UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

PORTILLO'S HOT DOGS, LLC
Employer

and **13-RC-313847**

INTERNATIONAL ASSOCIATION
OF BRIDGE, STRUCTURAL, ORNAMENTAL
AND REINFORCING IRON WORKERS, AFL-CIO
Petitioner

and

ARISE CHICAGO
Intervenor

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

On April 13, 2023[1], an agent of Region 13 conducted an election among certain employees of Portillo's Hot Dogs, LLC (the Employer). A majority of employees casting ballots in the election voted to be represented by the International Association of bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO (the Petitioner).

On April 19th, the Employer timely filed an objection to conduct affecting the results of the election. The objection is as follows:

1. The Union promised employees work permits, green cards, and citizenship in exchange for their vote and joining the Union.

After conducting the hearing and carefully reviewing all of the evidence as well as all of the arguments made by the parties, I recommend that the objections be overruled in their entirety because the Employer has not met its burden of establishing that the Intervenor[2] is an agent of

[1] All dates refer to 2023, unless otherwise noted.

[2] ARISE Chicago was granted Intervenor status for the sole purpose of protecting its interest during the post-election hearing.

the Petitioner, nor that the Petitioner engaged in objectionable conduct affecting the results of the election.

In the following sections, I recount the procedural history as well as the Employer's operations and the background of the case. I then describe the record evidence relevant to the Employer's Objection. I then state the Board standard applied to the Objection, the parties' respective burdens, analyze the record evidence under the appropriate standards, make my recommendations, and set forth the appeal procedure.

II. PROCEDURAL HISTORY

Based on a petition filed on March 10th, an election by secret ballot was conducted on April 13th, to determine whether a unit of employees of the Employer wished to be represented for purposes of collective bargaining by the Petitioner.

The voting unit consists of:

Included: All full-time and regular part-time production associates, Forklift Operators, HACCP Coordinators, FSQA Associate, Plant Mechanic, Crew Chiefs, and temporary employees in these classifications, employed by the Employer at its facility currently located at 380 S. Rohlwing Rd, Addison, Illinois.

Excluded: All other employees, salaried employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

The Tally of Ballots served on the parties at the conclusion of the election shows the following:

Approximate number of eligible voters	48
Number of void ballots	0
Number of votes cast for Petitioner	28
Number of votes cast against participating labor organization(s)	20
Number of valid votes counted	48
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	48

The challenges were not sufficient in number to affect the results of the election.

On April 19th, the Employer timely filed an objection. The Regional Director for Region 13 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objection. As the hearing officer designated to conduct the hearing and to

recommend to the Regional Director whether the Employer's objection is warranted, I heard testimony and received into evidence relevant documents on May 11th and May 23rd.[3]

III. THE EMPLOYER'S OPERATIONS AND FACILITY

The Employer operates a food service processing facility for its restaurants in Addison, Illinois (Employer's facility). The employees work in production, quality control and various product departments (raw veggie, etc.) The facility contains a break room, which is used by the entire bargaining unit during the various shifts.

IV. CREDIBILITY DETERMINATIONS

Unless otherwise stated, my credibility findings are based on the witnesses' general demeanors. There were eleven (11) witnesses called for this hearing, four (4) testified under subpoena by the Employer.

I found Fernando Medina (Medina) to be credible based on his general demeanor while testifying. Medina's testimony did not appear to be rehearsed and his answers to questions were straightforward and forthcoming and gave good details on conversations. Similarly, I found employees Alma Garcia (Garcia) and Liza Rodriguez (Rodriguez) to be credible based on their forthcoming answers and their demeanor while testifying, also giving good details on conversations. I also found ARISE worker center director Laura Garza (Garza) somewhat credible - she gave details concerning ARISE's involvement in the organizing campaign as well as the organization's involvement with the Iron Workers Union, but multiple employees gave testimony on statements she made at employee meetings that she denied.

I found employees Alexis Martinez (Martinez), Guadalupe Rivera (Rivera), Maria Cordova (Cordova) and Juan Hernandez Santoyo (Santoyo) somewhat less credible due to their testimony being vague and lacking the specific details given by Medina, Garcia and Rodriguez.

