

Pan American Optical Company, Inc. and International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioner. Case 28-RC-2549

May 31, 1974

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

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 28 of the National Labor Relations Board on July 13, 1973, an election by secret ballot was conducted in the above-entitled proceeding on August 31, 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, Series 8, as amended.

The tally of ballots shows that there were approximately 49 eligible voters and that 47 ballots were cast, of which 22 were for the Petitioner, 22 were against the Petitioner, 1 was challenged, and 2 were void.

The challenged ballot is sufficient to affect the results of the election and the Petitioner filed timely objections to conduct affecting the results of the election. The Regional Director caused an investigation of the challenged ballot and objections to be made and, thereafter, on October 26, 1973, issued and served on the parties his Report and Recommendations on Challenged Ballot and on Objections to Conduct Affecting the Results of the Election and Order. In his report, the Regional Director recommended to the Board that the challenged ballot be overruled, that the ballot be opened and counted, and that a revised tally of ballots be issued. He further recommended that Objections 1, 3, 4, and 5 be overruled, and ordered that a hearing be held, if necessary, to resolve the issues raised by Objection 2.

Thereafter, on November 5, 1973, the Employer filed timely exceptions to the Regional Director's report, contending that the election should be set aside and new election ordered or, in the alternative, that a hearing be directed on Objections 1, 3, and 4, as well as Objection 2.

The Board gave due consideration to the matter and concluded that the Employer's exceptions did not raise material or substantial issues warranting reversal of the Regional Director's findings and recommendations with respect to Petitioner's Objec-

tions 1, 3, and 4. Therefore, the Board adopted the Regional Director's findings and recommendations as contained in his report, and Petitioner's Objections 1, 3, 4, and 5 were overruled.¹ The Board further 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 Objection 2.

On January 15, 1974, a hearing was held before Hearing Officer Guy David Knoller, in El Paso, Texas. The Employer and the Petitioner were represented by counsel. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence relevant to the issues.

On February 21, 1974, the Hearing Officer issued and served on the parties his Report on Objections. In his report, the Hearing Officer recommended to the Board that Petitioner's Objection 2 be sustained, that the election be set aside, and that a second election be directed. Thereafter, the Employer filed timely exceptions to the Hearing Officer's report and a brief in support thereof.

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 Sections 9(c)(1) and 2(6) and (7) of the Act.
4. The parties stipulated, and we find, that the following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at 6213 Alameda, El Paso, Texas, excluding office clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

5. The Board has considered the Regional Director's report and the Petitioner's exceptions thereto, the Hearing Officer's report and the Employer's exceptions thereto, and the entire record in this case, and hereby adopts the findings, conclusions, and

¹ In the absence of exceptions thereto, the Board adopted, pro forma, the Regional Director's recommendation that the challenge to the ballot of C.

N. Martinez be overruled. The revised tally shows that 23 ballots were cast against, and 22 were cast for, the Petitioner.

recommendations of the Regional Director and the Hearing Officer to the extent consistent with this decision. Specifically, we do not agree with the Hearing Officer's recommendation that Petitioner's Objection 2 be sustained, the election be set aside, and a second election be directed.

Objection 2 is as follows:

The Employer held private meetings with each employee during the afternoon of August 30, 1973, less than 24 hours before the election. At these private meetings, the Employer discussed a profit sharing program with the employees, leading many of them to believe their voting for the Union would affect their participation in such plan, and also leaving in the mind of employees that they would cash in on the plan for an excessive amount of money, if they voted against the Union.

Briefly stated, the record shows that the Employer instituted a profit-sharing plan for its employees effective July 1, 1971. The first allocation under the plan, covering the period from July 1, 1971, to June 30, 1972, was announced to employees in late August or early September 1972.² In mid-August 1973, the Employer determined the amounts to be allocated under the plan to employees for the period covering July 1, 1972, to June 30, 1973. The announcement was made concerning this allocation on August 30, 1973, 1 day before the election, when the Employer conducted individual interviews with employees to explain benefits under the preexisting profit-sharing plan.³ The Employer claims that it would have announced the allocation sooner, but that it was waiting to make use of the profit-sharing booklets which were not received until August 27, 1973. The interviews, which were conducted by the president in his office and by a nonsupervisory office employee in a supervisor's office,⁴ lasted with some exceptions from about 2 to 5 minutes. The substance of the interviews was limited to an explanation of the profit-sharing booklet with a covering letter which included a detailed explanation of the plan. It is clear that the allocation announcement made during the interview did not provide for any change in the established benefits, but merely explained the preexisting method for the computation of employee shares. As noted by the Hearing Officer, no reference

was made to the Union or to the upcoming election by the Employer during the course of the interviews.

The Hearing Officer found the Employer's conduct in conducting the above employee interviews on the day before the election to be objectionable. We do not agree. In making his recommendations, the Hearing Officer relied upon the Employer's failure to sustain its burden of proving by a preponderance of the evidence that the timing of the announcement was justified. In addition, he also found that by holding the interviews within 24 hours of the election, and within the offices which were the locus of managerial authority, the Employer further intensified the objectionable conduct.

Under the circumstances of this case, where the profit-sharing plan had been in existence prior to the onset of organizational activity and where the final allocation announcement made no change in the previously established method for computing employee shares, we are unable to conclude that the Employer engaged in objectionable conduct by interviewing employees on the day before the election to inform them of their benefits under the plan. The interviews, as noted by the Hearing Officer, were limited to a discussion of the plan, and no references were made by the Employer to the Union or to the upcoming election. Furthermore, approximately one-half of the employees were interviewed by a nonsupervisory office employee in a supervisor's office. Under these circumstances, there is no reasonable basis for concluding that the Employer's interviews with employees were deliberately timed in order to prevent employees from expressing their true wishes in the secret ballot election. Accordingly, contrary to the Hearing Officer, we hereby overrule Petitioner's Objection 2.⁵

Accordingly, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid votes have not been cast for International Association of Machinists and Aerospace Workers, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

² The information regarding this announcement was distributed to employees while they were working on the floor.

³ The Employer claims that interviews were necessary in order to explain this allocation because it was the first year of reallocation and interest.

⁴ The record shows that the nonsupervisory office employee spoke to

half of the employees concerning the profit-sharing plan.

⁵ The Hearing Officer erred by finding that the holding in *Peerless Plywood Company*, 107 NLRB 427, prohibits an employer from conducting individual employee interviews within 24 hours of the election.