

Red's Express, Inc. and Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 32-RC-1738

27 February 1984

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 17 December 1982 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 19 against the Petitioner, with 5 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations only to the extent consistent herewith, and finds that a certification of results of election should be issued.

The hearing officer recommended that the Petitioner's Objection 3 be sustained and that the election be set aside based on the Employer's announcement and granting of a wage increase approximately 3 weeks prior to the election.¹ The Employer excepts to the hearing officer's findings and conclusions, contending, *inter alia*, that the wage increase was consistent with a financial decision and promise to employees made prior to the commencement of the union campaign. We find merit in the Employer's exceptions.

The facts are, on the whole, undisputed. The Employer is engaged in the business of providing transportation services from its terminals located in Modesto and San Leandro, California. In mid-September 1982,² the Employer hired a consultant, Campbell, for advice regarding the operating losses the Company had been experiencing for some time.³ Campbell spent 2 days at the Employer's Modesto office examining financial statements for the prior few months which had been prepared for the Employer by an independent accounting firm. After determining that the Company's operating

revenues were too low in comparison to its high overhead costs, Campbell recommended that the Employer: (1) increase the amount of freight carried between the Modesto and San Leandro terminals, and (2) immediately institute a 10-percent across-the-board wage cut. Campbell further advised the Employer to restore the wage cut as soon as the Company achieved a sufficient profit margin, which would be indicated by a 90-percent monthly operating ratio.⁴ Campbell did not put these recommendations into writing, and he made no recommendations as to what the Employer should do in the event that, once the wage cut was restored, profits again declined.

The Employer decided to implement both recommendations immediately. During the third or fourth week of September, the Employer's president, Rossio, informed employees at a meeting that all employees, including management, would receive a 10-percent wage cut, and that the wages would be restored as soon as profits reached an acceptable level. Although Rossio did not specify the level of profits that would be considered acceptable, employee Deto testified that Rossio indicated that their wages would be restored in approximately a month. In addition to implementing the 10-percent wage cut, the Employer took steps to increase the traffic between its two terminals and to increase efficiency by means of changes in routing, scheduling, loading, and the like.

On 17 November the Union filed a petition for an election in a unit of all employees at the Employer's San Leandro terminal, excluding guards, clerical employees, and supervisors. The next day, the Employer sent employees the first in a series of letters and handouts, urging them in the first letter not to sign cards and in the later letters to vote against the Union.

Meanwhile, on 19 November the Employer received from its accountants the financial statement for the month of October which showed that the monthly operating ratio was down to 87.7 percent, *i.e.*, a 12.3-percent profit. The next day, Adams, the Employer's general manager, telephoned Rossio, who had returned that day from a vacation abroad, informed him that the goal of a 90-percent monthly operating ratio had been reached, and recommended that the former wage levels be restored. Adams testified that he made that recommendation because of the Company's prior promise to employees and

¹ In the absence of exceptions thereto, we adopt, *pro forma*, the hearing officer's recommendations that Objections 1, 2, and 4 through 7 be overruled.

² All dates hereinafter are in 1982 unless otherwise specified.

³ Financial statements submitted into evidence indicate that the Employer sustained monthly operating losses ranging from 1.74 percent to 15.47 percent in April, May, and July, and gains of 5 percent and 3 percent in June and August, respectively.

⁴ According to Campbell, the term "operating ratio" is the ratio of fixed and variable costs to revenues. Thus, a 90-percent operating ratio indicates a 10-percent profit, a 100-percent operating ratio is the "break even" point, and a 110-percent operating ratio shows a 10-percent loss, etc. It is computed for the Employer on a monthly and a year-to-date basis, and it appears on the Employer's monthly statements.

because it also affected his own wages. Adams also informed Rossio about the Union's petition. Adams and Rossio next met on the morning of 22 November, at which time they decided to restore the 10-percent wage cut, pending approval by the Company's attorneys. Upon receiving such approval, Rossio sent the following letter to employees:

TO ALL EMPLOYEES:

You will recall that in September we were forced to implement a 10% reduction in all wages—including that of management—due to falling profitability. I promised you at the time that as soon as we regained profitability we would restore wages to their full rate.

I am happy to announce that our Profit and Loss Statement for October has just arrived, and it shows that we have regained profitability. Therefore, effective Monday, November 29, 1982, all wages will be restored to their full level.

Without the effort of each and every one of you it would have been impossible to turn our profitability around so quickly. I want to thank you all for your hard work. It certainly paid off.

As it turned out, October was the only month in which a 90-percent operating ratio was achieved. Thus, by the time of the hearing, the Employer had sustained operating losses for the months of November, December, and January 1983. However, the Employer had not reimposed a 10-percent wage cut.

It is well established that the granting of a wage increase or other benefits during the critical period preceding an election is not *per se* grounds for setting aside an election. The crucial determinant is whether the wage increase or other benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect.⁵ As a general rule, an employer's legal duty in deciding whether to grant improvements while a representation proceeding is pending is to decide that question as it would if the union were not on the scene.⁶ Thus, if the employer's actions were not altered by the presence of the union, the Board will not set aside the election.

