

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIXTEEN**

ARDENT MILLS, LLC

Employer

and

ESLI OMAR GUERRERO MELENDEZ

Case No. 16-RD-234061

Petitioner

and

**UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 540**

UNION

**UNION'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION
AND CERTIFICATION OF RESULTS OF ELECTION**

United Food and Commercial Workers, Local 540 ("the Union") respectfully submits the following Request for Review of the Regional Director's Decision and Certification of Results of Election ("the Decision") in the above-captioned case overruling the Union's objections to the conduct of the election, pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board.

I. OBJECTION 1

The Union submitted the following objection to the election:

Objection 1: During the critical period, the Employer, through its representatives and agents, threatened, restrained, and coerced bargaining unit employees by telling them that they would gain better pay, working conditions, and benefits if the Union was voted out.

The Decision on Objection 1 is clearly erroneous on the record and such error prejudicially affects the rights of the Union. There are also compelling reasons for reconsideration of important Board policy with respect to the Decision on Objection 1. Additionally, Objection 1 raises a substantial question of law or policy because of the departure from officially reported Board precedent.

There is substantial law on implied promises of benefits that employers make which constitutes grounds for overturning an election. In *General Shoe Corporation*, 77 NLRB 124, 127 (1948), the seminal case on election interference, the Board held that conduct which creates an atmosphere which renders improbable a free choice will warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. Where unfair labor practices are not involved, the test, which is objective, is whether the party's misconduct has the tendency to interfere with employees' freedom of choice. *Cambridge Tool & Manufacturing Company*, 316 NLRB 716 (1995).

With respect to the first objection that “the Employer threatened, restrained and coerced bargaining unit employees by telling them that they would gain better pay, working conditions and benefits if the union was voted out,” the Board has set aside elections when an implied promise of benefits is made to employees. *Etna Equipment & Supply Company*, 243 NLRB 596 (1979). The Board infers that such a promise interferes with free choice. To determine if a statement is an implied promise of a benefit, the Board considers the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise. *Viacom Cablevision*, 267 NLRB 1141 (1983); *Crown Electrical Contracting, Inc.*, 338 NLRB 336, 337 (2002). If the evidence indicates that an employer offers such implied information -- or implied promise via information without solicitation, this circumstance supports finding an implied

promise. *G & K Services*, 357 NLRB 1314, 1315-16 (2011), and *Coca-Cola Bottling Co. of Dubuque*, 325 NLRB 1275, 1276 fn. 6 (1995). The fact an employer is responding to employee questions does not necessarily excuse an actual implied promise. *California Gas Transport*, 347 NLRB 1314, 1318 (2006), *enfd.* 507 F.3d 847 (5th Cir. 2007). In *G&K Services, supra*, an employer description of benefits obtained by its employees at another facility after decertification was ruled objectionable.

In the present case, the Company made two presentations, and some of the specific items that the Company discussed in its power point presentations were *not* specific to a suggestion box question or a verbal question from an employee. For instance, in Employer Ex. 3, page 8, it states “Team Member Question.” And the question was: “Team member submitted a question in the suggestion box, asking ‘for a paid day off for birthdays.’” At the bottom of page 8, the Company produced a slide on holidays and vacation benefits in which it specifically states that you get a total of sixteen paid days off (eight paid holidays and eight paid personal days) at “Union-Free Locations,” whereas under the current Saginaw CBA, employees get a total of only eleven paid days off (eleven paid holidays and zero paid personal days). The Company followed-up the first presentation with a second one that also contains side-by-side comparisons showing how much better off the employees are going to be if they are at a “Union-Free Location.” *See Employer Ex. 4.*

In terms of the information that was actually given to employees, some of it was outright erroneous. Jon Cozad admitted that he told the employees at one of the meetings that the Company cannot randomly fire someone at these union-free locations. *Tr. 157-59*. The Union would ask that the Board take judicial notice of the fact that Texas is an at-will employment state. Thus, Cozad’s statement to the employees regarding firing employees is completely false.

Cozad also initially testified that Company representatives did not express a preference for the employees voting union over nonunion. *Tr. 160* . But then when confronted with Employer Ex. 4, page 5, he admitted that, in fact, the Company officials were expressing a strong preference for not having a union. *Tr. 160-61; Employer Ex. 4*.

The foregoing evidence brings this case well within the doctrine of implied promises of benefits that has been ruled to be grounds for overturning an election. See *Etna Equipment & Supply Company*, 243 NLRB 596 (1979); *G & K Services*, 357 NLRB 1314, 1315-16 (2011); *Coca-Cola Bottling Co. of Dubuque*, 325 NLRB 1275, 1276 fn. 6 (1995). Board law is clear in these cases that such promises interfere with employees' free choice. As such, the Board should overturn the Decision on Objection 1.

II. OBJECTION 2

The Union submitted the following objection to the election:

Objection 2: During the critical period, the Employer, through its representatives and agents, threatened, restrained, and coerced bargaining unit employees in regard to their election vote by telling them they could still file grievances if the Union was voted out.

