**DLC Corp., d/b/a Tea Party Concerts and/or Live Nation *and* International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the U.S. and Canada, Local 11, AFL–CIO.** Case 1–RC–22162

March 31, 2009

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The National Labor Relations Board has considered objections to an election held June 13 and 14, 2008, and the hearing officer's report recommending disposition of them.[1] The election was conducted pursuant to a Decision and Direction of Election dated January 16, 2008. The tally of ballots shows 48 for and 53 against the Petitioner, with 2 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 adopt the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction of Second Election.

In its Objection 2, the Petitioner alleged that the Employer interfered with the election by offering a benefit, 4 hours' pay, to off-duty employees in exchange for their participation in the voting process. The hearing officer found that the Employer in fact made such an offer, but concluded that it was not objectionable conduct.

Consistent with the Petitioner's exceptions, we find that the Employer's conduct was objectionable. Accordingly, we reject the hearing officer's recommendation to certify the election results, and we will direct the Regional Director to conduct a new election.[2]

Background

The Employer is DLC Corp., d/b/a Tea Party Concerts, a subsidiary of Live Nation, Inc. It promotes, stages, and presents music concerts at venues including the Tweeter Center, a summer-season facility located in Mansfield, Massachusetts.

The Petitioner seeks to represent the Employer's stagehands working at Tweeter Center. It filed an election petition on December 4, 2007. The Regional Director designated election dates in June 2008 because of the seasonal nature of the stagehands' work at Tweeter Center.

In a letter to all eligible voters dated May 6, 2008, the Employer explained some of the procedures for the upcoming June election and reviewed its position opposing the Petitioner on several campaign issues. In addition, the letter stated:

> If you are not on a call either of the two voting days, we would encourage you to come and vote (you will be paid for a 4-hour call if you vote and are not on a call either of those days.)
>
> IT IS VERY IMPORTANT THAT EVERYONE VOTES SINCE EVERY VOTE COUNTS![3]

The May 6 mailing enclosed two other documents: one raising a list of questions about the Petitioner's campaign that, in the Employer's view, should concern the stagehands, and the other identifying dates and times of upcoming meetings where the Employer's representatives would be available to discuss campaign issues.

Fifty-six eligible voters were not assigned a call at Tweeter Center on either of the election dates. Ten of these off-duty employees requested and received 4 hours' pay for voting in the election. As indicated above, the Petitioner lost the election by five votes.

In Objection 2, the Petitioner contended that both the offer to the stagehands in the May 6 letter and the actual payments to 10 of them were objectionable. The hearing officer identified *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), as relevant case law: a full-Board decision concluding that an employer's offer to off-duty employees of 2 hours' pay in return for voting was objectionable conduct. The hearing officer then discussed at length the weaknesses he perceived in the *Sunrise* decision in view of other of the Board's rules and policies underlying appropriate preelection campaign conduct. He concluded that the rights protected by Section 8(c) of the Act require that an employer be allowed to pay an employee for the time spent voting in a Board election,

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Petitioner filed seven election objections. Objection 4 was withdrawn at the hearing. Because we sustain Objection 2, we find it unnecessary to consider the hearing officer's recommendations to overrule Objections 1 and 7. In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule Objections 3, 5, and 6.

[3] A "call" is a work assignment at Tweeter Center. The Employer's stagehands receive a minimum of 4 hours' pay when they work a call. Thus, consistent with the stagehands' wage rates at the time of the election, the Employer's "4-hour call" offer to off-duty employees represented a range of potential payments between $40 and $95.

whether the employee is on duty or off. Accordingly, he recommended overruling Objection 2.

In its exceptions, the Petitioner argues that the Employer's payment offer to off-duty stagehands is not distinguishable in any significant way from *Sunrise* and Board decisions following it. The Petitioner contends that the hearing officer erred by ignoring the applicable precedent and substituting his own policy preference for the standard established by the Board.

In its answering brief, the Employer contends that its offer of 4 hours' pay was a matter of legitimate reimbursement consistent with its established practice. It argues accordingly that the offer was not objectionable under the *Sunrise* standard.

Discussion

*Sunrise Rehabilitation Hospital,* supra, is current law and is controlling.[4] Pursuant to *Sunrise,* a party engages in objectionable conduct by paying employees to attend the election unless the payment is for the reimbursement of actual transportation expenses. Cf. *Good Shepherd Home,* 321 NLRB 426 (1996), enfd. 145 F.3d 814 (6th Cir. 1998) (good-faith effort to reimburse an off-duty employee's actual transportation expenses for attending election not objectionable).

In the present case, the Employer explicitly offered to provide off-duty stagehands with 4 hours' pay in exchange for coming in to the polling location to vote. As in *Sunrise*, the offer was substantial; it was not linked to reimbursement for travel or other costs; and the number of employees potentially affected was not de minimis.[5]

In its answering brief, the Employer contends that the "4-hour call" offer was consistent with its established practice of paying stagehands for a minimum of 4 hours when they are present at Tweeter Center "under any circumstances." The Employer also argues that the offer represented no more than fair reimbursement for the expense of travelling to Tweeter Center, and/or for lost work opportunities at other concert venues if off-duty stagehands chose to vote.[6]

We are unpersuaded by the Respondent's reimbursement argument. The May 6 letter made no reference to reimbursement for off-duty employees' expenses in participating in the election. Rather, the Employer simply offered 4 hours' pay in exchange for showing up to vote. Thus, the Employer's reimbursement argument presents a post-hoc rationale.[7] In any event, the Employer has failed to substantiate this rationale.[8]

We therefore conclude that the Employer's May 6 offer to pay off-duty stagehands in return for voting interfered with the employees' freedom of choice in the election. Accordingly, we sustain Objection 2, and we will order a new election.

[Direction of Second Election omitted from publication.]

[4] Member Schaumber did not participate in *Sunrise Rehabilitation Hospital*, supra. However, he recognizes *Sunrise* and its progeny as extant Board precedent, and applies it here for institutional reasons. At the appropriate time, Member Schaumber would revisit the area of union/employer reimbursement of travel and lost wage expenses in connection with representation elections in order to foster participation in Board elections and provide greater clarity and uniformity in the applicable standards. See *Durham School Services LP,* 353 NLRB 1288 fn. 2 (2009).

[5] While there was no explicit "vote no" message in the Employer's offer, there was an implicit one. The May 6 letter, the two enclosures with it, and the Employer's campaign positions generally, all made clear the Employer's opposition to the Petitioner's campaign. In any event, decisions following *Sunrise* have not required a linkage between the offer and an antiunion message to find objectionable conduct. See *Lutheran Welfare Services*, 321 NLRB 915 (1996); *Perdue Farms,* 320 NLRB 805 (1996).

[6] The Employer cites *Allen's Electric Co.,* 340 NLRB 1012 (2003), in support of its arguments. *Allen's* is distinguishable. In that case, the union offered to reimburse on-duty employees for actual wages lost because of their time spent in voting in the Board election. No offer was made to off-duty employees in exchange for voting. Id. at 1013 fn. 8.

[7] See *Rite Aid Corp*., 326 NLRB 924 fn. 1 (1998) (Board rejected as a post-hoc rationale employer's assertion that payments were reimbursement for transportation costs of attending election).

[8] There is no evidence that the Employer maintained a practice of paying for a minimum 4-hour call whenever a stagehand was present at the Tweeter Center. Such payments were available only when stagehands were *required* to go to the facility pursuant to a work assignment. Voting in a Board election does not meet this standard. Moreover, the Employer did not establish that 4 hours' pay represented a reasonable estimate of off-duty stagehands' transportation expenses and financial losses due to lost work opportunities caused by coming in to vote.