

Thrift Drug Company, Employer-Petitioner and Retail Store Employees Union Local 526, Retail Clerks International Association, AFL-CIO. Case 30-RM-297

May 23, 1975

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS FANNING, JENKINS, AND KENNEDY

Pursuant to a Stipulation for Certification Upon Consent Election executed by the parties, and approved by the Acting Regional Director for Region 30 on April 4, 1974, an election by secret ballot was conducted on April 19, 1974, among the employees in the stipulated unit. At the conclusion of the election, the parties were served with a copy of the tally of ballots, which showed that, of approximately 13 eligible voters, 13 cast ballots, of which 5 were for and 8 against the Union. None were void or challenged. Thereafter, the Union filed timely objections to the election.

Following an investigation of the issues raised by the objections the Regional Director issued his Report and Recommendations on Objections wherein he recommended that a hearing be held for the purpose of resolving issues raised by Objections 1 and 3. Thereafter, the Board accepted the Regional Director's recommendation and issued an order directing such a hearing.

Pursuant to the Board's Order a hearing was held on August 27, 1974, before Hearing Officer Mark Burstein. All parties were represented at the hearing and were afforded full opportunity to be heard, to examine witnesses, to introduce relevant evidence, and to present oral argument.

On November 20, 1974, the Hearing Officer issued and duly served on the parties his Report on Objections in which he recommended that the Union's Objections 1 and 3 be sustained, that the election conducted on April 19, 1974, be set aside and that a new election be conducted. Thereafter, the Employer-Petitioner filed timely exceptions to the Hearing Officer's report and a supporting 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.

Upon the entire record in this case, the Board finds:

1. The Employer-Petitioner 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 Union 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-

Petitioner within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees of the Employer at its Kenosha, Wisconsin, drug store; but excluding the store manager, the assistant manager, professional employees, guards and supervisors as defined in the Act.

5. The Board has considered the Hearing Officer's report, the exceptions and brief, and the entire record in the case, and, contrary to the Hearing Officer, is of the opinion that the Union's Objections 1 and 3 should be overruled and that the results of the election should be certified.

In Objection 1 the Union alleges that the Employer, during the preelection period, granted and promised economic benefits in an attempt to influence employee votes.

The facts are not in controversy. The Kenosha drug store is one of the Employer's chain of drug stores. As of the time of the election it was the only union store in the chain. During the weeks prior to the election employer representatives conducted several meetings with store employees. These representatives, using a chart, compared the wages and other benefits at the Kenosha store with those at the Employer's other stores. They told the employees that the benefits in effect at the other stores were better than those in effect at the Kenosha store. As part of this presentation they also discussed the substance of the negotiations, including the fact that the Employer had offered to put into effect at the Kenosha store the benefits put into effect at the other stores in the chain. Employer representatives further noted that the disparity in benefits resulted, in part, from differences in the economic conditions in the various geographical areas where the Employer's stores were located. Employer also distributed a pamphlet similar to the chart used in the meetings, setting forth the differences between the benefits at the Kenosha store and other stores in the chain. The pamphlet did not contain any explanation of the reasons for the differences in benefits.

In our opinion this comparison of benefits is not objectionable. As our dissenting colleague notes, we have approved benefit comparisons under a number of other circumstances. Absent threats of reduction of benefits or promise of increased benefits, such benefit comparisons are permissible campaign techniques which fall within the bounds of free speech permitted

by Section 8(c) of the Act.¹ Our dissenting colleague and the Hearing Officer see the situation here as being different from other comparison cases, since the benefits comparison is between the benefits enjoyed by union represented employees at the Kenosha store and the greater benefits enjoyed by unrepresented employees at other stores. He suggests that the employees were being told that they could achieve these benefits by merely rejecting the incumbent union. The difficulty with this reasoning is that the employees were also told that the Union had already been offered these during bargaining.² Thus, the employees were not being told that they could only achieve these benefits through rejection of the Union. Rather, the only inference to be drawn is that the Union had for its own reasons not accepted these benefits, perhaps because they were in its view insufficient or because some other bargaining objective had not been attained. Since the Employer made it clear the benefits were available with union representation, we are unable to perceive how these comments can be said to constitute a promise of benefit, the granting of which is contingent on rejection of the Union.

In Objection 3 the Union alleges that the Employer gave employees gifts in an attempt to affect their attitude toward the election. In support of this objection the Union points to the contest the Employer held. About 10 days before the election, the Employer circulated a questionnaire containing 10 true or false questions and a tiebreaker question for employees to answer. A prize of a camera worth \$40 was to be given to the employee with the most correct answers. The parties stipulated that the questions were based on material that had been passed out by the Employer during the campaign or discussions that ensued between employer representatives and employees. Employees were permitted to submit as many entries as they wished. The contest ended in a tie with four employees having answered all of the questions, including the tiebreaker, correctly. A drawing was held at a dinner the evening before the election among the four employees, with the winner of the drawing winning the camera and the other three employees, based on additional drawings, winning gift certificates of \$20, \$15, and \$10, respectively.

The contest here was obviously designed to encourage employees to take an interest in the upcoming election and, especially, to make sure employees were aware of the facts which the Employer sought to emphasize during the campaign. Winning the contest was not in any way contingent on supporting the Employer's position. Nor were the prizes of sufficient value

as to create in the minds of the winners a feeling of an obligation to favor the Employer's position.³ The Employer's award, as a result of the tie, of four prizes instead of the single prize originally planned does not require a different result. Each winner had received a prize in a contest in which winning was not contingent on support and the size of the prize was not sufficient in value to create the feeling of an obligation to favor the Employer's position. The fact that others also received prizes under the same circumstances would not create a feeling of obligation not otherwise present.⁴ In our view, the contest was permissible campaign conduct as an aid in the Employer's efforts to arouse interest in the election and to assist it in making sure employees were aware of the items it wished to emphasize.⁵

Accordingly, and as the Union has failed to receive a majority of the valid votes cast, we shall 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 Retail Store Employees Union Local 526, Retail Clerks International Association, 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.

MEMBER JENKINS, dissenting:

I would adopt the Hearing Officer's report and order a second election based on the Employer's preelection conduct which, in my view, interfered with the employees' free choice as to whether they desired representation by the Union.

In the weeks shortly before the election, the Employer conducted several meetings during working time with the employees at its store in Kenosha, Wisconsin. At these meetings, the Employer's agents used a chart which reflected the fact that the wages and other benefits of the employees at the Kenosha store, which was the only unionized unit in the chain, were not as good

³ See *Hollywood Plastics*, 177 NLRB 679 (1969) (raffle of groceries worth \$82); *Buzza-Cardoza, a division of Gibson Greeting Cards, Inc.*, 177 NLRB 589 (1969) (raffle of groceries worth \$84); *Marathon Le Tourneau Company*, 208 NLRB 213 (1974) (raffle of a color television set).

⁴ There is no evidence that the contest was a sham designed to enable the Employer to give employees gifts, labeled as prizes, designed to induce employees to support its position. Nor is there any evidence employees had reason to believe the prizes were for the purpose of inducing their support of the Employer's position.

⁵ Unlike our dissenting colleague, we are unable to find anything in the questionnaire which required employees to identify themselves or to state their views as to campaign issues. All that was required was a response which indicated the employee was aware of particular items the Employer wanted to emphasize. Further, unlike our dissenting colleague, we see nothing in the questionnaire which would invite comments by employees as to how ballots would be cast in the forthcoming election.

¹ See, e.g., *The American Thread Company*, 101 NLRB 1306, 1324 (1952). *The Orchard Corporation*, 170 NLRB 1297 (1968)

² There is no contention that this constituted a misrepresentation.

as those that existed at the other stores. An agent of the Employer explained that the negotiations and the differences in the economic conditions in the various geographic areas where the Employer's stores were located were the reasons for the disparity between the benefits. In addition to the meetings, the Employer also distributed a pamphlet to its employees, in which benefits at the Kenosha store were compared to the benefits of the employees at the remainder of the Employer's stores. The pamphlet was similar to the chart which was used in the meetings, but the reasons for the differences between the benefits was not explained.

Benefit comparisons usually involve a demonstration by an employer that a union does not significantly improve working conditions. To demonstrate this fact, employers sometimes compare benefits at union plants with benefits at a nonunion plant to show that the union benefits do not greatly exceed, or may be less than, the benefits available to nonunion employees. We have approved such preelection conduct since there is no possible inherent promise of a benefit in such a comparison. However, the Board has never, before this decision, approved an employer's comparison of benefits at a plant at which an election is to be held with better benefits at a nonunion plant where both plants are owned by the same employer. No approval has been given heretofore because such a comparison contains an implied promise of better benefits in the event the union loses the election. Thus, such a comparison reasonably tends to convey to the employees that, by voting against the union, the employees could receive the better benefits which the employer, through its control of the economic purse strings, is already making available to its nonunion members at another location. Accordingly, I would find that the comparison of benefits made herein constitutes impermissible preelection conduct.⁶

