Somerset Welding & Steel, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Cases 6–CA–19922, 6–CA–20034, 6–CA–20096, 6–CA–20250, and 6–RC–9822

August 22, 1994

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On August 13, 1991, the National Labor Relations Board issued its Decision and Order[1] finding that the Respondent violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act. The violations found included: coercively interrogating employees, threatening employees with plant closure, loss of benefits, loss of jobs, loss of wages, and discharge. The Board also found an unlawful denial of a wage increase. The Board set aside the election held in Case 6–RC–9822 and issued a bargaining order under the test set forth in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

The Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. On January 22, 1993, the court issued its decision.[2] The court enforced the 8(a)(3) violation and most of the 8(a)(1) violations as found by the Board, but remanded the case to the Board for consideration of three issues: (1) whether the statements of the Respondent's chairman, Sidney Riggs, violated the Act, and, if so, whether his violations are needed to support a remedial bargaining order; (2) whether the statements of Plant Superintendent John Tims Sr. about plant closures and Plant Manager Dwight Clyde's profitability remark violated the Act, and, if so, whether their statements, along with those of Vice President Guy Rush, Supervisor Roger Pyle, and Supervisor Rod Berkley, as well as Clyde's other statements, were so pervasive as to warrant a remedial bargaining order; and (3) whether, assuming a bargaining order is otherwise warranted, changes in management and employee turnover have made a bargaining order unnecessary under the court's standard.

In April 1993, the Board advised the parties that it had accepted the remand and invited statements of position. Thereafter the Charging Party, the General Counsel, and the Respondent filed statements of position. The Respondent filed a reply to the Charging Party's and General Counsel's statements.[3]

The Board has delegated its authority in this proceeding to a three-member panel.

We have considered the original decision and record in light of the court's decision and the Charging Party's, General Counsel's, and the Respondent's statements of position. We accept the court's decision as the law of the case and have decided to modify the Board's original decision by finding that Tims Sr.'s plant closure statement violated the Act, finding that Clyde's profitability remark did not violate the Act, finding that Riggs' statements did not violate the Act, and by deleting the *Gissel* bargaining order and directing a second election.

Issues on Remand

We consider the issue of the lawfulness of Chairman Sidney Riggs' communications with the employees to be the paramount issue for our consideration, but we shall begin our analysis by considering the statements of Plant Superintendent John Tims Sr. and Plant Manager Dwight Clyde.

A. *Statement of Tims Sr.*

The judge found that, on the eve of the election, Plant Superintendent John Tims Sr. told an employee—his son, John Tims Jr.—that, if he could, he would fire his son and that the plant would close and employees would lose benefits if the Union won. The judge found that Tims Sr.'s references to removal of benefits and discharge as reprisal for union activity violated Section 8(a)(1). It appears that the judge inadvertently failed to find specifically that Tims Sr.'s threat of plant closure as a reprisal for union activity also violated Section 8(a)(1). We find that Tims Sr.'s statement to Tims Jr. that the plant would close if the Union won violated Section 8(a)(1) of the Act.[4] Additionally, in view of the nature of the statements, we are not persuaded by the Respondent's argument that Tims Sr. was not speaking in his capacity as a company representative. Although the credited testimony indicates that Tims Sr.'s threat was not disseminated and thus had limited impact on the unit, we find that the threat itself violated Section 8(a)(1).

B. *Statement of Clyde*

The judge found that, after a mandatory meeting, Plant Manager Dwight Clyde showed employees what purported to be a profit sheet indicating that the construction of three completed trailers had generated only

[1] 304 NLRB 32 (Member Cohen did not participate in the original decision).

[2] *Somerset Welding & Steel v. NLRB*, 987 F.2d 777 (1993).

[3] The Respondent also filed a motion to reopen the record to take evidence concerning changes in management and employee turnover. The Charging Party and the General Counsel filed oppositions to the motion to reopen. The General Counsel also filed a motion to consolidate the instant proceeding with other pending cases involving the Respondent; the Charging Party joined this motion and the Respondent filed an opposition. In view of our disposition of this case, we deny the motions to reopen and consolidate.

[4] We note that only Tims Sr.'s plant closure statement has been remanded to us and not his threats of termination or lost benefits. In the underlying decision the administrative law judge found, and we agreed, that Tims Sr.'s threats of termination and loss of benefits violated the Act. Those findings remain undisturbed by the remand.

a slight profit. He told the employees that with any wage increases ''there'd be no way that shop could continue to go.'' The judge concluded, and we affirmed, that Clyde had the right to demonstrate the slight profit involved in producing these three trailers but that Clyde's supporting statements were insufficient to privilege any comment suggesting that the trailer plant would close in the event of a wage increase. According to the judge, Clyde's remark was tantamount to a warning that the employees could not have their jobs and also a wage increase, so if they supported the Union for that reason, they had better vote ''no.'' (304 NLRB at 43.)

