

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SBM MANAGEMENT SERVICES

and

Case 5-CA-129128

INTERNATIONAL CHEMICAL WORKERS UNION
COUNCIL, UFCW

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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I. STATEMENT OF THE CASE

On May 16, 2014, SBM Management Services (“Respondent”) announced and presented its employees with bonuses, six days before the May 22 representation election. Respondent announced the bonuses at a meeting where all of Respondent’s employees were given pizza and beverages as they watched the employees be called to the front of the room and given bonuses.

At the May 16 party, as employees ate pizza, Respondent’s custodial supervisor, Ruben Chavez called the names of approximately 11 employees to come up to the front of the room while the rest of the employees watched. When those 11 employees came up to the front, Chavez told them to close their eyes and hold out their hands. He wanted to give them a surprise. He told them SBM had given them a bonus to show its appreciation for the work they had performed. Chavez announced the amount of the bonuses, \$75 for one employee, \$100 for the rest.

On May 20, 2014 the Union filed an unfair labor practice charge alleging the bonuses as unlawful. On May 22, at the representation election, the Union failed to receive a majority ballots cast, losing by a margin of 8-20. On May 28, the Union filed objections to the election. On July 30, the Regional Director for Region Five of the National Labor Relations Board issued complaint alleging Respondent violated Section 8(a)(1) of the National Labor Relations Act (“NLRA” or “The Act”) by announcing and granting “Great Job” bonuses to its employees in order to discourage them from supporting the Union. Following an October 8, 2014, trial on the unfair labor practice allegations and hearing on the objections in Harrisonburg, VA, Administrative Law Judge Arthur Amchan (“ALJ” or “Judge Amchan”) issued his decision (“ALJD”) on December 8, 2014.

In his decision, the ALJ weighed the evidence on the record and the credibility of the witnesses who testified before him and determined that: (1) Respondent gave its employees bonuses because it wished both to reward them for a job well done and at the same time influence the election; (2) the bonuses were not given pursuant to an established past practice; and (3) rewarding employees in front of all others was a significant departure from Respondent's prior practices at the Merck facility. The ALJ then correctly applied well-established National Labor Relations Board ("Board") law in finding that Respondent violated Section 8(a)(1) on May 16, 2014 when it announced and gave employees bonuses during the critical period prior to the election.

The ALJ also found that the Respondent engaged in objectionable conduct necessitating setting aside the results of the May 22, 2014 election and recommended holding a second election. Counsel for the General Counsel takes no position on the ALJ's findings with regards to the pending representation case, including the ALJ's findings on Respondent's objectionable conduct and the need for a second election.

In its brief in support of exceptions, Respondent challenges the ALJ's determinations and contends that Respondent had a legitimate business reason in providing bonuses to employees and that it had a practice of providing bonuses to employees.¹ The ALJ correctly determined that Respondent had failed to establish that it had a legitimate business reason for giving employees bonuses. Accordingly, the Board should affirm the ALJ's rulings, findings and conclusions.

¹ Respondent also excepted to the ALJ's finding that employees earned approximately \$300 per week but provided neither arguments in its brief nor any citations to record evidence in support of that exception. On the contrary, the record supports the ALJ's finding. (Tr. 30, 52, 75).

II. QUESTION PRESENTED

1. Did Respondent violate Section 8(a)(1) when its highest ranking on-site manager gave employees bonuses at a party six days before the election?

III. STATEMENT OF FACTS

Respondent is a Delaware corporation with a contract to provide custodial services for Merck & Co.'s facility in Elkton, Virginia ("Merck Facility"). (ALJD 2:12-13; GC Exh. 1-L). Respondent has provided custodial services on site since October 2013. (ALJD 2:25-26; Tr. 144). For the period of March 2014 to June 2014, Respondent's site manager at the Merck facility was Ruben Chavez. (ALJD 2:28-29). Soon after Chavez arrived at Elkton, he became aware of the Union's organizing drive. (ALJD 2:29-30). Respondent has approximately 27 rank and file employees, including 20 custodial employees and 7 GMP technicians. (ALJD 2:38).

Since it started providing custodial services at the Merck facility, Respondent has regularly conducted safety meetings on Fridays. (ALJD 2:34-36, Tr. 25, 50-51). Respondent's employees, including both GMP technicians and some custodians, perform 3x cleanings as part of their work duties. (ALJD 2:39-40, Tr. 149-50). 3x cleaning is a sterilization process with three stages, each stage treating the target area using a different cleaning material: first "1ph"; then "Spor-Klenz" and finally water. (ALJD 2:40-42, Tr. 48, 69). Employees who performed 3x cleaning from October 2013 until May 2014 were paid for their time, receiving their standard hourly rates of pay per the usual pay practices. Employee Dakota Knight testified that he has performed 3x cleaning 15-20 times for Respondent since he started working with them in October 2013 but did not receive a bonus before May 16, 2014. (Tr. 49, 63). Employee Melissa Bennett testified that she had performed 3x cleaning approximately 15 times for SBM from the start of their time on the site and had not received a bonus before May 16, 2014. (Tr. 70).

