

Georgia-Pacific Corporation, Building Products Manufacturing/Sales Softwood Lumber Division, Central Division, El Dorado Sawmill and United Paperworkers International Union, AFL-CIO, Petitioner. Case 26-RC-7927

June 10, 1998

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 27, 1997, 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 69 for and 73 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings¹ and recommendations,² and finds that the election must be set aside and a new election held.

The hearing officer found that the Employer engaged in objectionable conduct when plant manager Herman Boykin described the Employer's bonus plan as one "that was developed for [the Employer's] non-union plants in the Central Division." Boykin described the bonus plan in this fashion while announcing, at two employee safety meetings prior to the election, that employees would be receiving a quarterly bonus. We agree with the hearing officer that Boykin's statement is objectionable.

It is well settled that an employer violates the Act by making statements to employees suggesting they will be automatically excluded from a benefit as soon as they become represented by a union. See, e.g., *Hertz Corp.*, 316 NLRB 672, 693, 695 (1995) (statement that 401(k) plan "applies to non-union weekly and bi-weekly salaried employees" violative of Section 8(a)(1) of the Act). Applying this standard, we find that Boykin's statement to employees is objectionable because it reasonably suggests that employees would be foreclosed from participating in the bonus plan if they were represented by a union. Boykin made this statement while announcing the payment of a quarterly bonus to employees during safety meetings, thus linking the notion of the bonus plan's existence

¹ In adopting the hearing officer's finding that the Employer engaged in objectionable conduct by describing the employee bonus as one developed for the Employer's nonunion plants, we do not rely on employee George Lee Sr.'s testimony that he assumed that the employees would lose their bonuses if they voted for the Union.

² In the absence of exceptions, the Board adopts, pro forma, the hearing officer's recommendation that the Petitioner's Objections 4, 5, 6, and 6a be overruled.

to a nonunion workforce. Indeed, although Boykin made no direct reference to the Union's organizing campaign, neither did he attempt to place this statement in a different context.³ In these circumstances, we find that employees could reasonably infer that the plan's existence was contingent upon the workforce remaining nonunion.

Our dissenting colleague would find that Boykin's statement is not objectionable. According to him, Boykin's statement was merely a benign explanation of the plan's "historical terms." We disagree. Boykin, without making any other references to the historical origins of the plan, commented that the plan was "developed for non-union plants in the Central Division" (emphasis added). By using the word "for" in this context, the statement, by its terms, suggests something more than an innocent historical reference, i.e., that the bonus plan was *not* for unionized plants.

Our colleague also contends that we have failed to consider Boykin's statement within the "entire context" of which it was made. He contends that this context consists of the following factors: (a) the fact that the election was approximately 6 weeks away; (b) that there was no other discussion about the Union at the safety meetings where Boykin made this statement; (c) that Boykin was responding to employee-raised bonus questions; and (d) the historical framework and the traditional way in which Boykin described the benefit. We find these factors do not support a finding that Boykin's statement was nonobjectionable.

With respect to the timing of the statement, the record establishes that Boykin made this statement during the critical period, at meetings held during the latter half of July 1997. The election was held the following month on August 27.⁴ We do not believe this is too remote in time for coercive statements to affect employee free choice. See *Long-Airdox Co.*, 277 NLRB 1157, 1159 (1985). Further, the other factors relied on by our colleague fail to place the statement in another context. Indeed, there is no contention that Boykin's statement was made in response to a question about the historical origins of the plan. Moreover, that Boykin may have referenced the plan's historical origins in the past fails to show that employees understood that Boykin's statement was not linked to the upcoming election. With the petition having been filed and the campaign underway, employees certainly could reasonably infer that the bonus plan was contingent on their remaining nonunion.

Our colleague also contends that because Boykin did not specifically state that remaining nonunion was one

³ We find no significance in Boykin's testimony that his reference to the nonunion plants was how he customarily started off his explanation of the bonus plan.

⁴ Thus, our colleague's contention that the statements were made 6 weeks before the election is an approximation.

of the criteria for eligibility, the employees could not reasonably infer that they would be foreclosed from the plan if they were represented by a union. Whether Boykin's comment was objectionable, however, does not turn on whether he explicitly stated that the bonus plan is contingent upon employees remaining non-union. Rather, it turns on whether the statement *suggests* to employees that their participation in the plan will be withdrawn if the Union is selected as their bargaining representative. See, e.g., *Lynn-Edwards Corp.*, 290 NLRB 202, 204 (1988). By relying on the absence of an explicit, direct reference to employees remaining nonunion as a condition of eligibility, our colleague suggests that he would find objectionable only those statements which explicitly make clear to a virtual certainty that the benefits will be foreclosed upon unionization. Contrary to our dissenting colleague, we shall adhere to existing precedent and find that Boykin's statement is objectionable because—in these circumstances—it reasonably suggests that the bonus plan will exist only so long as the employees remain non-union.

