UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

BUNGE OILS, INC.

Employer

and **Case No. 16-RM-777**

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 540

Union

HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION

This report contains my findings and recommendations regarding one objection filed by the Union to the election held on September 5, 2008.

The Union alleged that the Employer, and its agents, representatives and/or supporters infected the laboratory conditions on the election and made a free and fair election impossible by engaging in the following conduct:

> David Harding, a manager, threatened, restrained and coerced voting unit employees at a meeting called by the Employer by implicitly suggesting that if the Union won the election, up to seven bargaining unit jobs would be lost as a result.

Upon examination of the entire record evidence, based on my observations of the witnesses and their demeanor, and upon review of the parties' post-hearing briefs, I conclude that the Union has not met its burden of establishing that Harding unlawfully threatened employees and, therefore, has not met its burden of proving objectionable conduct. I find that all of the witnesses testified credibly and consistently with the recording of the meeting on the main points. Therefore, I recommend the Board overrule the Union's objection.

Procedural History

Pursuant to a stipulated election agreement, an election was conducted by secret ballot on September 5, 2008, in the following unit of employees:

Included: All production and maintenance employees at the Employer's facility at 6700 Snowden Road, Fort Worth, TX 76140.

Excluded: All other employees, including full-time plant clerks, police force, watchmen, general office payroll, employees of the Plant Manger's office, managers and supervisors as defined in the Act.

At the conclusion of the election, the parties were served with a copy of the Tally of Ballots that disclosed the following:

Approximate number of eligible voters	28
Void ballots	0
Votes cast for the Petitioner	14
Votes cast against participating labor organization	14
Valid votes counted	28
Votes challenged	0
Valid votes counted plus challenged ballots	28

On September 12, 2008, the Union filed timely objections to conduct affecting the results of the election, copies of which were served upon the Employer and Regional Director.

On September 26, 2008, after an investigation conducted pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director issued and served on the parties an Order Directing Hearing and Notice of Hearing in which she found that the allegation raised by the Union's objection raised substantial and material issues of fact and credibility which could best be resolved by a hearing.

Pursuant to that Order, a hearing was held on October 16, 2008, in Fort Worth, Texas, before the undersigned duly designated Hearing Officer. The parties participated in said hearing

and were afforded full opportunity to be heard, to present testimony, to call, examine and cross-examine witnesses and to otherwise introduce evidence which was relevant to the issues involved herein. The Hearing Officer granted leave to file post-hearing memoranda of points and authorities not to exceed two pages.

Overview of Facts

The facts in the instant case are largely undisputed. The Employer is in the business of manufacturing and supplying edible oils to customers. David Harding is the Vice President of Operations of Bunge Oils, Inc. and employs approximately 28 production and maintenance employees at the Fort Worth facility.

By letter dated May 20, 2008, Johnny Rodriguez, Union International Vice President and President of Local 540, sent a letter to several of the Employer's customers including their largest customer, Yum! Brands, Inc. (hereinafter referred to as Yum!) which stated "After numerous valid attempts, we have been unable to reach a new and fair Collective Bargaining Agreement with Bunge. Due to this very serious matter, a labor dispute with Bunge Oils in Fort Worth, Texas is imminent. Because we recognize that our dispute is not with your Company we wanted to take this opportunity to give you the advance notice of this critical situation so that you may have time to seek out other business alternatives to avoid any delays or conflicts in serving your customers."

On August 28, 2008, David Harding held a mandatory meeting with each of the three shifts of bargaining unit employees, at which the plant manager, human resource manager, and Harding were present. During that meeting, he stated that he believed Yum! was concerned about the Union's letter because normally they would have had a contract for 2009 by July of 2008, but it was August 28, 2008 and they did not yet have a 2009 agreement to supply Yum!

with oil. He also stated that if the Employer lost Yum! as a customer as a result of the Union's letter, there would be a loss of seven jobs. Pertaining to the election, Harding told the employees that by voting no to union representation they could send a message to Yum! that the letter sent by the Union did not represent how they feel.

On September 5, 2008, an election was held which resulted in a tie vote and the Union not being certified as the employees' collective bargaining representative.

<u>The Witnesses' Testimony</u>

The Union's first witness, *Charles Hightower*, testified initially during his direct examination that his understanding of what Harding said in the August meeting was that the seven jobs would be lost because of the Union winning the election (p. 21); but then on cross examination testified that Harding stated during the August meeting that the loss of seven jobs was based on whether the Employer lost Yum! as a customer (p. 35). He also testified that he understood that if Yum! continued to be a customer, the seven jobs would remain (p. 36).

The Union's second witness, *Gilberto Aguilar*, testified that during the August meeting, Harding stated that if they lost Yum!'s business based on the letter the Union sent to Yum!, they would lose seven jobs (p. 43).

The Employer's witness, *David Harding*, testified that he told the bargaining unit employees during the August meeting that the Employer could lose Yum!'s business because of the Union's letter and if Yum!'s business was lost, seven jobs would be lost (p. 70, 72). He also testified that he told employees they could send a message to Yum! that the Union's letter did not represent their feelings by voting no in the election (p. 77).

The August 28, 2008 meeting was recorded and the recording was submitted into evidence by the Employer. The Union did not dispute the accuracy of the recording.

Analysis

The Union's objection asserts that the results of the election should not be certified because the Employer, through Manager Harding, affected the results of the election by implicitly suggesting to employees that if the Union won the election, seven jobs would be lost. The burden of proving objectionable conduct rests on the party asserting that claim. ***NLRB v. WFMT***, 997 F.2d 269 (7th Cir. 1993). For the reasons set forth below, I conclude that the Union has not met its burden and recommend certification of the results issue.

As noted, the facts in this case are largely undisputed as there was little substantial variation between witnesses' testimony on Harding's statement and each testified credibly on the main points based on their demeanor, the other witnesses' testimony and the recording offered into evidence by the Employer.

The evidence shows that there were 28 production and maintenance employees in the bargaining unit and almost all attended at least one of the Employer's mandatory meetings where the alleged threat of job loss was made. Further, the alleged threat was made only eight days prior to the election by a high ranking Employer representative, the Vice President of Operations. Additionally, an alleged threat of job loss affecting seven employees (more than 20 percent of the bargaining unit) is severe in nature.

However, the alleged threat was isolated as it was the only objection to the election filed.

Both parties correctly rely on ***NLRB v. Gissel Packing Co***., 395 U.S. 575 (1969) where the Court held that an employer can predict the "precise effect he believes unionization will have on his company…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."

The Union relies on ***Reeves Brothers, Inc***., 320 NLRB 1082 (1996) where the Board found that the employer's prediction was not based on objective facts because it overstated the statement made in customers' letters. However, the Board focused on the employer's statements to employees that they would lose the customer's business which could result in job loss, while the customer's letter only stated that they would consider taking work away from the employer if the union was voted in. That case is distinguishable from the instant case, because Harding did not say that the Employer would lose Yum!'s business if the Union was voted in, he merely expressed that they might lose Yum!'s business because of the Union's May 20, 2008 letter and if that were to happen, the loss of seven jobs would result.

The Employer relies on ***Tri-Cast***, 274 NLRB 377 (1985). In that case, the Board found that the employer's statement to employees that if "we have to bid higher or customers feel threatened because of delivery cancellations (union strikes) we *lose business and jobs*." was not objectionable because the employer's comments predicted what could happen if events out of their control occurred and the employer's statement was not a threat or retaliatory conduct. Similarly, in the instant case, Harding stated that jobs would be lost if the Employer lost Yum! as a customer and he tied the potential lost business to the specific action of the Union's May letter and Yum!'s concern over that letter rather than to unionization in general.

However, the Board found objectionable an employer's statement communicated to nearly all bargaining unit employees that the employees' were playing Russian roulette if they voted for the union, where one bullet was their only customer who could cancel at any time for any reason and the other bullet was a plant shut down if deemed necessary by the employer. ***Southern Labor Services, Inc. / Florida Transportation Services, Inc***., 336 NLRB 710 (2001). The Board found that both statements were objectionable because neither was based on objective

facts and it implied that the employer could take action solely on his own initiative which constituted a threat of retaliation. The instant case is distinguishable because Harding did not say that the Employer would eliminate jobs based solely on the outcome of the election or if Yum! continued as a customer. Additionally, Harding's comments that the Employer could lose Yum!'s business based on the Union's letter were based on the objective fact that Yum! had expressed concern over the Union's letter, requested weekly status reports on their labor issues, and delayed in signing a 2009 contract with the Employer.

The Board more recently overruled a union's objection to an employer's statement that one of their customers "doesn't like the Union; that if the Union comes in we wouldn't have a job with" that customer, and when asked if the customer would terminate its contract with the employer, the employer responded that the customer "does not have any union carriers doing home delivery services." ***TNT Logistics North America, Inc.,*** 345 NLRB 290 (2005). The Board overruled the objection because an employer may make predictions in the course of a campaign, those predictions were of actions that were beyond the employer's control, specifically what the customer might do if the employee's unionized, and the predictions were based on the objective fact that the customer in question did not have any union carriers and their contract with the employer was due to expire.

In conclusion, in the instant case, Harding's statements that the Employer could lose Yum! as a customer because of the Union's letter which would result in job loss was based on the objective evidence that Yum! was concerned by the Union's letter enough to contact the Employer for an explanation, delay in signing a 2009 contract with the Employer for several months, and request weekly status reports from the Employer on their labor issues.

Recommendation

Accordingly, upon the foregoing findings of fact and conclusions, and upon the entire record herein, it is recommended that the Union's objection be overruled, and that the Board issue a Certification of Results of Election in this matter.

Filing of Exceptions

Within 14 days from the date of this report, any party may file with the Board in Washington, D.C., an original and seven copies of exceptions in accordance with Section 102.69(b) of the Board's Rules and Regulations, Series 8, as amended. Immediately upon the filing of such exceptions, the party filing same shall serve a copy on the other parties and a statement of service with the Regional Director. If no exceptions are filed, the Board may then adopt the recommendations of the Hearing Officer.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relation Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance may also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Dated at Fort Worth, Texas, this 28th day of October, 2008.

/s/ Darci Slager

Darci Slager, Hearing Officer
National Labor Relations Board
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