

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

NUVERRA ENVIRONMENTAL SOLUTIONS, INC.	:	
	:	
	:	
Employer,	:	
	:	
and	:	
	:	CASE NO. 08-RC-164447
TEAMSTERS LOCAL UNION NO. 348,	:	
affiliated with the International	:	
Brotherhood of Teamsters,	:	
	:	
	:	
Petitioner.	:	

**PETITIONER’S OPPOSITION TO EMPLOYER’S
REQUEST FOR REVIEW**

The Employer in this case, Nuverra Environmental Solutions, Inc., has filed a Request for Review of the Decision by the Regional Director of Region 9 that overruled its objections to conduct affecting the outcome of the election and certified the results of an election among a group of Nuverra employees in favor of representation by the Petitioner, Teamsters Local Union No. 348. The Employer has not shown that the Decision was substantially erroneous or that it presents a substantial question of law or policy, and its Request for Review should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Following a Petition for Certification of Representative filed by Teamsters Local Union No. 348 (“Local 348” or “the Union”) on November 18, 2015, the Regional Director of Region 8 approved the parties’ Stipulated Election Agreement on November 30, 2015. An election was conducted on December 18, 2015, among the employees employed by Nuverra Environmental Solutions, Inc. (“Nuverra” or “the Company”) in the bargaining unit described as:

All full-time and regular part-time drivers at the Employer's Diamond, Ohio, location, but excluding all other employees, including supervisory, managerial, clerical, sales, professional and guards as defined by the Act.

Of the approximately 25¹ eligible voters, 25 cast ballots; 13 votes were cast for the Petitioner and 12 against. There were no challenged ballots. On December 28, 2015, the Employer filed Objections to Conduct Affecting the Results of the Election. Nuverra alleged, first, that an employee supporter of the Union had intimidated, harassed and threatened employees to coerce them to vote in favor of Union representation (Objections 1 & 2) and, second, that Local 348 had interfered with the laboratory conditions necessary for a fair election by offering and conferring benefits on the bargaining unit members (Objection 3). On January 12, 2016, the day before the scheduled hearing on the objections, the Employer withdrew its Objections 1 and 2, relating to alleged threats and intimidation, and the hearing proceeding solely on the issue of the alleged promise and conferral of benefits.

The facts adduced at the January 13 hearing were essentially uncontested. Wayne Trivelli, a business agent at Local 348, testified that for many years the Local Union has provided holiday hams as a gift to its members, distributing them at the Union hall on a weekend each December. Mr. Trivelli testified that Local 348 orders the hams in large quantities directly from a wholesale supplier and that the sizes vary; he estimated their value at \$10 to \$12 each. The event is publicized, along with other news about the activities of the Local Union, in the regular newsletter it publishes about three times a year and mails to the members. The six-page newsletter sent in December 2015 featured information about the holiday ham distribution on the first page, followed by information about the winners of that year's college scholarship competition, details about the nominations and elections process for the Local's delegates to the

¹ The Order Directing a Hearing and the Hearing Officer's Report on Objections refer to "approximately 25" eligible voters; the Tally of Ballots indicates there were 26 eligible voters and the *Excelsior* list provided by the Employer has 28 names.

upcoming convention of the International Brotherhood of Teamsters, information about *Weingarten* rights, contact information for the Union and other material. The December newsletter was mailed to all of Local 348's approximately 1300 members.

Mr. Trivelli, who was the Local's primary point of contact and organizer for the Nuverra group, arranged to have the December newsletter mailed to the members of that bargaining unit on December 2 or 3, 2015, immediately after he received the required list of voters and their addresses from the Employer that was submitted on December 2. This newsletter was the only communication during the organizing campaign that referred to the holiday ham distribution, and Mr. Trivelli testified that newsletter was sent to the Nuverra employees to give them information about the Union generally.

Mr. Trivelli testified that one Nuverra employee called him after receiving the newsletter to ask if the offer was open to the employees in that bargaining unit as well as to existing Local 348 members. Mr. Trivelli asked the Union's principal officer, Pat Darrow, who said the question had arisen a few times in the past and the Local Union had extended the offer to prospective members as well as to current members on those occasions. Therefore, Mr. Trivelli told the Nuverra worker that he and his coworkers would be eligible. Local 348 uses its membership roster and checks off names when the members pick up a ham, to make sure each person receives only one, so Mr. Trivelli added a copy of the Nuverra *Excelsior* list to be used in the same manner.² The testimony was uncontradicted that receipt of the ham was not conditioned upon supporting or voting for the Union.

² The Company in its Request for Review makes much of the fact that the newsletter indicated that the hams would be provided only to a member or spouse, "no exceptions," apparently suggesting that the Nuverra employees were being given the benefits of membership before they actually voted for Union representation. However, Mr. Trivelli explained that the purpose of the Union's restriction was to make certain that each recipient got only one ham and to make sure there were no disputes arising from other family members, roommates or the like attempting to pick up a ham in the member's name.

No one else from the Nuverra group contacted the Union to ask about the hams, and no one from Local 348 made any other communication to any Nuverra employee about the matter. The parties stipulated at the hearing that at least one Nuverra bargaining unit employee had obtained a ham during the weekend they were available, December 11 and 12. Upon questioning from the Hearing Officer, Mr. Trivelli testified that, after the objections to the election were filed, he checked the roster used during for the ham give-away and found that seven of the 28 individuals on the Nuverra bargaining unit list had received a ham, presumably having learned of it from the coworker who had called. Mr. Trivelli testified that neither he nor anyone from the Local Union had checked the list to see who had picked one up before the voting day or, indeed, at any other time except in preparation for the objections hearing.

