

**American Wholesalers, Inc. and Textile Workers
Union of America, AFL-CIO, Petitioner. Case
5-RC-8312**

May 9, 1974

DECISION ON REVIEW

**BY CHAIRMAN MILLER AND MEMBERS JENKINS
AND KENNEDY**

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 5 on January 15, 1973,¹ an election by secret ballot was conducted under his direction and supervision on February 9. The tally of the ballots showed that, of approximately 109 eligible voters, 63 voted for, and 41 against, the Petitioner, and 2 cast challenged ballots. Thereafter, the Employer filed timely objections to conduct affecting the results of the election. By Supplemental Decision and Notice of Hearing dated March 23 the Acting Regional Director overruled Objection 10 (alleging waiver of initiation fees) and ordered a hearing on the nine remaining objections. On March 30, the Petitioner filed a motion for a more definite statement regarding the Employer's objections, and on April 11 the Regional Director denied the motion, finding that the Supplemental Decision and Notice of Hearing adequately advised the Petitioner as to the issues to be heard. The Employer filed a request for review of the Acting Regional Director's Supplemental Decision. On April 13, the Board denied the request but, on its own motion, in view of pending court litigation of the issue in Objection 10 involving waiving of initiation fees, amended the Supplemental Decision to provide for the receipt of evidence with respect to that objection.

A hearing was held on the objections on April 19 and May 3 and 4. On April 19, after the Employer presented its first witness, counsel for the Petitioner requested that the Hearing Officer allow it to reserve cross-examination of that witness and made similar requests with regard to other witnesses to enable it to "intelligently investigate [its] side of the case" to prepare for cross-examination. The Employer objected strenuously, contending, *inter alia*, that to grant Petitioner's motion would, in effect, permit discovery which is not allowed in Board proceedings and would countermand the Regional Director's earlier denial of Petitioner's motion. The Hearing Officer granted the Petitioner's request to reserve cross-examination. Pursuant to such ruling, the cross-examination of the Employer's eight witnesses on the first day of the hearing was permitted to be deferred.

¹ All dates herein are 1973

The Petitioner cross-examined those witnesses on May 3, the next date the hearing convened, and on that date the Employer presented three additional witnesses, two of whom were cross-examined by the Petitioner on May 4.

The Hearing Officer issued his report on June 22 basing his credibility resolutions with respect to certain objections, in part, on the testimony given on deferred cross-examination of Employer's witnesses. The Hearing Officer recommended that the Employer's objections be overruled in their entirety and that an appropriate certification issue. The Employer filed timely exceptions, with a supporting brief, to the Hearing Officer's report. On October 12, the Regional Director for Region 5 issued a Second Supplemental Decision and Certification of Representative in which he adopted the Hearing Officer's report, overruled all of the Employer's objections, and certified the Petitioner.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Employer timely filed a request for review of the Regional Director's Second Supplemental Decision on the ground, *inter alia*, that prejudicial error resulted from the Hearing Officer's deferral of cross-examination of the Employer's witnesses in that it countermanded the Regional Director's Decision, bestowed unwarranted favored treatment upon Petitioner, and gave Petitioner a greater advantage than the taking of depositions would permit.

The Board by telegraphic order dated December 18 granted the request for review.

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.

The Board has considered the entire record in this case with regard to the issues under review, and makes the following findings:

We are persuaded that the Hearing Officer's ruling permitting deferral of cross-examination of the Employer's witnesses constituted prejudicial error. As urged by the Employer, an essential element of due process requires that governmental rules, regulations, and procedures be applied evenhandedly and uniformly and any departure from such equality of treatment should be predicated upon reasonable and articulated grounds. The orderly and normal presentation of testimony in Board proceedings, absent unusual circumstances not present here, requires that cross-examination of witnesses follow their testimony on direct. This traditional procedure affords all concerned an equal opportunity to test the witnesses'

testimony given on direct, which frequently in legal proceedings is previously unknown to opposing parties. The Hearing Officer's ruling herein, deviating from the normal procedure in order to give Petitioner an opportunity to further investigate the substance of the testimony given by Employer's witnesses was, in our opinion, unwarranted. It not only gave the Petitioner an undue advantage in preparing its case but it could have had a real effect on the witnesses' subsequent recollection of facts testified to previously in their direct examination. Thus, the Hearing Officer's ultimate credibility resolutions regarding the testimony may have been

² As to Objection 10, involving Petitioner's waiver of initiation fees, the Board has considered this issue and finds that the Petitioner's waiver of initiation fees does not constitute objectionable conduct, consistent with the

affected by the circumstances flowing from his erroneous procedural ruling. In view of our finding that prejudicial error exists in the Hearing Officer's ruling, the Board concludes that a hearing *de novo* on the objections is required. Accordingly, we remand the case to the Regional Director for a new hearing on Objections 1 through 9,² before another hearing officer who shall issue a report, returnable to the Board, containing findings of fact and resolutions of credibility. The parties may file exceptions to the report and briefs in accordance with Section 102.69(f) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended.

decision of the Supreme Court in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). Accordingly, Objection 10 is hereby overruled.