Thomas E. Gates & Sons, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 412, Petitioner. Case 28–RC–3049

May 17, 1977

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

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 Petitioner's objections to an election held November 12, 1975,[1] and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the Employer's exceptions and supporting brief, and hereby adopts the Regional Director's findings and recommendations[2] to the extent consistent herewith.

The Regional Director recommended that the election be set aside, based upon Objection 1.[3] We disagree.

Employer is alleged to have made a material misrepresentation when, 4 days prior to the election, it circulated a letter to its employees in which it misstated the existing wages which they could expect to receive under the Petitioner's current contract. Thus the letter stated that Petitioner's current contract provided for a base rate of $9.19 per hour with additional fringe benefits amounting to $2.13 per hour for a total of $11.32 per hour. The letter further stated that only $9.19 of this total was "take home" pay wages which represented a rate of $3.17 per hour less than the $12.38 hourly wage Employer was paying the employees. In fact, however, Petitioner's base rate under its current contract was $11.09 per hour with additional fringe benefits of $2.13 per hour. Thus Petitioner's 1975 contract "package" amounted to $13.22 per hour or $1.90 more than represented by the Employer. The Regional Director concluded the Employer's misrepresentation warranted setting aside the election under the principles set forth in *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 224 (1962).

In *Shopping Kart Food Market, Inc.*,[4] we carefully reviewed the rule set forth in *Hollywood Ceramics* and concluded that, on balance, the rule operates more to frustrate employee free choice than to further it. Thus, we there decided that we will no longer adhere to the *Hollywood Ceramics* approach and accordingly will not set elections aside on the basis of misleading campaign statements.[5] Since Employer's statements herein amounted to no more than misleading campaign statements they do not warrant setting aside the election.[6] Accordingly, we hereby overrule Petitioner's Objection 1.

As the tally of ballots shows that a majority of the valid votes have not been cast in favor of the Petitioner, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid votes have not been cast for United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 412, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

CHAIRMAN FANNING, dissenting:

For the reasons set forth in the dissent of Member Jenkins and me in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, in which the Board majority overruled *Hollywood Ceramics*,[7] I would adopt the Regional Director's report and set aside the election. It is inconceivable to me that a wage misrepresentation (which the majority characterizes as a misleading campaign statement) of approximately $2 per hour made at a time when no reply was possible would not have a significant impact on the election.

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: four for, and four against, the Petitioner; there were no challenged ballots.

[2] In the absence of exceptions, we adopt *pro forma* the Regional Director's recommendation that Petitioner's Objection 2 be overruled.

[3] The relevant portion of the Regional Director's report is attached hereto and marked "Appendix."

[4] 228 NLRB 1311 (1977).

[5] As we noted in *Shopping Kart, supra,* we will intervene in those instances where a party has engaged in such deceptive campaign practices as improperly involve the Board and its processes, or the use for forged documents which render the voters unable to recognize the propaganda for what it is. Of course, we shall continue to oversee other campaign conduct which interferes with employee free choice outside the area of misrepresentations which had been objectionable only under the *Hollywood Ceramics* rule.

[6] Member Murphy agrees for the further reason that Employer's conduct did not rise to the level of an egregious mistake of fact amounting to fraud. See her concurring opinion in *Shopping Kart, supra.*

[7] *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962).

APPENDIX

THE OBJECTIONS

Objection No. 1 - That prior to the election and at a time so close to the election that Petitioner did not have an opportunity to respond, the Employer delivered to employees in the stipulated unit a letter substantially misrepresenting the amount of compensation received

by employees working under the labor agreement between the Mechanical Contractor's Association of New Mexico, Inc. and Petitioner. In addition, in that same written information to employees the Employer incorrectly advised the employees that under the "Union's Contract", the employees would receive less compensation than the Employer was presently paying them.

The investigation disclosed that on November 7, employees in the stipulated unit received from the Employer, along with their paychecks, a letter (copy attached hereto as Exhibit A) comparing their existing wages with what they could expect to receive under the Petitioner's current contract. The letter stated that the Petitioner's current contract provided for a base rate of $9.19/hour with additional fringes of $2.13/hour for a total of $11.32/hour. The letter pointed out that only $9.19 of this total was "take-home pay" which represented a $3.19/hour reduction from their existing take-home wages of $12.38/hour. It appears that the Petitioner did not learn of the letter until the night before the election and did not obtain a copy thereof until early the next morning, just before the election.

