Keystone Automotive Industries, Inc. *and* International Brotherhood of Teamsters, Local 853. Case 32–RC–137319

April 13, 2017

DECISION AND DIRECTION OF SECOND ELECTION

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The National Labor Relations Board has considered objections to an election held February 19, 2015, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 21 for and 29 against the Petitioner, with 1 void ballot and 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions[1] and briefs, has adopted the hearing officer's findings[2] and recommendations, and finds that the election must be set aside and a new election held.

For the reasons that follow, and contrary to the dissent, we adopt the hearing officer's recommendation to sustain the Union's Objection 4, which alleges that the Employer made promises of better pay if employees voted against the Union.

In early February 2015, the Employer held captive audience meetings at its Stockton and Union City, California facilities, during which Regional Vice President Randy Wittig and labor consultant Oliver Bell addressed employees and gave a PowerPoint presentation. The Employer conducted these meetings during the critical period preceding the union election at those facilities, and soon after employees at its Santa Fe Springs facility in southern California (a facility not involved in the instant proceeding) had voted to reject union representation. Based on testimony credited by the hearing officer, during these meetings Wittig and/or Bell stated that (i) the Employer had raised wages in Santa Fe Springs after

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[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule Union Objections 1, 3, 5, 7, 10, and 12 through 19.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

We adopt the hearing officer's findings that the Employer engaged in objectionable conduct when (i) Supervisor Rolando Bellido stated to employee Terrell Ellis that if the Union "infiltrated" the Company, Keystone would stop offering the Core program, through which employees can earn as much as $500 over and above their regular wages every two weeks (Union Objections 6 and 11); (ii) Stockton General Manager Randi Graham said that if the Union were voted in, all the "little perks" employees had would go away and/or the "gray area" would be taken away as far as leniency was concerned (Union Objections 6 and 11); and (iii) Union City General Manager Chavin Prum interrogated employee Morgan Crowl regarding his union sentiments and those of other employees, and employee Tolopa-Joe Faumuina was similarly interrogated by several managers (Union Objection 9). With regard to Graham's statements, the hearing officer correctly stated that it is objectionable for an employer to threaten employees with stricter enforcement of work rules for supporting the union. However, for that proposition, we do not rely on *Onsite News*, 359 NLRB 797 (2013), cited by the hearing officer, since that decision was invalidated by the Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Instead, we rely on *Miller Industries Towing Equipment, Inc*., 342 NLRB 1074, 1074, 1084 (2004), and *Avecor, Inc.*, 296 NLRB 727, 732–733, 746 (1989), enfd. in relevant part 931 F.2d 924 (D.C. Cir. 1991), cert. denied 502 U.S. 1048 (1992).

For the reasons stated in the text, we also adopt the hearing officer's recommendation to sustain Union Objection 4 alleging that the Employer engaged in objectionable conduct by making promises of better pay if employees voted against the Union. However, separate and apart from Objection 4, the record shows that between 4 and 10 employees attended the meeting where Graham said that if the Union were voted in, all the "little perks" employees had would go away and/or the "gray area" would be taken away as far as leniency was concerned, and reports of the coercive interrogations of Crowl and/or Faumuina were disseminated to 5 employees. Accordingly, we agree with our colleague, who dissents as to Objection 4, that the Employer's objectionable conduct other than the conduct at issue in Objection 4 reached a determinative number of eligible voters and warrants setting aside the results of the election regardless of the merits of Objection 4.

The Union has excepted to the hearing officer's recommendation to overrule its Objection 8, which alleged that during the critical period, the Employer substantially increased the number of managers and agents on duty, and conducted ride-alongs with employees, for the purpose of intimidating employees and discouraging them from discussing the Union or participating in protected activities. As an initial matter, we decline the Union's request to overrule *Frito Lay, Inc.*, 341 NLRB 515 (2004), concerning an employer's use of ride-alongs. Further, having found the conduct at issue in Objections 6, 9, and 11 sufficient to warrant setting aside the results of the election, we find it unnecessary to address Objection 8, as any additional findings of objectionable conduct would merely be cumulative.

We grant the Union's request for the inclusion of language in the notice of election in accordance with *The Lufkin Rule Co.*, 147 NLRB 341 (1964) (notice to state that new election is result of Employer conduct that interfered with prior election). Such language is standard when requested. See NLRB Casehandling Manual (Part Two) Representation Sec. 11452.3; *Miller Industries Towing Equipment*, 342 NLRB at 1074 fn. 4; see also, e.g., *Guardian Automotive Trim, Inc*., 337 NLRB 412, 413 fn. 5 (2002); *Fieldcrest Cannon, Inc*., 327 NLRB 109, 110 fn. 3 (1998).

the election there based at least partially on the results of a survey of wages paid by its competitors; (ii) the Employer was in the early stages of conducting a similar wage survey for its employees in Stockton and Union City; (iii) after the representation election at Stockton and Union City, the wage survey would continue regardless of the outcome; (iv) if the Union won the election, a pay raise at Stockton and Union City could take "a whole lot longer"; it would involve a "long, drawn-out process" that could take 6 months, a year, 18 months, or "forever"; and there was a "really big chance" that employees might not get any raise at all, or they could end up losing money; (v) employees at Santa Fe Springs got their raise in the next pay period after the "union thing was done"; and (vi) although the Employer was not promising the employees that the same thing would happen to them in northern California as happened to the employees in southern California, the Employer was going to follow the same process, and a "reasonable man" could expect to receive a 12.45-percent wage increase.

