

Nestle Dairy Systems, Inc. and General Teamsters & Food Processing Local Union No. 87, International Brotherhood of Teamsters and International Union of Operating Engineers, Local 501, AFL-CIO, Joint Petitioners. Case 31-RC-6878

May 28, 1993

DECISION AND CERTIFICATION OF REPRESENTATIVE

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 March 13, 1992, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 192 for and 126 against the Joint Petitioners, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings and recommendations,¹ and finds that a certification of representative should be issued.

We agree with the Regional Director that Local 87's² filing of a \$20-million class action RICO³ lawsuit against the Employer on behalf of employees was not objectionable conduct. As discussed more fully below, we find that neither the lawsuit nor the costs attendant to its filing constituted a substantial benefit to employees, and therefore could not have reasonably tended to interfere with the employees' free choice in the election. Accordingly, we also find that the timing of the lawsuit and its announcement to employees could not have affected the outcome of the election.

The Petitioner and three individual bargaining unit employees were plaintiffs in the RICO suit filed by the Petitioner against the Employer and three former officers of the Petitioner. The suit was filed on March 10, 1992—3 days before the election. The suit alleged that the Employer and the former officers of the Petitioner violated the RICO statute by entering into a collective-bargaining agreement in 1988 at a time when the Petitioner did not represent an uncoerced majority of unit employees.⁴ The suit further alleged that union dues

were unlawfully exacted under the collective-bargaining agreement and that the agreement resulted in lower wage rates for the employees. The lawsuit sought recovery of the dues and lost earnings in a trebled amount. The plaintiffs alleged that the suit was brought in their representative capacity on behalf of an appropriate class of employees employed during the period when the collective-bargaining agreement was in effect. The Petitioner wholly financed the lawsuit.

The Petitioner announced the filing of the lawsuit to employees at a meeting on the evening of March 12, the night before the election. Approximately 100 employees of the 334-employee unit attended this meeting. Ward Allen, the Petitioner's business agent, opened the meeting by speaking about issues dealing with flyers which had been distributed by the Petitioner and the Employer during the campaign. Allen then introduced the Petitioner's International president, Ron Carey, who stated that he wanted employees to vote for the Joint Petitioners, and discussed an arbitration award won by the Petitioner on behalf of an individual employed by a different employer in the area.

David Rosenfeld, attorney for the Petitioner, then spoke. He stated that the Petitioner had filed a lawsuit against the Employer to get backpay for employees, double or triple the amount that was owed. Rosenfeld noted that the suit was filed on behalf of all employees, regardless of whether they were members of the Petitioner. Rosenfeld stated that the Employer had not paid employees the right amount of wages, and that the Petitioner had calculated that, if the lawsuit were successful, each employee might collect as much as \$35,000 based on the theory that the employees were owed \$5 per hour in lost wages. Rosenfeld, however, told the employees at the March 12 meeting that there were no guarantees of winning the lawsuit, and that it would be a long and difficult battle. Before the meeting closed, Carey repeated that the Petitioner needed the employees' vote the next day, and Allen stated that the Petitioner had filed the lawsuit for the employees, and that "you've got to support the union."

The Employer contends that by filing the lawsuit, the Petitioner granted a benefit to employees which took the form of free legal representation in connection with the lawsuit. In addition, the Employer argues that the Petitioner held out the promise of each employee receiving \$35,000 as a result of the suit, thus creating a sense of obligation on the part of the employees to vote for the Petitioner. The Employer also contends that the timing of the lawsuit and the manner in which the Petitioner publicized it interfered with the election.

We begin with the well-established principle that the burden is on the Employer, as the objecting party, to show that the alleged benefit granted to employees by the Petitioner was a substantial and direct benefit. We find that the Employer has failed to carry this burden.

¹ In the absence of exceptions, we adopt pro forma the Regional Director's dismissal of Objections 2, 3, 4, 5, 10, and 17.

² Referred to hereafter as "the Petitioner."

³ The Federal Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961 et seq.

⁴ This alleged unlawful contract was the subject of unfair labor practice charges filed by Joint Petitioner Operating Engineers Local 501 and a subsequent informal settlement agreement between the Employer and the Board. In a companion case, the Petitioner entered into a separate formal settlement agreement on February 4, 1992, which was approved by a Board Decision and Order on March 12, 1992.

