JD(SF)-02-10
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Good Samaritan Hospital
Employer
and

Allen V. Smith, an Individual — Case No. 31-RD-1555
Petitioner
and

Service Employees International
Union, United Healthcare Workers-West
Union

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(Jeffer, Mangels, Butler & Marmaro, LLP),
Los Angeles, CA, for the Employer.
Allen V. Smith, Carson, CA, for the Petitioner.
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SUPPLEMENTAL DECISION ON REMAND

Lana H. Parke, Administrative Law Judge. In an unpublished order dated August 27, 2009[1], the National Labor Relations Board (the Board) remanded this matter with instructions to reopen the record for the presentation of evidence by the Good Samaritan Hospital (the Employer) and the Service Employees International Union, United Healthcare Workers-West (the Union) explaining the basis for each party's respective calculation of overdeducted dues owed to individual unit employees. The Board ordered the judge thereafter to issue a supplemental report resolving any questions of credibility and containing additional findings and conclusions addressing whether the Union conferred benefits on employees, and, if so, whether the timing of and contemporaneous explanation by the Union for its action would reasonably tend to interfere with the employees' electoral choice in a decertification election conducted by Region 31 of the Board on April 29-30 (the 2008 decertification election) in the following unit of employees:

> All full-time and regular part-time and per diem non-professional employees, including technical and service and maintenance employees employed by the Employer at its facilities located at 637 South Lucas Avenue, 1225 Wilshire Boulevard, 1245 Wilshire Boulevard, 1350 Shatto Street, and 1254 West 6th Street, all within the city of Los Angeles, California.

[1] All dates hereafter are 2008 unless otherwise noted.

1. The Underlying Case

The underlying case concerned the Employer's objections to the 2008 decertification election. In that election, 209 employees cast votes in favor of the Union, and 180 cast votes against. On November 26, the Employer filed timely objections to conduct affecting the results of the election.[2] On January 30, 2009, the Regional Director issued a Second Report on Objections, Order Directing Hearing, and Notice of Hearing setting the Petitioner's objections 1 through 11 for hearing, which hearing was held before me on March 2-4, 2009 in Los Angeles, California (initial hearing). Thereafter I issued my Report and Recommendations on Objections, recommending, inter alia, that the Employer's Objection 3 be overruled.[3]

Following the Board's remand order, I held a hearing on the remand issues (remand hearing). The Board's remand order relates solely to the Employer's Objection 3, which reads:

Objection 3

> During the Critical Period, the union attempted to bribe and coerce employees into voting for the Union by mailing checks in varying amounts to employees' homes. The Union's conduct of attempting to bribe employees also constitutes an unfair labor practice. A union's offer of benefits to potential members during an election campaign is objectionable and is grounds for setting aside an election. *Alyeska Pipeline Service Co.,* 261 NLRB 125 (1982).

2. Factual Background of Objection 3

The Union has represented about 440-460 unit employees at the Hospital since 2000. During the term of the 2003-2006 collective bargaining agreement between the Employer and the Union, a dispute arose regarding calculation of union dues deducted from the paychecks of employees who had worked 12-hour shifts during the contract term (72-hour employees).[4] On June 9, 2006, the Union filed a class-action grievance against the Employer complaining that the Employer had overdeducted dues from union members and requesting immediate reimbursement upon identification of amounts due.

In the course of negotiating a successor contract to the 2003-2006 collective bargaining agreement, the Union agreed to withdraw the outstanding class action grievance subject to the parties' good faith efforts to calculate the amounts of union dues that had been overpaid during the term of the 2003-2006 Agreement. Thereafter, the Employer undertook the task of calculating dues refunds owed to 72-hour employees, which calculations the Union and the Employer discussed in email exchanges spanning the period of February 21 through April 25.

