEMENT OF SERVICE

I, Alan S. Miller, hereby certify that on January 3, 2013, I served, in the same manner or a faster manner as that utilized in filing with the Board, copies of:

- 1) Employer's Exceptions to Hearing Officer's Report and Recommendation on Objections and Challenges; and
- 2) Brief in Support of Employer's Exceptions to Hearing Officer's Report and Recommendation on Objections and Challenges, on the following:

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