No. 99-501

In the Supreme Court of the United States

DETROIT AUTO AUCTION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the union's campaign promises to provide certain strike benefits in the event of a strike did not impair the employees' freedom of choice in determining whether to select union representation, and thus did not warrant setting aside the election result.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is unpublished, but the decision is noted at 182 F.3d 916 (Table). The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet App. 30a-53a) is reported at 324 N.L.R.B. No. 143. The Board's underlying decision and certification of representative (App., *infra*, 1a-3a) is unreported. The hearing officer's report on petitioner's objections to the certification election (Pet. App. 54a-107a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1999. The petition for a writ of certiorari was filed on September 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Detroit Auto Auction (petitioner) is engaged in remarketing automobiles through auction sales. In 1995, the United Automobile Workers (Union) filed a petition with the National Labor Relations Board (Board) seeking certification as the exclusive bargaining representative of petitioner's drivers, mechanics, and certain other employees. In a secret ballot election, 79 votes were cast in favor of the Union, 45 votes were cast against it, and 11 votes were challenged (a number that could not affect the outcome of the election). Pet. App. 3a-4a, 34a, 54a-57a.

Petitioner filed objections to the election. The only objection at issue here (see Pet. 5) is petitioner's contention that the Union impermissibly promised employees benefits in exchange for their support. The facts relating to that objection are as follows: During the campaign, Union organizer Reyes distributed photocopies of three "coupons" to petitioner's employees. Coupon 1 states, "I promise and guarantee that you will not go on strike if 2/3 of the workers at Detroit Auto Auction vote not to strike. [*sic*] NO ONE FROM THE UAW WILL FORCE YOU TO STRIKE." Pet. App. 94a-95a, 108a. Coupon 2 states, "I promise and guarantee that if a majority of the workers vote to strike (2/3) you will receive $150 a week from the strike fund. Whether or not you've ever paid dues." *Id.* at 95a, 109a. Coupon 3 states, "I promise and guarantee to give you permission, if requested, to cross the union picket line and continue to work while other union members are on strike without being subjected to pressure, intimidation or union fines." *Id.* at 95a, 110a. Each of the coupons contained the following language on the back: "To protect yourself against false promises by

some union bosses and 'union pushers' we suggest you get certain promises guaranteed in writing. Ask the union boss or union pusher to sign and date each of the enclosed union guarantee certificates. Have it notarized to be protected." Each of the coupons bore Reyes' photocopied signature, which was dated and notarized. *Id.* at 95a-96a, 108a-110a.

The hearing officer recommended that petitioner's objection be overruled. Pet. App. 94a-98a. The hearing officer found that the statements in the three coupons were merely campaign propaganda, and that such propaganda is insufficient to warrant setting aside an election. *Id.* at 96a-98a. In reaching that conclusion, the hearing officer relied on *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982). In that case, the Board held that it would "no longer probe into the truth or falsity of the parties' campaign statements" and would "not set elections aside on the basis of misleading campaign statements." *Id.* at 133. Rather, it would "intervene" only in cases "where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Ibid.*

The Board adopted the Hearing Officer's recommendation and overruled petitioner's objections. App., *infra*, 1a-2a. The Board expressly rejected petitioner's contention that the statements in the coupons constituted an impermissible promise of future benefits. *Id.* at 2a n.2. The Board explained that it "has long held that the promise of strike benefits addresses a natural employee concern and does not impair employee free choice." *Ibid.* (citing *Dart Container*, 277 N.L.R.B. 1369 (1985)). The Board therefore certified the Union as the exclusive collective-bargaining representative of petitioner's employees. *Id.* at 2a-3a.

2. When petitioner refused the Union's request to bargain, the Union filed an unfair labor practice charge with the General Counsel of the Board. The General Counsel then issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). The Board upheld the allegations of the complaint and ordered petitioner to bargain with the Union. Pet. App. 30a-53a.

3. In an unpublished opinion, the court of appeals enforced the Board's order. Pet. App. 1a-29a. The court held that the Board had correctly determined that the coupons constituted permissible campaign literature and not illegitimate vote buying. *Id.* at 7a-19a. The court explained that the coupons promised the "type of future benefits that unions normally seek to obtain for their members," that "the benefits promised by the coupons would insure to all employees * * * in the bargaining unit," that "the promises were clearly attributable to the Union and could be evaluated by an employee as identifiable campaign literature," and that "nothing in the coupons threatened, directly or indirectly, that an employee would suffer any kind of economic loss if the Union was defeated." *Id.* at 17a-18a. The court concluded that, while the "distinction between legitimate campaign promises and illegitimate vote-buying may at times be subtle and problematic," in this case, "the distinction is clear." *Id.* at 18a-19a.

ARGUMENT

Petitioner contends (Pet. 16) that the court of appeals erred in holding that the coupons distributed by the Union in this case constituted legitimate campaign literature rather than impermissible vote-buying. That

contention is without merit and does not warrant review.

1. In evaluating whether particular campaign tactics are impermissible, the Board applies an objective standard. As petitioner acknowledges (Pet. 7), the question is whether the challenged conduct "reasonably tend[s] to interfere with the Section 7 rights of employees to make a free, uncoerced decision on the question of whether they wish to be represented by a union." See also Pet. 21. Petitioner does not challenge that legal standard. Accordingly, the only question presented here is whether the Board reasonably applied its objective standard to the particular facts of this case. That question is entirely fact-bound; it does not raise any issue of general importance. Further review of that question is therefore not warranted.

Review of such a fact-bound issue is particularly unwarranted here, because the decision below is unpublished. The decision therefore is not binding on subsequent Sixth Circuit panels. See 6th Cir. R. 206.

In any event, petitioner's challenge to the decision below is without merit. The Board has a "wide degree of discretion" to establish the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Here, the Board reasonably concluded that the Union's promises that (1) a strike would require authorization by two thirds of the employees, (2) employees would receive $150 a week from the Union's strike fund if a strike were authorized, and (3) employees would be free to cross the picket line constituted permissible campaign speech and did not preclude a fair election.

Several considerations support the Board's determination. First, because Union organizer Reyes signed

the coupons, the coupons clearly indicated that the promises emanated from the Union. The employees were therefore in a position to evaluate the coupons as union propaganda. Second, petitioner itself treated the coupons as union propaganda. In response to Coupon 2's promise of a $150 weekly strike benefit, petitioner circulated a flyer purporting to show that employees of another employer relied to their detriment on the Union's promise of strike fund payments. NLRB C.A. Br. 27. Petitioner followed that flyer with another showing Coupon 2 cut in half, with the caption, "UAW BROKEN PROMISE!" *Ibid.* Third, the promises made in the coupons addressed matters of natural concern to employees in a strike situation, and sought to allay that concern by explaining what benefits the Union would provide if it decided to call a strike. Indeed, petitioner acknowledges that "the subject of strikes," with the "possibility of being out of work without pay," was "a critical issue during the pre-election campaign" (Pet. 15), and that "the employees in this case were well aware of how unions do not tolerate employees crossing a picket line" (Pet. 23). Finally, voting for the Union was not a condition for receiving the promised strike benefits. The coupons promised that all employees would receive those benefits. Those circumstances fully justify the Board's conclusion that the coupons constituted legitimate campaign literature and not impermissible vote-buying.

2. Petitioner errs in contending (Pet. 17) that, because the Union's promises could be fulfilled without petitioner's consent, they necessarily amounted to coercive vote buying. A union's ability to fulfill a promise without an employer's consent is a factor that has been deemed relevant in some cases. But promises that

can be fulfilled without an employer's consent are not per se illegal.

This Court's decision *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), and the decisions implementing it, demonstrate that point. In *Savair*, a union announced a waiver of its initiation fee before an election. The waiver applied only to employees who signed union recognition slips before the election. *Id.* at 272-273. The Court held that such a *selective* waiver impermissibly interfered with employee free choice to vote for or against union representation in two ways. First, the union was able to "buy endorsements" and thus "paint a false portrait of employee support during its election campaign." *Id.* at 277. Second, at least some employees might have felt obligated, when they subsequently voted in the election, "to carry through on their stated intention to support the union." *Id.* at 278.

Despite invalidating the union's selective waiver, the *Savair* Court recognized that a union has a legitimate interest in waiving its fee for new members when the waiver is "available not only to those who have signed up with the union before an election but also to those who join after the election." 414 U.S. at 274 n.4. The Court explained that employees may be reluctant to pay money to a union before the union shows that it can do anything for them; a waiver of initiation fees "remove[s] this artificial obstacle to [employees'] endorsement of the union." *Ibid.* (quoting *Amalgamated Clothing Workers* v. *NLRB*, 345 F.2d 264, 268 (2d Cir. 1965)). Consistent with that observation, since *Savair*, the Board and the courts of appeals have consistently held that offers to waive fees for all employees currently in the work force do not interfere with employee free choice in representation elections and therefore are not improper inducements under *Savair*. See, *e.g.*,

NLRB v. *VSA, Inc.*, 24 F.3d 588, 594 (4th Cir.), cert. denied, 513 U.S. 1041 (1994); *NLRB* v. *Whitney Museum of Am. Art*, 636 F.2d 19, 21 (2d Cir. 1980); *Molded Acoustical Prods., Inc.* v. *NLRB*, 815 F.2d 934, 937 (3d Cir.), cert. denied, 484 U.S. 925 (1987); *Warner Press, Inc.* v. *NLRB*, 525 F.2d 190, 196-197 (7th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

The principle involved in those cases is equally applicable here. Like the waiver of fees approved in those cases, the strike benefits referred to in the Union's campaign materials were available to all employees, not just those who supported the union before the election. In addition, just as a union has a legitimate interest in waiving fees, the Union in this case had a legitimate interest in promising strike benefits—to alleviate natural employee concerns. Therefore, as with a waiver of initiation fees that is available to all employees, the Board reasonably concluded that the promised strike benefits did not interfere with employee free choice. A union's ability to confer strike benefits without an employer's consent no more condemns a promise to provide such benefits than a union's ability to waive its fees without an employer's consent condemns that action.

