

Allison-Haney, Inc. and Operating Engineers Locals 953-953A, AFL-CIO; Teamsters Local No. 492; Hod Carriers & Laborers Local No. 16; N. M. District Council of Carpenters; N. M. State Conference of Operative Plasterers & Cement Masons, AFL-CIO, Joint Petitioners. Case 28-RC-1997

October 2, 1970

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN MILLER AND MEMBERS BROWN AND JENKINS

Pursuant to a stipulation for certification upon consent election, an election by secret ballot was conducted by the Regional Director for Region 28 on January 23, 1970, among employees in the stipulated unit. After the election the parties were furnished a tally of ballots which showed that of approximately 61 eligible voters, 52 ballots were cast, of which 5 were for the joint Petitioners, 43 against the joint Petitioners, 1 was void and 4 were challenged. Thereafter, Petitioners filed objections to conduct affecting the results of the election. In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and, on May 22, 1970, issued and served upon the parties his Report on Objections in which he found that the acts described in the joint Petitioners' objections constituted substantial interference warranting the setting aside of the election and the direction of a second election. The Employer filed timely exceptions to the Regional Director's findings and recommendations.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The following employees, as stipulated by the parties, constitute a unit appropriate for purposes

of collective bargaining within the meaning of Section 9(b) of the Act:

All employees of Allison-Haney, Inc., employed in the State of New Mexico, excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

5. Petitioner's objection, which the Regional Director found to have merit, alleged that the Employer interfered with the election by distributing to certain of its employees, shortly before the election a paycheck stub, along with the paycheck, which set forth payroll deductions which the Employer would be required to make if the Petitioners won the election. The Regional Director's investigation revealed that the paychecks were issued on January 21, 2 days before the election of January 23, 1970. The paycheck stubs which constitute the basis of the objection were attached to the paychecks of only 26 of the approximately 61 eligible voters in the unit who, by reason of employment in certain specific crafts, were entitled under federal and State laws to receive additional cash payments in lieu of Employer contributions to union health and welfare funds or employer insurance plans.

In order to set aside an election there must be a material misrepresentation of vital facts,¹ and we do not discern one here. The employees in the unit sought by the joint Petitioners are employed in classifications having widely divergent pay ranges and this is particularly true in the case of the 26 craftsmen who received the notices in question. In preparing its comparability figures, the Employer relied upon the minimum rate schedule issued by the Labor Commissioner of the State of New Mexico and the most recent collective-bargaining agreement between the joint Petitioners and the New Mexico Heavy Engineering and Highway Employers. Since the rates of pay vary widely not only between different employee classifications but from job to job and are further complicated by the number of hours worked in any particular week, it would be unreasonable to require that the Employer, in preparing its paycheck attachment, precisely ascertain each individual's weekly deduction. Here, the Employer averaged the range of mandatory reductions and unmistakably presented them as an approximation of the amount the Employer's *own* employees, and no others, were then receiving in cash payments and were likely to have deducted if the Employer were operating under a union contract. It is not disputed that the cash payments to the Employer's employees in lieu of fringe benefits were determined by state authorities under the most recent contracts of the Petitioners and pursuant to applicable federal and State statutes and were accurate in amount.

¹ *Hollywood Ceramics Company, Inc.*, 140 NLRB 221

In these circumstances we fail to see wherein there was any basis for finding a substantial and material misrepresentation of fact. We find none of the cases cited by the Regional Director in support of his findings to be applicable or controlling. Moreover, contrary to the joint Petitioners' contentions and the Regional Director's findings, not only does the record show that the Petitioners had sufficient time to make effective response to the Employer's statement, but that the statement itself was in answer, in the course of the preelection campaign, to a number of circulars which the Petitioners had distributed and which described its policies with respect to health and welfare benefits to which the paycheck attachment was a reply. It is evident that the employees were, therefore, in a position to evaluate the claims of the respective statements.

Consequently, we find that the paycheck attachments did not impair the employees' freedom of choice but rather, constituted permissible campaign propa-

ganda. We therefore overrule the Regional Director's findings and do not adopt his recommendation that the election herein be set aside.

In view of the foregoing, and upon the record as a whole, we find that the Petitioners' objections do not raise substantial or material issues affecting the results of the election and they are hereby overruled. Accordingly, since the Petitioners failed to secure a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid votes has not been cast for the joint Petitioners herein, and that said labor organization is not the exclusive bargaining representative of the employees in the unit found appropriate within the meaning of Section 9(a) of the Act, as amended.