

Onan Corporation, a wholly owned subsidiary of Cummins, Inc. and International Automobile, Aerospace & Agricultural Implement Workers of America. Case 18–RC–16729

April 7, 2003

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

The National Labor Relations Board, by three-member panel, has considered objections to a rerun election held on September 26 and 27, 2001, and the hearing officer's report recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 296 for and 413 against the Petitioner, with 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to affirm the hearing officer's rulings, findings, and conclusions only to the extent consistent with this Decision and Certification of Results of Election. Contrary to the hearing officer and our dissenting colleague, we overrule the Petitioner's objection, which alleged that the Employer interfered with the rerun election by informing bargaining unit employees, shortly before that rerun election, that it had settled certain employee-initiated litigation regarding its pension plan. Accordingly, we certify the election results.

I. FACTUAL BACKGROUND

This case centers around a longrunning class action lawsuit brought by current and former Onan employees over changes to the Fridley plant's pension plan (the pension litigation).² On July 13, 2001, the Board set aside the first election at the Fridley plant, partly because of the announcement, 6 days before the election, of the Employer's willingness to seek a settlement of the class action litigation. This conduct was found to be objectionable as an ill-timed offer of benefit. *Onan Corp.*, 334 NLRB 531 (2001).³ Following the Board's Order, a rerun election was scheduled for September 26 and 27.

Approximately 1 month before the Board issued its decision to set aside the first election, the IRS indicated tentative approval of a settlement of a related pension litigation suit between the IRS and the Employer. This

settlement paved the way for more fruitful settlement discussions in the class action pension litigation.

On September 17, the Employer and the pension litigation class plaintiffs entered into a settlement agreement in this class action.⁴ There is no evidence or assertion that the Employer timed the settlement to influence the election's outcome. The Employer announced the settlement to all employees during on-the-clock meetings that same day.

The district court judge, in an Order dated September 18, preliminarily approved the settlement agreement and ordered the plaintiff's attorney to provide class members with notice of the settlement, as required by Rule 23 of the Federal Rules of Civil Procedure. Additionally, on September 18, during meetings with some employees, the Employer announced that copies of the settlement agreement were available for the employees. On September 19, the Employer posted the district court order as well as a summary memo informing employees about the terms of the settlement, and again notifying them that they could pick up a copy of the settlement agreement. The Employer also mailed copies of the memo and court order to all active employees.

II. ANALYSIS

At the outset, it is important to identify the narrow issue before us. The issue is not whether the settlement was entered into for the purpose of influencing the election. Nor is there an issue as to whether the settlement was timed to influence the election. Our dissenting colleague raises neither issue. Rather, she contends only that the announcement of the settlement was timed to influence the election.

The Board has held that during a union organizing campaign, employers must act as they would in the absence of a union campaign. *Waste Management of Palm Beach*, 329 NLRB 198 (1999); *American Sunroof Corp.*, 248 NLRB 748, (1980). The employer has the burden of showing that benefits granted during an election campaign are consistent with past practice. *Waste Management*, supra at 198, *American Sunroof*, supra at 748–49. We find that the Employer has met this burden.

The record evidence in this case shows that the Employer had a pattern of announcing developments in the pension litigation to its employees as they occurred. During employee meetings, the Employer repeatedly answered employees' questions about the litigation. Additionally, the Employer contemporaneously notified employees of important developments in the litigation,

¹ The Petitioner filed two objections, but withdrew Objection 2.

² The litigation affects approximately half of the voting unit employees, as well as some retirees and nonunit employees at this plant.

³ Neither Chairman Battista nor Member Acosta was a member of the Board at that time.

⁴ Under the agreement, either party could void the agreement if the Internal Revenue Service and the district court judge did not approve it by January 15, 2002.

such as the resolution of certain claims on summary judgment.

This pattern is sufficient to show that the Employer would have announced the settlement of the pension litigation regardless of whether there was an ongoing union organizing campaign. Under Board precedent, this is all that the Employer was required to show. The hearing officer, however, placed an undue burden on the Employer by insisting that the Employer show that it was *required* to make the announcement. The hearing officer and the Petitioner emphasize the fact that the district court required only that the plaintiffs' attorney notify class members. However, the Employer does not need to show that it was required to make the announcement; rather it must show only that it would have made the announcement absent a union campaign. *Adams Super Markets Corp.*, 274 NLRB 1334, 1335 (1985) (finding that the employer's unobjectionable announcement was "for legitimate reasons and not because of the Union's campaign"); *American Sunroof Corp.*, supra at 748, 749 (holding that the announcement of a new pension plan was unobjectionable because there was no evidence that the employer accelerated the announcement because of the union).

The dissent contends that the hearing officer did not require the Employer to demonstrate that it was obligated to make the announcement concerning the settlement. The dissent relies on the fact that the hearing officer discussed this issue when distinguishing the instant case from *American Sunroof Corp.*, supra. The Employer relied on that case, and the hearing officer distinguished it. The hearing officer's whole point was that the employer, in *American Sunroof*, was required to give the notice and the Employer here was not. Further, our colleague has overlooked the hearing officer's subsequent statement that "Probative and credible evidence shows the district court Order did not require the Employer [here] to notify employees regarding the terms of the settlement agreement." This statement clearly shows that the hearing officer believed that the Employer had to show that it was required to make the announcement.

This case is unlike the case arising from the first election. *Onan Corp.*, 334 NLRB at 531. In that case, the timing of the Employer's announced willingness to seek a settlement of the pension litigation was wholly within the control of the Employer. That is, the Employer could decide, whenever it wanted to, that it was willing to seek a settlement. By contrast, the instant case involves the fact of settlement, a matter obviously not wholly within the control of the Employer. The settlement occurred on September 17, and the Employer acted promptly to get the word out. There is no evidence, nor even any asser-

tion, that the Employer timed the settlement in order to influence the election's outcome. Concededly, the announcement of the settlement was within the control of the Employer. However, as discussed above, the announcement was consistent with the past practice of keeping employees up-to-date on the litigation.

Further, because there has been no allegation that the decision to enter into the settlement or that the timing of the settlement was objectionable, and because of the past practice of keeping employees promptly informed, it stands to reason that the announcement of such a non-objectionable factual event was likewise not unlawful. This conclusion finds support in Board precedent. The Board has found that the announcement of a lawfully granted benefit, even if immediately prior to an election, is not necessarily unlawful. *Cardivan Co.*, 271 NLRB 563, 563-564 (1984) (holding that the announcement of lawfully granted benefits was unobjectionable).

Our colleague finds that the Employer failed to establish that the timing of its announcement of the proposed settlement of the pension litigation was unrelated to the rerun election. She emphasizes the fact that the Employer did not simply announce the settlement but also held meetings announcing the settlement's details. She also relies on the fact that the Employer included non-members of the plaintiff class in these meetings. We disagree with these contentions.

First, as detailed above, the Employer constantly communicated with the employees regarding the status of the lawsuit, informing them of significant developments immediately after they occurred. Thus, the Employer's announcement of the settlement as soon as it occurred on September 17 was consistent with its past communications and, therefore, the timing was unrelated to the rerun election. Further, this is the type of announcement that an employer would normally make. In this case, the Employer had a legitimate motive to persuade employee class members to support the settlement. By generating support for the class action settlement, the Employer could promote a quick settlement hearing, with minimal objections or delays.

As to our colleagues' second contention, we believe that the Employer had legitimate business reasons for explaining the terms of the settlement to all of its employees. There was substantial record evidence that the pension lawsuit was a source of concern among all employees at the Fridley plant. Employees frequently inquired about the lawsuit's status and believed that it should be settled. Thus, it was reasonable for the Employer to assume that all employees would be interested in the settlement terms, including the impact of the settlement on their retirement benefits. Finally, the evi-

dence shows that the Employer wanted to provide employees with information about the settlement before any rumors about it began to circulate.

With respect to the fact that nonmembers of the class were invited to the meetings, we note that the proposed settlement of the litigation involved changes to the Employer's current pension plan. Although these nonmembers may not receive benefits from the settlements, they are covered by the plan. Accordingly, changes to the plan would affect them in the future. Further, even for employees who are no longer in the plan, the contemplated settlement would include changes that would affect any employee who was in the plan as of January 1, 1989. In sum, the fact that employee-nonmembers of the class were invited to the meetings is not indicative of an attempt by the Employer to link the settlement announcement to the rerun election.

In sum, we find that the Employer did not engage in objectionable conduct by announcing the settlement of the pension litigation to all employees. Accordingly, we shall issue a certification of results of election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Automobile, Aerospace and Agricultural Implement Workers of America and that it is not the exclusive representative of these bargaining unit employees.

MEMBER LIEBMAN, dissenting.

In a series of on-the-clock meetings, 9 days before a rerun election, the Employer announced to all its employees that it had settled a longstanding class-action lawsuit affecting the pensions of certain active employees and retirees. The Employer's announcement emphasized that the retirement benefits of active employees and retirees would increase by \$7.7 million and \$19 million, respectively. My colleagues concede that the timing of the announcement was within the Employer's control, but find that the Employer established that the timing of the announcement was unrelated to the impending rerun election. I disagree.

I. BACKGROUND

This is not the first time the Employer has interfered with the Board's election processes. The Board set aside the initial representation election at the Employer's facility because of the Employer's objectionable conduct, which included an announcement several days prior to the election that it was *willing* to settle the litigation over the pension-offset issue. See *Onan Corp.*, 334 NLRB 531 (2001). The Board ordered the rerun election that is the subject of this case.

The rerun election was scheduled for September 26–27, 2001.¹ In captive audience meetings on September 17, the Employer announced to all its active employees that it had tentatively settled the pension-offset litigation earlier the same day. The Employer made no effort to inform the affected retirees of the proposed settlement.

On September 18, the district court issued an order preliminarily approving proposed class action settlement and authorizing mailing of notice of proposed class action settlement and hearing. The court's order authorized the plaintiffs to inform the class of the proposed settlement and scheduled a settlement hearing for December 14. The same day, the Employer held additional "informational" meetings with active employees to impress upon them the benefits of the proposed settlement. Once again, the Employer did not attempt to inform the affected retirees of the proposed settlement.

On September 19, the Employer posted at the facility a memorandum outlining the proposed settlement and copies of the court's order. The Employer also mailed the memorandum and the order to all its active employees. The Employer did not send this mailing to the affected retirees, notwithstanding that it routinely mailed the retirees other benefit-related information.

The Petitioner lost the rerun election the following week.

II. ANALYSIS

The Board will infer that an announcement or grant of benefits during the critical period preceding an election is coercive. The employer, however, may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the benefit. See *Star, Inc. Lighting the Way*, 337 NLRB 962 (2002). Contrary to my colleagues, I find that the Employer has failed to establish that the timing of its announcement of the proposed settlement was unrelated to the impending rerun election.

To begin, the hearing officer properly stated that it was the Employer's burden to establish "that the announcement would have been forthcoming at the time made even if there were not a union campaign." Thus, contrary to the majority, the hearing officer did not impose any "undue burden" upon the Employer.²

¹ All dates are 2001, unless stated otherwise.

² The majority wrongly accuses the hearing officer of demanding that the Employer establish that it was "required" to make its announcements when it did. The hearing officer subsequently observed that the Employer "had no requirement to notify its employees of the pension settlement agreement," but she only made this observation in distinguishing cases relied upon by the Employer, including, for example, *American Sunroof Corp.*, 248 NLRB 748 (1980) (employer established that it was required to notify employees of new pension plan to receive tax deductions).

Rather, applying the appropriate standard, the hearing officer properly found that the Employer failed to establish that its announcement of the proposed settlement was unrelated to the rerun election. As my colleagues concede, the timing of the announcement was within the Employer's control. The Employer thus chose to make its announcement the week before the rerun election, less than 3 months after the Board set aside the initial election based on the Employer's similar announcement that it was willing to settle the pension litigation. The Employer offered no persuasive justification for the timing of the announcement. Accordingly, the hearing officer properly recommended that the Board set aside the rerun election.

"My colleagues rightly acknowledge that, even if the Employer's decision to settle the lawsuit, or the timing of the settlement, was not objectionable, the Employer's announcement of the settlement still might be objectionable. As the Board recently made clear, "an employer cannot time the announcement of the benefit in order to discourage union support, and the Board may separately scrutinize the *timing* of the benefit announcement to determine its lawfulness." *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002) (emphasis added) (timing of announcement of wage increase was objectionable, even though wage increase itself was lawful).³

Turning to the circumstances of this case, then, the majority asserts that the Employer showed it had a past practice of announcing developments in the pension litigation, and that its September 17–19 announcements were consistent with this practice. (Presumably, my colleagues would not regard the Employer's prior objectionable conduct as reflecting this practice, too.) The evidence, however, shows that the Employer was not merely advising members of the plaintiff class that a settlement of the pension litigation was in the offing.

³ Thus, in *Cardivan Co.*, 271 NLRB 563, 563–564 (1984), cited by the majority, the Board, although holding that an employer's announcement of lawfully granted benefits was not objectionable, relied on all the circumstances surrounding the announcement—not the bare proposition that if the granting of the benefit was lawful then any announcement also was lawful.

Instead, the Employer's announcements emphasized the substantial financial benefits at stake: that active employees and retirees stood to gain \$7.7 and \$19 million, respectively, in retirement benefits. As the Petitioner points out, moreover, the Employer announced these benefits to its entire work force, even though only about half the active employees were members of the plaintiff class. At the same time, the Employer made no effort to inform the affected retirees of the proposed settlement, even though it routinely communicated with them regarding other benefit-related matters. These facts belie the Employer's claim that it was simply apprising affected employees and retirees of a development in the pension litigation. Such notification, of course, was imminent in any event, by means of the court-approved notice from the plaintiff class representatives.

The majority also suggests that the Employer had a legitimate motive in making the announcement: to persuade employee class members to support the settlement to ensure a quick settlement hearing with minimal objections or delays. That suggestion raises further questions: If the Employer was trying to build support for the settlement, then why did it not contact the affected retirees? Why did it idle nonmembers of the plaintiff class, by including them in captive audience meetings to explain the benefits of a settlement they had no standing to challenge? In any case, why did the Employer announce the proposed settlement the week before the September 26–27 rerun election—preempting the court-authorized notice from the plaintiff class representatives, who had the same interest in winning approval of the settlement—when the settlement hearing was scheduled for December 14, nearly 3 months later? The Employer has not answered any of these questions.

It was the Employer's burden to establish a legitimate explanation for the timing of its announcement. Because the Employer has failed to rebut the inference that its real motive here was—as it was prior to the initial election—to influence the outcome of the impending rerun election, I would adopt the hearing officer's recommendation to set aside the election and direct a second rerun election.