

**Hotel Properties Inc. d/b/a Landmark Hotel and Lawrence W. McLennan, Petitioner and Local 151, International Union of Police & Protection Employees, I.W.A., Union.** Case 31-RD-208

May 23, 1974

DECISION ON REVIEW AND  
CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN MILLER AND MEMBERS  
FANNING AND JENKINS

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 31 of the National Labor Relations Board on March 7, 1973, an election was conducted under his supervision on May 18, 1973, among the employees in the unit found appropriate. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 27 eligible voters, 13 cast valid ballots for, and 12 against, the Union. There were no challenged ballots. Thereafter, the Employer filed timely objections to the election.

The Regional Director, in accordance with National Labor Relations Board Rules and Regulations, Series 8, as amended, conducted an investigation and on July 18, 1973, issued his Supplemental Decision, Order, and Direction of Second Election in which he overruled the Employer's Objections 1 and 2, sustained Objection 3, and accordingly set aside the election and directed a new one. The Union, in accordance with the National Labor Relations Board Rules and Regulations, as amended, filed with the Board a timely request for review of the Regional Director's Supplemental Decision on the ground that in sustaining Objection 3 he made findings of fact which are clearly erroneous and departed from precedent. The Employer filed opposition thereto.

By telegraphic order dated August 9, 1973, the Board granted the Union's request for review, stayed the second election pending decision on review, and remanded the case to the Regional Director for a hearing as to Objection 3 (which involves alleged misrepresentations by the Union concerning mandatory retirement at age 65) and other appropriate action.

Pursuant to a notice of hearing issued by the Regional Director, a hearing was held on August 24, 1973, before Hearing Officer Michael O. DeGrace. On October 19, 1973, the Hearing Officer issued and duly served on the parties his report and recommendations in which he recommended that Objection 3 be overruled and the Union certified. The Employer filed timely exceptions to the Hearing Officer's

report and a supporting brief. The Union filed a brief in opposition, in which it incorporated its posthearing 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.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Hearing Officer's report, the pertinent portion of which is attached hereto as an Appendix,<sup>1</sup> the Employer's exceptions and brief, and the Union's opposition and brief, and hereby adopts the Hearing Officer's findings, conclusions, and recommendations, with the following additions.

The record indicates that the Employer is a member of the Nevada Resort Association (herein called NRA) which at the present time represents the Employer in collective bargaining as to certain units of its employees. Until the instant decertification election proceeding was instituted, NRA represented the Employer in negotiations with the Union for the unit of security guards here involved. Although NRA did not represent the Employer in 1973 negotiations referred to by the Hearing Officer in his report, a representative of the Employer was present at the meeting of NRA members in April 1973 at which the members' bargaining position in upcoming negotiations was under discussion.

We note also that the statements of union agents, concerning the bargaining position being adopted by NRA members on the subject of mandatory retirement of guards at age 65, were made openly to employees, beginning about May 1, 17 days before the election, and they were widely discussed by the guards. There was testimony that about a week before the election the subject matter of the statements was general knowledge among the guards. Of the 27 security guards in the unit, 4, possibly 5, were near or beyond age 65. The Employer did not actively campaign against the Union in the election, and its chief of security, Powell, had instructed supervisory personnel not to discuss the election with the guards. Indeed, one guard, Epstein, who was 71 years of age, on the day before the election approached Powell to ask a question and the latter testified he told Epstein that if the question concerned the Union or the election he did not wish to talk about it. Epstein thereupon walked away without asking the question. Powell testified that on the day after the election, after discussing with Employer's officials possible election irregularities,

<sup>1</sup> In transcribing the attached excerpt from the Hearing Officer's report certain obvious typographical errors have been corrected.

he telephoned Epstein to ask what his question was, and Epstein said he wanted to check the truth of the statement being circulated by the Union on the subject of mandatory retirement.