The Employer failed to present any evidence regarding the cost of filing the lawsuit. It is reasonable to assume, however, that the costs attendant to filing the suit were minimal at best. The filing of the lawsuit bestowed no tangible benefits on employees, because the outcome of the RICO litigation was uncertain and remote. Moreover, even assuming that the filing of a lawsuit on employees' behalf can be considered an actual benefit, the granting of legal services worth a minimum amount is certainly not a benefit that is sufficiently substantial or direct to warrant finding that it would have a reasonable tendency to interfere with the employees' free choice in the election.⁵

In arguing that the election must be set aside, the Employer and our dissenting colleague also rely on Rosenfeld's suggestion that each employee might collect up to \$35,000 in backpay if the RICO suit were successful. This statement cannot be considered an impermissible promise of a gift or benefit because the Petitioner has no control over the outcome of the lawsuit and it is not within the Petitioner's power to bring about that financial gain for the employees. At most, Rosenfeld's reference to a possible judgment resulting in \$35,000 per employee is analogous to a union's promise during an election campaign to obtain increased wages or benefits for employees. The Board consistently has found that such union campaign promises are not objectionable because employees are aware that these promises are contingent on factors beyond the union's control—such as the results of collective bargaining—and that a union does not have the ability to achieve such results independently.⁶ In this case, Rosenfeld, the Petitioner's attorney, emphasized to employees the contingencies involved in the RICO suit and warned them that the possible backpay for employees was not guaranteed but only might be possible after a "long and difficult battle." Further, the Petitioner did not attempt to establish a nexus between its winning the election and success in the RICO suit.⁷

In addition, even assuming *arguendo* that the filing of the lawsuit here was a benefit, public policy considerations dictate that the Board not constrain a party's ability, prior to an election, to seek redress on behalf of employees for alleged misconduct by the other party to the election. To set aside the election here would have a chilling effect on the legitimate right of unions and employers to file lawsuits and to invoke adminis-

trative proceedings.⁸ Here, the Petitioner sought redress for the employees in the form of a RICO lawsuit.⁹ The filing of this lawsuit properly can be analogized to the filing of an OSHA complaint, a charge with a state labor commission, or an unfair labor practice charge with the Board just before an election. We would not regard any of these filings or charges to constitute a tangible benefit for employees and therefore conduct interfering with the representation election.

Nor does the timing of the filing of a lawsuit or administrative action transform what is not objectionable into a basis for setting aside an election. Our dissenting colleague's position would improperly place limits on a party's right to file a lawsuit by effectively discouraging any lawsuits during a representation campaign leading up to an election.¹⁰ In any event, the timing of the Petitioner's lawsuit is of no consequence here because there has been no benefit bestowed in the filing of the suit. Accordingly, we conclude that the Petitioner's conduct in filing and announcing the lawsuit did not exceed the bounds of privileged campaign propaganda.¹¹

Further, we agree with the Regional Director that the Petitioner's actions did not violate the settlement agreement or vitiate the purpose of the agreement such that the election results must be set aside. As the Regional Director noted, the remedy for violating or vitiating the purpose of a settlement agreement with the Board is to set aside the settlement agreement and reinstate the unfair labor practice charges. See *Bangor Plastics*, 156 NLRB 1165 (1966); *Gould, Inc.*, 260

⁸ See *Johnson & Hardin Co.*, 305 NLRB 690 (1991).

⁹ A union may take actions to protect employees' rights before the union has been elected as the employees' collective-bargaining representative. See, e.g., *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991).

¹⁰ Thus, we do not agree with our dissenting colleague's suggestion that the Petitioner was required to offer a justification for filing the lawsuit 3 days before the election. We note, however, that independent events outside of the Petitioner's control may have affected the timing of the filing and announcement of the lawsuit. It is not unreasonable, for example, to conclude that the Petitioner waited until the Regional Director approved its settlement agreement with the Board on February 7, 1992, before it decided to file the RICO lawsuit and that it took 3 to 4 additional weeks for the Petitioner to prepare the RICO complaint. Contrary to the dissent's assertion, we do not view the approval of the settlement agreement as a "pre-requisite" to preparing the RICO lawsuit.

¹¹ We find unpersuasive the Employer's arguments that the employees received a benefit because the lawsuit created an obligation flowing to the employees from the law firm retained to handle the lawsuit, including alleged enforceable rights for the employees against the firm that "they previously did not have or to which they were not entitled." Whatever legal obligations to the employees the law firm may have incurred under the court and state bar codes, those obligations and their possible breach are matters of concern only to the courts and the state bar. As such, they can no more constitute a substantial, tangible, and direct benefit than the lawsuit that gave rise to them.

⁵ Our dissenting colleague acknowledges that the only tangible benefit bestowed here was the payment of attorney and filing fees, and the preparation of the lawsuit.