In the instant case, undisputed testimony supports the Employer's contention that it had decided, prior to the commencement of the union campaign, to restore the 10-percent wage cut as soon as a monthly operating ratio of 90 percent was at-

tained. The hearing officer, however, stated that, although the Union presented no direct evidence on this issue, he had difficulty crediting the Employer's witnesses, particularly Adams and Campbell, because he found their testimony to be "evasive and self-serving." The hearing officer further observed that he would not credit them "in any instance where their accounts diverge from what could reasonably be expected." Accordingly, he found it necessary to analyze the "economic reasonableness" of the Employer's position.

Although acknowledging that the Employer's monthly operating ratio might "lie within the bounds of generally accepted accounting principles," the hearing officer questioned its value as a tool for managerial analysis and found it "hard to conceive of a knowledgeable consultant making a recommendation" based thereon. Further finding it "highly unlikely that a rational Employer" would cut wages just to achieve 1 month of profitability, the hearing officer concluded that the only reasonable explanation for the Employer's action in restoring wages when it did was to diminish support for the Union, particularly since the Employer's campaign literature contained the "recurring theme that the Union was not the one who grants pay increases and benefits around here."

In disagreeing with the hearing officer's findings and conclusions, we note at the outset that the hearing officer's credibility resolutions were not based primarily on the demeanor of the witnesses. Rather, his resolutions were grounded on his assessment that the testimony of the Employer's witnesses was evasive and self-serving and on his belief that the Employer's financial decisions were unreasonable or irrational. Our policy normally is to attach great weight to a hearing officer's credibility findings insofar as they are based on demeanor. However, to the extent they are based on other factors, we may proceed with an independent evaluation. *Canteen Corp.*, 202 NLRB 767 (1973); *Valley Steel Products*, 111 NLRB 1338 (1955).

It is clear from the record that Campbell was an independent consultant who had years of experience in the trucking industry and who had no financial ties to, or financial interest in, the Employer. It further appears that Campbell made his recommendations to the Employer based on a review of financial statements which were prepared for the Employer each month by an independent accounting firm. We further find, based on our review of the record, that the testimony of the Employer's witnesses was neither evasive nor self-serving on this issue, albeit Adams' testimony may have been vague and imprecise at times.

⁵ See *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

⁶ *Great Atlantic & Pacific Tea Corp.*, 166 NLRB 27 (1967).

Nor do we share the hearing officer's belief that the Employer's decision to accept Campbell's recommendations based on the monthly operating ratio was inherently unreasonable or irrational. Uncontradicted testimony indicates that the monthly operating ratio, although admittedly subject to fluctuation, is the standard measure of profitability for the trucking industry and that it was used as such by the Employer. Nevertheless, the hearing officer proceeded to substitute his own judgment as to the reasonableness of the accounting principles applied, which in turn played a part in his credibility resolutions. Since we find that the hearing officer's findings are unsupported by testimony and are contrary to the uncontradicted evidence, we conclude that there is no basis for discrediting the Employer's witnesses or rejecting the Employer's defense on such grounds.

Moreover, even if we were to adopt the hearing officer's credibility resolutions in full, it still is evident that, prior to any organizational activity, the Employer had decided to restore the 10-percent wage cut when some level of profitability was reached, and that it had already informed its employees to that effect.⁷ We further find that the Employer's 23 November announcement of the wage restoration was made in a neutral manner, with no reference to the Union or to the filing of the petition 1 week before.⁸ Finally, we note that

⁷ To the extent the hearing officer relied on the fact that the Employer did not communicate to its employees the specific level of profitability that would trigger a return to the former wage levels, we do not view this as a basis for rejecting the Employer's position that it had decided on the 90-percent figure prior to any union activities. In this regard, we also note employee Deto's testimony (which we have discussed above, but which the hearing officer failed to mention) that Rossio told employees at the late September meeting that wages would be restored approximately within a month.

⁸ We also note that the Employer's campaign literature contained no reference to the wage restoration and that the hearing officer's finding

the 10-percent wage cut and its subsequent restoration were both implemented Companywide and affected all employees from the Company's president on down. Under all of these circumstances, we find that the 29 November wage increase was merely the culmination of events begun in September prior to the commencement of union activity and therefore that the Employer's course was not altered by the presence of the Union.⁹

Based on all of the foregoing, we conclude that the wage increase was not designed to interfere with the election. Therefore, we shall overrule the Petitioner's Objection 3. Accordingly, as we have overruled the objection and as the tally of ballots shows that the Petitioner has not received a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that it is not the exclusive representative of these bargaining unit employees.

that the "recurring theme" of the Employer's campaign literature was that wage increases and benefits were granted by the Employer, not the Union, is unsupported by the record.

⁹ Although the Employer's monthly operating ratio did in fact decline after 1 month of profitability in October 1982 and no new wage cut was imposed, we do not view this circumstance as determinative of the Employer's motivation in restoring full wages in November, particularly in view of Campbell's uncontradicted testimony that he made no recommendation as to what to do in the event the monthly operating ratio again declined once the former wages were restored, and since there was no other evidence that the Employer's officials had ever discussed such an eventuality.