Meanwhile, PowerPoint slides shown during the presentations stated that the Company was not making any promises; that as a part of the collective-bargaining process, wages could go up, stay the same, or go down; and that the wage review at Stockton and Union City would continue after the election regardless of the outcome. In addition, one slide hypothetically posited a scenario in which the Union won the election and employees received a 12.45-percent wage increase. The slide indicated that if union dues were 1.4 percent of the new wage rate, the net increase would be 11.05 percent, not 12.45 percent.

Where testimony conflicted regarding what was said at these meetings, the hearing officer generally credited the Union's witnesses over the Employer's witnesses. In particular, the hearing officer found the Employer's witnesses' testimony "evasive" and "vague," and she noted that they "did not offer specific details about what was said during the meetings, but rather stuck to the content of the Employer's PowerPoint slides." Thus, the hearing officer implicitly discredited testimony from the Employer's witnesses that they strictly adhered to the content in the PowerPoint slides—none of which is alleged to be objectionable—insofar as she credited testimony establishing that the Employer's representatives strayed from this written content and made additional, unscripted statements.

Based on the testimony the hearing officer deemed credible, the hearing officer found that the Employer "suggested that if the Union won," it "could take '6 months or 18 months'" to deal with the issue of possible wage increases, "that it would be a 'long drawn-out process,' and that there was a 'really big chance' that employees would not get the raise or would end up losing money."[3] The hearing officer concluded that the Employer's statements conveyed to employees that instead of the Employer continuing with its wage review as planned while bargaining in good faith with the Union over the matter, the Employer would "go to battle with the Union and drag its heels over the wage review if the Union won." Additionally, the hearing officer found that the Employer told employees "that a 'reasonable person' could expect to receive a 12.5 percent wage increase if the Employer won the election"—a statement she found to constitute "a not-so-subtle suggestion that the employees were guaranteed to get the wage increase if they did not support the Union."[4] The hearing officer reasoned that the Employer's statements concerning what a "reasonable person" could assume about wage increases, on the one hand, and the lengthy delays that employees could expect prior to receiving any increase if the Union won, on the other, served to "negate" content on the PowerPoint slides which expressed that the process for granting wage increases would go forward regardless of the outcome of the election. Based on these statements, the hearing officer recommended sustaining Objection 4.

An implied promise of benefits is objectionable conduct that may warrant setting aside an election. See, e.g., *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979). "Determining whether a statement is an implied promise of benefit involves consideration of the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise." *G & K Services*, 357 NLRB 1314, 1315 (2011). It is well established that an employer may lawfully compare union and nonunion wages and benefits, respond to employee requests for information about such wages and benefits, and make statements of historical fact. See, e.g., *Suburban Journals of Greater St. Louis, LLC*, 343 NLRB 157, 159 (2004). But depending on what is said and the context in which it is said, even comparisons and statements of fact may nevertheless convey implied promises of benefits. See *California Gas Transport*, 347 NLRB 1314, 1318 (2006) (finding implied promise of benefits where drivers at employer's Nogales facility were aware that drivers at San Diego and El Paso facilities had received a 10-percent bonus *after* the representation petition was filed at Nogales, and employer, questioned by Nogales drivers about the possibility of a bonus at Nogales, replied that "what happened in Tijuana [San Diego], happened in Juarez [El Paso]"),

[3] Hearing Officer's Report and Recommendations on Objections ("HOR") at 11.

[4] HOR at 12.

enfd. 507 F.3d 847 (5th Cir. 2007); *Etna Equipment & Supply Co.*, 243 NLRB at 596–597 (finding implied promise of benefits where employer not only informed employees about pension benefits at a nonunion facility but provided each employee a chart, specifically tailored to his age, length of service, and wage rate, showing the exact difference in pension benefits he would receive under the nonunion and union pension plans; stating that "it seems very difficult to believe the [e]mployer would go to such effort . . . unless it intended the employees to believe the pension benefits presented were more than a mere possibility"); *Grede Plastics, A Division of Grede Foundries*, 219 NLRB 592, 592–593 (1975) (factually accurate letter nevertheless "was a clear invitation to the employees to reject the Union and receive benefits for doing so"); *Westminster Community Hospital, Inc.*, 221 NLRB 185, 185 (1975) (considered in context of employer's other statements, wage rate comparison conveyed implied promise to increase wages if employees rejected the union), enfd. mem. 566 F.2d 1186 (9th Cir. 1977).

Here, the Employer informed its Stockton and Union City employees that the employees at its Santa Fe Springs facility had recently voted against union representation. In that context, the Employer told its Stockton and Union City employees that pursuant to a wage survey it had conducted, it had raised wages 12.45 percent in Santa Fe Springs and had done so in the very next pay period after the election there; that it was in the early stages of conducting a similar wage survey for its employees in Stockton and Union City and that the survey would continue after the election; that because it was going to follow the same process in northern California (where the Stockton and Union City facilities are located) as it followed in southern California (where the Santa Fe Springs facility is located), a reasonable man could expect to receive a 12.45-percent wage increase; and, finally, that if the Union won the election, a pay raise at Stockton and Union City could take a whole lot longer; it would involve a long, drawn-out process that could potentially take 6 months, a year, 18 months, or even "forever;" and there was a really big chance that employees might not get any raise at all, or they could end up losing money.

We recognize, as the dissent emphasizes, that the Employer also said that the wage survey would continue for Stockton and Union City employees regardless of the outcome of the election; that the Employer told employees it was "supposed to come to the table and bargain in good faith" with the Union if they voted for representation; that the Employer displayed a PowerPoint slide that hypothetically posited a scenario where employees received a 12.45-percent wage increase after the Union *won* the election; and that the Employer on several occasions told employees it was not making any promises. Nevertheless, we agree with the hearing officer that the Employer went beyond what is lawfully permitted and "crossed the line" into objectionable conduct by implying that it would reward employees by expeditiously doling out a wage increase if they voted against the Union.

As the Board has observed, "[i]t is immaterial that an employer professes that he cannot make any promises, if in fact he expressly or impliedly indicates that specific benefits will be granted." *Michigan Products*, 236 NLRB 1143, 1146 (1978) (citing *Westminster Community Hospital*, 221 NLRB at 185). Thus, the Employer's seemingly lawful campaign remarks cannot be examined in isolation. Rather, under the applicable standard, we must consider the totality of the Employer's relevant statements in the context in which they were made. Having done so, we find, in agreement with the hearing officer, that when viewed in context, the Employer's unobjectionable statements did not cure the clear implication that a wage increase for its Stockton and Union City employees would follow promptly on the heels of a union defeat at the polls. Based on the credited testimony regarding what the Employer said, it would be entirely reasonable for employees to conclude that they would have to wait 6 months, a year, 18 months, or possibly forever for a raise if the Union won, but if the Union lost, the Employer would act as it did in Santa Fe Springs and grant raises right away.

We agree with the hearing officer that the Employer conveyed an obvious and specific link between the rejection of union representation by employees in Santa Fe Springs and their receipt of a 12.45 percent wage increase quickly thereafter. This finding is amply supported by the record evidence. For instance, employee Terrell Ellis, whose testimony the hearing officer found "especially likely to be credible" on this issue, testified that the Employer unambiguously connected rejecting union representation with receiving a wage increase. Ellis's testimony, as summarized by the hearing officer, was that

> Wittig said that at the Employer's Santa Fe Springs facility, the raises happened weeks after the victory [by the Employer] and if the Union was not voted into the Employer's Stockton facility, then the Employer would start the process of surveying the surrounding area and implementing the wage increase for Northern California and the Employer's employees could possibly see raises within a matter of weeks.[5]

[5] HOR at 8 (emphasis added).

Multiple other witnesses corroborated Ellis's account, including Tony Chham, an employee witness presented by the Employer. Chham recalled that "the Employer said that the Union was rejected in Santa Fe Springs and that there were no election objections, and the employees got salary increases after the election."[6] Another employee witness called by the Employer, Kevin Gritsch, testified that "the Employer stated that there was a wage increase relatively soon after the vote to reject the Union in Santa Fe Springs."[7] Employee Max Cervantes testified "that Wittig said that the employees in Santa Fe Springs got a good raise after the election," and employee Eric Stevens testified "that Wittig said that the same raise would happen with the Union City employees if they did the same thing and the Union did not go through and the Employer won."[8]

Thus, the Employer did not merely make statements of historical fact or accurate representations of the collective-bargaining process.[9] Instead, the Employer directly linked the rejection of union representation by the employees in Santa Fe Springs with their receipt of a wage increase promptly thereafter. We find that a reasonable employee, upon hearing that a "reasonable man" could expect the same result in Stockton and Union City, would readily understand the artificiality and emptiness of the Employer's declarations that it was not making any promises. Accordingly, we adopt the hearing officer's recommendation to sustain Union Objection 4.[10]

Consistent with the foregoing discussion, we find that the election held February 19, 2015, must be set aside and a new election held.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Brotherhood of Teamsters, Local 853.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. April 13, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, dissenting in part.

I dissent from my colleagues' finding that the Respondent, Keystone Automotive Industries, Inc. (Key-

[6] Id.

[7] Id.

[8] Id. at 8-9.

[9] Cf. *TCI Cablevision of Washington*, 329 NLRB 700 (1999); *Viacom Cablevision*, 267 NLRB 1141 (1983).

[10] The hearing officer's report inadvertently omits footnote 4, which evidently would have documented her finding that the conduct at issue in Objection 4 "clearly affected a significant number of employees in the bargaining unit." The Employer acknowledges in its exceptions brief, and the record evidence establishes, that 20 employees were present for the Union City meeting and 4 to 10 employees were present for the Stockton meeting where the objectionable statements were made. Accordingly, we find that a determinative number of employees were exposed to the Employer's impermissible conduct at issue in Objection 4.

stone or the Company), made objectionable promises that employees would receive wage increases if employees voted against the Union. In this regard, my colleagues, like the hearing officer, sustain Union Objection 4, which alleges that during the critical preelection period, Keystone representatives "made promises of better pay . . . if the employees voted against the Union." Although I agree with my colleagues' decision in other respects,[1] I dissent as to Objection 4. I believe the record establishes that Keystone clearly indicated it was *not* promising wage increases. Rather, Keystone promised that it would continue *evaluating* potential wage increases after the election. Moreover, Keystone made clear that it would conduct that evaluation in exactly the same manner regardless of whether the Union won or lost the election—although wages along with other mandatory subjects would, of course, be subject to collective bargaining if the Union won.

At the time union organizing commenced, certain events had made it reasonable for employees in the petitioned-for unit—drivers and warehouse workers employed at Keystone's Stockton and Union City, California facilities—to believe that they were in line for a wage increase. In particular, it is undisputed that Keystone had previously conducted a wage survey that resulted in a 12.45 percent wage increase for employees who work at its nonunion Santa Fe Springs and Ontario, California facilities,[2] and Keystone had already commenced a similar wage survey for its employees at its Stockton and Union City facilities. After the Union filed the representation petition in the instant case, Keystone announced it would complete the Stockton/Union City wage survey after the election and evaluate potential wage adjustments at Stockton and Union City in the same manner without regard to whether the Union won or lost the election.[3] Keystone also stated, repeatedly, that it was not making any promises about future wage adjustments at Stockton and Union City. In light of these statements, I believe the Board cannot reasonably adopt the hearing officer's finding that Keystone "made promises of better pay" when it expressly stated to the contrary, let alone that it promised better pay "if the employees voted against the Union" when it said it would evaluate wages the same way regardless of the outcome of the election. Keystone did inform unit employees of historical facts: that it had conducted a wage survey at its Santa Fe Springs and Ontario facilities, where employees are not represented; that as a result of that survey, employees at those facilities had received a 12.45-percent wage increase; and that it had begun a similar wage survey at Stockton and Union City. But it is lawful and unobjectionable for employers to inform their employees about historical facts, including when those facts reveal that unrepresented employees at other facilities receive higher wages or better benefits. See, e.g., *TCI Cablevision of Washington*, 329 NLRB 700 (1999); *Viacom Cablevision*, 267 NLRB 1141 (1983). Accordingly, as explained more fully below, I would overrule Union Objection 4.

The hearing officer sustained Objection 4 based primarily on two statements made by Keystone representatives. Contrary to the hearing officer, these statements were not objectionable.

First, Keystone Regional Vice President Randy Wittig indicated that the wage survey at Santa Fe Springs resulted in a 12.45 percent wage increase for Santa Fe Springs employees. Wittig also discussed the Stockton/Union City wage survey. Regarding what Wittig (and possibly a second, unidentified Keystone representative) said to employees, the hearing officer credited

[1] I agree that the Employer engaged in objectionable conduct when (i) Supervisor Rolando Bellido stated to employee Terrell Ellis that if the Union "infiltrated" the Company, Keystone would stop offering the Core program, through which employees can earn as much as $500 over and above their regular wages every 2 weeks; (ii) Stockton General Manager Randi Graham said that if the Union were voted in, all the "little perks" employees had would go away and/or the "gray area" would be taken away as far as leniency was concerned; and (iii) Union City General Manager Chavin Prum interrogated employee Morgan Crowl regarding his union sentiments and those of other employees, and employee Tolopa-Joe Faumuina was similarly interrogated by several managers. I also agree that the number of employees who heard General Manager Graham's statements, combined with the number of employees to whom reports of the interrogations were disseminated, is sufficient to warrant setting aside the election.

[2] Employees in Santa Fe Springs had recently voted against union representation in a Board-conducted election.