⁶ See *Smith Co.*, 192 NLRB 1098, 1101 (1971).

⁷ Thus, because the direct financial "benefit" to employees was so minimal and the possibility of a large backpay award so speculative, we cannot agree with our dissenting colleague's conclusion that the Petitioner's actions could cause the employees to feel obligated to vote for the Petitioner.

NLRB 54 (1982). Thus, even if we were to find (which we do not) that the settlement agreement was violated by the Petitioner's actions, we would void the settlement agreement and resume prosecuting the unfair labor practice charges, but we would not necessarily be required to set aside the representation election.

Finally, the Regional Director correctly applied *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), in response to the Employer's request that the Board examine the representations made in the RICO suit. *Midland* requires that unless a representation is made in a deceptive manner, e.g., forgery, the Board will not examine the truthfulness or falsity of the representation and will leave the task of evaluating the campaign propaganda to the employees.¹²

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the Joint Petitioners, General Teamsters & Food Processing Local Union No. 87, International Brotherhood of Teamsters and International Union of Operating Engineers, Local 501, AFL-CIO, and that they are the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All production and maintenance employees employed by the Employer at its Bakersfield, California facility.

Excluded: Office clerical employees, professional employees, guards and supervisors as defined in the Act.

CHAIRMAN STEPHENS, dissenting in part.

I would set the election aside because the combination of circumstances involving the Petitioner's filing a lawsuit on behalf of the unit employees and the manner of the Petitioner's announcement of that lawsuit had a reasonable tendency to interfere with the employees' free choice.

¹²In addition, we note that the RICO suit is allegedly based on the same factual allegations that formed the basis of the charge filed against the Employer in Case 31-CA-17367 that led to the Employer's entering into the informal settlement agreement mentioned in fn. 4, *supra*.

Member Oviatt finds it unnecessary to rely on *Midland*, *supra*. In Member Oviatt's view, the Petitioner's statements at the March 12 meeting with employees concerning the objectives of its RICO lawsuit do not present an issue of an alleged misrepresentation. Member Oviatt points out that the Employer's contention that the Petitioner deceived the employees with respect to the RICO lawsuit relates solely to the alleged merits of the lawsuit, a matter which is not relevant to the question of whether the Petitioner interfered with the employees' free choice in the election by the manner in which it announced and explained its lawsuit. Member Oviatt also notes that there is no contention that the Petitioner, in fact, failed to file the RICO lawsuit or failed to seek monetary damages for the class of affected employees.

The majority adopts the Regional Director's summary of the test for evaluating preelection benefits. According to the majority, neither the Petitioner's filing of the lawsuit, payment of attorney fees, nor payment of filing fees constituted a substantial benefit to employees and therefore, could not reasonably tend to interfere with the employees' free choice. Thus, the majority finds that the election should not be set aside.

There is no per se rule of invalidity governing preelection payments or gifts. See *Bristol Spring Mfg. Co.*, 247 NLRB 245 fn. 6 (1980). Whether improprieties exist in a given case is a matter to be decided under the particular facts of that case. The appropriate test in determining whether conduct is objectionable, and that an election must therefore be set aside, is whether the conduct in question has a "reasonable tendency to influence" the outcome of the election. *NLRB v. Gulf States Cannery*, 585 F.2d 757, 759 (5th Cir. 1978), on remand 242 NLRB 1326 (1979), *enfd.* 634 F.2d 215 (5th Cir. 1981); see also *Savair Mfg. Co.*, 414 U.S. 270 (1973).

Contrary to my colleagues, on the narrow set of facts before us, I would find that the Petitioner's filing a \$20-million class action RICO lawsuit against the Employer on behalf of the employees, without cost to them, announcing the suit to the employees the evening before the election, and holding out the prospect of their recovering \$35,000 each, while at the same time "reminding" them that the Petitioner needed their votes the next day, would have a reasonable tendency to influence the outcome of the election and therefore interfere with the employees' exercise of their free choice.¹

More specifically, as the Board explained in *B & D Plastics*,² it uses a multifactor test to determine whether granting a benefit would unlawfully influence the outcome of an election:

[W]e 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 inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the in-

¹I agree with the majority's findings that the Board will not inquire into the truthfulness of the representations made in the RICO complaint and that filing the lawsuit did not violate the settlement agreement between the Petitioner and the Board. I do, however, take administrative notice that subsequent to the Regional Director's report in this case, the RICO complaint pending in U.S. district court was dismissed because the Petitioner's allegations did not support certain of the claims and because the other claims were preempted by the National Labor Relations Act.

