Smithers Tire and Automotive Testing of Texas, Inc., and its Labor Contractors, Joint Employers *and* International Union of United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO, Petitioner. Case 16–RC–9383

July 30, 1992

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 25, 1991, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 57 for and 54 against the Petitioner, with no challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the hearing officer's findings[1] and recommendations only to the extent consistent with this Decision and Direction of Second Election.[2]

Contrary to the hearing officer, we find that a remark by employee Pilar Contreras, who the hearing officer found was an agent of the Union,[3] and remarks by employees Robert and Manual Rodriguez, constituted threats which, in the circumstances presented here, require that the election be set aside and a new election be held.

The credited testimony establishes that Contreras, on observing employee Fernando Sanchez with a black eye, remarked, ''This is what happens when you cross us.'' This remark was made to Sanchez at the dispatch window in the presence of Supervisor Randy McWhirter, who just before had asked Sanchez about his eye. McWhirter, whose testimony regarding the incident was credited,[4] also testified that people were always near the place where the remark was made.

The hearing officer found that the statement was so ambiguous as to not amount to a threat of retaliation. In this regard, he noted that Sanchez did not testify and that Contreras was not asked about the statement—for example, who was referred to by ''us'' or whether the remark was made in a joking manner.

We disagree with the hearing officer. In this regard, we begin with the familiar rule that the test to be applied is whether a remark can reasonably be interpreted by an employee as a threat. The test is *not* the actual intent of the speaker or the actual effect on the listener. Under this test, it would be reasonable for an employee to conclude that the word ''us,'' spoken by Contreras, was a reference to the Union. Contreras was an agent of the Union, and the employees regarded him as such. He was the in-plant organizer and spokesman for the Union. Consequently, when Contreras told Sanchez that ''this is what happpens when you cross us,'' Sanchez could reasonably regard ''us'' as referring to the Union. Further, since the remark was made in reference to Sanchez' black eye, Sanchez could reasonably interpret the remark to mean that ''black eyes'' befall those who ''cross'' the Union.

Our dissenting colleague argues that the remark was ambiguous, was made in jest, and was a spontaneous reaction to Sanchez' black eye. We disagree on all three counts. With respect to ambiguity, we need not parse the remark to ascertain what it really meant. As discussed above, suffice it to say that it could reasonably be regarded as a threat. With respect to our colleagues' contention that the remark was made in jest, we note that this suggestion is pure speculation and is counterintuitive. Contreras, who was called to testify, did not offer this explanation. Our colleague therefore attributes to Contreras an explanation that he himself did not give. Further, we recognize that a black eye may make the possessor the subject of some jest, but in our experience the jokes unsually relate to how the person in question got the black eye. Whether in good humor or bad, a person attempting to make a joke about another's black eye does not threaten him with future physical harm if he does not conform to a particular point of view. Finally, were are not persuaded by our dissenting colleague's reliance on the alleged ''spontaneity of Contreras' remark. Employees know that ''spontaneous'' remarks from union agents may in fact carry as ominous a message as formal comments. In all of these circumstances, this statement would reasonably tend to interfere with employee free choice.

The credited testimony also establishes that, shortly before the election, employees Robert and Manual Rodriguez separately threatened to flatten the tires of employee Angela Barfield's automobile if she voted against the Union, and told her that others would know how she voted. The hearing officer, citing *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), found

---

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings. In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations to overrule all objections except 2(c), and 1, 2(g), and 2(i) insofar as these relate to the Barfield-Rodriguez incidents described below.

[2] With respect to the alleged threat to employee Gober, we note that even if it were construed as an economic threat, it was not within the Union's power to fulfill. See *Allis Chalmers Co.*, 278 NLRB 561, 563 (1986).

[3] No exceptions have been taken to this finding. We adopt it pro forma.

[4] Contreras in general denied making any threats but he did not deny this incident or making such a statement to Sanchez.

that the two remarks to one employee in a unit of 123 eligible voters, with no indication of dissemination to other employees, did not meet the test for setting aside elections based on third party conduct, i.e., the conduct did not ''create a general atmosphere of fear of reprisal rendering a free election impossible.''

Contrary to the hearing officer, we find it immaterial that the Rodriguezes' threats to flatten Barfield's tires did not go beyond her. In this regard, we note that her vote, along with that of Sanchez, could reverse the outcome of the election. The threats were obviously intended to influence Barfield's vote and the threats intimated a substantial harm.[5] Threats to damage an automobile have a particular significance here where the record shows that the Employer's workplace is isolated and the employees need their cars to go to work. As Barfield testified, her car ''is not the greatest thing, but it's all I have.''

