CENVEO, INC.

Employer

and Case 4-RD-2107

PETER GURBA

Petitioner

and

GRAPHIC COMMUNICATIONS CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
GCC/IBT LOCAL 14-M

Union Involved

HEARING OFFICER'S REPORT ON CHALLENGED BALLOT AND OBJECTIONS TO ELECTION

Dated: July 10, 2007

DEVIN S. GROSH, Hearing Officer: Pursuant to a Notice of Hearing on Challenged Ballot and Objections to Election issued by the Regional Director for Region 4 on April 27, 2007, I conducted a hearing on this matter on May 15, 2007 in Philadelphia, Pennsylvania. Based on the evidence submitted in that hearing, including the testimony of the witnesses and my assessment of their demeanor, as well as the post-hearing briefs of the parties, I make the following findings and conclusions.

The issues presented in this case arose from a decertification election conducted on April 10, 2007, in accordance with a stipulated election agreement in a unit of bindery employees employed by the Employer at 7625 Suffolk Avenue, Philadelphia, Pennsylvania.[1]

The April 10, 2007 election was conducted over two sessions (2:00 p.m. to 3:00 p.m. and 6:00 p.m. to 6:30 p.m.) in the break room in the Employer's 7625 Suffolk Avenue, Philadelphia, Pennsylvania location. The Union Involved received 7 votes, while 6 voters voted against representation, and one voter's eligibility was challenged by the Union Involved. No ballots were voided. Approximately 14 employees were eligible to vote in the election. The challenged ballot is determinative of the results of the election. As set forth in the Notice of Hearing, the Union Involved filed timely

[1] The unit description: All full-time and regular part time cutter/folders, cutter/stitchers, die cutters, bailers, helpers, drivers, janitorial employees, sample clerks, and receiving clerks employed by the Employer in the bindery currently located at Philadelphia, PA, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

objections to the election on April 13, 2007. As shown below, I find that voter Timothy Kleinfelter was an eligible voter and I overrule the Objections filed by the Union Involved.

THE CHALLENGE OF VOTER TIMOTHY KLEINFELTER

The Union Involved challenged the ballot of Timothy Kleinfelter on the ground that he was no longer employed or had worked an insufficient number of hours during the calendar quarter prior to the election eligibility date to be eligible to vote. The Employer and Petitioner have taken the position that Kleinfelter is a regular part-time employee and an eligible voter. The burden of proof rests on the party challenging the voter's eligibility. *Laneco Construction Systems*, 339 NLRB 1048 (2003).

FACTS

Kleinfelter worked for the Employer from October 7, 2001 to December 31, 2003 as a full-time stitcher operator in the bindery department. On July 19, 2004, Kleinfelter resumed work for the Employer in his previous position. Kleinfelter continued employment as a stitcher operator until June 2006 when he submitted a letter of resignation to his immediate supervisor Joe Zebley. Zebley convinced Kleinfelter not to resign and to work instead as an on-call or part-time stitcher operator. During the beginning of July 2006, Kleinfelter began full-time employment with another printing company, Phoenix Lithographing Corporation.[2] Thereafter Kleinfelter continued to work as an on-call employee for Cenveo; Zebley would contact Kleinfelter whenever a need to employ him arose. Kleinfelter was not scheduled to work a specific shift or times and could decline work hours at Cenveo. Kleinfelter received the same rate of pay he had received as a full-time employee, worked for the same supervisor, and worked under the same conditions as other bindery employees, but without benefits. As of the date of the hearing, Kleinfelter worked the following hours at Cenveo:

- July 27, 2006……..5.78 hrs
- August 5, 2006……12.00 hrs
- August 26, 2006 …….12.00 hrs
- September 13, 2006…….2.89 hrs
- September 30, 2006…….12.00 hrs
- November 15, 2006……..5.80 hrs
- December 10, 2006……...8.00 hrs
- December 16, 2006……...12.00 hrs
- December 19, 2006……3.70 hrs
- December 28, 2006……6.00 hrs
- December 30, 2006……12.10 hrs
- January 20, 2007……6.60 hrs

[2] Kleinfelter began working part-time for Phoenix Lithographing on February 5, 2006 while he was still employed on a full-time basis with Cenveo. From February 5, 2006 to early July 2006 Kleinfelter worked a total of 113.25 hours at Phoenix Lithographing.

- April 17, 2007……3.24 hrs
- April 18, 2007……2.20 hrs

On January 20, 2007, Zebley told Kleinfelter that his services would not be needed until Cenveo picked up work and laid him off. Kleinfelter did not work again at Cenveo until April 17, 2007, a week after the date of the election. During this period, the Employer kept Kleinfelter on the payroll and kept his employee-access device activated. The Employer submitted testimony and evidence showing that from late January 2007 to April 2007 bindery employees worked fewer hours due to a lack of available bindery work. The Employer did not lay employees off during this period, but instead scheduled employees for fewer hours and cancelled shifts to reduce its payroll. They worked fewer hours because of a reduction in scheduled work time or cancelled shifts.

DISCUSSION

In determining whether an individual is a regular part-time employee, the Board "'takes into considerations such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits and working conditions.'" *New York Display Corp.*, 341 NLRB 930, slip op. at 1 (2004), quoting *Muncie Newspapers*, 246 NLRB 1088, 1089 (1979). To determine the regularity of part-time employment, the Board frequently looks to whether the employee worked an average of four hours or more per week in the calendar quarter preceding the eligibility date. *Arlington Masonry Supply Co*., 339 NLRB 817, 819 (2003), citing *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970). Where employees have experienced lengthy breaks in employment, the Board looks to the periods both before and after the hiatus to assess whether the employee had sufficient employment to be regarded as a regular part-time employee. See *Pat's Blue Ribbons*, 286 NLRB 918, 919 (1987).

During the quarter prior to Kleinfelter's layoff on January 20, 2007, he worked a total of 54.2 hours for an average of 4.17 hours per week. Kleinfelter's hours of employment satisfy the *Davison-Paxon* standard. The fact that Kleinfelter could turn down work and was unscheduled is not determinative. See *Tri-State Transportation Co.*, 289 NLRB 356, 357 (1998); and *Mercury Distribution Carriers,* 312 NLRB 840 (1993). I therefore find that he was a regular part-time employee prior to being laid-off. Thus, the remaining issue is whether his layoff rendered him ineligible.

To be eligible to vote, a laid-off employee must have a reasonable expectation of recall in the near future as of the payroll eligibility period. *Apex Paper Box Co*., 302 NLRB 67, 68 (1991). In determining whether an employee has a reasonable expectation of recall, the Board examines several factors, including what the employee was told about the likelihood of recall, the circumstances surrounding the layoff, and the employer's past experience and future plans. Id. In *A L Investors Orlando*, 344 NLRB No. 73, slip op 2-4 (2005), the Board considered the eligibility of a regular part-time employee laid off prior to the election because of a downturn in the number of patients at a healthcare facility. The Board found that the employer informed the employee that he would return when work picked up and did not:

1) Inform the employee that the layoff was permanent;
2) Inform the employee that he should not expect to be recalled;
3) Inform the employee that he should find other employment;
4) Inform the employee that his insurance benefits would be cancelled; and
5) Take any action inconsistent with its position that the employee was temporarily laid off.

Therefore, the employee was on a temporary layoff with a reasonable expectation of recall. The Board made this ruling without any evidence of the employer's past layoff experience or future plans, other than that the layoff was tied to a routine change in health care facilities.

Applying the factors in *Apex Paper Box Co*., and the Board's decision in *New York Display Corp.*, I find that Kleinfelter reasonably expected to be recalled in the near future as of the March 4, 2007 eligibility date and he is therefore an eligible voter.

THE OBJECTIONS

The Union involved filed the following objections:

> The reasons for these objections is that the Employer restrained and coerced employees within a twenty-four (24) hour period prior to the conduct of the election. The Employer denigrated the Union's position and ability to negotiate a collective bargaining agreement and told employees that they would not obtain better or improved benefits from the Union than they could get from the Employer.
>
> Such threats and coercion occurred within the twenty four (24) hour period prior to the conduct of the election. The Employer addressed individual employees at their work stations during working time and, in effect, threatened employees with loss of benefits if they selected the Union as their bargaining representative.
>
> The Employer's conduct destroyed the free and fair atmosphere within which a Board election must be conducted. The Employer created an environment of fear by threatening employees with loss of benefits if they were to select the Union as their bargaining representative. The history of collective bargaining between these parties since the Union's certification in January, 2006 lends firm support to the fact that the Employer's comment's [sic] to employees within the twenty four (24) hour period prior to the election contributed to a mood of restraint and coercion

and threats and promises to employees. The Employer's conduct went beyond the scope of permissible campaigning and constitutes a basis to set aside the election.

FACTS

On April 9, 2007, at about 7 p.m., which was within 24 hours of the election,[3] Cenveo's Vice President and General Manager William Smart approached unit employee Robert Benner at his machine while he was working and said, "We don't need the union telling us how to run the business," and that "the union [doesn't] sign the paychecks, the company [does]." Smart also told Benner, "There is no guarantee of better benefits with the union." No other employees overheard or were present during this conversation.

On April 9 and 10, 2007 Smart approached unit employee Maria Reyes in her work area in the bindery while she was working. At lunchtime on April 9, Smart told Reyes, "The Union's not going to get nothing. The Union's not going to give us better stuff than what the company does." Reyes asked Smart, "What do you want me to do?" Smart responded by stating, "Be on our side." At lunchtime on April 10, Smart told her, "The Union's not going to get you nothing better than the company." Reyes said, "What would you want me to do?" Smart responded by stating, "Be on our side." No other employees overheard or were present during this conversation.

DISCUSSION

The Union Involved has the burden of proving that the conduct to which it has objected had the tendency to interfere with the employees' freedom of choice. *Double J Services*, 347 NLRB No. 58, slip op. 1-2 (2006). As shown below, I find that the Union Involved has not met its burden in this case.

The Board in *Peerless Plywood*, 107 NLRB 427, 429 (1954), announced a rule forbidding employee captive-audience election speeches within 24 hours before the scheduled time for an election. In *Business Aviation*, 202 NLRB 1025 (1973), the Board stated, "That rule was not intended to nor, in our opinion, does it prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." In *Electro Wire Products*, 242 NLRB 960 (1979), the Board overruled an objection citing an employer president who individually spoke to each employee on the day of the election and asked them to vote no. See e.g., *Andel Jewelry Corp., 326 NLRB 507* (1998); and *Associated Milk Producers*, 237 NLRB 879 (1978). I therefore find that Smart's remarks to employees Benner and Reyes within 24 hours before the scheduled time for the election was not objectionable within the meaning of the *Peerless Plywood* rule.

On April 9, 2007, Smart initiated a conversation with employee Benner in which he expressed his opinions about union representation. The expression of an opinion is

[3] As noted, the election was conducted from 2:00 p.m. to 3:00 p.m. and 6:00 p.m. to 6:30 p.m. on April 10, 2007.

protected under Section 8(c) of the Act as long as the statement contains no threat of reprisal or force or promise of benefit. See e.g. *Park 'N Fly*, 349 NLRB No. 16 (2007); and *Winkle Bus Company*, 347 NLRB No. 108 (2006). I find that Smart made no comment to Benner on April 9 that contained a threat of reprisal, force or promise of benefit.

On both April 9 and 10, Smart initiated a conversation with Reyes in which he assures Reyes – in blanket terms – in effect, that nothing would change as a result of the up coming decertification election. Smart did not introduce on either occasion any connection between his assurances and Reyes' vote in the election. Only Reyes does so and, when she asked Smart what she should do, i.e., how she should vote, Smart lawfully gave his opinion that Reyes should vote against the Union.

In *Wake Electric Membership Corp*., 338 NLRB 298, 299 (2002), the Board found that the employer had indicated to employees that selecting a Union would be futile by its statement, "Employees [will] not receive any benefits if there [is] a high vote for the union." In *Park 'N Fly*, 349 NLRB No. 16 slip op. page 3 (2007), by contrast, the Board found that an employer's statement that the Union would not do the employees any good was a lawful statement of opinion protected by the free speech provisions of Section 8(c) of the Act. The Board noted that the statement did not indicate that the employer would refuse to deal with the Union or the employer would refuse to give employees more than they received without union representation as a result of the election. I find that the analysis in *Park 'N Fly* controls this case. As the employer in *Park 'N Fly*, Smart did not, in either of his two conversations with Reyes, connect his blanket assurance that nothing would change in collective bargaining to Reyes or any other employees' vote in the decertification election.

For the forgoing reasons I find the Union Involved has not proven that Smart's conduct had a reasonable tendency to interfere with employee free choice. I therefore recommend the Objections be overruled.

CONCLUSION and RECOMMENDED ORDER

In accordance with the above findings, I recommend that the ballot of Timothy Kleinfelter be opened and counted, a final tally be prepared and that an appropriate certification based on the results of the final tally be issued.

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, within 14 days from the date of issuance of this Report, either party may file with the Board in Washington, D.C., an original and 8 copies of exceptions hereto by mail or by electronic filing through the Agency's Web site at www.nlrb.gov. Immediately upon the filing of such exceptions, the party filing them shall serve a copy thereof on the other party, and shall file a copy with the Regional Director either by mail or by electronic filing through the Agency's Web site. If no exceptions are filed hereto, the Board will adopt the recommendations of the Hearing Officer.

Signed at Philadelphia, Pennsylvania this 10th day of July, 2007.

/s/ Devin S. Grosh, Hearing Officer
National Labor Relations Board
Fourth Region
615 Chestnut St, Seventh Floor
Philadelphia, Pennsylvania 19106-4404

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