[3] In so announcing, Keystone acted in accordance with its duties under the Act. If an employer is already planning to consider or make adjustments in wages at the time it becomes aware of union organizing, it may not discontinue such plans based on union considerations. See, e.g., *Sacramento Recycling & Transfer Station*, 345 NLRB 564, 564–565 (2005) (finding employer violated Sec. 8(a)(1) where it stated that it had been considering granting a raise but could not do so now that the union had filed a representation petition); *Feldkamp Enterprises*, 323 NLRB 1193, 1198, 1199 (1997) (finding employer violated Sec. 8(a)(1) where it blamed the union as the reason raises were being withheld); but see *Great Atlantic & Pacific Tea Co*., 192 NLRB 645, 645–646 (1971) (lawful for employer, who generally gave yearly raises but had no clearly established practice of doing so, to postpone granting raises during the critical period without providing employees an explanation in order to avoid the appearance of election interference), enfd. per curiam 463 F.2d 184 (5th Cir. 1972). However, it is equally well established that if a majority of employees vote to be represented by the union, wage adjustments become a mandatory subject of bargaining, and unilateral wage changes violate the Act unless and until bargaining results in an overall impasse. See *Winn-Dixie Stores, Inc.*, 243 NLRB 972, 973–974 (1979) (citing, inter alia, *NLRB v. Katz*, 369 U.S. 736 (1962)).

the testimony of employees Faumuina and Eric Stevens, among others, as follows:

> According to Stevens, Wittig said that as soon as the [Stockton/Union City] vote was over, *the Employer was going to start up the wage review process no matter what the election results were*. Petitioner witness employee Tolopa-Joe Faumuina testified that during a meeting that he attended, the Employer said that *if the Union came in, then the pay raises could take a whole lot longer and it would be a long drawn-out process and there was a "really big chance" that the employees might not even get a raise at all or could end up losing money.* Stevens recalled that either Wittig or another representative of the Employer stated that *if the Union won the Employer was "supposed to come to the table and bargain in good faith, but that doesn't mean that [the employees were] going to get whatever [they] ask for" and that it could take six months, or a year, or it could take "forever."*[4]

Second, Labor Consultant Oliver Bell, who participated in an employee meeting conducted by Keystone, responded when an employee asked whether he (Bell) was saying that Stockton/Union City employees would receive the same increase that had previously been given to Santa Fe Springs and Ontario employees. Regarding what Bell said, the hearing officer credited the testimony of employees Terrell Ellis and Max Cervantes, among others, as follows:

> Ellis testified that an employee asked if Bell was saying that the Stockton employees were going to get the raise and the money and the percentage that the employees in Southern California got. Bell replied that *he was not promising that the employees were going to get the same dollar amount or that the same thing would happen in Stockton*, but he was saying that *the Employer was ultimately going to follow the same process and a reasonable man could assume that Northern California would get the same result*. Cervantes also testified that Bell said that *any reasonable person would assume that he might be getting the same 12.45 percent wage increase*.[5]

Neither Ellis nor Cervantes testified that Bell conditioned any wage increase at Stockton and Union City on the outcome of the election. To the contrary, the record shows that Keystone representatives repeatedly stated that the wage survey being conducted at Stockton and Union City would be completed in the same way *regardless* of whether employees voted for or against the Union in the election.[6]

Accordingly, the record contradicts the hearing officer's conclusion that "the Employer's communications to employees regarding the planned wage review *crossed the line into objectionable statements . . . by implying that the wage review might not be forthcoming unless there was a 'no' vote.*"[7] It is true that Keystone representatives indicated that the collective-bargaining process involves uncertainty and that wages could increase, decrease or stay the same as the result of collective bargain-

[4] Hearing Officer's Report and Recommendations on Objections (HOR) at 9 (emphasis added).

[5] HOR at 8 (emphasis added; footnote omitted).

[6] See, e.g., HOR at 8 ("Ellis testified that Wittig said that *if the Union won, then the Employer would continue the process that was already explained regarding Southern California*, but it could take 6 months or 18 months for wage issues to be dealt with.") (emphasis added); id. at 9 ("According to Stevens, Wittig said that as soon as the vote was over, *the Employer was going to start up the wage review process no matter what the election results were*.") (emphasis added); id. at 10 ("Wittig said that the other locations in California were receiving wage reviews for the purpose of ensuring that employees were at market rate, but the Employer was unable to do any wage review in Union City or Stockton due to the union campaign, and that *the wage survey would take place after the vote regardless of the outcome*.") (emphasis added); id. (PowerPoint presentation used at employee meetings stated that "the Employer *would perform its wage review at its Union City and Stockton facilities no matter what happened in the vote*.") (emphasis added); id. ("*[I]f Ontario and Santa Fe Springs would have been union*, then the Employer *would have followed the same wage review, but with the collective-bargaining process*.") (emphasis added); id. ("*[T]he Employer was not stating that with a union that wage adjustments would have been different*, but with a union, the Employer has to negotiate an entire contract and handle what the Union needs.") (emphasis added); id. (hypothetical example stating that if the Union won the election, Stockton/Union City employees would still potentially receive a 12.45-percent increase, except "if union dues were 1.4 percent of the new rate, then employees would only get an 11.05 percent increase instead of the 12.45 percent increase"); Emp. Exh. 10, slides 8, 9, 14, 15, 16 (same); Emp. Exh. 11 at 7 (meeting script stating in part that "[w]hether our operations are union or non-union, *the Company is going to look at wages the same way*") (emphasis added); id. at 8 ("[E]ven before the Company was aware of any union activity here, the Company was looking at the wages for all the different jobs we have . . . [and] *no matter what happens in the union vote, the Company will continue this review*.") (emphasis added); id. at 9 ("I can tell you that *no matter what happens in the union vote, the Company will continue this review*.") (emphasis added).

