

B & D Plastics, Inc. and Retail, Wholesale & Department Store Union, AFL-CIO. Case 15-RC-7517

March 29, 1991

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 19, 1990, and the hearing officer's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 votes for and 44 votes against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the entire record in light of the exception and brief,¹ has adopted the hearing officer's findings and recommendations, and finds that the election must be set aside and a new election held.

In its Objection 2 the Petitioner asserts that, under all the circumstances, the Employer's granting all employees a paid day off 2 days before the election created an atmosphere that interfered with employees' free choice. The hearing officer recommended sustaining this objection and directing a second election. We agree with the hearing officer, for the reasons which follow.

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. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board has held that the rationale of *Exchange Parts* is applicable to objections cases. See, e.g., *United Airlines Services Corp.*, 290 NLRB No. 114 (Aug. 24, 1988).

Our standard in preelection benefit cases is an objective one. See *Gulf States Cannery*, 242 NLRB 1326 (1979). To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the in-

¹ In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the Petitioner's Objections 1, 3, 4, and 5 be overruled.

ference that benefits granted during the critical period are coercive. It has, however, permitted the employer 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. See *Speco Corp.*, 298 NLRB 439 fn. 2 (1990); *United Airlines*, supra; *May Department Stores Co.*, 191 NLRB 928 (1971).

In this case, 2 days before the election the Employer conferred on all unit employees, with no strings attached, a day off with pay solely in connection with its admitted purpose to deliver the final message in its antiunion campaign. Thus, employees, including those who elected not to attend the cookout and listen to the Employer's speeches, received what was tantamount to a substantial bonus for no other reason than the upcoming election. Employees could reasonably have viewed this conduct as intended to influence their votes in favor of the Employer's position. The grant of such a benefit in these circumstances constitutes objectionable conduct sufficient to require that the election results be overturned unless the Employer comes forward with a persuasive business justification for granting the benefit when it did.

The Employer's asserted business justification is insufficient to warrant a different result. The Employer essentially argues that it had no other way to end its antiunion campaign except to hold a cookout and grant a paid day off. The Employer has not explained, however, why it could not have pursued alternative means of communicating its message, e.g., giving the speeches at the plant (where they could have reached more employees, because attendance at the cookout was not required), rather than granting a substantial benefit to the entire unit shortly before the election.² The Employer's contention that the cookout was necessary as a means of gathering all three shifts of employees together incorrectly assumes that its desire to address the employees en masse at the end of its campaign without asking any of them to come to the plant outside their shifts must be accommodated without regard to the foreseeable effect of this conduct on the employee, i.e., the message it sent concerning "the source of benefits now conferred . . . which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, supra at 409.

² In fact, when questioned at the hearing about the Employer's plans to deliver the final message in its antiunion campaign, the Employer's vice president and chief operating officer, Robert Daffin, acknowledged that there were "two ways to do it . . . to have three separate events, or to have—give people time off to have one event. And in order to be fair to everyone, we just decided to close the plant that day."

Further, contrary to our dissenting colleague, we do not find that this cookout was consistent with any past practice. Although the evidence indicates that three times in the previous 5 years the Employer had held cookouts for its employees and given them paid time off to attend, there is no evidence that such events occurred on a continuing or regular basis. Thus, this cookout was a more random event than a customary or consistently conferred benefit, and employees could reasonably view it as one intended to influence their votes in the election.

In essence, the Employer's "business justification" has little or nothing to do with its "business," but amounts only to a claim that granting the paid holiday in connection with, and at the culmination of, its antiunion campaign was the most effective way to influence the election outcome in its favor. Far from establishing a "legitimate reason"³ for its grant of the benefit, this argument merely underscores the likely effect on the election that warrants our setting it aside.

[Direction of Second Election omitted from publication.]

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I do not find the Employer's holding of a cookout for its employees with a paid day off to be objectionable. The Board has held that continuation of a benefit conferred by the employer in the past is not unlawful.¹ Here, the Employer's decision to hold a cookout for its employees was consistent with past practice. Record evidence indicates

that some three times in the previous 5 years the Employer had held a cookout for its employees, given them the day off to enable them to attend, and paid them their regular pay. These occasions gave everyone an opportunity to "get together and talk." In the instant case, the fact that the Employer chose to utilize the occasion of the cookout as a forum to end its campaign does not alter the nature of the cookout so as to make it an impermissible benefit. Indeed, the Employer was simply exercising its right to gather its employees together in order to "speak its mind" and, by making attendance voluntary, it chose the least intrusive approach. Under all the circumstances of this case, noting also that the Employer runs three continuous shifts, I find that the Employer's choice of a cookout with a paid day off was reasonable. Under the circumstances in this case, setting the election aside is not warranted. The employees in this situation would not "infer that the benefit might be withdrawn or future benefits withheld should they select a union to represent them."² Accordingly, I respectfully dissent.

³ *Speco Corp.*, supra at fn. 2; *May Department Stores Co.*, supra at 928.

¹ Cf. *Duo-Fast*, 278 NLRB 819 (1986).

² *Lou Taylor, Inc.*, 226 NLRB 1024, 1029 (1976).