

**Mallory Controls Company, A Division of P. R. Mallory Co., Inc. and Local 512, Retail, Wholesale, and Department Store Union, AFL-CIO, Petitioner.**<sup>1</sup>  
Case 25-RC-5569

November 4, 1974

**DECISION AND CERTIFICATION OF RESULTS OF ELECTION**

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 25 on January 8, 1974, an election by secret ballot was conducted in the above-entitled proceeding on February 8, 1974, under the direction and supervision of the Regional Director, among the employees in the stipulated appropriate unit.<sup>2</sup> Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended.

The tally of ballots shows that of approximately 746 eligible voters, 319 cast ballots for, and 418 cast ballots against, the Intervenor. Nine ballots were challenged, but were not determinative of the results of the election.

On February 14, 1974, the Intervenor filed timely objections to the election. An investigation of the objections was conducted and, thereafter, on April 1, 1974, the Acting Regional Director issued and served on the parties his "Report on Objections to Conduct Affecting Results of Election, Recommendations to the Board, Order Directing Hearing, and Notice of Hearing." In his report, the Acting Regional Director recommended to the Board that Intervenor's Objections 2, 3, 4, 5, 6, 7, and 8 be overruled in their entirety. The report also ordered that a hearing be held to resolve the issues raised by Objection 1 and by the section of the report entitled "Additional Alleged Objectionable Conduct."

No exceptions to the Acting Regional Director's report, or request for special permission to appeal from his order, were filed by either party. On April 19, 1974, the Board adopted the Acting Regional Director's findings, conclusions, and recommendations, and ordered that a hearing be held to resolve the issues raised by Objection 1 and by the section "Additional Alleged Objectionable Conduct."

On May 2, 1974, a hearing was held before Hear-

ing Officer John W. Gray, who, on July 5, 1974, issued a Report on Objections in which he recommended that Intervenor's Objection 1 be sustained, that the "Additional Alleged Objectionable Conduct" be overruled, and that the Regional Director be directed to set aside the election and conduct a second election. Thereafter, the Employer timely filed exceptions to the Hearing Officer's Report on Objections, and an accompanying brief.<sup>3</sup>

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 that:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

2. The Intervenor is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of 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 production and maintenance employees employed by the Employer at its Frankfort, Indiana, plant, including set-up personnel, toolmakers, shipping and receiving employees and truck drivers; but excluding all timekeepers, all time-study men, all sales employees, all material and production control employees, all laboratory employees, all draftsmen, all engineers, all watchmen and guards, all professional employees, all office clerical employees, all shipping office clerical employees, all group leaders, and all other supervisors as defined in the Act.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the record and the Report on Objections in light of the exceptions and brief, and has decided to affirm the findings, conclusions, and recommendations of the Hearing Officer only insofar as consistent herewith.

We do not agree with the Hearing Officer's conclusion that the Employer timed its announcement of

<sup>1</sup> The Petitioner withdrew from the ballot prior to the election

<sup>2</sup> The Intervenor, International Brotherhood of Electrical Workers, AFL-CIO-CLC, was the only labor organization on the ballot

<sup>3</sup> In the absence of an exception thereto, the Board adopts, *pro forma*, the Hearing Officer's recommendation that the "Additional Alleged Objectionable Conduct" be overruled

and granted wage and fringe benefit increases with the purpose of inducing its employees to vote against union representation. Nor do we agree that the size of the wage raise and the granting of two paid holidays were calculated to interfere with the election.

The record shows the following sequence of events. In the summer of 1973, P. R. Mallory & Co., Inc., initiated an increase in vacation benefits for all salaried employees with over 20 years' service, to take effect in every division of the corporation. In addition, a review of the corporation's insurance program was undertaken to update its coverage.

Mallory Controls Company (herein called Mallory), a division of P. R. Mallory & Co., Inc., located in Frankfort, Indiana, is the Employer in this proceeding. Its president and personnel director, Armean Wright and Robert Farrell, respectively, attended a corporationwide meeting on September 26, 1973, at which it was recommended that each division initiate changes in its insurance and vacation programs. Each division was also advised that it could reappraise its schedule of holidays.

A survey of wage and fringe benefits in plants in the Frankfort area was conducted at Mallory in September, October, and November, 1973, in accordance with Mallory's practice of annual area surveys. Among other things, the survey revealed that Mallory's chief competitor in the labor market in Frankfort, National Seal, had instituted an increase in insurance benefits, added two additional half holidays per year, and granted what Personnel Director Farrell learned was an 8-percent increase in wages. Shortly after October 5, 1973, the date of the National Seal increase announcement, Wright and Farrell agreed that to keep pace with National Seal, and to reduce employee turnover at Mallory and prevent a loss of Mallory's employees to its competitor, an 8-percent increase was necessary. The survey also revealed that Mallory had fallen behind other Frankfort plants with regard to the number of paid holidays granted to employees.<sup>4</sup>

<sup>4</sup> The Employer excepts to the Hearing Officer's interpretation of Farrell's testimony concerning paid holidays. As to whether or not the survey reflected sufficient change in area holiday policies to justify Mallory's granting of an additional two holidays, Farrell testified, "It did not change that much at all, it really didn't."

Q [By Mr Lawson] But, yet in 1974, the situation changed so drastically that you had to give them two holidays, extra holidays added in one year, whereas you went for a period of seven years and it didn't change enough to add one?

A It did not change that much at all, it really didn't.

Q It really didn't?

