UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

Bob’s Discount Furniture of New York, LLC

Employer, Case No. 29-RD-284944

and

Rohan Reid

Individual Petitioner,

and

United Food and Commercial Workers Union, Local 888

Petitioner.

EMPLOYER’S STATEMENT IN OPPOSITION TO
UNION’S REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S DECISION
AND CERTIFICATION OF RESULTS OF ELECTION

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I. INTRODUCTION

This Statement in Opposition to the Union’s Request for Review of Regional Director’s Decision and Certification of Results of Election is submitted by the Employer, Bob’s Discount Furniture of New York, LLC, (Company, Employer, or Bob’s), by and through its attorneys Jackson Lewis P.C.

II. STATEMENT OF THE CASE

A. Procedural History.

Petitioner Rohan Reid filed a decertification petition with the National Labor Relations Board (hereinafter the “Board” or “NLRB”) on October 1, 2021. An election was held pursuant to a Stipulated Election Agreement on December 1, 2021 among the employees employed in the following unit:

All full-time and regular part-time sales associates employed by the Employer at its facility located at 2520 Flatbush Avenue, Brooklyn, New York, but excluding all other employees including guards and supervisors as defined in the Act. (Bd. Ex. 1).

There were approximately 28 eligible voters and 24 ballots cast. There were 14 ballots cast against representation by the Union and 10 ballots cast in favor of representation by the Union (Local 888, United Food and Commercial Workers Union).

The Union filed objections and the Acting Regional Director found that the allegations contained in just one of the Union’s objections (below) raised material and substantial issues of fact warranting a hearing and, accordingly, directed the hearing in this matter.

In its first objection, the Union alleges that during the critical period before the election, the Employer posted and distributed to unit employees certain campaign propaganda flyers with misleading information about the Union.
In its offer of proof, the Union states that a named employee will testify that the Employer posted two flyers in the employee breakroom during the critical period prior to the election. The Union further states that Marshall Paris, the Union’s Director of Organizing, will testify that these flyers contained inaccurate information about the Union that was designed to deceive employees. (Bd. Ex. 1).

The hearing was held via Zoom videoconference before Rachel Zweighaft, Field Attorney, National Labor Relations Board, Region 29 (Hearing Officer), on January 5, 2022. In a Report and Recommendations on Objection dated February 3, 2022, Hearing Officer Zweighaft recommended that the Union’s objection be overruled and that a Certification of Results be issued in this case.

The Union filed Exceptions to the Hearing Officer’s Report and Recommendations and the Regional Director, in a Decision and Certification of Results of Election dated April 11, 2022, overruled the Union’s objection and certified the results of the election. The Union has now filed a Request for Review of the Regional Director’s decision.

B. The Employer’s Position.

The Regional Director rightfully concluded, as supported by the record evidence and established Board precedent, that the Union’s objection is without merit and, accordingly, overruled it and certified the result of the election. The Employer submits that the Union fails to meet its burden of proof and identify any compelling reason warranting review of the Regional Director’s decision. The Union’s request for review should be denied.

III. ARGUMENT

A. The Union Fails to Identify any Compelling Reason Warranting Review.
The Employer reasserts that the Regional Director’s Decision was correct in all respects. The Board grants review of a decision only where “compelling reasons” exist. 29 C.F.R. § 102.67(d). Compelling reasons exist where (1) a substantial question of law or policy is raised due to the absence of, or a departure from, Board precedent; (2) the Regional Director’s decision is clearly erroneous on a substantial fact issue and prejudicially affects the rights of a party; (3) the conduct of any hearing, or any ruling made in connection, results in prejudicial error; or (4) there are compelling reasons for reconsideration of an important Board rule or policy. 29 C.F.R. § 102.67(d)(1)-(4).

The Union files its request for review “on the grounds that there are compelling reasons for reconsideration of an important Board rules or policy.” Union Request for Review at 1. As is set forth below, there are no such compelling reasons.

