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Holdings Acquisition Co. L.P. d/b/a Rivers Casino *and* International Union, Security, Police and Fire Professionals of America (SPFPA). Case 6–RC–12701

April 26, 2011

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held November 9, 2009, 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 35 votes were cast for and 38 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and, contrary to the hearing officer's recommendation, finds that the Employer's imposition and enforcement of an overly broad no-distribution policy, surveillance of union activity, prohibition on union buttons, and grant of a benefit on the day of the election was objectionable conduct that warrants setting aside the election and directing that a new election be held.[1] In reaching this conclusion, we find that the hearing officer erred by failing to find certain conduct objectionable and by failing to assess the objectionable conduct as a whole to determine whether it affected the results of the election.

1. Alleged objectionable conduct

Overbroad No-Distribution Policy

Objection 7 alleges that the Employer "imposed and/or enforced" an overbroad policy prohibiting the distribution of informational materials. The hearing officer overruled this objection, finding that, although the Employer's conduct violated the Act, the conduct was isolated and did not affect the results of the election. We disagree.

The facts are undisputed. The Union petitioned for an election among the Employer's security employees. One or two weeks before the election, Andre Barnabei, the Employer's vice president of human resources, received a call from the security department stating that there was a disruption in the section of the parking garage reserved for employees because someone was passing out union materials. Barnabei testified that the Employer did not have a rule concerning the distribution of materials on company property.

When Barnabei arrived at the parking garage, he discovered off-duty security employee Brian Bradley standing alone, with T-shirts to offer to other employees. Barnabei testified that he did not see what the T-shirts said, but he believed that they supported the union cause.[2] Barnabei told Bradley that he could not distribute the T-shirts because it was causing a distraction. Bradley stopped distributing the T-shirts, but stayed in the parking garage to talk with other employees. The hearing officer found, and neither party disputes, that Bradley was off duty at the time of the incident and that the parking garage was not a working area. Barnabei testified that other employees had complained about Bradley's conduct.

It is well settled that off-duty employees have a right under Section 7 to disseminate union material in nonwork areas. See, e.g., *Nashville Plastics Products*, 313 NLRB 462 (1993) (finding that employer violated Sec. 8(a)(1) by prohibiting off-duty employees from distributing union literature on company property); *Tri-County Medical Center*, 222 NLRB 1089 (1976) (except where justified by business reasons, a rule that denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid). In addition, it is settled that opposition of other employees to Section 7 activity does not constitute a valid business justification for banning it. See *Power Equipment Co.,* 135 NLRB 945, 965 (1962) (finding that employee complaints about coworkers wearing union bowling shirts was not sufficient to justify ban on shirts), enfd. in pertinent part 313 F.2d 438 (6th Cir. 1963); accord: *Mead Corp.*, 314 NLRB 732, 735 fn. 14 (1994) (citing *Power Equipment Co*.). See also *Jasper Seating Co.,* 285 NLRB 550, 550 (1987), enfd. 857 F.2d 419 (7th Cir. 1988).

Accordingly, we find that the Employer engaged in objectionable conduct when it prohibited Bradley, an off-duty employee, from passing out union T-shirts in a nonworking area during nonworking time.

Unlawful Surveillance

Again, the facts surrounding this allegation are undisputed. After directing Bradley to stop distributing the T-shirts, Barnabei stayed in the parking garage for 15 to 20 minutes talking to Bradley. During this time, Bradley stopped several passing employees to talk about the Union. Barnabei testified that he was standing close enough

[1] No exceptions were filed to the hearing officer's recommendation to overrule Objections 1–7, 10–13, 15, and 19.

[2] The record does not establish what message the T-shirts bore.

to overhear Bradley tell an employee about an upcoming union meeting.

The hearing officer found that Barnabei did not engage in objectionable conduct by continuing to stand next to Bradley in the parking garage after preventing Bradley from distributing the T-shirts. In reaching this conclusion, the hearing officer reasoned that "Bradley knew full well that Barnabei was there, and did not stop his conduct and efforts to speak with employees."

Contrary to the hearing officer, we find that Barnabei engaged in objectionable conduct when he remained in the parking garage talking to Bradley and observing his conduct. The Board has recognized that, although an employer's "routine observation" of open, public union activity on or near its property does not constitute unlawful surveillance, an employer violates the Act when "it surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005); see also *PartyLite Worldwide*, 344 NLRB 1342, 1342 fn. 5 (2005) (finding surveillance unlawful where managers stood in close proximity to handbillers); *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003) (same). To determine whether surveillance is coercive, the Board looks to such factors as "the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive conduct during its observation." *Aladdin Gaming*, 345 NLRB at 586 (citing *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enfd. sub nom. mem. *S.J.P.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993)). Here, it is clear that there was nothing "routine" about Barnabei's surveillance of Bradley's actions. Barnabei, a high-level manager, remained in close proximity to Bradley in a nonwork area immediately after having directed Bradley to stop distributing union T-shirts. Further, Barnabei stood close enough to Bradley to overhear conversations about the Union between off-duty employees. Accordingly, we find that Barnabei's conduct was objectionable. See *Hoschton Garment Co.*, 279 NLRB 565, 566 (1986).