A No.

Q According to your survey?

A That's right [Emphasis supplied].

The Employer asserts, and we agree, that the Hearing Officer's conclusion that Farrell was admitting there had been no change in area practice

In a November 9, 1973, memorandum from President Wright to G. K. Franklin, director of employee relations of P. R. Mallory & Co., Inc., Wright expressed the need to announce a wage increase and improvements in benefits in order to stop the increasing rate of employee turnover and to attract new employees. Significantly, the memorandum reads: "This should be done early in December 1973 because of the changing rates and benefits of those industries competing in the local labor market." It was not until the middle of November 1973 that Mallory officials became aware of the organizational activities of Petitioner Local 512. In order to obtain P. R. Mallory & Co., Inc.'s approval of Mallory's recommended program, meetings were arranged between the officers of the two companies. W. O. Druetzler, the director of wage and salary administration for P. R. Mallory & Co., Inc., went to Mallory's Frankfort plant on December 4, 1973, to help assemble Mallory's data for subsequent consideration by the corporation on December 11, 1973. Between these two dates, on December 6, 1973, Local 512, Retail, Wholesale & Department Store Union, AFL-CIO, filed an election petition with the Board. Mallory received the petition on December 10, 1973.

At the December 11 meeting, the Mallory division's recommendations were presented and approved by the parent corporation. The decision was made to make the increase in wages and fringe benefits effective on January 5, 1974, the first day of the first full payroll week in 1974. The increases were announced on December 12, 1973, the day following the meeting at which they were approved. The timing of this announcement was in accord with the recommendation made by Mallory President Wright in his memorandum of November 9, 1973, dated before the advent of union activity at Mallory.

The Intervenor, International Brotherhood of Electrical Workers, AFL-CIO-CLC, failed to achieve a majority of votes in the appropriate unit in a February 8, 1974, election at the Mallory Frankfort plant. The Hearing Officer recommended that the results of the election be set aside and that a new election be conducted. He concluded that the timing of the wage and fringe benefits increases, their size, and their announcement soon after the filing of the election petition were designed to interfere with the election. Indicating that the Employer did not sufficiently justify its actions by offering "a compelling eco-

for 7 years and there was consequently no justification for the current change in the holiday schedule at Mallory was a misconstruction of Farrell's testimony. Contrary to the Hearing Officer, the record shows that Farrell was saying that, while there was no appreciable change over the past 7 years in area holiday schedules, the Mallory survey in 1973 indicated a significant change over the findings of the previous year's annual survey which justified the granting of additional paid holidays to Mallory employees

conomic reason," the Hearing Officer relied on the lack of documentary evidence in the record, most notably the omission of the Employer's survey results.<sup>5</sup>

It is the Employer's contention that its program of wage increases and benefits in 1973 was economically justified, in accordance with past company practice, and instituted without regard to union organizational activities. We agree.

The record establishes that it is a yearly practice since at least 1967 for the Employer to effectuate wage increases in January or February of the year based on survey results of area practices. The announcements of these increases have been made to the employees variously 1 day to 3 weeks prior to the effective date of the increase. In 1973, the National Seal increase was the major determinative factor leading to the current increase at Mallory. The impetus for the increases in insurance and vacation programs arose from the corporationwide meeting on September 26, 1973, at which all of the divisions at P. R. Mallory & Co., Inc., including the Frankfort plant of the Employer, were advised to follow the corporationwide fringe benefit policy. Thus the Employer initiated its current program of increases before union activity came to its Frankfort plant, and was clearly motivated by purely economic reasons.

<sup>5</sup> The Employer excepts "to the Hearing Officer's failure to accord appropriate weight to the Employer's evidence solely because the Employer introduced evidence through witnesses rather than introducing documentary evidence." We agree with the Employer that the Hearing Officer misapplied the best evidence rule. Employer's witnesses testified as to the results of the area practice survey, and it is established that "where facts testified to are peculiarly within the knowledge of a party testifying the admission of his evidence as to them does not violate the rule which requires that the best obtainable evidence be produced, even though such facts are contained in a writing." 29 Am Jur 2d Evidence Sec 449. Furthermore, until the Hearing Officer chose to do so in his report, no party to this proceeding ever objected to the method by which the Employer presented its case.

Furthermore, the current 8-percent wage increase does not vary appreciably in size from increases in former years. Prior to 1972, increases up to 8 percent were granted. In 1972 and 1973, increases were down because of the Federal wage-price freeze. The 1974 increase was based on the National Seal increase, and the survey which revealed the need for additional employee income to contend with inflation. Inflation also influenced the decision to increase fringe benefits.

The Employer asserts, and we agree, that since it was following established company practice, and because preparations for the current increase and the timing of its announcement were made before the advent of union activity, the increases were lawfully announced and granted.<sup>6</sup> Moreover, if the Employer had decided not to act as it did, and withheld its increases, such action might have been violative of the Act.<sup>7</sup> In view of all the foregoing, we overrule Intervenor's Objection 1.

Since all the objections to the election have been overruled, we shall, accordingly, certify the results of the election.

#### CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for the International Brotherhood of Electrical Workers, AFL-CIO-CLC, 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.

<sup>6</sup> *Meier's Wine Cellars, Inc.*, 188 NLRB 153, 154 (1971)

<sup>7</sup> *The Deutsch Company, Metal Components Division*, 178 NLRB 616 (1969), affd 445 F 2d 902 (C A 9, 1971)