

**Amsterdam Printing & Litho Corp. and Local 259,
Graphic Arts International Union, AFL-CIO, Petitioner.** Case 3-RC-5847

November 15, 1974

**SUPPLEMENTAL DECISION, ORDER, AND
DIRECTION OF SECOND ELECTION**

BY CHAIRMAN MILLER AND MEMBERS FANNING AND
PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election executed by the parties and approved by the Regional Director for Region 3 of the National Labor Relations Board on November 14, 1973, an election by secret ballot was conducted in the above-entitled proceeding on December 19, 1973, under the direction and supervision of said Regional Director.¹ Upon the conclusion of the election, the parties were furnished a tally of ballots which showed that, of approximately 24 eligible voters, 24 cast ballots, of which 11 were for, and 13 against, the Petitioner. There were no void or challenged ballots.

Thereafter, on December 28, 1973, the Petitioner filed timely objections to conduct affecting the results of the election. The Regional Director conducted an investigation of the objections and, on January 29, 1974, issued and served on the parties his Report on Objections. In his report, the Regional Director recommended to the Board that the objections be overruled and that a certification of results issue.

Thereafter, on February 22, 1974, the Petitioner filed exceptions to the Regional Director's Report on Objections with a brief in support thereof.² In a Decision and Order Directing Hearing, dated May 10, 1974,³ the Board overruled certain of the Petitioner's objections but directed that a hearing be held for the purpose of receiving evidence to determine the issues raised by Petitioner's Objection 2; namely, whether or not Petitioner received the Employer's December 14 letter assertedly sent to it and had an opportunity to reply; whether the Employer had established a practice of giving and announcing the results of its

annual wage review on or about the same date each year; and, to adduce such other evidence as was relevant to the issues raised by Petitioner's Objection 2.

Pursuant to a notice of hearing on objections served on the parties on May 21, 1974, and an order rescheduling hearing served on the parties on May 31, 1974, a hearing was held on June 14, 1974, before Hearing Officer Christopher G. Roach. The Employer and Petitioner were represented by counsel and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues raised.

On June 27, 1974, the Hearing Officer issued and duly served on the parties his Report and Recommendations on Objections in which he recommended that the election be set aside and a second election directed. Thereafter, the Employer filed exceptions to the Hearing Officer's report and a supporting brief, and the Petitioner filed limited exceptions to the Hearing Officer's report and brief in support thereof. Petitioner also filed a brief in answer to the Employer's exceptions.

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 that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Hearing Officer's report, the exceptions and briefs, and the entire record in this case, and hereby adopts the Hearing Officer's report and recommendations, except as modified herein.

The Hearing Officer found that on December 18, 1973,⁴ the evening before the election, the Employer sponsored a dinner party at a Holiday Inn for the voting unit employees and their spouses. At the dinner several officers of the Employer, including Executive Vice President Robert Singer, delivered speeches to the employees. In the course of his speech, Singer said:

Incidentally as you all may have heard we made our annual wage review and are informing employees of the various benefits as well as wages. We feel we have been exceptionally generous. In regard to the Offset Department [the unit here involved] we have written the union a letter which I will read to you.

Singer went on to read the following letter, dated December 14, 1973, and addressed to Petitioner's president, Emery B. Miller:

⁴ All dates herein are in 1973 unless otherwise indicated

¹ The following unit, as stipulated by the parties, was found to be appropriate for purposes of collective bargaining within the meaning of Sec 9(b) of the Act

All lithographic production employees employed by the employer at its Wallins Corners Road, Amsterdam, New York plant and place of business, excluding all non-lithographic production and maintenance employees, office clerical employees, professional employees, confidential employees, guards and supervisors as defined in the Act

² The Petitioner also filed a motion to accept untimely filed exceptions and brief, which was opposed by the Employer. By telegraphic ruling of March 13, 1974, the Board notified the parties that it would consider Petitioner's exceptions and brief as timely filed

³ Not published in bound volumes of the Board's Decisions

Dear Mr. Miller:

Some of our Lithographic production employees have raised a question about their status under the annual review on wages and benefits, which for the past several years has been made at this time.

The Board of Directors of Amsterdam Printing and Litho Corp. has authorized an increase in wages, additional holidays, and other benefits for all hourly employees, effective January 1, 1974. We are withholding payment of this increase and the granting of the holidays to the Lithographic production employees on the advice [sic] of counsel, who states that any increase given to these employees while representation proceedings are pending could result in the company's being charged with an unfair labor practice by your Union.

We would like to grant these increases, holidays and other benefits to our Lithographic Production employees. However, we feel we cannot grant them unless we have the assurance from your Union, who desires to represent these employees, that such action on our part will not be used as a basis for an unfair labor charge or as a basis for a challenge to the results of any election held by the National Labor Relations Board. Obviously, we cannot negotiate any details of this wage increase and benefits with your Union.

Will you please let us know promptly in writing whether your Union will give us assurance that you will not file a complaint based on such voluntary action on our part or use it as a basis for challenging election results.

After reading the letter, Singer closed his speech as follows:

We haven't received an answer yet!!!

All I can say in closing is why should you gamble on outsiders?—Outsiders who can't give you a job—guarantee you a job—actually who can't place their own unemployed members in jobs.

You won't be taking any chances or any gamble if you vote 'NO' UNION tomorrow.

The Petitioner contends that it never received the letter and consequently had no opportunity to reply. The Hearing Officer found, on the basis of his credibility resolutions,⁵ and, in our opinion, legitimate in-

⁵ The Employer and Petitioner have excepted to certain credibility resolutions of the Hearing Officer. It is the established policy of the Board not to overrule a Hearing Officer's credibility resolutions unless the clear prepon-

ferences drawn therefrom, that the letter was mailed about 5:45 p.m. on Friday, December 14, and received by Petitioner on the evening of December 17. However, based on general knowledge of postal service, the Hearing Officer inferred and found that, because the letter was received less than 24 hours before the dinner party, Petitioner's president did not have a sufficient opportunity to reply to the letter.⁶ The Hearing Officer also noted that the letter did not contain any reference to the fact that it would be read to the unit employees and thus did not put Petitioner on notice that a reply would be necessary by December 18.

With respect to the annual wage review itself, the Hearing Officer found that the Employer's regular practice was to conduct such a wage review and announce the results thereof to its employees in the course of individual interviews during the last 3 weeks of December. The Hearing Officer further found that the Employer deviated from this practice by not conducting such interviews with voting unit employees prior to December 18, and by making a group announcement concerning the wage review to the employees at the dinner that evening. The Hearing Officer concluded from these findings that Singer's speech implied to the employees that an element of risk was associated with a union victory by suggesting that if Petitioner won the election there was a serious question as to whether or not the unit employees would receive the customary increased benefits. Accordingly, and relying on *McCormick Longmeadow Stone Co., Inc.*,⁷ the Hearing Officer found that Singer's speech interfered with the employees' exercise of a free choice in the upcoming election and recommended that the election be set aside.

While agreeing with his ultimate recommendation, we find, contrary to the Hearing Officer, that the Employer did not substantially deviate from its practice with respect to the annual wage review. As in the past, both the wage review and the announcement thereof to the employees came in December. Thus, the timing of both the review and its publication, which to us is the controlling factor here in determining whether the Employer deviated from its practice, remained unchanged.

derance of all the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961), *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no sufficient basis for disturbing the credibility resolutions in this case.

⁶ The Employer has excepted to the Hearing Officer's inferences that the letter was received no earlier than December 17 and that Petitioner consequently did not have an adequate opportunity to respond. Contrary to the Employer, we find these inferences reasonable and, accordingly, find the Employer's exception to be without merit.

⁷ 158 NLRB 1237 (1966)

Furthermore, such changes as did occur, namely, announcing to the employees as a group rather than individually that a wage review favorable to their interests had been completed and scheduling such individual interviews approximately 1 week later than usual, were, in our view, minimal and inconsequential variances from past practices.

Notwithstanding our finding that the Employer did not substantially deviate from practice with respect to the annual wage review, we agree with the Hearing Officer that the Employer interfered with the employees' exercise of free choice in the election. We further agree with the Hearing Officer that the rationale expressed in *McCormick Longmeadow Stone Co., Inc., supra*, is applicable here. In that case, while representation proceedings were pending, the employer mailed employees copies of a letter sent to the petitioning union requesting that the union waive the institution of increased benefits as a basis for filing objections or unfair labor practice charges. The letter contained numerous references to the employer's desire to implement the benefits and stated that it would be unfair and unfortunate for the employees to be deprived of such benefits while questions pertaining to the representation proceeding were pending before the Board. The letter further concluded that if the waiver was not given the benefits would not be put into effect. The Board found that by drafting the letter in this manner and by sending copies of the letter to the employees without first affording the union an opportunity to reply to the request, the employer sought to discredit the union and discourage support for it by announcing a desire to institute immediate benefits for its employees and then shifting to the union the onus for not instituting those benefits. Accordingly, the Board found that by this conduct the employer violated Section 8(a)(1) of the Act.

Similarly, in the instant case the Employer announced to the employees in the voting unit that it had asked the Union for a waiver and that the Union had not replied to the request, despite the fact that the Union had not had sufficient time to do so. The Employer then warned the employees not to "gamble on outsiders." By this conduct, we find that the Employer in effect told the employees that they would risk losing their normal increases in benefits if they voted for the Union and, significantly, attempted to shift the onus to the Union for any delay in receiving

benefits at that time. Such conduct on the part of the Employer, in our opinion, interfered with the employees' exercise of a free choice in the ensuing election. Accordingly, we shall order that the election held on December 19 be set aside and that a new election be conducted.

ORDER

It is hereby ordered that the election conducted herein on December 19, 1973, be, and it hereby is, set aside.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

CHAIRMAN MILLER, concurring:

I agree with my colleagues and the Hearing Officer that Singer's election eve speech interfered with the employees' exercise of a free choice in the ensuing election. However, in so doing, I do not adopt the position expressed in *McCormick, supra*, which appears to say that an employer risks a finding that it has engaged in objectionable conduct if it truthfully informs the employees that it has requested a waiver from the union and that it has not received a reply.

In my view, the Petitioner's objection to the Employer's preelection misconduct should be sustained only because the Employer's speech here had the effect of misrepresenting the facts concerning the Union's lack of responsiveness to employee interests. Singer's speech plainly intimated to the employees that the Union had been less than diligent in protecting their interests by failing to reply to its request, whereas the fact was, as Singer well knew, that it was hardly reasonable to have expected a union reply in view of the timing, which timing was not—and, I suspect, deliberately not—clearly explained to the employees. Thus the obviously inferred suggestion was that the Union had been derelict in its duty toward the employees, an inference not warranted from the facts and which would not have been drawn if the Employer had been open and frank as to the timing. This misrepresentation was material to the issue of whether the Union was a responsible agent—a necessarily significant issue in any election campaign. Without adopting all of the rationale offered by my colleagues, therefore, I nevertheless concur in their conclusion that the election should be set aside and a new election be conducted.