The court, in remanding this issue to the Board, cited *NLRB v. Gissel Packing Co.*, 395 U.S. at 618, where the Supreme Court declared that a ''prediction must be carefully phrased on the basis of objective fact to convey an employee's belief as to demonstrably probable consequences beyond his control.'' The court further stated that, ''Clyde's comments seem to us to satisfy *Gissel*.''[5] The court also analogized the plants in this case to the restaurant industry, citing *NLRB v. Shenanigans*, 723 F.2d 1360, 1368 (7th Cir. 1983), and found that the Respondent here, which the court characterized as a small manufacturer, was ''competent to recognize that if a plant is barely turning a profit on its product, any wage increase threatened its profitability and ultimately its survivability.'' As the court clearly indicated that it would view Clyde's statement as a prediction ''carefully phrased'' on the basis of ''objective fact'' to convey his belief about ''demonstrably probable consequences beyond his control,'' we are constrained to find on the law of the case that Clyde's profitability statement did not violate the Act.

C. *Communications of Chairman Riggs*

The court has remanded to us the issue of Chairman Sidney Riggs' communications with employees. As fully set forth by the judge, in the weeks preceding the election Chairman Riggs held a series of four mandatory meetings at the various Somerset plants. In addition to his presentation, Riggs answered questions from employees. He declared that it was ''survival time'' in the Somerset labor market. He talked of numerous plants in the area, almost all of them unionized, that had recently closed. He stressed that he ''had an obligation to learn from these problems and try to structure Somerset Welding so that the same thing doesn't happen to it.'' He talked about Abex Company which early in its operations was struck by the Steelworkers and ''never reopened as a viable business after that.'' Riggs also spoke about nearby U.S. Steel's shutdown, stating that this had occurred after management had tried, without success, to obtain concessions from the Steelworkers. In that context Riggs stated that ''if we're not careful and we don't learn from what's going on here, that it could happen in Somerset.'' He told employees,

> most of them had much more to gain by Somerset Welding & Steel plant being there and being a strong company than I did. I had a couple years to work yet. Most of them had twenty . . . to thirty years to work yet. Obviously their employment would generate much more from the company than I was ever going to get out of it.

He also told employees that wage rates were as high as the Respondent could afford and that increases had to come from profits, but that there were none to divide.

Riggs told the employees that the wages and benefits the employees presently enjoyed would be subject to negotiation, explaining:

> There is [sic] many ways to structure the pay scale in a plant. If you would go to job classifications, everybody that's doing that job got the same rate of pay and we would be in chaos. We were paying all that our business could stand to pay. Our average rate was commensurate with the business around us . . . including the union plants around us. All of it would have to be laid on the table, all of the fringe benefits, the vacation, the paid holidays, pension plan, the whole thing would have to be laid out. We would have to pick and choose . . . everything would be reviewed, not eliminated, it could be reviewed. [N]othing would change until this contract is arranged.

Riggs also stated to employees that benefits would have to be ''restructured.'' He said that the Respondent's existing labor cost package was all that it could afford, so if more was given in wages, it would have to come from other existing benefits such as pension or hospitalization. Riggs admitted that he might have used the words ''bargaining from scratch'' to convey that:

> [Y]ou have to start someplace. Normally in a bargaining situation . . . a person in our position would lay out the lowest figures they could. In this case it would be the minimum wage.

The Respondent also sent numerous mailings to employees. In the first mailing, the Respondent stressed its need to remain competitive. The letter noted that competitiveness had enabled the company to ''get new orders and customers and continue to provide jobs.'' It opined that the Union would make the Respondent less competitive, and that ''all of us have a lot to lose if an outside union like the Steelworkers organizes Somerset Welding . . . .''

Another mailing stated:

[5] 987 F.2d at 780.

> [J]ob security means having a job to go to on a regular basis. The Steelworkers do not provide you with a job or pay your wages, the company does. Your job security, therefore, depends upon the company being able to remain competitive and stay in business. We have provided new jobs and good wages while many union companies are closing their doors. We attribute this to our ability to remain competitive.
>
> . . . .
>
> Customers are likely to place orders with a company which provides the best service for the best price. You might ask yourself: ''If I were the customer, would I be likely to give an order to a company where it might be delayed by strikes, arguments, and restrictive work rules, or would I give the order to a company which is free to provide the special attention and consideration which the job might require?''
>
> . . . .
>
> You have a *big* stake in the company continuing to be competitive. Only by being competitive in terms of both quality and price can we get new orders and customers to provide jobs. This is particularly true because we bring a significant amount of work into Somerset County from out-of state. Even with the added costs which are involved when we deal with out-of-state customers, we must still be able to do the work competitively or lose the business.

An additional letter stated:

> [T]he presence of the Steelworkers could hurt our business. We could lose jobs because customers might be afraid to give work to a company which could have a strike or labor unrest.

In our earlier decision we did not pass on Riggs' communications,[6] because we found that the other 8(a)(3) and (1) violations required a remedial bargaining order. The court has now remanded this issue to us for our consideration. The court observed, ''The Board may have avoided the issue because it determined that Riggs' conduct did not violate the Act,''[7] citing *Shenanigans*, supra, and with the cautionary statement that, ''[w]ithout Riggs' conduct, however, there is not sufficient evidence that the effect of the supervisors' coercive threats was pervasive and the bargaining order therefore cannot be upheld.''[8] After careful consideration, and noting the court's statements, we conclude that the written and oral communications of Chairman Riggs did not violate the Act.

We construe the court's references to the Seventh Circuit's decision in *Shenanigans*, supra, as a holding that *Shenanigans* should guide our evaluation of Riggs' statements. In *Shenanigans*, the court found, contrary to the Board, that certain employer statements were lawful. Among the statements found lawful were ones made by one of the company's (Shenanigans) co-owners regarding the competitive nature of the restaurant business in Decatur, Illinois. He stated that:

> Unions do not work in restaurants . . . . The balance is not here. . . . If the Union exists at Shenanigans, Shenanigans will fail. That is it in a nutshell. . . . I won't be here if there is a Union within this particular restaurant. I am not making a threat. I am making a statement of fact. . . . I respect anyone who wants to join the Union if that in essence is a workable place and can afford to pay Union wages. We can't in the restaurant business.

The owner went on to state that the only restaurant in Decatur that was unionized was struggling, and that if Shenanigans raised its prices in order to pay union wages its customers would switch to the nonunion restaurants, whose prices would be lower. He added:

> Shenanigans can possibly exist with labor problems for a period of time. But in the long run we won't make it. The cancer will eat us up, and we will fall by the wayside. And if you walk into this place five years down the road, if there is a Union in here, then I guarantee you it won't be a restaurant. I don't know what it will be. But wherever you people will be working in this town, in Decatur, it will not be in a Union restaurant. It will be in a non-Union restaurant, because there is a Union in town, it's at the Sheridan, and I think they only use one or two waitresses during the week and maybe three on the weekends. And you get Union wages, and I doubt if you get hardly any tips.
>
> I am not making a threat. I am stating a fact. When you are dealing with the Union you had better consider the pros and cons. I am sure there is a lot of pros that are involved. I haven't looked into them in that great of detail because this is my first experience with them. I only know from my mind, from my heart and from my pocketbook how I stand on this. And I don't like the idea of looking at a Union as far as my employees are concerned.

The Seventh Circuit found the speech noncoercive. As a general proposition, the court noted that a com-

[6] The judge in the underlying decision found that Riggs' comments transcended 8(c) guarantees and violated the Act by associating unionization with loss of jobs. The judge also found that Riggs' communications were offered as a fear-inspiring suggestion of what was likely to occur at the Respondent's plants and his statements as to bargaining from ''zero'' or ''scratch'' threatened a loss of existing benefits.

[7] 987 F.2d at 781.

[8] Id. at 781.

pany has the right under Section 8(c)[9] to state its ''side of the case'' against unionization but it may not threaten retaliation against employees for joining the union. The court also expressed the view that ''since the only effective way of arguing against the union is . . . to point out . . . the adverse consequences of unionization, one of which might be closure,'' distinguishing between lawful advocacy and threats of retaliation can be difficult.[10] The court found that the ''line between predicting adverse consequences and threatening to bring them about is a fine one''[11] and the ''prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control,'' citing *NLRB v. Gissel Packing Co*., 395 U.S. at 618.

In *Shenanigans*, supra, the court found that the company owner provided ''objective'' support for his predictions by pointing out the competitive nature of the restaurant business and the fact that only one other restaurant in the area was unionized and it was doing poorly. The court found that ''more was not required.''[12] The court went on to state that it did

> not read *Gissel* to require the employer to develop detailed advance substantiation in the manner of the Federal Trade Commission . . . at least for predictions founded on common sense and general experience. A small company in the restaurant business should not have to hire a high-powered consultant to make an econometric forecast of the probable consequences of unionization on the restaurant business in Decatur. The usual assumption that [the] employer holds all the cards in dealing with employees is reversed when a large national union is waging an organizational campaign against a small service company. The company may not threaten retaliation; but the tenor of Block's [co-owner] remarks, remarks for which there was some objective basis, was not that the company would close the restaurant out of spite if the union got in but that he believed the restaurant business in Decatur too fragile for a restaurant to survive if union wage scales were paid. To forbid expression of that opinion would not serve the interests of Shenanigans' employees, for unionization might in fact hurt rather than help them in the long run. [723 at 1368.]

As we have noted, the court of appeals in this case relied on *Shenanigans*, supra. Applying the reasoning of *Shenanigans* as the law of the case, we find that Riggs was presenting the employees with the Respondent's ''side of the case'' and was not threatening retaliation. Based on our interpretation of *Shenanigans*, we find that Riggs' comments, under the standards of that case, did not cross the line from lawful advocacy to unlawful threats. In his statements to the employees, Riggs noted his view of the competitive nature of the tractor and trailer manufacturing industry, and pointed out that many plants in the area that had been unionized had failed. Much like the restaurant owner in Decatur who, the Seventh Circuit held, did not have to get a ''high powered consultant to make an econometric forecast of the probable consequences of unionization on the restaurant business in Decatur,'' so, too, the owner of a small tractor and trailer business in Somerset, Pennsylvania, need not do so. As chairman of the Respondent, Riggs was in a position to assess the effect of increased costs on the Respondent's operations. Thus, contrary to the judge in the underlying decision, we find, on the law of the case, that Riggs' statements did not go beyond Section 8(c) and thus did not violate Section 8(a)(1) by associating unionization with loss of jobs. Nor, in this posture, do we agree with the judge's finding that the statements on plant closing were offered as fear-inspiring suggestions of what was likely to occur at the Respondent. Rather, we find that Riggs stated to employees possible consequences of unionization over which he had no control and that his communications did not violate the Act.

With reference to Riggs' comments regarding bargaining from ''zero,'' ''scratch,'' or ''the minimum wage'' such statements must be judged with reference to the context in which they are made. An employer can tell employees that bargaining will begin from ''scratch'' or ''zero'' but the statements cannot be made in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union. See *Belcher Towing Co*., 265 NLRB 1258 (1982). Additionally, employees can be told that bargaining will start from zero but they cannot be threatened with loss of benefits and left with the impression that all they will ''get'' is what the union can restore to them. *Plastronics, Inc*., 233 NLRB 155 (1977). Here, we have found that Riggs' other communications did not violate the Act. Thus, we do not find that Riggs' statements threatened to deprive employees of existing benefits or left them with the impression that they would only get back what the Union could restore. Rather Riggs discussed the reality of negotiating and bargaining, which is that benefits can be both gained and lost. He specifically told the employees the benefits would be ''reviewed not eliminated.'' We find under *BI-LO*, 303 NLRB 749 (1991), that he was making lawful statements that benefits could be lost through bargaining rather than an unlawful threat that benefits would

[9] Sec. 8(c) protects an employer's right to address the issue of union representation, provided that its views are devoid of threat of reprisal or promise of benefit.

[10] 723 F.2d at 1367.

[11] Id. at 1368.

[12] Id. at 1368.

be taken away and the Union would have to bargain to get them back.

We have found that Riggs' communications did not violate the Act. In light of the court's admonition that a bargaining order would not be warranted unless Riggs' statements violated the Act,[13] we are constrained to conclude that a *Gissel* bargaining order is not warranted in this case. We shall delete the bargaining requirement from our original Order, reopen the representation proceeding, and direct that a second election be held.

ORDER[14]

The National Labor Relations Board orders that the Respondent, Somerset Welding & Steel, Inc., Somerset, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure in the event of unionization.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at it Somerset, Pennsylvania place of business copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) 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.

IT IS FURTHER ORDERED that Case 6–RC–9822 is severed and remanded to the Regional Director for Region 6 for the purpose of conducting a second election.

[Direction of Second Election omitted from publication.]

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with plant closure in the event of unionization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SOMERSET WELDING & STEEL, INC.

---

[13] In this regard, as previously noted, the court said:

> Without Riggs' conduct, however, there is not sufficient evidence that the effect of the supervisors' coercive threats was pervasive and the bargaining order therefore cannot be upheld. [987 at 781.]

[14] We are advised that the Respondent has complied with all of the terms of the Board's earlier Order as enforced by the court of appeals.

[15] If 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.''