Arizona Public Service Company *and* International Brotherhood of Electrical Workers, Local 387, AFL–CIO, Petitioner. Case 28–RC–5407

May 4, 1998

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 30, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 374 votes for, and 428 against, the Petitioner, with 43 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and adopts the hearing officer's findings and recommendations[1] only to the extent consistent with this decision and certification of results of election.

I do not agree with the hearing officer's recommendation to sustain the Petitioner's Objection 5, which alleges that the Employer interfered with the election by conducting a raffle on the day of the election.

The election in this case was held at four polling places: three at the Employer's Palo Verde, Arizona facility, where the unit employees worked; and one at a hotel in Phoenix, Arizona where off-duty employees could vote. There were 928 employees in the unit.

The Employer conducted a preelection raffle. The stated purpose of the raffle was to encourage employees to vote. The raffle prizes were two television sets worth $999.99 each, two camcorders worth $799.99 each, and four restaurant certificates worth $100 each. These prizes were to be split evenly between the on-site employees and the off-duty employees.

The Board's multifactor test for determining the legality of raffles is set forth in *Sony Corp.*, 313 NLRB 420 (1993). Interestingly, the dissent does not even mention this test. This is not surprising. As shown below, that result clearly leads to the result that the raffle was lawful.

In *Sony*, the Board quoted the following principles regarding raffles:

> [T]he Board has held that the conduct of a raffle does not constitute a per se basis for setting aside the election. Rather, the Board will consider all of the attendant circumstances in determining whether the raffle destroyed the laboratory conditions necessary for assuring employees full freedom of choice in selecting a bargaining representative. Some of the factors considered relevant by the Board have been whether the circumstances surrounding the raffle provided the employer with means of determining how and whether employees voted, whether participation was conditioned upon how the employee voted in the election or upon the result of the election, and whether the prizes were so substantial as to either divert the attention of the employees away from the election and its purpose or as to inherently induce those eligible to vote in the election to support the employer's position.

I agree with the hearing officer's finding that there is no evidence that the Employer used the raffle to determine how and whether the employees voted, or that participation in the raffle was conditioned upon how the employee voted or upon the result of the election. Thus, these elements of the *Sony* test clearly militate in favor of the legality of the instant raffle.

With respect to the monetary value of the raffle, I note that the value of a raffle ticket was even less than it was in *Sony* (where the raffle was upheld). In *Sony*, the unit consisted of about 120 employees, and the prizes were worth $1500. Thus, a raffle ticket was worth $12.50. In the instant case, the unit consisted of 928 employees, and the prizes were worth $4000. Thus, the value of a raffle ticket was about $7. In sum, under this element of the *Sony* test, the raffle passes muster.

The dissent argues that the Employer's purpose was to induce employees to vote against the Union. In response, I note that this factor is not a part of the *Sony* test. The only part of *Sony* that even comes close to this contention is the inquiry into whether the monetary values are so substantial ''as to inherently induce those eligible to vote in the election to support the employer's position.'' As discussed above, the monetary values involved here were even less than those in *Sony*.

Further, even if the dissenter's point is relevant, this would not change the result. In essence, the dissent asserts that the Employer wanted a large voter turnout because it believed that such a turnout would more likely result in a union loss. In my view, a large turnout is a public good, quite consistent and indeed desirable under the Act. If one party or the other thinks that a large voter turnout will favor its side, there is nothing wrong in encouraging such a turnout. In that way,

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule Objections 1 and 4, and his granting of the Petitioner's motion to withdraw Objection 7.

The Employer filed a Motion to Supplement the Record, and the Petitioner filed an opposition. In its motion, the Employer seeks to supplement the record with an affidavit of a company official describing raffles allegedly conducted by the Employer prior to the one at issue here. In light of our decision herein, the Employer's motion is denied as moot.

many employees, rather than a few, will vote their choice. That is the way a democracy works.

The dissent says that the Employer opposed the Union, and stated its opposition in its announcement of the raffle. The dissent concedes that such an expression of opinion is itself permissible. I do not see how this permissible expression of an opinion can render objectionable that which is otherwise unobjectionable.

As stated at the outset, the dissent is unwilling to deal with the *Sony* test. It has chosen instead the *B & D Plastics* test.[2] Of course, *Sony* deals specifically with raffles, while *B & D* deals with changes in employee terms and conditions of employment (a paid day off). Clearly, *Sony* is the applicable test inasmuch as the instant case involves a raffle. My colleague gets to her *B & D* test through a curious route. She says that *Gulf States Canners*, 242 NLRB 1326 (1979), sets forth a test for ''grants of benefits,'' and that this test does not distinguish between ''raffle'' benefits and other benefits. She then says that *Gulf States* was ''cited and applied'' in *B & D*. However, she ignores the facts that: (1) *Gulf States* was not a raffle case; (2) *B & D* was not a raffle case; (3) *Gulf States* was cited only for the proposition that the test in ''grant of benefit'' cases is an objective one (no one disagrees with that proposition); and (4) the *Sony* case is a raffle case.

Further, even if *B & D* were applicable, the raffle would not be objectionable. The dissent focuses on only one (of four) of the *B & D* factors. The dissent asserts that the employees ''would perceive the purpose of the raffle for what it was—a material incentive to vote against the Union.'' There is no evidence to support the assertion. As noted, the purpose of the raffle was to encourage employees to vote. The Employer hoped and believed that a large turnout would result in a union loss. However, offering an incentive to vote is not the same thing as offering an incentive to vote against the Union.

The dissent also relies upon *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995). I agree with the dissent in that case, with the similar dissent in *Lutheran Welfare Services*, 321 NLRB 915 (1996), and with the concurrence in *Good Shephard Home*, 321 NLRB 426 (1996). That is, I see nothing objectionable in compensating off-duty employees for their transportation expenses and for their time in coming to the polls, where the purpose of the compensation is to encourage employees to vote.

Further, even accepting *Sunrise* as the law, I note that the instant case is different. As in *B & D Plastics*, the *Sunrise* employees were given a benefit concerning their terms and conditions of employment (they were given 2 hours wages for coming in to vote.) As discussed supra, raffles are treated differently from wages. Accordingly, *Sony* (the raffle case) was not overruled, or even mentioned, in *Sunrise*.

The dissent notes that there is no evidence of a past practice of raffles in the instant case. The concurrence also emphasizes the factor of past practice. However, the asserted absence of a past practice of raffles was not a basis for the objection, and thus the Employer had no occasion to introduce any rebuttal evidence on this point. In any event, as the dissent concedes, the past practice does include the payment of transportation expenses as a means of encouraging employees to vote. The Employer paid such expenses in the past, i.e., when such payments were lawful under *Young Men's Christian Assn.*, 286 NLRB 1052 (1987). The Employer resorted to a new practice (the raffle) in this case in order to comply with the ''new law'' of *Sunrise*. In these circumstances, I would not condemn the Employer's raffle simply because it never held one before.

The dissent relies on *Drilco, a Division of Smith International, Inc.*, 242 NLRB 20 (1979). The case is clearly distinguishable. In *Drilco*, the employer announced, 4 days prior to the election, that the raffle prizes would be given away on the day of the election. In finding objectionable conduct, the Board emphasized that the prizes were to be given away ''on the day of the election.'' The Board concluded that such conduct would ''divert the attention of the employees away from the election and its purpose.'' In the instant case, the Employer did not award the prizes until almost a week after the election. Thus, the Employer took care not to sully the atmosphere on election day.[3]

Finally, with respect to the concurrence, I do not believe that I have wandered into ''the Scylla of excessive deregulation.'' However, the phrase is more colorful than precise, and thus I am uncertain as to what it means. If it means that I would permit reasonable efforts to get out the vote, I plead guilty to such deregulation. As stated above, I believe that a large turnout at the polls is consistent with the democratic goals of the Act, and I would not use government regulation as a device to hinder the attainment of that goal.

