Manor Care—Ruxton, MD, LLC d/b/a ManorCare Health Services *and* 1199 SEIU, United Healthcare Workers East. Case 05–RC–108090

April 30, 2015

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 7, 2013,[1] and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 28 ballots for and 33 against the Petitioner. The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations[2] only to the extent consistent with this Decision and Direction of Second Election.

On June 24, the Employer approved a "market adjustment" wage increase for its 65 geriatric nursing assistants (GNAs), the employees the Union seeks to represent. By June 25, the Employer had notified at least 25 GNAs that they would receive an unspecified wage rate increase under the market adjustment. On June 26, the Union filed a petition to represent the GNAs. Beginning on July 7, the Employer distributed to each GNA an individualized letter informing her of the specific increase in her hourly wage rate. Around the same time, the Employer also informed 11 GNAs that they would receive a lump-sum bonus payment instead of an hourly wage rate increase because their hourly wage rate was already above the market wage rate. On July 10, the Employer included in each GNA's paycheck the specific amount of the wage increase or lump-sum bonus payment that, only days earlier, the Employer had notified each employee that he or she would receive.

The hearing officer found that the Employer's announcement of the wage increase to GNAs was not objectionable because it occurred before the critical period, which commenced on June 26, when the Union filed its representation petition. Because the announcement predated the petition, the hearing officer found that the Employer's payment of the wage increase during the critical period was not objectionable.

In its exceptions, the Union contends that a significant number of GNAs were informed about the wage increase on or after July 7, when they received their individualized letters from the Employer. Although it is unclear whether the Employer notified all 65 GNAs prior to June 26 that they would receive an unspecified wage increase, it is undisputed that, during the critical period, the Employer distributed a letter to each GNA announcing the precise amount of the wage rate increase that each would receive. It was also during the critical period that the Employer first announced to 11 of its GNAs that they would be receiving a lump-sum bonus payment. Finally, it was during the critical period that the Employer first issued each GNA a paycheck that included either the wage increase or lump-sum bonus payment.

For these reasons we find, contrary to the hearing officer and our dissenting colleague, that the Employer engaged in objectionable conduct by announcing to GNAs during the critical period the amount of their hourly wage increase or that they would be receiving a lump-sum bonus payment.[3] We similarly find objectionable the Employer's subsequent issuance during the critical period of paychecks reflecting those payments.[4] See *Catalina Yachts*, 250 NLRB 283, 291 (1980) (setting aside election based, in part, on employer's wage increase that went into effect prior to the filing of a representation petition, but first appeared in employees' paychecks during the critical period); see also *Desert Aggregates*, 340 NLRB 289, 290 fn. 5 (2003) (wage increase that first appeared in employees' paychecks during the critical period was objectionable "grant of benefits during the critical period," even though it was announced before the critical period).[5] We therefore sus-

[1] All dates are in 2013, unless otherwise indicated.

[2] Because we sustain the Union's Objections 2 and 3, we find it unnecessary to pass on the Union's Objections 4 and 5. In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Objection 6.

[3] Even if, as our colleague contends, the Employer determined the amount of each employee's wage increase before the petition was filed, it did not inform employees of those amounts until the critical period. Moreover, the Employer did not announce that GNAs with wages above the market rate would receive lump-sum bonuses—let alone the amount of the bonuses—until after the petition was filed. The timing of these events had a reasonable tendency to interfere with employees' freedom of choice in the election.

[4] *Kokomo Tube Co.*, 280 NLRB 357, 358 fn. 8 (1986), relied on by the hearing officer and the Employer, is distinguishable. In that case, the Board found that an across-the-board 25-cent "merit" wage increase that was announced and became effective prior to the critical period was not objectionable, even though employees did not receive paychecks reflecting the 25-cent increase until after the petition was filed. Here, the Employer did not announce the amount of the wage increase or lump-sum bonus until after the filing of the representation petition. Therefore, unlike the paychecks issued in *Kokomo Tube*, the paychecks issued by the Employer in this case reflected changes not announced before the start of the critical period.

[5] Our colleague asserts that our reliance on *Catalina Yachts* is unpersuasive because the Board affirmed the judge's finding in that case without discussion and the Board's finding must be considered implic-

tain the Union's Objections 2 and 3, set aside the election, and direct a second election.

[Direction of Second Election omitted from publication.]

MEMBER MISCIMARRA, concurring in part and dissenting in part.

This case involves two types of allegedly objectionable employer conduct that occurred prior to a representation election. First, before the election petition was filed, the Employer announced wage increases, and the increases were also effective prepetition, but employees were advised of specific increase amounts after the petition was filed. Second, after the election petition was filed, the Employer gave employees a comparison of wages between their facility and nearby unionized facilities. Like the hearing officer, I would find that the wage increases do not warrant overturning the election because they were both announced and effective prior to the "critical period," which commences with the filing of the election petition. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). As to the critical-period wage comparisons, however, I disagree with the hearing officer, who overruled the Union's objections to that comparison. I believe the Employer's postpetition wage comparisons, which reflected increases given with the intention of affecting the election, constituted objectionable conduct that reasonably tended to interfere with employees' freedom of choice.

