Young Men's Christian Association of San Francisco-Embarcadero Branch *and* Service Employees Union Local 87, S.E.I.U., AFL-CIO, Petitioner. Case 20-RC-15921

23 November 1987

DECISION AND DIRECTION

BY MEMBERS JOHANSEN, CRACRAFT, AND STEPHENS

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in an election held 4 December 1985 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to the Acting Regional Director's Decision and Direction of Election. The tally of ballots shows 14 votes for and 17 votes against the Petitioner with 19 determinative challenged ballots.[1]

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's report[2] as modified by this Decision and Direction.

The hearing officer found merit in the Petitioner's Objection 5 that alleged that the Employer's offer to pay and the subsequent payment of 2 hours' wages to those employees who were not scheduled to work on election day but came in to vote, interfered with the election. We disagree, for the reasons set forth below.

Prior to the 4 December 1985 election, the Employer disseminated to all employees an "Election Notice" (not an official NLRB notice of election), which read as follows:

ELECTION NOTICE

Finally, a new election date has been established replacing the original date that had to be cancelled because of frivolous charges placed against the YMCA by Local 87.

Hopefully, the election will be conducted on the date scheduled and there will be no stall tactics by Local 87.

DATE: December 4, 1985
TIMES: TO BE ANNOUNCED
PLACE: EMBARCADERO YMCA

THOSE ELIGIBLE: All regular full-time and part-time employees at the Embarcadero YMCA, excluding room attendants, janitors, summer camp counselors, work study students, volunteers, confidential employees, professional employees and supervisors.

Keeping Local 87 out will take the support of all eligible employees. Plan now to vote. The election will be decided by a majority of those who vote, not by a majority of those eligible.

If you are not scheduled to work the day of the election, the YMCA will pay two hours of wages to all employees who come in to vote (be sure to punch in and out). This is to cover your transportation and time costs.

Plan now to vote!

PROTECT YOUR FUTURE—VOTE—VOTE NO!!

The hearing officer found that at least 15 persons took advantage of this offer. Employees not scheduled to work punched in and out to indicate that they had come in to vote. Those who did so were paid for 2 hours' wages even though they were at the YMCA for only a few minutes. Payment was calculated from entries on timecards and was not made until the next regular payday after the election. There was no allegation that the Employer conditioned payment on how the employees voted nor that the Employer tried to ascertain how the employees voted.

The Employer did not know whether the employees actually voted, only that they came in during the election period.

The hearing officer rejected the Employer's argument that the payment was comparable to furnishing free transportation to employees to the polls or to "lunch money" to employees attending preelection meetings. Rather, the hearing officer found that the monetary offer appeared designed to tip the balance of a close election in favor of the Employer, relying on recent Board cases finding gifts or raffle prizes can constitute economic interference even when not conditioned on a favorable vote by the employees.[3] We disagree. After closely examining the particular facts of this case, we find that the moneys paid did not constitute a substantial benefit that would influence votes, but rather were a reasonable reimbursement for transportation and time costs.[4] The bargaining unit here included

[1] The Regional Director sustained 2 of the challenged ballots, leaving 17 to the hearing officer's determination

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the challenges to 10 ballots be sustained and that the challenges to 7 ballots be overruled and that the Petitioner's Objections 1, 2, 3, 4, 6, 7, and 8 be overruled

[3] *Owens-Illinois, Inc*, 271 NLRB 1235 (1984), *Gold Bond Building Products*, 280 NLRB 1003 (1986)

[4] Contrary to our dissenting colleague, we do not believe that because the employer did not ascertain the employees' actual transportation expenses or the amount of time consumed in coming to vote, a substantial portion of the payment was likely to appear to be a payment to vote Nor do we find the amount of money paid here to be controlling or as sub-

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part-time employees rendering specialized services on an infrequent but regular basis and resulted in obvious difficulties arranging an election when all members of the bargaining unit would be working. The employees in this case were required to expend time and money to vote; the wages compensated them for their cost of getting to the polling site rather than bestowing on them a windfall or bonus, and the employees had no reason to be at the facility except to vote. In view of the limited hours that some of these employees worked, it can reasonably be inferred that they had to take time off from their normal activities, possibly from other employment, to come to vote. It is well established that an employer may, on a nondiscriminatory basis, provide free transportation to employees to the polling site.[5] It has also been held that a union's payment of cash for gas to carpool drivers to transport other employees to vote was not unlawful.[6] We agree with the Employer that this case is closely aligned with the cases which hold that furnishing transportation to employees is not objectionable.[7]

For these reasons we find that the Employer's offer to pay 2 hours' wages to employees not scheduled to work who came in to vote and the subsequent payment of those wages as promised, in the circumstances of this case, did not constitute unlawful interference with the election.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 20 shall, within 10 days from the date of this Decision and Direction, open and count the ballots of Beth Celani, Maria Li, Hilda Reiner, Sydney Abrahams, Hideaki Hiraoka, Merill Jung, and Carlos Bonilla. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

MEMBER STEPHENS, dissenting in part.

Contrary to my colleagues, I would adopt the hearing officer's recommendation to sustain the Petitioner Union's Objection 5 and order a new election. That objection challenges the Employer's payment of the equivalent of 2 hours' wages to employees "not scheduled to work the day of the election" for the stated purpose of covering "transportation and time costs" incurred in traveling to the workplace to vote. Employees receiving the payments constituted more than 25 percent of the eligible voters and more than 30 percent of those who actually voted.

Several facts are, for me, especially salient. First, so far as the record shows, the Employer made no effort at all to ascertain what any given employee's actual transportation expenses or the amount of time consumed in coming to vote were. (So far as the record shows, the Employer did not normally pay transportation expenses simply for coming to work.) Thus, in some cases a substantial portion of the payment was likely to appear nothing more than a payment to vote.[1]

Second, the sums of money paid here were not insubstantial. As the hearing officer found, they ranged from $10 to $37 (a few of the larger payments reflecting the fact that in those instances the 2-hour election-day payment was calculated at an overtime rate because the employee had worked a

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stantial as the dissent seems to imply Only one employee, Ji Hwa Chen, received $37, and her vote was successfully challenged There was no evidence that any other employee received more than $20

The facts of this case were unusual in that there were many part-time employees who worked only a few hours each pay period There appeared to be no reasonable way for the Employer to provide actual transportation nor to schedule the election at a time when all employees who were working varied schedules would be there to vote In order to vote, these employees were using their own time to come whatever distance at whatever expense when they had no other reason to be at the facility The amount of money paid was aimed at compensating them for their time as well as out-of-pocket costs in coming to the polls and was not so grossly disproportionate as to reasonably tend to influence their vote Its stated purpose was to cover time and transportation and it was paid on a nondiscriminatory basis Given the circumstances of this particular case, we find it unreasonable to assume that employees would tend to feel obligated to vote against their own interests or convictions. We do not see the payment as a substantial benefit or a gift which tended to influence the outcome of the election

We also do not find that the juxtaposition of the payment offer with the Employer's statement of the need to keep the Union out would tend to put employees leaning toward union support in an uncomfortable position It is unfortunate that the Employer combined the offer to pay with an exhortation to vote against the Union However, the Employer made no attempt to find out whether or how the employees voted, nor to condition the payment on the outcome of the election Payment was to be made after the election, on the next paycheck to employees who came to vote during their nonworking hours, regardless of the outcome of the election

Although we agree with our dissenting colleague's summary of the law, i e , that the appropriate objective test is whether the conduct in question reasonably tended to influence the election outcome in the Employer's favor, we do not agree that the conduct in this particular case did so tend to influence the employees

[5] *Garner Aviation Service Corp*, 114 NLRB 293 (1955), *Gong Bell Mfg Co*, 108 NLRB 1314 (1954), *E J Kelley Co.*, 99 NLRB 791, 792 (1952), *John S. Barnes Corp*, 90 NLRB 1358 (1950), *Charroin Mfg. Co*, 88 NLRB 38 (1950), *Hercules Motors Corp*, 73 NLRB 650 (1947)

[6] *Federal Silk Mills*, 107 NLRB 876, 877–878 (1954)

[7] We agree with the hearing officer that *Swift & Co*, 13 NLRB 210 (1939), is distinguishable from the case at issue We also agree with the hearing officer that it is immaterial that some of the paid voters may ultimately be determined to be ineligible to vote or that they were not actually paid until after the election

[1] Indeed, in several cases the hearing officer found that contrary to the terms of the offer, employees who had already worked that day received the extra 2 hours' pay In such cases, the payment would represent nothing more than compensation for the few minutes spent in waiting in line to vote and actually voting Even regarding employees who had not been scheduled to work that day, it cannot reasonably be assumed that most of the payment would go toward paying their transportation expenses As noted below, many of the recipients normally worked only 2 or 4 hours a week, so unless transportation expenses were modest in relation to 2 hours' wages, we would have to make the unlikely assumption that the employees were working at jobs that paid them little more than the cost of getting to and from the workplace

full day at another employer facility). Their impact was also a matter of the relation they bore to employees' customary wages. As the hearing officer found, many of the beneficiaries were part-time employees who regularly worked no more than 2 to 4 hours a week. Thus, many received the equivalent of an additional week's paycheck.[2]

Third, the payment offer, which was made in an "Election Notice" that the Employer disseminated to all unit employees, followed immediately after a paragraph in which the Employer made the following points:

> Keeping Local 87 out will take the support of all eligible employees. Plan now to vote. The election will be decided by a majority of those who vote, not by a majority of those eligible.

Although it is true that the Employer did not condition payment on how an employee voted, the juxtaposition of the payment offer with the point about the need for the "support" of employees to keep the Union "out" would reasonably tend to place employees leaning toward support of the Union in an uncomfortable position. They would have to choose among three unsatisfying courses of action: (1) accepting the payment, voting for the Union, and feeling like an ingrate who bit the benefactor's hand; (2) voting against the Union so as to avoid any such feelings of guilt; and (3) foregoing the payments and following their initial inclinations in voting. For employees who had no strong inclination one way or other, the choice would be simpler; but the danger here, as the hearing officer reasonably noted, is that apathetic voters who would not otherwise be inclined to go to the polls "will more likely favor the party making a monetary offer."[3]

An observation from former Chairman Miller's dissenting opinion in *Quick Shop Markets*, 200 NLRB 830, 831–832 (1972), is instructive in this regard. In *Quick Shop*, the panel found unobjectionable a union's payment to six employees of amounts equal to double their normal wage rate as compensation for serving as the union's election observers. In dissent, Chairman Miller stated (id. at 831–832):

> In my view, any time an employer or a union offers an observer an extra payment over and above reimbursement at his regular rate of pay plus expenses, there is a lurking danger that, no matter how pure the heart of the payor, such payments will be regarded by the recipient as a form of monetary inducement to demonstrate his support of the paying party's cause and also as an inducement to secure his unspoken commitment to vote in the manner desired by the payor.

Although in the present case, nearly all of the affected employees received payments at only their "regular" hourly rate, former Chairman Miller's reasoning is applicable, because the payments represented something "extra," since all that the employees were required to do for them was show up and vote.[4]

In relying on the foregoing facts to set the election aside, I am applying the appropriate objective test—whether the conduct in question has a "reasonable tendency to influence" the election outcome. *NLRB v. Gulf States Canners, Inc.*, 585 F.2d 757, 759 (5th Cir. 1978), on remand 242 NLRB 1326 (1979), enfd. 634 F.2d 215 (5th Cir. 1981). I am also relying on the direct relation between the payment and the act of voting. I am well aware that we have accorded some latitude to parties for payments reimbursing employees' expenses incurred in the course of campaigning.[5] But I think strict scrutiny must be accorded payments directly associated with the election itself. This, in my view, is the key to *Owens-Illinios, Inc.*, 271 NLRB 1235 (1984), in which the Board set aside an election because of the union's distribution of $16 union jackets to unit employees *on election day between voting sessions.*[6] Under those circumstances, the Board reasoned, even though the gift of a jacket was not conditioned on how an employee voted, the gifts "could well have appeared to the electorate as a reward for those who had voted for the Petitioner and as an inducement for those who had not yet voted to do so in the Petitioner's favor." Id. at 1235. I see the same danger here.

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[2] As the hearing officer noted, this was one of several circumstances that distinguishes this case from *Swift & Co*, 13 NLRB 210 (1939). My colleagues in the majority and I all reject the Employer's argument that *Swift* is controlling in this case

[3] Cf. *NLRB v Savair Mfg Co*, 414 U S. 270, 277–278 (1973)

[4] Although *Quick Shop* concerned payments to election observers rather than payments to those who had merely to come vote, the precedential value of the majority opinion has, I believe, been undermined by the Board's opinion in *Owens-Illinois, Inc*, 271 NLRB 1235 (1984), discussed below The rationale of the latter includes reasoning similar to that of the *Quick Shop* dissent See also *Easco Tools*, 248 NLRB 700, 701 (1980) (noting that observers' compensation was such that they might have felt a "sense of obligation to vote for the Petitioner")

[5] See, e g , *Aurora Steel Products*, 240 NLRB 46 (1979), *Gulf States Canners*, supra

[6] I would read *Owens-Illinois* as not applying to distribution of jackets, caps, or other regalia with a party's logo in advance of an election as part of the campaign I also would distinguish cases in which parties have either provided transportation to the voting site or have reimbursed employees for the expenses of transporting voters there See cases cited at fns 4 and 5 of the majority's opinion To the extent, however, that *Federal Silk Mills*, 107 NLRB 876, 877–878 (1954), suggests that evidence concerning employees' *subjective* understanding of payments is relevant, I would not follow it As explained in *Gulf State Canners*, supra, the proper standard is an objective one

In sum, under all the circumstances of this case, the Employer's promised payments to "cover" employees' "time and transportation expenses" were not carefully restricted so as to serve only that limited purpose; instead, the promised payments reasonably tended to influence the election outcome in the Employer's favor. For that reason I would set the election aside and direct a new election.