The Hearing Officer's report found that the gift of a holiday ham was intended as a holiday greeting to the Union's members, their friends and families and was proportionate to that stated purpose. However, it recommended overturning the election based on a line of cases involving the conferral of benefits, reasoning, that notwithstanding the Union's apparently innocent motivation, the distribution of this gift "would reasonably tend to influence the outcome of the election." Hearing Officer's Report at 6.

Local 348 filed exceptions to this recommended decision, and the Regional Director overruled the Hearing Officer and on March 22, 2016, issued a Decision and Order Overruling Objection and Certification of Representative. The Regional Director concluded that the Petitioner had rebutted the inference that the holiday ham giveaway was objectionable. The Employer is seeking review by the full Board of this decision.

APPLICABLE STANDARDS

Under Section §102.67(d) of the Board’s regulations, the Board is to grant a request for review “only where compelling reasons exist therefor.” Specifically:

[A] request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

In this case, the Employer argues that the Regional Director’s Decision “failed to properly follow and apply [Board] precedent, as well as erroneously construed and misapplied the undisputed facts.” Obviously, Nuverra disagrees with the Regional Director’s ultimate resolution of the case and his application of the case law to the facts. However, it cannot show, and has not shown, that any factual basis for the decision was clearly erroneous, that the case raises a substantial issue question of law or policy or that there is any other compelling reason for the Board to review his matter.

DISCUSSION

The Regional Director’s Decision properly evaluated the facts in the context of all of the circumstances and in light of the applicable case law and there is no basis for reviewing it, much less overruling it. The Regional Director analyzed the case in light of the controlling authority

relating to pre-election benefits cases, starting with the Board's decision in B & D Plastics, which provides:

To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits.

B & D Plastics, 302 N.L.R.B. 245, 245 (1991). Applying this framework, the Regional Director agreed with the Hearing Officer that the \$10-\$12 value of the benefit was proportional to the stated purpose of the gift, to celebrate the holidays – which weighed against the inference that it was objectionable – and that the number of employees who actually received it in an election decided by one vote weighed in favor of a finding that it was objectionable. However, the Regional Director disagreed with the Hearing Officer and concluded that the timing of the gift and how it would reasonably be perceived by the employees in question weighed in favor of rebutting the inference and required that the election be certified.

The Regional Director found, in contrast to the Hearing Officer, that the Union's past practice regarding the holiday ham giveaway was in fact relevant. Because the Union had done this for many years at Christmas time, it was coincidence that the 2015 event occurred in proximity to the Nuverra vote; therefore, he held, "the Petitioner's announcement of the ham giveaway had nothing whatsoever to do with the pending election but was part of an established past practice at Christmas time."

The Regional Director also relied on the facts that it was the Union's normal practice to send prospective employees its most recent newsletter and that it was this publication, not some

special announcement or invitation, that contained the information about the holiday ham. As he noted, “the newsletter contained many articles and features and . . . the offer of a holiday ham to members was but one small item.” Regional Director’s Decision at 3.

The Regional Director also found it significant that the newsletter, the only written communication to the Nuverra employees about the Christmas gift, did not mention making it available to them as prospective members of the Union. When a single Nuverra employee called the business representative to ask about it, the Union agreed to allow them to participate, as it had on a few occasions in the past when there were organizing campaigns going on at the same time as the holidays. Ultimately, that employee must have told others, as it was learned only after the election and in preparation for the objections hearing that seven total Nuverra employees had obtained a ham. However, “the Petitioner did not pursue these employees or any other unit employees to offer them a ham.” Id. at 4. The Regional Director’s decision considered that “this critical fact distinguishes this case” from those relied upon by the Employer and the Hearing Officer, General Cable Corp., 170 N.L.R.B. 1682 (1968) and Mailing Services, Inc., 293 N.L.R.B. 656 (1989).

In General Cable, union representatives went to the employer’s facility to present gifts to employees who had not attended a meeting at the union hall where the gifts had been distributed. In Mailing Services, the union announced its intention to and did bring two mobile medical units to the employer’s facility and provided the employees with free medical screenings, creating a special event targeted specifically at employees before a vote and providing a much larger benefit than the Christmas ham. Here, the Regional Director concluded:

[T]he Petitioner never took the initiative to offer the gifts to unit employees nor did it pursue them with gifts in hand. Furthermore, there was no evidence that the delivery of the ham was accompanied by any statements from agents of the

Petitioner that would make the employees feel beholden to vote for union representation.

The material evidence therefore objectively demonstrates that the holiday hams were provided on account of the upcoming holidays and not because of the pending election.

Regional Director's Decision at 4.

The Regional Director then concluded that, under all of the circumstances, the Union had rebutted the presumption that the holiday ham giveaway was objectionable, as "the gift was of negligible value, was part of a traditional Christmas event sponsored by the Petitioner, was not part of any initiative directed at potential voters by the Petitioner and could not have been viewed by any reasonable employee as an attempt to influence his or her vote." Therefore, it did not interfere with the employees' exercise of free choice and did not require the election to be set aside. All of these conclusions are fully supported by the facts and by the underlying case law.

CONCLUSION

The Employer here has shown no basis under the applicable standards for overturning the Regional Director's Decision, other than its disagreement with the ultimate conclusion. The Regional Director made reasonable and correct findings of fact and properly applied them in light of the controlling legal authorities, and this case presents no substantial questions meriting review by the Board. Therefore, the Employer's Request for Review should be denied.

Respectfully submitted,

DOLL, JANSEN & FORD

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CERTIFICATE OF SERVICE

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