

**Ayr-Way Stores, a Division of L.S. Ayres and Company<sup>1</sup> and Local Union No. 25, Retail Clerks International Association, AFL-CIO, Petitioner.** Case 25-RC-4958

September 6, 1973

**SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION**

BY CHAIRMAN MILLER AND MEMBERS FANNING AND KENNEDY

Pursuant to a Stipulation for Certification Upon Consent Election, a secret ballot election was conducted among the employees in the stipulated unit. The tally of ballots furnished the parties showed that of approximately 78 eligible voters, 74 cast valid ballots, of which 28 were for, and 46 against, the Petitioner. There was one challenged ballot, which was insufficient to affect the results. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Acting Regional Director conducted an investigation and, on October 16, 1972, issued and served on the parties his Report on Objections to Conduct Affecting Results of Election and Recommendations to the Board, recommending, *inter alia*, that the election be set aside on the basis of the Employer's objectionable no-solicitation rule or, alternatively, that a hearing be directed to resolve certain issues raised by Petitioner's Objections 4(c) and 4(d). Thereafter, the Employer filed timely exceptions to the Acting Regional Director's report.

In its Decision and Order directing a hearing dated February 14, 1973, as corrected by an order correcting the Decision and Order directing a hearing dated February 15, 1973, the Board found, *inter alia*, that the Employer's no-solicitation rule, as enforced, did not warrant setting aside the election, but that Petitioner's Objections 4(c) and 4(d) raised issues which could best be resolved by a hearing. Accordingly, the Board ordered that a hearing be held before a duly designated Hearing Officer for the purpose of receiving evidence to resolve the issues raised by Petitioner's Objections 4(c) and 4(d).

Pursuant to the Board's order, a hearing was held before Hearing Officer Frederick G. Winkler on March 13, 1973. On May 11, 1973, the Hearing Offi-

cer issued and served on the parties his Report on Objections and Recommendations to the Board, recommending that (1) Petitioner's Objection 4(c) be sustained, (2) the Regional Director be directed to set aside the election and conduct a second election, and (3) Petitioner's Objection 4(d) be dismissed. Thereafter, the Employer filed timely exceptions to the Hearing Officer's report and a supporting brief, and the Petitioner filed a brief in opposition to the Employer's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to the same three-member panel which issued the February 14, 1973, Decision and Order directing a hearing, as corrected.

The Board has considered Petitioner's Objections 4(c) and 4(d), the Hearing Officer's report, the Employer's exceptions and brief, and the Petitioner's brief, and hereby adopts the Hearing Officer's findings,<sup>2</sup> conclusions, and recommendations.<sup>3</sup>

Accordingly,

It is hereby ordered that Petitioner's Objection 4(c) be sustained, Petitioner's Objection 4(d) be dismissed, the election conducted on April 28, 1972, be set aside and a second election be held in the unit previously stipulated by the parties to be appropriate.

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

CHAIRMAN MILLER, dissenting:

I do not find the evidence persuasive that the Employer had any knowledge of the organizing campaign at the time of its decision to effectuate a change in the workweek.

The knowledge finding is based solely on testimony that handbilling occurred on the day the decision was made. But the witness who engaged in the handbilling testified that it occurred in the evening hours, which clearly would place it at a time after the decision had been made.

<sup>2</sup> In his report, the Hearing Officer inadvertently found that the Employer's conduct violated Sec. 8(a)(1) of the Act. Since this case is a representation proceeding rather than an unfair labor practice proceeding, we have not relied upon this 8(a)(1) finding in reaching our result herein.

<sup>3</sup> In adopting the Hearing Officer's recommendations, we find it unnecessary to rely upon either the contents of certain handbills or the precise dates on which they were distributed, since it is clear that some of Petitioner's literature was, in fact, distributed on March 3. Moreover, unlike our dissenting colleague, we are satisfied that the Employer had knowledge of Petitioner's organizing campaign when the decision was reached on March 3 to implement the 5-day schedule. According to the credited and undenied testimony of Petitioner's executive officer, the March 3 handbilling at the Kokomo store was part of a statewide handbilling effort commenced on that date, and the Kokomo handbilling itself was started by Ron Gross at approximately 10 a.m. In addition, the fact that the new schedule was not announced to the employees until after the representation petition had been filed provides, in our view, an additional reason for finding that the schedule change interfered with the election.

<sup>1</sup> At the hearing, the Employer indicated that Ayr-Way Stores is no longer a division of L.S. Ayres and Company, but that both Ayr-Way Stores and L.S. Ayres and Company are now subsidiaries of Associated Dry Goods, Incorporated.

Under these circumstances, and in view of the fact that the record established ample business justification for the change and a long prior history of consideration by the Employer as to the desirability of

making it, I find no reason to believe that it was improperly motivated.

Consequently, I would certify the results of the election.