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Caraustar Mill Group, Inc., d/b/a Sweetwater Paper-board and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Petitioner. Case10–RC–15820

December 19, 2011

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

The National Labor Relations Board has considered objections to an election held March 16, 2011,¹ in a unit of full-time and regular part-time production and maintenance employees, 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 27 votes for and 33 votes against the Petitioner, with no void or challenged ballots.

The Board has reviewed the record in light of the Petitioner’s exceptions and the parties’ briefs and has adopted the hearing officer’s findings² and recommendations only to the extent consistent with this Decision and Direction of Second Election.

For the reasons set forth below, we reverse the hearing officer and find merit in the Petitioner’s Objection 3, which alleged that, during the critical period, the Employer solicited grievances and promised to remedy them. Consequently, we shall set aside the election results and direct a second election.³

¹ All dates are 2011 unless otherwise indicated.

² The Petitioner 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.

³ In the absence of exceptions, we adopt pro forma the hearing officer’s recommendations that Objections 6, 13, 14, and 15 be overruled.

Chairman Pearce would find that labor consultant Shade Zebib’s statement that unionization at the facility would cause operating costs to increase by 20 percent was an objectionable threat. He finds it unnecessary to decide whether CEO Patton’s comment (that unionization might cause the Employer to lose its most valuable customer) was objectionable. He would also find that the statement made by Supervisor Randy McGatha to employee Nathan Gamal (“The CEO means what he says, if the Union is voted in he will shut down the mill.”) to be objectionable in the context of this election.

Members Becker and Hayes find no merit in the Petitioner’s exceptions to the hearing officer’s recommended overruling of the remaining objections. In particular, because the Petitioner failed to prove dis-

On February 2, the Petitioner filed its election petition. Upon learning of the petition, the Employer hired a labor consulting company to direct its antiunion campaign. After meeting with the Employer’s management, the labor consultants spent the following 3 weeks holding weekly, mandatory meetings for all employees in small groups of four to seven employees. There is no evidence that the Employer, either itself or through a consulting company, had held similar meetings in the past. An employee secretly made a recording of one of the meetings, held on February 15 with four or five employees present, and the parties submitted a transcript of that recording as a joint exhibit. The lead labor consultant, Shade Zebib, spoke for most of the meeting.

Zebib began the February 15 meeting by explaining the main areas of employee concern identified by management, which included employee dissatisfaction with Manager Randy Bollinger.⁴ According to Zebib, the managers to whom he had spoken consistently identified Bollinger as a source of employee discontent. As he put it, “[T]here were three people with multiple phone calls that said— I’m just going to spit this out—Randy is a problem in this facility, right?” He went on to explain some of the concerns management had heard about Bollinger, then invited employees to share their perspective, stating, “So we’ve heard two sides of the story and I’ll be more than happy to listen to you by the way you know, if you want to give us like a little fill in on this— no problem.” Zebib explained that he would appreciate, and be happy to write down, any employee feedback, stating he would “be more than happy to listen to [employees]” and that he “[needed] to verify . . . the employee side of” the Bollinger issue. Contrary to the hearing officer’s report, employees did respond to Zebib’s solicitations, including an employee who specifically asked why management had not acted on the reports of Bollinger’s overbearing conduct:

Employee: If you report to corporate and everybody, salaried people, hourly people, you’ve done seen a lot of people and everybody has the same—there’s two big problems here – but the same problem with this one individual—if they’re going to do something about it, why wasn’t he fired today?

Zebib: Actually, that is a very good question.

semination of Supervisor McGatha’s statement, they agree with the hearing officer that the statement was not grounds for overturning the election.

⁴ The hearing officer erroneously stated that Randy Bollinger was not identified by name in the meeting; Zebib repeatedly referred to “Randy” as the problem.

Zebib stated that the issue was important to company management, that “corporate wants to get to the bottom line in this” to understand “[w]hat went wrong, what happened and how we can avoid this in the future.” Zebib assured employees that no one was untouchable, including managers, and directly suggested that if employees verified that Bollinger was a concern, the Company would not retain him:

We have not met everybody yet. . . . It’s not fair to make, you know, let’s say a judgment of somebody without hearing everybody on all three shifts . . . Now the message was very consistent from the management team, by the way, and now we all need to verify that from the employee side of it and that is a decision we will have to make here very soon. . . . Friday we’re meeting with corporate and you know, something has to be done on the line there. So, are we listening? Absolutely. That’s the whole purpose of this meeting. Now they have no other choice. You can’t run a business like this with this kind of individual in any other mill, in any other plant by any other standards . . . But so far, everybody agrees in this room that this guy’s a problem, right?