About 10 days before the election herein the Employer began a contest in which it circulated a questionnaire containing 10 true or false questions and a tie-breaker question for its employees to answer, with

prizes to be awarded to those with the most correct answers. Among the true/false questions were the following:

7. (Circle The Correct Answer) Local #526 has been unsuccessful in negotiating a contract for the past:
 - A. 1 year & 6 months
 - B. 2 years & 10 months
 - C. 3 years & 5 months
9. (Circle True or False) The union can guarantee that they will be more successful in negotiating a contract if they win this election than they have been in the past.
10. (Circle True or False) The union has obtained higher wages for Kenosha associates than enjoyed by associates in other Thrift Drug Stores.

Other questions related to the Union's bargaining ability, the Employer's right to replace economic strikers, the employees' freedom to reject the Union, the financial and other obligations of union members, and union discipline.

Employees responded to the questions, put their answers in a sealed box and retained a numbered stub corresponding to the number on the sheet they had handed in. On the night before the election, the Employer sponsored and paid for a dinner at a local restaurant which all the employees were invited to attend. The number of the contestants with the most correct answers were announced and a camera valued at \$40 and gift certificates of \$20, \$15 and \$10 were awarded to the winning employees.

Raffles and contests usually are designed to create employee interest in the Board's election process and do not interfere with the employees' free choice as to whether they desire union representation. Examples of permissible raffles and contests are found in the cases cited by my colleagues. However, the Board has never before this decision approved a "contest" which would reasonably tend to make one-third of a proposed unit of employees feel an obligation to vote against a union.⁷ Neither has the Board approved a "contest" which by its very nature would be likely to invite comments in the presence of an employer as to how ballots would be cast in a forthcoming election.⁸ Nor has the Board approved a "contest" in which eligibility for a prize depended on an employee's statement as to his or her views as to campaign issues.⁹

Although question 10 reinforces the intracompany comparison of benefits which I have already found to be objectionable, the primary vice of the contest is not

⁶ Unlike my colleagues, I do not conclude that the "Employer made it clear that benefits were available with Union representation." In fact, the course of conduct pursued by the Employer in negotiations made it clear that equalized benefits would, in all likelihood, never be available with union representation. By telling its employees that one of the reasons for the disparity in benefits was that the parties had been negotiating unsuccessfully for 3-1/2 years, the Employer, in effect, was inferring that further negotiations would be similarly unsuccessful and therefore futile. Moreover, the evidence here is unclear as to whether, in fact, an offer was made by the Employer to equalize benefits. Thus, although one employee testified that she was told at a meeting that equalized benefits were offered to the Union during negotiations, the same employee testified that a union representative told her that the subject of equalized benefits was "refused to be discussed because of the, they were still trying to get over the open shop" and that "if the Employer had brought up or proposed benefits during the negotiations, the Union would have considered them." In these circumstances, I cannot agree with my colleagues that equalized benefits were available whether or not the Employer's employees chose union representation.

⁷ Cf. *Hollywood Plastics, Inc.*, 177 NLRB 678 (1969)

⁸ Cf. *Glamorise Foundations, Inc.*, 197 NLRB 729 (1972)

⁹ Cf. *Jacqueline Cochran, Inc.*, 177 NLRB 837 (1969)

in the questions, *per se*, but in the fact that 4 of 13 employees, over 30 percent of the proposed unit, were given substantial benefits, prizes worth \$40, \$25, \$15, and \$10, on the eve of the election for disclosing their agreement with the Employer's views on practically every important issue in the campaign with the exception of the ultimate question of how the employees intended to vote. It is only natural that the recipients of such prizes would tend to feel an obligation to favor an employer in these circumstances. And, after disclosing their views as to important campaign issues in the presence of an employer, it is only natural that such disclosure would tend to invite further comments from employees as to the ultimate question of how they in-

tended to vote in the upcoming election.

In my opinion, the manner in which the Employer in this case solicited the views of its employees is close enough to either unlawful surveillance, interrogation, or actually influencing votes improperly by prizes related to attitudes toward the union to set the election aside. In the circumstances of this case, there is no doubt in my mind that the Employer's "contest" tended to interfere with the employees' free choice as to whether they desired representation by the Union. Accordingly, I would find that the contest constitutes impermissible preelection conduct.

Based on the foregoing, I would order a second election.