G & K Services, Inc. *and* Diane Carmack, Petitioner and Mid-Atlantic Regional Joint Board, Workers United, a/w SEIU, Intervenor. Case 05–RD–001484

November 7, 2011

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

The National Labor Relations Board has considered an objection to an election held September 23, 2010, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 12 for and 13 against the Intervenor (the Union), with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has decided to affirm the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction of Second Election.

The hearing officer found that the Employer did not engage in objectionable conduct by promising to grant improved benefits if the employees voted against the Union. The Union excepts, contending that, in a letter to employees, the Employer implicitly promised to grant a new benefit if the employees decertified the Union. Contrary to the hearing officer, we agree with the Union's contention.

Facts

For many years, the employees at the Employer's facility in Portsmouth, Virginia, have been represented by the Union and have participated in the Union's health plan, which does not offer family coverage. At the same time, the employees at the Employer's nonunion facilities have participated in a health plan that does offer family coverage. During the campaign preceding the September 23, 2010[1] decertification election at the Portsmouth facility, the employees' lack of family coverage became a significant issue. For example, at a special meeting held about 2 weeks before the election, the Employer distributed a chart comparing the Portsmouth employees' benefits package with the benefits offered at the Employer's nonunion facility in Laurel, Maryland; the chart highlighted the availability of family coverage at Laurel and the lack of family coverage at Portsmouth.[2]

On September 17, the Employer mailed a letter to the Portsmouth employees. The letter, which was intended to reach employees 1 to 2 days before the September 23 election, encouraged employees to vote against the Union, and criticized the Union's "underfunded pension plan and minimal health care coverage that excludes your spouse and children." After recounting the Employer's success in other decertification elections, the letter set forth the following paragraph, which refers to a decertification election held at the Employer's Memphis, Tennessee facility on August 26:

> Most recently, the production employees in Memphis, TN voted to get rid of their union (the same union that currently represents you here in Portsmouth). The employees in Memphis used to bargain their contract with the employees in Portsmouth so they were covered under a contract that contained the exact same wages, benefits and terms and conditions of employment that your contract provides. While by law I can't make any promises about what will happen in Portsmouth if the union is decertified, I can share with you that just last week the production employees in Memphis were able to sign up for health insurance that covers their spouses and children for the first time ever.

At the hearing, the Employer testified that the health plan at its Laurel facility was the default plan offered at all of its nonunion facilities and that at least some of its unionized facilities also offered the Employer's health plan. There is no evidence, however, that the Portsmouth employees were aware of these circumstances.

The Hearing Officer's Findings

The hearing officer found that the Employer's letter did not convey an implied promise of benefit to the employees, but instead "accurately reported" both the events that occurred at a sister facility and the benefits in existence at that facility. In finding that the letter did not offer an implied promise of benefit, the hearing officer found several considerations significant: (1) beyond the paragraph at issue, no other objectionable conduct was alleged; (2) the letter's reporting of facts was "not tailored" for the Portsmouth employees; (3) the letter did not project future benefits if employees chose to be unrepresented; (4) the letter expressly disclaimed making any promises; and (5) the letter was a response to employee questions. The hearing officer further likened this case to *Viacom Cablevision*, 267 NLRB 1141 (1983), where the Board found unobjectionable an employer's comparisons of pay and benefits at its union and nonunion worksites, accompanied by a statement that employ-

[1] All dates hereafter are in 2010, unless stated otherwise.

[2] There is no contention that the Employer's distribution of this chart was objectionable.

ees who had decertified at one location had done "better" than those at a unionized location.

Contrary to the hearing officer, we find that the Employer's letter conveyed an implied promise of benefit and, as such, constituted objectionable conduct warranting setting aside the election.

Analysis

It is well settled that an employer may lawfully inform employees of the wages and benefits its nonunion employees receive and respond to requests for information from employees about such benefits. See, e.g., *Suburban Journals of Greater St. Louis, LLC*, 343 NLRB 157, 159 (2004) (citations omitted). The Board will set aside an election, however, when an implied promise of benefits is made to employees. See, e.g., *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979). The Board infers that such a promise interferes with employees' free choice in the election; an employer may rebut this inference by showing a legitimate purpose for the timing of the promise. See *Sun Mart Foods*, 341 NLRB 161, 162 (2004).