Since my concurring colleague joins me in the result, we reverse the hearing officer and overrule Petitioner's Objection 5. Further, because we agree with the hearing officer's recommendations to overrule the Petitioner's other objections, we certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Brotherhood

[2] 302 NLRB 245 (1991).

[3] I recognize that the Board in *Drilco* found that *the announcement* of the prizes was unlawful. However, as noted above, in finding that the announcement was objectionable, the Board relied on the fact that the prizes were given away on the day of the election.

of Electrical Workers, Local 387, AFL–CIO and that it is not the exclusive representative of these bargaining unit employees.

CHAIRMAN GOULD, concurring.

The unsatisfactory nature of the competing analyses of my colleagues in the instant case is perplexing. I am of the view that the views set forth in my opinion are consonant with the Act's policy objectives and that they carefully skirt the Scylla of excessive deregulation provided by Member Hurtgen[1] and the Charybdis of wasteful litigation inherent in the approach devised by Member Liebman. Neither approach is properly attuned to the policies of the Act.

Nonetheless, inasmuch as the labor-management electoral campaign arena is best addressed through broad mechanical rules[2] which put the parties on notice as to their rights and obligations and given the perils of time-consuming litigation[3] inevitably more delphic than elucidating[4] ever present in the whirlpool of Charybdis, I am persuaded that the better course is to join the general approach of Member Hurtgen under the circumstances of this case.

Accordingly, I join Member Hurtgen in reversing the hearing officer's recommendation to sustain Petitioner's Objection 5, which alleges, in part, that the Employer held a raffle for employees who voted in the election. I disagree with the Board's current approach in this area, i.e., that an election-day raffle is objectionable if the prizes are of a substantial nature. See *Grove Valve & Regulator*, 262 NLRB 285, 303 (1982); *Drilco, a Division of Smith International*, 242 NLRB 20, 21 (1979). In my view, the Board should modify its analysis of election-day raffles to place primary consideration on whether the employer has, in the past, held raffles of a similar nature for employees.

In my opinion the Board should impose as few regulations with respect to elections as possible. However, the analysis of election day raffles needs to be consistent with the Board's decision in *Sunrise Rehabilitation Hospital*, 320 NLRB 212, 213 (1995). There, the Board held that payments offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses constitutes objectionable conduct warranting setting aside the election. Thus, where the offer of a monetary benefit is closely related to voting in the election, the offer is objectionable because it is construed as ''something extra for employees on election day.'' *Sunrise*, supra at 213.

The Employer's election day raffle for employees here may be similar to the offer of benefit in *Sunrise* if it too is an offer of benefit that is closely related to the election. Whether the raffle amounts to an actual benefit, however, can only be determined by viewing the election-day raffle in context with the Employer's past practice with respect to raffles.

In circumstances where an employer has a past practice of holding raffles for its employees, the conduct of an election-day raffle—with prizes similar to those awarded in prior raffles—would not interfere with employee free choice. Indeed, in such circumstances, employees would be accustomed to raffles and therefore would not likely perceive the election-day raffle as a grant of a benefit or ''something extra'' for voting in the election.[5]

If, however, an employer has held no previous raffles for its employees, its election-day raffle could easily be perceived as ''a favor from the [e]mployer which employees might feel obligated to repay by voting against the [u]nion, as the [e]mployer requested.'' *Sunrise*, supra at 213. In such circumstances, the raffle would undermine employee free choice in the election. Similarly, in circumstances where an employer has a history of conducting raffles with prizes of a certain value, employees could well perceive an election-day raffle—with prizes of a substantially greater value—as ''something extra'' for employees voting in the election, and thus the raffle would constitute objectionable conduct.[6]

Because prior cases concerning raffles have not placed primary emphasis on employer past practice, the record in the instant case is devoid of evidence concerning the existence of prior raffles conducted by

[1] Although Member Hurtgen contends that he would permit ''reasonable efforts'' to get out the vote by an employer, it is readily apparent from his opinion that his standard would permit employer efforts that are anything but ''reasonable.'' Precisely, this view constitutes much of the Scylla against which proponents of the Act's policies would be dashed if their ships were to pursue the siren call of Member Hurtgen's opinion.