Alyeska Pipeline Service Co., 261 N.L.R.B. 125 (1982), relied on by petitioner (Pet. 12, 17), does not suggest otherwise. In that case, a union that controlled all access to construction jobs in Alaska promised the employees it sought to organize a preference in job referrals if they became members of the union. The Board found that the union possessed "a power comparable to an Employer's power to close a plant," and that the union "imparted an aura of legitimacy to its unlawful promise" by quoting from "its collective bargaining agreement the manner in which the referral advantage

for union members is effectuated." 261 N.L.R.B. at 127. The Board concluded that, in those circumstances, the union's promise was "more coercive than the promise to waive initiation fees which the Supreme Court in *Savair* found unlawful," and thus precluded a fair election. *Ibid.* Since the Union here possessed no similar control over the employment conditions of the employees it sought to organize at petitioner's facility, the decision in *Alyeska* is inapposite here.

Petitioner's reliance (Pet. 8, 19) on *Mailing Services, Inc.*, 293 N.L.R.B. 565 (1989), is similarly misplaced. There, the union provided free medical screenings for employees shortly before the election. The Board found that the union had conferred a tangible economic benefit on employees, "with a clear implication that this benefit would remain only contingent on the selection of the Union." That circumstance "created an incentive for the employees to take the test prior to the election," and "therefore * * * the recipient of this gift would likely have felt a sense of obligation to the donor, the Union." *Id.* at 566 n.3. Unlike the situation in *Mailing Services*, the Union's promises of strike benefits here did not result in any tangible economic benefit for the employees before the election. Rather, the benefits would materialize only if the Union were selected as the bargaining representative and decided to call a strike. And, as previously discussed, the benefits would be available to all employees, irrespective of whether they had voted for the Union. There is therefore no inconsistency between the decision in *Mailing Services* and the decision in this case.

3. Finally, petitioner contends (Pet. 27-30) that the decision below creates a double standard under which employer promises of benefits are unlawful, while union promises of benefits are harmless propaganda. Neither

the Board nor the court below, however, purported to establish any such rule. They simply ruled that, in light of the particular circumstances of this case, the Union's campaign literature did not constitute coercive vote-buying.

Moreover, petitioner's apparent premise that an employer's actions and a union's actions always have the same potential to coerce employees is incorrect. In view of the economic dependence of the employees on their employer, the employer occupies a different position with regard to the impact of its action upon employees than does a union. See *Rendell Warehouse of Ariz., Inc.*, 328 N.L.R.B. No. 153 (July 27, 1999); Pet. Supp. App. 361a, 378a-383a; *Louis-Allis Co.* v. *NLRB*, 463 F.2d 512, 517 (7th Cir. 1972); *NLRB* v. *Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969). As one leading commentator has observed, "[u]nlike the employer's promise of benefits conditioned on a rejection of the union, the union's economic promises are not tantamount to a threat which it will be in a position of power to implement in the event a majority of the employees support 'no agent.'" R. Gorman, *Labor Law* 170 (1976).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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LINDA SHER
Associate General Counsel
NORTON J. COME
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NOVEMBER 1999

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 7-RC-20648

DETROIT AUTO AUCTION, INC., EMPLOYER

AND

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, PETITIONER

BFH, Taylor, Michigan

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 11, 1995, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 79 for and 45 against the Petitioner, with 11 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's

findings[1] and recommendations,[2] and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union United Automobile, Aerospace and Agricultural Implement Workers of American (UAW), AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon

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[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In recommending that Objection D be overruled, the hearing officer found that the language contained in Petitioner's three coupons, which were distributed during the campaign, was merely campaign propaganda which is insufficient to warrant setting aside an election under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). We agree with the hearing officer that the language contained in the coupons was unobjectionable campaign propaganda. As to the Employer's contentions that the statement in the coupons concerning the union's strike fund and strike benefits constituted an impermissible promise of future benefits, we note that the Board has long held that the promise of strike benefits addresses a natural employee concern and does not impair employee free choice. *Dart Container*, 277 NLRB 1369 (1985).

In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations to overrule the Employer's objections A and F. We also adopt the hearing officer's recommendation that the Employer's request to withdraw its objection E be approved.

lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by the Employer at or out of its facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

Dated, Washington, D.C., January 14, 1997.

/s/ MARGARET A. BROWNING
MARGARET A. BROWNING, Member

/s/ SARAH M. FOX
SARAH M. FOX, Member

/s/ JOHN E. HIGGINS, JR.
JOHN E. HIGGINS, JR., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD