United Steelworkers of America Local 1397, AFL–CIO (United States Steel Corporation, Homestead Works) *and* Joseph Diaz. Case 6–CB–4321

February 21, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On October 26, 1978, Administrative Law Judge Herbert Silberman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering 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.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

This proceeding is, as stated by the Administrative Law Judge, an outgrowth of controversies between the leadership of Steelworkers Local 1397 and a group of dissident members, calling themselves "1397 rank & file," who oppose the Union's incumbent officers. It arose, specifically, as a result of certain statements made by Respondent's agent, Milan "Mike" Bekich, who was at the times relevant herein vice president, acting president, and a member of the grievance committee of Local 1397.[2] The credited testimony establishes that on March 11, 1978, during the course of an argument in a work shanty on the Company's premises, Bekich told fellow union member Joseph "Indian Joe" Diaz, an activist in "1397 rank & file," that he would file charges against Diaz and would seek to cause Diaz to be fired. Bekich also told Diaz on the same occasion that neither he nor other union officials would represent Diaz should Diaz thereafter file any grievance against the Company.

Bekich's above statements were ostensibly evoked by his belief, challenged by Diaz, that Diaz was partially responsible for the preparation and publication of a forged document maligning Bekich which had been distributed by "1397 rank & file." That document, consisting of a forged "Supervisor's Safety Observation Report" stating that a "1397 rank & file" supporter had been reported to management for infraction of a company rule by the vice president of the Union (Bekich), was published and distributed by "1397 rank & file" via a leaflet which also demanded Bekich's resignation because of his alleged betrayal of a fellow union member.

The Administrative Law Judge found that there was no evidence that Diaz was in any way involved in the utterance and publication of the forged report. He further found that, while the immediate reason for the argument between Bekich and Diaz was the forged observation report, an underlying reason—and thus inducement for the threats—was Diaz' intraunion activities and opposition to the Union's leadership. The Administrative Law Judge concluded, however, that neither of Bekich's "objectionable remarks" constituted threats of a nature that tended to restrain and coerce employees in the exercise of their rights guaranteed in Section 7 of the Act. We disagree.

The Administrative Law Judge, in reaching his conclusion, analyzed the statements made by Bekich in terms of whether Bekich intended them to constitute threats; and whether, attributing to Diaz the characteristics of the reasonable employee, Diaz understood the remarks to be threats and was presumably thereby restrained in the exercise of his Section 7 rights. Analogizing Bekich's remarks made in the heat of the altercation between himself and Diaz to the exhortations of a distraught mother to her errant child,[3] the Administrative Law Judge concluded that Bekich's statement that charges would be filed against Diaz and that Diaz would be fired was not a threat but more in the nature of an epithet. Thus, he concluded that the remark did not constitute a threat and did not serve to restrain or coerce employees. With regard to Bekich's statement, that, if Diaz should be subject to discipline and require the Union's representation neither he nor other union officials would represent him, the Administrative Law Judge acknowledged that the statement was indeed a threat, but viewed it as an evanescent one which likewise did not serve to restrain or coerce employees in the exercise of their statutory rights. We find that the standard applied by the Administrative Law Judge in his evaluation of the lawfulness of Bekich's remarks is erroneous, and therefore we disagree with his findings.

[1] Pursuant to Sec. 102.35(i) of the Board's Rules and Regulations, the parties entered into a stipulation at the hearing waiving a verbatim transcript of the oral testimony, as well as the right to file with the Board exceptions to any findings of fact made by the Administrative Law Judge.

[2] We note that Respondent, while denying that Bekich was acting on its behalf in its answer to the complaint, did not so contend in its brief in answer to the General Counsel's exceptions to the Administrative Law Judge's Decision. We find, in any event, that Bekich, the highest ranking officer of Local 1397 at the times relevant herein, is Respondent's agent for whose actions the Union is liable.

[3] We are constrained to note that we do not regard the analogy drawn between a mother and child and the two Steelworkers herein to be an apposite one.

In judging whether Bekich's statements to Diaz violated Section 8(b)(1)(A) of the Act, the test of misconduct is not what Bekich may have subjectively intended by his comments, nor whether any employee was, in fact, coerced or intimidated by the remarks. Rather, the test is whether the alleged offender engaged in conduct which tends to restrain or coerce employees in the rights guaranteed them in the Act. *United Steelworkers of America, AFL–CIO–CLC, Local Union 5550 (Redfield Company, a Division of Outdoor Sports Industries)*, 223 NLRB 854, 855 (1976); *Local 542, International Union of Operating Engineers AFL–CIO* v. *N.L.R.B.*, 328 F.2d 850, 852 (3d Cir. 1964), enfg. 139 NLRB 1169 (1962), cert. denied 379 U.S. 826 (1964). That an employee's right to engage in intraunion activities in opposition to the incumbent leadership of his union is concerted activity protected by Section 7 is, of course, elementary. Thus, we have previously held that a threat to have an employee discharged in retaliation for that employee's dissent over intraunion matters violates Section 8(b)(1)(A) of the Act. *United Steelworkers of America, Local No. 8061, AFL–CIO (Arrowhead Engineering Corp.)*, 226 NLRB 403 (1976); *Local 636, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO (Arco Industries, Inc.)*, 213 NLRB 61 (1974). We have likewise held that union threats to employees that the union would not represent them also violates Section 7, particularly when made by a union officer with the apparent capability of effectuating the actions threatened. *International Brotherhood of Teamsters, General Drivers, Chauffeurs and Helpers Local Union No. 886 (Lee Way Motor Freight, Inc.)*, 229 NLRB 832 (1977). Such is the case before us.

Here, the acting union president threatened a dissident union member that he would file charges and seek to have him fired, and also told that employee that neither he nor other union officials would represent the employee should he thereafter file any grievance against the Company. Such actions, if carried out, would clearly be in contravention of the duties incumbent upon any union by virtue of its status as exclusive agent of the employees it represents. Further, having found that Bekich's remarks were precipitated by Diaz' open adherence to the "1397 rank & file" movement, to speculate as to Bekich's intentions in making these threats, or as to whether the employee was actually intimidated by them, as does the Administrative Law Judge, is irrelevant. Such threats would obviously tend to chill employees in the exercise of their rights to engage in activities in opposition to the policies and activities of Respondent's incumbent officers; to do so would be to run the risk of losing one's job, while at the same time being denied the representation to which one is rightfully entitled in contesting that adverse action. We find that such statements *prima facie* tend to restrain and coerce employees in the exercise of their Section 7 rights. Accordingly, we conclude, contrary to the Administrative Law Judge, that both of the statements made by Respondent through Bekich constitute threats which violate Section 8(b)(1)(A) of the Act.

THE REMEDY

Having found that Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent, United Steelworkers of America Local 1397, AFL–CIO, is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.
2. By threatening to bring charges against employees and to cause their discharge because they participated in intraunion activities or because of employees' disagreement with the views, opinions, or conduct of Respondent's officers or agents, Respondent has violated Section 8(b)(1)(A) of the Act.
3. By threatening employees that, if they were disciplined by their Employer, Respondent would fail and refuse to represent them because they participated in intraunion activities or because of employees' disagreement with the views, opinions, or conduct of Respondent's officers or agents, Respondent has violated Section 8(b)(1)(A) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United Steelworkers of America Local 1397, AFL–CIO, Pittsburgh, Pennsylvania, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Threatening to bring charges against employees and to cause their discharge because they participated in intraunion activities or because of employ-

ees' disagreement with the views, opinions, or conduct of Respondent's officers or agents.

(b) Threatening employees that, if they were disciplined by their Employer, Respondent would fail and refuse to represent them because they participated in intraunion activities or because of employees' disagreement with the views, opinions, or conduct of Respondent's officers or agents.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Post at its offices and meeting places in and about Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forward signed copies of said notice to the Regional Director for Region 6 for posting by United States Steel Corporation, Homestead Works, if willing, in conspicuous places, including all places where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Following a hearing at which all parties had an opportunity to present evidence and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice. We intend to abide by the following:

WE WILL NOT threaten to bring charges against employees and to cause their discharge because they participated in intraunion activities or because they disagree with the views, opinions, or conduct of our incumbent officers or agents.

WE WILL NOT threaten employees that, if they are disciplined by their employer, we will not represent them because they participated in intraunion activities or because they disagree with the views, opinions, or conduct of our incumbent officers or agents.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights protected by Section 7 of the Act.

UNITED STEELWORKERS OF AMERICA LOCAL 1397, AFL-CIO

DECISION

STATEMENT OF THE CASE

HERBERT SILBERMAN, Administrative Law Judge: Joseph Diaz, an individual, having filed a charge of unfair labor practices on March 15, 1978, in Case 6-CB-4321 against United Steelworkers of America, Local 1397, AFL-CIO, herein called the Union, a complaint was issued by the acting Regional Director for Region 6, dated April 25, 1978, alleging that Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act, as amended. In substance, the complaint alleges that Respondent made unlawful threats against Joseph Diaz because he "participated in intraunion activities or because of [his] disagreement with the views, opinions or conduct of Respondent's officers." Respondent filed an answer, dated May 3, 1978, generally denying that it has engaged in the alleged unfair labor practices.[1]

Pursuant to notice, a hearing in this proceeding was held in Pittsburgh, Pennsylvania, on September 26, 1978, before me. General Counsel and Respondent were represented at the hearing by counsel and Charging Party appeared in person. In accordance with the procedure authorized by Section 102.35(i) of the Rules and Regulations of the National Labor Relations Board,[2] the parties at the hearing entered into a stipulation waiving a verbatim transcript of the oral testimony and waiving the right to file with the Board exceptions to the findings of fact which the Administrative Law Judge shall make in this case. A copy of the stipulation is attached hereto as Appendix A. [Appendix A omitted from publication.] All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Pursuant to permission granted the parties at the hearing, General Counsel and Respondent filed briefs with me.

Upon the entire record in this case[3] and from my obser-

[1] At the hearing Respondent admitted the pertinent jurisdictional allegations of the complaint.

[2] See *George Williams Sheet Metal Co.*, 201 NLRB 1050 (1973).

[3] The pleadings and the other formal papers were received in evidence as

vation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Union is a party to a collective-bargaining agreement with the United States Steel Corporation covering a unit of employees at the corporation's Homestead Works. United States Steel Corporation, a Delaware corporation, manufactures and sells steel and steel products. During the 12 months preceding the issuance of the complaint, the corporation purchased and received goods and materials valued in excess of $50,000 which were shipped through channels of interstate commerce by suppliers located outside the Commonwealth of Pennsylvania to the corporation's Homestead facility. During the same period of time, the corporation shipped goods and materials valued in excess of $50,000 from its Homestead facility using channels of interstate commerce to locations outside the Commonwealth of Pennsylvania. The complaint alleges, Respondent admits, and I find, that United States Steel Corporation is an employer within the meaning of Section 2(2) engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This proceeding is an outgrowth of controversies between the Union's leadership and a group of dissident members who call themselves "1397 rank & file" who have been, and who intend to continue, opposing the incumbents in elections of delegates to the international's conventions, elections of officers, and in other union matters. During the times relevant hereto, Milan "Mike" Bekich was the vice president and the acting president of the Union, was a member of the Union's grievance committee, and was the particular subject of attack by the "rank & file" group. Early in March 1978 the "rank & file" distributed a leaflet which demanded Bekich's resignation because of an accusation that Bekich had reported to the Company by filing a "Supervisor's Safety Observation Report" that employee Joe Parkinson (a supporter of the "rank & file" group) had violated a company rule by being out of his work area. The alleged observation report is reproduced in the leaflet.

Bekich's uncontradicted testimony is that the observation report is a forgery; that he learned that a locked drawer in Foreman Chamos' desk had been pried open and a number of report forms had been surreptitiously removed; and that he was informed, by other union members, that Joseph "Indian Joe" Diaz and two other "rank & file" supporters were responsible for the theft and for the preparation and publication of the forged observation report.

On March 11, 1978, about 10:15 a.m., Bekich and Diaz had a heated argument in a work shanty on the Company's premises during which each used epithets such as thief, roach, liar, and idiot to describe the other. Also, Bekich accused Diaz of being one of the three persons responsible for the forged observation report.[4]

While Diaz and Bekich agree that they had an argument on March 11 during which Bekich accused Diaz of being one of the three persons responsible for uttering the forged observation report, they disagree as to the circumstances which led to their encounter and as to whether Bekich directed any threats to Diaz.

Diaz testified that when he entered the shanty Bekich was sitting there. Bekich asked whether he was called Indian Joe and accused him of being one of three persons responsible for the forged report. In the course of their argument, according to Diaz, Bekich threatened, "I am going to bring charges and I'll get you fired". After further words and after Diaz asserted that he was not "scared of" Bekich, the latter said, "I defended you once, if you ever get a (disciplinary) slip, (neither) I nor my staff will represent you."

Bekich, on the other hand, testified that on the morning of March 11 he was informed that Indian Joe was in the shanty, loudly maligning the Union's officers. About 15 minutes later, when he had an opportunity to leave his work, Bekich entered the shanty and accosted Diaz. According to Bekich, during the ensuing argument he accused Diaz of being one of the persons who had stolen the report forms and also stated that as a union officer he had a right to bring charges against Diaz.[5] Bekich denied that he had threatened to bring about Diaz' discharge or that he had threatened that the Union would not represent Diaz if the latter filed a grievance.

Diaz prepared a written version of his altercation with Bekich which was published and circulated in a "rank & file" leaflet dated April 1978. To the extent that Diaz was questioned about the March 11 incident, his testimony was a faithful reiteration of his statement. His recollection of other events was faulty. Thus, on direct examination he testified about a conversation with Bekich that took place in September 1977 in the union hall, at which time Bekich warned Diaz that he could be fired for passing out union leaflets in the plant. After Diaz' direct examination and cross-examination had been concluded, in response to a question from the Administrative Law Judge, he testified that he had not met Bekich prior to March 11, 1978, and continued to repeat such assertion until he was reminded of his earlier testimony. Also, on direct examination Diaz testified that at a union meeting on March 13 he accused Bekich of making the threat (during their altercation 2 days earlier) that neither Bekich nor any other union official would represent him if he should seek to defend against possible company discipline and that Bekich made no response to this accusation. Diaz was asked this question

G.C. Exh. 1(a) through (h). In addition, General Counsel offered in evidence three additional documents of which two were received and one was rejected; Respondent offered in evidence one document which was received.

[4] Diaz testified that as of the time of his argument with Bekich, he knew nothing about the observation report and did not then understand to what Bekich was referring.

[5] Bekich explained that the charge he had in mind was conduct unbecoming a union member.

more than once, and each time he positively asserted that Bekich made no response. However, General Counsel introduced in evidence a transcript of a tape recording of portions of the March 13 union meeting which shows that Bekich, in response to Diaz' accusation, specifically denied that he had made the alleged threat. Contrary to General Counsel's argument at the hearing and in the brief, I find that Diaz does not have a good or clear recollection of all the events about which he was questioned. However, this does not mean that his testimony was fabricated or that the statements about which he testified were not made.

Bekich's testimony was briefer than Diaz'. His recollection of the altercation with Diaz was sketchy. Diaz and Bekich are contrasting personalities. Whereas Diaz as a witness was excitable and voluble, Bekich was calm and spoke slowly. Both Bekich and Diaz were defending interests important to themselves and tended to testify in a manner which each believed would best serve his cause. Upon consideration of all the evidence adduced at the hearing, and based upon my impression of the reliability of the testimonies of Diaz and Bekich, I credit Diaz that during the March 11 argument Bekich said that he would file charges against Diaz and would seek to cause Diaz to be fired and also said that neither he nor other union officials would represent Diaz should he file any grievance against the Company.

Although I find that Bekich made the statements objected to by General Counsel, it does not necessarily follow that there has been a violation of Section 8(b)(1)(A). The pertinent portions of the complaint refer to the following as constituting the alleged violations of the Act:

> (a) Threatening to bring charges against employees to cause their discharge because they participated in intraunion activities or because of employees' disagreement with the views, opinions or conduct of Respondent's officers.
>
> (b) Informing employees that if they receive discipline, Respondent would fail and refuse to represent them because they participated in intraunion activities or because of employees' disagreement with the views, opinions or conduct of Respondent's officers.

The immediate and proximate reason for the March 11 argument between Bekich and Diaz did not concern Diaz' intraunion activities but related to the belief on the part of Bekich that Diaz was one of the three persons responsible for the utterance and publication of the forged observation report. The utterance of the forged observation report was a mischievous and despicable act, and the "rank & file"group, by publishing and circulating the forged report made itself party to the malicious libel. Both the "rank & file" group as an organization and the individuals who were personally responsible for the preparation and publication of the libel were engaged in an activity which is not protected by the Act. However, there is no evidence that Diaz was in any way involved in the matter. Although Bekich might have believed that Diaz was one of the persons responsible for the preparation of the forged observation report—as there is no evidence that, in fact, he was—Respondent had no lawful right to treat Diaz as if he had been engaged in unprotected activity.[6]

Bekich did not explain how it came about that Diaz was accused of responsibility for the forged observation report. The reasonable inference is that somehow the accusation was related to Diaz' open adherence to the rank & file movement and to Diaz' opposition to the Union's leadership. Therefore, although the immediate reason for the argument between Bekich and Diaz was the forged observation report, an underlying (not necessarily the only) reason was Diaz' intraunion activities and opposition to the Union's leadership. Accordingly, if the objectionable remarks constituted threats of a nature that tended to restrain and coerce employees in the exercise of the rights guaranteed in Section 7, then the violations of the Act alleged in the complaint have been proved.

However, words and phrases which literally constitute "an expression of intention to inflict injury or damage" in the context of their use may not be a threat. For instance, a mother who has become distraught by some misdeed of her child might, in anger, shout at the child, "the next time you do something like this I'll murder you", normally would not be considered as having threatened to commit mayhem upon her child. Persons frequently use threatening expressions when engaged in an argument which the utterer does not intend to fulfill and the listener knows will not be fulfilled. In this case, it is necessary to determine whether Bekich intended the remarks he made to constitute threats and whether Diaz—attributing to him the characteristics of the reasonable employee—understood the remarks to be threats.

The first alleged threat which Bekich made was that charges would be filed against Diaz, and he would be fired. That is a non sequitur. The only charges that Bekich was in a position to file were intraunion charges, which conceivably might lead to union discipline but would not have any effect upon Diaz' employment. The statement has no coherent meaning. It is a juxtaposition of two unconnected assertions. As theremark was made during the heat of an argument, it is more in the nature of an epithet than a threat. While not necessarily determinative of the question, it is noted that Diaz' response was that Bekich did not scare him. I find that Bekich's remark to Diaz that charges would be filed against him and that he would be fired, in the circumstances, was not a threat and did not serve to restrain or coerce employees.

On the other hand, my view of Bekich's second remark is different. As the argument progressed Bekich stated that if Diaz should be subject to discipline and would require the Union's representation neither Bekich nor other union officials would represent him. This was a more considered statement than the first, and even Diaz reacted to this statement differently by inquiring whether Bekich intended it as a threat. I agree with General Counsel that this latter statement does constitute a threat.

The final question to be determined is whether the single threat made by Bekich to Diaz during an argument, not over Diaz' union activities or opposition to the Union's leadership, but over the alleged forged observation report

[6] *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

constitutes such conduct on the part of Respondent—through the agency of its then acting President Milan Bekich—as to constitute a violation of Section 8(b)(1)(A) of the Act. I am of the view that it does not. A single act may have a sustaining and lingering effect so that its impact is continuous, not momentary; and if the act constitutes restraint and coercion of employees, it would be a violation of the statute. On the other hand, in this case, the offensive remark was made by Bekich during an argument. While Bekich did not withdraw the alleged threat, thereafter he took the position that he never made the threat. At the union meeting on March 13 when he was asked directly by Diaz whether he had made such a threat, Bekich denied having done so.[7] I am of the view that the impact of the threat made by Bekich to Diaz on March 11, which was made to one individual during an argument, which was not repeated, and which Bekich denied having made when the subject was raised by Diaz at the union meeting 2 days later, was evanescent and did not serve to restrain or coerce employees in the exercise of their statutory rights.[8]

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

Conclusion of Law

Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

[7] It is to be noted that at the union meeting on March 13 Diaz made no reference to the fact that Bekich had threatened to file charges against him and to cause his discharge, but he did accuse Bekich of threatening that the Union would not represent him in connection with grievances. This confirms my view that the impact of the two remarks was entirely different.

[8] *Retail Clerks International Association, AFL–CIO, C.L.C.*, 226 NLRB 1393 (1976); *American Federation of Musicians, Local 76, AFL–CIO (Jimmy Wakely Show)*, 202 NLRB 620 (1973); *Peerless Woolen Mills*, 86 NLRB 82 (1949); *J.J. Newberry Co., Inc. v. N.L.R.B.*, 442 F.2d 897 (2d Cir. 1971).