In light of the foregoing, we must consider that at least two votes, Sanchez' and Barfield's, could have been influenced by the remarks of Contreras and the Rodriguezes' threat. Where, as here, the votes of the two threatened employees could be determinative of the election, there is a substantial question whether the tally in favor of the Petitioner reflected the free choice of a majority of the employees.[6]

We shall therefore set aside the election and direct that a second election be held.

[Direction of Second Election omitted from publication.]

CHAIRMAN STEPHENS, dissenting.

I disagree with my colleagues that the so-called black eye incident and the third-party threats to flatten tires on Barfield's automobile (threats not shown to have been disseminated to employees other than Barfield) warrant setting aside the election.

My conclusion regarding the allusion to the black eye turns on the ambiguous nature of the remark and the circumstances in which it was made. The record shows that Supervisor McWhirter observed employee Sanchez' black eye when Sanchez was picking up his timecard at the dispatch window. McWhirter asked Sanchez about the black eye but before Sanchez could respond Union Agent Contreras interjected, ''This is what happens when you cross us.''

In evaluating Contreras' remark I would note first that there is no indication that Contreras or the Union were involved in Sanchez' black eye. Sanchez did not testify and the record is devoid of any evidence of the cause of his black eye. Nor for that matter, does the record show that Sanchez did not support the Union at the time of the incident.

It also must be kept in mind that the incident did not arise as a result of Contreras taking the initiative to approach Sanchez or threaten him personally. Rather, Contreras' remark was prompted by Supervisor McWhirter's question to Sanchez. I believe it significant that Supervisor McWhirter, in whose presence the remark was made, gave no indication at the time of the remark that he viewed it as a threat, nor is there evidence that he took any disciplinary action against Contreras. Perhaps this can be explained by the ambiguous nature of the remark and McWhirter's recognition of its ambiguity at the time, given the circumstances in which it was made. Although there was no testimony that the remark was, or was not made, in a joking manner, the fact that it was prompted spontaneously by McWhirter's question to Sanchez about his eye while Contreras happened to be present, strongly suggests that Contreras uttered the remark as a quip or smart aleck comment that was not intended to be taken seriously, and that McWhirter at the time took it that way. In any event, a reasonable employee would be just as likely, if not more so, to view the apparent reference to his black eye as a spur-of-the-moment jest as he would to take it as a threat that the Union was planning to embark on a campaign of beating up antiunion employees.

Accordingly, because of the remark's ambiguity and the context in which it occurred,[1] coupled with the absence of any credited testimony which might help establish its real meaning, such as threatening remarks or conduct by Contreras, I am persuaded that Union Agent Contreras' remark does not rise to the level of a threat, and thus, that it provides no basis for setting the election aside.

Nor would I find that the two threats to flatten the tires of employee Barfield's automobile created a general atmosphere of fear and reprisal sufficient to warrant invalidating the election. *Duralam, Inc.*, 284 NLRB 1419 (1987). These threats constituted the sole extent of aggravated third-party conduct occurring during the critical preelection period. The threat by Robert Rodriguez occurred 2 weeks before the election. The threat by Manuel Rodriguez occurred 1 week before the election. The hearing officer found that there was no evidence that these threats to Barfield were disseminated to the 122 other eligible voters in the unit. Thus, despite the objectionable nature of the threats, the threats were isolated and could only have had a tendency to influence the vote of Barfield. Because the tally of ballots shows a three-vote margin in favor of the Union, however, Barfield's vote could not be deter-

[5] See *Buedel Food Products Co.*, 300 NLRB 638 (1990), which involved one employee's threat to burn another employee's car if she did not vote for the petitioner.

[6] Ibid.

[1] Cf. *M. K. Morse Co.*, 302 NLRB 924, 925 (1991).

minative. In these circumstances, the Rodriguezes' conduct does not warrant setting aside the election.[2]

Accordingly, I would adopt the hearing officer's recommendations to overrule the Employer's objections and to certify the Union as the exclusive representative of the unit employees.

[2] Thus, although I share my colleagues' concern about elections in which it is established that threats have been shown to have affected voters whose ballots would be determinative, this case does not, in my view, present that situation. Cf. *Buedel Food Products*, 300 NLRB 638 (1990).