

Nash Finch Company and General Drivers and Helpers Union, Local No. 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner.
Case 17-RC-8654

June 18, 1979

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

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 determinative challenges and the objectives to an election held on January 18, 1979,¹ and the Hearing Officer's report² recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Hearing Officer's findings and recommendations.

[Direction of Second Election³ omitted from publication.]

MEMBER PENELLO, concurring in part and dissenting in part:

I agree with the majority's adoption of the Hearing Officer's recommendation to sustain five of the Petitioner's eight challenges to ballots cast at the election.⁴ However, for the reasons set forth in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), I strongly disagree with the majority's determination that the alleged misrepresentations detailed in the Employer's Objections 2 and 4 warrant setting aside the results of the election. As I noted in my dissent in *General Knit of California, Inc.*, 239 NLRB 619 (1978), I continue to adhere to the sound principles enunciated in *Shopping Kart, supra*. This case is one of an ever-growing number in which the Board, through its renewed reliance upon the doctrine of *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962), has frustrated the desires of employees for union representation. Accordingly, as the remaining challenged ballots cannot affect the results of the election, I would certify the Petitioner and allow it to proceed with the business of collective bargaining without further delay.

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 30 for, and 26 against, the Petitioner; there were 8 challenged ballots.

² Relevant portions of the Hearing Officer's report are attached hereto as an appendix.

³ [*Excelsior* fn. omitted from publication.]

⁴ The Hearing Officer overruled the Petitioner's challenges to two ballots and, pursuant to the parties' stipulation, sustained the challenge to another.

APPENDIX

III. *Objections*

The Employer timely filed five objections to the election. At the hearing, the Employer withdrew Objection 1 with my approval. The remaining four objections will be considered below.

The gravamen of the Employer's objections to the election are found in Objections 2 and 4, specifically Objection 4. These objections are:

2. The Petitioner, by its agents, officers, supporters, and certain individuals acting in concert with Petitioner, engaged in misrepresentations of fact and law, promise of benefit, threat of reprisal, and other acts and conduct which warrant setting aside the election.

4. The Petitioner, by its agents, officers, supporters, and certain individuals acting in concert with Petitioner, misrepresented wage rates at other facilities represented by Teamsters Locals.

The record evidence reveals that Jerry Younger, the Petitioner's recording secretary, was in charge of the Petitioner's organizational campaign at the Employer's Grand Island facility. During the course of the campaign, Younger prepared or caused to be prepared certain materials which purportedly showed contract provisions secured by the Petitioner with two Nebraska employers (Hinky Dinky in Omaha and Safeway Stores, Inc.) and by other locals of the Teamsters Union with the Employer at its facilities located at Minneapolis, Minnesota, Liberal, Kansas, and Appleton, Wisconsin (Bd. Exh. 2).

Younger prepared the materials relating to the two Nebraska employers in November 1978, at the outset of the campaign from contracts he obtained from the Petitioner's Omaha office. He prepared the materials concerning the other facilities of the Employer thereafter, from contracts received in the mail from other Teamsters Union's locals (Er. Exhs. 2, 3, and 4). Younger testified that he had received these contracts (Er. Exhs. 2, 3, and 4) by December 1978. From the record evidence, it appears that Younger prepared the materials concerning these contracts in November 1978. Thereafter, these materials (Bd. Exh. 2) were made available to employees. The extent of dissemination to employees is not clear from the record.

Leonard Ehrlich, director of the Employer's distribution center operations, including the Grand Island facility, represented the Employer during the campaign and election. Ehrlich testified that he had not seen the Petitioner's materials concerning contracts at the Employer's other facilities until shortly before the election. Ehrlich was aware by around mid-November 1978, however, that the Petitioner was describing to employees the contract at the Employer's Liberal, Kansas, facility. Ehrlich knew approximately 2 weeks prior to the election that the Petitioner was informing employees about contracts at the Employer's Minneapolis, Minnesota, (Fruit and Assembly) facility and Appleton, Wisconsin, (S.C. Shannon Company) facility.

