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Allen's Electric Company, Inc., and International Brotherhood of Electrical Workers, Local Union 520, Petitioner. Case 16-RC-10472

November 19, 2003

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 7, 2003, 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 13 for and 7 against the Petitioner, with 2 challenged ballots, a number insufficient to affect the results of the election.

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

We agree with the hearing officer's recommendation to overrule the Employer's objection to the Union's promises and payments to voters to reimburse them for wages lost while they voted. The Employer failed to prove that the Union's conduct had a reasonable tendency to influence voters' free choice in the election.

Facts

Because the Employer in this case is engaged in the construction industry, eligibility to vote was determined by the *Steiny/Daniel* formula.¹ Some eligible voters who were working for the Employer and other employers on the day of the election lost wages while voting. In response to a voter's preelection expression of concern about loss of worktime, the Union offered to reimburse voters for wages lost because of voting.² The offer was repeated to prospective voters who appeared in person at union meetings. Others were contacted individually by the Union, and some heard about the offer from other voters. Voters were informed by the Union that the offer

¹ See *Steiny & Co.*, 308 NLRB 1323 (1992) (reaffirming Board's use of voting eligibility formula including voters not currently working for employer at issue, because of intermittent nature of employment in construction industries); *Daniel Construction Co.*, 133 NLRB 264 (1961), modified 167 NLRB 1078 (1967).

² The Union's offer and its subsequent payments were authorized by a union policy, in effect since 1999, providing for reimbursement of lost wages for any union member who missed work due to union business.

applied only to those who lost work hours because of the election; thus, voters who were unemployed or working on schedules that did not conflict with the voting period were not eligible for reimbursement. Further, the Union repeatedly reminded voters that the reimbursement was conditioned only on voters' loss of wages because they voted, and that the Union had no way of knowing how any individual had voted.

On the morning of the election, the Union arranged a carpool for three voters from the union hall to the polling place in the Federal Building in downtown Austin, Texas. The carpool was arranged to alleviate parking difficulties near the Federal Building and to assist voters who did not know where it was located. The carpool left the union hall about a half hour before the polls opened and returned after the voters learned the outcome of the election, approximately 50 minutes after they had finished voting. Thus, the three voters who participated in the carpool, two of whom requested and received wage reimbursement, were away from their jobs for somewhat longer than the time they actually spent voting. This increased these voters' reimbursement payments by approximately \$11 for one employee and just under \$14 for the other.

Most voters who were eligible for reimbursement filed their request forms and W-4 forms at the union hall after the election and then proceeded to their workplaces. Voter Gabriel Cantu, whose worksite was approximately 70 miles away, estimated that he would arrive at work at noon. He actually arrived about a half hour earlier and was reimbursed for the extra half hour. The six voters eligible for reimbursement³ received payments ranging from \$59.36 to approximately \$81.83.⁴

The Employer objects to the Union's preelection promises and postelection payments to reimburse voters for lost wages.

Analysis

The facts of this case do not establish that the Union's conduct was objectionable. Because a party's preelection conduct is objectionable only if it reasonably tends to interfere with voters' free and uncoerced choice in the election, our inquiry centers on what employees were told before the election. Here, the Union's offer of wage

³ Five of these voters were working for other employers on the day of the election. One was working for the Employer. None of the six were paid wages by their employers for time spent voting.

⁴ Voter Scott Grube submitted his forms 2 weeks later than the other voters. As a result, he had not yet been paid on the hearing date, and the amount of his reimbursement, after payroll taxes, was unknown. It appears, however, that his payment should have been approximately \$81.83, like that of another voter who had the same hourly wage and total hours lost.

reimbursement was prompted by a voter's inquiry and was repeated to other prospective voters. The Union limited the reimbursement offer to voters who would actually lose work hours because of the election⁵ and stressed that the offer was not conditioned on their voting for the Union. The Union's representatives repeatedly emphasized the compensatory nature of the payments.⁶ Voters would have reasonably understood that the purpose of the wage reimbursements was to return them to the financial position they would have been in had they not lost worktime by voting, and not to provide them anything extra.⁷ Thus, the Employer has not demonstrated that the Union's preelection promises of wage reimbursement were promises of election-related *benefits*.⁸ Rather, after careful scrutiny, we find that the payments promised and made were limited to unavoidable costs clearly related to casting a ballot.⁹ Cf. *Good Shepherd Home, Inc.*, 321 NLRB 426 (1996).