²302 NLRB 245 (1991).

ference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. [Citations omitted.]³

In the present case, the Petitioner filed the RICO lawsuit approximately 3 days before the election, but it was not immediately served on the Employer. The Petitioner announced the lawsuit to the public at a press conference the afternoon before the election and announced it to employees attending a union meeting the evening before the election.

At the union meeting, the Petitioner's attorney explained to the employees that the damages sought in the lawsuit were based on \$5 per hour for each hour worked by the employees under an alleged "sweet-heart contract" and stated that because RICO suits allow double or triple damages, this amounted to \$35,000 per employee. The Petitioner's International president then addressed the employees, stating that the Petitioner needed the employees' votes the next day. The Petitioner's business agent next stated, with reference to the lawsuit, that the Petitioner was doing this for the employees and that "you've got to support the union."

The lawsuit was reported on the television news and in the newspapers the evening before and the day of the election. The Regional Director credited the Employer's evidence that knowledge of the lawsuit was widespread among the employees and that the employees were excited about the opportunity to collect \$35,000 each. The lawsuit was completely financed by the Petitioner including attorney and filing fees.

The *B & D Plastics* factors support a finding of objectionable conduct. Less than 24 hours before the election, the Petitioner announced that it had granted a tangible benefit (payment of attorney and filing fees, and preparation of a \$20-million lawsuit) to most of the employees, whether or not they were union members. The Petitioner also announced that the lawsuit might result in \$35,000 for each employee. Finally, the Petitioner made statements that clearly linked its filing of the lawsuit to its request that the employees vote for the Petitioner the next day. Based on these facts, it is obvious that the Petitioner's actions could cause the

employees to feel obligated to vote for the Petitioner and would have a reasonable tendency to influence the outcome of the election. Therefore, unless the Petitioner presents a persuasive justification for the timing of the lawsuit and its announcement to the employees, the election should be set aside.

The Petitioner offers no justification whatsoever for filing the lawsuit 3 days before the election and announcing it to the employees the day before the election. The majority attempts to provide the justification for the timing of the lawsuit and its announcement that was not furnished by the Petitioner, by speculating that the Petitioner may have waited until the settlement agreement was approved before it began drafting the RICO complaint. The majority fails to explain however, why the approval of the settlement was a prerequisite to preparing the RICO suit, or why, having waited for such approval, the Petitioner could not have waited until the day or week after the election to file the lawsuit. Because the Petitioner has not presented a persuasive justification for the timing of its actions, I conclude that the Petitioner timed the filing of the lawsuit to influence the votes of the employees. I therefore, would set aside the election.

The majority assumes that the costs of the lawsuit are "minimal at best." I question the reasonableness of the majority's assumption regarding the legal fees involved in preparing a \$20-million class action lawsuit. However, even if the majority assumed correctly that the costs were "minimal," I point out again that the monetary value of the fees as a benefit is not the sole criterion, but is one of many factors to consider when determining whether the Petitioner's lawsuit had a reasonable tendency to influence the outcome of the election. *B & D Plastics*, supra. The majority's characterization of the value of the legal services as being worth a minimal amount is very different from the Petitioner's portrayal of the benefit to the employees less than 24 hours prior to the election. The Petitioner's presentation of the benefit was in effect that "we, the union, have filed a \$20 million lawsuit on your behalf—based on our belief that the Employer owes each of you approximately \$35,000. We have done this for you and we need your votes tomorrow." When all of the *B & D Plastics* criteria are considered, it is obvious that the Petitioner's presentation would have a tendency to influence the outcome of the election the next day, regardless of the actual costs of the lawsuit.

³ Although *B & D Plastics* involved a benefit granted by an employer, unions and employers are generally held to the same standard for evaluating the permissiveness of preelection benefits, see *Mailing Services*, 293 NLRB 565 (1989), therefore the factors articulated above are applicable here.

The majority suggests that setting the election aside in this case will chill a party's willingness to seek redress on behalf of employees for wrongs committed prior to a representation election. I am certainly not proposing that we adopt a per se rule of invalidity applicable to each representation case in which a party files a lawsuit on behalf of employees prior to an election. I base my conclusions on the unique combination of factors in this case. In particular, the timing of the

filing and announcement of the lawsuit (3 days and 1 day, respectively), the amount of money that the Petitioner suggested would result from its gift in the form of the lawsuit, and especially the statements made by the Petitioner's representatives linking the lawsuit with their exhortations to vote for the Petitioner the next day, combined to impermissibly influence the employees' votes.