[2] See, e.g., my opinions in *Mod Interiors*, 324 NLRB No. 33 (Aug. 7, 1997); and *Fountainview Care Center*, 323 NLRB No. 172, slip. op. at 2–3 (June 16, 1997) (W. Gould concurring). See also W. Gould, *Agenda for Reform: The Future of Employment Relationships and the Law* (MIT Press 1993).

[3] See, e.g., *Flint Iceland Arenas*, 325 NLRB No. 43, slip op. at 4–6 (Jan. 23, 1998) (W. Gould, dissenting); *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844; 847–848 (1996) (W. Gould concurring); *Douglas-Randall, Inc.*, 320 NLRB 431 (1995), and *Management Training Corp.*, 317 NLRB 131 (1995).

[4] This, of course, is a paraphrase of Justice Frankfurter's words in *International Association of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958).

[5] In *Sony Corp.*, 313 NLRB 420 (1993) the Board took notice of the employer's past practice in finding that an election-day raffle held for voting employees was not objectionable. However, the Board in *Sony* did not place primary emphasis on employer past practice, but rather applied its traditional analysis and found the raffle not objectionable because the value of the prizes was not so substantial as to interfere with employee free choice in the election. Thus, *Sony* did not hold that past practice was a determinative factor.

[6] Further, if the employer's past practice established that the election-day raffle was in addition to other regularly scheduled raffles, that too might well be considered as something extra for employees voting in the election.

the Employer. Thus, the most appropriate analysis of Objection 5 would require establishing a new standard focusing on employer past practice, and also remanding that objection for further evidence concerning the Employer's past practice.[7] However, in the absence of a majority vote for remanding this case to place primary consideration on the Employer's past practice, I shall decide the case on the record that is before us. Thus, insofar as the record fails to show that the election-day raffle was inconsistent with the Employer's past practice, I am unable to find that the raffle was objectionable. Accordingly, I join Member Hurtgen in certifying the results of the election.

MEMBER LIEBMAN, dissenting.

Unlike my colleagues in the majority, I agree with the hearing officer's recommendation to sustain the Petitioner's Objection 5, which alleges that the Employer's raffle of door prizes worth $4000 plus tax, conducted on the day of the election, interfered with the employees' free choice. In recommending that the election be set aside, the hearing officer correctly found, consistent with Board precedent, that the raffle prizes were so substantial as to both divert the employees' attention away from the election and its purpose, and to inherently induce eligible voters to support the Employer's antiunion position. E.g., *Drilco, A Division of Smith International*, 242 NLRB 20 (1979).[1] Further, I agree with the hearing officer that the manner in which the raffle was announced and promoted by the Employer had the tendency to induce voters to support the Employer's position by voting against the Petitioner.

The Employer announced the raffle in an ''FYI'' styled flyer that exhorted employees to vote against the Union. The flyer notified employees that, in the past, the Employer had paid off-duty employees for their time spent voting, but, because of a recent ruling by the National Labor Relations Board, that practice was no longer permitted. ''[I]nstead,'' the flyer stated, the Employer would provide prizes for voters, including two color television sets, two video cameras, and other door prizes. The bottom half of the one page flyer consisted of a question and answer:

> Q: All the talk aside, why not a union?
>
> A: There are many reasons. The 10 most important are: . . .