Prohibition on Wearing Union Buttons

On November 4, 2009, 5 days before the election, Security Supervisor John Kovach informed employees before the start of the graveyard (night) shift that they could not wear union buttons on their uniforms. Kovach then asked at least two employees to remove their union buttons. As employee Dan Homa was attempting to remove his button, Kovach approached him and "assisted" him in the removal of the button; this action was witnessed by at least three other employees.

The following evening, Human Resources Vice President Barnabei and Supervisor Felix Diax held a preshift meeting with the graveyard shift employees. Diaz informed the employees that they could wear union buttons and that Kovach's asking them to remove the buttons the previous day had been "a misunderstanding." Barnabei testified that he was unsure whether the five employees who were present when Kovach told employees to remove their buttons were at the preshift meeting. Barnabei also testified in general terms about one-on-one meetings that took place on the morning of November 5, 2009, regarding the union buttons. Barnabei did not indicate which employees he talked to or what was said.

The hearing officer found that, although Kovach's November 4 actions were coercive and violated the Act, the conduct was not objectionable because the Employer effectively repudiated the unlawful conduct. We agree with the hearing officer's conclusion that Kovach's actions were objectionable, but we disagree with his further finding that the Employer effectively repudiated the conduct. In order for a repudiation to be effective, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978), citing *Douglas Div., Scott & Fetzer Co*., 228 NLRB 1016 (1997). Furthermore, there must be adequate publication of the repudiation to the employees involved, and the employer must not engage in any further proscribed conduct after the publication. Finally, the repudiation or disavowal of coercive conduct must include an assurance to employees that, going forward, the employer will not interfere with the exercise of their Section 7 rights. Id. at 138–139.

The record establishes that 24 hours after the employees were asked to remove their union buttons Supervisor Diaz apologized to employees and stated that "they could continue wearing their buttons if they wanted to." This statement fails to satisfy all of the requirements set forth in *Passavant*. First, the Employer's attempted repudiation was not sufficiently clear because the Employer did not admit any wrongdoing, but rather stated that the earlier instruction to remove the buttons was a "misunderstanding." See *Powelltown Coal Co*., 354 NLRB No. 60, slip op. at 4 (2009), incorporated by reference in *Powelltown Coal Co.*, 355 NLRB No. 75 (2010) (finding unlawful conduct was not repudiated by document that refers to clearing up "confusion"); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993) (finding that repudiation did not negate the coercive effect of an unlawful unilateral change where the employer did not admit to wrongdoing and the repudiation did not occur in an atmosphere free from other coercive conduct), enfd. 48 F.3d 1360 (4th

Cir. 1995), affd. on other grounds 517 U.S. 392 (1996). Second, the Employer's statement did not include an assurance that the Employer would not interfere with employee rights in the future. See *Bell Halter, Inc*., 276 NLRB 1208, 1213–1214 (1985). Accordingly, we find that the objectionable conduct was not effectively repudiated.

Grant of Extra Break on Election Day

On election day, voting took place from 7 to 9 a.m. and from 3 to 5 p.m. In Objections 16–18, the Petitioner alleges that the Employer engaged in objectionable conduct by granting some employee-voters an extra break that day. It is undisputed that on election day when the polls opened at 7 a.m., Supervisor Diaz told the approximately 12 to 15 employees working the graveyard shift (from 12 to 8 a.m.) that they could take an additional break for a short period for any purpose. Each of the employees working the graveyard shift took advantage of the extra break. The extra time off was not offered to day-shift employees working during the 3 to 5 p.m. voting period, however, because by 7:30 a.m., Diaz was informed that employees were supposed to vote during their regularly scheduled break.[3]

The hearing officer found that while "the extra benefit of time off was conferred on approximately 15 percent of the eligible security personnel," the benefit was small and not objectionable as it "appears unlikely that the incident would interfere with the [employees'] freedom of choice." We disagree.

