STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of TEAMSTERS, CHAUFFEURS AND HELPERS UNION, LOCAL NO. 43 For a Referendum on the Question of an All-Union Agreement between KING CADILLAC, INC. Brookfield, Wisconsin, Employer and TEAMSTERS, CHAUFFEURS AND HELPERS UNION, LOCAL NO. 43, Union	Case I No. 15714 R-5340 Decision No. 11152-B

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan M. Levy, for the Union.

Mr. Walter S. Davis, Attorney at Law, for the Employer.

ORDER WITH RESPECT TO CHALLENGED BALLOTS, SUSTAINING OBJECTIONS TO CONDUCT OF REFERENDUM, SETTING ASIDE RESULTS OF REFERENDUM AND DIRECTION OF NEW REFERENDUM

The Wisconsin Employment Relations Commission, pursuant to a Direction previously directed by it based on a stipulation filed by the parties, conducted a referendum on August 2, 1972, among all mechanics, body men, setup men, adjusters, polishers, lot men, pick up and delivery drivers and parts men in the employ of King Cadillac, Inc., Brookfield, Wisconsin, excluding all office clerical employes, sales personnel, guards and supervisors, as well as all other employes, to determine whether the required number of such employes desire to authorize an all-union agreement between said Employer and Teamsters, Chauffeurs and Helpers Union, Local No. 43; that the results of the referendum indicated that of eighteen employes claimed eligible to vote, eighteen cast ballots, three of which were challenged, and of the remaining fifteen ballots counted, seven were cast in favor of authorizing an all-union agreement, while eight ballots were cast against such authorization; that the three individuals whose ballots were challenged, one by the Union claiming that the individual involved was a supervisor, and the remaining two by the Employer on the basis that the two individuals involved had been terminated prior to the conduct of the balloting; that on August 4, 1972, the Commission directed a letter to the parties wherein it indicated that the three individuals whose ballots were challenged were not on the eligibility list agreed upon by the parties prior to the conduct of the referendum, and in said letter, the Commission requested an explanation as to why no protest had been made to the eligibility list prior to the conduct of the balloting; that no satisfactory explanation with regard thereto

On August 7, 1972, the Union timely filed objections to the conduct of the referendum, wherein it alleged that prior to the balloting, the Employer engaged in such conduct as to interfere with the free choice of the employes in the referendum; that on receipt of said objections, the Commission, on August 7, 1972, issued an Order requiring the Union to make its objections more definite and certain; and on August 10, 1972, the Union submitted a letter setting forth its objections with more definiteness and certainty; that, pursuant to notice, hearing on the objections was conducted on August 31, 1972 at Milwaukee, Wisconsin, by Marshall L. Gratz, Hearing Officer; that the Commission having considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises, being satisfied that prior to the conduct of the balloting the Employer engaged in such conduct which interfered with, and affected, a free choice of the employes in determining whether they desire to authorize an all-union agreement between the parties, and the Commission, therefore, being satisfied that the objections to the conduct of the referendum be sustained;

NOW, THEREFORE, it is

ORDERED

1. That the challenge to the ballot cast by John Miedzybrocki be, and the same hereby is, overruled, and the challenges to the ballots cast by William Braidigan and Bruce Hanson be, and the same hereby are, sustained.

2. That the results of the referendum heretofore conducted herein on August 2, 1972, be, and the same hereby are, set aside.

IT IS FURTHER ORDERED that a new referendum by secret ballot be conducted within thirty (30) days from the date hereof among all mechanics, body men, setup men, adjusters, polishers, lot men, pickup and delivery drivers and parts men employed by King Cadillac, Inc. at its location at 12800 West Capitol Drive, Brookfield, Wisconsin, but excluding all office clerical employes, sales personnel, guards and supervisors as defined in the Act, and all other employes who were employed by the Employer on July 12, 1972, except such employes as may prior to the referendum quit their employment or be discharged for cause, for the purpose of determining whether the required number of such employes favor an all-union agreement between the Employer and the Union named above.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