On or about January 15, 1979, Younger prepared and mailed to all the employees on the *Excelsior* list of eligible voters three separate pages of materials (Er. Exh. 1, attached hereto as Exh. 1). Ehrlich testified that he first saw these materials in the early afternoon of Wednesday, Janu-

ary 17, 1979. There is no evidence that the Employer made a response to these materials prior to the election. The Employer points to these materials, specifically the third page which purportedly shows Teamster contract provisions applicable to the Employer's Appleton, Wisconsin, Liberal, Kansas, and Minneapolis, Minnesota, facilities, as the basis for Objections 2 and 4. Page 3 of the alleged objectionable materials (Er. Exh. 1) appears to recite information identical to that which appeared in the materials the Petitioner prepared and disseminated to employees early on in the campaign (Bd. Exh. 2).

At the top of page 3 of the alleged objectionable materials (Er. Exh. 1) appears the words:

TAKE A GOOD LOOK

AT WAGES ALONE—GUARANTEED IN WRITING IN A TEAMSTER NEGOTIATED CONTRACT/THAT IS LEGAL AND BINDING AT NASH FINCH IN APPLETON, WISCONSIN, LIBERAL, KANSAS./MINNEAPOLIS, MINNESOTA.

Below this caption appears "*Union Negotiated Wages at Nash Finch, Appleton, Wisconsin*" with a listing of job classifications and hourly wage rates effective at given dates. These classifications and wage rates correspond to Schedule A of the Appleton, Wisconsin, contract (Er. Exh. 4). While the rates of pay effective 7/3/77 and 7/2/78 as shown on the document are higher than those listed in the contract, the higher rates apparently reflect cost of living adjustments required under article 25 of the contract. In deed, the document states that cost of living increases are reflected in these rates.

Below these job classifications and hourly wage rates appear the notations:

Guaranteed 40 hour work week, to be worked in 5 consecutive 8 hour days, Monday through Friday.

Guaranteed 8 hours work or pay daily.

These statements are correct as they apply to warehouse employees under article 20, section 1(a) of the Appleton contract. With respect to truck drivers, however, the guaranteed work week is 40 hours to be worked in not more than five tours of duty, Monday through Friday (art. 20, sec. 2(a), Er. Exh. 4). Thus, as to truck drivers, there is no guarantee of an 8-hour work day or that the work days will run in consecutive fashion. The document does not delineate the application of the stated guarantees as to warehouse employees or truck drivers. The remaining statements as to time and a half and double time apply to all employees and appear correct according to the contract (art. 20, sec. 3(a) and 3(c), Er. Exh. 4).

The next section of the document is captioned "*Union Negotiated Wages at Nash Finch, Liberal, Kansas*." The job classifications, hourly rates of pay, guaranteed weekly pay, and single mileage rates appear to be correctly listed when comparing them to article II of the Liberal, Kansas, contract (Er. Exh. 2). Below these listings is the statement:

THE COST OF LIVING INCREASE effective 6/4/78 was .38¢ on hourly/rates and 9.5¢ on mileage rates which would be added to all the above rates.

Article II, 3(e) of the Liberal contract provides that all employees shall be covered by the provisions for a cost of living allowance to be effective the first pay period beginning on or after June 4, 1978. This cost of living allowance is to apply to both hourly wages and mileage according to the contract. Despite this contract language, the evidence establishes that the employees are not being paid the cost of living allowances provided for in the contract.⁵

According to Jerry Younger, who was the only witness who seemed to understand the workings of cost of living adjustments, a cost of living increase would normally not take effect until the second year of a contract. Since the Liberal contract provided for a cost of living adjustment effective on the same day the contract took effect, Younger explained that he telephoned Bud Smith, an official with Teamsters Union Local 795 in Wichita, Kansas, who services the Liberal contract, to ascertain the cost of living being paid under the contract. According to Younger, he placed this telephone call to Bud Smith before preparing the alleged objectionable document. Younger testified that Smith told him that the cost of living increases under the Liberal contract were the same as the Teamsters' National Master Freight Agreement with an increase of 38¢ per hour for hourly wages and an adjustment to the mileage rate.

Younger explained that the mileage rate of 9.5¢ appearing on the document was incorrect and an "error" on his part. According to Younger, the 9.5 represented a mill increase rather than an increase in cents. Article II, 3(e) of the contract provides that "when hourly employees gain 1¢ per hour under this cost of living provision, Road Drivers (mileage paid) will receive .25 mills per mile." Using the cost of living increase of 38¢ per hour, the mill increase would be 9.5. Converting this mill increase to cents, the addition to the mileage rates would be .95¢ rather than the 9.5¢ which appeared on the document.

The final notation on the document concerning the Liberal contract is:

1-1/2 times after 8 hours per day or 40 hours per week. Article II, 4(a) of the contract provides that all hours in excess of 8 hours per day, or 40 hours per week, (except over-the-road drivers) will be compensated at time and one-half the regular hourly rate. Thus, the notation on the document appears correct, although it fails to except road drivers.

The final section of the document is captioned "*Union Negotiated Wages at Nash Finch, Minneapolis, Minnesota*". The job classifications and hourly wage rates correspond to section 7:01 through 7:05 of the Minneapolis contract (Er. Exh. 3). Following the job classifications of truck drivers listed on the document is the notation, "(city)." While the contract does not contain the city notation, the evidence establishes that the Employer's Minneapolis facility is a 5-man operation involved in loading and unloading merchandise. This evidence suggests that deliveries by the Employer would be local or "in city" in nature. Also, the job classifications are spaced closely together making it difficult to ascertain the wage rates for certain of the classifications.

Since article 35 of the contract provides for cost of living adjustments, the statement on the document that "COST

⁵ Besides certain record testimony, see Er. Exs. 5, 8, and 9.

OF LIVING INCREASE provide for in the contract are not/included in the above rates" is correct. At the bottom of the section covering the Minneapolis contract is:

WORK WEEK

5 consecutive days

1-1/2 times the regular hourly rate for all hours worked after 8 per day/or 40 hours per week

Double time pay on the seventh consecutive days.

The statements that the work week consists of 5 consecutive days and double time is paid on the seventh day apply to both inside employees and drivers under sections 4:01 and 4:02 of the contract. With regard to time and a half pay, the statement is correct as to inside employees (sec. 4:01, Er. Exh. 3). Drivers are not compensated at the overtime rate for hours worked in excess of eight hours in any one day. Overtime is paid only for work performed over 40 hours in any one work week (sec. 4:02, Er. Exh. 3).

In *General Knit of California, Inc.*,⁶ the Board majority returned to the standard of review for alleged misrepresentations as stated in *Hollywood Ceramics Company, Inc.*⁷ According to *Hollywood Ceramics*:

[A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.⁸

Applying this standard to the facts in the instant case, I must consider the timing of the alleged misrepresentation, its impact on the election, and whether it involves a substantial departure from the truth. I am not required to determine whether the misrepresentation is a deliberate misstatement or an inadvertent error.

The alleged objectional document is accurate to the extent that it lists job classifications followed by rates of pay contained in Teamster contracts at the Employer's facilities in Appleton, Wisconsin, Liberal, Kansas, and Minneapolis, Minnesota. I give little weight to the evidence that employees at Liberal, Kansas, are not being paid according to the cost of living adjustments, specifically the hourly wage increase of 38¢. The Liberal contract (art. II, 3(e), Er. Exh. 2) clearly provides for a cost of living allowance to be effective the first pay period on or after June 4, 1978. Moreover, the alleged objectional document indicates at the top of the page that it will describe contract provisions when it directs the reader to look at wages "GUARANTEED IN WRITING IN A TEAMSTERS NEGOTIATED CONTRACT . . ." Since the document recites what the contract provides with respect to cost of living wage adjustments, I find that it was not a material misrepresentation that employees were not being paid hourly wages according to the contract. I also find that the basic thrust of the document concerns wage rates which are correctly stated when they appear

following job classifications. These factors militate against a finding that the document contains substantial misstatements which would warrant setting the election aside.

On balance, however, I am constrained to find that the misstatement on the document with respect to the cost of living increases on mileage rates in the Liberal, Kansas, contract amounted to a substantial and material misrepresentation of fact which had a significant impact on the election.⁹ While the Petitioner may argue that the misstatement of the cost of living increase of the mileage rates was a simple clerical error, the difference of placement of the decimal point by one tenth (from .95 to 9.5) represented a substantial increase of the mileage rates, from 20.75¢ per mile to 30.25¢ per mile in 1978. Correctly stated, the increase of the mileage rate should be 21.70¢ per mile. It appears from the Employer's records that approximately 20 of its employees would be in the job classification of road drivers.¹⁰ Thus, the overstatement of mileage rates would have a direct impact on approximately one-third of the eligible voters and a lesser impact on the remaining voters who could observe the inflated mileage rates. In assessing the impact of the misstatement, one must also consider the closeness of the vote, 30 votes in favor and 26 against representation by the Petitioner with 8 challenged ballots.

Since the document containing the misrepresented mileage rates was mailed to all the employees on the *Excelsior* list on Monday, January 15, 1979, the Employer had little, if any opportunity, to respond prior to the January 18, 1979, election. I am mindful that the misrepresentation on the mileage rates first appeared in documents prepared at the outset of the campaign and disseminated to employees (Bd. Exh. 2). Moreover, Ehrlich, the Employer's representative in the organizational campaign, was aware at the start of the campaign that the Petitioner was describing the Liberal contract as part of its organizational efforts. Nevertheless, and absent any clear evidence to the contrary, I credit Ehrlich that the Employer was first aware of the misrepresentation of the mileage rates on Wednesday afternoon, January 17, 1979, at a time when it was unable to mount an effective response to the document. Finally, it should be noted that the document containing the misrepresented mileage rates was mailed to all employees on the *Excelsior* list, unlike the earlier documents (Bd. Exh. 2) which could be accepted or rejected by those employees who chose to attend the Petitioner's meetings.

I do not consider it a defense to the overstatement of mileage rates that the wages increase as it appeared (.38¢) technically amounted to an understatement of wage adjustments pursuant to the cost of living provision of the Liberal contract. Most readers would no doubt assume that a .38¢ represented 38¢ rather than something less than half a cent. Certainly this was the assumption and belief of the parties at the time of the hearing. Moreover, the substantial overstatement of the mileage rates coupled with a substantial

⁹ I have considered the other alleged misrepresentations in the document, specifically the fact that certain of the stated contract provisions dealing with work week and overtime do not apply to truck or road drivers as discussed above. I consider the inapplicability of these provisions to be minor discrepancies having no appreciable impact on the election.

¹⁰ See Bd. Exh. 3 which shows department code 24, "Trans & Delivery" and Pet. Exh. 2 which lists 19 to 20 employees in department 24.

⁶ 239 NLRB 619 (1978).

⁷ 140 NLRB 221 (1962).

⁸ *Id.* at 224.

understatement of the wage increase could only have served to create confusion in the minds of voters who read the document. Accordingly, I recommend that Objection 4 and that portion of Objection 2 which alleges that the Petitioner engaged in misrepresentations of fact be sustained.

I have examined the other two pages of Er. Ex. 1 and have found no additional misrepresentations of either fact or law which would warrant setting aside the election. I do

not consider the overstatement of the mileage rates to be a promise of benefit since there is no evidence that the Petitioner assured employees that they would receive the mileage rates or wages listed in Employer Exhibit 1 if they voted for representation by the Petitioner. No further evidence was adduced by the Employer in support of Objection 2. I, therefore, recommend that the remainder of this objection be overruled.