We are satisfied that the statements circulated by the Union, even if substantially in error, were not within the Union's special knowledge and that the employees had ready means to evaluate their accuracy. The average age of the Employer's guards is in the mid-40's. Of the four or five guards who were near or over 65 in age, one of them sought to ask the Employer's chief of security about the Union's statements, but the latter, applying what he believed to be the Employer's policy, would not hear the question. It is therefore possible that other guards were deterred from asking supervisory or managerial personnel questions about the statements because of the Employer's policy of not discussing the election issues with the guards. While the Employer has the right to maintain a policy of neutrality with regard to the election issues, it may not utilize that policy as a basis for denying to employees access to knowledge readily available to it which is necessary to their proper evaluation of campaign propaganda. Having denied its employees access to the truth concerning the Union's misstatements, the Employer may not now be heard to object on the basis that it had insufficient opportunity to make an effective reply. We conclude, therefore, that, even assuming *arguendo* the Union's misstatements were substantial, they do not warrant setting aside the election results. We do not see this result as "unjustly" penalizing the Employer "for electing to remain neutral," as does our dissenting colleague. The result does, to some extent, penalize the Employer for closing its ears to employee questions, which it could answer or not answer as it saw fit. In fact, it would not be an unreasonable inference here that the refusal to listen to a preelection question from its oldest guard employee—in this context of general discussion by all guards of the issue of mandatory retirement at age 65—denoted a studied desire to avoid an issue of which the Employer was aware.

Accordingly, as the Employer's objections have been overruled, and as the tally of ballots shows that the Union has received a majority of the valid ballots cast in the election, we shall certify it as the exclusive bargaining representative of the employees in the appropriate unit.

#### CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Local 151, International Union of Police & Protection Employees, I.W.A., and that, pursuant to Section 9(a) of the National

Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

CHAIRMAN MILLER, dissenting:

I respectfully dissent from the majority's finding that the Employer herein was in a position to learn of the Union's misrepresentation and that it had sufficient time to make an effective reply thereto.

In this case, the Union was campaigning to avoid decertification in a unit of guards. It chose to conduct its campaign orally, without distributing any leaflets or other literature to the employees. From the outset, the Employer maintained a policy of neutrality, taking no public position and refusing to discuss campaign issues with the employees.

The record establishes that throughout the election campaign, the union shop steward reported to employees the progress of the negotiations between the Union and the Nevada Resort Association, an employer association from which the Employer had withdrawn prior to the filing of the decertification petition. On three separate occasions, the shop steward falsely told employees that the Association was "insisting" on a contract provision requiring mandatory retirement at age 65. In fact, the employer-members of the Association had discussed such a provision but had rejected it.

There were a number of unit employees who were near or older than 65. On the day before the election, one of them, Epstein, approached the Employer's chief of security, Powell, to ask about the Employer's position on mandatory retirement. Before the employee could ask the question, Powell said that if the question had to do with the campaign, he didn't want to discuss it. After the election, which was won by the Union by a vote of 13 to 12, Powell learned from Epstein the content of the misrepresentations. Thereafter, the Employer filed objections to the conduct of the election.

In my view, there can be no doubt, considering the record testimony, that the Union's misstatement that the Association—and therefore by implication the Employer herein—was "insisting" on 65 as the mandatory retirement age, constituted a substantial and material misrepresentation that tended to have an impact on the employees' freedom of choice in the election. Some of these employees already were past that age; others were near or at it. I cannot imagine a more pressing and real concern to them than their job security. At a time in their lives when other employment opportunities would be limited or nil, the prospect of facing mandatory retirement must

surely have posed a direct and very real threat to them. In such circumstances, the rumored proposal would necessarily be of material concern to them, and hence, would, in my view, have been likely to have unfairly impacted on the election by falsely creating fear as a means of inducing a vote for the Union which tended to appear to be the only opposing force to the alleged proposal's adoption.

Nevertheless, the majority, without finding but merely assuming *arguendo* that the misrepresentation was material, concluded that the Employer had "sufficient opportunity to learn the true facts and make a response" and that its failure to do so prevents it from urging the misrepresentations as a basis for setting the election aside. I cannot accept that view in light of the record facts which show that the matter did not come to the Employer's attention at all until the day before the election, and even then its representative was not informed of the statements that were being circulated orally by the Union. Moreover, even assuming that the Employer had learned, or could have learned, of the misrepresentation on the day before the election, there would have been little it could have done to clear the air before the election. There was insufficient time for the Employer to verify the Association's bargaining position and to thereafter communicate with each of its employees, who worked in small groups on a round-the-clock schedule.

In my opinion, my colleagues' view that by insulating itself from the campaign the Employer precluded its reliance on these misrepresentations, unjustly penalizes the Employer for electing to remain neutral in the election campaign. The issue is not one of what the Employer might have done—it is whether a material misrepresentation violated our election standards and the integrity of the election process. Where a union agent misrepresents a critical fact to employees, when the misrepresentations were of such a serious and material nature as to have had a substantial impact on the outcome of the election, and when the misrepresentations came to the Employer's attention too late to enable it to make an effective correction, I would find that the laboratory standards which we endeavor to maintain were destroyed.

I would, therefore, set the election aside and direct a new one.

## APPENDIX

### FINDINGS OF FACTS AND CONCLUSIONS

The purpose of the hearing was to take evidence with regard to the Employer's Objection 3, which is:

During the week prior to the election, officers

and/or agents of the Union told several bargaining unit employees that if they voted the Union out, the Nevada Resort Association had a plan which they were going to implement that called for a forced mandatory retirement at age 65.

The first question presented at the hearing was whether or not the Union made any material misrepresentations concerning a mandatory retirement at age 65.

Undisputed testimony revealed that Shop Steward Leonard Pulsipher, at the behest of, and instructions by, Business Agent Lewis Stiensberger, told several employees that the Nevada Resort Association, hereafter referred to as the NRA, was insisting upon a mandatory retirement at age 65. The record disclosed that the statements concerning such a mandatory retirement age were directed principally to older employees. The times at which employees were informed of the alleged NRA bargaining demand varies from 3 weeks to 3 days before the election. The record further disclosed that the Employer did not become aware of these statements until after the election. The Union's campaign was conducted by word of mouth rather than by printed material. The Employer, for reasons of its own, chose not to actively participate in the campaign and issued no campaign material or statements, and directed its supervisors not to discuss the election with the employees.

Sometime prior to the April 30, 1973, bargaining session between NRA and the Union, a caucus of the employers belonging to the NRA met to discuss the impending negotiations. One topic discussed was a mandatory retirement age for guards but many of the employers, fearing that it might be extended to pit bosses, croupiers, and the like, voiced strong objections over such a proposal. Several NRA employer representatives testified at the hearing that the proposal was rejected at the caucus.

However, Stiensberger testified that at the April 30 session William Campbell, the NRA's chief negotiator, said that management was considering the mandatory retirement age because of problems with the health and welfare trust caused by the high age of the guards and that the elderly men working in the different security departments were a hazard to themselves and to the hotel because of their deteriorating physical condition. Robert Glenn, the resident manager of Caesar's Palace, testified that he was present at the April 30 session and that Campbell did bring up the subject of an adverse loss ratio on health and welfare, and that one of the factors involved was the age of the guards. Glenn further testified that he did not recall Campbell making any statements regarding a mandatory

retirement age. Charles King, a business consultant to the Golden Nugget, Inc., substantiated the testimony of Glenn with regard to the statements made by Campbell. King, like Glenn and other representatives of NRA member-employers, denied that Campbell said anything about a mandatory retirement age. Subsequent written proposals from the NRA contained no bargaining demand for a mandatory retirement age.

Although the Employer and the NRA made it quite clear in the original representation proceeding in this matter that the NRA would neither represent the Landmark Hotel nor the Sands Hotel in the upcoming negotiations, many employees felt that the NRA was still the spokesman for the instant Employer, and thus the NRA's bargaining position would have had an impact on the election.