At some point prior to April 10, rumors circulated among unit employees that union-dues overdeductions would be refunded. On April 10, 19 days prior to the 2008 decertification election, the Union issued checks in varying amounts ($1.19 to $849.30) to 126 unit employees

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[2] The hiatus between election and objections was occasioned by blocking unfair labor practices.

[3] Insofar as not modified herein, the findings of fact in said report are hereby incorporated by reference.

[4] The dues overdeduction issue concerned unit employees who worked 12-hour shifts and whose dues should have been but were not capped at 72 hours pay during a 14-day pay period.

with attached notations that the money was a refund.[5] When some employees expressed confusion about why the checks had been issued, the Union issued a memorandum dated April 19 (the April 19 letter) to bargaining unit employees, reading in pertinent part:

> Re: Dues Refund Checks
>
> Recently, many of you received a check from UHW for a refund of your Union dues. The check reflected the excess amount that Good Samaritan Hospital deducted from your pay. Many times employers will purposely overcharge Union dues as a way to turn employees against the Union. In other cases, it is just an administrative error by the employer. We do not know why Good Samaritan Hospital overcharged you for Union dues.
>
> As soon as we became aware of the hospital's error, we attempted to work with them to correct the error and refund the proper amount to each employee. Managers at Good Samaritan Hospital were not overly cooperative in this endeavor. In fact we are still awaiting information we requested from them to calculate the refunds. As a result, the refund took longer than was necessary.
>
> Now the Good Sam is trying to blame their mistake on the Union. That is ridiculous and shameful! Remember, with a Union there is a process to address errors and mistakes made by the hospital. Without a Union, there is no process and you have to live with Good Samaritan Hospital's mistakes. That is what is at risk in this election. I urge you to VOTE YES.

By email dated April 25, Diana Scribner (Ms. Scribner), the Employer's Human Resources director notified the Union that the Employer had compiled all pay periods from May 16, 2004 to March 1 on all employees and had applied the agreed-upon calculation formula to employees who had worked excess 12 hour shifts in a pay period. The Employer attached 111 pages of employment and payroll information relative to dues-overdeductions for the relevant period, along with a much shorter summary calculation of each unit employee's dues-overdeduction (Employer Overdeduction Calculations).

3. The Remand Hearing

At the remand hearing, the Union presented Tere Omnes (Ms. Omnes), the Union's membership director, as its sole witness to explain how the Union determined which employees should be reimbursed for dues-overdeductions and in what amounts. Ms. Omnes was not directly involved in the Union's computations but directed several staff members to make the calculations, which she thereafter approved. Ms. Omnes said the Union calculated the refunds it distributed to qualifying members by compiling a list of all 12-hour shift classifications, ascertaining the hourly rates of employees within those classifications, and determining excess dues payments since January 1, 2005. Thereafter the Union applied the following formula to the data: hourly rate multiplied by 72 multiplied by 2 percent. The Union then refunded to qualifying employees the difference between the 72-hour formula and the actual amount of dues deducted from individual employees' paychecks. According to Ms. Omnes, based on its formulaic computations, the Union either refunded dues or, in some cases, charged employees who had underpaid. Ms. Omnes did not know what employees may have been asked to pay

[5] Check invoices (or stubs) attached to the checks noted "72H Rfnd," which I have found employees must have understood to mean 72-hour refund.

dues deficiencies, and the Union provided no records of dues underpayment collection. In the absence of any probative supporting evidence, I decline to find that the Union charged any employee for underpaid dues during this period.

