

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

In the Matter of

DUNKIN' DONUTS NORTHEAST DISTRIBUTION
CENTER

Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL UNION NO. 25

Petitioner

CASE 1-RC-22303

BEFORE:

Kevin J. Murray, Hearing Officer

APPEARANCES:

FOR THE EMPLOYER:

Shari G. Kleiner, Esq.
Julie Murphy Clinton, Esq.
Wilmer, Cutler, Pickering, Hale and Dorr, P.C.
60 State Street
Boston, MA 02109

FOR THE PETITIONER:

Jonathan M. Conti, Esq.
Feinberg, Campbell and Zack, P.C.
177 Milk Street, Suite 300
Boston, MA 02109

**HEARING OFFICER'S REPORT AND RECOMMENDATION
ON OBJECTIONS**

Pursuant to a petition for election filed on February 19, 2009,¹ and a Stipulated Election Agreement executed by the above parties on March 4, and thereafter approved on March 5, an election was conducted on March 31 and April 1 among certain employees² of the Employer:

The tally of ballots cast at the election was as follows:

Approximate number of eligible voters.....	198
Void ballots.....	0
Votes cast for Petitioner.....	87
Votes cast against participating labor organization.....	102
Valid votes counted.....	189
Challenged ballots.....	0
Valid votes counted plus challenged ballots.....	189

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

On April 6, the Petitioner timely filed objections to the conduct of the election and conduct affecting the results of the election. A copy of the Petitioner's objections was served upon the Employer.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the objections was conducted. On May 13, the Regional Director issued a Direction and Notice of Hearing that found that the objections raised substantial and material factual issues, including issues of credibility, which would best be resolved on the basis of record evidence at a hearing. Thereafter, on June 3, the Regional Director issued a Direction and Notice of Rescheduled Hearing confirming that the objections would best be resolved on the basis of record evidence at a hearing and rescheduling the date of that hearing.

On June 10, a hearing was held on the objections in Boston, Massachusetts at which time the Employer and the Petitioner appeared before me and participated. All parties were afforded a

¹ All dates are in 2009 unless otherwise specified.

² The appropriate collective-bargaining unit as set forth in the Stipulated Election Agreement is:

All full-time drivers and helpers employed by the Employer at the following locations: 150 Depot Street, Bellingham, Massachusetts; Penske, 10 Shoham Road, East Windsor, CT; Penske, 19 Sparks Street, Plainville, CT; Ryder, 362 Miracle Mile, Route 4, Lebanon, NH; Kris-Way, 43 Hemco Road, South Portland, ME; but excluding all office clerical employees, guards and supervisors as defined in the Act.

full opportunity to be heard, to present evidence, to examine and cross-examine witnesses, and to file briefs. On review of the entire record, including my observations of the witnesses appearing before me, I make the following findings of fact, conclusions of law and recommendations to the Board.

SUMMARY OF FINDINGS

In Objection 1, the Petitioner contends that the Employer threatened employees in its driver training program that they would lose their positions if the employees selected the Petitioner to represent them. I conclude that the Petitioner failed to present any evidence that such a threat was made. Accordingly, I recommend that this objection be overruled.

In Objection 2, the Petitioner alleged that employees were threatened that they would no longer be able to make contributions to their 401(k) plan if they selected the Petitioner to be their representative. I conclude that by distributing the summary plan description of its 401(k) plan to employees at meetings held between March 23-25, which indicated that the coverage of the plan would not extend to employees who unionized, and by informing employees on March 29 that they would no longer be able to contribute to the 401(k) plan or to receive matching employer contributions upon selecting the Petitioner to represent them, the Employer threatened its employees with loss of benefits upon unionization and committed objectionable conduct warranting setting aside the election. Accordingly, I recommend that this objection be sustained and that a new election be ordered.

OBJECTION 1:

The Employer operates a warehousing and distribution operation delivering goods and materials to all of the Dunkin Donuts outlets throughout New England and upstate New York.

In this objection, the Petitioner alleged that supervisor Kevin Kennedy threatened employees in the Employer's driver training program that if the Petitioner was voted in, they would lose their positions as drivers.³

The Employer has a driver training program under which warehousemen and helpers who have a CDL license train for a year as drivers and, if they pass the program, become drivers for the Employer. At the time of the organizing campaign, the Employer had two employees in its driver training program, Joseph DePina and Albert Faria.

The Petitioner presented no evidence at the hearing that Kennedy threatened any employee. Kennedy credibly testified that he did not threaten any employees.

The Petitioner did present testimony from employee Gerald Houde to the effect that Houde heard employee Joseph DePina speak at a mandatory employee meeting. According to Houde, DePina stated that he had been told by senior operations manager Kevin Kennedy and operations manager Jason Jack that if the union was voted in, the driver training program would be eliminated. Counsel for the Employer had objected to this question, prior to its being answered, on hearsay grounds. Counsel for the Petitioner stated that the testimony was not being offered for the truth of the matter asserted. On that basis, I overruled the objection and allowed the testimony.

Employee Joseph DePina denied in his testimony that any supervisor ever threatened him that the driver training program would be eliminated if the union was voted in. Further, supervisor Jason Jack denied that he threatened DePina. I credit the testimony of DePina and Jack.

³ While the Petitioner did not discuss this objection in its brief, neither did it withdraw the objection. Consequently, I must make a recommendation concerning it.

ANALYSIS AND RECOMMENDATION:

I conclude that the Petitioner has failed to establish that any threat was made by the Employer. The sole evidence offered by the Petitioner was the testimony of Houde. This testimony, which clearly is hearsay, was admitted solely because counsel for the Petitioner stated it was not offered for the truth of the matter asserted. Therefore, this testimony cannot serve as the basis for supporting the objection. Moreover, I credit the testimony of DePina, Jack and Kennedy that no threats were made in this regard. Accordingly, I conclude that the Petitioner has failed to establish that any threats were made warranting setting aside the election. I recommend that Objection 1 be overruled.

OBJECTION 2:

Around late-March, discussions occurred between John Ditmars, the Employer's vice president of operations, and the Employer's human resources department concerning whether employees would be covered under the Employer's 401(k) plan during the period between when the union was certified and a collective-bargaining agreement was reached. The issue arose because of language in the summary plan description of the Employer's 401(k) plan regarding the coverage of union employees under the plan. Ditmars requested that vice president of human resources Renee St Germain and human resources manager Katherine Norton-Edge clarify that language with Prudential Retirement, the plan administrator, and get back to him.

The Employer held mandatory meetings for employees during the organizing campaign. Three of these meetings were held on March 23, 24 and 25. Employees were required to attend one of the three meetings. The same issues were discussed at each meeting. At these meetings, John Ditmars distributed to employees a copy of a portion of the Employer's summary plan description for its 401(k) plan. The document described the eligibility requirements for

employees to participate in the plan. One requirement in the summary plan description distributed to employees stated that an employee was in an eligible class to participate in the plan if:

“you are *not* a union employee, unless you are covered by a collective bargaining agreement that provides for you coverage under the Plan.” (emphasis in original).

This portion of the document was highlighted in yellow by the Employer before distribution to employees. Ditmars told the employees that this matter had been brought to his attention and he was looking to clarify what it meant. Ditmars said he would be checking with the plan administrator on that issue, that attorneys were looking into it and he would get back to them.

Employee Gerald Houde testified that he attended the meeting on March 24 with about 30 employees. Houde testified that, following the distribution of this document, one of the employees asked Ditmars what would happen to the 401(k) if the union was voted in. Ditmars responded that he was not sure, that the attorneys were checking into it and he would get back to the employees with an answer.

Ditmars had not, at this point in time, received the clarification of the summary plan description that he had requested from the Employer’s human resources department. Ditmars testified that he brought this issue to the employees’ attention anyway because he felt it was important that they know that there might be an issue with their being able to be part of the 401(k) program if they selected the union to represent them.