1. *The Wage Increase*. The Union's Objections 2 and 3 allege that the Employer improperly announced and implemented a wage increase during the critical period—i.e., between the filing of the petition and the election. I believe this issue is governed by black-letter Board law. It is well established that a party's actions *before* an election petition is filed do not warrant overturning an election even if the actions would otherwise be objectionable because the filing of the petition starts what the Board considers the "critical period." *Ideal Electric & Mfg.*, supra. In the instant case, wage increases that the hearing officer effectively found were motivated by a desire to influence the election[1] were announced and effective (retroactively) prior to the petition. This same issue was presented in *Kokomo Tube Co.*, 280 NLRB 357 (1986), where "the wage increase was both announced and effective before the petition was filed," and where the Board held that under the longstanding *Ideal Electric* rule, the increase could not serve as a basis to set aside the election. Id. at 358. The Board in *Kokomo Tube* also held that the postpetition *implementation* of a wage increase both announced and effective prepetition—i.e., the increase first shows up in paychecks issued during the critical period—does not convert the increase into postpetition conduct. Id. at 358 fn. 8. Therefore, I disagree with my colleagues' finding that the wage increases were converted into "critical period" conduct merely because, after the petition was filed, employees learned of their

itly overruled by *Kokomo Tube Co.*, discussed above. In *Catalina Yachts*, the employer announced an across-the-board wage increase on June 13, 2 days before the filing of the petition, which was effective retroactively to cover the June 3–10 pay period. 250 NLRB at 284. The judge found that the "first appearance of the wage increase in the pay checks" during the critical period constituted grounds for overturning the election. Id. at 291.

Contrary to our colleague, although the Board found it unnecessary to pass on or adopt the judge's finding on another issue in that case, the Board adopted the judge's finding that the appearance of the wage increase in employees' paychecks constituted objectionable conduct. Id. at 283. In addition, the Board's finding in *Catalina Yachts* was not implicitly overruled by *Kokomo Tube Co.* because there is no indication that the amount of the wage increase was announced prior to the critical period. Our colleague contends that when the Employer announced the wage increase amount is immaterial. Notably, it was not immaterial to the Board in *Kokomo Tube Co.*, which found that the 25-cent wage increases in that case were not objectionable because, "while the employees received the increases during the critical period, the increases were both *announced* and effective before that period." 280 NLRB at 358 fn. 8 (emphasis added). In any event, we disagree with our colleague's assertion that there is no objective interference with employee free choice when an employer announces the amount of a wage increase during the critical period. In that situation, the employees will reasonably understand the employer's announcement as demonstrating 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." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). This is so whether individual employees are pleased or displeased by the amount of the wage increase.

Our colleague correctly notes that *Desert Aggregates*, supra, involved an unfair labor practice allegation, not an election objection. Nonetheless, in that case, the Board found that the judge "properly treated" the wage increase, which the employer announced prior to the filing of the petition but added to the employee's paycheck after the petition had been filed, as "a grant of benefits during the critical period." 340 NLRB at 290 fn. 3. Unlike *Kokomo Tube Co.*, in *Desert Aggregates*, the employee's paycheck contained a larger wage increase than the employer announced before the filing of the petition. 340 NLRB at 290.

[1] Although the hearing officer recognized that the lawfulness of the wage increase was not at issue in this election objections case, he found, and I agree, that the Employer "failed to provide sufficient evidence that the [increase] was for legitimate business reasons unrelated to the Union's activities."

individual increase amounts. It is undisputed that each employee's wage increase comported with the amount the Employer had determined *before* the petition was filed.[2]

2. *Dissemination of the Wage Comparisons*. Objections 4 and 5 challenge the Employer's presentations that compared the starting wage rate for Ruxton employees to the lower starting wage rates for union represented employees at nearby facilities. The wage rates depicted for Ruxton's bargaining unit employees included the wage increases announced 1 day before the petition was filed (as described in part 1 above). As the hearing officer found, the record contains no credible evidence of any business purpose for the wage increases unrelated to the Union's organizing campaign.[3]

It is entirely lawful and unobjectionable for an employer to compare the wages and benefits received by its represented employees with those received by its unrepresented employees. See, e.g., *Suburban Journals of Greater St. Louis, L.L.C.*, 343 NLRB 157, 159 (2004); *TCI Cablevision of Washington*, 329 NLRB 700, 700 (1999); *Viacom Cablevision*, 267 NLRB 1141, 1141–1142 (1983). In this case, however, the wage comparison *included the upward adjustment* described above, as to which the hearing officer found insufficient evidence that it resulted from "legitimate business reasons unrelated to the Union's activities."[4] Moreover, as noted above, the wage comparison undisputedly was presented during the "critical period."[5] On these facts, I find that the critical-period wage comparisons encompassed by Objec-