Admittedly the Union did not have the benefit of the Employer's calculations, for which the Union had been pressing the Employer, but the Union contends it had the following data: employees' hourly rates of pay, 12-hour employee status information, and the amount of dues each employee paid. In support of its calculations, the Union proffered bargaining unit files based on information the Employer periodically provided to the Union, which show the hire date, rate of pay, and employment status of each unit member. The Union provided neither the payroll files Ms. Omnes said had been used in the Union's calculations[6] nor any computation documents showing the Union's calculations of employee dues overages.[7]

4. Discussion

There is no dispute that by February the Union and the Employer had settled on the formula to be applied in determining dues overdeductions and had agreed that the Employer would prepare a report as to which 12-hour shift employees had worked over 72 hours per pay period during a 3-4 year span and had been overcharged dues. Ms. Omnes admitted that such a report was necessary in order properly to calculate dues overpayments, agreeing that without that information, the Union did not have a complete list of 12-hour shift employees who had worked over 72-hours in a particular pay period. While Ms. Omnes' testimony suggested the Union may have had a partial list of employees who were owed reimbursements, she admitted that the Union would not have known who had reached the monetary cap without the information the Employer had agreed to provide following its calculations, agreeing that the Union's bargaining unit files did not reveal which employees were12-hour shift employees or, of that group, who had worked over 72 hours in a pay period. The Union did not receive the anticipated Employer Overdeduction Calculations until 15 days after it had issued dues refund checks to 126 employees. It is reasonable to infer that at the time the Union issued its dues reimbursements, it did not have the information necessary to accurately assess dues overdeductions.[8]

The Union essentially argues that while its refund amounts do not exactly correlate with the payroll data the employer provided 15 days after the Union had disbursed refunds, the mathematical assumptions the Union utilized in calculating refunds were reasonable and employees were entitled to the refunds they received. The Union asserts that since it "simply

[6] Ms. Omnes said she could not find those payroll files, which purportedly contained, inter alia, the amount of dues deducted from each employee's pay and the deduction type.

[7] Ms. Omnes agreed that she had no copy of a report detailing any calculation methods or specifics although she believed one must have been submitted to her; she also had no outline or other documentation of what information the Union utilized in making its calculations.

[8] At the remand hearing, the Employer Overdeduction Calculations were received as a memorialization of employer calculations made on the basis of accurate payroll information available to the employer at the time of calculation. The parties were offered the opportunity of arguing the accuracy of the Employer Overdeduction Calculations. The Employer has presented persuasive evidence and post-hearing argument of the accuracy of the Employer Overdeduction Calculations. The Union has presented no countervailing evidence. Therefore, I find the Employer Overdeduction Calculations to be accurate.

returned dues to 12 hour shift workers because they had been overcharged dues by the employer in an effort to correct the overdeduction" and did not condition the refunds on whether or not workers supported the Union, the reimbursements do not justify overturning the election.

As to the first element of the Union's argument, I cannot find that the Union computed employees' dues overpayments in a manner likely to yield reasonably accurate results. While the Union described a logical formula to be used in calculating dues overpayments, it is clear from Ms. Omnes' testimony that the Union did not have all the data it needed to correctly apply its formula. I find that the Union could not have, and therefore did not, accurately compute dues overpayments for affected unit members. Having accepted the Employer Overdeduction Calculations as accurate, it follows that the Union issued erroneous reimbursements of overpaid dues to an appreciable number of unit employees within the three weeks before the 2008 decertification election.

The second element of the Union's argument is not so easily resolved. As the Union points out, some unit employees were entitled to dues reimbursements because of dues deducted from 12-hour shift employees who had worked more than 72 hours in a pay period, a fact of which employees must have been aware since the Union had pursued a class action grievance concerning the matter for over a year during 2006-2007 and since rumors of impending union-dues overdeduction refunds circulated among unit employees in the weeks before the election. Further, the Union included an explanation, albeit terse, with each dues refund check that the check was a 72-hour refund. Following the refund distributions, on April 19, ten days before the election, the Union issued a letter to bargaining unit employees notifying them that many employees had recently received a check from the Union that was a refund of excess union dues the Employer had deducted from their pay. Although the Union blamed the dues overdeductions on employer "error" and accused the Employer of uncooperative delay in providing information necessary for refund calculation, the Union clearly identified the money in each check as a refund to which certain employees were entitled by virtue of having had dues overdeducted from their pay. There is no evidence the Union conditioned the refunds on union support in the decertification election or selected refund recipients based on union support.