Determining whether a statement is an implied promise of benefit involves consideration of the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise. See *Viacom*, supra, 267 NLRB at 1141 ("the question is, was there a promise, either express or implied from the surrounding circumstances"); *Crown Electrical Contracting, Inc.*, 338 NLRB 336, 337 (2002) (finding employees could not reasonably interpret employer statement as implied promise). Although an employer may compare union and nonunion benefits and make statements of historical fact, the Board has long held that even comparisons and statements of fact may, depending on their precise contents and context, nevertheless convey implied promises of benefits. See, e.g., *Grede Plastics*, 219 NLRB 592, 593 (1975) (factually accurate letter contained implied promise); *Westminster Community Hospital, Inc.*, 221 NLRB 185, 185 (1975), enfd. mem. 566 F.2d 1186 (9th Cir. 1977) (wage rate comparison contained implied promise).

Applying these principles to the Employer's letter, we find, contrary to the hearing officer and our dissenting colleague, that the paragraph at issue is not merely a benefit comparison or a report of an historical fact. This is evident by the direct parallel it drew between the Portsmouth and Memphis union contracts and benefits, its recounting of the recent Memphis decertification vote, and its emphasis that, shortly thereafter, Memphis employees "were able to sign up for health insurance that covers their spouses and children for the first time ever." Given this description and emphasis, linking the enhanced Memphis benefits to their decertification vote, employees would reasonably interpret the paragraph as a promise that they too would receive the option to elect family coverage if they similarly voted to decertify the Union. Indeed, we can fathom no reason for the Employer to juxtapose the Memphis employees' vote to decertify with the receipt of an improved benefit other than to convey the notion that the Portsmouth employees would also receive that benefit if they voted to decertify the Union.

The Board has found implied promises of benefits in similar circumstances. For example, in *Zero Corp.*, 262 NLRB 495, 510 (1982), enfd. mem. 705 F.2d 439 (1st Cir. 1983), an employer on several occasions informed unit employees that employees at another facility had recently rejected a union and received improved benefits shortly thereafter. The Board adopted the administrative law judge's conclusion that "any reasonably intelligent concerned employee[s]" would view such information as a promise that they would receive benefits if they rejected the union. Id.[3] Similarly, in *Grede Plastics*, supra, 219 NLRB at 592–593, the Board found that a description of nonunion employee benefits, coupled with an invitation for employees to emulate the nonunion "team" by decertifying the union, constituted an implied promise that the voting employees would receive the "team" benefits upon decertification.

Nothing in the circumstances surrounding the Employer's issuance of the letter diminishes the impression that the paragraph at issue conveys an implied promise of benefit. Although the paragraph at issue was unaccompanied by other objectionable conduct and was not individually tailored to the Portsmouth employees, these considerations are not dispositive. See, e.g., *Grede Plastics*, supra (finding implied promise without reference to these considerations); *Lutheran Retirement Village*, 315 NLRB 103 (1994) (same).

In addition, and contrary to hearing officer's finding, the paragraph at issue was not a response to employee questions. At the hearing, the Employer offered only vague testimony that the letter was "a summary of a lot of the questions that had come up" during the campaign and that employees had asked "a lot of questions around specific benefit coverages that G&K provides to nonunion facilities."[4] There is no evidence, however, that

[3] The hearing officer found *Zero Corp.* distinguishable because the statements at issue were made in the midst of other objectionable conduct. However, the finding of implied promise in that case was not premised on the presence of other objectionable conduct. See *Zero Corp.*, supra, 262 NLRB at 510.

