

**Oberthur Technologies of America Corporation and Graphic Communications Conference International Brotherhood of Teamsters, Local 14-M.**  
Cases 04-CA-086325, 04-CA-087233, and 04-RC-086261

August 27, 2015

DECISION, ORDER, AND CERTIFICATION  
OF REPRESENTATIVE

BY MEMBERS MISCIMARRA, HIROZAWA,  
AND JOHNSON

On February 20, 2013, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions, a supporting brief, answering briefs, and reply briefs. The General Counsel filed exceptions, a supporting brief, an answering brief, and a reply brief. The Charging Party filed cross-exceptions, a supporting brief, and a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> only to the extent consistent with this Decision, Order, and Certification of Representative, to amend his remedy, and to adopt his recommended Order as modified and set forth in full below.<sup>3</sup>

I. THE UNFAIR LABOR PRACTICE CASES

This proceeding consolidates two unfair labor practice cases with a representation case. In the unfair labor practice cases, the General Counsel alleged that, following the advent of a union campaign at the Respondent's facility, the Respondent committed several unfair labor practices. The judge found merit in most of the allegations. We adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act by telling employees that they could not discuss the Union in work areas or

<sup>1</sup> The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We have amended the judge's Conclusion of Law 1 to reflect the violation found.

<sup>3</sup> We shall modify the judge's recommended Order to conform to our findings herein and the Board's standard remedial language and in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). Further, we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

during worktime,<sup>4</sup> and telling employees that bonuses, wage increases, transfers, and promotions were being put on hold until after the election. We also adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by delaying and withholding wage increases, bonuses, transfers, and promotions.<sup>5</sup>

II. THE REPRESENTATION CASE

The Stipulated Election Agreement entered into by the parties and approved by the Regional Director provided for the following unit:

*Included:* All full-time employees employed by the Employer in litho printing, finishing card and sheet, ink, facilities janitorial, card auditing plastics, pre-press composition, QC [quality control], smart card embedding, screen making, screen printing, production expeditor, quality systems analyst, warehouse plastic, customer service manufacturing, and maintenance depart-

<sup>4</sup> In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by telling employees that they could not discuss the Union in work areas or on worktime, we find the instruction unlawful on the basis that it constituted a discriminatory restriction on union-related speech. See *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003) ("[A]n employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign.").

<sup>5</sup> The judge found that the Respondent unlawfully failed to grant spot bonuses (among other bonuses) to employees who may have been approved for them during the period from August 1, 2012, until after the September 7, 2012 election. However, he stated that the failure to grant spot bonuses did not warrant a make-whole remedy because of the small amount of the spot bonuses and the difficulty of determining who would have received a spot bonus. The General Counsel excepts to this conclusion, and we find merit in his exception. A traditional backpay remedy, with interest, is appropriate for those employees who would have received spot bonuses but for the Respondent's unlawful conduct, and we leave for compliance the identification of employees unlawfully denied spot bonuses and the determination of the amount they should receive, including interest. The Respondent may renew at compliance its contention that this determination would involve improper speculation.

We agree with the judge that the Respondent did not violate Sec. 8(a)(1) by prohibiting an employee from using the Respondent's copier to copy union literature, or by telling an employee that it preferred she hand out union literature rather than place it on a cafeteria table. Finally, there are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by interrogating employees.

Member Hirozawa, contrary to his colleagues, would find that the employer did violate the Act when a supervisor called a subordinate employee into his office and stated "the company" preferred that she distribute union flyers by hand rather than leaving the flyers on tables in the breakroom. The majority agrees with the judge that the statement was not coercive because the supervisor merely expressed a preference. In Member Hirozawa's view, however, if a supervisor calls an employee into his office in order to express the company's preference that the employee not engage in a specific protected activity, the employee would reasonably understand the communication as a direction to cease that activity.

ments at its facility located at 523 James Hance Court, Exton, Pennsylvania.

*Excluded:* All other employees, temporary and seasonal employees, confidential employees, guards and supervisors as defined in the Act.

On September 7, 2012, the Board conducted a secret-ballot election to determine whether employees in the stipulated unit wished to be represented by the Union for purposes of collective bargaining. The tally of ballots showed that, out of approximately 229 eligible voters, 108 cast votes for the Union and 106 cast ballots against representation. The Union filed several objections to the election and challenged the ballots of Scott Hillman, John DiTore, and Ben Sahijwana.<sup>6</sup> The Respondent did not file any objections to the election or challenge any ballots.

The judge sustained the challenges to DiTore's and Sahijwana's ballots on the ground that they are professional employees under Section 2(12) of the Act.<sup>7</sup> The judge observed that, because DiTore and Sahijwana are professional employees under Section 2(12), they cannot be included in the stipulated unit as a matter of law absent an election that conforms to the requirements of *Sonotone Corp.*, 90 NLRB 1236 (1950).<sup>8</sup>

The Respondent argues that the judge incorrectly found that DiTore and Sahijwana are professional employees and thus that, contrary to the judge, the challenges to their ballots should be overruled. In the alternative and for the first time, the Respondent now argues that if the judge is correct that DiTore and Sahijwana are pro-

fessionals, then he erred by not ordering a *Sonotone* election for them. In support of this alternative argument, the Respondent contends that, in analyzing these individuals' eligibility, the judge failed to apply the test set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002), for resolving determinative challenged ballots in cases involving stipulated bargaining units. The Respondent contends that the stipulated unit unambiguously includes DiTore and Sahijwana because they both work in a department—Quality Control—listed in the stipulated unit, but that their inclusion renders the stipulated unit inappropriate under Section 9(b)(1) unless DiTore and Sahijwana vote for inclusion in the unit. Accordingly, the Respondent concludes, if DiTore and Sahijwana are professionals, the Board must set aside the election and direct a second election that conforms to the requirements of *Sonotone*.

The Union contends that the judge correctly found that DiTore and Sahijwana are professional employees. It further contends that although the judge did not cite *Caesar's Tahoe*, supra, he implicitly and correctly concluded that the stipulated unit description is ambiguous with respect to DiTore and Sahijwana, that DiTore and Sahijwana do not share a community of interest with the rest of the unit employees, and that the challenges to their ballots should be sustained and the Union certified as the unit employees' representative.

We agree with the judge, for the reasons stated in his decision, that DiTore and Sahijwana are professional employees under Section 2(12) of the Act. Thus, we conclude that he properly sustained the challenges to their ballots even if we were to assume that the parties intended to include DiTore and Sahijwana in the stipulated unit.<sup>9</sup> A contrary ruling would arguably permit the parties to stipulate to a conventional election, even though at least two professional employees (DiTore and Sahijwana) were part of the stipulated unit. Giving effect to the parties' stipulation in that circumstance would contravene Section 9(b)(1) of the Act, which permits a bargaining unit to include professional and nonprofessional employees only if the professional employees are afforded a separate self-determination election.<sup>10</sup> Here, if the stipulated unit *excluded* DiTore and Sahijwana, the challenges to their ballots would be sustained. Conversely, if the stipulated unit were assumed to *include* DiTore and Sahijwana, the challenges to their ballots would have been properly sustained because Section 9(b)(1) prohibits the type of election to which the parties also stipulated—a conventional election, with no separate self-determination vote for DiTore and Sahijwana.

<sup>6</sup> There are no exceptions to the judge's recommendation to overrule the challenge to Hillman's ballot. In light of our decision in this case, however, Hillman's ballot is not determinative and will not be opened or counted. Nor do we reach the Union's objections, which are mooted by our Certification of Representative.

<sup>7</sup> The judge also found that, even if DiTore and Sahijwana were not professional employees, they were ineligible to vote because they did not share a community of interest with the employees in the stipulated unit. In light of our disposition of the representation case, we find it unnecessary to pass on this issue.

<sup>8</sup> Sec. 9(b)(1) of the Act provides that the Board shall not "decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit[.]" Thus, "the Act effectively grants professional employees the right to decide by majority vote whether they wish to be included in a unit with nonprofessional employees." *American Medical Response, Inc.*, 344 NLRB 1406, 1408 (2005). To safeguard that right, the Board adopted the procedure that is commonly known as a *Sonotone* election. In a *Sonotone* election, the ballots for the professional employees include two questions. The first question asks the professionals if they want to be included in a unit of professional and nonprofessional employees. The second question asks the professionals if they wish to be represented by the union or unions involved. See *American Medical Response*, 344 NLRB at 1408; *Sonotone Corp.*, 90 NLRB at 1241.

<sup>9</sup> As described in his separate concurring opinion, Member Hirozawa believes that the parties excluded DiTore and Sahijwana from the unit.

<sup>10</sup> See, fn. 8, above.

The Respondent asserts for the first time in exceptions that the engineers are professionals, are included in the stipulated unit, and are therefore entitled to a self-determination election. The Respondent did not file objections to the conduct of the election on any basis, let alone on the specific grounds concerning the engineers. Instead, the Respondent argued for the first time in its exceptions that the entire election must be nullified because the engineers were eligible to vote and were improperly denied a *Sonotone* election. The Respondent's failure to file objections, or in any other way raise its concerns at the appropriate time, limits the issues that it has preserved for our consideration. See *Tekweld Solutions*, 361 NLRB 201, 202 (2014). In effect, the Respondent seeks to have its exceptions to the judge's decision treated as if they were objections, despite being filed long after the objections deadline and with no explanation—let alone reasonable justification—for its failure to timely raise the issue.<sup>11</sup> As we explained in *Tekweld*, the Board's practice is not to set aside an election based only on challenged ballots and in the absence of objections to the election.<sup>12</sup> *Id.*, slip op. at 2. As in *Tekweld*, we decline to deviate from our established procedural requirements.<sup>13</sup> The above analysis results in a ballot tally of

<sup>11</sup> This case, therefore, is clearly distinguishable from *American Medical Response*, 344 NLRB at 1408–1409 (setting aside election and directing a new election providing for *Sonotone* ballots for RNs, where RNs—stipulated to be professional employees—had not been given *Sonotone* ballots). In *American Medical Response*, the employer timely objected.

<sup>12</sup> The result might differ in a case in which the stipulated unit violates Sec. 9(b)(1) on its face, and therefore the stipulation should not have been approved, see *Sunrise, Inc.*, 282 NLRB 252 (1986), or where timely objections have been filed based on the failure to conduct a self-determination election among professional employees, see, e.g., *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999). But this is not such a case. Here, it was not readily apparent from the face of the stipulation that the reference to quality control employees might have entailed the inclusion of professional employees in a mixed professional-nonprofessional unit. Moreover, as noted in the text, the Employer has filed no objections to the election in this case.

In *Sunrise*, supra, the Board dealt with an election where the stipulated unit on its face expressly included “registered nurses” (who were found to be professional employees) and expressly excluded “all professional employees.” Even in the absence of objections, based on Sec. 9(b)(1)'s prohibition of a mixed professional-nonprofessional unit without a self-determination election, the Board concluded that it would “best effectuate the purposes of the Act to set aside the election, vacate the stipulation, and remand [the] proceeding to the Regional Director to resume processing of the petition by either assisting the parties to reach agreement on a new stipulation or, in the absence of a new stipulation, conducting a hearing on the unit issue.” *Id.* Here, to the contrary, the stipulated unit did not appear on its face to include professional employees.

<sup>13</sup> Although the Respondent now asserts that another employee, Khalid Husain, is also an engineer, his ballot was not challenged and no argument was timely raised about his status. The judge therefore did not address the matter, and neither can we. See *NLRB v. A. J. Tower*,

108 votes in favor of the Union, 106 votes against representation, and one nondeterminative challenged ballot. Accordingly, we find that a certification of representative should be issued.

#### AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 1.

“1. The Respondent violated Section 8(a)(1) of the Act by telling employees that they could not talk about the Union in work areas or during work time.”

#### AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent unlawfully delayed and withheld employees' wage increases, bonuses (including spot bonuses), transfers, and promotions, we shall order the Respondent to make the employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Backpay for the discriminatees shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The General Counsel shall be permitted to establish, during compliance, the identity of employees who did not receive a scheduled wage increase and/or bonus (including spot bonuses), without prejudice to the Respondent's right to contend that identifying who would have received spot bonuses is unduly speculative.<sup>14</sup>

Further, we shall require the Respondent to rescind its unlawful prohibition against employees talking about the Union in work areas or during worktime.

#### ORDER

The National Labor Relations Board orders that the Respondent, Oberthur Technologies of America Corporation, Exton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from talking about the Union in work areas or during worktime.

(b) Delaying the payment of scheduled wage increases, bonuses, transfers, and promotions during the pen-

329 U.S. 324 (1946) (voter eligibility cannot be challenged after ballot is cast and commingled with others).

<sup>14</sup> The judge specifically identified one individual, Efrain Marrero, as entitled to a wage increase from the date he was scheduled to receive it to the date of his resignation.

gency of a representation election to discourage union support.