[7] HOR at 11 (emphasis added). Along similar lines, the hearing officer stated that "[r]ather than suggesting that it would continue with its wage review as planned but while bargaining in good faith with the Union over the matter, the Employer's comments suggested that it intended go to battle with the Union and drag its heels over the wage review if the Union won." Id. As noted in fn. 5, supra, and contrary to the hearing officer's statement, the record is replete with evidence that Keystone representatives stated that the Company intended to continue the wage survey at Stockton and Union City and approach potential wage adjustments in the same manner *regardless* of whether the Union won or lost the election, and similar statements are contained in the PowerPoint displayed during employee meetings and in the script used by Keystone officials.

ing if the Union won the election.[8] However, numerous cases establish that it is permissible for an employer to make these types of statements.[9]

I believe the record also contradicts the hearing officer's conclusion that Keystone's permissible statements—that the Company would complete the wage survey and approach wage issues in the same manner regardless of whether the Union won or lost the election—were "negated" by "statements regarding what a 'reasonable person/reasonable man' could assume about wage increases and statements that the Employer made regarding the lengthy delays that employees could expect in receiving any wage increase if the Union won the election."[10] The latter statements did not "negate" the former statements; rather, the two sets of statements addressed entirely different subjects. On the one hand, and consistent with its obligations under the Act,[11] Keystone said it would continue its wage survey regardless of the outcome of the election. On the other, Keystone accurately described its legal obligation to engage in collective bargaining if the Union won the election—and the fact of the matter is that collective bargaining takes time, particularly when the parties are negotiating for an initial collective-bargaining agreement.[12] Thus, it was truthful and permissible for Keystone representatives to state, as described by employee Ellis, that "if the Union won, then the Employer would continue the process that was already explained regarding Southern California [the wage survey], but it could take 6 months or 18 months for wage issues to be dealt with."[13] It is true that Keystone was lawfully permitted to increase wages more quickly at its Santa Fe Springs and Ontario facilities, since employees at those facilities were nonunion and therefore the increases at those facilities could be implemented unilaterally. However, these facts were accurately conveyed by Keystone representatives along with disclaimers making it clear that Keystone was *not* promising Stockton/Union City employees would receive the same increases—or, for that matter, anything else.[14]

Finally, I believe the record fails to support the hearing officer's conclusion that objectionable conduct was proven based on Bell's "statements regarding what a 'reasonable person/reasonable man' could assume about wage increases" if the Union lost the election.[15] In this regard, the hearing officer reasoned as follows:

> I . . . find that the Employer's comments about its planned wage review interfered with employees' free

[8] See, e.g., Emp. Exh. 11 at 17 ("As part of the collective bargaining process, your wages could go up, could stay the same, but they could also go down. The law says that in collective bargaining, it is possible for employees to lose during negotiations. I am not predicting this. I am just letting you know what the law says."); Emp. Exh. 10, slide 15 (setting forth "Facts on Collective Bargaining & Unions" and stating there is a "[r]equirement to negotiate an entire contract," which may involve union demands for "Dues Checkoff," "Union Security" and "Super Seniority"); HOR at 9 (Keystone representative said that "if the Union came in, then the pay raises could take a whole lot longer and it would be a long drawn-out process and there was a 'really big chance' that the employees might not even get a raise at all or could end up losing money."); id. (Either Wittig or another Keystone representative said that "if the Union won the Employer was 'supposed to come to the table and bargain in good faith, but that doesn't mean that [the employees were] going to get whatever [they] ask for' and that it could take six months, or a year, or it could take 'forever.'").

[9] E.g., *Apogee Retail, NY, LLC*, 363 NLRB No. 122, slip op. at 1 fn. 3 (2016) (citing *Flexsteel Industry*, 311 NLRB 257, 257 (1993)); *Mantrose-Haeuser Co.*, 306 NLRB 377, 377–378 (1992)); *UARCO, Inc.*, 286 NLRB 55, 58 (1987), review denied mem. sub nom. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. NLRB*, 865 F.2d 258 (6th Cir. 1988); *Oxford Pickles*, 190 NLRB 109, 109 (1971).

[10] HOR at 12.

[11] See fn. 2, supra.