Finally, I do not find Hank Hunsell's (Hunsell) testimony to be credible. Hunsell's testimony consisted mostly of unknowns about payments made to and from ARISE to the Local Union and International Union and self-serving denials concerning any statements made during campaign meetings about work permits and work authorizations, which was in contrast to many employees' testimony. I also do not find Juan Diaz's (Diaz) or Juan Mariaca's (Mariaca) testimony credible as both witnesses denied statements and conversations that many other witnesses confirmed about the campaign meetings and discussions with co-workers made at the Employer's facility.

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[3] The hearing was conducted in person on May 11th and by Zoom teleconference on May 23rd due to the absence of subpoenaed witnesses on the 11th.

V. THE BURDEN OF PROOF AND THE BOARD'S LEGAL STANDARDS FOR SETTING ASIDE ELECTIONS

A. Burden of Proof for Representation Elections

It is well settled that "[r]epresentation elections are not lightly set aside," and that "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB 637 (2014), citing *Polymers, Inc*., 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). The objecting party's burden encompasses every aspect of a prima facie case. *United Sanitation Services, Division of Sanitas Service Corp.*, 272 NLRB 119, 120 (1984). Moreover, to meet its burden, the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

B. Legal Standard for Alleged Party Misconduct

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test, the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In assessing whether an election should be set aside, the Board considers all the facts and circumstances to determine "whether the atmosphere was so tainted as to warrant such action." *Madison Square Garden*, 350 NLRB 117, 119 (2007), citing *General Shoe Corp.*, 77 NLRB 124 (1948), enfd. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952). Some of the factors considered by the Board in determining whether a party's conduct has the tendency to interfere with employee free choice, include: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the

misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

VI. THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR ESTABLISHING UNION AGENCY

Legal Standard for Establishing Whether Intervenor was Agent of Petitioner

The Board, in *E. J. Brach Corp.,* 324 NLRB 1193 (1997), examined whether a temporary employment agency West Personnel Service, in securing temporary employees' signatures on dues check-off forms, was an agent of the union. The answer to this inquiry begins with Section 2(13) of the Act which provides that: "in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question is whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

In *Service Employees Local 87,* 291 NLRB 82 (1988), the Board explained that agency may be established in several ways, either by apparent authority and/or ratification. The Board concluded that apparent authority is created when the principal acts in a manner which leads a third person "to believe that the principal has authorized the alleged agent to do the acts in question." *Id* at 82-83. The Board also defined ratification as "the affirmance by a person of a prior act that did not bind him, but which was done or professedly done his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Id.* at 82-83.

In *Service Employees, supra,* the Board found the union liable for unlawful picketing, even in the absence of specific evidence that it initiated or authorized the objectionable conduct. In reaching this conclusion, the Board relied on the fact that the union leadership had been notified that pickets were carrying "Local 87" signs for seven days and took no action to stop it. The Board reasoned that, under these circumstances, the union should have known that the pickets' conduct would give rise to the belief that they were authorized to act on the union's behalf and that by failing to act, the union ratified the pickets' conduct.

In *University Towers,* 285 NLRB 199, the Board ruled that where a union permits employees to distribute authorization cards to other employees, it thereby vests the solicitors with actual authority to obtain signed cards on its behalf. Moreover, unless the union indicates to third parties that employee statements made during the course of such solicitations are not regarded as union policy, the employee-solicitors are vested with apparent authority to make statements with respect to the cards. In this case, the union will be held responsible for such representations, lawful or not.

In the instant case, Laura Garza testified that she works for ARISE Chicago (Intervenor) as the Worker Center Director. She testified that the Intervenor met with employees in January of 2023 and helped organize employee meetings for the employees in February of 2023 with the Petitioner and that their role was educating employees on concerted activity, wages, sick leave

and collaborating to support union campaigns. She further testified that individuals from the Intervenor were present along with the Petitioner, who were encouraging employees to sign authorization cards and encouraging employees to join the union. (TR. 40-41).

Fernando Medina, Alma Garcia and Maria Cordova all testified that individuals from the Intervenor (usually Laura Garza, (b) (6), (b) (7)(C) (b) (6), (b) (7)(C)) were present along with union representatives during several campaign meetings in January, February and March of 2023. This testimony consisted of the Intervenor encouraging employees to join the union and to be united.

