

**Associated Lerner Shops of America, Inc. and Retail,  
Wholesale and Department Stores Union,  
AFL-CIO, Petitioner. Case 12-RC-4269**

November 15, 1973

**DECISION AND ORDER**

BY MEMBERS JENKINS, KENNEDY, AND  
PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election executed by the parties, and approved by the Regional Director for Region 12 of the National Labor Relations Board on January 29, 1973, an election by secret ballot was conducted in the above-entitled proceeding on February 21, 1973, under the direction and supervision of said Regional Director. Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Board's Rules and Regulations which showed that there were approximately 115 eligible voters and that 120 ballots were cast, of which 54 were for, and 55 against, the Petitioner, 11 were challenged, and none were void. The challenged ballots were sufficient in number to affect the results of the election. On February 28, 1973, and March 1, 1973, the Petitioner and Employer, respectively, timely filed and duly served objections to conduct affecting the election.

In accordance with the Board's Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation of the challenged ballots and objections to conduct affecting the election and, thereafter, on May 31, 1973, issued and to conduct affecting the election and, thereafter, on May 31, 1973, issued and duly served on the parties his report on the challenged ballots and objections to election in which he recommended to the Board that the challenges to four ballots be sustained; the challenges to five ballots be overruled, opened, and counted; and a revised tally of ballots be issued. He also recommended that, in the event the two remaining challenged ballots, those of Luna Moore and Lydia Johnson, are determinative, a hearing be directed to resolve material and substantial questions of fact. Concerning the objections, the Regional Director recommended<sup>1</sup> that the Board overrule all the Union's objections and Employer's Objection 2 but sustain Employer's Objection 1. He further recommended that, in the event the Petitioner secures a majority of the ballots, the election be set aside and a second election directed; and, if the Union does not receive a majority of the ballots, the results of the election be certified. Thereafter, on July

2, 1973, the Petitioner filed timely exceptions to the Regional Director's Report on Challenged Ballots and Objections to Election, and Recommendations to the Board, with a brief in support, and the Employer timely filed an answer to Petitioner's exceptions and a supporting brief.

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 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 Petitioner is a labor organization claiming to represent certain employees of the Employer.

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

4. The parties stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and regular part-time warehouse employees, including warehouse area leaders, merchandising office employees, data processing department employees, general office employees, statistical department employees, and mail room employees, employed by the Employer at its Divisional Merchandising and Distribution Center located at 5343 Normandy Boulevard, Jacksonville, Florida; excluding: confidential secretaries, executive secretaries, PBX operators, guards, and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report, the Petitioner's exceptions and brief, the Employer's answering brief, and the entire record in this case, and adopts the Regional Director's findings and recommendations as modified herein.

As noted, the Regional Director recommended that the Board sustain Employer's Objection 1, which asserted that the Petitioner's letter of February 17, 1973, contained substantial misrepresentations of wage rates and fringe benefits at the Employer's Atlanta, Georgia, branch, where Petitioner represents the employees. He found that the wage rates and fringe benefits as set forth were substantially greater than those prevailing at the Employer's Atlanta operation, and, although the letter does not specifically assert these were the Atlanta rates, he believed that, as written, it clearly carried this implication. He concluded that it therefore constitut-

marked "Appendix"

<sup>1</sup> The portions of the Regional Director's report disposing of Employer's Objection 1 and Petitioner's Objections 2 and 3 are attached hereto and

ed a substantial misrepresentation which employees were not in a position to evaluate. He further held that because the employees did not receive the letter until the evening before the election, the Employer had no opportunity to respond. We find merit in the Union's exceptions<sup>2</sup> to this aspect of the report.<sup>3</sup>

The letter<sup>4</sup> sent by the Petitioner clearly states that the wages and benefits were "contract proposals, we list some of them for your information . . ." While there is some ambiguity resulting from the insertion of the second paragraph between that statement and the list of rates, we find that this is merely an inartistically worded message which does not justify setting aside the election.<sup>5</sup> The letter, contrary to the contention of the Employer, nowhere asserts that the wages and benefits are those in effect at Atlanta, and, in fact, the Regional Director found that this was merely "implied" in the letter. Furthermore, each fringe benefit listed is followed by the comment that it is to be paid or will be put into effect, thus indicating additionally that these were proposals rather than representations as to the Atlanta wage rate. We are persuaded that the employees would reasonably have construed this letter only as campaign propaganda. As we have found that the letter would not tend to interfere with the election, the Employer's lack of opportunity to reply becomes immaterial. We shall, therefore, overrule Employer's Objection 1.

The Regional Director found no merit in Petitioner's Objections 2 and 3<sup>6</sup> and recommended that they be overruled. The Petitioner contends that the sample ballot, a copy of which is attached hereto, was distributed among the employees by the Employer during the period preceding the election and interfered with the election under the *Allied Electric* rule.<sup>7</sup> The Petitioner also contends that the Employer's action in conducting a mock voting demonstration utilizing this sample ballot likewise serves as grounds for setting aside the election. We do not agree. The so-called sample ballot purports to be nothing more than it actually is, a campaign document prepared for use by the Employer and we deem it unlikely that employees would be lead to believe that this Board endorsed the position expressed therein. Likewise, for the reasons expressed by the Regional Director in the sections of his report, attached hereto, we conclude that the mock voting

demonstration did not interfere with the employees freedom of choice. Accordingly, we adopt the Regional Director's recommendations that Petitioner's Objections 2 and 3 be overruled.

As the five ballots, whose challenges we have overruled, may be determinative of the election, we shall direct the Regional Director to open and count them and to prepare a revised tally of ballots and an appropriate certification, if warranted. We shall further direct that, in the event the ballots of Luna Moore and Lydia Johnson are then determinative of the results of the election, a hearing be held to resolve their eligibility.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Regional Director for Region 12 shall, pursuant to the Board's Rules and Regulations, Series 8, as amended, within 10 days from the date of this Decision and Order, open and count the ballots of Richard Cornatzer, John Sullivan, Marvin Stevens, Jacyn Hall, and Lottie Hux, and prepare and cause to be served on the parties a revised tally of ballots, including therein the count of the above-mentioned ballots. In the event that the ballots of Luna Moore and Lydia Johnson are not sufficient to affect the outcome of the election as shown by the revised tally, the Regional Director shall issue an appropriate certification in accordance with the Board's Rules and Regulations. However,

IT IS FURTHER DIRECTED that, if the ballots of Luna Moore and Lydia Johnson are sufficient in number to affect the results as shown by the revised tally of ballots, the Regional Director shall conduct a hearing, for the purpose of receiving evidence to resolve the issues raised by the said challenges, before a Hearing Officer to be designated by the said Regional Director.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting such hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the challenges. Within the time prescribed by the Board's Rules and Regulations, any party may file with the Board in

<sup>2</sup> Member Kennedy agrees with the Regional Director, for the reason set forth in the latter's report, that Petitioner's letter substantially misrepresented the Atlanta rates at a time when the Employer had no opportunity to reply, Member Kennedy therefore would adopt the recommendation that Employer's Objection 1 be sustained and a new election be conducted if, upon opening and counting the challenged ballots, the Union receives a clear majority of the valid ballots cast.

<sup>3</sup> In the absence of exceptions, we adopt, *pro forma*, the recommendation of the Regional Director to overrule Employer's Objection 2 and

Petitioner's Objections 1 and 6. As no exceptions were filed to the Regional Director's recommendations regarding the 11 challenged ballots, his recommendations are adopted *pro forma*.

<sup>4</sup> A copy of the letter is attached.

<sup>5</sup> *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 224.

<sup>6</sup> The Union's exceptions to the Regional Director's overruling of its exceptions 4 and 5 in our opinion raise no issue which would warrant reversal of the Regional Director's findings and recommendations.

<sup>7</sup> *Allied Electric Company*, 109 NLRB 1270.

Washington, D.C., eight copies of exceptions thereto. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER ORDERED that the proceeding be remanded to the Regional Director for Region 12 for further proceedings consistent herewith, including the arranging of such hearing, if necessary, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.

#### APPENDIX

##### EMPLOYER'S OBJECTIONS: OBJECTION 1:

Set out in full in Exhibit 1, attached hereto, the Union letter dated February 17, 1973, reads in part as follows:

Your Union Committee has now completed your contract proposals, we list them for your information;

It is to be fully understood however, "*YOUR COMMITTEE Promises you ONE THING ONLY.*" We will do everything humanly possible to obtain wages and conditions on par with the employees of the Atlanta Branch and get rid of the disgraceful wages and unsatisfactory working conditions. We will demand that the Company live up to the provisions of the Compensation Act in injuries at work.

Upon careful study and evaluation of the facts developed by the investigation, it is clear that the wage rates and fringe benefits set forth in the Union's February 17, 1973, letter are substantially greater than those prevailing in the Employer's Atlanta operation to which the letter makes reference. Although the letter does not specifically assert that the rates shown therein are the Atlanta rates, the undersigned believes the letter, as written, clearly implies such fact, and therefore constitutes substantial misrepresentation which the employees were not in position to evaluate, and which because of the time of mailing over the weekend with an intervening holiday (no mail delivery on Monday, February 20) afforded the Employer no opportunity to correct the facts prior to election. Accordingly, the undersigned will recommend that Employer's Objection 1 be *sustained*, and that the election be set aside in the event the Union has secured a majority following determination and count of challenged ballots.