On Friday, May 16, Respondent's supervisors informed employees of a pizza party that day around 12:30. (ALJD 2:36; Tr. 26). Respondent did not provide pizza to its employees at all its Friday meetings. (ALJD 3:1-2). At the hearing, Chavez testified that the May 16 meeting was "a little party for the employees." (Tr. 119). At the meeting, Chavez called the names of nine employees and told them to close their eyes and hold out their hands. (ALJD 3:2-3). Chavez told them that they would be getting a bonus to show Respondent's appreciation for what they had done. (ALJD 3:3-4; GC Exh. 1-P; Tr. 27, 119). Chavez told the employees he wanted to thank them for the good job they did and announced the amount of the bonuses (\$100 for each employee he had called except for Bennett, who received \$75). (ALJD 3:4; ALJD fn. 2, Tr. 28).

Custodial employee Charlotte Bywaters testified during the hearing that neither Chavez nor any of the previous site managers had ever mentioned bonuses during any previous meeting or otherwise. (Tr. 29). Respondent did not usually call employees up to the front of Friday safety meetings, give employees checks in Friday safety meetings or provide employees with pizza in Friday safety meetings. (Tr. 45). Fellow employees Dakota Knight and Melissa Bennett corroborated Bywaters' testimony. (Tr. 57-58, 75-76).

Respondent introduced evidence regarding other occasions where it has given compensation above and beyond hourly pay to its employees. (Tr. 145-48). On one occasion in December 2013 or January 2014 Respondent distributed gift cards to employees, outside of employees' normal pay, as prizes in a safety poker game. (ALJD 3:14-15; Tr. 144-46). These gift cards were worth between \$25 and \$100. Supervisor Amanda Turner, who testified about the gift cards, said she had no knowledge of the 'Great Jobs' bonuses. (Tr. 148). Turner also testified that Respondent had distributed some gift cards to employees at Christmas 2013. (ALJD 3:19-21; Tr. 148).

Knight was among the employees who performed both the April and May 3x cleanings. He had performed 3x cleaning many times before at the Merck Facility and testified that neither of these two 3x cleans were any more difficult or time consuming than previous 3x cleanings he had performed in that area. (Tr. 54-55). Respondent employee Melissa Bennett, who also performed 3x cleaning many times working at the Merck Facility, both for Respondent and previous contractor EA Breeden, participated in the May 3x cleaning and corroborated Knight's testimony that it did not take any longer than usual or present any usual difficulties. (Tr. 72).

Respondent has given employees bonuses at other facilities. (ALJD 3:23; Resp. Exh. 4). There is no record evidence regarding the circumstances under which these bonuses were paid or how many were given to managerial employees, as opposed to rank and file employees. (ALJD 3:23-26). There is no evidence whether these bonuses were distributed in public or privately. (ALJD 3:26-27). Respondent does not have any formal policy of paying bonuses. (ALJD 3:27).

IV. ARGUMENT

a. Respondent failed to establish that the bonuses were given as part of an established business practice.

In its brief in support of exceptions, Respondent argues that the May 16 bonuses were given for a legitimate business purpose, rather than for the purpose of influencing the May 22 election. This argument fails because the evidence established that the announcement and granting of the bonuses was a significant departure from any past practice that Respondent had. In *NLRB v. Exchange Parts*, the Supreme Court held that Section 8(a)(1) of the Act prohibits “conduct immediately favorable to employees which is undertaken with the express purpose of infringing upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.” 375 U.S. 405, 409 (1964). “The Board has long recognized that the danger

inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *Torbitt & Castleman, Inc.*, 320 NLRB 907, 908 (1996) (citing *NLRB v. Exchange Parts Co.*, supra.). When a representation election is pending, conferral of benefits “for the purpose of inducing employees to vote against the union” interferes with the employees' protected right to organize. *NLRB v. Exchange Parts Co.*, supra. at 409. Section 8(a)(1) of the Act “prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.” *Id.* This includes benefits granted during the critical period prior to the election. See *B & D Plastics*, 302 NLRB 245 (1991). There is no need for a finding of animus to establish a violation of Section 8(a)(1) where an employer grants a bonus during an organizing campaign, absent a legitimate business reason. See *Kanawha Stone Company*, 334 NLRB 235, fn. 2 (2001) (citing *Mariposa Press*, 273 NLRB 528 (1984)). In *Kanawha*, the Board adopted an administrative law judge’s determination that the granting of show up pay during the organizing campaign was a violation of the Act, expressly noting that they need not rely on the judge’s finding of animus. *Id.*

Here, Respondent argues the bonuses were given to reward employees for performing extra work, i.e. the two occasions where employees performed 3x cleans in April and May of 2014 and as part of a past practice of giving bonuses to employees. The ALJ considered both of these arguments in his decision and correctly decided that neither was dispositive on whether the May 16 bonuses were violative of Section 8(a)(1).

b. Respondent failed to rebut the inference that the May 16 bonuses were given with the purpose of influencing the election.