Following the March 24 meeting, Ditmars discussed the issue with Norton-Edge, who said that she had spoken to Prudential Retirement and an ERISA attorney. Norton-Edge told Ditmars that she had been told by Prudential that employees who selected a union would not be able to contribute to the 401(k) or receive employer matches during the interim period following certification when they were not covered by a collective-bargaining agreement, but still might be

able to take money out for hardship or for loans. Norton-Edge testified that she received this information from Tammy Wells of Prudential Retirement.⁴ At Ditmars' request, Norton-Edge sent him an email confirming this clarification of the language in the summary plan description. Ditmars said he took the information from Norton-Edge's email and "cut and pasted" it into a slide for a PowerPoint presentation he was preparing for an employee meeting.

On Sunday, March 29, Ditmars presided over another employee meeting, the last one held before the election. There were about 120 employees in attendance. Ditmars presented a PowerPoint presentation, projecting slides on a screen. According to Ditmars, the third slide of his PowerPoint presentation was entitled "401k Information." Ditmars introduced this slide by stating that he had told the employees that he would obtain clarification of the summary plan description he had passed out on March 23-25. Ditmars stated that this was the clarification that he had obtained from Prudential, the plan administrator, who had consulted with their ERISA attorneys. Ditmars then read the slide to the assembled employees. The slide read:

410K Information

- Cannot make contributions into the plan
- Cannot receive the company match or profit share award
- Cannot remove balance of funds unless it's a loan or hardship withdrawal
- Can repay outstanding loans
- Can take out loans
- Can take withdrawals according to the plan (age 59 ½ or more, Hardship)
- Vesting will continue during the period of ineligibility (union employee without an agreement)

Ditmars testified that, later in the presentation, he showed employees a slide related to collective bargaining. The slide stated:

Collective Bargaining

- During CB ALL pay, benefits, rules and policies have to remain unchanged
- Neither the union nor the company can change anything unless the other agrees

⁴ No representative from Prudential Retirement was called to testify. The 401(k) plan documents were not offered into evidence.

Promises are made to be broken – *get it in writing!*

Ditmars testified that, following his presentation of the second slide, employee Gerald Houde stated that he didn't believe there could be any changes to benefits after the election and before the collective-bargaining agreement was in place. Ditmars testified that he responded "to the best of my knowledge, the 401(k) was the only thing that changed."

Houde testified that Ditmars projected the first slide on the screen and informed the employees that the 401(k) plan would "basically cease" during bargaining, that the only thing that employees would be able to do regarding the 401(k) would be to pay on a loan, if they had one, or to obtain a loan. Ditmars said neither the employees nor the Employer could contribute to the 401(k) during this period. Houde further testified that, after a later slide was projected stating that policies could not change during bargaining, he asked Ditmars how the 401(k) plan could change if there could be no changes during bargaining. Ditmars responded that the 401(k) plan was different, that it was "controlled by the government." Houde testified that Ditmars did not explain that response.

Houde also testified that, following the March 29 meeting, a lot of the drivers congregated in the parking lot and expressed concerns about what Ditmars had told them about not being able to put money into their 401(k) plan during the period when a collective bargaining agreement was being negotiated.

POSITIONS OF THE PARTIES:

The Petitioner contends that the election should be set aside because the Employer threatened its employees that they would no longer be able to contribute to their 401(k) plan or to receive matching contributions from the Employer if they selected the Petitioner as their collective-bargaining representative. The Petitioner contends that the Employer's 401(k) plan

was invalid on its face as it automatically excluded employees from participation upon selection of a union representative, citing *Handelman Company*, 283 NLRB 451, 452 (1987). The Petitioner further contends that, by its comments to employees regarding its exclusionary 401(k) plan on March 24 and 29, the Employer threatened employees with loss of benefits upon unionization warranting the holding of a new election, relying upon *Yuma Coca-Cola Bottling Co.*, 339 NLRB 67 (2003) and *Hertz Corp.*, 316 NLRB 672 (1995).

