

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 1

In The Matter Of

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION 25

Petitioner,

Case No. 1-RC-22303

And

DUNKIN' DONUTS NORTHEAST
DISTRIBUTION CENTER

Employer.

EMPLOYER'S POST-HEARING BRIEF IN OPPOSITION TO PETITIONER'S
OBJECTIONS TO ELECTION

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I. INTRODUCTION

Dunkin' Donuts Northeast Distribution Center ("Dunkin' Donuts" or the "Employer") submits this Post-Hearing Brief in opposition to the objections filed by International Brotherhood of Teamsters, Local 25 (the "Union" or "Petitioner") following the election held on March 31, 2009 and April 1, 2009 (the "Election") in which employees voted 102 to 87 not to be represented by the Union.

The Union objected to the Election on the grounds that (1) "on March 10, 2009, within the critical period, supervisor Kevin Kennedy threatened employees in the Employer's driver training program that if the Union was voted in, they would lose their positions as drivers" and (2) "on March 29, 2009, two days prior to the Election, supervisor John Ditmars held a captive audience speech in which employees were told that if the Union was voted in, within seven days after the certification, the employees would no longer be able to contribute to their 401(k) accounts and the Employer would not make any matching contributions to the employees' 401(k) accounts." (Petitioner's Objections). The Union seeks to have the Election results set aside and a new election ordered. Based on the evidence, and for the reasons set forth below, the Union's objections should be denied and the Election results should be certified.

II. STATEMENT OF MATERIAL FACTS

The Employer operates a warehousing and distribution center that supplies goods and materials to the Dunkin' Donuts stores throughout New England and upstate New York. (Tr. 38:19-24). In the Election, a unit of Dunkin' Donuts' full-time drivers and helpers employed at its Bellingham, Massachusetts, East Windsor and Plainville, Connecticut, Lebanon, New Hampshire and South Portland, Maine locations voted on whether to be represented by the

International Brotherhood of Teamsters, Local Union 25. (Stipulated Election Agreement, March 4, 2009).

A. Statements Made About The Employer's Driver Training Program.

The Employer runs a driver training program, overseen by Operations Manager Jason Jack. (Tr. 97:25 to 98:4). The driver training program, a one year program, provides trainees with practical experience on the road with the Employer's field supervisor group. (Tr. 98:7-11). After participation in the year-long program, the Employer evaluates the trainees and determines whether a trainee may become a Class A driver for the Employer. (Tr. 98:9-11). Only two employees, Joseph DePina and Al Faria, participate in the driver training program. (Tr. 98:12-15).

Senior Operations Manager Kevin Kennedy never had any conversations with Mr. DePina or Mr. Faria regarding the driver training program or whether they would lose their positions if the Union won the Election. (Tr. 75:20-23; Tr. 84:13-18). Further, Mr. Kennedy never threatened any employee that they might lose their job if the Union were to win the Election. (Tr. 85:13-16).

The Employer discussed the driver training program during the pre-Election period only with Mr. DePina, who spoke to Mr. Jack (not Mr. Kennedy) several weeks before the Election asking what would happen if the Union won the Election. (Tr. 98:16 to 99:1; Tr. 84:13 to 85:16; Tr. 76:12-17; 79:20-21). Mr. Jack responded that he had no idea what would happen to the driver training program if the Union won the Election. (Tr. 99:1, Tr. 76:18-19). Mr. DePina asked Mr. Jack if the driver training program would be a program about which the Employer and the Union would negotiate, and Mr. Jack responded it could be a subject of bargaining. (Tr. 77:7-9). Mr. Jack had no other discussion with Mr. DePina about the driver training program during the pre-Election period. (Tr. 99:8-12). Further, Mr. Jack had no conversations with Mr.

Faria regarding what would happen to the driver training program if the Union won the Election. (Tr. 99:13-17).

Mr. DePina stated at a pre-Election group meeting led by Vice President of Operations, John Ditmars, that Mr. Jack had said that he did not know what would happen to the driver training program if the Union won the Election. (Tr. 37:15-16; 77:18-23). Mr. DePina did not hear Mr. Ditmars' response, as other employees then began yelling and screaming that Mr. Jack's statement was wrong and that he had threatened Mr. DePina's job. (Tr. 77:24 to 78:4; 78:21 to 79:1.) Mr. DePina testified that he never felt that his job was threatened by Mr. Jack or anyone else. (Tr. 78:6-7).

