

NOT TO BE INCLUDED
IN BOUND VOLUMES

LSP
Los Angeles, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GOOD SAMARITAN HOSPITAL

Employer

and

Case 31-RD-1555

ALLEN V. SMITH

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS-WEST

Union

DECISION AND DIRECTION OF THIRD ELECTION

The National Labor Relations Board, by a three-member panel,¹ has considered an objection to an election held April 29-30, 2008, and the judge's report and supplemental decision on remand recommending disposition of it. The election was conducted pursuant to a Decision and Direction of Second Election issued by the Board on February 29,

¹In an unpublished order dated August 27, 2009, the Board remanded this matter to the judge with instructions to reopen the record for the presentation of additional evidence. Having carefully considered the matter, we reaffirm the earlier decision to remand the case for this purpose.

2008. The tally of ballots shows 209 for and 180 against the Union, with 5 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 judge's findings² and recommendations,³ as supplemented and amended on remand,⁴ and finds that the election must be set aside and a new election held.⁵

² The judge was sitting as a hearing officer in this representation proceeding. The Employer and the Union have implicitly excepted to some of the hearing officer's credibility findings in her report and supplemental decision on remand, respectively. 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 have carefully examined the record and find no basis for reversing the findings.

³ Although 11 objections were originally set for hearing, the Employer presented evidence on only Objections 3, 10 and 11. In the absence of exceptions, we adopt pro forma the judge's recommendation to overrule the Employer's Objections 10 and 11, alleging improper electioneering at the polls.

⁴ In her original report, the judge recommended overruling Objection 3, which alleged that the Union had interfered with employees' free choice by mailing checks to employees' homes a few weeks before the election. On remand, having found that the Union conferred a benefit by distributing these checks, the judge recommended sustaining Objection 3. We agree that under the Board's traditional conferral of benefits analysis the Union's conduct was objectionable.

⁵ In her original report, the judge quoted *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1201 fn. 6 (2005), for the proposition that the critical period "commences at the filing of the representation petition and extends through

DIRECTION OF THIRD ELECTION

A third election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Third Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military

the election." Although this statement is accurate for initial elections, "the critical period for a second election commences as of the date of the first election." *Star Kist Caribe, Inc.*, 325 NLRB 304 (1998). Similarly, the critical period for the third election will be the period between the second and third elections.

Furthermore, the judge recommended that, pursuant to *Lufkin Rule Co.*, 147 NLRB 341 (1964), language explaining the basis for holding a new election be included in the notice of a new election. The Union filed a bare exception to the inclusion of this language. Absent any argument by the Union as to why such language should not be included, we adopt the judge's determination to include the language. *Guardian Automotive Trim, Inc.*, 337 NLRB 412, 413 fn. 5 (2002); NLRB Casehandling Manual (Part Two), Representation Proceedings, Sec. 11452.3.

services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Service Employees International Union, United Healthcare Workers-West.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Third Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No

extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C., August 6, 2010.

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

CHAIRMAN LIEBMAN, concurring.

I agree with my colleagues and the judge that the Employer's Objection 3 should be sustained.

The Board's function in election proceedings is "to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."

General Shoe Corp., 77 NLRB 124, 127 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952). The Board will set aside an election if one party engaged in conduct that could have the reasonable effect of upsetting those laboratory conditions. See *id.*

Here, the Employer and the Union were in the process of resolving a dispute concerning the Employer's over-deduction of dues from certain unit employees' pay. Although the amounts of those over-deductions had not yet been resolved, 19 days before the election 126 unit employees received checks from the Union in amounts as high as \$849.30. It was later determined that the total amount of those payments -- more than \$27,000 -- was almost double the amount actually owed employees. Other than a cryptic notation on the check stub, the Union did not explain the payments to employees until 9 days later, when it distributed a letter that could

be interpreted as linking the payments to the upcoming election.

In concluding that laboratory conditions were upset, I need not, and do not, find that the Union issued the checks in an improper attempt to influence the election, as opposed to a good-faith attempt to resolve the parties' lingering dispute concerning the amount of over-deduction of dues.¹ Regardless, reasonable employees would be puzzled and unsettled by the payments, and some would view them as an attempt to influence employees' votes.² The Union won the election by 29 votes; therefore, a change in 15 votes -- a small fraction of the number of employees who received checks -- would have resulted in a different outcome. Accordingly, I find that, in the particular circumstances of this case, the election was not held under the requisite laboratory conditions. I therefore agree with my colleagues that the results must be set aside and a new election held.

¹ The timing and inaccuracy of the checks were attributable at least in part to the fact that the Union had earlier requested from the Employer, but had not yet received, information needed to calculate the amounts owed.

² Although the test is an objective one, the conclusion that reasonable employees would be confused by the payments is supported by evidence that at least 20 employees did, in fact, express confusion to the Union about why the checks had been issued.

Dated, Washington, D.C., August 6, 2010.

Wilma B. Liebman, Chairman

NATIONAL LABOR RELATIONS BOARD