

Center for the Disabled and UNITE, Union of Needletrades, Industrial, and Textile Employees, AFL-CIO. Case 3-RC-11255

February 16, 2005

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered an objection to a rerun mail ballot election conducted from May 13 through 28, 2004, and the hearing officer's report recommending disposition of it.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots showed 285 for and 381 against the Petitioner, with 83 challenged ballots, an insufficient number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations, and finds that a certification of results of election should be issued.²

The only issue in this case is whether the Employer engaged in objectionable conduct, as alleged in the Union's Objection 1, by announcing and then partially granting a "Twelve Month 10% Pay Plan for Center Staff" during the critical period between the first and second elections.³ The Union argues that, in overruling this objection, the hearing officer misapplied Board law by finding that the Employer presented a legitimate business justification for the wage increases. Specifically, the Union asserts that while the "presence of a legitimate business justification may be a viable defense to a § 8(a)(1) allegation: it does not allow the employer to es-

cape responsibility here in an unconsolidated representation case."

Contrary to the Union's argument, and as explained recently in *Sun Mart Foods*, 341 NLRB 161, 162 (2004), also an "unconsolidated representation case":

The Board will infer that an announcement or grant of benefits during the critical period is objectionable; however, the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or the bestowal of the benefit. *Star, Inc.*, 337 NLRB 962, 963 (2002). The employer may rebut the inference by showing that there was a legitimate business reason for the timing of the announcement or for the grant of the benefit.

Applying the foregoing principles, the Board found in *Sun Mart* that although the employer presented a legitimate business justification for its preelection decision to grant employees a benefit by remodeling the grocery store where they worked, it failed to establish such a defense with respect to the *timing* of the announcement just 2 days before the election, thereby interfering with the election.⁴ The Board similarly considered a business justification defense in *Network Ambulance Services*, 329 NLRB 1 (1999), also an unconsolidated representation case, and overruled the union's objection by finding that the employer presented legitimate business reasons for both its preelection announcement and grant of two floating holidays. See also *B&D Plastics*, 302 NLRB 245 (1991) and *United Airlines Services*, 290 NLRB 954 (1988).

Therefore, the Board does consider, as a viable defense in a representation case, an employer's business justification for announcing and granting employee benefits during the critical period before an election. Here, the hearing officer correctly articulated the standard set forth above for determining the merits of the Union's Objection 1, and we find that, in overruling the objection, he properly applied the standard to conclude that the Employer established a valid business justification with respect to both the grant of the wage increases and the timing of their announcement. Accordingly, we will certify the election results.

¹ On October 25, 2004, the hearing officer issued an erratum which revised fn. 1 of his report by specifying the correct due date for filing exceptions to his report.

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that Petitioner's Objection 3 be overruled. The hearing officer granted Petitioner's request to withdraw Objections 2, 4, 5, 6, and 7.

In fn. 15 of the hearing officer's report, the correct citation of *Stanley Smith Security, Inc.* is 270 NLRB 225 (1984).

On p. 9 of his report, the hearing officer cited *Wis-Pak Foods, Inc.*, 319 NLRB 933, 935 (1995), enfd. 125 F.3d 518 (7th Cir. 1997), for the proposition that raising wages to address staffing needs can be relied upon to establish a clear business necessity justifying its actions. Although we agree with that proposition, which is supported by *Automated Products, Inc.*, 242 NLRB 424, 427 (1979), also cited by the hearing officer, we do not rely on *Wis-Pak*. In that case, there were no exceptions to the portion of the judge's decision in which the relevant discussion appears, and therefore the issue was not before the Board for consideration. See 319 NLRB 933 fn. 3.

³ The wage increase was announced 1 year prior to the election, to be granted in three "phases." Two separate increases of 2-1/2 percent each were granted 6 months apart prior to the election, and a 5-percent increase was granted 2 months after the election.

⁴ Member Schaumber agrees with his colleagues that the business justification defense is available to an employer in a representation case such as the one presently before the Board here. While he dissented in *Sun Mart Foods*, as here a representation case, he did not do so because the hearing officer considered the employer's business justification defense. He dissented from the majority's holding that the employer's announcement during the critical period of the remodeling of a store pursuant to a companywide remodeling plan adopted long before the union organizing campaign to retain market share and increase profitability was an objectionable announcement of an employee benefit made to interfere with the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for UNITE, Union of Needletrades, Industrial and Textile Employees, AFL-CIO, and that it is not

the exclusive representative of the bargaining unit employees.