The pivotal question in this remand is whether the Union's distribution of inaccurate dues overpayment refunds to employees 19 days before the decertification election had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election. Before answering the question, it is necessary to determine whether the Board has directed the application of an objective standard to this issue or whether the Board wishes the analysis to focus on the Union's motivation, i.e., whether the Union intended to influence the outcome of the election by issuing inaccurate dues refunds shortly before the election. On the one hand, the Board describes the issue herein as "whether, viewed objectively, the Union's mailing of [the refund] checks during the critical period tended to interfere with employees' free choice [citations omitted]." Board Order, pp. 2-3. That suggests the Board seeks application of an objective standard, i.e., whether the Union's conduct had a tendency to influence the outcome of the election. Application of an objective standard requires the analysis to focus on the probable perspective of reasonable employees upon receiving the refund checks.[9] On the other hand, the Board, citing *Noah's Bay Area Bagels, LLC,* 331 NLRB 188 (2000), points out that it has "often drawn the inference that benefits that are granted during the critical period are

[9] See *Flexsteel Industries,* 311 NLRB 257, 257 (1993).

coercive, but it has allowed the grantor to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits," which suggests the analysis should focus on the Union's motivation in distributing the refunds.

In its final instruction, the Board has directed me to address "whether the Union conferred benefits on employees and, if so, whether the timing and contemporaneous explanation by the Union for its action would reasonably tend to interfere with the employees' electoral choice." Board Order, p. 5. That instruction, coupled with the Board's approving reference to *Gulf States Canners, Inc.,* persuades me that the Board intends me to apply an objective standard to this issue.[10]

It is clear that in distributing dues overage refunds on April 10, the Union refunded to a substantial number of employees sums considerably in excess of the amounts to which they were entitled, in many instances more than trebling the appropriate sums.[11] In doing so, the Union conferred on numerous employees a refund benefit to which they were not entitled. Under an objective analysis, the concomitant question is whether from the perspective of reasonable employees conferral of such a benefit would have a reasonable tendency to interfere with employees' free and uncoerced choice in the election.

The Union issued the dues-refund checks to more than a quarter of the unit employees fewer than three weeks before the election. Given the invoice information accompanying the refund checks, along with the Union's explanation of the disbursements in the April 19 letter, check recipients must have realized in the ten days before the election that the money the Union had given them was, ostensibly at least, reimbursement of overpaid dues. The accurate reimbursement of overpaid dues, being money to which employees were entitled, would not of itself be coercive even if repayments were distributed during the critical period. Further, the April 19 letter, although it cast the Employer as villain in the dues' overdeduction drama, was not itself coercive. No party contends, and there is no basis on which to find, that if the Union had distributed substantially accurate refunds in these circumstances its conduct would have been objectionable. Consequently, the only union conduct in this scenario that might reasonably tend to interfere with employees' electoral choice is the Union's conferral of benefit in refunding unwarranted amounts of dues overages to employees.

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[10] In *Gulf States Canners, Inc.,* 242 NLRB 1326 (1979), enfd. 634 F. 2d 215 (5th Cir. 1981), cert denied 452 U.S. 906 (1981), the Board accepted a remand from the United States Court of Appeals for the Fifth Circuit regarding an election objection issue. The remand directed the Board to consider alleged union misconduct under the appropriate standard of whether the Union's conduct had a tendency to influence the outcome of the election rather than whether the union intended to influence the outcome of the election. The Board utilized the following factors suggested by the court in its analysis of whether or not the union's purchase of gasoline for employees tended to influence the election: whether the size of the benefit conferred bore a proper relationship to the stated purpose in conferring it, the number of employees receiving the benefit, the views of the employees concerning the purposes of the payments, and the timing of the payments. Here, the Board's order does not direct me to consider the views of employees, which factor advances a subjective rather than objective analysis.