B. **There Is No Compelling Reason to Reconsider the Midland National Standard.**

Nearly 40 years ago, in *Midland National Life Insurance Co.*, 263 NLRB 127, 130 (1982), the Board held that it would “no longer probe into the truth or falsity of the parties’ campaign statements.” The Union argues that the *Midland National* standard should be modified to outlaw “intentional deception as to facts.” See Union Request for Review at: 3 (“The Employer’s assertion … as to the increases in cost of the Union’s Health & Welfare plan was demonstrably false and intentionally misleading.”); 4 (“Knowing as the Employer did that those figures were initial proposals, to assert on the day before the election that those were actual expected costs was *intentionally false and deceptive.*”); and 5 (“But simple acknowledgment that there are such things as facts militates toward holding that intentional deception as to facts *should not be countenanced by the Board.*”).
1. The Standard Sought by the Union Would Not Change the Holding in this Case.

The Union appears to seek a standard that would condemn “intentional deception as to facts.” Yet the undisputed record evidence establishes that there was no intentional deception in this case.

The Employer described the fact that the cost of the Union’s Health and Welfare plan were going up. U. Exh. 3. This was based upon information the Union provided to the Employer. U. Exh. 2. The Union admitted that the percentage increases described (“the math”) was correct. Tr. 73. While the Union claims that the rates provided to the Employer were subject to negotiation, that was not the Employer’s understanding.

The undisputed testimony of the Employer’s witness, Vice President of HR Operations Ed Soulier, established that the Employer had been told by the Union in the past that: “[T]he fund that establishes those rates, that neither [the Union negotiator] nor we [the Employer] as parties to the contract had influence over what those rates were. And that where -- where our discussion would be -- would be limited to was the degree of sharing of that cost, the Employer's contribution against that [paid by employees].” Tr. 89. Mr. Soulier explained that the rates received from the Union in 2021 were understood by the Employer to be similarly fixed, and not subject to negotiation other than with respect to the amount of the Employer and employees’ respective contributions. Tr. 89-90.

In short, the undisputed record evidence demonstrates that the Employer believed it was communicating the actual rates for the Union’s health fund. Since the Employer and the Union had not yet negotiated over the employee contribution, the Employer specifically noted that: “The amount employees would pay is subject to negotiation.” U. Exh. 3.
The Union claims that it is this caveat that renders the communication unlawful:

“And the relevance of all this is quite simple: the Employer well knew that its insinuation that employee costs might rise 43% and 52% was misleading and deceptive, and intentionally calculated to frighten employees.” Union Request for Review at 5.

The Union’s argument fails for several reasons. First, the caveat that employee contributions would be subject to negotiation did not insinuate that employee costs might rise by the same amount of the health insurance rates. If anything, it implied that they might not rise by that amount (or any amount). Second, the argument that the caveat was misleading and deceptive fails because it is a simple statement of the legal reality of the collective bargaining process.

2. The Current Media Landscape Demonstrates the Soundness of the Midland National Standard.

The Union describes the basis of the Midland National standard as a “nihilistic, fact-free universe.” Union Request for Review at 5 (citations omitted). This argument gives too little credit to employees. The Board has noted that the evolution of labor law “was grounded in part on our belief that employees are mature individuals who are capable of recognizing campaign propaganda for what it is and evaluating its claims.” SDC Investment, 274 NLRB 556, 557 (1985).

The Union’s argument is also out of touch with the modern media landscape. The public at large have become savvy consumers of information, keen to see through biases and hidden motives, with immediate access to information that was unthinkable when the Board decided Midland National, and able to decide what is true and what is not. This is no less true for employees than for anyone else.
The facts of the instant case bear this out. The record evidence shows that there were robust communications by both sides, but especially by the Union, and employees were well positioned to understand those communications as the arguments of partisans, to be weighed and considered, and to be believed or not.

The animating belief that underlies the *Midland National* standard is not nihilism – not a rejection of truth or reality – but a deep and abiding belief in, and respect for, employees’ ability to discern the truth and to make their own decision, even in the face of conflicting information.

