

ABC North Central Theatres, Inc. and Fargo Theatre Employees Union, Petitioner. Case 18-RC-9971

December 16, 1974

DECISION ON REVIEW, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN MILLER AND MEMBERS FANNING AND KENNEDY

On June 26, 1974,¹ the Regional Director for Region 18 issued a Supplemental Decision, Report on Objections, and Certification of Representative in the above-entitled proceeding, in which he overruled Employer's Objections 1 and 2 and certified the Petitioner as the representative of all the Employer's employees in the unit found to be appropriate.² Thereafter, in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's Supplemental Decision on the grounds, *inter alia*, that, in overruling Employer's Objection 2, he made findings of fact which are clearly erroneous and departed from precedent.

By telegraphic order dated August 15, the Employer's request for review was granted with respect to Objection 2 and the certification of representative was stayed pending decision on review.

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 considered the entire record in this case with respect to the issues under review and makes the following findings:

Objection 2 alleges that Petitioner, through its representatives, falsely interpreted a pamphlet published by the Commissioner of Labor of the State of North Dakota and informed the employees in the voting unit that the North Dakota minimum wage regulations applied to all of them, and that these regulations required the Employer to pay them a rate of \$1.60 per hour. The Employer further alleges that these statements were

¹ Unless otherwise indicated, all dates herein are in the year 1974.

² Pursuant to the Regional Director's Decision and Direction of Election issued April 22, an election was conducted on May 21 in the following unit:

All full-time and regular part-time ushers, usherettes, doormen, cashiers, floormen, concession attendants and janitors employed by the Employer at its Fargo Theatre and Lark Theatre in Fargo, North Dakota; excluding temporary and casual employees, projectionists, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots indicated that, of approximately 19 eligible voters, 10 voted for, and 6 against, the Petitioner, and 1 ballot was challenged.

made to the employees shortly prior to the election and the Employer did not learn of them until the late evening of the day before the election.

The Petitioner conceded that its representatives informed Employer's employees that most of them were covered by the North Dakota minimum wage laws and that these regulations required the Employer to pay them a rate of \$1.60 per hour.

The Regional Director found that three of Employer's voting unit job classifications³ are covered by the North Dakota minimum wage laws and that employees within these three classifications were entitled to \$1.60 per hour.

Relying on *Modine Manufacturing Company*, 203 NLRB 527 (1973), the Regional Director concluded that, although the Petitioner's statement may have involved an inadvertent departure from the truth, it does not appear that the statement was of such a significant nature as to have had any real impact on the election. He concluded that, as the implementation of the North Dakota minimum wage laws is not in any way dependent upon union representation and the alleged misrepresentations amount only to derogatory references to the Employer's compliance with those laws, the statements would not lead the employees to believe that their receipt of the minimum wage scale was dependent upon an election victory by the Petitioner.

The Employer, in its request for review, contends that its employees are not covered by the North Dakota minimum wage laws and that the Regional Director erred in finding that three of its job classifications are covered. In addition, the Employer argues that the nature of the Petitioner's misrepresentations, their timing, and their complete falsity make it unlikely that the statements were inadvertent departures from the truth, were calculated and substantial departures which interfered with the employees' free and reasoned choice, warranting a new election.

We find it unnecessary to decide whether or not three of the Employer's job classifications are in fact covered by the North Dakota minimum wage laws, as it is not disputed that the Petitioner misstated the facts when it informed other classifications of employees in the unit that they were covered. In the circumstances, we conclude, contrary to the Regional Director, that the Petitioner's statements, insofar as they related to some of the employees in the unit,⁴ constituted substantial and material misrepresentations which impaired the exercise of free choice in the election. In our

³ Concession attendants, janitors, and cashiers.

⁴ The Petitioner, as noted, conceded that its representatives informed voting unit employees that most of them were covered by the state minimum wage laws. Thus, without deciding whether or not the Employer's concession attendants, cashiers, and janitors were covered, it is undisputed that misrepresentations were made with regard to the remaining classifications in the unit, i.e., ushers, usherettes, doormen, and floormen.

opinion, the statements had the effect of placing the Employer in an underservedly unfavorable position with respect to potential negotiations with the Petitioner, as they could reasonably have led the affected employees to believe that, if the Petitioner won the election, it at the least would attempt in negotiations to obtain the Employer's compliance with the state minimum wage laws. As the Employer did not learn of the misrepresentations until the eve of the election, it had no opportunity to neutralize their impact on the voters.⁵

⁵ Chairman Miller dissents from his colleagues' action in setting aside the election. While he would not have summarily overruled the objection as did the Regional Director, he would have directed a hearing on the objection, and is not prepared to join his colleagues herein without benefit of a full factual record which could be developed by such a hearing.

Accordingly, we hereby sustain Objection 2 and we shall set aside the election and direct that a second election be conducted.

ORDER

It is hereby ordered that the election conducted herein on May 21, 1974, be, and it hereby is, set aside. [Direction of Second Election and *Excelsior* footnote omitted from publication.]