The Employer contends that it did not threaten its employees but, rather, simply reported information about the 401(k) plan which the Employer had received from the plan administrator. The Employer contends that at no time did the Employer state that the Employer would take away or restrict Plan benefits to employees and, therefore, the election should not be set aside. The Employer further argues that it clearly informed employees that all benefits would be the subject of negotiation regarding collective bargaining. It contends that the Board has held that no objectionable conduct occurs where an employer makes clear that benefits may be negotiated and, thus, its comments regarding the 401(k) plan do not justify setting aside the election, citing *Lynn-Edwards Corp.*, 290 NLRB 202, 205 (1988); *Handelman Co.*, 283 NLRB 451, 452 (1987).

ANALYSIS AND RECOMMENDATION:

An employer's pre-election statement to employees that, should they choose union representation they will automatically lose a fringe benefit, violates Section 8(a)(1) of the Act. *DynCorp*, 343 NLRB 1197, 1199 (2004); *Cooper Tire & Rubber Co.*, 340 NLRB 958, 959 (2003); *Hertz Corp.*, 316 NLRB 672 (1995). An employer engages in objectionable conduct warranting overturning an election where it makes statements to employees that they would be excluded from an existing benefit upon choosing a union to represent them. *Carpenter Technology Corp.*, 346 NLRB 766 (2006); *Cooper Tire*, supra. The test is whether employees

reasonably would believe that they could lose an existing benefit as a result of unionization, not the actual effect on the employees. *Smithers Tire*, 308 NLRB 72 (1992). Further, the Board has held that an employer violates Section 8(a)(1) of the Act through a provision in, or a statement about, a benefit plan that suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union. *Niagara Wires*, 240 NLRB 1326 (1979).

In *Hertz Corp.*, 316 NLRB 672 (1995), the Board found that an employer committed objectionable conduct by distributing a two page summary of its 401(k) plan to employees during the union campaign. The document conveyed to employees the impression that the employees would lose their 401(k) plan immediately upon choosing union representation. The oral explanation given by the employer of the negotiation process was found to be insufficient to dispel this impression, for it conveyed to employees that they would lose the plan upon becoming unionized, subject to possible restoration upon the completion of negotiations. The Board stated, "Thus, the impression remained that unionization itself would trigger the loss of the plan, and the loss would continue throughout negotiations unless and until it was restored." *Hertz*, supra, at fn. 2.

Based on these principles, I find that the Employer's distribution of the summary plan description document on March 23-25 and its March 29 clarification of it to employees constituted objectionable conduct. As in *Hertz*, the Employer distributed a document to employees in the March 23-25 meetings which stated that union employees were not eligible to participate in the 401(k) plan unless they were covered by a collective-bargaining agreement. The Employer literally highlighted this statement to employees and promised to obtain clarification of it. The reasonable implication to employees of the document distributed by the Employer was that employees would lose their rights to participate in the 401(k) plan upon

selecting the Petitioner to represent them. The events that followed served to confirm and reinforce that implication.

Following its March 23-25 presentation, the Employer did not clearly disavow the threat that it had made in distributing the 401(k) summary plan description to employees, nor did it reassure employees that the selection of the union would not result in the immediate loss of benefits. Rather, the Employer made subsequent statements which served to confirm and reinforce the initial threat. See *Yuma Coca-Cola Bottling Co.*, 339 NLRB 67, 68 (2003).

It is undisputed that, on March 29, the Employer informed to employees that they would lose their right to participate in its 401(k) plan at a gathering attended by at least 120 out of the 198 eligible voters. Specifically, Ditmars told employees that, upon unionization, they would be ineligible to continue to contribute to the 401(k) plan or to receive employer matches to those contributions. While Ditmars' statements were clear, any ambiguity employees may have had about them was resolved by Ditmars' subsequent response to employee Houde's question at the meeting. When Houde stated that he thought benefits could not change during the period following selection of the union while negotiations were being conducted, Ditmars admittedly responded that the 401(k) was the only thing that changed. Ditmars' response left no doubt among employees that, by voting for the Petitioner, they would be voting to end their participation in the Employer's 401(k) plan.

