

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

SIMPSON STRONG-TIE, INC.

Employer

and

Case 9-RC-17274

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION #287

Petitioner

SUPPLEMENTAL DECISION, ORDER
AND
DIRECTION OF SECOND ELECTION

Pursuant to the provisions of a Decision and Direction of Election, herein called the Decision, a secret ballot election was conducted on September 3, 1999, among certain employees ^{1/} of the Employer to determine whether such employees desire to be represented by the Petitioner for the purposes of collective bargaining. The tally of ballots furnished to the parties showed that of approximately 73 eligible voters, 20 cast ballots for the Petitioner, 41 cast ballots against union representation and 9 ballots were challenged. The challenged ballots were not sufficient in number to affect the results of the election. On September 9, 1999, the Petitioner filed timely objections to conduct affecting the results of the election.

On September 29, 1999, I issued a Report on Objections, Order Directing Hearing and Notice of Hearing in which I ordered that a hearing be conducted before a duly-designated hearing officer to resolve the issues raised by the Petitioner's Objections 1, 2 and 4. I further ordered that the hearing officer designated for the purposes of conducting the hearing prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, finding of facts and recommendations as to the disposition of the issues raised by the Objections.

^{1/} The appropriate bargaining unit as set forth in the Decision is: "All full-time and regular part-time production and maintenance employees, including fabricating employees and warehouse employees, employed by the Employer at its facility located at 2600 International Street, Columbus, Ohio, excluding all office clerical employees, administration employees, operations employees, sales and service employees, engineers and all other professional employees, guards and supervisors as defined in the Act."

On October 19, 1999, a hearing was held in Columbus, Ohio before Hearing Officer Charles H. Brooks. On October 29, 1999, the hearing officer issued and served upon the parties his report and recommendations in which he recommended that Objections 1 and 2 be overruled as they did not raise any issues adversely impacting the election.^{2/} However, the hearing officer found that Objection 4 raised substantial and material issues affecting the results of the election. Accordingly, the hearing officer recommended that Objection 4 be sustained, that the election be set aside and that a second election be directed. On November 12, 1999, the Employer timely filed exceptions to the hearing officer's recommendation that Objection 4 be sustained and that the election be set aside along with a supporting brief.

The undersigned has reviewed the hearing officer's rulings made at the hearing and find that they are free from prejudicial error.^{3/} Accordingly, they are hereby affirmed.

In Objection 4, the Petitioner alleges that the Employer gave hourly raises to the unit employees immediately preceding the election. The Employer concedes that it granted wage increases to unit employees during the critical period but maintains that such increases were consistent with its past practice and were implemented based on legitimate business considerations.

The hearing officer found, and the record discloses, that the Employer granted wage increases to 41 unit employees during the critical period prior to the election. The hearing officer noted that the Board infers that benefits granted during the critical period prior to an election are objectionable but that such inference may be rebutted by an employer. *United Airlines Services Corp.*, 290 NLRB 954 (1988); *Lampi, L.L.C.*, 322 NLRB 502 (1996). In making a determination whether a grant of benefits prior to an election is objectionable, the Board, as noted by the hearing officer, considers: (1) the amount of the benefit; (2) the number of employees receiving the benefit; (3) whether the raise was excessive when measured historically; (4) how employees would reasonably view the purpose of the benefit and (5) the timing of the benefit. *B & D Plastics*, 302 NLRB 245 (1991); *A.K. Steel Corporation*, 317 NLRB 260 (1995).

Applying the rationale of the above cases, the hearing officer found that six of the wage increases granted during the critical period were consistent with the Employer's past practice and

^{2/} In the absence of any exceptions, I adopt *pro forma* the hearing officer's recommendations overruling Objections 1 and 2. The Employer's contention, in its exceptions, that the hearing officer erred by failing to specifically find that Mike Bandy was a supervisor lacks merit. The hearing officer found that if Bandy's conduct in permitting an employee to circulate an antiunion petition for a short period of time was attributable to the Employer, it would not warrant setting aside the election. Neither party, as noted, has filed exceptions to the hearing officer's recommendation that the conduct allegedly engaged in by Bandy, if attributable to the Employer, would not warrant setting aside the election. Under these circumstances, I find that the hearing officer did not commit error by his failure to specifically rule on Bandy's supervisory status.

^{3/} The Employer has challenged some of the hearing officer's credibility findings. A hearing officer's credibility resolutions will not be overruled unless the clear preponderance of all the relevant evidence shows they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359 (1957). I find no basis for reversing the hearing officer's credibility findings.

were not objectionable. The record supports this conclusion. However, the hearing officer found that wage increases granted to 35 unit employees effective August 16, 1999 and which appeared for the first time on paychecks distributed to employees on August 25 and 26, 1999, approximately 8 or 9 days before the election, were not based on any past practice or justified by business considerations. A careful review of the record supports the hearing officer's findings. The hearing officer notes that these 35 raises were based on employee evaluations and were unprecedented in the amount of the raise and number of employees impacted. Although the Employer, as found by the hearing officer, granted some wage adjustments on July 1, 1998, such increases were not based on employee evaluations and the number of employees effected and the amount of the increases were small. The August 1999 increases were substantial consisting of between a 4.9 percent and a 25.5 percent increase. In addition, as found by the hearing officer, the Employer's August 18, 1999 campaign literature made clear that the Employer's behavior regarding wage increases during the critical period was affected by the fact that the employees were seeking representation.

The hearing officer found that granting a wage increase to 35 of approximately 73 unit employees, which grant was made known to the entire unit through the Employer's August 18, 1999 campaign literature, was coercive and constituted objectionable conduct. In reaching this decision, the hearing officer found that the Employer had failed to rebut the presumption that wage increases of the type involved here have an improper influence on employees and constitute a basis for setting aside an election. *United Airline Services Corp.*, supra; *Beverly Enterprises*, 279 NLRB 327 (1986). Accordingly, the hearing officer recommended that the election be set aside and that a second election be directed.

Having carefully reviewed the hearing officer's report, the entire record and the arguments of the parties at the hearing and in the Employer's exceptions, I find that the hearing officer's recommendations are fully supported by the record testimony. Specifically, I agree that the August 1999 wage increases granted to the unit employees were inconsistent as to timing with the increases granted in 1998 or in any previous year, that the substantial amount of the increases were unprecedented, and that the granting of the increases approximately 8 or 9 days before the election was calculated by the Employer to interfere with the Board's election processes. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *NLRB v. WKRG-TV*, 470 F.2d 1302, 1307-1308 (5th Cir. 1973); *NLRB v. Axton Candy & Tobacco*, 645 F.2d 555 (6th Cir. 1981). Indeed, the Board has based *Gissel* bargaining orders solely on 8(a)(1) violations, including wage increases. See, *Stanley Feil*, 250 NLRB 1154 (1980), enf'd 674 F.2d 567 (6th Cir. 1982); *Tower Records*, 182 NLRB 382 (1970), enf'd 79 LRRM 2736 (9th Cir. 1972). Conduct by an employer sufficient to support a *Gissel* bargaining order, *a fortiori*, warrants setting aside an election.

In its exceptions, the Employer does not contest the findings of the hearing officer regarding the granting of the wage increases. Moreover, the Employer does not challenge the amount or timing of the increases. However, in its exceptions the Employer claims that consistent with its previous mid-year wage adjustments it granted the August 1999 wage increases for a legitimate business reason resulting from a "wage compression."

I agree that *Red Express*, 268 NLRB 1154 (1984), cited by the Employer in its brief, stands for the proposition that an employer, in determining whether to grant benefits during

pending representation proceeding, must answer the question as it would if the union were not on the scene. I also agree that *Uarco, Inc.*, 216 NLRB 1 (1974) and *Singer Co.*, 199 NLRB 1195 (1972), cited by the Employer in its brief, holds that an employer may rebut the inference that benefits granted during the critical period prior to an election are coercive and that the critical issue is whether the benefits were granted for the purpose of influencing the votes of the employees or were reasonably calculated to have that impact. *NLRB v. Exchange Parts Co.*, supra. In his report, the hearing officer carefully considered and rejected the same arguments which the Employer advances in support of its exceptions. I find that the record supports the hearing officer's findings on these issues and that the Employer's arguments lack merit. In reaching this decision, I note that the Employer has not cited any legal precedent in factual situations similar to those present here which supports its position.

The evidence discloses, as found by the hearing officer, that the only pay raise in the history of the Employer that in any way resembles the August 16, 1999 increases was a wage adjustment given to 14 employees on July 1, 1998. However, in my opinion, and as found by the hearing officer, the July 1, 1998 one-time adjustment for some 14 employees does not establish a history of granting mid-year wage increases. The July 1, 1998 wage increases were not based on employee evaluations and the amount of the increases was confined to a very narrow range. As found by the hearing officer, the increases granted in August 1999 were inconsistent as to timing and amount with respect to the raises in July 1998 and, in fact, were unprecedented. Accordingly, I find, in agreement with the hearing officer, that such unprecedented raises granted only 8 or 9 days before the scheduled election would, absent unusual circumstances, constitute grounds to set aside the election. *International Shore*, 123 NLRB 682 (1959); *NLRB v. Exchange Parts Co.*, supra.; *NLRB v. WKRG-TV*, supra; *NLRB v. Axton Candy & Tobacco Co.*, supra.

The unprecedented pay increases implemented during the critical period, as noted above, constitute grounds to set aside the election unless the Employer can demonstrate that the increases were necessary based on business considerations. The only business justification offered by the Employer, which it argues in its brief, is that the increases were required because of a "wage compression." In support of this position, the Employer relies on the testimony of its plant manager, Richard Nolan. Nolan testified that commencing early in 1999 the Employer began experiencing problems in hiring enough employees to fully staff its facility. According to Nolan, the Employer had 19 unfilled positions in May 1999. Nolan avers that to staff these positions the Employer determined that it would have to increase its starting wages for new employees and that by August 1999 10 of the 19 positions had been filled. Nolan states that as a result of hiring a number of new employees at a higher rate of pay the wages for the new employees were close or more than that of some of the older employees. Thus, the Employer had created a "wage compression" and that to relieve the compression, the Employer decided to stretch its wage scale in order to keep a reasonable span between the new employees and those who had been employed for several years. However, the Employer does not state why it had to implement these raises effective August 16, 1999, particularly when only 10 of the 19 positions that were unfilled in May had been staffed by August 1999.

Initially, the hearing officer concluded that, based on the evidence, he was unable to determine when any wage compression actually occurred or whether there was any causal

connection between the need to alleviate the effects of the asserted wage compression and the August 16, 1999 wage increases. The hearing officer also noted that Nolan testified that the decision to stretch the Employer's wage scale was made early in the summer of 1999 but the record is devoid of any evidence as to how and when the decision was made as to the actual date (August 16, 1999) the raises would be implemented. Accordingly, the hearing officer concluded that the reason advanced by the Employer for granting the August 16, 1999 pay increases was a pretextuous attempt to conceal its true desire to affect the outcome of the election. In my opinion, the record fully supports the hearing officer's conclusion. Based on the fact that the timing of the August 16, 1999 wage increases was in close proximity to the election as well as the August 18, 1999 campaign literature in which the Employer placed the onus on the Petitioner for the Employer's failure to grant increases earlier in the summer of 1999 and the suggestion that the Petitioner might cause the Employer to rescind the raises already granted, I find that the conclusion of the hearing officer that the Employer granted the wage increases on August 16, 1999 to affect the outcome of the election is supported by the record.

Moreover, I agree with the hearing officer that there is no record testimony, and the Employer, in its brief, has not advanced any valid reason why it could not have stretched its wage scale prior to the filing of the petition or, more importantly, why it could not have waited until after the election to do so. Indeed, where an employer has legitimate business considerations, which I have found that the Employer did not have here, to grant employee benefits during a pending representation proceeding, the implementation of such a decision during the critical period will nevertheless be, as found by the hearing officer, objectionable, unless the employer can establish a legitimate reason for its timing. *Shore & Ocean Services, Inc.*, 307 NLRB 1051 (1992); *Beverly Enterprises*, supra. Having carefully reviewed the record I find, in agreement with the hearing officer, there is no evidence as to why the Employer selected August 16, 1999 as the date on which to implement the wage increases as opposed to some date a few weeks earlier or later. Succinctly, there is no conceivable reason why the Employer was compelled to suddenly correct a problem on August 16, 1999 which had commenced earlier in the year and which could have been easily corrected after the election without any harm. Therefore, even assuming *arguendo* the Employer could establish that it needed to stretch its pay scale because of a "wage compression," the timing of the wage increases would, nevertheless, be objectionable. *Shore & Ocean Services, Inc.*, supra; *International Shore*, supra.

Based on the foregoing and having carefully reviewed the hearing officer's report, the entire record and the arguments of the parties at the hearing and in the Employer's brief on exceptions, I find, in agreement with the hearing officer, that Petitioner's Objection 4 raises substantial and material issues affecting the results of the election and it is hereby sustained. Accordingly, I shall order that the election be set aside and direct that a second election be conducted.

ORDER

IT IS HEREBY ORDERED that the election conducted on September 3, 1999 among the employees of the Employer in the unit found appropriate be, and it hereby is, set aside

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Second Election to be issued subsequently, subject to the Board's Rules and Regulations.^{4/} Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Supplemental Decision, Order and Direction of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Sheet Metal Workers International Association, Local Union #287.

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Supplemental Decision 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **November 23, 1999**. No extension of time to

^{4/} In agreement with the hearing officer, the Notice of Second Election in this matter shall contain the following language:

NOTICE TO ALL VOTERS

The election conducted on September 3, 1999, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with this Notice of Election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties. *Lufkin Rule Company*, 147 NLRB 341, 342 (1964).

file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **November 30, 1999**.

Dated at Cincinnati, Ohio this 16th day of November 1999.

Richard L. Ahearn, Regional Director
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