Stiensberger characterized Campbell's verbal remarks at the April 30 session as that the NRA was considering a mandatory retirement age, but by the time Pulsipher relayed the statement to employees it had been characterized as, the NRA was "insisting" on a mandatory retirement age.

Thus, the record disclosed that the Union did not conjure from thin air the subject of the mandatory retirement age, but rather became aware of it either through rumor emanating from the employers' caucus or the possible mention of it at the bargaining table by Campbell. However, there is no doubt that a transformation from rumor, or possible mention of it at the bargaining table, to Pulsipher's "insisting" on a mandatory retirement age took place. The question then is whether or not such transformation constitutes a material misrepresentation.

The Union was communicating to the employees it represented what it believed to be a subject of genuine concern to the NRA; a concern which prompted its discussion at the caucus and which was mentioned at the bargaining table. Surely in this day and age of mass media coverage of important labor negotiations, wherein one of the parties "insists" on a specific proposal but finally settles on something less, the average worker has reached a level of sophistication which allows him to discern that contract bargaining is a process of give and take and compromise, with the final solution differing from the public pronouncements of the parties involved. Thus, Pulsipher's remarks would mean no more to the employees than if he told all of them that the Union was "insisting" on \$80 per day in wages. In both instances these are merely possible bargaining demands, certainly permissible in an election campaign. While I find that Pulsipher's remarks might

constitute an exaggeration of a possible NRA bargaining demand, I do not find that it rises to the level of a misrepresentation so gross or material in nature as to warrant setting aside the election.<sup>2</sup>

The second question posed at the hearing was whether or not the material misrepresentation, assuming that it was such, was made at a time which precluded the Employer from making an effective response.

As noted above, undisputed testimony revealed that the statements about a mandatory retirement age were circulated as early as 3 weeks, and as late as 3 days, before the election. The record also disclosed, however, that due primarily to the Employer's choice to remain aloof from the election the Employer did not learn or hear about such statements until after the election.

The Union argues that because the Employer voluntarily adopted a "hands-off" policy the Employer cannot now challenge the validity of the election. As a general rule the Board does not "police or censor [propaganda] used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matter, and to opposing parties the task of correcting inaccurate and unlawful statements."<sup>3</sup>

Clearly the Employer did not accept the task because he remained aloof from the election process until the results of the election revealed that the Union had won. The Union made no attempt to conceal its remarks from the Employer. It was discussed among the employees as well as were other elements of the negotiations with the NRA.

In *Hollywood Ceramics, supra*, the Board stated that one of its criteria to be used in deciding whether an election should be set aside was that, if a material misrepresentation was made, it had to have been made so that "the timing of its distribution was such as to prevent any reply. . ."<sup>4</sup> Clearly the Board intended this to refer to the action of the party making the material representation and not the opposing party. In the instant case, it was the action of the Employer, not the Union, which prevented an effective reply. Assuming *arguendo* that the Union had made a material misrepresentation concerning a mandatory retirement age, I find that it was made at a time which allowed the Employer to make an effective response, but that the Employer's failure to do so was by his own design. Further, I find that the Employer failed to prove a *prima facie* case with regard to this element of the Board's criteria for setting aside an election due to material misrepresentation.<sup>5</sup>

<sup>2</sup> *Modine Manufacturing Company*, 203 NLRB No. 77, *Hollywood Ceramics Company*, 140 NLRB 221

<sup>3</sup> *Linn v. United Plant Guard Workers*, 383 U.S. 53, 60 (1966),

quoting *Stewart-Warner Corp.*, 102 NLRB 1153, 1158 (1953).

<sup>4</sup> *Hollywood Ceramics Company, supra* at 225.

<sup>5</sup> *Cf. NLRB v. O.K. Van Storage*, 297 F.2d 74, 76 (C.A. 5, 1961).

## RECOMMENDATIONS

Having made the above findings of fact and conclusions, I recommend that the Employer's Objection 3 be overruled and a Certificate of

Representative be issued to Local 151, International Union of Police & Protection Employees, I.A.W.<sup>6</sup>  
[Fn. 6 omitted.]