The position of the Petitioner is that the Employer's letter understated, by $1.90/hour, the wages being received under its current contract. A copy of the relevant portions of that contract are attached hereto as Exhibit B. The Employer's jobsite is some 45 miles away from Gallup, New Mexico, the nearest basing point city defined in the contract, which places it in an area described in the contract as Zone 5. In Zone 5 the contract base rate is $11.09/hour rather than $9.19/hour as given in the Employer's letter. The entire amount of the 1975 "cost-of-living" improvement has been placed in the area of fringe benefits and this was correctly given in the Employer's letter as $2.13/hour. The total 1975 contract "package" amounts to $13.22/hour or $1.90 more than represented by the Employer. Additionally, the Petitioner contends that due to the remoteness of the jobsite and its long distance from the Petitioner's headquarters in Albuquerque, New Mexico, the employees could not readily contact the Petitioner with regard to the Employer's distribution and that the Employer's misrepresentation destroyed the credibility of the Petitioner's representative.

The Employer's position is that while there may have been a mistake in the presentation of the base rate paid under the Petitioner's current contract, the basic theme of the letter, that employees would receive less "take-home" pay, was essentially correct. Additionally, it contends that its letter was simply a response to information it had received that the Petitioner had told employees that under its contract they could receive $ .73/hour more (over the Employer's rate of $12.48/hour) and that, beyond this, the Petitioner had ample time (4 days) in which to respond to the Employer's representations.

There appears to be no dispute as to the facts. The letter distributed by the Employer contained a substantial, if inadvertent, misrepresentation as to the benefits enjoyed by employees covered by the Petitioner's contract with the Mechanical Contractors Association of New Mexico, it was distributed to employees some four days prior to the election, and it was designed to respond to alleged statements about potential wage improvements made by Petitioner.

As a general rule the Board does not undertake to police the utterances of a party to a representation election in the absence of fraud or coercion. However, neither the Board nor the courts will condone conduct which creates an atmosphere rendering improbable a free choice of a collective-bargaining representative by employees. The Board's policy is to set aside an election conducted under such circumstances where it appears that there has been a material and substantial departure from the truth at a time which prevents the other party 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. *Hollywood Ceramics Co., Inc.,* 140 NLRB 221, 224.

There is no question as to the materiality or importance of the subject of wages to the employee, wages being "the stuff of life for unions and members, the self same subjects concerning which men organize and elect their representatives to bargain," *Gallenkamp Stores Co.* v. *N.L.R.B.,* 402 F.2d 525, 534 (C.A. 9, 1968), or that the misrepresentation in this instance was substantial. The Employer's error in "take home" pay alone amounted to 17 percent or about $304/month. By the Employer's own calculations, the employees' total loss under the Petitioner's contract would have amounted to $510.40/month. A misrepresentation related to a subject of such vital concern may reasonably be expected to have a substantial effect upon an election. *Coca Cola Bottling Company of Louisville,* 150 NLRB 397, 400 (1964). The only question here is whether or not the misrepresentation was made at a time which prevented the Petitioner from making an effective reply.

The Employer's jobsite is located on the Navajo Indian Reservation at Navajo Pine, New Mexico, some 18 miles from Window Rock, Arizona, which, in turn, is about 27 miles from Gallup, New Mexico. The Petitioner's office is located in Albuquerque, New Mexico, which is 145 miles from Gallup. Petitioner's representative, Wallace Sparks, is responsible for the area in northern New Mexico north and west of Albuquerque, some 10,000 square miles. The investigation disclosed that Sparks had talked to employees regarding wages prior to the distribution of the Employer's letter. There is no dispute as to the fact that the Employer then responded to an essentially correct statement by Sparks with a substantial misrepresentation on the same subject. Sparks did not learn of the letter until the night before the election and was not able to obtain a copy of that letter until just before the election.

The Employer contends that four days should have been ample time for Sparks to have discovered and answered the misrepresentation. I do not agree. The test is not one of determining whether an arbitrary number of days elapsed between the time of the misrepresentation and the election.[3] Instead, the determination must satisfy the

[3] *Zarn, Inc.,* 170 NLRB 1135 (1968); *Western Health Facilities, Inc.,* 208 NLRB 56 (1974).

question of whether or not Sparks could reasonably have been expected to know about the letter in time to effectively counter the misrepresentation. In view of the remoteness of the jobsite, its long distance from the Petitioner's office, the large area which must be covered by the Petitioner's representative, the uncontradicted evidence that the Petitioner's representative did not learn of the misrepresentation until the eve of the election, and the fact that two of the four elapsed days fell on a weekend, I conclude that the Petitioner did not have sufficient time to counter the Employer's misrepresentation. I shall, therefore, recommend that this objection be sustained.