Soon after, Zebib reiterated that “on Friday [i.e., February 18], we’ll take a look at [the Bollinger issue].” Bollinger was subsequently terminated on February 28, just over 2 weeks before the March 16 election, and the record demonstrates that employees were aware of the termination.

The hearing officer recommended overruling the objection, finding that Zebib’s statements were vague and did not demonstrate that he explicitly or implicitly promised to remedy any problems, and that he only stated that he could not do anything but write down what employees told him. Based on the transcript admitted by mutual agreement of the parties, we disagree.

Board law holds that, in the absence of a previous practice of doing so, an employer’s solicitation of grievances during an organizational campaign is objectionable when the employer expressly or impliedly promises to remedy those grievances. See, e.g., *Majestic Star Casino, LLC*, 335 NLRB 407, 407 (2001) (citing *Maple Grove Health Care Center*, 330 NLRB 775 (2000)); *Uarco, Inc.*, 216 NLRB 1, 2 (1974). Further, “the Board has found unlawful interference with employee rights by an employer’s solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary.” *Majestic Star Ca-*

sino, supra at 407–408 (quoting *Uarco*, supra at 1–2).⁵ Applying these principles here, we find that the record reflects that Zebib did more than merely campaign against the Union; he actively solicited grievances and implicitly promised to remedy them at the February 15 preelection meeting. Zebib began the meeting by conveying to employees his knowledge of their dissatisfaction with Bollinger. He then asked for feedback regarding Bollinger, whether “everybody” agreed that “this guy is a problem,” and whether employees could “verify” that the Bollinger grievance was genuine. He further told employees that the “whole purpose of this meeting” was to listen to them, and he engaged them in a dialogue on their views concerning the problem. He stated that corporate wanted to understand “[w]hat went wrong, what happened and how we can avoid this in the future.” Far from being a simple expression of his awareness of the Bollinger issue, Zebib’s statements constitute a persistent attempt to coax employees into validating a specific grievance that the Employer believed was of great importance to a large number of employees. Such conduct is not unobjectionable simply because the employer may have some preexisting knowledge of employee discontent. We find that, by repeated attempts to obtain feedback on and verification of employees’ dissatisfaction with Bollinger, Zebib engaged in the solicitation of grievances within the meaning of Board law.

Following the solicitations, Zebib impliedly if not expressly promised that management would remedy the Bollinger grievance and would do so soon, thereby violating the Act. He told employees that they would be wrapping up their meetings shortly, that management would “take a look at the [the Bollinger issue],” that “something has to be done,” that corporate had “no other choice,” that “everybody’s touchable,” and that “[y]ou can’t run a business like this with this kind of individual.” These were not vague or generalized statements, as the hearing officer found. Nor were they noncoercive campaign speech protected by Section 8(c). Rather, beyond merely stating that he would look into and review the problem with management, Zebib committed the Employer to a specific course of action: firing Bollinger. Taken together, Zebib’s statements clearly indicate that the Employer would end Bollinger’s employment, and as

⁵ Member Hayes did not participate in the cited cases, and does not pass on whether they were correctly decided. He agrees that those cases reflect current Board law governing unlawful solicitations and implied promises and applies that precedent here for institutional reasons. In Member Hayes’ view, the existence of an organizing campaign does not preclude an employer from discussing with its employees work-related issues and problems brought to management’s attention or from taking action to remedy the same.

such, were designed to undermine the Petitioner by improperly promising to remedy employees' grievances.

We do not find dispositive the fact that Zebib, rather than the employees, initially raised the Bollinger issue. As already discussed, Zebib's numerous statements constitute a clear solicitation of grievances.⁶ Additionally, although the hearing officer implied that Zebib stated at every meeting that the Employer could not solicit grievances and promise to remedy them, the record on this issue is not at all clear. None of the employees testifying to this fact attended the recorded February 15 meeting. Moreover, at no point during the recorded portion of the meeting did Zebib state that he was not permitted to solicit grievances or make promises.⁷ There is, therefore, insufficient evidence to rebut the objectionable effect of Zebib's solicitation of, and promise to remedy, the employees' grievance at the February 15 meeting. See *Majestic Star Casino*, supra.

We therefore find that the Employer's objectionable conduct during the critical period warrants setting aside the election and ordering a new election.

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 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

⁶ The burden was on the Employer to rebut the inference of an implied promise by establishing that, prior to the critical period, it had a past practice of soliciting grievances and implicitly promising to remedy them. See *Maple Grove Health Care Center*, supra at 775. Here, the Employer had been aware of the employees' dissatisfaction with Bollinger for months, yet there is no evidence that the managers or any other Employer representative met with employees to discuss their complaints.

⁷ The recording did not last for the entire duration of the February 15 meeting.

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 re-hired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

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 whenever proper objections are filed.

Dated, Washington, D.C. December 19, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD