Delta Brands, Inc. *and* Machinists District Lodge 290, Local Lodge 1528 a/w International Association of Machinists, AFL–CIO, Petitioner. Case 32–RC–5055

February 7, 2005

SUPPLEMENTAL DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 28, 2003, Hearing Officer Karen Reichmann issued a report and recommendation, sustaining one of the Union's objections to an election conducted on September 10, 2002, pursuant to a Stipulated Election Agreement, in which 8 ballots were cast for and 10 ballots against the Union. The Employer filed exceptions to the hearing officer's supplemental report and a supporting brief, and the Union filed an answering brief.

The hearing officer's initial recommendation that the election be set aside was based on the finding that**,** during the critical period, the Employer maintained an unlawful rule (rule 31) in its employee policy manual that restricted workplace solicitation.[1] On November 28, 2003, in an unpublished decision, the Board, by a three-member panel, remanded the case to the hearing officer with instructions to take additional evidence on the factual issue of whether rule 31 had been disseminated to employees.[2]

On January 28, 2004, the hearing officer issued a supplemental report, reaffirming her finding that the Employer had engaged in objectionable conduct as to rule 31, which prohibits "[v]ending, soliciting, or collecting contributions for any purpose unless authorized by management." The Employer again filed exceptions and a supporting brief, and the Union filed exceptions and an answering brief.

The National Labor Relations Board has considered the hearing officer's report and supplemental report, the record, the exceptions, and the parties' briefs, and has decided to adopt the hearing officer's reports only to the extent explained below.

I. THE HEARING OFFICER'S SUPPLEMENTAL FINDINGS

In her supplemental report, the hearing officer found that one employee was hired and given the Employer's policy manual, containing rule 31, during the critical period; that a second new employee received the manual 3 days before the Union's petition was filed; and that a third new employee received it less than 6 months before the petition's filing. Each new employee is given a copy of the manual and is required**,** upon receipt**,** to sign a written acknowledgement of responsibility for reading and abiding by its contents. The hearing officer also found, based on the evidence in the record, that the Employer expects all its employees to "adhere to all the rules and policies contained within [the manual] throughout their employment."

From these fact findings, the hearing officer found that "the overbroad no-solicitation [rule] at issue was indeed fresh in the minds of at least three employees close in time to the date of the election." Given the closeness of the election and the small size of the unit, the hearing officer concluded that rule 31 was disseminated to those three employees "in such close proximity to the election [that it] reasonably could have affected the results." On these grounds, the hearing officer again recommended that the election be set aside. For the reasons that follow, we disagree.

II. ANALYSIS

In remanding the case for the taking of additional evidence, the Board found that the hearing officer's initial finding that the no-solicitation rule was "widely disseminated throughout the entire bargaining unit" was not supported by the record. The Board found that "[a]lthough each employee apparently received a copy of the manual at the time of hire, and was required to sign an acknowledgment of having received it at that time, it is not clear that employees' attention was ever called to the no-solicitation rule, or even to the manual as a whole, at any time after they were hired. . . . In short, the hearing officer, in considering whether the rules in question were maintained during the pre-election period, did not fully address the extent to which the Employer's policy manual was disseminated."

The evidence shows that the rule was not adopted in response to the Union's organizing campaign, that it was part of a 36-page handbook, and that only one employee received the handbook during the critical period. There is no evidence that the Employer called employees' attention to the rule, including, significantly we think, the one employee who received the handbook during the critical period. Nor is there any evidence that the Employer enforced the rule or that any employee was in fact deterred by the rule from engaging in Section 7 activity.

It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omit-

[1] The hearing officer did not pass on three other rules in the Employer's policy manual that the Union contended were unlawful, and no exceptions were filed as to the hearing officer's treatment of those other rules.

[2] Member Liebman, while joining the decision to remand, stated that the evidence from the original record was sufficient to decide the case.

The Union filed a motion for reconsideration of the decision to remand, which the Board denied on February 2, 2004.

ted). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." Id. Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (internal citation omitted). The objecting party must show, inter alia, 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 alleged coercive incident), see *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999), and had a reasonable tendency to affect the outcome of the election. Id.

That burden of proof has not been met here. The rule at issue was contained in a policy manual which was 36 pages long and which contained a large number of workplace rules and requirements in addition to the no-solicitation rule, which was relatively brief. It is also clear from the record that the rule was not enforced. The Employer had an established practice of permitting solicitations in the workplace. The Employer's witnesses testified, without contradiction, that solicitations for Girl Scout cookies, Christmas gifts, sports teams, and school fundraisers had previously been permitted.[3] In these circumstances, we do not believe that the inclusion of the no-solicitation rule in the Employer's policy manual, standing alone, is sufficient to establish that the outcome of the election could have been affected by the existence of rule 31. Contrary to our dissenting colleague's claim, our decision is not a departure from established Board law. Our colleague cites Board cases which hold that it is "axiomatic that merely maintaining an overly broad rule violates the Act." Even accepting that premise, it is not "axiomatic" that such conduct warrants setting aside an election. For example, if a union lost an election 100–0, and the rule was not enforced, adverted to, or given to any employee during the critical period, we doubt that it would be "axiomatic" that the election should be set aside. Rather, as with all elections, the Board looks to all of the facts and circumstances to determine whether the atmosphere was so tainted as to warrant the setting aside of the election. In the instant case, we have the mere presence of an overbroad rule in a much larger document, with no showing that any employee was affected by the rule's existence, no showing of enforcement, and indeed no showing of any mention of the rule. In short, there is no showing that the mere existence of the rule could have affected the results of the election.[4]

Our colleague presumes that employees are "affected" by the rule. She indulges in this presumption because there is no evidence of such an effect.[5] We are unprepared to so presume on the facts of this case. Of course, the burden is on the objecting party to prove its objection, and without such a presumption, that burden is not satisfied here.[6]

Our decision here is supported by the approach followed in *Safeway, Inc.*, 338 NLRB 525 (2002). There, the Board considered whether an arguably overbroad confidentiality rule could reasonably have affected the outcome of a union-decertification election. The employees there were represented at all material times by the union, which could have advised employees that the rule could not lawfully be applied to protected activity**,** and which never viewed the rule as infringing on employee rights. The Board declined to set aside the election. *Safeway,* at 526. Here, too, in holding that mere maintenance of the challenged rule is not a basis to set aside the election, we properly look at all of the surrounding circumstances.

As noted, *Safeway* stands for the proposition that the mere maintenance of an arguably overbroad rule will not be the basis for overturning an election where an incumbent union was in a position to advise employees of their rights. Our colleague reads *Safeway* to stand for the obverse proposition, i.e., that the election *will* be overturned when there is *no* incumbent union. Of course, *Safeway* does not so hold. Neither would we read the case to so hold. A union engaged in an organizational campaign, like an incumbent union, has both the interest and the know-how to apprise employees of their statutory rights.

Accordingly, we will certify the election result.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Machinists District Lodge 290, Local Lodge 1528 a/w International Association of Machinists, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

[3] There is no allegation that the Employer permitted these activities and prohibited Sec. 7 activities. Thus, employees had no reason to believe that Sec. 7 activities would be forbidden.

[4] We do not hold that the objecting party must show that the rule is "fresh in the minds of the employees." We simply note that the absence of that "freshness" is a factor to be considered.

[5] Our colleague also says that three employees were given the manual "shortly before the election." In fact, as noted above, only one employee was given the manual during the critical period.

[6] The evidence that is required is not "subjective" evidence. For example, the Union could have adduced evidence that it told employees, or employees told each other, that they should refrain from solicitation because of the rule. There is no such evidence.

MEMBER LIEBMAN, dissenting.

Until today, under Board law, it was well settled that an employer's mere maintenance of an unlawful rule is not only objectionable conduct, but also sufficient grounds to set aside an election.[1] This result follows from the reasonable tendency of the rule to interfere with employees' free choice, by inhibiting them from engaging in the conduct prohibited by the rule.[2] As the Board has explained, "the maintenance of the rule, not its date of promulgation, enforcement, or the effects it had on employees' specific conduct, is what is significant."[3] We have applied these established principles very recently. See *Pacific Beach Hotel*, 342 NLRB 372, 373–374 (2004) (setting aside election, based on maintenance of an overbroad handbook policy prohibiting solicitation on company property).

The no-unauthorized-solicitation rule involved in this case was facially unlawful. See *Opryland Hotel*, 323 NLRB 723, 728–729 (1997) (employer may not lawfully require employees to seek prior approval for solicitations). The majority does not dispute that the rule was generally disseminated to employees, in a policy manual to which employees were expected to adhere. On this occasion, however, the majority holds the Union to additional requirements of proof. To set aside this election, the Union must show: (1) that the policy manual containing the unlawful rule was actually given to multiple employees during the critical period; (2) that the Employer enforced the rule or otherwise "called the attention" of employees to it; or (3) that employees were, in fact, influenced in voting or deterred by the rule from engaging in Section 7 activity. There is no basis in our case law for such requirements. And, on the record here, it is clear in any case that the rule reached enough employees, recently enough, to make a potential difference in the election results.

I.

Well-established legal principles govern this case. With respect to an overbroad workplace rule, the only question is whether maintenance of the rule could reasonably have affected the election results. See, e.g., *Pacific Beach Hotel*, id. at 3.[4] As with respect to objectionable conduct in general,[5] this is an objective test. "The mere maintenance of an overbroad rule can affect the election results because employees could reasonably construe the provision as a directive from their employer that they refrain from engaging in permissible Section 7 activity." *Pacific Beach Hotel*, ibid. A union is not required to prove that the rule was enforced or that it actually had an effect on employees. E.g., *Freund Baking*, id. at 847 fn. 5. Rather, where an objectionable rule is contained in an employee handbook, employees who received the handbook are presumed to be aware of the rule and to have been affected by it. As a result, the election must be set aside.[6]

In the face of this authority, the majority insists that its decision is "not a departure from established Board law." I disagree. Here, the majority reallocates the burden of proof to the objecting party to show more than that the rule was maintained.[7]

No prior decision of the Board has ever required such a showing.[8] The majority relies on only a single case involving an employer rule, *Safeway*, supra, in which a panel majority refused to set aside a *decertification* election, concluding that the employees would not reasonably have been affected by the rule at issue, because of the incumbent union's mitigating role.[9] My dissent in that case explained, the holding in *Safeway* was at odds with

[1] See, e.g., *Freund Baking Co.,* 336 NLRB 847 (2001) (setting aside election based on handbook rule prohibiting disclosure of confidential information, including terms and conditions of employment).

[2] Id., citing *Farah Mfg.*, 187 NLRB 601, 602 (1970). See also *IRIS U.S.A., Inc.,* 336 NLRB 1013 (2001), citing *Mervyn's*, 240 NLRB 54, 61 fn. 16 (1979).

[3] *Freund Baking*, id. fn. 5. The same approach is followed in unfair labor practice cases. See, e.g., *Cardinal Home Products, Inc.,* 338 NLRB 1004 (2003) (setting aside election in consolidated unfair labor practice and representation case).

[4] Where the rule has also been found to be an unfair labor practice, the test is whether it is "virtually impossible to conclude" that maintenance of the rule could have affected the election results. *Safeway, Inc.,* 338 NLRB 525, 526 fn. 3 (2002), citing *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

[5] E.g., *Cambridge Tool & Mfg.*, 316 NLRB 716, 716 (1995); *Hopkins Nursing Care Center*, 309 NLRB 958 fn. 4 (1992).

[6] See *Pacific Beach Hotel*, id. (handbook given to all employees upon hire; "no evidence that the employees were ever told that they could ignore the policy"); *Freund Baking*, supra at fn. 5 (each employee received handbook and was required to acknowledge that handbook was read and understood); *IRIS U.S.A.*, supra at 1015 (handbook distributed to all employees; new hires required to sign acknowledgment). See also *St. Joseph's Hospital*, 262 NLRB 1385 (1982) (setting aside election based on overly broad no-distribution/no-solicitation rule in handbook and in policy manual).

[7] This burden allocation is also diametrically opposed to the burden imposed where the objectionable rule is also found to violate Sec. 8(a)(1): i.e., that the *employer* must show that it is virtually impossible to conclude that the misconduct could have affected the election result. *Safeway*, id. at fn. 3; *Clark Equipment*, id. at 505.

[8] The majority asserts that is not requiring the Union to show that the rule was (as the hearing officer found) "fresh in the minds of the employees," but is only finding the "absence of such freshness" to be a "factor to be considered." It seems clear, however, that the majority would refuse to overturn any election where an objectionable rule was not affirmatively shown to be "fresh" in employees' minds.

[9] The *Safeway* majority itself described the incumbent union's presence as "a material fact in [its] evaluation of the likely impact of the confidentiality rule on the election results." Id.

the precedent I cite here. And, because no incumbent union was present in this case to inform employees of their rights, the majority extends *Safeway*'s invalid premise even further.

The majority's reliance on decisions that involve objectionable conduct *other* than the maintenance of unlawful rules is also misplaced.[10] An employer rule is categorically different from coercive action taken on a particular occasion against particular employees. Obviously, to justify setting aside an election, the specific coercive action (e.g., a supervisor's threat) must be shown to have been disseminated to other employees. An unlawful handbook rule, however, represents an ongoing term and condition of employment, applicable to all employees and presumably known to them. On the basis of this distinction, the Board has always correctly presumed—at least in the absence of evidence to the contrary—that all employees who are subject to the rule are reasonably likely to be affected by it. Contrary to the majority, no "indulgence" in speculation is required to justify this presumption.

II.

Applying the Board's well-established principles to the facts here should compel the Board to set aside the election.

The unlawful rule at issue was included in the Employer's policy manual for employees during the critical period. The rule defined "vending, *soliciting*, or collecting contributions *for any purpose* unless authorized by management" (emphasis added) as "prohibited conduct" that "will not be tolerated by the Company." The majority does not dispute that the policy manual was generally distributed to employees. That is clearly sufficient to invalidate the election result, under controlling Board law.

Even if more evidence of dissemination were required, it is also undisputed that at least three newly hired employees were given the Employer's policy manual shortly before the election. All three employees were required to sign written acknowledgments of receipt. At least two of them—a sufficient number to change the election result—were required by their written acknowledgments to "read," "familiarize myself," and "understand" the manual's contents *during the critical period* (i.e., between the filing of the representation petition and the election), and to "abide by" all the rules set out therein.[11] In the light of this evidence, the majority's characterization of the rule as "buried in the handbook" is inaccurate, and it is illogical *not* to infer that these two employees, at a minimum, were made aware of the unlawful rule.[12]

III.

Finally, even applying the majority's erroneous requirements, the only reasonable inference in view of the evidence is not only that the unlawful rule was disseminated to the unit through the manual, but also that employees' "attention" *was* called to the unlawful rule with coercive impact.

The hearing officer found, based on the testimony of the Employer's own witnesses, that the Employer expects all employees to "adhere to all the rules and policies contained within [the manual]." In this connection, as noted above, and as in *Freund Baking*, supra, each of the three employees who were given the policy manual shortly before the election was required to sign a written receipt mandating that he read and "familiarize" himself with the manual's contents, in two cases during the critical period. The Employer, in short, did everything practically necessary to publicize the unlawful rule to its employees, short of reading it aloud to them.

In finding no evidence that employees' "attention was called" to the rule, the majority appears to presume that employees will *not* read their employer's policy manual—notwithstanding each employee's written promise to do so and the manual's explicit warning of discharge for noncompliance. The majority also appears to presume that employees will not become aware of a particular rule that is "merely present" in a "much larger" policy manual (36 pages here) unless the rule is explicitly cited to them. Surely we should at least presume that employees are aware of formal rules that their employer intends to communicate to them and that could affect their tenure. Indeed, in California, where the Employer is located, policy manuals are frequently given the force of contracts that create rights and obligations enforceable in court.[13] To operate on the presumption that employees

[10] *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092–1093 (1999) (threats); *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (threats). Significantly, however, even in such cases, where dissemination is shown, the Board conclusively presumes that the election was adversely affected.

[11] One of these employees was hired and received the manual during the critical period. The other, having received and signed for the manual three days before the critical period began, was effectively required to review it over an ensuing period of days that clearly overlapped the critical period. It is the maintenance of the rule during the critical period that is relevant, not the date on which any employee was given the handbook. *Freund Baking*, supra.

[12] It is beside the point that, as the majority observes, "there is no evidence that any employee was in fact deterred, by the rule, from engaging in Sec. 7 activity." As noted above, employees' subjective reactions to objectionable conduct are irrelevant.

[13] See *Guz v. Bechtel National, Inc.,* 100 Cal.Rptr.2d 352, 366–371 (2000); *Asmus v. Pacific Bell*, 96 Cal.Rptr.2d 179, 183 (2000); *Scott v.*

nevertheless routinely ignore the rules imposed in such critical documents flies in the face of that reality.[14]

The majority also maintains that the Employer had an established practice of permitting worksite solicitations, which negated its written rule to the contrary. This finding is entirely unsupported. The rule, by its own terms, prohibited all solicitations "not authorized by management." Even if the Employer had previously permitted nonunion solicitations without preauthorization, the Board could not presume that the Employer would have been equally tolerant of union solicitation, and that disparate enforcement would not have occurred. Nor could the Board presume, without supporting evidence, that the two newly hired employees who were required to read and comply with the policy manual shortly before the election were made aware of any unwritten exception to the unlawful rule. It is therefore not the case, as the majority states, that "employees had no reason to believe that Section 7 activities would be forbidden." Employees rather had every reason to believe that Section 7 solicitation not preapproved by management would be punishable.[15]

The majority's approach, in short, is internally inconsistent. On one hand, the majority refuses to infer that employees were aware of the written, publicized rule, despite good reason to do so. On the other hand, the majority eagerly presumes that all employees were aware of unwritten *exceptions* to the rule, without any evidentiary support.

IV.

At bottom, the majority's approach to this case seeks a way around controlling precedent. It has not found one—and, if it had, the majority would still run up against the record evidence here. Because the Employer's rule was unlawful and because the maintenance of that rule reasonably tended to coerce employees, I would set the election aside. I would reach the same result, on the record here, even applying the new and dubious requirements imposed by the majority. Accordingly, I dissent.

Pacific Gas & Electric Co., 46 Cal.Rptr.2d 427, 432–433 (1995). "When an employer promulgates formal personnel policies and procedures in handbooks, manuals, and memoranda disseminated to employees, a strong inference may arise that the employer intended workers to rely on these policies as terms and conditions of their employment, and that employees did reasonably so rely." *Guz,* 100 Cal.Rptr.2d at 371.

[14] I doubt that the majority would be inclined to bar an employer from disciplining an employee for an infraction listed in a policy manual, in the absence of evidence either that the employee actually read the manual or that the employee's attention was specifically "called" to the pertinent rule. As for the length of the policy manual, the majority offers no hint as to exactly how "large" the policy manual must be before it will presumptively remain unread by employees.

[15] Significantly in this context, all three of the other rules alleged by the Union to be objectionable restricted activity only "on Company property" or "during working time."