MEMORANDUM ACCOMPANYING ORDER WITH RESPECT TO CHALLENGED BALLOTS, SUSTAINING OBJECTIONS TO CONDUCT OF REFERENDUM, SETTING ASIDE RESULTS OF REFERENDUM AND DIRECTION OF NEW REFERENDUM

On June 6, 1972, the Union filed a petition requesting the Commission to conduct a referendum among the employes of the Employer, employed in the unit set forth on June 26, 1972, and was subsequently postponed to July 11, 1972. During the hearing on July 11, 1972, the parties submitted a Stipulation for Referendum. Said stipulation did not include a list of employes agreed upon by the parties as being eligible to participate in the referendum. On July 13, 1972, pursuant to an understanding reached during the hearing, Counsel for the Employer furnished the Union and the Commission with a list containing the names of sixteen employes who were allegedly in the employ of the Employer as of that date. On July 19, the Commission issued a formal Direction of Referendum in the matter. The Direction contains a typographical error. It indicates that the Direction was issued on May 19, 1972. The month should have been corrected to indicate July, 1972. On July 25, 1972, the Commission forwarded a Notice of Referendum to the parties which indicated that the balloting would be conducted on Wednesday, August 2, 1972, between 2:00-2:30 p.m. at the Employer's premises. The tally of ballots executed by the parties and the Commission agent, following the conduct of the balloting indicates the following results:

1.	Employes claimed eligible to vote	18
2.	Ballots cast	18
3.	Ballots challenged	3
4.	Valid ballots counted	15
5.	"Yes" ballots	7
6.	"No" ballots	8

During the conduct of the balloting, the Union challenged the ballot of John Miedzybrocki, whose name had appeared on the eligibility list previously furnished to the Union prior to the balloting. The Employer challenged the ballots of William Braidigan and Bruce Hanson, whose names had not appeared on the eligibility list. However, Braidigan and Hanson presented themselves to vote and the Employer's challenge to their ballots was based on the Employer's claim that Braidigan and Hanson were terminated from employment on July 7, 1972 and March 31, 1972 respectively.

On August 4, 1972, upon receipt of the tally sheet and the report of the Commission's agent regarding the balloting, the Commission directed the following letter to the Union with copies to its Counsel as well as copies to the Employer and its Counsel:

> "During the conduct of the referendum balloting among the employes of the above noted Employer, the observer of your Union challenged the ballot of John Miedzybrocki and also, the Employer challenged the ballots of Bruce Hansen and William Braidigan whose names were not on the eligibility list but who appeared to vote. The Employer challenged the ballots cast by Braidigan and Hansen contending that they were terminated.

Your observer contended that they were in layoff status. You will recall that this proceeding was initiated by the filing of a petition. However, that on July 11, 1972, Attorney Davis, on behalf of the Employer, and Attorney Levy, on behalf of your Union, executed a stipulation for referendum. At the time the stipulation did not contain a list of employes agreed upon as being eligible to vote. However, on the following date Mr. Davis submitted an eligible voter list to the Commission and sent a copy thereof to you and to Mr. Levy. No objection to the eligibility list as submitted by Attorney Davis was raised prior to the conduct of the balloting. Normally, the Commission will not take challenges where an eligibility list is submitted either along with the stipulation or during the course of the hearing, where there is no objection to the list as submitted by the Employer. Will you please advise as to why you did not question the correctness of the eligibility list between the receipt of same by you on or about July 13, 1972, and the conduct of the ballot."

On August 7, 1972, the Union timely filed objections to the conduct of the referendum where they contended that:

"On or about July 28, 1972, the Employer misrepresented to employees the significance of the referendum, the significance of their vote, and the rules and law concerning these matters.

By these and other acts, the Employer has engaged in conduct which interfered with the employees' right to a fair and free election procedure."

The Commission on its own motion, upon receipt of the objections, issued an Order requiring the Union to make the objections more definite and certain by setting forth exactly as possible the statements made by the Employer alleged to have constituted the misrepresentation referred to in the objections.