In applying the *Service Employees, supra,* standard to the instant case, the testimony shows that the Intervenor and Petitioner were present for several organizing meetings in the months leading up to the April 13th election. The testimony further establishes that employees of the Intervenor were involved with planning these meetings, speaking at them, encouraging employees to sign union authorization cards and answering questions from employees. Under these circumstances, the Petitioner should have known (considering they were in attendance during these meetings) that the Intervenor, in engaging in the same conduct as Petitioner, would be vested with apparent authority to speak on the Petitioner's behalf and the Petitioner would be held responsible for their statements, lawful or not.

Similarly in applying *University Towers*, *supra,* the Petitioner in the instant case never informed employees during the meetings that the statements made by the Intervenor while soliciting authorization cards were not union policy nor was it ever made clear to the employees that the Intervenor was not soliciting employees to sign the authorization cards.

Consequently, I would find that the Petitioner, in failing to distinguish themselves from the Intervenor when soliciting authorization cards and organizing employee meetings, ratified the Intervenor's conduct during the campaign and vested the Intervenor with apparent authority to speak on behalf of the Petitioner. I would recommend, based upon the testimony received, that the Intervenor was an agent of the Petitioner.

VII. THE EMPLOYER'S OBJECTIONS

Legal Standard for Conduct Outside the Critical Period

Since *Ideal Electric Co.,* 134 NLRB 1275 (1961), the Board has consistently held that the critical period during which parties conduct will be scrutinized for its impact on employees who voted in an election commences with the filing of the petition. The Board, in setting the date of filing as the commencement of the critical period, was satisfied that this date would be the appropriate cut off point and would not permit consideration of matters that were too remote to the election during the post-election process. The Board, thereafter, has routinely applied the *Ideal Electric* period as the time frame for review of conduct asserted to be objectionable. See also *National League of Professional Baseball Clubs,* 330 NLRB 670 (2000).

The Board will consider conduct that occurred prior to the filing of the petition in very limited circumstances. In *Dresser Industries*, 242 NLRB 74 (1974), the Board was confronted with a motion for reconsideration after the Ninth Circuit had reversed several of the findings that it had been relied upon in ordering a new election. Upon reconsideration, the Board noted that the record still supported findings of unlawful conduct by the employer's plant manager and several supervisors, and it again set the election aside. The Board held that the employer had interrogated an employee, solicited complaints from employees, and threatened employees with a loss of benefits if the union was elected. While all of this conduct occurred prior to the filing of the petition, the Board specifically noted that the employer, within the critical period, also engaged in an unlawful interrogation and promise of benefits to an employee previously threatened and that the pre-petition conduct continued within the critical period. Therefore, the Board held in *Dresser* that the rule in *Ideal Electric* does not preclude consideration of pre-petition conduct where it "adds meaning and dimension to related post-petition conduct."

While the Board will consider pre-petition conduct that is directly related to post-petition conduct that is directly related to post-petition conduct, it is also well established that the Board will generally not set aside an election based solely on conduct which occurred prior to the petition. See *Data Technology Corp.,* 281 NLRB 1005 (1986).

Legal Standard for Union Promises and Grants of Benefits

The Board has held that "employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises…..are easily recognized by employees to be dependent on contingencies beyond the union's control and not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises of benefits." *Smith Co.,* 192 NLRB 1098, 1101 (1971); see also *Lalique N.A., Inc.*, 338 NLRB 986 (2003).

That said, a union promise may be objectionable if the benefit promised is within the union's power to effectuate it. See *Alyeska Pipeline Service Co.,* 261 NLRB 125, 126 (1982) (union controlled all access to construction jobs in Alaska for employees participating in election, and thus union's suggesting only way to get union card was by voting for union in upcoming election was objectionable as union was clearly promising to grant members advantage over nonmembers and had the power to do that). But see *Station Operators,* 307 NLRB 263, 263 fn. 1 (1992) (stating that the holding in *Alyeska* was tied to its special facts); *Electrical Workers Local 103 (Drew Electric),* 312 NLRB 591, 593 fn. 6 (1993) (distinguishing *Alyeska).*

The Board has found union offers to waive back dues objectionable in *Go Ahead North America LLC,* 357 NLRB 77 (2011), but did not find objectionable a union offering to put employees in contact with a news reporter who was doing a story on organizing, stating that this conduct was not shown to be "tangible, substantial, and a direct benefit" that would interfere with free choice. See *Washington National Hilton Hotel,* 323 NLRB 222 (1997).