Ten numbered reasons to vote against the Union followed. At the bottom of the page, in large bold letters was printed ''**85% of American workers can't be wrong! Vote NO!**''

I view as disingenuous the Employer's contention and Member Hurtgen's conclusion that the purpose of the raffle was purely to encourage a large voter turnout. From its research during the campaign, the Employer had concluded that a close election was likely and that a high voter turnout would be important in defeating the Union. The raffle was thus not a simple incentive to vote. The manifest purpose of the raffle, as evidenced by its announcement, was to induce employees (with prizes of not insignificant value) to ''**Vote NO!**'' Significantly, the raffle was not conducted in a neutral context. The Employer conducted an active campaign to defeat the Union; even the raffle announcement itself was partisan.

Critical to determining the propriety of any offer of benefit during an election campaign is how the employees would reasonably construe the purpose of the benefit. *B & D Plastics, Inc.*, 302 NLRB 245 (1991).[2] Here, it is reasonable to infer that employees would perceive the purpose of the raffle for what it was—a material incentive to vote against the Union. Likewise, it is reasonable to infer that employees would view the raffle prizes as a favor or benefit, being offered by the Employer, which was intended to influence their vote in favor of the Employer, or which they might feel obligated to repay by voting against the Union, as the Employer requested. Apathetic voters in particular, who might not otherwise be inclined to go to the polls, would more likely favor the party offering the inducement.[3]

Contrary to my colleagues in the majority, I agree with the hearing officer's reliance on *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), in which the Board held that it would no longer permit off-duty em-

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[7] I would also overrule *Sony*, supra, because it does not hold that past practice is the determinative factor.

[1] Member Hurtgen's claim that *Drilco* is ''clearly distinguishable'' does not withstand scrutiny. He states that in *Drilco* the Board emphasized that the prizes were to be given away ''on the day of the election,'' while in the instant case the prizes were awarded after the election. In *Drilco*, however, it was not the grant of the prizes that the Board found objectionable, but rather the announcement of the prizes, the identical ground on which the hearing officer relied in this case.

[2] Member Hurtgen claims that I have applied the wrong test, stating that under Board law ''raffles are treated differently'' from other grants of benefits. I disagree. In *Gulf States Canners*, 242 NLRB 1326 (1979), a leading case in this area, the Board made clear that in deciding whether a party's bestowal of economic benefits on employees is objectionable, it applies the same test regardless of the particular benefit involved. Citing, inter alia, raffle cases, the Board stated that the appropriate standard is whether the challenged conduct ''had a tendency to influence the outcome of the election.'' *B & D Plastics* cited and applied the *Gulf States Canners* test.

[3] I agree with Member Hurtgen that the Employer's expression of opposition to the Union, in and of itself, is permissible. However, in determining whether the raffle ''had a tendency to influence the outcome of the election,'' *Gulf States Canners*, supra, the Employer's statements in the flyer announcing the raffle are plainly relevant.

I fully concur with Member Hurtgen's assertions that ''a large turnout is a public good'' and that ''there is nothing wrong in encouraging such a turnout.'' But, in my view, what is ''wrong'' is to seek to achieve the objective of a large turnout by offering employees material incentives while exhorting them to vote against the Union.

ployees to be paid for voting. In the instant case, as in *Sunrise*, the Employer's announcement of prizes for voters came in a flyer exhorting the employees to vote against the Union and was not linked to any legitimate expense reimbursement. Also as in *Sunrise*, the Employer here provided something ''extra'' to the employees who voted, and it did so in a manner that likely would induce employees to support the Employer's antiunion position. Significantly, in its flyer announcing the raffle, the Employer, presumably referring to *Sunrise*, expressly substituted raffle prizes for its past, now prohibited, practice of paying employees for voting.

I also agree with the hearing officer that *Sony Corp.*, 313 NLRB 420 (1993), is distinguishable. In that case, the Board considered the employer's past practice of conducting raffles on other occasions as a factor in finding an election raffle unobjectionable. There was no evidence of such a past practice in this case. Lastly, the prizes offered in the raffle conducted in *Sony* were of lesser value than those here.

Accordingly, for the reasons set forth by the hearing officer, I find that the Employer's election-day raffle interfered with the election and that a new election must be held.