Mercury Industries, Inc. *and* Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 30-RC-3271

May 8, 1979

DECISION AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN FANNING AND MEMBERS 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 the objections to an election held on November 8, 1978,[1] and the Hearing Officer's Report on Objections with findings and recommendations regarding disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Hearing Officer's findings[2] and recommendations,[3] the relevant portions of which are attached hereto.

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

MEMBER PENELLO, dissenting:

I decline to pass on the issues the Employer raises in its exceptions to the Hearing Officer's report. For the reasons stated in my dissent in the Decision and Direction of Second Election in this case, reported at 238 NLRB 896 (1978), I would have certified the Petitioner *ab initio* and thereby given effect to the employees' clearly stated desire for union representation.

APPENDIX

Objection 9 alleges that a wage raise implemented by the Employer in June was objectionable. The Employer admitted implementing the raise—indeed the fact of the raise was stipulated to by the parties on the record—but denied that its implementation was intended to influence employee feelings towards the Petitioner. Instead, the Employer defended the raise on the basis of past practice and economic and business justifications.

The salient facts concerning the raise are not in dispute. The Employer started its business in early 1976, and by late summer 1976, had hired its employee complement and had commenced production. At that time, pay raises for employees in the various job classifications were set forth in a progression schedule, which provided for progression to the top pay level after 6 months of employment. In May 1977, the Employer modified its progression schedule to provide for additional steps at the 12- and 18-month marks. Also, for those employees in the higher-rated job classifications where more lengthy progression steps prevailed, these steps were condensed to allow for step increases at shorter time intervals. According to Vice President Brown, these changes had the effect of providing raises to approximately 40 percent of the work force immediately, and to approximately 90 percent of the employees within 90 days after the progression changes were implemented. According to Brown, these raises averaged 16 cents an hour, and ranged as high as 25 cents an hour. In January, when the federal minimum wage was changed, raising the minimum wage to $2.65 an hour, the Employer raised the wages of those employees whose hourly rates were below that level to the $2.65 rate. Apparently, the wages of the other employees were not adjusted at that time. Brown explained that when the Employer was established as a contract manufacturer for the main product line marketed by Merkle-Korff Industries of Illinois (both he and President Simms are, respectively, vice president and president of Merkle-Korff), its fiscal year and wage review policies were established along the lines of those in existence at Merkle-Korff. Hence, the Employer's fiscal year ends each January 31, wage reviews are generally conducted each March and April, and wage changes are generally implemented each May or June. Because of this procedure, Brown testified, the wage rates of those employees who were not below the $2.65 level were not adjusted at that time, pending the normal March-April review. Brown said that when the review was conducted in March and April, cognizance was taken of the fact that the minimum wage level was scheduled to be raised again, to $2.90, on January 1, 1979. Accordingly, said Brown, the progression schedule was altered by the elimination of two of the steps, and an across-the-board wage increase of 26 cents an hour was simultaneously implemented. The 26-cent figure raised the base wage to $2.91 an hour, in anticipation of the then-upcoming minimum wage level rise. Petitioner's witnesses confirmed their receiving a 26-cent-an-hour wage increase in June. Finally, Brown testified that at the time the Employer decided, and then implemented, the June wage increase, the Employer's objections to the March election were still pending. As such, he said he had no way of knowing whether there would even be a second election, and he denied that that wage increase was in any tied to the Petitioner's campaign.

As should be clear from the above recitation, the Employer defends the June wage increase partly on the grounds that it conformed to the Employer's established practice of increasing wages at that time of year, and partly on the justification that the rises in the minimum wage floor necessitated a sizeable adjustment so the experience of giving only some of the employees raises in January could be avoided at the same time in 1979. In support of its argument, the Employer cites, *inter alia*, *Essex International, Inc.*, 216 NLRB 575 (1975); *Micro Measurements, an Autonomous Division of Vishay Intertechnology, Inc.*, 233

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 45 for, and 64 against, the Petitioner. There were 4 challenged ballots, an insufficient number to affect the results.

[2] For the reasons set forth in the Hearing Officer's report, we agree the election should be set aside on the basis of the Petitioner's Objection 9. Having made this determination, we find it unnecessary to reach the issue raised by the Petitioner's Objection 6.

[3] In the absence of exceptions thereto, we adopt, *pro forma*, the Hearing Officer's recommendations to overrule Objections 3, 4, 5, 7, 8, 10, and 11.

NLRB 76 (1977), and *Hardy-Herpolsheimer Division of Allied Stores of Michigan, Inc.*, 173 NLRB 1109 (1968). *Essex* is cited for the proposition that the employer is obliged to conduct itself in granting wage increases as it would if the petitioning union had not been in the picture. *Micro* is cited to justify such wage increases when they are founded on viable economic or legal considerations, and *Hardy* is advanced to show that wage increases granted in anticipation of increases in the federal minimum wage are permissible. The Petitioner, to the contrary, places reliance on *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405 (1964) to argue that the granting of wage increases during the pendency of a union's election petition is objectionable.

Close scrutiny of *Hardy* shows the employer, prior to its implementation of its wage increases and before the advent of the union, had advised its employees that a raise was in the offing (although no notice regarding the structure of the raise was revealed). When the raises were later implemented, following the union's appearance on the scene, they were large enough to encompass the scheduled minimum wage increases for both that year and the next. Moreover, the employer there adjusted the wages of those employees not affected by the rise in the minimum wage floor so as to preserve their wage positions relative to the new minimum wage levels. No other factors were taken into account by the employer when it formulated this wage increase. The Board reached the same conclusion in *American Motors Inns d/b/a Rodeway Inn*, 228 NLRB 1326 (1977). In that case, the employer raised its employees' wages during the pendency of a union petition because of an increase in the minimum wage law, and also raised the wages of its other employees proportionately to preserve their relative wage levels. As the increase was forced upon the employer by federal law, the Board held the wage raises not to be objectionable.

The facts herein differ, however, from the above cases. Here, the Employer has a very limited history of wage reviews. A comparison of the raises granted in 1977 and 1978 show marked differences in the manner of the increases. Thus, the 1977 adjustments were effected solely by changes in the wage progression structure, with the result being that employees received their raises only as their status within the revised progression structure changed. Accordingly, the 1977 raises were not actually received by the employees at the same time, but rather, they were received by various employees over a 90-day period. By contrast, the 1978 wage increases were across-the-board increases in the usual sense: all the employees received raises at the same time. As changes in the progression structure were also made at this time, it is curious that the Employer, if it was truely adhering to its past pattern, would not again on the revised progression structure to gradually effectuate the increases.

Brown testified that the pending representation matter was not in any way a factor when the increases were decided upon. Yet, President Simms personally announced the increases to the employees in June, an unprecedented method of announcement and a statement made when the outcome of the then-pending objections to the March election was every bit as much in doubt as it was when the decision to grant the increases was made. Simms' act lends a strong inference that the pendency of the representation matter was of very great concern to the Employer after all. In *Micro Measurements, supra*, the Board based its holding that that employer's wage increases were lawful partly on its standard that the employer's legal duty was to grant the increases in the same manner as it would have in the union's absence. The evidence clearly shows that the wage increases granted by this Employer were not granted in the same manner as in the past, hence I cannot conlude that the increases were granted in accordance with the *Micro* standard. Finally, case law indicates that where an employer is faced with the possibility of a second election, an inference is warranted that wage increases granted during the pendency of objections to the first election were actually designed to erode union support among its employees. *Gabriel Mfg. Co., Inc.*, 201 NLRB 1015 (1973); *All-Tronics, Inc.*, 175 NLRB 644 (1969). I conclude that the Employer's granting of wage increases in June constituted objectionable conduct.