On August 10, 1972, the Union, by its Counsel, in a letter with respect to the Commission's Order to make the objections more definite and certain responded as follows:

"The challenges were based on what can only be labeled confusion. The matter was put on for hearing, and at the hearing, the parties agreed to an election. The eligibility list was forwarded by the company a few days later to the Union, at my request, and the Union officials did not appreciate the difference between what they thought was an 'Excelsior List' and the Commission's rules concerning stipulated eligibility list in referendum cases. The end result is that the Union failed to make a timely objection to the list simply because the Business Agents did not appreciate this subtle legal distinction. For that reason, the Union feels it is is (sic) necessary to follow the challenge path.

The specific basis for the objections is the Employer's letter to employees dated July 28, 1972. In this letter, the Employer told employees that an affirmative vote for union shop and a consequent all union agreement would mean that all employees in the bargaining unit were subject to union

discipline and fines, and repeated mention was made of the disadvantage of being subject to such discipline and fines. Of course, Federal law does not permit mandatory membership and subjection to internal union discipline as part of union security, but simply states that payment of regular dues and fees will represent adequate compliance with the union security so that actual membership, oaths of obligation, and subjection to discipline are not necessarily part of compliance with union security. In short, the employer specifically misrepresented the significance of the union security procedures and the impact it would have on the individuals, implying that they would necessarily be subject to discipline and fines if union security came into the contract and was ratified by referendum; this threat clearly had an inhibiting effect on employee voting."

The Commission conducted hearing with respect to the objections on August 30, 1972, where the parties were given the opportunity to present evidence and arguments with respect to the matters of issue.

THE CHALLENGED BALLOTS:

The Union's argument with respect to the challenged ballots is not persuasive, and therefore, the Commission has overruled the challenged ballot of John Miedzybrocki and sustained the challenges to the ballots cast by William Braidigan and Bruce Hansen. 1/

OBJECTIONS TO THE CONDUCT OF THE REFERENDUM:

On July 28, 1972, Frank J. King, Chief Executive for the Employer, mailed the following letter to each of the employes in the unit:

"TO ALL KING SHOP EMPLOYEES AND THEIR FAMILIES,

On Wednesday, August 2, 1972 there will be another election in our shop to determine whether a majority of the

> Mechanics, body men, set up men, adjusters, publishers, lot men, pick up and delivery drivers and parts men

wish to give the Racine Teamsters Union the authority to try to negotiate a union shop agreement. Before you vote on this very important issue I want you to know why I strongly urge you to vote 'NO'.

1. What is a union shop? A union shop is a place of employment where the employer and the union agree that no one can work there without joining the union and maintaining their

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1/ Since Miedzybrocki's ballot, if counted, and if it were cast in favor of the all-union agreement, would not affect the result of the referendum, said ballot shall be impounded and remain sealed.

membership by paying dues and accepting the discipline of fines and assessments of the union OR BE FIRED.

2. A union shop in my view is not in your interest or mine because it --

a. Makes it expensive to hire good people. You've heard the union saying join now for $10 or later for $75 initiation fee. Would you be anxious to go to work if you had to lay out $75 just to get the job.

b. Forces and coerces free people--you--to pay tribute to an outsider whether he does what you want or not, whether you want him or not. It would be just like if a majority elected Ricahrd Nixon, then all of us having to contribute from our earnings to support the Republican party or lose our citizenship. In my opinion this is fundamentally unfair to people.

c. Forces and coerces free people to pay not only initiation fees and dues or lose their jobs, but it also makes free people subject to the discipline, fines and assessments of unions and forces them to support political issues and candidates--not of their choice--but of the union bosses' choice.

No matter what the outcome of this vote, I do not now intend to agree to a union shop which will subject our employees to these risks and outside domination. The union will have to bargain hard for a union shop and my observation has been that when unions bargain hard that usually means strikes and strikes mean loss of income to all of us and loss of customers, who are our real job security.

So, I urge you to vote 'NO'. Don't vote for my interests. Don't vote for the union's interest. Vote for your own self-interest and your own freedom of choice. Vote 'NO'.

Sincerely,

(Signed) Frank J. King
Frank J. King."

Charles Spore, one of the employes in the unit, who was delegated the responsibility by Union officials to forward any and all materials received by him concerning the referendum to the Union Business Representative, did not bring the letter to the attention of the Business Representative until August 3, 1972, the day following the balloting, since Spore had been out of town on the days preceding the referendum and did not, therefore, check his mail until August 3. To Spore's knowledge, no one else brought the letter to the attention of the Business Representative prior to the balloting. Spore did not know when the letter was delivered to his home.

POSITIONS OF THE PARTIES:

The Union argues that paragraphs 1. and 2.c. of the letter assert that a vote in favor of an all-union agreement and a consequent all-union agreement in the contract would mean that all employes in the bargaining unit would become subject to the disadvantages of union discipline and fines; that Federal law provides that union security means that an employe must "tender the periodic dues and the initiation fees" of the union, not that he must actually join the union, take the oath, and become subject to union discipline; that the letter therefore contained a misrepresentation which would have an inhibiting effect on employe voting; that the letter should be presumed to have been received on Saturday, July 29 or Monday, July 31 in the ordinary course of the mails; and that under the circumstances, the Union was not able to effectively respond to the Employer's misrepresentations before the vote. For those reasons, the Union requests that the referendum be set aside and that a new vote be ordered.

The Employer argues that the letter referred to the requirements and consequences of a "union shop"; that a "union shop" and an all-union agreement are one and the same; that both of the foregoing arrangements require union membership; that the Petitioner's proposal for union security expressly required membership in a union 2/; that Federal law provides that all members of a union are subject to its discipline and fines; that for the foregoing reasons, the letter was not misleading; that the letter contained no misrepresentations of the legal consequences of a union shop or of an all-union agreement; and that, in any event, the letter constituted proper pre-election propaganda in which the Employer was lawfully entitled to engage.

DISCUSSION:

Where the validity of an election or referendum conducted by this Commission is challenged on grounds other than direct interference or irregularities in the voting process, there is a strong presumption that ballots cast in secrecy under the safeguards provided by our procedure reflect the true wishes of the employes participating. 3/ Moreover, the Commission will not ordinarily pass judgment on campaign materials. Though we do not condone exaggerations, inaccuracies, partial truths and name-calling, campaign material incorporating such devices may be excused as propaganda if it is not so misleading as to prevent a free choice by the employes. 4/ Thus, the question which the Commission must determine is whether under the circumstances in this case the Employer's letter was of such character that it would interfere with the free choice of the employes voting.

2/ The Employer brought forward the Union's union security proposal for the first time as an appendix to its brief. Since it was not presented at the hearing, the Commission cannot consider that document as part of the Record in this case.

3/ Whitefish Bay Cleaners & Tailors, Inc., Dec. No. 5335-B, 2/60.

4/ North Avenue Laundry, Dec. No. 5716-B, 11/61; London Hat Shop, Dec. No. 7023-B, 6/65 and City of Green Bay, Dec. No. 8098-B, 11/67.

We conclude, for reasons that follow, that the letter herein at issue involved a substantial departure from the truth, was communicated at a time which prevented the Union from making an effective reply and may reasonably be expected to have an adverse impact on the outcome of the balloting.

Misrepresentation

The introductory paragraph of the letter clearly indicates to the reader that the paragraphs which follow it were addressed to the disadvantages of the possible consequences of a "Yes" vote by a majority of the employes in the bargaining unit. Thereafter in Paragraph 1, the letter states in part that

> "A union shop is a place of employment where the employer and the union agree that no one can work there without joining the union and maintaining their membership by paying dues and accepting the discipline of fines and assessments of the union OR BE FIRED." (Underlinings added.)

The message that would be drawn from those words by a layman is that if a majority of the employes were to vote "Yes" and an all-union agreement were to be granted at the table by the Employer, all employes would become subject to discharge by the Employer in the event of their failure to pay fines assessed by the Union for breaches of Union discipline. That message misrepresents the legal consequences of an all-union agreement.