[4] The Employer identified only one employee who had asked about health coverage at nonunion facilities, indicating that she first broached the question prior to the meeting at which the Laurel-Portsmouth com-

employees requested information about the Memphis employees' bargaining history, their decertification election, the timing of that election, or the family coverage those employees received afterwards. Accordingly, the paragraph volunteered unsolicited information, which supports a finding of an implied promise. See *Coca-Cola Bottling Co. of Dubuque*, 325 NLRB 1275, 1275–1276, 1276 fn. 4 (1995) (finding implied promise where employer offered no direct evidence employees had requested the information, and no indication was given "of the occasion on which questions were asked and of whom").[5]

Finally, although the Employer disclaimed making "any promises," it is well settled that such a disclaimer is "immaterial . . . if in fact [an employer] expressly or impliedly indicates specific benefits will be granted." *Michigan Products*, 236 NLRB 1143, 1146 (1978). Here, by indicating that the grant of family coverage occurred shortly after the Memphis employees voted to decertify the Union, the Employer insinuated that if the Portsmouth employees similarly were to vote to decertify the Union, they too could expect a grant of family health coverage.

Viacom Cablevision, cited by the hearing officer, is distinguishable from this case. In *Viacom*, the Board held that an employer permissibly responded to specific employee requests for wage information by distributing (1) a letter comparing the voting employees' wages to two of the employer's nonunion locations; (2) a letter demonstrating that employees who had decertified at one location had done "better" than those who had remained unionized at another location; and (3) a letter stating that wages at the employer's nonunion locations had always been increased yearly, accompanied by a chart comparing the voting employees' wages to wages in 10 nonunion locations. See *Viacom Cablevision*, supra, 267 NLRB at 1141. The letters in *Viacom* appear to be comparable to the Employer's earlier presentation here of its comparison chart, not alleged to be objectionable, which responded to employee questions about nonunion benefits by setting out the differences between the Laurel and Portsmouth benefits. Unlike the Employer's letter at issue here, however, the *Viacom Cablevision* letters limited themselves to wage comparisons. See id. Further, although the second letter in *Viacom* mentioned benefits received by employees who had decertified their union, these benefits were compared to those at a third, unionized location, not to the voting employees' benefits. See id. Significantly, there was also nothing in the second *Viacom* letter suggesting that employees received improved wages *shortly after*, and thus, implicitly, in return for, voting to decertify their union.

Likewise, in *TCI Cablevision*, 329 NLRB 700, 700 (1999), employees specifically asked the employer if they would receive a 401(k) plan if they voted the union out. Although the employer answered that they would, this was because both the terms of the employer's 401(k) plan and applicable ERISA provisions *required* that the plan be available to all employees who were not represented by a collective-bargaining representative; the employer was not free to select which unrepresented employees would receive the benefit. See id. In view of these facts, the Board found that the employer's description of the 401(k) plan amounted to a permissible statement of historical fact.[6] Here, by contrast, there is no evidence that the Employer is required—by law or by the terms of the health plan—to provide the health benefits at issue to all of its unrepresented employees, nor did the Employer describe the benefit as being automatic for unrepresented employees.[7] See *Coca-Cola Bottling*, supra, 325 NLRB at 1276 fn. 7 (finding no evidence that 401(k) plan was "automatically available to non-unit employees without the necessity of some decision by the [e]mployer," notwithstanding the fact that nonunion employees companywide (and at the worksite) participated in the 401(k) plan).[8] In these circumstances, it cannot be

parison chart was distributed. The Employer did not identify any specific questions that the letter addressed.

[5] Even if the Employer had brought up the Memphis events in response to specific employee questions, this consideration would not necessarily excuse an actual implied promise. See *California Gas Transport*, 347 NLRB 1314, 1318 (2006), enfd. 507 F.3d 847 (5th Cir. 2007).

[6] We disagree with our dissenting colleague's claim that nothing in the Board's decision in *TCI Cablevision* suggests that the automatic availability of the 401(k) plan to unrepresented employees was not "dispositive." Indeed, the Board recounted the hearing officer's finding that the employer was "not free to select which nonrepresented employees" would receive the benefit, and that therefore the employer's statement that employees would receive the 401(k) plan upon decertification was a statement of fact. Immediately thereafter, the Board stated its agreement with the hearing officer "that [the objection] is without merit." See *TCI Cablevision*, supra, 329 NLRB at 700. The Board did not state that it disavowed all reliance on the plan's automatic availability. Had that been the Board's intent, it would clearly have said so, as it typically does when it decides not to rely on a particular fact at issue. See, e.g., *TM Group, Inc.*, 357 NLRB No. 98, slip op. at 1 fn. 1 (2011); *Palm Beach Metro Transportation, LLC*, 357 NLRB No. 26, slip op. at 1 fn. 5 (2011); *ACF Industries, LLC*, 347 NLRB 1040, 1042 (2006); *Craftmatic Comfort Mfg. Corp.*, 299 NLRB 514, 514 fn. 2 (1990); *SMCO, Inc.*, 286 NLRB 1291, 1293 fn. 10 (1987), enfd. mem. 863 F.2d 49 (6th Cir. 1988).

[7] Nor does the record establish that the health benefits are automatically granted to all unrepresented employees.

[8] Contrary to our dissenting colleague's contention, there is no evidence that the Board majority in *Coca-Cola Bottling* rejected the idea that the "automatic availability" of employee benefits is a relevant factor in the analysis as to whether an employer made an unlawful

said that the Employer's statements to the employees regarding the health benefits were confined to a description of historical fact. Rather, the Employer "shared" that the similarly union-represented and recompensed employees at the Memphis facility received this benefit soon after decertifying, thus focusing on the action those employees took prior to the Employer's grant of the identical benefit.

We agree with our dissenting colleague that an employer does not engage in objectionable conduct when it describes wages, benefits, or other working conditions at its unionized and nonunionized facilities. But the objection in this case is not to such a factual comparison. The Employer presented such a factual comparison in the chart it distributed at the meeting 2 weeks before the election comparing the Portsmouth employees' benefits with those of unrepresented employees in Laurel. There is no contention that that comparison was objectionable. The Employer could have made a similar comparison of benefits at Portsmouth and Memphis and no valid objection would have followed. If it was true, the Employer could also have added that the benefits provided at Laurel and Memphis were provided under a plan or contract that covered all unrepresented employees or that the law required those benefits be provided to all unrepresented employees. But here the Employer did not make any of those unobjectionable statements of fact. Rather, the Employer expressly linked the extension of benefits in Memphis with employees' vote to decertify the Union and, with what was tantamount to a wink, did so while stating, "While by law I can't make any promises about what will happen in Portsmouth if the union is decertified . . . ." In the absence of evidence establishing that the change in benefits would occur automatically as a result of plan coverage or legal requirements, those statements went beyond a description of historical fact and constituted an implied promise of benefits suggesting the Employer would reward the employees if they voted to decertify the Union.

In any event, our dissenting colleague's argument that the letter was a mere description of historical fact focuses on what the letter expressly states and does not state. As we have already noted, a letter consisting of truthful and accurate factual statements may nevertheless convey an implied promise. See *Grede Plastics*, supra. Moreover, the relevant inquiry in such cases is not confined to the actual text of an employer's statements. Rather, the Board may draw reasonable inferences regarding the unstated messages or impressions that the statements convey. See, e.g., *Crown Electrical Contracting*, supra, 338 NLRB at 337; *Grede Plastics*, supra, 219 NLRB at 592–593 (finding that although employer letter did not overtly state joining "team" would result in receiving team benefits, letter nevertheless conveyed that message). The dissent's approach would prohibit us from considering the inference a reasonable employee would draw from the text of the letter, and thereby require us to close our eyes to the promise implied by the letter's clear statement of cause (employees vote to decertify union) and effect (employees gain opportunity to elect family coverage, courtesy of the author of this very letter). As the letter linked the decertification vote to the new benefits, and the availability of the benefits was within the exclusive control of the Employer, the letter must be treated as an implied promise of benefits.[9] The dissent's exclusive focus on the literal text of the letter would render objectionable only the most blatant, explicit promises of benefits.

For these reasons, we find that the Employer made an implied promise that the employees would receive the benefit of family health coverage if they voted to decertify the Union. We infer that that promise interfered with employee free choice in this election, and find that the Employer has failed to rebut the inference, as it has not offered any evidence that it had a legitimate reason for the timing of the promise. We therefore sustain the Union's objection, and shall set aside the election and direct that a new election be held.

[Direction of Second Election omitted from publication.]

MEMBER HAYES, dissenting.

The decision whether to elect or retain union representation is a significant one, and employees ought to know whether the costs outweigh the benefits. Here, the Employer related a historical fact—that employees at another of its facilities recently decertified their union—and truthfully described the benefits offered to employees at its nonunion facilities; benefits for which the employees became eligible upon decertification. The hearing officer properly found, consistent with longstanding precedent, that this conduct was not objectionable. Elevating "surrounding circumstances" over historical fact and relying on decisions that are readily distinguishable to support

implied promise of benefits. Rather, the majority simply rejected the dissent's claim that the record evidence in that case in fact established that the 401(k) plan was automatically available to nonunit employees.

[9] The dissent states, without further elaboration, that unlike the situation in *Grede Plastics*, the Employer in this case has not linked the benefit to decertification. However, the employer in *Grede Plastics* never explicitly stated that joining the "team" would result in receiving the team benefits—a fact emphasized by the dissent in that case. See id. at 594 (Chairman Murphy and Member Kennedy, dissenting). Rather, the linkage in *Grede* was implied. As explained above, there is a similar implied linkage here.

their legal conclusions, my colleagues reverse the hearing officer and find an implied promise of benefits where none exists. I dissent.

The Union-negotiated health plan covering the unit employees at the Employer's Portsmouth, Virginia facility does not contain family coverage while the health plan available at the Employer's nonunion facilities does. As my colleagues observe, this disparity became an important issue for employees during the decertification campaign. During a meeting with employees 2 weeks before the election, the Employer distributed a chart comparing the Portsmouth facility benefits package to the one offered at its nonunion Laurel, Maryland facility. (The health plan at the Laurel facility is the default plan offered at all the Employer's nonunion facilities.) The chart highlighted the availability of family coverage at Laurel and the lack of such family coverage at Portsmouth. There is no dispute that the chart was accurate and its distribution was not alleged to be objectionable.

Following up on that meeting, the Portsmouth facility's general manager mailed a letter to the employees that again highlighted the availability of family coverage at the Employer's nonunion facilities. The letter referred to a decertification election recently held at the Employer's Memphis, Tennessee facility. The letter's fourth paragraph contained the language alleged to be objectionable (emphasis added):

> Most recently, the production employees in Memphis, TN voted to get rid of their union (the same union that currently represents you here in Portsmouth). The employees in Memphis used to bargain their contract with the employees in Portsmouth so they were covered under a contract that contained the exact same wages, benefits and terms and conditions of employment that your contract provides. *While by law I can't make any promises about what will happen in Portsmouth if the union is decertified, I can share with you that just last week the production employees in Memphis were able to sign up for health insurance that covers their spouses and children for the first time ever.*

As explained in *Viacom Cablevision*, 267 NLRB 1141, 1141 (1983) (emphasis added): "[a] comparison of wages is not per se objectionable; the question is, was there a promise, either express or implied from the surrounding circumstances, that wages *would be adjusted* if the Union were voted out." In *Viacom*, the Board found no implied promise of benefits because, pursuant to employee requests for information, "the Employer did no more than truthfully inform the employees of wages enjoyed by other employees in other Viacom systems and made statements of historical fact concerning the yearly increases which had been given elsewhere in the past." Id. at 1141–1142. In my view, the hearing officer correctly relied on *Viacom* to find that the fourth paragraph of the Employer's letter did not contain an implied promise of benefits, but was merely a recitation of historical fact regarding the recent decertification of the Union at the Memphis facility and the benefits available under the Employer's health plan.

In finding otherwise, my colleagues rely on "surrounding circumstances" to transform statements of fact into an implied promise of benefits, i.e., that the Portsmouth employees would receive family coverage if they decertified the Union. In reaching this conclusion, the majority finds that paragraph four of the letter is not merely a benefit comparison or a report of historical fact because of the "direct parallel" it drew between the Portsmouth and Memphis union contracts and benefits and its "emphasis" on the fact that, shortly after the decertification vote, the Memphis employees "were able to sign up for health insurance that covers their spouses and children for the first time ever." From this, the majority asserts that the Portsmouth employees "would reasonably interpret the paragraph as a promise *that they too would receive the option to elect family coverage* if they similarly voted to decertify the Union" (emphasis added). My colleagues also contend that my approach "would prohibit [them] from considering the inference a reasonable employee would draw from the text of the letter, and thereby require [them] to close [their] eyes to the promise implied by the letter's clear statement of cause (employees vote to decertify union) and effect (employees gain opportunity to elect family coverage, courtesy of the author of this very letter)."

The difficulty with my colleague's position is that, contrary to their assertion, the allegedly objectionable language does not state that the Employer gave the Memphis employees the option to elect coverage because they voted to decertify the Union. Nor does it even state that the Memphis employees received such an option after decertification. Rather, the statement simply reflects the fact that, after decertification, the Memphis employees were covered under the Employer's company health plan and that under that health plan they could elect family coverage. Thus, the statement says no more than the facts allow—that the Memphis employees could opt for—"were able to sign up for"—family coverage after they decertified the Union.

If the Portsmouth employees could reasonably interpret the language at issue to mean that if they decertified the Union, they "too" would be able to sign up for family coverage, so be it. Even assuming the cause (employees

vote to decertify union) and effect (employees gain opportunity to elect family coverage) which my colleagues posit, such an interpretation would only reflect the essential fact that the Portsmouth employees would be able to elect such coverage because it is available to all unrepresented employees, not that they would receive it as a reward for voting out the Union. And while my colleagues attempt to gloss over this essential fact by suggesting that the opportunity is "courtesy of" the Employer, that attempt must fail.

In this regard, the majority seems to rely on the facts that, contrary to the situation in *TCI Cablevision*, 329 NLRB 700 (1999), the Employer's letter here did not state that the Employer's health care plan was "automatically" available to all unrepresented employees, nor was there evidence that provision of such coverage was compelled by plan documents or ERISA. As to the first point, I fail to see the relevance; the Employer's representation to employees was not that they would automatically receive anything, it was that employees at its unrepresented facilities were eligible to sign up for family coverage, a fact previously conveyed to the employees during the benefit comparison meeting that my colleagues concede was unobjectionable.[1] As to the second point, whether the availability of family coverage at the Employer's nonrepresented facilities was compelled by plan documents or ERISA is likewise irrelevant; the pertinent question in establishing a matter of historical fact is not *why* such coverage was available, but *whether* it was. Here, there is no serious dispute that family coverage historically had been available, and indeed was available, at the time of Employer's August 26 letter at the Employer's nonunion facilities. See footnote 1, supra. And while it is true that the Board in *TCI* recounted the hearing officer's findings that, according to the Employer's plan documents and ERISA, the 401(k) plan must be available to all employees not represented by a union, nothing in the Board's decision indicates that those facts were dispositive.[2] Rather the Board, specifically relying on *Viacom*, supra, in which there was no discussion of automatic or legally compelled eligibility, stated simply:

> [In *Viacom*] the employer compared the pay and benefits of employees in its nonunion locations with those received in its unionized locations. It stated that employees who decertified the union in one location had done better than those in another location who remained unionized. The employer also disclaimed any promise of what the employees might receive in the future. The Board found that providing this information about "historical fact" was not objectionable. Here, as in *Viacom*, the Employer informed the employees about a "historical fact," a benefit which its unrepresented employees received. And, also as in *Viacom*, the Employer advised the employees that it could not make any promises.

329 NLRB at 700. Thus, in this case, just as in *TCI* and *Viacom*, the determinative considerations are that the Employer truthfully informed employees about a historic fact—the benefits available at its union and nonunion locations—and advised the employees that it could not make any promises about what would happen in the future.[3]

In sum, my approach does not require, as my colleagues contend, that they close their eyes, but it does demand that they not turn a blind eye to the fact that neither "surrounding circumstances"[4] nor the absence of a

[1] My colleagues insist that the text of the letter be read in the context of "surrounding circumstances," yet analyze it independent of the earlier and more detailed, nonobjectionable description of benefits provided to employees. Moreover, while my colleagues appear to maintain that the record does not establish that family coverage eligibility is "automatically" granted to all unrepresented employees, they do not dispute the hearing officer's finding that the Union did not contend, and the evidence would not support, a contention "that the Employer's 'promised' treatment at the Portsmouth facility in the event of decertification was anything other than the way the Employer treats all of its other nonunion facilities."

[2] To my knowledge, there is no case in which the Board has employed the factor of "automatic availability" in analyzing an alleged implied promise of benefits. While, as my colleagues point out, the majority in *Coca-Cola Bottling Co. of Dubuque, Iowa*, 325 NLRB 1275, 1276 fn. 7 (1995), did discuss "automatic availability," it was only to reject the dissent's reliance on it. As the majority noted there, in raising the issue of automatic availability, the dissent "argue[d] a position at odds even with that of the Employer."

[3] Though my colleagues assert that the statements at issue here "went beyond a description of historical fact" and therefore constituted an implied promise of benefits, that assertion relies on the erroneous premise that for a description of historical facts to be valid, it must be established "that the change in benefits would occur automatically as a result of plan coverage or legal requirements[.]"

[4] Among the "surrounding circumstances" emphasized by my colleagues is the fact that the Employer volunteered the information regarding the Memphis health benefit instead of providing it in response to a specific employee request. I fail to see the relevance of that fact. The Employer's health care benefits, and, in particular, family coverage, had been a significant issue in the campaign for some time. The Employer addressed those concerns at its special meeting for employees two weeks before the election. Since there is no allegation that the meeting was objectionable because of the information that the Employer provided there, I fail to understand why the Employer's subsequent letter that furnished additional and updated information on the subject, which was of continuing concern to the employees, would be objectionable.

statement of "automatic availability" converts the language at issue here into an implied promise of benefits.[5]

For these reasons, I would adopt the hearing officer's recommendation to overrule the objection and I would certify the results of the election.

[5] While the majority asserts that the Board has found implied promises of benefits "in similar circumstances," the cases relied on by the majority to support this assertion are readily distinguishable. Thus, in *Zero Corp*., 262 NLRB 495, 509–510 (1982), enfd. mem. 705 F.2d 439 (1st Cir. 1983), the Board adopted the judge's finding that Zero-East employees could reasonably interpret a letter as an implied promise that problems would be resolved at Zero-East if the union lost the election where the letter stated that certain problems with benefits had come to light during the union campaign at Zero-West and that Zero-West made changes to address these problems within 5 days of the union's loss of the election. The language at issue here, by contrast, contains neither a statement of what the Employer might do after the decertification election, nor a suggestion that employees would receive benefits not already available if the Union lost the election. In *Grede Plastics*, 219 NLRB 592 (1975), a Board majority found objectionable a successor employer's letter that stressed the fact that employees at the employer's unrepresented facilities had better benefits than the predecessor's represented employees and invited those employees to join the employer's "team" effort by rejecting the union and to enjoy better benefits by doing so. There is no such linking of "team" benefits to decertification in the present case. Finally, in *Lutheran Retirement Village*, 315 NLRB 103 (1994), the Board found that an employer's spontaneous announcement, two days before the election, that the employer was looking into getting a pension plan constituted an implied promise of a substantial *new* benefit. By contrast, the family coverage at issue here already exists and is already available as an option for nonunion employees. Since the Employer is not promising, impliedly or otherwise, that it will create a new benefit for the Portsmouth employees if they decertify the Union, *Lutheran Retirement Village* is inapposite.