Hughes & Hatcher, Inc. a/k/a Hughes Hatcher Suffrin, and its wholly owned subsidiary, Oppenheim's Inc., Petitioner *and* **Local 909, Central States Joint Board, Amalgamated Clothing Workers of America, AFL-CIO** *and* **Retail Store Employees Union Locals 876 and 36, Retail Clerks International Association, AFL-CIO.** Case 7-RM-710

June 25, 1969

DECISION OF REVIEW AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND ZAGORIA

On November 21, 1968, pursuant to a Decision and Direction of Election issued by the Regional Director for Region 7, an election by secret ballot was conducted among the Emloyer's employees in the appropriate bargaining unit. The results of the election were as follows: of 688 valid ballots cast, 435 were for Local 909, Central States Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, hereinafter called Amalgamated; 226 were for Retail Store Employees Union Locals 876 and 36, Retail Clerks International Association, AFL-CIO, hereinafter called the Retail Clerks; and 27 votes were against the two participating labor organizations. There were also 49 challenged ballots. The challenged ballots were not sufficient in number to affect the results of the election.

The Retail Clerks filed timely objections to conduct affecting the results of the election and on December 4, 1968, the Regional Director issued a Notice of Hearing on Objections. The Hearing Officer issued his report on February 19, 1969, recommending that the Retail Clerks' objections be overruled. The Retail Clerks then filed timely exceptions to this report. On March 27, 1969, the Regional Director issued a Supplemental Decision, Order, and Direction of Second Election in which he adopted the Hearing Officer's recommendations as to Objections 1, 3, 4, 5, 6, and 7, but overruled his recommendations as to Objection 2 and 8.

Thereafter, in accordance with the National Labor Relations Board Rules and Regulations, as amended, Amalgamated filed a timely Request for Review of the Regional Director's Supplemental Decision, and a brief in support thereof, on the grounds that he erred in sustaining Objections 2 and 8.[1] By telegraphic Order dated May 12, 1969, the National Labor Relations Board granted the request for review and stayed the second election. Retail Clerks has filed a brief on review.

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

The Board has considered the entire record in this case with respect to the Regional Director's determination under review, and makes the following findings:

1. In Objection 2, Retail Clerks alleged that Amalgamated misrepresented to employees in its electioneering that it was responsible for obtaining their current insurance plan and that continuation of the plan depended upon Amalgamated winning the election.

In considering this objection, it is helpful to set forth certain background events leading to the election of November 21, 1968. In May 1965, after approximately 1-1/2 years of organizational activity, the Employer voluntarily recognized and executed a collective-bargaining agreement with Amalgamated. The Retail Clerks then filed unfair labor practice charges against the Employer. In June 1966, the Board found that the Employer had violated Section 8(a)(1), (2), and (3) by illegally assisting Amalgamated and by recognizing and bargaining with the Union when it did not represent an uncoerced majority of the employees.[2] Thereafter, on April 17, 1968, the Sixth Circuit Court of Appeals enforced in relevant part the Board's order which required, *inter alia,* that the Employer withdraw recognition from Amalgamated unless certified and cease giving effect to any agreements or renewals thereof entered into between the parties.[3] Prior to the Court's decision, in December 1967, the Employer and Amalgamated had negotiated a new collective-bargaining agreement which included an insurance plan, identical to the one here in issue. This plan was terminated as of July 1, 1968, however, in compliance with the Board's order. The Employer then attempted to provide alternative group insurance. When a group of employees, admittedly encouraged by Amalgamated, protested, that the proposed new plan was less satisfactory than the old, the Employer determined that it could procure insurance coverage similar to that under the original plan from the same carrier provided the Amalgamated did not participate.

By letter dated June 26, the Employer advised its employees that current benefits would continue under the new insurance contract but that Amalgamated was not associated with it. However, on July 1, or in some cases a few days thereafter, the Employer also distributed to employees a leaflet spelling out the terms and benefits of the insurance plan. The leaflet was, except for the deletion of the Amalgamated letterhead, a verbatim copy of an earlier document sent to employees in January 1968 when the original insurance plan took effect. In it

[1] Since no request for review was filed concerning the Regional Director's determinations to overrule the remaining objections, they are adopted *pro forma*

[2] *Hughes Hatcher, Inc*, 159 NLRB 1202.

[3] *Hughes Hatcher, Inc* v *N L R B*, 393 F.2d 557 (C.A. 6)

there appears the following critical paragraph:

> Your Employer, through labor contract negotiations with your Union will pay to the Trustees of the Amalgamated Department Store and Retail Employees Insurance Fund the entire cost of the Base Insurance Program.

Subsequently, Amalgamated distributed two letters to employees which the Retail Clerks assert misrepresented Amalgamated's role in obtaining and retaining the insurance plan. The first Amalgamated letter dated November 9, 1968 contains the following allegedly objectionable language:

> We wish to thank all Members for their support during the last few trying months. We have been able to maintain our Union standards and working conditions and one of the outstanding examples is saving our Insurance program. This has resulted in thousands of dollars of additional benefits many members would have lost.