The Board has drawn an inference that benefits granted during the critical period before an election are coercive. See *United Airline Services, Corp.*, 290 NLRB 954 (1988); *B & D Plastics*, 302 NLRB 245 (1991). The Board has allowed employers to rebut this inference by showing that it had a valid business reason beside the pending election, for the timing or announcement of that benefit. *B & D Plastics*, supra; see also *Uarco Inc.*, 216 NLRB 1, 2 (1974). Benefits granted during an election campaign are not unlawful if the employer shows that its action was governed by factors other than the pending election. See *Waste Management of Palm Beach*, 329 NLRB 198 (1999). The employer can meet its burden by showing the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the union. *American Sunroof Corp.*, 248 NLRB 748, 748–749 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981).

Here, Respondent relies upon limited and unclear record evidence to argue that it has met its burden and sufficiently rebutted the inference that the May 16 bonuses were coercive. As the Administrative Law Judge correctly noted:

[T]o rebut the inference that the payment of bonuses was illegal, Respondent must show that it had an established past practice of giving cash bonuses for extra or superior work. This...requires the employer to establish that such events occurred on a continuing or regular basis.

(ALJD 4:14-16) (citing *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001) and *B & D Plastics*, supra at 245 at fn. 2) (internal quotations omitted).

The record shows that Respondent had previously given its employees gift cards on only two occasions. Even though Respondent had been at the facility for less than a year, evidence of

these two instances is not sufficient to show that Respondent had an established practice of giving cash bonuses. Even assuming arguendo that these two instances show the beginnings of a pattern, Respondent's May 16 announcement of the bonus checks differs significantly from Respondent's previous distribution of gift cards. (ALJD 4:43-45). The May 16 bonuses came as checks and not gift cards; were announced dramatically in front of other employees at a pizza party, and were ostensibly tied to employees' completion of their duties. The record shows that the prior distribution of gift cards were holiday gifts and as prizes for participation in a safety game and training exercise. (Tr. 91-92, 144-46, 148). These significant differences make it difficult to give weight to Respondent's argument that the May 16 bonuses were unrelated to the May 22 election, but rather just a continuation of a well-established past practice.

As the Administrative Law Judge notes, an "employer may have more than one reason for the grant of benefits [and] wish to reward its employees for a job well done, and at the same time influence them to vote against union representation." (ALJD 4:12-14). Even if the desire to reward those employees who performed the 3x cleaning was part of the reason for granting the May 16 bonuses, Respondent fails to rebut the inference their purpose was, at least partially, coercive.

Alternatively, Respondent argues that examples of gifts and distributions at other facilities show that the May 16 bonuses were given as part of an established practice. However, the spread sheets at the crux of this argument (Resp. Exh. 4, Resp. Exh. 5) are of limited probative value on this point because there is no evidence in the record to show the context of these gifts, the circumstances of their announcement to employees, or even the number that were given to rank and file employees as opposed to managers, supervisors, clients or suppliers. Without this crucial contextual evidence –necessary to using these examples as comparators—

Respondent's exhibits should not be given great weight as probative of whether the May 16 bonuses were part of an established past practice.

The Administrative Law Judge correctly applied Board and Supreme Court precedent to find that “[g]iven the amount of discretion exercised by Respondent in this case with [regard to] bonuses, the awarding of bonuses on May 16 was not an established past practice.” (ALJD 4:32-34)(internal quotations omitted). Accordingly, the Board should reject Respondent's exceptions arguing that the May 16 announcement and grant of bonuses to employees did not violate Section 8(a)(1).

V. CONCLUSION

Based on the foregoing, counsel for the General Counsel respectfully urges the Board to adopt the ALJ's rulings, findings and conclusions.

Respectfully submitted,

/s/ Timothy Bearese

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Dated at Baltimore, Maryland this 3rd day of February 2015.

CERTIFICATE OF SERVICE

I hereby certify that this Answering Brief of the counsel for the General Counsel was electronically filed on February 3, 2015, and, on that same day, copies were electronically served on the following individuals by e-mail:

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