3. **The Union’s Belated Claim That the Employer Bears the Burden of Showing Its Predictions Are Based on Objective Fact Must be Rejected.**

The Union argues that “an employer bears the burden of showing its predictions are based on objective fact.” Union Request for Review at 5. For the following reasons, this argument must be rejected.

First, the Union did not raise this claim in its objections, it was not included in the sole objection set for hearing by the Regional Director, and it was never raised or litigated at the hearing. The Board has held that allegations based on a new legal theory or different factual circumstances are insufficiently related to the objections set by the regional director for hearing. *Precision Products Group, Inc.*, 319 NLRB 640 (1995); *Iowa Lamb Corp.*, 275 NLRB 185 (1985).

Second, even if the Union’s argument were considered on its merits, it would have to be rejected. The Employer’s communications in this case did not involve a prediction as do the line of cases the Union references when it cites *Southern Bakeries*, 364 NLRB 804 (2016).
The Supreme Court described these predictions in *NLRB v. Gissel Packing Co. Inc.*, 395 U.S. 575, 618-619 (1969): “[An employer] may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. **If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and, as such, without the protection of the First Amendment.**” (citations omitted, emphasis added).

There were no such predictions made by the Employer in this case. In fact, in the caveat seized upon by the Union (“The amount employees would pay is subject to negotiation”), the Employer eschewed prediction, noting that the issue was one for the parties to negotiate.

C. **The Regional Director Properly Rejected the Union’s Belated Claim of a Threat of Futility.**

The Union argues that the Employer’s communication, and specifically the statement that “nothing about your wages, benefits … or working conditions will change if you choose that you don’t want to be represented by the union anymore.” Union Request for Review at 6 (citing U. Exh. 4). For the following reasons, the Union’s argument must be rejected.
First, the Regional Director, agreeing with the Hearing Officer, found that the issue was not timely raised in the Union’s objections, that the Report on Objections did not notice the parties of this issue, and that the Hearing Officer lacked the authority to consider it. The Regional Director noted that while the alleged threat is included in a flyer that is in evidence, the threat of futility is based on a different legal theory than the objection alleging misleading campaign statements. The Regional Director also noted that there was no testimony or argument about the allegation at the hearing. Regional Director’s Decision at 7-8.

While the Union cites Fiber Industries Inc., 267 NLRB 840 (1983) for the proposition that allegations of objectionable conduct that are sufficiently related to the objections may be considered, the Union’s own quote from the case demonstrates that the alleged objectionable conduct was raised “for the first time at the hearing.” Id., at fn. 2. Yet it is undisputed that the Union raised the alleged threat of futility for the first time in its brief to the Hearing Officer. The Union never raised the alleged threat at the hearing, and the issue was not litigated.

The Board has held that issues that do not exactly coincide with the precise wording of the objections set for hearing nevertheless warrant consideration of the merits, when those issues are sufficiently related to the objections set for hearing and have been fully litigated. Pacific Beach Hotel, 342 NLRB 372, 373 (2004); Hollingsworth Management Service, 342 NLRB 556, 559 fn. 3 (2004).

Second, even if the issue were to be considered on its merits, the Regional Director correctly noted that alleged threat of futility was “akin to an employer advising its employees that it intends to maintain the status quo under an existing contract, which the
Board has held to be unobjectionable in the context of a decertification election.” Regional Director’s Decision at 8 (citations omitted). The Union ignores those cases, which are on point, and cites only one case (Southern Bakeries), without any description of its relevance, because the case arose in a different context and involved different statements.

IV. CONCLUSION

The Regional Director rightfully concluded, as supported by the record evidence and established Board precedent, that the Union’s objection is without merit and, accordingly, overruled it and certified the result of the election.

The Employer submits that the Union fails to meet its burden of proof and identify any compelling reason warranting review of the Regional Director’s decision. The Union’s request for review should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of New York that a true and accurate copy of the document was E-Filed through the Agency’s E-filing system to the Executive Secretary and also to the Regional Director of Region 29, and electronically served on the following parties to this case, this 2nd day of May 2022 as follows:

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