##### UNION'S OBJECTIONS: OBJECTIONS 2 and 3:

Since the substance of these Objections are basically the same, they are treated together. Petitioner contends, *inter alia*, that by the distribution of certain pamphlets the Employer unlawfully influenced the vote of unit employees. In this regard, it appears that a "Vote Demonstration" was conducted by the Employer on February 19, 1973, wherein a reproduction of the sample ballot taken from the official Board notice, with certain markings thereon was used. (Exhibit 2) Melvin J. Redmond, vice president of the Employer, who conducted this meeting states the purpose was to alleviate any fear of the employees that the election would not be a secret ballot election. Redmond met with three groups of employees covering the entire bargaining unit. The meetings were all held in the cafeteria, and lasted about fifteen minutes each. Redmond basically followed a typewritten text for this procedure. This consisted of soliciting four volunteers to act as Board agent, Union observer, Company observer and a voter. The Employer provided a voting booth and a ballot box. Redmond, using said text and a sample ballot, stated to the employees and the aforementioned designated voter:

You will see that we have constructed a booth with a drop cloth, curtain and a shelf. The Labor Board will bring a booth very similar to the one we have constructed. They will have a pencil in the booth. Now take the ballot into the booth, go ahead (votes), no one is in there.

After you mark the ballot in the booth, you fold the ballot over just once with the "x" mark on the inside, don't curl it into a little ball, just fold it over once; come out now, and put it into the ballot box.

The voter thereupon came out and put the ballot into the ballot box. According to Redmond, the bottom of the ballot box was not sealed and the voters retrieved their own ballots. While it does not appear in the typewritten text, Redmond states he orally advised the voter that they need not mark their ballots. At the close of this session, Redmond stated:

We have prepared a sample ballot for you to keep, it is exactly like the one on the Notice of Election, in fact it is a reproduction of it. Look it over, if you have any questions, please feel free to ask your supervisor, or come directly to me.

Whereupon, the sample ballot referred to above (Exhibit 2) was distributed to employees as the meeting ended.

As a matter of established precedent, the Board "will not permit the reproduction of any document purporting to be a copy of the Board's official ballot,

other than one completely unaltered in form and content, and clearly marked sample on its face. . .” *Allied Electric Products, Inc.*, 109 NLRB 1270, 1272. In the instant case, the paper containing the ballot facsimile has markings and language other than the printing appearing within the perimeter of and on the face of the ballot, i.e., there appears a drawing of a hand with the index finger thereof pointing to the “NO” box, with the legend beneath the hand, “Your X in this square will mean you do *not* want this Union.”

It is well established that the purpose of the Board’s *Allied Electric* policy is to prohibit the parties to a Board election from suggesting “either directly or indirectly to the voters that this Government agency endorses a particular choice.” While in some instances the Board and the Courts have held as grounds for setting aside elections the adding by the parties of their own comments to official Board documents, however, unlike the instant case, the party so doing did not identify itself as the author of the added-on comments.

An unaltered sample ballot, together with added Employer comments, including a clear Employer acknowledgment of its issuance with such added comments lying outside the perimeter and face of the actual sample ballot all appear on the same sheet of paper (Exhibit 2). It is noted that such additional comments, including the suggestion to vote “NO,” appears, in most part, in longhand as contrasted with the printed content of the actual sample ballot.

Having carefully considered the document, the undersigned is of the opinion that under the total circumstances any conclusion that the voters were misled into believing this Agency was in any way sponsoring or suggesting a choice would be without basis. Therefore, the undersigned concludes that the sample ballot, when reasonably viewed, could not be expected to interfere with a free choice. Accordingly, the undersigned will recommend the overruling of Objections 2 and 3, insofar as they relate to the issuance and circulation of the sample ballot.

As to the mock voting demonstration held by the Employer, with voter employee participants, it appears clear that employees were not being polled as to their sentiments, a type of conduct which the Board has found to constitute election interference. (*Affner Electronics, Inc.*, 127 NLRB 991) Employer’s written text read at the vote demonstration, clearly invites the participating employee demonstration voter to mark his ballot. However, Redmond states, although not part of the text, he told the demonstration voters they need not actually mark the sample ballot. In any event, it is clear the voter (one at each meeting) apparently retrieved his own ballot at the conclusion of the demonstration without anyone else handling it. Accordingly, as in *Erie Dry Goods Company*, 117 NLRB 815, 820, the undersigned concludes the vote demonstration is not likely to have interfered with the freedom of choice. Accordingly, the undersigned will recommend that Petitioner’s Objections 2 and 3 be *overruled*.