We also find unpersuasive our dissenting colleague's contention that the Board's decision in *Phelps Dodge Mining Co.*, 308 NLRB 985, 995 (1992), enf. denied 22 F.3d 1493 (10th Cir. 1994), is inapposite. In that case, the Board found unlawful an employer's use of the term "union-free" in connection with its quarterly appreciation payment program for employees. The Board adopted the administrative law judge's finding that the use of that term "necessarily invited . . . the . . . inference . . . that nothing short of full 'freedom' from *all* 'union' entanglements would suffice to make one eligible for 'coverage' under the program." We fail to see any meaningful distinction between the reference to "union-free" in *Phelps Dodge*, and Boykin's reference to the bonus program—within the context of announcing quarterly bonuses—as one developed for nonunion plants. Both statements reasonably suggest that the benefit would be unavailable if the employees were represented by a union. Our colleague nevertheless attempts to distinguish *Phelps Dodge* by primarily focusing on the fact that the employer there had changed to its "union-free" plan shortly before the petition had been filed. The judge's decision, however, which the Board adopted, did not rely on the timing of the change in plans. Rather, as noted above, it focused on the rhetorical implications of the term "union-free." Thus, our colleague's reliance on factors other than those relied on in that decision does not make that case inapposite, as he contends. Rather, it illuminates the point that his analysis is inconsistent with Board precedent.

Accordingly, having found that Boykin's comments are objectionable, we shall set aside the election and direct that a new one be held.

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting.

Unlike my colleagues and the hearing officer, I would overrule the Petitioner's Objection 4(a) and certify the results of the election.

In sustaining Objection 4(a), the hearing officer found that Plant Manager Herman Boykin informed employees that the Employer had a bonus program for its nonunion plants. The remarks occurred during safety meetings that were held approximately 6 weeks before the election. Relying on *Phelps Dodge Mining Co.*, 308 NLRB 985, 995 (1992), enf. denied 22 F.3d 1493 (10th Cir. 1994), the hearing officer found that the employer thereby improperly implied to its employees that they would automatically lose this benefit if they selected the Union. In reaching this conclusion, the hearing officer relied on the testimony of employee George Lee Sr. as to his subjective understanding of Boykin's statement.

Although the majority correctly rejects the hearing officer's reliance on Lee's testimony, they adopt the hearing officer's conclusion that the election should be set aside based solely on Boykin's statements.¹ I disagree. I find that the hearing officer and the majority mischaracterize Boykin's credited testimony. I further find that, under the applicable legal principles, Boykin's comments were not objectionable.

Boykin credibly testified that, after many employees had inquired about their eligibility for bonuses for the second quarter of 1997, he decided to address the issue at regularly scheduled safety meetings. Thereafter, during July 1997 safety meetings in the saw and planer mills, Boykin discussed bonus eligibility. Boykin began his discussion by stating that the Employer's bonus plan had been "developed for non-Union plants in the Central Division." He then proceeded to describe the criteria for eligibility, and announced that employees who meet those criteria would receive bonuses for the preceding quarter. At these meetings, Boykin did not state that employees would be ineligible for bonuses if the Union were selected. Indeed, there was *no* discussion at these meetings of the Union, the election, or the effect, if any, of union representation on employees' continued coverage under the bonus plan.

In these circumstances, I find that Boykin's reference to the bonus plan's historical origin does not constitute objectionable conduct. Boykin credibly testified that the plan had always been explained in historical terms, and this is precisely how he described it to employees at the safety meetings. This description was

¹ The hearing officer finds, and my colleagues agree, that there is no other employer conduct that warrants setting aside the election.

not geared to the Union's campaign, and there was no reference to that campaign.

In order to find objectionable conduct, employees would have to reasonably infer the following from Boykin's statement: (1) the plan was developed *only* for nonunion plants; (2) the "only non-union" policy continues; and (3) because of this, selection of the Union will automatically result in noneligibility. In my view, Boykin's bare statement cannot reasonably be stretched to carry all of these inferences. Indeed, when Boykin described the criteria for eligibility, he did not mention nonunion status as a criterion.

The cases relied on by the hearing officer are inapposite. The applicable inquiry, when evaluating an employer's statement concerning benefits, is whether there is a "suggestion inherent in the exclusionary language that unrepresented employees will forfeit the plan's benefits, if they choose union representation." *Handleman Co.*, 283 NLRB 451, 452 (1987).² Under this test, in *Phelps Dodge* the Board found that the employer's repeated written statements to employees that its bonus program was a "Union-free plan," impermissibly implied that "employees [were] automatically and irrevocably foreclosed from inclusion in the [bonus plan] simply because they have a union bargaining on their behalf." *Phelps Dodge*, supra, 308 NLRB at 995, quoting *KEZI, Inc.*, 300 NLRB 594 (1990). Significantly, in *Phelps Dodge*, the employer had traditionally made bonus payments available to all employees—represented and unrepresented, alike—but changed to a "union-free" plan shortly before a decertification petition was filed. Further, when announcing its new plan, Phelps Dodge repeatedly referred to what the judge found (and the Board adopted) was the "inherently sweeping expression, 'union free.'"

Here, unlike *Phelps Dodge*, there was no change in the bonus plan during the organizing campaign, or evidence that the Employer used the plan as a tool during the organizing campaign. On the contrary, precisely at the usual time when eligibility for quarterly bonuses was determined, Boykin merely responded to employee questions, and did so only at safety meetings where the Union was not discussed. Thus, compared to the facts in *Phelps Dodge*, Boykin's statements do not even come close to the "inherently sweeping expression 'union free.'" Nor did Boykin or any other Employer agent repeat the statement concerning the historical antecedents of the plan. In these circumstances, the fact that Boykin's prefatory remarks at the safety meetings correctly stated that the bonus program had begun

at unrepresented plants, is insufficient, standing alone, to constitute objectionable conduct.

I cannot agree with the majority's conclusion that there is no meaningful distinction between this case and *Phelps Dodge*. The explicit reference to "union free" in that case, and the timing of the recent change to a "union free" system, clearly suggests to employees that, if they were not "union free," they would not get the benefit. The majority's unwillingness to see this distinction suggests that they view statements in isolation, without reference to the context in which they were made. This approach is at odds with extant law.

My colleagues accuse me of forsaking Board precedent in finding Boykin's comments unobjectionable. I disagree. I have carefully applied the relevant legal principle that conduct will be objectionable if it carries the inherent suggestion that employees will automatically forfeit a benefit if they choose representation.³ My colleagues appear to view as objectionable any employer use of the term "union" in conjunction with an existing benefit during an organizational campaign. Unlike them, I would consider the entire context in which the challenged statement is made in order to determine what message it reasonably conveys to employees. Thus, I find extremely probative such factors as: the timing of Boykin's comments—both in relation to the election (6 weeks away) and to established bonus payment periods; the context in which his comments were made (i.e., the fact that the Union was not even discussed at the regularly scheduled safety meetings where the bonuses were discussed); the fact that Boykin was responding to employee-raised bonus questions; the historical framework of the benefit; and the traditional way in which Boykin described the benefit.

My colleagues place great weight on the fact that the Employer said that the bonus program was developed "for" nonunion plants. However, as set forth herein, I look to the complete context in which a statement was made, not simply one word that was used.

I reject the majority's unfounded conclusion that Boykin's description of the bonus plan was objectionable because it occurred during the critical period and because it was not in response to precise employee questioning about the historical origin of the bonus plan.

With respect to the first point, I agree that statements made outside the critical period are ordinarily not objectionable. However, it does not follow that

²The Board has also described the applicable inquiry as whether an employer, orally or in writing, suggests to employees that their coverage in a plan will automatically be withdrawn as soon as they become represented by a union. See, e.g., *Lynn-Edwards Corp.*, 290 NLRB 202, 204 (1988).

³My colleagues suggest that I would find employee statements objectionable only if they "explicitly make clear to a virtual certainty" that the benefits will be foreclosed upon unionization. As made clear herein, this is not my position. I have applied extant Board principles. My colleagues and I simply disagree as to the application of those principles.

statements made within the critical period are necessarily objectionable. Rather, one is permitted to consider, *inter alia*, *when* during the critical period a particular statement was made.

With respect to the second point, it is true that employees simply asked about the bonus plan, and not about its historical origins. However, as noted above, Boykin credibly testified that he customarily begins his answer (to bonus questions) by describing the origins of the plan.

Finally, I also reject the majority's conclusion that Boykin's description of the bonus plan was somehow rendered objectionable because Boykin simultaneously

announced that bonus payments would be made. However, this statement was simply an announcement, at the customary time, that bonuses would be paid. There is no allegation that the bonuses, or the announcement thereof, were unlawful, *i.e.*, that they were timed to influence the selection process.

In all of these circumstances, the mere fact that the Respondent mentioned the word "nonunion" in relation to the origin of the plan does not make the Respondent's conduct unlawful.

Accordingly, I would certify the results of the election.