I find that, by its distribution of the summary plan description of the 401(k) plan on March 24 and by its clarification of that document on March 29, the Employer threatened employees that, if they voted to be represented by the Petitioner, they would lose the benefit of the 401(k) plan that they presently enjoyed. These threats, which are in the nature of violations of Section 8(a)(1) of the Act, constituted objectionable conduct that interfered with the fairness

of the election. *Hertz Corp.*, 316 NLRB 672 (1995); *Carpenter Technology Corporation*, 346 NLRB 766, 769-770 (2006); *Cooper Tire & Rubber Co.*, 340 NLRB 958 (2003). This conclusion is reinforced by the fact the statements were widely disseminated among the employees in the bargaining unit.

Further, the impact of Ditmars' statements was substantial, being made only two days before the election. Employee Houde testified that there was a lot of concern and discussion among employees following the meeting about this potential loss of benefits. It is evident to me that employees would reasonably believe, based on Ditmars' statements, that they would lose their 401(k) benefit upon selecting the Petitioner to represent them. *Smithers Tire*, 308 NLRB 72 (1992).

The fact that Ditmars may only have been stating to employees what he had been informed by the plan administrator, through the human resources department, does not minimize the impact of this threat upon employees. An employee benefit plan which restricts coverage to unrepresented employees is a per se violation of Section 8(a)(1), regardless of whether the employer exploits the restriction during an organizing campaign, for such an exclusionary requirement necessarily exerts a coercive impact upon employees. See *Niagara Wires, Inc.*, 240 NLRB 1326, 1328 (1979). Plans such as the Employer's that discriminate based upon union membership "interfere with, restrain and coerce currently unrepresented employees because the exclusionary clauses automatically eliminated the benefits on selection of a representative and do not allow for their continuation pending negotiations." *Handelman Company*, 283 NLRB 541, 452 (1987). Thus, it is not a defense to an objection to an election to assert that the employer was only describing to employees the plan in effect. It is the Employer's plan, for which it is responsible.

While Ditmars also told employees in his March 29 presentation that benefits could not change following the selection of a union, this comment does not serve to dispel the impression on employees of his other statements which indicated that the 401(k) plan would be lost to employees upon unionization. As the Board has found, an employer's general explanation of the bargaining process is insufficient to dispel the lasting impression of an employer's statement that a benefit lost upon unionization would remain lost unless and until it was restored through negotiations. *Yuma Coca-Cola Bottling Co.*, 339 NLRB 67, 68 (2003); *Hertz Corp.*, 316 NLRB 672 fn. 2 (1995). Moreover, as described above, Ditmars' response to Houde's question served to reinforce and emphasize to employees that the 401(k) benefit would be lost upon unionization.

I find that the cases relied upon by the Employer do not support its position that it is not objectionable conduct for an employer to describe an exclusionary benefit plan to its employees so long as the Employer makes clear to employees that all benefits may be negotiated. In *Handelman Company*, 283 NLRB 451 (1987), the Board held that the exclusionary language in the benefit plan did not violate the Act because the plan language indicated that the coverage for employees, unlike in this case, was subject to negotiations between the parties. In *Lynn-Edwards Corp.*, 290 NLRB 202, 205 (1988), the Board found that the Employer's exclusionary benefit plan violated the Act as it indicated that coverage for employees in an employee benefit plan would be automatically withdrawn as soon as the employees became represented by a union. Neither case supports the proposition, asserted by the Employer, that its comments to employees about its exclusionary 401(k) plan were not objectionable because the Employer also informed employees that benefits are negotiable.

Accordingly, for these reasons, I recommend that Objection 2 be sustained, that the election be overturned and a new election ordered.

CONCLUSION

For the reasons stated above, I recommend that Petitioner's Objection 1 be overruled and that Petitioner's Objection 2 be sustained and the election conducted on March 31 and April 1 be set aside and a new election conducted.

/s/ Kevin J. Murray

Kevin J. Murray, Hearing Officer
National Labor Relations Board
First Region
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222-1072

Dated at Boston, Massachusetts this 1st
day of July, 2009

Right to File Exceptions:

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on July 15, 2009, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are**

encouraged to file exceptions electronically. If exceptions are filed electronically, the exceptions 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. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁵ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions

⁵ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

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