[2] My colleagues erroneously rely on *Desert Aggregates*, 340 NLRB 289 (2003), involving postpetition implementation of a wage increase announced prepetition, in which the Board stated in a footnote that "the judge properly treated the wage increase as a grant of benefits during the critical period, and no party argues to the contrary." 340 NLRB at 290 fn. 5. Citing this footnote, my colleagues characterize *Desert Aggregates* as standing for the proposition that a wage increase that first appears in paychecks issued during the critical period is an "objectionable" grant of benefits, even though the increase was announced before the critical period. If *Desert Aggregates* stood for that proposition, it would squarely contradict the Board's holding in *Kokomo Tube*. But *Desert Aggregates* does not stand for that proposition because the Board's remarks in fn. 5 were merely dicta. In *Desert Aggregates*, it was not relevant whether the wage increase was deemed to occur during the critical period because the Board was not considering whether the increase warranted a rerun election. Rather, *Desert Aggregates* involved an allegation that the increase was an unfair labor practice, which does not turn on whether the increase constituted prepetition or postpetition conduct. See, e.g., *Hampton Inn NY—JFK Airport*, 348 NLRB 16, 17 (2006). Consequently, the "critical period" reference in *Desert Aggregates* was mere dictum, which means it has no precedential value. See *Best Life Assurance Co. of California v. Commissioner*, 281 F.3d 828, 834 (9th Cir. 2002) ("[D]ictum [is] a statement . . . that is unnecessary to the decision in the case and therefore not precedential."). Moreover, as *Desert Aggregates* itself stated, *no party took issue* with the judge's reference to the wage increase as critical-period conduct. Therefore, this issue was not even raised in *Desert Aggregates* for review by the Board, which independently renders it nonprecedential. See, e.g., *Trump Marina Casino Resort*, 354 NLRB 1027, 1027 fn. 2 (2009), affd. 355 NLRB 585 (2010), enfd. mem. 435 Fed. Appx. 1 (D.C. Cir. 2011); *ESI, Inc.*, 296 NLRB 1319, 1319 fn. 3 (1989).

The other case on which the majority relies, *Catalina Yachts*, 250 NLRB 283 (1980), is also unpersuasive in my view. There, the Board summarily affirmed, without discussion, the judge's finding (id. at 291) that the election should be overturned based on several actions by the employer, including a wage increase announced before the critical period that first appeared in employees' paychecks during the critical period. One cannot determine from the decision whether this finding was before the Board on exceptions, but this finding not only was completely unexplained, it was unnecessary to the result (because other objectionable conduct necessitated setting aside the election regardless of the wage increase) and this aspect of *Catalina Yachts* must be considered implicitly overruled by *Kokomo Tube*. Moreover, it appears that the prepetition-wage increase in *Catalina Yachts* may have been reaffirmed at a second meeting, which took place *after* the petition was filed, and this could independently support the outcome in that case. See 250 NLRB at 285.

The majority says that *Catalina Yachts* was not implicitly overruled by *Kokomo Tube* because, in *Kokomo Tube*, the fact of an increase *and* the amount were announced prepetition, and the majority reasons that, in *Catalina Yachts*, "there is no indication that the amount of the wage increase was announced prior to the critical period." I believe this distinction is immaterial, which explains why the judge in *Catalina Yachts* did not even address when the *amount* of the increase was communicated. The immaterial nature of this distinction is also suggested by our cases holding that an objective standard governs whether particular conduct should be deemed objectionable. See, e.g., *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). Communicating the fact of an increase clearly tends to interfere with the exercise of free choice by *all* unit employees. However, one cannot objectively determine possible interference with free choice when only the *amount* of a previously announced increase is communicated during the critical period, because this would depend on each employee's subjective expectations. Employees who are pleased by the increase amount may be influenced to vote in the employer's favor; yet others who subjectively expected a greater increase amount may be disappointed and, therefore, may vote against the employer. Thus, our cases properly turn on whether and when the *fact* of a particular increase is communicated.

[3] The Employer's divisional human resources director, John Kolesar, testified at the hearing. The hearing officer found that, although Kolesar was "ideally situated" to provide testimony regarding business reasons responsible for the wage increases, he "did not provide that testimony." The hearing officer credited Kolesar's testimony "concerning the *general* purposes served by MAWAs [market analysis wage adjustments] and the Employer's *general* processes used in determining whether to conduct a wage analysis, and whether to propose a MAWA" (emphasis added). He did not extend his credibility finding, however, to "[s]pecific aspects of Kolesar's testimony regarding particular MAWAs," including the one upon which the increase announced the day before petition filing was based.

[4] Although not a basis for my reasoning in the instant case, the Board found that the Employer implemented wage increases with the intention of influencing an election at another of its facilities being organized by an SEIU local. *ManorCare Health Services–Easton*, 356 NLRB 202, 202, 222–223 (2010).

[5] Under *Dresser Industries*, 242 NLRB 74, 74 (1979), the Board may consider precritical-period conduct that "adds meaning and dimension to related postpetition conduct."

tions 4 and 5 were objectionable and reasonably tended to interfere with employees' freedom of choice.

For the above reasons, I concur in part and dissent in part from my colleagues' decision.