O'Brien Memorial *and* Local 627, Service Employees International Union, AFL–CIO, CLC, Petitioner. Case 8–RC–14734

March 31, 1993

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which considered the Employer's request for review of the Regional Director's Supplemental Decision (the pertinent portions of which are attached). The request for review is denied as it raises no substantial issues warranting review.[1]

MEMBER RAUDABAUGH, concurring.

I believe that the conduct alleged in Employer's Objection 3 could reasonably tend to interfere with the right of Licensed Practical Nurse (LPN) Schuster to make a free and uncoerced choice in the election. In this regard, I note that Schuster was a vocal critic of the Union and that her four accusers were principal supporters of the Union. Their accusation was that she had physically abused a patient. Such an accusation could lead to a loss of her LPN license and to state sanctions, not to mention her emotional pain and suffering. Apparently, there was no evidence to support the accusation. In these circumstances, Schuster could reasonably conclude that the cause of the accusation was her opposition to the Union. In my view, it would be outrageous if an LPN's license and reputation were placed in jeopardy simply because of her Section 7 beliefs concerning the Union.

However, I nonetheless conclude that the conduct here does not warrant setting aside the election. In this regard, I note the evidence is insufficient to establish that the four accusers were agents of the Union. Further, there is no showing that the conduct created ''a general atmosphere of fear and reprisal.'' See *Westwood Horizons Hotel*, 270 NLRB 802 (1984). Thus, I agree with my colleagues that the election should not be set aside.

APPENDIX

SUPPLEMENTAL DECISION AND ORDER DIRECTING HEARING ON OBJECTIONS

Pursuant to a Decision and Direction of Election issued by me on July 23, 1992, an election was conducted on August 26, 1992, among employees of the Employer in the following-described unit:

> All full-time and regular part-time service and maintenance employees, including licensed practical nurses, nursing aides/assistants, nursing aide coordinators, assistant nursing aide coordinators, orderlies, dietary aides, cooks, housekeepers, laundry employees, physical therapy aides, occupational therapy aides, infection control aides, activities employees, social service employees, maintenance employees, and medical records employees, employed at the Employer's Masury, Ohio facility, but excluding all office clerical employees, administrators, directors of nursing, dietary supervisors, registered dieticians, aides supervisors, housekeeping supervisors, laundry supervisors, and professional employees (including registered nurses), guards, and supervisors as defined in the Act.

The tally of ballots issued after the elections shows that of the approximately 154 eligible voters, 160 cast ballots, of which 88 were for and 60 against the Petitioner. There were 12 challenged ballots, a number insufficient to affect the results of the election. On September 2, 1992, the Employer filed timely objections to conduct affecting the result of the election, a copy of which was duly served on the Petitioner.

Objection 3

In this objection, the Employer asserts that the Petitioner, through its officers, agents, and those acting on its behalf, made fraudulent accusations of patient abuse against an employee, thus creating an atmosphere of fear, intimidation, and coercion.

In support of this objection, the Employer proffered the testimony of its in-house counsel, John Daliman, and others that employees Linda Gill, Kathleen Mason, Tammy Oden, and Cheryl Holloway, who are allegedly several of Petitioner's principal supporters, presented Daliman with a written statement, containing accusations against LPN Elaine Schuster, a known critic of the Petitioner. Daliman will further testify that these accusations, if true, would have established that Schuster had engaged in patient abuse, which would have been grounds for her dismissal, loss of her nursing license, and possible state sanctions against the Employer. Daliman will testify that he fully investigated the matter and found no merit to the allegations.

[1] The Employer requested review of the Regional Director's overruling of Objections 3, 5, 11, and 12, without a hearing. The Employer's request for review of Objection 5 was limited to that portion of the objection which alleged that the Petitioner made antisemitic remarks prior to the election.

In denying review of the Regional Director's overruling of Employer's Objection 3, to the extent that the Regional Director's reliance on the absence of evidence of motive can be interpreted as requiring evidence of subjective intent, it is disavowed. The evidence presented by the Employer in support of this objection fails to establish a prima facie case of objectionable conduct as it is undisputed that the conduct involved third parties, and their conduct did not create a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Moreover, there is no evidence linking the conduct in question to the Petitioner's campaign as in the decisions cited by the Employer. See *Futuramik Industries*, 279 NLRB 185 (1986); and *ARA Services v. NLRB*, 712 F.2d 936 (4th Cir. 1983). For the reasons set out by the Regional Director in his Supplemental Decision, and by Member Raudabaugh in his concurring opinion, the Regional Director properly overruled Employer's Objection 3. In the absence of any evidence linking the conduct to the Petitioner's campaign, we find any speculation as to why the four individuals filed the charge to be both unwarranted and unnecessary.

The Employer argues that this situation is analogous to these where it has been deemed objectionable for either an employer or union adherent to threaten to report employees to the appropriate authorities as illegal aliens, unless the employees support their position in a representation election, citing *Futuramik Industries*, 279 NLRB 185 (1986), and *ARA Services v. NLRB*, 712 F.2d 936 (4th Cir. 1983).

First, I must note the lack of any proffered evidence which would tend to establish that the Petitioner was in any way responsible for the conduct in question. Second, no evidence was proffered which would establish, or even indicate, that these individuals were motivated by anything other that a legitimate concern for the welfare of the residents at the Employer's facility. My reading of the cases cited by the Employer had lead me to conclude that evidence of improper motive is a necessary element of establishing that this type of conduct is objectionable. Accordingly, I have determined to overrule this objection.

