Phillips Chrysler Plymouth, Inc. *and* Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL–CIO, Petitioner. Case 13–RC–17995

August 12, 1991

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 4, 1990, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows six for and four against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and adopts the Regional Director's findings and recommendations only to the extent consistent with this decision.

The Employer's Objection 2 alleges that the conduct of Union Organizers Dennis Jawor and Donald Hackl destroyed the laboratory conditions of the election. The Regional Director's investigation revealed that Jawor and Hackl were talking to bargaining unit employees in the Employer's shop area at 8:15 a.m. on the day of the election. The Employer's president, Curtis Pascarella, told the organizers that they were not permitted in the shop area until the 9 a.m. preelection conference. He asked them to leave the shop area and to wait in the reception area until then. Jawor and Hackl refused to leave the shop area.

According to Pascarella and Service Manager Greg Fielder, Jawor and Hackl started a ''shouting match'' in front of the employees. The organizers maintained that they had a right to be there, and that it would jeopardize the election if Pascarella removed them. The police were called and spoke to Jawor and Hackl. Neither Jawor nor Hackl left the shop area.

The Regional Director recommended overruling the objection, noting that ''at most'' the organizers may have been trespassing, which was ''not itself objectionable conduct.'' We disagree.

Jawor and Hackl are both union agents. Therefore, the test to be applied is whether their conduct ''reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election.'' *Baja's Place*, 268 NLRB 868 (1984). In deciding whether the employees could freely and fairly exercise their choice in the election, the Board evaluates the following factors: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

Here the incident was a major one that continued for some time. In front of the employees and in the employees' work area, the two nonemployee union organizers, who had no demonstrated legal right to be there,[1] repeatedly and belligerently refused to heed requests of the Employer's president to leave. If not directly witnessed by all 10 unit employees, the union agents' conduct must have quickly been made known to all. This direct challenge to the Employer's assertion of its property rights could not have been lost on the employees as they began to vote 75 minutes later. Further, even after the police were summoned, the organizers failed to stop their unwarranted trespass. The message undoubtedly conveyed to employees by the union agents' conduct was that the Employer was powerless to protect its own legal rights in a confrontation with the Union. The impact of this incident is especially significant in this election, in which a shift of one vote could have changed the outcome.

There is no evidence of any misconduct on the part of the Employer to weigh against the misconduct of the Petitioner's agents, and the organizers' actions plainly are attributable to the Petitioner. In these circumstances, we find that the Petitioner's conduct reasonably tended to interfere with the employees' free and uncoerced choice in the election.

We find that the Petitioner destroyed the laboratory conditions of the election.[2] Thus, we shall sustain the Employer's Objection 2, and we shall set aside the election and direct a second election.

[Direction of Second Election omitted from publication.]

MEMBER DEVANEY, dissenting.

My colleagues set aside the election in this case based on the refusal of two union representatives to leave the Employer's shop area 45 minutes before the preelection conference. Contrary to my colleagues, I would adopt the Regional Director's recommendation to certify the Union.

[1] There is no contention that the organizers could not have reached the unit employees off the Employer's premises before the employees started work or at some other time and place. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

[2] See generally *Great Atlantic & Pacific Tea Co.*, 120 NLRB 765, 766 (1958), *Kennicott Bros.*, 284 NLRB 1125 (1987), and *John M. Horn Lumber Co. v. NLRB*, 859 F.2d 1242 (6th Cir. 1988).

Based on the affidavits of the Employer's president, Pascarella, and its service manager, Fielder, the Regional Director described the alleged objectionable conduct as follows. At 8:15 on the morning of the election, Pascarella encountered two union agents, Jawor and Hackl, in the shop, talking to some of the mechanics. Pascarella informed the union agents that they were not allowed in the shop area until the preelection conference scheduled to begin at 9 a.m., and asked them to leave the shop and go to the reception area until that time. The union agents allegedly ''started a shouting match,'' yelling that they had a right to be there and that, if they were kicked out, it would jeopardize the election. The Employer then summoned the police. The police spoke with the union agents, but the agents did not leave.

Characterizing the union agents' conduct as ''repeatedly and belligerently refus[ing] to heed requests to leave,'' my colleagues find this conduct objectionable because ''this direct challenge to the Employer's assertion of its property rights'' conveyed to employees a message that ''the Employer was powerless to protect its own legal rights in a confrontation with the Union.'' This finding is both factually and legally unsound.

First, as a factual matter, it is most unlikely that the employees inferred any broad conclusion from the union agents' refusal to leave. In any event, my colleagues' conclusion as to the likely impact of the incident on employees, i.e., that the Employer was powerless to protect its legal rights against the Union, is totally unpersuasive. Because police officers spoke with the union agents but did not insist that they leave, I find it far more reasonable to conclude that the employees assumed that the union agents were correct in asserting that they had a right to remain *because of the election.*

Further, contrary to the majority, I find the present case bears no resemblance to the cases on which my colleagues rely for setting aside this election. Thus, in *Great Atlantic & Pacific Tea Co.*,[1] a *union's* election objection was sustained when the union's principal organizer was arrested in front of employees in the employer's store a few minutes before the election. The Board found that the organizer's arrest under these circumstances ''was sufficient to create an atmosphere of confusion and render impossible the free and untrammeled choice of a bargaining representative.''[2] The Board's decision hardly suggests that, if the police had declined to arrest the organizer, his presence in the store would have provided a meritorious basis for an *employer* objection.

In *Kennicott Bros.*,[3] during the critical period, two union agents entered the employer's premises, threatened to physically harm the employee who had filed the decertification petition, and assaulted the employer's president and manager in the presence of 15 employees and customers. In setting aside the election, the Board found that the employees would not fail to heed the message that any opposition to the union could result in physical retaliation. *Kennicott Bros.* is totally unlike the present case, as here there is no contention that the union agents, in refusing the Employer's request to leave the shop area, assaulted or threatened anyone.

A divided court of appeals in *John M. Horn Lumber Co. v. NLRB*[4] held that for an election to be set aside, it must be shown that unlawful acts interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election. In *Horn*, the court reversed the Board and found such interference where a prounion employee threatened to ''blow [a union opponent's] brains out'' and a prounion employee knocked another union opponent's hat off and stated that he better vote for the union. Again, these facts bear no resemblance to those in the present case.

Finally, in *Avis Rent-A-Car System*,[5] the Board found that a number of incidents of picket-line misconduct during the critical period, including blocking two delivery trucks, spitting next to or slapping cars crossing the picket line, damage to two employees' cars, and scattering of nails in a driveway, did not interfere with employees' free choice in the election. In the present case, there is no conduct of a nature or gravity similar even to the conduct found unobjectionable in *Avis.*

In sum, under the facts of this case, the union agents' conduct did not reasonably tend to interfere with employee free choice. The union agents did not assault or threaten either the Employer's representatives or the employees, and their exchange of harsh words with Pascarella hardly rises to the level of such conduct. Moreover, assuming that the agents' presence in the Employer's shop area before the election constituted trespassing, like the Regional Director I do not find that their refusal to leave this area before the preelection conference, without a showing that something more substantial occurred here, reasonably tended to interfere with the employees' free and uncoerced choice in the election. Accordingly, I dissent from my colleagues' decision to set aside the election.

[1] 120 NLRB 765 (1958).
[2] Id. at 767.
[3] 284 NLRB 1125 (1987).
[4] 859 F.2d 1242 (6th Cir. 1988).
[5] 280 NLRB 580 (1986).