The second letter sent on November 13, was headed "74,000 IN CLAIMS" and was attached to a list of employees who had received insurance benefits under the Amalgamated program. It read:

> All $74,000 was incurred prior to July 1, 1968 — a period of only 6 months![4] An additional $30,000 to $40,000 or more may be needed to completed the claims for employees who became ill or were injured prior to July 1st of this year.
>
> Since July 1st, additional thousands of dollars have been paid through the HHS office under the same insurance program.
>
> You won your insurance program on January 1, 1968, by Local 909 Union contract negotiations with the company.
>
> You saved your insurance program on July 1st when the company attempted to switch you to an inferior program with another insurance company.
>
> You can continue to have this insurance program by voting on Thursday, November 21st for Local 909, Central States Joint Board, Amalgamated Clothing Workers of America, AFL-CIO.
>
> Local 909 has been successful in protecting your Insurance during these last few trying months while the grocery clerks 876 stalled the election. Local 909's strength, because of the united support of its members, has resulted in thousands of dollars in benefits to HHS employees!

The Hearing Officer concluded that the alleged misrepresentation was clearly evident to employees as campaign exaggeration and that the Petitioner had adequate time to respond to Amalgamated's assertions.

The Regional Director decided, to the contrary, that the Employer's leaflet describing insurance benefits together with the two Union letters sent out 10 to 12 days prior to the election misled them into believing that Amalgamated was responsible for the current insurance program.

As the Board stated in Hollywood Ceramics:[5]

> We believe that an 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.

In applying this standard to the present case, we are persuaded that Amalgamated's campaign rhetoric was not such a substantial departure from the truth as to affect the employees freedom of choice in the election. It is, in fact, true that Amalgamated obtained the initial insurance plan. It is also true that the Employer continued the identical program albeit without Amalgamated's participation after June 26, 1968. In spite of the potentially misleading leaflet distributed about July 1, employees were put on notice by the Board's posted Notice To All Employees with regard to the unfair labor practice case, that Amalgamated was no longer their bargaining representative and therefore, not responsible for the new insurance program. Also, the Employer's June 26 letter clearly explained to employees that the insurance plan was instituted unilaterally. Further, Amalgamated's second letter credited the employees with salvaging the plan. Thus, we cannot view Amalgamated's claims as anything more than campaign puffing. They cannot be characterized as material misrepresentations.

Additionally, we note that the Employer's letter and accompanying leaflet were distributed on or about July 1, 1968, well in advance of the November election. In our opinion, the Retail Clerks had more than ample opportunity to correct any misleading implications that might have ensued from these communications. Amalgamated's letters too were distributed at least a week prior to the election. Here again there was sufficient time for the Retail Clerks to inform employees that Amalgamated was not responsible for the new insurance plan.[6]

In view of the foregoing, we find no merit in the Retail Clerk's Objection 2. Accordingly, it is hereby overruled.

2. Objection 8 alleges that Amalgamated made promises of discriminatory treatment with reference to payment of dues.

Following loss of recognition in April 1968, Amalgamated urged employees to continue paying dues on a voluntary basis. Then, on November 8, it

[4] This refers to the amount of claims paid unit employees, under the Amalgamated plan, between January and July 1968.

[5] *Hollywood Ceramics Company, Inc.*, 140 NLRB 221.

[6] See *York Furniture Corporation*, 170 NLRB No. 169, *S H Lynch and Company Inc.*, 171 NLRB No. 167.

advised employees that the following policies with respect to dues had been adopted:

1. INITIATION FEE. There will be no Initiation Fee to join Local 909 for any employee on the company payroll as of the date of an N.L.R.B. election.

2. DUES. Dues for Members of Local 909 will become due and payable as of December, 1968, after the N.L.R.B. election.

a. Dues for Regular Full time employee shall be Four Dollars monthly

b. Dues for Part time employees shall be eighty cents weekly only for those weeks worked.

3. CREDIT FOR VOLUNTARY DUES PAID. All Members who have paid Local 909 voluntary dues will be given credit for one month's future dues for each month of voluntary dues paid.

At the same time, Retail Clerks promised that "No dues will be collected until 30 days after the contract has been negotiated and ratified by you."

The Regional Director analogized the dues credit offer to a Union's gift of life insurance coverage should it win the election. In *Wagner Electric Corp.*,[7] the Board held this latter inducement to be a tangible economic benefit subjecting donee employees to a constraint to vote for the donor union. The Regional Director concluded that the dues credit, too, was an illegal promise of benefits.

We do not agree with the Regional Director's analysis of the problem. Rather, we rely on *Dit-MCO, Inc.*, where a union's offer to waive initiation fees if it won the election was found lawful.[8] In that case, the Board said that it could not consider as an improper inducement the waiver of something which could be avoided simply by voting against the union. So too in the present case. It is not likely that an employee would vote for Amalgamated to avoid future dues payments for a brief period when it could eliminate such payments altogether by voting against any union.

We also note that the dues credit offer was made to employees who had paid dues voluntarily without any expectation of reward for their loyalty. In our opinion, it is quite improbable that these employees could have been influenced in their vote by this promise of dues abatement.

We are persuaded, therefore, that the Hearing Officer correctly overruled Objection 8.

Accordingly, as Amalgamated has received a majority of the ballots cast in the election, we shall certify it as bargaining representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that Local 909, Central States Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, has been designated and selected by a majority of the employees in the unit found appropriate as their representative for the purposes of collective bargaining, and that pursuant to Section 9(a) of the Act, the said labor organization is the exclusive bargaining agent for all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

[7] 167 NLRB No. 75.
[8] 163 NLRB No. 147.

☆ U S GOVERNMENT PRINTING OFFICE 1971 O—381-116