Objection 5

In this objection, the Employer asserts that the Petitioner, in newsletters it distributed to employees prior to the election, made threatening statements, including antisemitic remarks.

In support of this objection, the Employer proffered copies of the newsletters in question, which on their face indicate they are from the Petitioner and contain some articles written by its officers, including the Petitioner's president. The specific portion of the newsletters on which the Employer relies is a reference to ''a small scale war'' contained in one article authored by an employee and a cartoon which depicts a meeting conducted by the Employer as taking place in a ''Gestapo Meeting Hall'' where the employees are chained to their chairs.

As for the ''small scale war'' reference, it occurs in a paragraph where others, apparently nonunion employees, are accused by the author of starting this so-called war. Nowhere therein is there an appeal for escalating the perceived battle. In fact, the author urges her audience to neither believe nor spread rumors, to show more consideration to fellow employees, and to do their jobs better than before. When taken in context, this article cannot be characterized as objectionable.

The Employer correctly notes that in *Sewell Mfg. Inc.*, 138 NLRB 127 (1962), the Board set forth the criteria for evaluating the objectionable nature of racial appeals made by a party to a representation election. There, the Board noted that if a party deliberately seeks to overstress or exacerbate racial feelings by irrelevant, inflammatory appeals, that would constitute a basis for setting aside an election. The problem with Respondent's argument is that the cartoon, however tasteless it may be, cannot reasonably be construed as a racial appeal. At worse, the reader of the cartoon could conclude only that the Employer was engaging in ''Gestapo'' tactics in holding these meetings. Cartoons and other comments by a union or an employer's actions are not normally objectionable conduct, even if in poor taste or inaccurate. In *Del Rey Tortillerie*, 272 NLRB 1106 (1984), the court found that a union did not engage in objectionable conduct when it distributed literature to employees which accused the employer of engaging in scare tactics and false promises and contained cartoons lampooning fictional schemes by an unnamed employer against the employees. In an earlier case *Cormier Hosiery Mills*, 230 NLRB 1052 (1977), the Board found that a union's accusation, that an employer had manipulated its financial situation to deprive employees of their profit-sharing moneys, was not objectionable.

In short, it is clear that one party has great latitude to comment on the conduct of another during an election campaign, without engaging in objectionable conduct. See also *Alson Industries*, 230 NLRB 735, 738 (1977). The one isolated cartoon in question does not cross that line. Accordingly, I have determined to overrule Objection 5.

Objections 11 and 12

In these objections, the Employer argues that the Petitioner interfered with the election by the conduct of its officers, agents, and those acting on its behalf occurring in the Employer's parking lot during the election.

In support of these objections, the Employer proffers the testimony of its owner, John Masternick; its president, John J. Masternick; and its in-house counsel, John P. Daliman, that throughout the day on August 26, 1982, prounion employees were gathered in the Employer's parking lot, accompanied a portion of the time by the Petitioner's representative Timko, yelling and chanting, ''Vote Yes'' appeals to all who entered and left the facility.

First, I note that there is no evidence presented, or even a claim made, that contact took place inside the polling area. Therefore, the conduct alleged cannot be objectionable or violative of the rule set forth in *Milchem, Inc*., 170 NLRB 362 (1968). In fact, the Employer's argument is that this conduct constitutes a ''captive audience'' meeting by the Petitioner, violative of the prohibition on such gatherings within 24 hours of a representation election, as set forth in *Peerless Plywood*, 107 NLRB 437 (1953). The Board and courts have primarily, if not exclusively, considered potential *Peerless Plywood* violations by a union in cases where it employs a sound truck to broadcast campaign appeals outside an employer's facility on the day of an election. It is quite clear that the Board will not find such conduct to be objectionable absent clear evidence that the appeals were loud enough to be heard inside the employer's facility while employees were actually working and therefore unable to avoid the campaigning. Compare *United States Gypsum Co*., 115 NLRB 734, 735 (1956), with *Underwood Corp*., 108 NLRB 1368, 1369 (1954). Further, it has been noted that exhortations to vote yes are not a ''speech'' within the *Peerless Plywood* doctrine. *Crown Paper Board Co*., 158 NLRB 440, 443 (1966). There is no evidence or claim that, in this case, the shouting of these employees could be heard inside the facility at any time or that it consisted of any appeal which resembled a ''speech.'' It is true that the court in *Industrial Acoustics Co. v. NLRB*, 912 F.2d 717 (4th Cir. 1990), rejected as irrelevant the distinction as to whether the sound truck could be heard inside the facility. However, in that case, it is clear that the message being broadcast consisted of appeals relating to wages and benefits, which more closely resemble ''speeches'' than the ''vote yes'' appeals the Employer alleges to have taken place in this instance. In any event, I am bound to follow Board precedent where there is a dispute between it and an appellate court. *Iowa Beef Packers*, 144 NLRB 615 (1963). Accordingly, I find no *Peerless Plywood* violation on the facts alleged to exist by the Employer and, therefore, overrule Objections 11 and 12.

IT IS FURTHER ORDERED that Employer's Objections 1, 3, 5, and 11–13 be overruled for the reasons noted above.