B. The Employer's Statements Regarding Its 401(k) Plan.

Mr. Ditmars ran several pre-Election employee meetings to provide information about unions and to answer employees' questions. (Tr. 41:12-17). At an employee meeting on March 24, 2009, Mr. Ditmars handed out the Employer's Summary Plan Description (the "SPD") for its 401(k) Plan (the "Plan"), which was drafted by Prudential Retirement. (Tr. 43:2 to 44:2; Tr. 89:18-20; Petitioner's Exhibit (Ex.) 1). Mr. Ditmars informed the employees that he was uncertain as to the meaning and effect of the statement in the SPD, stating "[y]ou are in an 'eligible class' if . . . you are not a union employee, unless you are covered by a collective bargaining agreement that provides for your coverage under the Plan." (Tr. 44:13-25; Petitioner's Ex. 1). Mr. Ditmars told the employees that he needed to check with the plan administrator to get clarification as to what that statement meant. (Tr. 47:3-4). In order to obtain clarification on this language, Mr. Ditmars spoke with Human Resource Manager Katherine Norton-Edge, who contacted Tammy Wells, an employee at Prudential who worked with the Employer. (Tr. 88:7; Tr. 90:11-15). Ms. Wells investigated the issue and then informed Ms. Norton-Edge that Union employees would not be able to contribute to the Plan in the period

between the Election and the completion of negotiations of a collective bargaining agreement (the "Pre-CBA Period"). (Tr. 90:16-19; Tr. 91:2-6). Ms. Norton-Edge then sent Ms. Wells an email asking for more specific information regarding what would happen with respect to loans and hardship withdrawals under the 401(k) Plan during the Pre-CBA Period. (Tr. 91:9-11). Ms. Wells responded, stating that Union employees would not be able to contribute to their 401(k) Plans and the Employer would not be permitted to make a matching contribution during the Pre-CBA Period, but that employees could continue to pay off their loans, or request loans or withdrawals, as provided in the Plan. (Tr. 91:11-16). Ms. Norton-Edge then sent Mr. Ditmars an email containing this information that she received from Prudential. (Tr. 91:19-20). Ms. Norton-Edge believed the information provided by Prudential about the SPD was correct. (Tr. 91:21 to 92:4).

On March 29, 2009, Mr. Ditmars held another meeting for employees. (Tr. 48:12-13). At this meeting, Mr. Ditmars gave a PowerPoint presentation that included a slide regarding 401(k) benefits. (Tr. 49:21-25; Petitioner Ex. 1). The slide contained the information obtained through Prudential, the plan administrator, stating that, during the Pre-CBA Period, employees would not be able to contribute to the 401(k) Plan, the Employer would not make any contributions and employees could not remove funds from their accounts unless it was a loan or hardship. (Tr. 52:14 to 53:11; Petitioner Ex. 1). Mr. Ditmars explained that he had received clarification on the 401(k) Plan from the plan administrator and that the slide contained this information. (Tr. 50:25). Mr. Ditmars read the slide about the Plan. (Tr. 50:25). Later in the presentation, Mr. Ditmars read another slide stating that there would be no changes in policies during the Pre-CBA Period. (Tr. 54:5-9; Employer's Ex. 1, p. 21.) During Mr. Ditmars' presentation, driver Gerald Houde asked why the 401(k) Plan would change if there were no

policy changes during the Pre-CBA Period. (Tr. 20:25 to 21:8). Mr. Ditmars responded that, to the best of his knowledge, the 401(k) Plan was the only exception. (Tr. 54:17-19). However, the Employer made it clear during the presentation and the pre-Election period that all benefits would be the subject of negotiation during collective bargaining. (Tr. 101:14-24; Employer's Ex. 1, p. 21).

III. ARGUMENT

The Petitioner bears the burden of proving that the Election should be set aside because of objectionable conduct. See Colgate Scaffolding and Equip. Corp., Case No. 2-RC-23327, 2009 WL 1605286 (NLRB Div. of Judges, June 9, 2009) (noting the burden of proof is on the party seeking to set aside an election and the burden is a "heavy one"); Delta Brands, Inc., 344 NLRB 252, 252-53 (2005) (stating "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees") (quoting Kux Mfg. Co. v. NLRB, 890 F.2d 804, 808 (6th Cir. 1989)). As a result, the Union must show that the Petitioner's conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the Election. See Delta Brands, Inc., 344 NLRB at 253. As described below, the Petitioner has failed to meet its burden of proving that the Election results should be set aside.

A. **The Employer Did Not Threaten Employees In The Driver Training Program That They Would Lose Their Positions As Drivers If The Union Were To Win The Election.**

No evidence supports the Union's objection that Mr. Kennedy threatened employees in the driver training program that they would lose their positions as drivers if the Union were to win the Election. In fact, Mr. Kennedy never spoke to any employee about the driver training program during the pre-Election period. As a result, the Union's objection must be denied.

Moreover, contrary to the Union's objection, the only employee with whom the driver training program was discussed during the pre-Election period was Mr. DePina. Mr. Jack explained that he did not know what would happen to the driver training program should the Union win the Election, and, further, correctly stated that the driver training program could be a subject of collective bargaining. These truthful and legally correct statements did not constitute a threat of any kind. See Smithfield Foods, Inc., 347 NLRB No. 109, 2006 WL 2559835, *3 (Aug. 31, 2006) (stating an employer may state its views, argument or opinion and may make truthful statements of existing facts).

The driver training program only has two participants. One participant, Mr. DePina, testified that he did not feel threatened with a loss of benefits. Given that the Employer won the election by 15 votes, the results of the Election should not be set aside because it would be impossible to conclude that any statements regarding the driver training program could have affected the Election results. See Bon Appétit Mgmt. Co., 334 NLRB 1042, 1044 (2001) (explaining that misconduct is insufficient to warrant setting aside an election if it is virtually impossible to conclude that the election outcome has been affected). As a result, the Board should deny the Union's first objection to the Election.

B. The Employer's Comments Regarding Participation In Its 401(k) Plan Did Not Constitute A Threat Of Loss Of Benefits Or Warrant Setting Aside The Election.

As described above, Prudential administered the 401(k) Plan, prepared the Plan and the SPD and provided the information about the Plan and SPD which Mr. Ditmars repeated at an employee meeting. Mr. Ditmars made it clear that he was merely reporting information which the plan administrator had provided the Employer about Prudential's interpretation of the meaning of language in the SPD. As such, Mr. Ditmars' comments at this meeting do not constitute a threat by the Employer that it would take such adverse action towards employees if

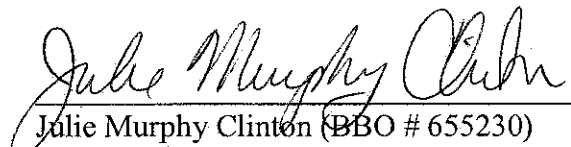
they supported the Union. Mr. Ditmars' comments merely passed along information from Prudential clarifying the SPD. At no time did Mr. Ditmars state that the Company would take away or restrict the Plan benefits or that it had any desire or intention to do so. As such, the Election results should not be set aside based on these comments.

Furthermore, here the Employer clearly informed employees that all benefits would be the subject of negotiation during collective bargaining. Under well established Board principles, no objectionable conduct occurs where an employee makes it clear that benefits may be negotiated and, therefore, these comments regarding the 401(k) Plan do not justify setting aside the Election. See Lynn-Edwards Corp., 290 NLRB 202, 205 (1988); Handleman Co., 283 NLRB 451, 452 (1987). Accordingly, the Election results should be certified.

IV. CONCLUSION

Based upon the foregoing, the Employer respectfully submits that the Petitioner's objections to the Election should be denied.

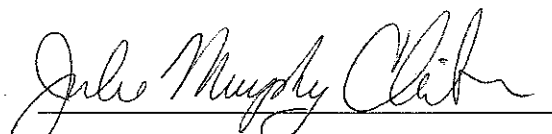
Respectfully submitted,


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Dated: June 22, 2009

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been delivered via hand delivery on this 22nd day of June, 2009 to Jonathan M. Conti, Esq., Feinberg, Campbell & Zack, P.C., 177 Milk Street, Boston, MA 02109.


Julie Murphy Clinton