[11] The Employer Overdeduction Calculations showed the total amount of money to be refunded to employees was $14,168.29; the amount of money the Union distributed to employees on April 10 was $27,003.13,

As the Board points out in its remand order, "a union, like an employer, is barred during the critical period from conferring on voters a financial benefit to which they otherwise would not be entitled." Board Order, p. 3. Citing *Mailing Services,* 293 NLRB 565 (1989) where a union's provision of free medical screenings were found objectionable and *McCary Processors,* 286 NLRB 703 (1987) where a union's promise not to collect accrued dues was found objectionable, the Board stated that while the Board "does not condemn a union's efforts to make itself a more attractive candidate, the Board does require that a union's 'methods of self-enhancement exclude the direct conferral of substantial benefits…' *Mailing Services,* supra at 566." Board Order, p. 3. Applying the Board's reasoning, I find the Union's conferral of benefit on employees herein would tend to interfere with employees' electoral choice if employees knew a benefit had been conferred on them. Although a number of the 72-hour employees clearly anticipated dues refunds, there is no evidence any of them knew the amounts to which they were entitled. If employees did not know the Union had conferred a benefit by giving them inflated refunds but, rather, assumed they were properly due the refunded monies they received, it is difficult to see how such an unrecognized benefit conferral could tend to interfere with employees' electoral choice. The question, then, is whether a reasonable employee, upon receipt of money depicted as an accurate refund of overpaid dues, would have realized the sum exceeded the appropriate amount of the refund due.

The Union and the Employer expended considerable energy and time devising a computational formula and obtaining the necessary payroll data for determining what the dues overpayments were. Their efforts suggest the calculations were of a complexity beyond the resources of a reasonable employee to duplicate. Nonetheless, I find it appropriate to give reasonable employees credit for knowing generally, or at least approximately, what their paycheck deductions should amount to, to understand that they did not have to pay dues on overtime wages, and to have a rough idea of what dues overages based on overtime pay would amount to. Employees who received refund checks did not need to know the intricacies or the results of the Employer Deduction Calculations to understand, particularly in those instances in which the refund was trebled or quadrupled beyond its appropriate amount, that the Union had given them a windfall. When unit employees received supersized dues refunds, a significant number of them must have realized the Union had conferred an unwarranted benefit upon them. Such realizations would tend to interfere with employees' electoral choice. Accordingly, I recommend the Employer Objection 3 be sustained.

RECOMMENDATION

Based on the above, I recommend that Employer Objection 3 be sustained. I conclude the Union's conduct affected the results of the Board election in Case 32-RD-1555. Accordingly, I recommend that the Board election in Case 32-RD-1555 be set aside and a new election be held.[12]

[12] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, D.C. within 14 days from the date of issuance of this Recommended Decision. Exceptions must be received by the Board in Washington by February 12, 2010. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.

Further, and in accordance with *Lufkin Rule Co.*, 147 NLRB 241 (1964) and *Fieldcrest Cannon, Inc.,* 327 NLRB 109 FN 3 (1998), I recommend that the following notice be issued in the Notice of Second Election:

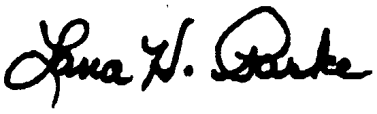
NOTICE TO ALL VOTERS

The election conducted on April 29-30, 2008 was set aside because the National Labor Relations Board found that certain conduct of the Union interfered with the employees' exercise of a free and reasoned choice among employees in the following unit:

> All full-time and regular part-time and per diem non-professional employees, including technical and service and maintenance employees employed by the Employer at its facilities located at 637 South Lucas Avenue, 1225 Wilshire Boulevard, 1245 Wilshire Boulevard, 1350 Shatto Street, and 1254 West 6th Street, all within the city of Los Angeles, California.

Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

Dated, at Washington, DC: January 29, 2010



Lana H. Parke
Administrative Law Judge