(c) Telling employees that their scheduled wage increases, bonuses, promotions, and transfers have been delayed as the result of the pendency of a representation election.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees whole for any loss of earnings and other benefits suffered as a result of having their bonuses, scheduled wage increases, promotions, or transfers delayed as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(b) Compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(c) Rescind the instruction prohibiting employees from talking about the Union in work areas or during worktime.

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post in its facility in Exton, Pennsylvania, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Region's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasona-

ble steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed its facility in Exton, Pennsylvania, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Graphic Communications Conference, International Brotherhood of Teamsters, Local 14-M, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

*Included:* All full-time employees employed by the Employer in litho printing, finishing card and sheet, ink, facilities janitorial, card auditing plastics, pre-press composition, QC [quality control], smart card embedding, screen making, screen printing, production expeditor, quality systems analyst, warehouse plastic, customer service manufacturing, and maintenance departments at its facility located at 523 James Hance Court, Exton, Pennsylvania.

*Excluded:* All other employees, temporary and seasonal employees, confidential employees, guards and supervisors as defined in the Act.

MEMBER HIROZAWA, concurring.

I agree with the majority decision upholding the challenges, finding that the Respondent failed to timely raise its argument that a *Sonotone* election was required, and that a certification of representative should issue. I would find in addition that the Respondent's argument fails on the merits.

In *Caesar's Tahoe*, 337 NLRB 1096 (2002), the Board adopted the "three-prong approach to resolving stipulated unit cases" set forth in *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999):

Under [this] test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the

<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

*Caesar's Tahoe*, 337 NLRB at 1097. Here, the paragraph of the stipulation describing the voting unit included the "full-time employees" in over a dozen named departments and excluded "all other employees," a phrase that encompassed, as both parties knew well, the Engineering department. The paragraph of the stipulation that specifies the ballot language clearly provides for an election with no self-determination question.<sup>1</sup> On the basis of these provisions, and in light of the absence of anything in the stipulation suggesting that engineers or any other professional employees were intended to be included in the voting unit, I conclude that the stipulation clearly and unambiguously provides for a nonprofessional unit, excluding all professional employees.<sup>2</sup> For these reasons, in conjunction with the judge's rationale for finding that DiTore and Sahijwana are professional employees, I would sustain the challenges to their ballots.

The Respondent argues that because DiTore and Sahijwana were employed in a department named in the "included" part of the stipulated unit description, the stipulation clearly and unambiguously provides for the inclusion of professional employees. I reject this argument for the reasons explained above. Moreover, even if the "included" list were read to cover the two engineers, the stipulation should at the very least be deemed ambiguous for purposes of the first step of the *Caesar's Tahoe* analysis, because the stipulated voting unit would then be irreconcilable with the stipulated ballot language. Such an internal inconsistency, which would produce an absurd result, would preclude a finding that the stipulation is unambiguous. See *NLRB v. Detective Intelligence*

<sup>1</sup> The Board's Casehandling Manual provides that stipulations for self-determination elections contain, in the stipulation's ballot-language paragraph, specific language set forth in the manual for the self-determination question. NLRB Casehandling Manual, Part Two, Representation Proceedings, Secs. 11091, 11091.1.

<sup>2</sup> The cases relied on by the Respondent, *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999), and *Valley View Hospital*, 252 NLRB 1146 (1980), are inapposite because they involved stipulated election agreements that were facially contrary to the Act or where the parties and Regional Director were on notice that there was a dispute over the terms of the stipulated election agreement. The Board recognized this distinction in *Hollywood Medical Center*, 275 NLRB 307, 308 (1985) (denying objection that the stipulated nonprofessional job classifications included professional employees because "the stipulation on its face is neither contrary to Board policy nor violative of Section 9(b)(1) of the Act.").

*Services*, 448 F.2d 1022, 1025–1026 (9th Cir. 1971). The inquiry would proceed to, and end with, the second *Caesar's Tahoe* step, "determin[ation of] the parties' intent through normal methods of contract interpretation." The record establishes beyond dispute that the Petitioner sought to represent a unit of nonprofessional employees. That is precisely why its observer challenged the ballots of the engineers when they appeared to vote. There is nothing in the record to suggest that the Respondent intended to agree to a mixed professional-nonprofessional unit without a self-determination election. The record contains no indication that either party knew that there were any professional employees in the listed departments, and it supports a strong inference that neither party thought that any professional employee was covered. Indeed, if the Respondent had known at the time of the stipulation that the voting unit included professional employees, but failed to disclose the fact and stipulated to a nonself-determination election, it would be estopped from objecting on that basis. See *Cruis Along Boats*, 128 NLRB 1019, 1019–1021 (1960) (precluding petitioner from pursuing challenges inconsistent with preelection stipulation). Finally, it is a well-established canon of contract interpretation that a reading that gives an agreement lawful and effective meaning is preferred to one that renders it unlawful or of no effect. Restatement (Second) of Contracts, § 203 (1981). Under accepted principles of contract interpretation, pursuant to *Caesar's Tahoe*, the Respondent's reading of the stipulation must be rejected.

MEMBER MISCIMARRA, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by telling employees that they could not discuss the Union in work areas or during worktime (based on *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003)) and telling employees that bonuses, wage increases, transfers, and promotions were being put on hold until after the election. I also join in adopting the judge's finding that the Respondent violated Section 8(a)(3) and (1) by delaying and withholding wage increases, bonuses, transfers, and promotions, and in furnishing a make-whole remedy for the Respondent's failure to grant "spot bonuses." And I agree with my colleagues that the Respondent did not violate Section 8(a)(1) by prohibiting an employee from using the Respondent's copier to copy union literature, and with Member Johnson that the Respondent did not violate Section 8(a)(1) by telling an employee that it preferred she hand out union literature rather than place it on a cafeteria table.

I do not join my colleagues, however, in their disposition of the representation case. I agree that DiTore and

Sahijwana are professional employees, but I disagree regarding two other points.