⁵ As the hearing officer observed, the Union was consistent, both before and after the election, in making the reimbursement offer available only to voters with actual lost wages, even though its refusal to offer payment to several eligible voters who would not lose wages risked antagonizing those voters.

⁶ The payments were based on each payee's hourly wage rate and the number of work hours missed, and applicable payroll taxes were deducted from each individual's payment.

⁷ We will not overturn the election merely because voter Gabriel Cantu received approximately a half-hour's extra pay, due to his apparently good faith but mistaken estimate of the duration of the 70-mile drive to his jobsite. In any event, it is clear that Cantu was unaware at the time he cast his vote that he would be receiving any such excess payment. There is no evidence that any other voter received a payment in excess of actual wages lost.

⁸ The Employer argues that *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), requires a finding that the Union's promises and payments of wage reimbursement were objectionable. We disagree. In *Sunrise Rehabilitation*, the employer offered, inter alia, 2 hours' pay to off-duty employees who came to the workplace to vote. Reimbursements of voters' actual losses because of voting were not at issue in *Sunrise Rehabilitation*.

⁹ Our dissenting colleague would find that the Union's promises of reimbursement were objectionable because there is no showing that they were made to all prospective voters. The Employer has not objected to the Union's conduct on this basis, the issue was not litigated, and we therefore find it unnecessary to address the issue here.

In any case, the record does not support our dissenting colleague's inference that the wage reimbursement offer was "kept largely within the community of prounion employees." Reimbursement was first offered at a meeting arranged by the apprentice program's training director that included all the eligible voters who were present at apprentice training that day. Attendance at that meeting—and, therefore, knowledge of the reimbursement offer—was clearly not dependent on prounion sentiments. Contrary to our colleague, we would not describe the record as "conflicting" as to whether the apprentice program was union-sponsored. Rather, the record simply lacks clear evidence on the matter. This is unsurprising, given that the parties did not raise or litigate this issue or any related issue. Thus, it is not clear how our colleague can confidently declare that "we know" that the employees

Nor does the Union's election-day carpool, arranged at a voter's request, require the election to be set aside. As the hearing officer found, there is no evidence that the carpool's departure from the union hall a half-hour before the start of the election caused the three carpooling voters to miss any more worktime than they would have if they had traveled separately to the downtown polling place. Further, there is no evidence that the employees were aware before they voted that the carpool arrangement would cause them to remain at the polling place until the ballots had been counted. Thus, even if use of the carpool increased these voters' reimbursements, it has not been shown that this reasonably tended to interfere with their free and uncoerced choice in the election.

Finally, we agree with the hearing officer that the post-election reimbursement payments were not objectionable. Such payments could not have interfered with employees' free and uncoerced choice in the election that had already occurred.¹⁰

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Electrical Workers, Local Union 520, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All electrical workers, including foremen, employed by the Employer during the payroll period ending December 10, 2002, or who were employed for 30 days or more within the 12 months preceding December 10, 2002, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date in the following counties: Travis, Bastrop, Hays, Blanco, Burnet, Williamson, Lee, Llano, San Saba, Burleson, Caldwell,

who attended training that day were willing to "hear the Union's message."

¹⁰ We do not, however, suggest that postelection payments in excess of preelection promises will be entirely free from scrutiny. If voters would reasonably understand a preelection offer of reimbursement as a promise of unwarranted largesse (for instance, because of a party's history of making postelection payments in excess of its permissible preelection promises), we may find interference with the voters' free and uncoerced choice.

Member Liebman finds this case distinguishable from *New Era Cap Co.*, 336 NLRB 526 (2001), in which she would have found that the employer's offer of free transportation and a half-hour's wages for employees to vote in an off-site union affiliation election violated Sec. 8(a)(1) of the Act. Union affiliation elections are internal union matters, and the employer was not a party to that election, unlike the Union here. Further, the wage payments in *New Era Cap* occurred in a context of other employer violations; here, there was no other conduct by the Union that could have undermined the employees' understanding of the reimbursements' purpose.

Fayette and parts of Coryell and Bell Counties to include that part of Fort Hood in Coryell County south of Cowhouse Creek, and not to extend to more than two (2) miles into Bell County from the Southeast boundary line of Coryell County, Gray Field, and the City of Killeen, and parts of Lampasas, Bell and Milam Counties, which are nearer to Austin than Waco, in the State of Texas.

EXCLUDED: All other employees, clerical employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. November 19, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

At issue here is whether the Union engaged in objectionable conduct by promising to reimburse, and, thereafter, reimbursing, certain voters for wages they lost by taking time off to vote in a Board election.¹ I will assume for purpose of this dissent that a party's offer to reimburse employees—in these circumstances—for lost wages is not per se objectionable.² Nonetheless, I find that such an offer taints the election by unduly affecting the election's outcome if it is not made available to all employees eligible to vote.

In *NLRB v. Savair Mfg.*, 414 U.S. 270 (1973), the union offered to waive initiation fees for employees who signed authorization cards before the election. The Supreme Court held that the offer had to be made available to all employees—not just union supporters—and not just those who acted before the election. The Court took note of lower Federal court decisions and decisions of the Board that “have recognized that promising benefits or conferring benefits before representation elections may unduly influence the representational choices of employees where the offer is not across the board to all

employees but, as here, only to those who sign up prior to the election.” 414 U.S. at 279, fn. 6 (and cases cited therein). The Court held:

Any procedure requiring a “fair” election must honor the right of those who oppose a union as well as those who favor it.

. . . .

The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union. *NLRB v. Savair*, supra, 414 U.S. at 278, 280.

In *Savair*, and in the cases cited by the Court, which I reference above, the procedures adopted were found objectionable primarily on the ground that they had an undue influence on individual employees' representational choice. Here, we are assuming that the wage reimbursement procedure did not affect the individual employee's representational choice. However, its effect on the outcome of the election—the Section 7 right of employees to chose to have a union and not have a union—by facilitating the participation of less than all eligible voters and, most problematically, perhaps predominantly only pronoun voters is what casts such a large shadow.

The record does not show that the Union informed, or took action reasonably aimed at informing, all 32 eligible voters of its offer of wage reimbursement by, for example, a mailing to all voters. Further, it would not be unreasonable to infer that the announcements of the offer were kept largely within the community of pronoun employees. The announcements were made by union officials to three employees attending apprentice training and employees attending union-sponsored campaign meetings, and a few other employees heard of the offer by word of mouth, presumably from the employees who attended the union training and the meetings.

My colleagues take issue with my observation above that it would not be unreasonable to infer that the Union's wage reimbursement offer was kept largely within the community of pronoun employees. While this observation is not the fundamental reason for my finding the Union's offer objectionable, I believe the record supports it. As mentioned, the Union's wage reimbursement offer was made to three employees attending an apprentice training session and to employees attending union organizational meetings. My colleagues focus only on the employees attending the apprentice training and argue that “[r]eimbursement was first offered at a meeting arranged by the apprentice program's training director that included all the eligible voters who were present at

¹ I agree with my colleagues that the Union's providing an election day carpool to help voters get to the polls was not objectionable.

² In the construction industry there may be legitimate concern that some eligible voters who must take time off from work to vote at a distant location do not do so to avoid lost wages. What remains to be explored is whether in circumstances such as these our regional offices can reasonably adopt procedures to assure maximum voter participation nonetheless.

the apprentice training that day.” They conclude, therefore, that the offer was not limited to employees with prounion sentiment. The record is conflicting as to whether the apprentice program and training were union-sponsored. However, *only 3* of the 32 employees eligible to vote were present at the training that day and we know they were willing to meet and hear the Union’s message. Of course, more eligible voters attended the Union’s campaign meetings.

I recognize that the Union did take some measures to negate the inference that it was buying employee participation and offering wage reimbursement in return for voter support. It limited the reimbursement to employees who were working and who actually lost wages for the time they took off to vote and it made known that the offer was not conditioned on how an employee voted. But, as noted above, the essential element necessary here for the procedure not to unfairly “cast [its] weight” in favor of unionization and against a nonunion shop is missing, namely, there is no evidence that the offer was made available to all eligible voters by communicating the offer to them. Thus, the “procedure . . . [did not] honor the right of those who oppose a union as well as those who favor it.” *NLRB v. Savair*, supra, 414 U.S. at 278.

Absent a showing that the offer was made to all eligible voters, I cannot conclude, as do my colleagues, that the Union’s offer of wage reimbursement to less than all the employees did not unfairly affect the election outcome and unduly influence the employees’ choice.

Finally my colleagues note that the Employer did not specifically contend that the Union’s reimbursement offer was objectionable because it was not extended to all prospective voters. Nonetheless, the Employer’s objection and exception put the Union’s conduct before the Board for review. The Board’s obligation is to insure that employees have a free and untrammelled choice in a Board-conducted election. In this case, by not addressing a key element of the Union’s conduct, my colleagues have failed to uphold the Board’s high standard regarding elections.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. November 19, 2003

Peter C. Schaumber,

Member

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