[12] See *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002), where the Board stated: "Experience teaches that a period of around 6 months approximates the time typically required for employers and unions to negotiate *renewal* collective-bargaining agreements" (emphasis added). Negotiating an *initial* agreement typically takes much longer than it does to negotiate a "renewal" or successor agreement. This reality is reflected in the Board's "certification year" rule, under which a newly certified union's majority status is immune from challenge for a full year following certification. See *Ray Brooks v. NLRB*, 348 U.S. 96, 98 (1954). Of course, experience shows that negotiating an initial collective-bargaining agreement may often take much more than a year.

[13] HOR at 8. The statement recounted by employee Ellis is similar to the one testified to by employee Faumuina (that "if the Union came in, then the pay raises could take a whole lot longer and it would be a long drawn-out process and there was a 'really big chance' that the employees might not even get a raise at all or could end up losing money"), by employee Stevens (that "if the Union won the Employer was 'supposed to come to the table and bargain in good faith, but that doesn't mean that [the employees were] going to get whatever [they] ask for' and that it could take six months, or a year, or it could take 'forever'"), and in the PowerPoint presentation the Employer displayed during employee meetings (that "with a union, the Employer has to negotiate an entire contract and handle what the Union needs"). Id. at 9–10; see also Emp. Exh. 11 at 17 ("As part of the collective bargaining process, your wages could go up, could stay the same, but they could also go down. The law says that in collective bargaining, it is possible for employees to lose during negotiations. I am not predicting this. I am just letting you know what the law says.").

[14] See HOR at 8 (as described by employee Ellis, consultant Bell stated "he was not promising that the employees were going to get the same dollar amount or that the same thing would happen in Stockton"); Emp. Exh. 10, slide 6 ("Sharing details could be viewed as promising the same adjustments here. . . . We will not do that" and "We are not doing that."); Emp. Exh. 11 at 4 ("I want to make sure that everyone understands I am not making any promises. The Company is not making any promises."); id. at 4–5 ("[N]othing we say today should be considered a promise to fix issues being brought up as part of the union activity."); id. at 13 ("Again, I am not making any promises about what will happen in the future.").

[15] HOR at 12.

> choice in the election because instead of simply informing employees that a wage survey was taking place, the Employer went a step further and told employees that a "reasonable person" could expect to receive a 12.5 percent wage increase if the Employer won the election. The Employer's comments constituted a *not-so-subtle suggestion that the employees were guaranteed to get the wage increase if they did not support of [sic] the Union*. . . . Here, the Employer's suggestion about what a "reasonable person" might expect the outcome of the wage review to be *was . . . "tantamount to a wink" that the employees could count on the 12.5 percent raise if the Union lost the election*.[16]

In my view, there are multiple problems with the hearing officer's characterization of the facts and with her legal conclusion that Bell's "reasonable person" comment constituted an objectionable promise that "employees could count on the 12.5 percent raise if the Union lost the election."[17] Most importantly, as noted above, the record makes clear that Company representatives stated repeatedly that Keystone would complete its wage survey and approach wage issues in the same manner *even if the Union won the election*.[18] Along similar lines, the PowerPoint displayed during employee meetings included an example *that assumed employees became union-represented and received a 12.45 percent increase*—the same increase afforded to Santa Fe Springs and Ontario employees.[19] The most detailed testimony regarding Bell's "reasonable person" comment was supplied by employees Ellis and Cervantes,[20] whose testimony the hearing officer stated was "especially likely to be credible."[21] As described by the hearing officer, their testimony revealed the following:

- The Company indicated that "if the Union won, then the Employer would continue the [wage survey] process that was already explained regarding Southern California, but it could take 6 months or 18 months for wage issues to be dealt with."[22]
- An employee "asked if Bell was saying that the Stockton employees were going to get the raise and the money and the percentage that the employees in Southern California [Santa Fe Springs and Ontario] got."[23] As described by Ellis, this question was *not* premised on whether the Union won or lost the election.
- Bell immediately stated "he was *not* promising that the employees were going to get the same

[16] Id. (quoting *G & K Services*, 357 NLRB 1314, 1317 (2011) (emphasis added)). In my view, the instant case is materially different from *G & K Services* and from a second case cited by the hearing officer, *California Gas Transport, Inc.*, 347 NLRB 1314 (2006), enfd. 507 F.3d 847 (5th Cir. 2007), upon which my colleagues also rely. In those cases, the employer made statements that were deemed to imply promises regarding what employees would receive if the union lost an impending representation election. In the instant case, by comparison, Keystone stated that its description of events in Santa Fe Springs and Ontario should *not* be regarded as promises. See fn. 13, supra. More importantly, and unlike in *G & K Services* and *California Gas Transport*, Keystone representatives repeatedly stressed that the Company would complete its wage survey and take the same approach to wage increases *regardless of the outcome of the election*. See fn. 5, supra; see also the text accompanying fn. 3, supra.

In any event, I believe *G & K Services* and *California Gas Transport* were wrongly decided. In each of those cases, the employer informed employees of a historical fact concerning unrepresented employees at other facilities—that they had received a bonus (*California Gas Transport*) or had better health insurance (*G & K Services*)—while also stating that it could not make any promises. In each case, I agree with the dissenting member who would have found that the employer's statement was lawful and/or unobjectionable. See *G & K Services*, 357 NLRB at 1317–1320 (Member Hayes, dissenting); *California Gas Transport*, 347 NLRB at 1318 fn. 14 (Chairman Battista, dissenting). As my colleagues concede, it is neither unlawful nor objectionable for an employer to compare wages or benefits received by its union and nonunion employees, even when the comparison reveals that nonunion employees receive higher wages or better benefits than union-represented employees. See *TCI Cablevision of Washington*, supra; *Viacom Cablevision,* supra; *Suburban Journals of Greater St. Louis*, 343 NLRB 157 (2004); *Langdale Forest Products Co.*, 335 NLRB 602 (2001).

Other cases cited by the majority are also distinguishable from the instant case. In *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979), an implied promise was found based on the employer giving each of its union-represented employees an individualized projection of how much better they would fare under the retirement plan covering its nonunion employees. In *Westminster Community Hospital, Inc.*, 221 NLRB 185 (1975), enfd. mem. 566 F.2d 1186 (9th Cir. 1977), the employer went beyond comparing wage rates at union and nonunion hospitals and blamed the union, falsely, for the employer's purported inability to provide increased benefits to union-represented employees. Finally, in *Grede Plastics*, 219 NLRB 592 (1975), the employer characterized nonunion employees as a "team," told union employees that nonunion employees received larger and more frequent raises and better benefits, and urged the union employees to join "this successful team"—implying that if they joined the nonunion "team," they would enjoy "team" raises and "team" benefits. The facts of these cases are very different from those presented here.

[17] HOR at 12.

[18] See fn. 5, supra; see also the text accompanying fn. 3, supra.

[19] See Employer Exh. 11, slide 16, which stated that assuming employees became union-represented and received a 12.45-percent wage increase, the obligation to pay union dues would reduce their net wage increase to 11.05 percent. There is no allegation that the information set forth in this slide or in other portions of Keystone's PowerPoint presentation was objectionable.

[20] See HOR at 8.

[21] Id. at 11.

[22] Id. at 8.

[23] Id.

dollar amount or that the same thing would happen in Stockton."[24]

- Bell stated "the Employer was ultimately going to follow the same process" that had led to the 12.45 percent wage increases at Sante Fe Springs and Ontario.[25] This was consistent with many similar statements described by other witnesses and reflected in relevant documentation.[26]
- According to employee Cervantes, "Bell said that any reasonable person would assume that he *might* be getting the same 12.45-percent wage increase."[27] According to employee Ellis, Bell said that "a reasonable man *could* assume that Northern California would get the same result."[28]

Bell's statement regarding what a "reasonable person" or "reasonable man" could or would assume cannot reasonably be regarded as an objectionable promise that employees would receive a 12.45 percent wage increase if the Union lost the election. As just shown, this statement was preceded by Bell stating, in response to a question, that "he was not promising" what Stockton employees would get. More importantly, the assumed 12.45 percent wage increase *was not conditioned on the outcome of the election*. This was consistent with the PowerPoint displayed at employee meetings that likewise assumed employees *would still get the same 12.45 percent wage increase* if the Union *won* the election.[29]

It is not objectionable conduct for an employer to advise employees that wage increases will be treated *in the same manner* regardless of whether the union wins or loses a representation election. Neither is it objectionable for an employer to compare "the pay and benefits of employees in its nonunion locations with those received in its unionized locations," especially where the employer "also disclaim[s] any promise of what the employees might receive in the future."[30]

For the above reasons, I would overrule Union Objection 4 alleging that Keystone representatives "made promises of better pay . . . if the employees voted against the Union." I believe the record fails to support a finding that Keystone promised employees wage increases. Moreover, even if any statements may be regarded as a promise of wage increases, the record establishes that Keystone indicated the increases would be equally available if the Union won the election—subject, of course, to the Company's legal duty to bargain with the Union on request concerning all mandatory subjects, including wages.

Accordingly, as to this issue, I respectfully dissent.

Dated, Washington, D.C. April 13, 2017

Philip A. Miscimarra, Acting Chairman

NATIONAL LABOR RELATIONS BOARD

[24] Id. (emphasis added).
[25] Id.
[26] Id. See also fn. 5, supra; text accompanying fn. 3, supra.
[27] Id. (emphasis added).
[28] Id. (emphasis added).
[29] See fn. 19, supra.

[30] *TCI Cablevision of Washington*, 329 NLRB at 700; see also *Viacom Cablevision*, 267 NLRB at 1141 ("A comparison of wages is not per se objectionable; the question is, was there a promise, either express or implied from the surrounding circumstances, that wages would be adjusted *if the Union were voted out*.") (emphasis added).