We find that, although the extra break was characterized by the Petitioner as a "grant of benefit," this action by the Employer was not an ordinary grant of benefit. First, it was granted on election day for the clear purpose of permitting employees to vote during the extra break. Second, the Employer's action was in direct contravention of the ground rules agreed to by the parties to the election.[4]

The Employer's conduct raises concerns under both grant of benefit precedent and prior decisions concerning conduct that creates the impression that a party controls aspects of the election process. See *Alco Iron & Metal Co*., 269 NLRB 590, 591–592 (1984). But whether the conduct is characterized as a grant of benefit or as an infringement on the neutrality of the election process, there was an impermissible impact on employee free choice.

The purpose of a ground rules agreement such as the one entered into in this case is to insure that all parties agree about the details of the election, including whether and how employees will be released from work to vote. Without the agreement of all parties, neither the employer nor the union is permitted to control any aspect of the election process or convey the impression to eligible employees that it does so.[5] Here, where the parties had entered into a well-publicized agreement specifying that employees were to vote during their breaktime, the graveyard-shift employees would have understood that they had been given an extra break on election day solely as a matter of the Employer's beneficence and discretion and that the break was intended to facilitate their voting. Thus, right before the employees cast their ballots, the Employer's action unfairly signaled its authority to grant and thus to take away benefits (what the Supreme Court has called "the fist inside the velvet glove," *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964)), and suggested to the employees that the Employer controlled aspects of the election process, i.e., when they were permitted to vote.[6] Accordingly, we find that the Employer's actions constituted objectionable conduct.

2. Impact of objectionable conduct on the election

Having found that the Employer engaged in certain objectionable conduct, we must now determine whether the conduct warrants setting aside the election. In resolving the question of whether party misconduct is de minimis or whether it has the tendency to interfere with the em-

[3] Although there is no direct evidence of the Employer's motive, the fact that only one group of eligible voters was given the extra break raises concerns that the change in working conditions on election day might have been designed to make it easier for only those employees whom the Employer believed were opposed to union representation to vote. In fact, the hearing officer stated, "[s]ince the language describing the voting schedule was closely monitored by all parties, and the final schedule was posted days before the election, Diaz's offer of extra time off because he was under a mistaken belief about a release schedule is suspect."

[4] The Employer proposed a release schedule that would have allowed employees to vote during their worktimes, but that schedule was not approved by the parties. The parties' final agreement on the voting schedule provided that employees could vote "during working times if on a regularly scheduled break."

[5] Thus, the Board has overturned election results when a Board agent delegated the task of translating voting instructions to a union observer, see *Alco Iron*, supra at 591–592, and the D.C. Circuit has reversed the Board when it declined to do the same when a Board agent sent union representatives into the workplace to release employees to vote, see *North of Market Senior Services v. NLRB*, 204 F.3d 1163, 1168 (D.C. Cir. 2000).

[6] The fact that the Employer's conduct took place on election day, indeed, just before many if not all of the graveyard shift employees cast their ballots is also grounds for heightened scrutiny under Board precedent. See, e.g., *Kalin Construction Co*., 321 NLRB 649, 651 (1996) ("conduct that is otherwise unobjectionable can disturb laboratory conditions if it occurs during, or immediately before, the election"); *Milchem, Inc*., 170 NLRB 362, 362 (1968) ("final minutes before an employee casts his vote should be his own, as free from interference as possible").

ployee's freedom of choice, we consider several factors: the number of incidents, their severity, the extent of dissemination, the size of the unit, the temporal proximity of the misconduct to the election, the closeness of the final vote, and other relevant factors. See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004); see also *Caron International,* 246 NLRB 1120 (1979).

To begin, we find that the Employer engaged in four instances of objectionable conduct: it twice impermissibly restricted employees' right to engage in union activity at the workplace (distribution of T-shirts and prohibition on union buttons), it surveilled union activity, and it impermissibly granted a benefit to employees on the day of the election. Contrary to the hearing officer, we find that the objectionable conduct was more than minimal.

In considering the severity of the Employer's conduct, we find that the Employer engaged in conduct that impermissibly interfered with both the dissemination of campaign material and the free flow of information during the critical period. The Employer engaged in additional misconduct on the day of election. Accordingly, we find that the Employer's objectionable conduct was sufficiently serious to warrant setting aside the results of the election.

In reaching this conclusion, we have considered that the number of employees who were affected by the Employer's objectionable conduct is sufficient to require setting aside the results of the election given the 3-vote margin of victory.

Accordingly, we find that the hearing officer erred in finding that the Employer's conduct was de minimis and in overruling the Petitioner's objections. We sustain the Petitioner's objections numbered 7, 8, 9, 14, and 16–18, and direct that a second election be 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 that 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 date of the election directed herein and who retained their employee status during the eligibility period and their replacements. 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 date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, Security, Police and Fire Professionals of America (SPFPA).

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 ground for setting the election whenever proper objections are filed.

Dated, Washington, D.C. April 26, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD