

Pacific Motel Corp. d/b/a Best Western Motel and Hotel-Motel-Restaurant-Cafeteria and Miscellaneous Employees, Local 162 a/w Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, Petitioner. Case 11-RC-4801

April 21, 1980

**DECISION AND DIRECTION OF
SECOND ELECTION**

**BY MEMBERS JENKINS, PENELLO, AND
TRUESDALE**

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to and challenged ballots cast in an election held on December 10, 1979,¹ and the Regional Director's report, attached hereto in pertinent part as Appendix A, recommending disposition of same.² The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations.³

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 17 for, and 17 against, the Petitioner; there were 10 challenged ballots, a sufficient number to affect the results.

² We make the following correction of an apparently inadvertent error in the Erratum issued by the Acting Regional Director. The phrase "with an arrow pointing to the 'Yes Box' of the ballot" in the next to last sentence of the text of the Erratum should read "with an arrow pointing to the 'No Box' of the ballot." This correction appears in the excerpt of the Regional Director's report attached hereto.

³ We find no merit in the Employer's exceptions to the Regional Director's recommendation that "paragraph (B) of Petitioner's Other Acts" be sustained. In the absence of exceptions, we adopt, *pro forma*, the Regional Director's recommendations with respect to the remaining objections of the Petitioner and the challenged ballots. In the absence of exceptions, we also adopt, *pro forma*, the Regional Director's recommendation that Employer's Objections 1 and 2 be sustained.

In joining in the Decision herein with respect to "paragraph (B) of Petitioner's Other Acts" Member Penello notes that, although he generally will not consider matters that are not specifically alleged in timely filed written objections, he indicated in his dissenting opinion in *Dayton Tire & Rubber Co.*, 234 NLRB 504, 509 (1978), that he regards as an exceptional circumstance instances "wherein the investigation of the alleged objectionable conduct discloses an unalleged flagrant abuse of the Board's processes." Member Penello finds that the instant case falls under this exception.

Member Penello further notes that he finds the facts in this case distinguishable from those in *Mercury Industries, Inc.*, 238 NLRB No. 124 (1978), relied on by the Regional Director. As he noted in his dissenting opinion in *Mercury*, the source of the alteration on the ballot therein was

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

clearly identified on the face of the ballot; thus, there was no suggestion that the injunctive propaganda appeared with the Agency's approval. In the instant case, however, the reproduction of the ballot is accompanied by the directive "Vote No," but there is no indication anywhere on the face of the material that the Employer is the source of the propaganda. See EDM of Texas, Div. of Chromalloy American Corp., 245 NLRB No. 119 (1979). He is not persuaded by the Employer's contention that the source of the leaflet was identified since it was passed out at a meeting held by the Employer, for the reason that there is no identification of the source actually on the face of the material.

APPENDIX A

Other Acts:

(B) The investigation also revealed that the Employer held a meeting of all employees on December 7, at which supervisor Charles Walker held up a sample ballot (hereby attached as Petitioner's Exhibit A) and explained the various possibilities to the assembled employees. He testified that he did not tell the employees which way they should mark their ballot, only which box to mark for either choice. At the end of the meeting or during the meeting, Walker testified that General Manager Lonnie Woolsey handed each employee a copy of a sample ballot (hereby attached as Petitioner's Exhibit B [omitted from publication]). This sample ballot is a replica of the Board's sample ballot and has the writing "Vote No" on it, and also in large type, the statement, "Your X in this square of the official ballot will mean that you do not want the union," with an arrow pointing to the "No Box" of the ballot. Nowhere on the ballot does it indicate that the Employer was the author of the language on the Board's sample ballot.

In *Mercury Industries, Inc.*, 234 NLRB No. 124, the Board reaffirmed their determination in *Allied Electric Products, Inc.*, *supra*, and restated their adherence to the doctrine, ". . . that we will not permit the reproduction of any writing which purports to be a copy or rendering of the Board's official secret ballot, 'other than one completely unaltered in form and content.'"

Thus, based on the foregoing, I recommend that paragraph (B) of Petitioner's Other Acts be sustained.