Employer Objections

In the instant case, the Employer's objections are as follows:

The Union Promised Employees Work Permits, Green Cards, and Citizenship in Exchange for their Vote and for Joining the Union During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, promised voting unit employees on multiple occasions that: (a) the Union would give two-year work permits for employees if the Union was voted in; (b) if employees joined the Union then they could qualify for getting a two year work permit and the Union would help them get the permits; (c) the Union would provide employees with green cards in exchange for voting "Yes"; (d) employees could become American citizens if they voted "Yes" to the Union; and (e) the Union and Arise were already submitting for work permits for employees who attended the Union meeting.

The Employer presented several witnesses at hearing who gave testimony concerning meetings and conversations had during the organizing campaign by the Petitioner and Intervenor. Employees Fernando Medina, Alexis Martinez and Alma Garcia all testified that organizing meetings were held in January, February and on March 9th at various locations, including a McDonalds and a church. Laura Garza also testified similarly about the time frame for these meetings. There was also testimony from employees Guadalupe Rivera, Liza Rodriguez, and Maria Cordova as well as Medina, Martinez and Garcia, concerning conversations had with co-workers about the contents of those meetings during the week leading up to the election (April 13th).

The Employer is asking that this election be overturned based primarily (if not exclusively) on pre-petition conduct. As set forth above, most if not all of the conduct occurred in January, February and March 9th (day before petition filed). There was no testimony presented at hearing of conduct that occurred post-petition or during the critical period. An argument could be made that March 9th was the day before the petition was filed and is as close to the critical period as possible. The only testimony presented that occurred during the critical period was discussions between co-workers about the allegedly objectionable conduct (possible dissemination).

There was no testimony presented at hearing concerning the Employer's objections listed under (c), (d), and (e) above. Medina testified that Garza informed a group of employees that if the Union came in, there could be a possibility of work authorization for two years (TR 50-51). Garcia testified that in one meeting, Garza informed the employees that they could help them the same way they helped employees at El Milagro, that they were in the process of DACA (TR 78), and in another meeting, Garza informed them that they were going to give them (employees) a work permit for two years and after we won, the process for work permits could begin (TR 79). Cordova testified that Garza informed employees that probably, she couldn't ensure them, but depending on the work situation, she could probably get them work permits (TR 117-118).

In applying the *Alyeska* case to the instant case, I do not find that the Petitioner, nor the Intervenor acting as an agent of the Petitioner, has the power to grant individuals work authorizations or work permits. While there was minimal testimony as to how or when the Petitioner or Intervenor could grant such a benefit, Petitioner's Exhibit 3 shows that the Department of Homeland Security, in coordination with the U.S. Citizenship and Immigration Services (USCIS), handles any and all applications for work authorizations and granting of work permits, as well as working with any investigatory labor agencies in granting two-year work "deferrals". The testimony by most of the witnesses showed that Garza made reference to the "two-year work permits/authorizations".

Ultimately, it is moot as to whether the conduct occurred pre-petition or post-petition (during the critical period) as it is not objectionable conduct under *Alyeska* and *Washington National* case standards.

VIII. CONCLUSION

I recommend that the Employer's objections be overruled in their entirety. The Employer has failed to establish that the Petitioner or Intervenor engaged in objectionable conduct affecting the results of the election. Thus, there is insufficient evidence to set aside the election held on April 13th. Therefore, I recommend that an appropriate certification issue.

IX. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 13 by **Wednesday, August 2, 2023.** A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Pursuant to Section 102.5 of the Board's Rules and Regulations, exceptions must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing exceptions does not have access to the means for filing electronically or filing electronically would impose an undue burden. Exceptions filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business 5:00pm on the due date. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: July 19, 2023

/s/ Christopher J. Lee
Christopher J. Lee
Hearing Officer
National Labor Relations Board, Region 13
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Chicago, IL 60604