

**Network Ambulance Services, Inc. and International Association of EMTs & Paramedics, National Association of Government Employees, a/w Service Employees International Union, AFL-CIO, Petitioner.** Case 4-RC-19511

August 31, 1999

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on October 16, 1998, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots showed 9 for and 25 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the Employer's exceptions and supporting brief, and has adopted the hearing officer's recommendations only to the extent consistent with this decision. Contrary to the hearing officer, the Board finds no objectionable conduct and concludes that a certification of results of election should be issued.

The hearing officer recommended that the Board overrule the Union's objections concerning the Employer's granting of sick pay and one additional fixed holiday (Easter Sunday) during the critical period before the election, and concerning an election-related raffle the Employer held for employees the same day as the election. The hearing officer also found that the Employer's announcement of a new annual benefit consisting of two floating holidays during the critical period was not objectionable because the Employer and its corporate owner had an established practice of announcing new employee benefits during the month of September, during which month the announcement was made.<sup>1</sup> However, the hearing officer found that the actual implementation of the new benefit of floating holidays on October 1, 1998,<sup>2</sup> was objectionable and accordingly recommended that the election be set aside.

The record establishes that the Employer, Network Ambulance Services (Network), is a subsidiary of Genesis Health Ventures (Genesis), which employs about 47,000 employees at its facilities in a number of States. During the critical period, Network had 42 full-time and part-time health care and office employees, who comprised the voting unit. On September 22—which was 24 days before the election<sup>3</sup>—Network circulated a memo informing its employees that “the following new bene-

fits,” including two floating holidays a year, would “be available beginning 10/1/98” for full-time employees. As the hearing officer noted, the Employer's vice president, Michael Kling, testified without contradiction that this new benefit was given to all Genesis employees, effective October 1, at the direction of Genesis management; that none of Genesis' employees enjoyed the benefit prior to that date; and that it was Genesis' policy to offer the same benefits package to all of its employees.

The hearing officer found the granting of the floating holidays to Network employees to be objectionable on the grounds that “no reason has been advanced by the Employer which would explain why it needed to put into effect the new benefit of floating holidays beginning October 1, 1998, during the critical period instead of deferring this benefit pending the election's outcome.” In the hearing officer's view, under *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995), the employer was required either to defer announcing and implementing the new benefit until after the election, or to inform the employees that implementation of the new benefit would be deferred until after the election in order to avoid the appearance of election interference. In view of the employer's “speedy implementation” of the floating holidays during the critical period, the hearing officer concluded that the implementation was intended to deter employees from voting for the Union.

As the hearing officer noted, benefits granted during the critical preelection period are coercive, and therefore objectionable, if they are granted for the purpose of influencing the employees' vote and are of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board has drawn an inference that benefits granted during the critical period are coercive, but an employer may rebut this inference by showing that the action was motivated by a legitimate business purpose unrelated to the election. *Perdue Farms*, 323 NLRB 345, 352 (1997), modified on other grounds 144 F.3d 830 (D.C. Cir. 1998); *B & D Plastics*, 302 NLRB 245 (1991).

As noted above, the hearing officer found that the floating holidays were made available for the first time to all Genesis employees, including Network's, on October 1 on a corporatewide basis. In a number of cases where a multiunit corporation has granted corporatewide employee benefits during the critical period before a Board election held at one of its subsidiaries, the Board has viewed the corporatewide nature of the action as evidence that the action was taken for legitimate business reasons and was not objectionable.<sup>4</sup>

<sup>1</sup> In the absence of exceptions we adopt, pro forma, the hearing officer's recommendations concerning all of the foregoing objections.

<sup>2</sup> All dates are in 1998 unless otherwise indicated.

<sup>3</sup> The Union filed its petition for recognition with the Board on September 1, 1998.

<sup>4</sup> E.g., *Stanley Smith Security*, 270 NLRB 225 (1984); *American Sunroof Corp.*, 248 NLRB 748, 749 fn. 10 (1980), *enfd.* 667 F.2d 20 (6th Cir. 1981); *Northern Telecom, Inc.*, 233 NLRB 1104, 1105 (1977). The Board's approach in these cases has been based on the premise that, where there is no other indication of an antiunion motive, a multiunit entity is unlikely to have granted a benefit to all of its employees

The record contains no evidence negating Kling's credited testimony that the benefit was implemented solely at the direction of Genesis management, and for the sole purpose of equalizing Network's benefits with those offered by Genesis to its other 42,000 employees as of October 1, 1998. As the hearing officer found, Genesis' policy was to offer the same benefits package to all of its employees, and the Petitioner has not contended that Genesis' other employees did not enjoy the two floating holidays after October 1.<sup>5</sup> It was also Genesis' practice to announce new employee benefits in September and implement them on October 1, the beginning of its fiscal year. All of this is consistent with the Employer's contention that it was Genesis' management, not Network's, that made the decision to implement the two floating holidays for Network's 42 employees in October 1998, and that the implementation was not related to the election. By the same token, there is no indication in the record that Genesis, in mandating the new benefit, was motivated by an intent to affect the election's outcome.

The hearing officer concluded, substantially for these reasons, that Network's announcement of the new benefit on September 22 was not objectionable. He nevertheless found that the Employer was required to defer the actual implementation of the benefit until after the election. However, *Kauai Coconut Beach Resort*, supra, the sole authority on which the hearing officer relies for this finding, imposes no such requirement. *Kauai*, and similar cases preceding it, addressed the situation where an em-

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ployer, during a critical preelection period, had a legitimate concern that the Board might perceive a projected pay increase or benefit improvement as objectionable, even though the employer had made the decision to grant the improvement before the critical period. In such cases, the Board has permitted the employer to announce that, solely for the purpose of avoiding the appearance of influencing the election's outcome, the scheduled improvement will be deferred until after the election.<sup>6</sup> 317 NLRB at 997; *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). However, we have not held or implied, in *Kauai* or any other case, that an employer is obligated to take this course of action. An announcement that an improvement planned for legitimate business reasons will be deferred under these circumstances is rather an optional exception to the general rule that the employer is required to proceed with projected wage or benefit improvements as if the union were not on the scene. *Atlantic Forest*, 282 NLRB at 858.

Since Network has made a credited and uncontested showing that the new benefit was implemented for a lawful purpose, and since there is no other evidence from which we could infer that the benefit was calculated to influence the election, we cannot find that the implementation of the floating holidays was objectionable. We will accordingly certify the election results.

#### CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for the International Association of EMTs & Paramedics, National Association of Government Employees, a/w Service Employees International Union, AFL-CIO, and that it is not the exclusive representative of these bargaining unit employees.

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<sup>6</sup> Such an announcement must make it clear to employees that the improvement will occur regardless of whether they select a union, and it must also avoid the appearance of implying that the union is responsible for the delay. E.g., *Atlantic Forest Products*, supra.

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solely for the purpose of influencing an election that affected only a few.  
<sup>5</sup> While there is some indication, based on the text of a December 23, 1997 memo from Kling, that Genesis' other employees may have been receiving a floating holiday even prior to October 1, and that they may have also begun to receive as many as three floating holidays after that date, there is no evidence to dispute that Genesis employees received at least two such floating holidays as of October 1, consistent with the September announcement.