The Decision on Objection 2 is clearly erroneous on the record and such error prejudicially affects the rights of the Union. There are also compelling reasons for reconsideration of important Board policy with respect to the Decision on Objection 2. Additionally, Objection 2 raises a substantial question of law or policy because of the departure from officially reported Board precedent.

The Union's second objection was based on the Company telling the employees that they could still file grievances if the union was voted out. A bargaining unit employee testified that his understanding of what was said was that the Company had an alternative procedure that was

similar to the filing of grievances in the other nonunion plants. *Tr.* 77-82. That is an implied promise of allowing employees to file grievance-like complaints that simply are not in effect at these nonunion plants.

The foregoing evidence brings this case well within the doctrine of implied promises of benefits that has been ruled to be grounds for overturning an election. See *Etna Equipment & Supply Company*, 243 NLRB 596 (1979); *G & K Services*, 357 NLRB 1314, 1315-16 (2011); *Coca-Cola Bottling Co. of Dubuque*, 325 NLRB 1275, 1276 fn. 6 (1995). Board law is clear in these cases that such promises interfere with employees' free choice. As such, the Board should overturn the Decision on Objection 2.

III. OBJECTION 3

The Union submitted the following objection to the election:

Objection 3: During the critical period, the Employer, through its representatives and agents, threatened, restrained, and coerced bargaining unit employees concerning their right to vote for a collective bargaining representative by intimidating union supporters.

The Decision on Objection 3 is clearly erroneous on the record and such error prejudicially affects the rights of the Union. There are also compelling reasons for reconsideration of important Board policy with respect to the Decision on Objection 3. Additionally, Objection 3 raises a substantial question of law or policy because of the departure from officially reported Board precedent.

The Union's third objection was that the Employer "unlawfully threatened, restrained and coerced bargaining unit employees concerning their right to vote for a collective bargaining representative by intimidating union supporters." There is undisputed testimony that the

Petitioner, Esli Omar Guerrero Melendez¹, called another employee (known Union supporter Mark Clevenger) “a shit” during one of the Company’s presentations in front of management officials. *Tr. 39, 60, 99.* There is no testimony that Clevenger, said anything inappropriate like calling someone “a shit.” Yet there was no admonition of Melendez in any way. This evidence shows preference, and constitutes intimidation of employees who are in favor of keeping the Union in the plant. Additionally, Cozad’s admission that the Company’s power point presentation made it clear to the employees that the Company wanted the union voted out is also a form of intimidation. *Tr. 160-61.*

The Board’s test in connection with threats and intimidation is whether a remark can reasonably be interpreted by an employee as a threat. The test is not the actual effect on the listener. *Smithers Tire*, 308 NLRB 72 (1992); *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231, 1231 fn. 2 (1999). In the present case, the Company tolerated completely inappropriate conduct by the person filing the decert petition against a known union-supporter. Combine that fact with the plant manager’s admission that the power point presentation was a clear message to employees that the Company wanted the employees to vote against keeping the Union, and there is clear evidence that the Company’s conduct reasonably can be interpreted by an employee as intimidation or threats. As such, the Board should overturn the Decision on Objection 3.

IV. CONCLUSION

For all of the foregoing reasons, the Union proved that the laboratory conditions have been disturbed by management, and a new election should be ordered. Accordingly, the Board should grant this request for review, overturn the Decision, and order a new election.

DATED this 3rd day of May, 2019.

¹ Melendez was not just the Petitioner in this case, but also given the position of “Ambassador” by the Company. *Tr. 148.*

Respectfully submitted,

LYON, GORSKY & GILBERT, L.L.P.

12001 N. Central Expressway

Suite 650

Dallas, Texas 75243

Phone: (214) 965-0090

Fax: (214) 965-0097

Email: dwatsky@lyongorsky.com

/s/ David K Watsky

David K. Watsky

State Bar Number 20932600

ATTORNEYS FOR UNION

CERTIFICATE OF SERVICE

A copy of United Food and Commercial Workers, Local 540's Request for Review of the Regional Director's Decision and Certification of Results of Election has been filed with the Board and served this day on:

Mark Kruger
Ardent Mills
Labor and Employment Counsel
1875 Lawrence St.
Suite 1400
Denver, Colorado 80202
Mark.Kruger@ArdentMills.com

Chad Richter
Jackson Lewis P.C.
10050 Regency Circle
Suite 400
Omaha, Nebraska 68114
Chad.Richter@jacksonlewis.com

Michael T. Mortensen
Jackson Lewis, P.C.
500 North Akard, Suite 2500
Dallas, Texas 75201
michael.mortensen@jacksonlewis.com

Esli Omar Guerrero Melendez
6502 Sabrosa Court E
Fort Worth, Texas 76133
esly817@gmail.com

/s/ David K Watsky
David K. Watsky