First, contrary to the views expressed in Member Hirozawa's concurring opinion, I believe the stipulated unit unambiguously includes DiTore and Sahijwana. Although they are both professional employees, they both unquestionably fall within the stipulated unit's description, which encompasses all "full-time employees employed by the Employer in . . . QC [quality control]." Therefore, the fact that the stipulated unit expressly excludes "[a]ll other employees" does not apply to DiTore and Sahijwana. The stipulated unit's express exclusions make no reference to "professional employees."<sup>1</sup> The fact that the stipulated unit operates to exclude engineers employed as professional employees in the Respondent's separate Engineering Department has no bearing on the stipulation's express inclusion of all full-time employees employed in the QC Department. Moreover, in my view, the scope of the stipulated unit is not rendered ambiguous based on the parties' failure to provide for a self-determination election. See *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002) (setting out a three-step test for resolving ballot challenges in stipulated unit cases, including an initial determination whether the stipulation is ambiguous). I am unaware of any precedent in which the Board has looked beyond the language of the stipulated unit description—i.e., the language that sets forth who is included in and who excluded from the stipulated unit—in determining whether a stipulation is ambiguous.

Second, I believe this case is controlled by *Sunrise, Inc.*, 282 NLRB 252 (1986), where the Board addressed a stipulated election agreement that provided for the inclusion of professional employees in a mixed professional/nonprofessional unit without a self-determination election. Here, as in *Sunrise*, supra, I believe it would "best effectuate the purposes of the Act to set aside the election, vacate the stipulation, and remand [the] proceeding to the Regional Director to resume processing of the petition by either assisting the parties to reach agreement on a new stipulation or, in the absence of a new stipulation, conducting a hearing on the unit issue." *Id.*<sup>2</sup>

<sup>1</sup> In this respect, the instant case differs from a situation where the stipulated unit expressly excludes "all professional employees." See, e.g., *Sunrise, Inc.*, 282 NLRB 252 (1986).

<sup>2</sup> I acknowledge, as stated in my partial dissenting opinion in *Tekweld Solutions, Inc.*, 361 NLRB 201, 203–204 (2014) (Member Miscimarra, dissenting in part), that when dealing with ballot challenges—in the absence of election objections—the Board might "reasonably limit its review to the question of whether or not the disputed votes should be counted." However, *Tekweld* did not involve a stipulation that provided for a conventional election in a mixed unit of professional and nonprofessional employees without a self-determination election, which is directly contrary to the requirements of Sec. 9(b)(1). Moreover, even in *Tekweld*, I favored a rerun election on the basis that our

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from talking about the Union in work areas or during worktime.

WE WILL NOT delay the payment of scheduled wage increases, bonuses, transfers, and promotions during the pendency of a representation election to discourage you from supporting the Union.

WE WILL NOT tell you that your scheduled wage increases, bonuses, promotions, and transfers have been delayed as the result of the pendency of a representation election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of having their bonuses, scheduled wage increases, promotions, or transfers unlawfully delayed, plus interest.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL rescind the instruction prohibiting employees from talking about the Union in work areas or during work-time.

OBERTHUR TECHNOLOGIES OF AMERICA  
CORPORATION

"regular procedures [were] deficient" and "we should satisfy our overriding statutory responsibility to 'assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act.'" *Id.*, slip op. at 4 (quoting Sec. 9(b)). In any event, I believe the issues presented here are governed by *Sunrise*, where the Board held the appropriate action was a remand to resume processing the petition.

The Board's decision can be found at [www.nlr.gov/case/04-CA-086325](http://www.nlr.gov/case/04-CA-086325) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Randy Girer, Esq.*, for the General Counsel.  
*Kevin C. McCormick, Esq.*, for the Respondent.  
*Thomas H. Kohn, Esq.*, for the Union.

## DECISION

### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard these consolidated cases on November 28, 29, and 30, 2012, and January 2 and 3, 2013. The Petition in Case 04–RC–086261 was filed on July 30, 2012. On August 8, 2012, the Regional Director approved a Stipulated Election Agreement pursuant to which an election was held on September 7, 2012. The tally of ballots showed that of about 229 eligible voters, 108 cast votes for the Union, 106 cast ballots against representation and 3 persons cast challenged ballots. The challenged voters were John DiTore, Ben Sahijwana, and Scott Hillman and these challenges were determinative of the outcome of the election.

The Union also filed objections to the election and these alleged as follows:

1. That on or about July 31, 2012, the Employer falsely accused an employee of using company property to make union flyers and told her that she could not leave them on cafeteria tables.

2. That on or about August 2, 2012, the Employer told employees that there would be no wage increases or promotions until the union matter was resolved.

3. That during the course of the election, employee Debbie Lester left a stack of antiunion T-shirts on a table within the polling areas.

4. That on or about August 13, 2012, the Employer engaged in surveillance of Union Supporter Donald Deputy in the parking lot.

5. That during the election, Laura McCarthy, a nonunit employee, stood in the doorway to the voting room and urged voters to vote no while wearing a red shirt with the word “NO” in large black letters and wearing a button having a union bust-er logo on it.

The unfair labor practice charge in Case 04–CA–086325 was filed by the Union on July 31, 2012, and the charge in Case 04–CA–087233 was filed on August 14, 2012. A consolidated complaint was issued on October 22, 2012. This alleged as follows:

1. That on or about July 11 and 25, 2012, the Respondent implemented and enforced a new policy prohibiting employees from discussing the Union in work areas.

2. That on or about July 18, 2012, the Respondent by Dorsey and Newman, interrogated employees about their union sympathies.<sup>1</sup>

3. That on or about July 31, 2012, the Respondent by Roman Young, a supervisor, prohibited an employee from making copies of prounion flyers using company copy machines and told the employee to hand them out instead of placing them on a cafeteria table.

4. That on or about August 2, 2012, the Respondent by Anthony Ganci, a supervisor, told employees that they would not receive promotions or wage increases until the union matter was resolved.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

## FINDINGS AND CONCLUSIONS

### I. JURISDICTION

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. THE CHALLENGED BALLOTS

The employer is a multinational enterprise, with its headquarters in Paris, France. The facility involved in the present case is located in Exton, Pennsylvania, where it is engaged in the manufacture of credit cards, debit cards, smart cards, governmental identifications (for the United States and foreign governments), and related products. This is not simply a printing operation. Rather, the creation of these types of cards is a high-tech operation involving, inter alia, the embedding of data, holograms, and other security devices into these types of cards and identification products.

The Stipulated Election Agreement defined the appropriate collective-bargaining unit essentially by describing employees in various departments instead of defining employees by job title or job descriptions. The unit was defined as follows:

*Included:* All full-time employees employed by the Employer in litho printing, finishing card and sheet, ink, facilities janitorial, card auditing plastics, pre-press composition, QC [quality control], smart card embedding, screen making, screen printing, production expeditor, quality systems analyst, warehouse plastic, customer service manufacturing and maintenance departments at its facility located at 523 James Hance Court, Exton, Pennsylvania.

<sup>1</sup> At the hearing the General Counsel withdrew one of the interrogation allegations.

*Excluded:* All other employees, temporary and seasonal employees, confidential employees, guards and supervisors as defined in the Act.

It should be noted that although the Employer utilizes leads in many of its departments, the evidence is that the parties intended to include them in the bargaining unit. Indeed, one of the employee organizers for the Union (Richard Crabtree) was a lead in the production department. He also acted as the Union's observer at the election.

I also note that that all of the employees who voted in the election (except for DiTore and Sahijwana), were hourly paid workers, most of whom were paid in the range of from \$8.28 per hour to a maximum of \$36.55 per hour.<sup>2</sup> In the case of Scott Hillman, he was, until 2012, paid on a salary basis but was thereafter changed to an hourly employee.

#### A. Scott Hillman

Hillman's title is strategic account manager, he works under the supervision of Dave Domsohn, the manager of Client Service Manufacturing. Also in his department are seven other employees who have titles of client service representatives. All of these employees (who like Hillman are hourly paid),<sup>3</sup> are responsible for making sure that customer orders are processed from the time they come in to the time they go out. The only difference between Hillman and the other account representatives is that he is responsible for the largest account, that being American Express. Almost all of their work is done in the second floor offices and basically involves tracking the customers' orders from beginning to end.

The Stipulated Election Agreement specifically includes employees in the customer service manufacturing department and other than Hillman, the other client representatives all voted in the election without challenge. In my opinion, Hillman's job, despite the nomenclature of manager, is essentially the same as the other persons in this department. There was no evidence that he exercised either managerial or supervisory authority. Therefore, I conclude that he was an eligible voter.

#### B. John DiTore and Ben Sahijwana

Both of these gentlemen are persons with engineering degrees who, in my opinion, do jobs that require the independent use of the skills and advanced knowledge, acquired through their engineering education and work histories. They are employed in the Company's quality control department under the supervision of Joe Blossic who also has an engineering degree. In the latter regard, Blossic testified that although he does supervisory functions instead of engineering tasks, his background in engineering enables him to understand what DiTore

<sup>2</sup> This means that these employees are considered to be covered by the Fair Labor Standards Act and are entitled to overtime for work over 40 hours per week. It also means that the Employer keeps track of their time. Salaried employees are those who are paid on a biweekly basis irrespective of the amount of time that they work during a given week. The salaried employees at Oberthur include managers, supervisors, and engineers.

<sup>3</sup> The evidence indicates that that people in this department are paid in the range of \$14.18 per hour to \$28.93 per hour. Hillman is the highest paid of these employees.

and Sahijwana are doing. In addition to these two employees, the quality control department employs a relatively small group of hourly paid employees who receive much less compensation than either DiTore or Sahijwana. They are individuals who have high school degrees.

Both DiTore and Sahijwana are paid on an salaried basis. All of the other employees whom the Union and the Employer agreed were eligible to vote, are paid on an hourly basis and are subject to the wage and hour provisions of the Fair Labor Standards Act.

The Company has an engineering department but neither DiTore nor Sahijwana are assigned to it. The people employed in the engineering department were not included in the voter eligibility list and did not vote. Although not either explicitly included or excluded from the Stipulated Election Agreement's voting unit, I think that it would be reasonable to assume that both parties implicitly understood that engineers in the engineering department should be considered professional employees who, as a matter of law, would not be permitted to be included in the unit, except as a result of a self-determination election. *Sonotone Corp.*, 90 NLRB 1236, 1241-1242 (1950)

John DiTore was hired as a "Lean Engineer." In this respect, the description for the job is that it requires a B.S. Degree in Engineering. In addition to holding a degree in mechanical engineering, DiTore has a Master's of Business Administration and a Master's of Science Degree from Temple University. Also, he has taken specific courses in lean manufacturing in conjunction with a previous employer. The testimony shows that lean engineering is a subspecialty in engineering and that it involves the use of science, engineering, and applied mathematics to configure a workplace and the flow of work so as to reduce waste, human exertion, and to maximize the production of goods and services. As testified to by DiTore and Blossic, he is responsible for taking on ad hoc projects and applying his knowledge and skills to assemble teams of employees to analyze manufacturing processes and problems.

DiTore was hired at a salary of \$72,000 which is substantially higher than any of the other employees who both sides agreed were in the voting unit. In 2009, he received a bonus of \$800 which is the type of bonus only given to managerial employees. In 2010, DiTore received a merit increase that brought his annual salary to \$73,098. He received another raise in 2011 and a discretionary bonus in 2012 that is paid only to managerial employees. His 2011 evaluation was done on the form used for managers and professionals and his position was listed as a "process improvement manager."

In 2008, Ben Sahijwana was hired for the position of quality engineer at a salary of \$65,000 per year.<sup>4</sup> Like DiTore, he is considered as and is treated by the Company as being exempt from the Fair Labor Standards Act (FLSA) wage and hour requirements. Sahijwana has a College Degree from India and a Bachelors Degree in engineering from Florida Institute of Technology. He has a Masters Degree in engineering from Villanova University and an MBA from Widener University.

<sup>4</sup> A prerequisite for obtaining the job was that the applicant needed, at a minimum, to have a Bachelor of Science Degree with knowledge of statistics and statistical process control.

Finally, he has a six sigma green belt, which as far as I understand is a type of certification from a course or courses in manufacturing quality standards.

Based on the testimony, it seems to me that Sahijwana is responsible for determining the cause and cure for items that come out as defects. This is not simply a matter of reaching into a conveyer line and removing and discarding those items with imperfections. Rather, this is a process, whereby Sahijwana is responsible for determining the cause of a defect and the means by which the defect can be corrected and prevented in the future. As he testified, this requires his utilization of various scientific and/or engineering skills including pressure and temperature analysis. It also requires that he have knowledge of and understand the materials that are used by the Company to manufacture its items, such as inks and plastics. Although Sahijwana does work with some of the other employees in the quality control department, his function involves a level of advanced knowledge and independent judgment which is, in part, a product of his educational background. The evidence shows that he will meet suppliers to determine the cause of a problem and sometimes visit their factories in an effort to find out the cause of a defect. Additionally, he will communicate with the Company's customers about manufacturing issues.

In 2010, Sahijwana received a 1.5-percent-merit increase and in 2011, he received a 1-percent-merit increase. His current salary is \$67,967 per year.

Whereas DiTore is principally concerned with how to make the manufacturing process itself more efficient, Sahijwana's job is to make sure that the products once manufactured are done so without defects and that they meet appropriate standards.

In my opinion, both of these employees should be classified as professional employees within the meaning of Section 2(12) of the Act. Their work is, in my opinion, predominantly intellectual and varied as opposed to being routine or standardized. In *Westinghouse Electric Corp.*, 163 NLRB 723, 725-726 (1967), the Board concluded that the duties and responsibilities performed by a group of engineers was essentially professional in nature. The Board noted that the performance of such work required a high degree of technical competence and the use of independent judgment with respect to matters of importance to the employer's financial and other managerial interests, and that "such characteristics are typical of the work which Section 2(12) . . . defines as 'professional' work."<sup>5</sup>

Having concluded that DiTore and Sahijwana are professional employees within the meaning of the Section 2(12) of the Act, they cannot, in the absence of a *Sonotone* election, be included in the stipulated unit as a matter of law.<sup>6</sup> Moreover,

<sup>5</sup> Other Board cases where engineering employees were construed to be professionals would include *Chrysler Corp.*, 154 NLRB 352 (1965) (manufacturing engineers held to be professionals); and *Ryan Aeronautical Co.*, 132 NLRB 1160 (1961) (various types of engineers held to be professional employees). Cf. *A. A. Mathews Associates*, 200 NLRB 250 (1972), where engineer inspectors as opposed to engineers were held to be nonprofessional employees.

<sup>6</sup> In *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999), the Board held that were it has sufficient information to put it on notice that there is an issue regarding the professional status of an employee, it

even the Board concluded that their jobs did not meet the criteria of Section 2(12), I would still conclude that because of their positions within the Company that they do not share a community of interest with the employees in the stipulated voting unit and therefore were ineligible to vote.

### III. ALLEGED UNFAIR LABOR PRACTICES

#### A. *No-Solicitation Admonitions*

The Union commences its campaign in or about the spring of 2012 and it filed a petition for an election on July 30, 2012. Even before the petition was filed, the Employer commenced its own campaign in July 2012. This consisted of meetings, videos, and written materials by which the Company communicated its position regarding unionization.

On or about July 25, 2012, a group of employees consisting of Kevin Connaghan, Scott Grove, Harvey Werstler, and Jerry Thompson were talking on the plant floor about a flyer that the Company had just put out in response to a union flyer.

Soon thereafter, employees Connaghan and Grove were summoned to Belcher's office. According to Connaghan, Belcher said that they could not talk about union matters on the plant floor; that they could only talk about it on breaks or in the parking lot. Scott Grove testified that Belcher said that he had gotten complaints about them talking about the Union and that they should not speak about the Union on the plant floor.

Werstler testified that he and Thompson were also called over by Belcher who told them that they had to refrain from talking about the Union on the plant floor.

Linda Thompson, another employee testified that on an occasion in late July or early August 2012, Belcher told employees in the tacking/lamination area that they should not discuss the Union in their work space or on the work floor; that they should discuss the Union outside the SMAK doors, which are doors setting off the Company's secured space from its more public areas. She testified that Belcher told the employees that if they wanted to discuss the Union they should do so in the locker area hallway, in the cafeteria, or outside the plant. Thompson testified that Belcher repeated these or substantially similar comments to her on two other occasions in August 2012.

Finally employee Efrain Marrero testified that in early July at a departmental meeting for about 12 to 13 first-shift employees, Supervisor Anthon Ganci told them that "he didn't want any outside distractions coming in and onto the floor."

In an affidavit given by Belcher, he states that at a meeting of about 26 third-shift employees that he told them:

I did tell employees during a production huddle in approximately June 2012 (I do not know the exact date) that I was instructed by the company to tell them that discussions about the Union or organizing had to take place in common areas, not work areas, so that production was not affected. I specified the common areas as the break room, parking area, bulletin board area, and the hallway. Present for this comment were all of the employees under my supervisor.

must make its own inquiry and cannot rely on the failure of the parties to raise the issue.

Since the admission by Belcher is consistent with the corroborative testimony of the General Counsel's witness, I am going to credit their testimony.

Based on the credited testimony, I find that Belcher told employees that they could not talk about the Union to other employees except in areas other than the work floor or on non-worktime. This restriction was, in my opinion, overly broad and would prohibit employees from talking about the Union at times and places which would not interfere with either their own work or the work of others. The evidence shows that the Company did not have any preexisting rule about solicitations and permitted employees to talk while working.<sup>7</sup> Since Belcher's instructions to employees were directed only at discussion about the Union, it must be concluded that this was improper under Section 8(a)(1) of the Act. *Austal USA, LLC*, 356 NLRB 363, 401 (2010); *Southwest Gas Corp.*, 283 NLRB 543 (1987); *Marathon Letourneau Co. v NLRB* 699 F.2d 248 (5th Cir. 1983); *Lawson Co.*, 267 NLRB 463 (1983).

#### B. Alleged Interrogation

The General Counsel offered testimony by Robert Thompson that in mid-July, before coming out as an active union supporter, Nicole Dorsey a lead employee said that she wanted to ask him a question that he didn't have to answer, but she wanted to know how he thought about the Union. He testified that responded that although he thought that the Company would run better with a union, he was up in the air and hadn't decided how to vote.

Efrain Marrero testified that in June 2012, before he started advertising his union support, Alex Newman, another lead employee, asked if he was supporting the Union. Marrero responded affirmatively.

The parties agree that lead employees are not supervisors as defined in the Act. The Union and the Company also agreed that lead employees were eligible to vote in the election. There is no evidence that lead employees were ever instructed or authorized to speak for management during the election campaign. Indeed, one of the leads was an active union supporter and acted as the Union's observer at the election.

Having agreed that lead employees should be eligible to vote, it is reasonable to assume that both the Union and the Company had expectations that these leads would talk to other employees about the pros and cons of unionization and that, being part of the voting unit, would ask other employees what they thought about the Union.

Given the circumstances described above I do not conclude that these alleged interrogations should be deemed to be coercive under *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). I therefore recommend that these allegations of the complaint be dismissed.

<sup>7</sup> At most, a supervisor may have told employees on occasion that they were talking too much and that they should be paying more attention to their work.

#### C. Allegation that Respondent prohibited an Employee from Using a Copy Machine to Copy Union Literature and Prohibited her from Distributing them in the Cafeteria

Sandra Smith, a union supporter, testified that on July 31, 2012, at the beginning of her shift, she used a company copying machine in the press room to make copies of some union literature which she later put on tables in the cafeteria.

Shortly thereafter, Smith was called to the office of Supervisor Roman Young who told her that she was not allowed to make copies of "this" on company property. He made the statement while holding up a union flyer. She denied that she made the copies that he showed her asserting that she did not even know how to make color copies. She testified that he then told her that the Company *preferred* that she distribute union flyers by hand. Her understanding of this was that he was telling her that she should not leave union flyers on tables in the cafeteria. In her affidavit, Smith acknowledged that Young did not tell her that she could not hand out union literature in the cafeteria; only that he preferred that she not do it."

There is no evidence that Smith was in any way disciplined or threatened with discipline for either making copies of union literature on company machines or for distributing union flyers to employees in the cafeteria or anywhere else. At most, she was told that she shouldn't use company machines to make union flyers and that Young would prefer that if she distributed union flyers that she do so by hand instead of leaving them on cafeteria tables. In my opinion, this entire transaction is trivial and essentially noncoercive. I would therefore recommend that this allegation of the complaint be dismissed.

#### D. Alleged Delay in Implementing Wage Increases, Bonuses, Promotions, etc.

On August 1, 2012, Diane Ware, the director of human resources, sent out an email to the Company's managers and supervisors. This stated:

All increases, promotions, transfers and even spot bonuses are on "hold" as they could be perceived as if we are trying to "buy" the employees' "NO" vote. We need to "maintain the status quo." It is unfortunate that we have to do this, but I think it is warranted. If one of your employees is waiting for an increase—please use the following phrase; "During this period, we have to keep the status quo on all issues related to wages, transfers and promotions." PLEASE NOTE: We cannot say things like, "it's because of the union" or "your promotion will be processed once we vote the union down." These phrases although very likely true, will be viewed as a promise and we need to make sure that doesn't happen. Hopefully, with the phrase, "during this period," employees will realize that it may be linked to unions, but we cannot draw that conclusion for them.

This email was not directly transmitted to unit employees. Nevertheless, the message got out and before long many employees became aware of this policy. Moreover, there were a number of employees directly affected by the freeze who did not receive bonuses or pay increases that they otherwise would have received but for the freeze.

Ware admitted that from August 1 to the date of the election, September 7, 2012, there were a number of instances where employees who had been approved for spot bonuses before August 1, 2012, had the payment of the bonuses delayed until after the election.<sup>8</sup> Additionally, the evidence shows that there were employees who were recommended for and or approved for spot bonuses after August 1, but where payment was delayed until after the election. The Company concedes that the payments of these bonuses were in fact delayed during the period leading up to the election, but asserts that they ultimately were paid after the election.<sup>9</sup>

In addition to spot bonuses the Company also has a program whereby employees who have been transferred or promoted to new job can get a wage increase, or if the difference between the job wage scales are significant, a series of scheduled increases over a defined period of time.

For example, Efrain Marrero, was transferred to a new job in April 2011 and was recommended for a \$.25 wage increase in May 2012. Although this wage increase was submitted to the regional human resource vice president in July 2012, Marrero did not receive it. On August 2, 2012, Marrero asked his supervisor, Ganci, why he hadn't received the increase and Ganci read from an email on his computer and stated that no raises or promotions were going to be handed out until further notice. A few days later Marrero resigned and he never got his \$.25 increase.

A somewhat different example involves an employee named Marcellus Barnett. He, and a number of other employees, were all promoted in April 2011. As arranged, these employees were to receive quarterly wage increases over a period of 18 months to 2 years. In August 2012, Barnett heard Ware tell some employees that all raises were on hold until after the election. He asked Ware if his increase was being affected by this union thing and she responded that the raises were on hold until the outcome of the election. Barnett said that he didn't think that this was fair because his wage increase had been scheduled before the Union came on the scene.

Notwithstanding this conversation, Barnett's next scheduled wage increase was not affected by the freeze because it was scheduled for October. There were, however, a number of other employees in Barnett's same circumstance who did have scheduled wage increases delayed until after the election.<sup>10</sup>

The evidence shows that the Respondent did *not* tell employees that the freeze was going to be temporary and that withheld

bonuses and wage increases would only be deferred until after the election regardless of the outcome.

In my opinion, the Respondent violated Section 8(a)(3) and (1) of the Act by withholding bonuses and scheduled wage increases during the period of time between the filing of the petition and the holding of the election. I also conclude that by telling employees that bonuses, wage increases, promotions, and transfers were being put on hold until after the election, the Respondent violated Section 8(a)(1) of the Act.

It is unlawful for an employer to either grant or withhold employee benefits if the decision to do so is motivated by union activity. Even in the absence of direct evidence of illegal motivation an employer, during the period between the filing of an election petition and the holding of an election, may be precluded from changing the status quo ante with respect to wages, benefits, and other terms and conditions of employment. This means that a company can neither grant new benefits to its employees nor withhold benefits that its employees would otherwise have received. In *NLRB v. Aluminum Casting & Engraving Co.*, 230 F.3d 286 (7th Cir. 2000), the court affirmed the Board's finding that an employer violated the act by failing to give annual across-the-board increases during an organizational campaign.

In *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000), a Board majority held that an employer violated Section 8(a)(3) and (1) by withholding health benefits only at a store involved in an election during the critical period preceding an election. Citing *Llampi, LLC*, 322 NLRB 502 (1996), and quoting from *United Airlines, Services Corp.*, 290 NLRB 954 (1988), the Board stated:

It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits that are granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election for the timing of the grant or announcement of such benefits.

The Respondent argues that it was on the horns of a dilemma and that it did not want to either give the impression that it was bribing employees to vote against unionization or that it was punishing them for being in favor of unionization. The answer to this "paradox" is explained in *Noah's Bay Area Bagels*, supra, where the Board stated that although an employer is not allowed to inform employees that it is withholding benefits because of a pending election, "it may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be *deferred* until after the election—regardless of the outcome." The Board concluded that:

<sup>8</sup> Since 2007, the Company has had a policy of providing spot bonuses in modest amounts for doing extra work, for spotting errors, or for other specific activities worthy of reward. Although the program has been in existence for quite a while, the granting of specific spot bonuses is ad hoc and event driven. These bonuses range from \$50 to \$150 and hourly paid employees can receive multiple spot bonuses but no more than \$1000 per year.

<sup>9</sup> In her brief, the General Counsel suggests that at least one employee, Borkee Phethsarath, was nominated for two spot bonuses in August, may not have received payment after the election.

<sup>10</sup> The General Counsel points out that wage increases scheduled for Alejandra Garcia, Sio Doe, Lorraine Dolowski, and Yaritz Jimenez-Perez were delayed until after the election. She also notes that these people were paid retroactively.

[T]he respondent unlawfully withheld restoration of the Prudential plan at the Telegraph store while at the same time lawfully restoring it at all of its other stores, without providing the Telegraph store employees with assurances that the withholding of the Prudential plan at that store was only temporary and that it would be restored retroactively to them following the election, regardless of its outcome.

We also do not agree with our colleague that if the Respondent had restored the Prudential plan to the Telegraph store at the same time it was restoring it to all of other locations it would have run afoul of precedent holding that it is unlawful for an employer to grant benefits while an election is pending unless the employer can establish that the benefit had been planned prior to the union's arrival on the scene, or that the grant of the benefit was part of an established past practice.

#### IV. THE OBJECTIONS TO THE ELECTION

The Union filed eight objections to the election but withdrew Objections 1, 2, and 4. Some of the remaining objections overlapped with the unfair labor practice allegations and some did not.

In order to balance the interests of insuring that employees have a fair chance to express their choice with the requirement that elections have at least a reasonable degree of finality, the Board has set forth a set of standards by which to judge whether conduct (by either party), will be sufficient to set aside an election. In *Taylor Wharton Harsco Corp.*, 336 NLRB 157, 158 (2001), the Board stated:

[T]he proper test for evaluating conduct of a party is an objective one- whether it has "tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg.*, 316 NLRB 716 (1995). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g. *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

In the present case, the evidence shows that the Employer put a freeze on pending wage increases and bonuses during the period from the filing of the petition (July 30, 2012), to the date of the election. The evidence also establishes that after August 1, 2012, various unit employees were told by supervisors and managers that bonuses and wage increases were put on hold during the pendency of the election. These employees, in turn told other employees about their conversations so it would fair to conclude that by the time of the election, many if not most of the employees in the voting unit were aware of this policy.

I have concluded above that the Employer violated Section 8(a)(3) and (1) by implementing this policy of withholding existing benefits during the pendency of the election and by notifying employees of this policy. Given the degree of dissemination of this policy within the voting group and the closeness of the election outcome, it is my opinion that this conduct should reasonably be construed as adversely affecting the outcome of the election.

I shall therefore sustain the Union's Objection 5 and conclude that this conduct is sufficient to set aside the election.<sup>11</sup>

#### CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act when, in the absence of a preexisting valid no solicitation rule, its supervisors told employees that they could not talk about the Union in work areas or during worktime.

2. The Respondent violated Section 8(a)(3) and (1) of the Act by implementing a policy of freezing bonuses, wage increases, and/or other benefits during the period of time the filing of the representation petition and the election.

3. The Respondent violated Section 8(a)(3) and (1) by notifying employees of the aforesaid freeze policy.

4. Scott Hillman is an eligible voter and the challenge to his ballot should be overruled.

5. John DiTore and Ben Sahijwana are professional employees who are ineligible to vote and therefore the challenges to their ballots should be sustained.

6. Objection 5 is sustained and would be the basis for setting aside the election.

7. Except to the extent found herein, the Respondent has not violated the Act in any other manner.

8. The unfair labor practices affect commerce within the meaning of the Act.

<sup>11</sup> I would dismiss the other objections. Although I have concluded that the Employer violated Sec. 8(a)(1) of the Act by telling employees that they should not talk about the Union on company time or in working areas, all of those incidents except two involving a single employee, occurred before the petition was filed and therefore were outside the critical period. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). The Union also alleged that a nonsupervisory employee entered the polling area and placed a stack of antiunion T-shirts on a table. In my opinion, this third party conduct does not constitute objectionable conduct. The Union alleged that when Donald Deputy, an active union supporter was on his way back from lunch, he was told that a HR person had called and wanted to know why he (Deputy) had been in the parking lot. To me, this does not rise to a level that could be construed as being surveillance or giving the impression of surveillance. Finally, the Union produced evidence that Laura McCarthy, a nonsupervisory employee who was not in the voting unit, on two short occasions, stood in the doorway of the voting room while wearing an antiunion button, and a red Vote NO T-shirt. Even assuming that this version is correct, I do not conclude that this constituted improper electioneering under *Milchem, Inc.*, 170 NLRB 362 (1968). I note that in *Queen Kapiolani Hotel*, 316 NLRB 655, 668 (1995), and *U-Haul of Nevada, Inc.*, 341 NLRB 195 (2004), the Board even held that the wearing of a union T-shirt by an observer during the election is not objectionable as improper electioneering.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The evidence in this case shows that during the period from August 1 to September 7, 2012, the Respondent unlawfully delayed the payments of certain bonuses and wage increases that were scheduled or approved during that period. The evidence also shows that except for perhaps a few people, such as Efrain Marrero, all those employees who should have received these benefits did so retroactively in October 2012. As to Marrero, he is entitled to his wage increase from the date that he was scheduled to receive it to the date of his resignation. To the extent that there may have been an individual or individuals who did not receive either a scheduled increase or an approved bonus, whose name was not mentioned or known at the time of the hearing, the General Counsel can determine that in compliance.

The General Counsel contends that the affected employees should receive interest on the amount of money for which there was a delay. Technically, she is right. But in this case, the amount of interest on the small bonuses or wage increases for the short time that they were delayed would be vanishingly small, especially given the interest rate that is currently in

place. Frankly, I don't think that the Regional compliance department should be put to the task of figuring out how many cents each employee would receive in interest. But if the General Counsel wants to undertake that task, that is her prerogative. I therefore shall agree with the General Counsel that interest should be charged for the minimum loss of money suffered by these employees. Interest on any moneys owed should be paid at the rate prescribed in *New Horizons*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The General Counsel also contends that with respect to spot bonuses, I should compel the Respondent to grant spot bonuses to employees who might have been approved for them during the period from August 1 to September 2012. I do not agree. Spot bonuses are relatively small ad hoc rewards for employees who earn them by their work, initiative, etc. Although the record shows that the Company froze the approval of spot bonuses during the election period, it is my opinion that it would be speculative for me to determine who, if anyone, might have had a spot bonus recommended and approved during the period of time in question. Moreover, since this policy ceased after little more than a month, the degree of prejudice to any given employee would not only be speculative but be slight.

[Recommended Order omitted from publication.]