

Etna Equipment & Supply Co., Inc. and John R. Heck, Petitioner, and United Mine Workers of America. Case 6 RD-583

July 20, 1979

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS
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 the objections to an election held on August 31, 1978,¹ and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and conclusions only to the extent consistent herewith.

The Regional Director overruled all of the Union's objections and recommended that the results of the election be certified. The Union excepts to the Regional Director's findings. In Objection 1, the Union contends that the Employer made an unlawful implied promise to grant benefits if the employees voted against the Union.² We agree with the Union's contention.

Prior to the election, the Employer held three dinner meetings for the employees and their spouses. At the first dinner meeting for employees and their wives, held in March 1978, Hynick, the Employer's vice president, discussed various benefits, including pension benefits, received by unrepresented employees working at nonunion mines and compared them with benefits under the expired union contract and the proposed union contract. Hynick said that discussion of the superior benefits enjoyed by the nonunion employees did not mean the Employer was promising these benefits would be put into effect if the Union were no longer the bargaining representative.

In August 1978, the Employer held dinner meetings for employees and their wives on each of the two Sundays immediately preceding the election. At the first of these meetings, Hynick again stressed the superior benefits payable under an unidentified non-

union mine pension plan and Individual Retirement Account (IRA) as compared with the benefits under the most recently negotiated Bituminous Coal Operators Association (BCOA) contract.³ Hynick then distributed to each employee a chart specifically tailored to the age, length of service, and wage of the employee showing the actual difference in benefits between the nonunion mine's pension and IRA plans and the BCOA pension plan. These very detailed charts set forth the exact benefit each employee would receive under the nonunion and BCOA plans. At the bottom of each individualized chart is the disclaimer, "We do not promise that if the UMWA loses the election that this retirement plan will be instated [sic] at Etna. This is an example of a plan at a non-union coal company."

At the last dinner meeting, Hynick again compared pension benefits at the nonunion mine with the BCOA pension benefits.⁴

The Regional Director found almost summarily that there was no implied promise of benefit, because comparison of benefits *per se* is not objectionable and the Employer stated that it was not promising the benefits if the Union lost. We are unable to agree with the Regional Director's findings, for, in our opinion, it would have been difficult for the Employer to have come closer to making an explicit promise of benefit.

To begin with, it was common knowledge that the Employer operated a nonunion mine. Thus, the employees could not only readily assume what pension plan was being referred to, but could also assume that such benefits were a distinct possibility since the Employer was already paying such benefits. And this would appear to be a normal assumption for the employees to make, whether the pension plan referred to was the one actually provided at the Employer's non-union mine or not.

Then the Employer not only emphasized the non-union pension benefits at three dinner meetings to which the employees' wives were invited, but also, at the second meeting, provided the individually tailored benefit comparisons under the union and non-union plans for all 40 or more employees. These comparison charts were obviously intended to be taken as more than just a casual mention of the fact that some nonunion plans provided greater benefits. Considering the amount of time and expense the Employer

³ Hynick did not identify a particular nonunion mine. However, it was common knowledge that the Employer operates a nonunion mine.

⁴ Apparently, pension benefits were a very significant issue in this election campaign, as is further evidenced by the Petitioner's Objection 6, which alleged the Employer materially misrepresented the number of employees covered by the Union's pension fund and adversely reflected on the pension plan's solvency. The Regional Director found that although there was a misrepresentation it did not have an impact on the election, partially because the issue had previously been raised by both parties. As noted in fn. 2, we find it unnecessary to pass on that objection.

¹ The election was conducted pursuant to a Decision and Direction of Election issued by the Board. The tally was 17 for, and 25 against, the United Mine Workers of America; there was 1 challenged ballot, an insufficient number to affect the results.

² The Union contends that, because there are several factual issues raised in its other objections, if the Board does not sustain those objections a hearing is warranted. In view of our disposition of Objection 1, we find it unnecessary to consider the other objections.

necessarily incurred to prepare such charts, the employees could readily believe that the Employer was doing more than just "comparing" nonunion benefits. After such an elaborate presentation, the employees would logically be justified in assuming this was the pension plan they were being offered or promised if the Union lost. Put differently, it seems very difficult to believe the Employer would go to such effort for each and every employee⁵ unless it intended the employees to believe the pension benefits presented were more than a mere possibility.

Nor do we believe that the statement at the bottom of the sheet, which was obviously intended to absolve the Employer from engaging in objectionable conduct, counteracts the clear impression conveyed to the employees. For even that purported disclaimer is

⁵ It would appear that one employee example or chart would have sufficed if only a simple comparison of benefits were actually intended.

phrased in terms of "if the UMWA loses the election." In short, the disclaimer, so presented, only makes clear what the necessary condition is in order to obtain the superior pension benefits.

In sum, in view of the foregoing we find it difficult to discern what other conclusion the employees would draw except that if they voted out the Union they would obtain the pension benefits. We therefore find the Employer's conduct constituted an implied promise of benefit which warrants setting aside the election and directing a second election.

ORDER

It is hereby ordered that the election previously conducted on August 31, 1978, be set aside.

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