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION AFL-CIO

February 17, 1973

Your Union Committee has now completed your contract proposals, we list some of them for your information;

It is to be fully understood however, "YOUR COMMITTEE PROMISES YOU ONE THING ONLY" "We will do everything humanly possible to obtain wages and conditions on par with the employees of the Atlanta Branch" and get rid of the disgraceful wages and the unsatisfactory working conditions. We will demand that the company live up to the provisions of the Compensation Act in injuries at work;

Classification	Start	<u>Wages</u>							
		30 days	1 yr.	2 yrs.	3 yrs.	4 yrs.	5 yrs.	6 yrs.	7 yrs.
I. Stock clerks, maids, porters punch mach. clerical	\$85	\$90	\$95	\$100	\$105	\$110	\$115	\$120	\$125
2. Sorters, Tabulators order checkers	\$90	\$95	\$100	\$105	\$110	\$115	\$120	\$125	\$130
3. Stock Heads, Compt. Oper. Advanced Clerical, Clerks, payroll clerks, Stenos,	\$95	\$100	\$105	\$110	\$115	\$120	\$125	\$130	\$135
	<u>Start</u>	<u>30</u>	<u>60</u>	<u>90</u>					
4. Warehouseman (Male)	\$135	\$140	\$145	\$150					
5. Assistants	\$140	\$145	\$150	\$155					
6. Leaders	\$135	\$140	\$145	\$150					
7. Compt. Leader	\$155								
8. Payroll clerk Leader	\$165								
9. Data Proc. Leader	\$175								
10. Data Assistant	\$150								

MERIT REVIEWS

After any employee has reached their max rate they will receive a merit review each six months and raised at least \$2.00 per week on each review.

Employees will be placed in their respective wage brackets according to the present seniority lists.

Hospitalization and Physician coverage, family coverage to be paid in full by the company and shall be the RWDSU preferred plan. 13 week sick pay and \$10,000.00 major medical.

Insurances--all employees will be covered with \$6,500.00 and spouses \$1,000.00 co. paid.

Pension Plan all employees will be granted present seniority on the RWDSU pension plan of \$300.00 per month pension.

Dental and Optical the company shall pay the full cost of a dental and optical plan (Family)

Sick Leave the company shall grant seven days per year accumulating from year to year to be given at the request of the company, all unused leave payable on leaving the company.

Seniority strict seniority rights shall prevail at all times.

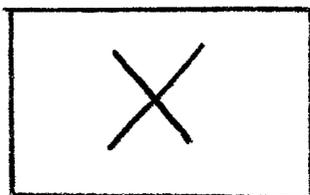
Vacations to be increased to four weeks of which two will be winter after twenty years.

Holidays shall be increased to 10 paid days per year.

A word on our International Constitution--the company has attempted to give you their ideas on the interpretation of our International Constitution, but they are too scared to debate this and the Atlanta agreement with the Union in front of the people. When you think of the statements made about our Constitution remember: more than 200,000 members vote in convention every four years to amend this Constitution, if it suits the membership, WE CARE VERY LITTLE WHAT MANAGEMENT THINKS OF IT.

Put the Union in-charge of your Collective Bargaining Rights, to place the Company in-charge of your labor relations is like placing DRACULA in charge of the blood bank. ASK YOURSELF THE QUESTION: "WHY HAS THE COMPANY SEEN FIT TO REFUSE TO TELL US ABOUT THE WAGES AND THE CONDITIONS OF EMPLOYMENT AT ATLANTA BRANCH: ARE THEY ASHAMED OF THE COMPARISION?"

"YES"



WHAT IS THE COMPANY DOING  
ABOUT LUNA MOORE? ARE THEY  
TRYING TO SWEEP IT UNDER  
THE RUG?

EXHIBIT 2

**VOTE**

DATE: February 21, 1973 - Wednesday

TIME: 10:00 A.M. to 11:45 A.M.

PLACE: Cafeteria

UNITED STATES OF AMERICA National Labor Relations Board <b>OFFICIAL SECRET BALLOT</b> FOR CERTAIN EMPLOYEES OF ASSOCIATED SERVER SHOPS OF AMERICA, INC. JACKSONVILLE, FLORIDA	
Do you wish to be represented for purposes of collective bargaining by -  RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO?	
MARK AN "X" IN THE SQUARE OF YOUR CHOICE	
YES  <input type="checkbox"/>	NO  <input type="checkbox"/>

DO NOT SIGN THIS BALLOT, Fold and drop in ballot box.  
If you spoil this ballot return it to the Board Agent for a new one.



*YOUR X IN THIS SQUARE  
WILL MEAN YOU DO  
NOT WANT THIS UNION*