It is true that Section 111.02(9) of the Wisconsin Statutes (1969, as amended) defines "All-Union Agreement" as ". . . an agreement between an employer and the representative of his employees in the collective bargaining unit whereby all or any of the employees in such unit are required to be members of a single labor organization." (Emphasis added.) It is also true that so long as an individual is a member of a union, he or she is ". . . subject to union discipline". 5/ But it is not true that a union may enforce fines by subjecting the offending employe to discharge by the employer in alleged compliance with an all-union agreement or with any other form of union security arrangement valid under the National Labor Relations Act (as amended). For no requirement for initial or continued union membership except for payment of customary dues and initiation fees may be used as the basis for a discharge by an employer pursuant to a union security agreement. 6/ The United States Supreme Court has clarified this area of law, in NLRB v. General Motors 373 U.S. 734, as follows:

5/ See, Lodge 405, Machinists v. NLRB, 79 LRRM 2443, 2447 (CADC, 1972) citing Scofield v. NLRB, 394 U.S. 175, n.5, 70 LRRM 3105, 3107 n.5 (1969).

6/ See, Union Starch & Refining Co. v. NLRB, 87 NLRB 779, 25 LRRM 1176 (1949), enforced, 186 F.2d 1008, 27 LRRM 2342 (CA 7, 1951), cert. denied, 342 U.S. 815, 28 LRRM 2625 (1951). A union may, however, pursue a judicial remedy based on a contract between the union and it members. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 65 LRRM 2449 (1967).

". . . the 1947 amendments not only abolished the closed shop, but also made significant alterations in the meaning of 'membership' for the purposes of union security contracts. Under the second proviso to Sec. 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core."

Thus, an employer's discharge of an employe for failure to pay a union-imposed fine would constitute an unfair labor practice in violation of Section 8(a)(3) of the National Labor Relations Act (as amended). 7/ The National Labor Relations Board has the authority to issue cease and desist orders concerning proven unfair labor practices ". . . and to take such affirmative action including reinstatement of employes with or without pay, as will effectuate the policies of . . ." the National Labor Relations Act. 8/ Remedial orders concerning discharges in violation of Section 8(a)(3) ordinarily include reinstatement and often include back pay. 9/

Thus, to unqualifiedly inform employes that in the event of an all-union agreement they will face discharge for failure to accept union discipline or fines is to mislead those employes significantly.

Paragraph 2.a. of the Employer's letter contains a very significant misstatement of fact in that the Employer states that unions force its employes to support political issues and candidates not of the employes choice "but of the union bosses' choice." 10/ By such a statement the Employer has gone far beyond the permissible bounds of campaign rhetoric. No other inference can be drawn by said statement made by the Employer but that employes will be fined and subject to discipline if they do not support and vote for candidates endorsed by the Union.

Impact on Election Outcome

The misrepresentations involved herein are especially serious because they relate to the job security of the employes and untruthfully asserts that a "Yes" vote could make that job security dependent upon conditions other than those permitted by law. In short, the misrepresentations are such which might reasonably have had an impact on the free choice of the employes.

7/ See, Pen and Pencil Workers, 91 NLRB 883, 26 LRRM 1583 (1950) (8[b][2] violation).

8/ NLRA, Section 10(c) (as amended).

9/ cf. Pen and Pencil Workers, 91 NLRB 883, 26 LRRM 1583 (1950).

10/ The remarks of the Employer are significant since they were made during an election year.

The probability that the misrepresentation affected the outcome of the referendum is heightened considerably by the fact that the Union did not have an opportunity to effectively reply to and thereby correct the misrepresentations stated in the Employer's letter. We presume that the employes received copies of the letter in the ordinary course of the mails on Saturday, July 29 or Monday, July 31. The record in this case suggests that Union officials were not in fact alerted about the Employer's letter until after the vote was taken. In any event, the period from July 29 until August 2 did not give the Union an opportunity to research and effectively respond to the Employer's assertions even in view of the small number of eligibles involved. 11/

Conclusion

Based upon the foregoing reasons and the record as a whole, the Commission concludes that the Employer's letter was, under the accompanying circumstances, "so misleading as to prevent a free choice by the employes". The results of the referendum are therefore set aside, and a new referendum ordered.

Dated at Madison, Wisconsin, this 30th day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

11/ See, e.g., K-F Products, Inc., 170 NLRB No. 41, 67 LRRM 1425 (1968).