Taylor Wharton Division Harsco Corporation *and* Sheet Metal Workers' International Association Local Union #441, AFL–CIO. Case 15–RC–8321

September 28, 2001

DECISION, DIRECTION, AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

The National Labor Relations Board has considered objections to an election held on March 16, 2001, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally shows 90 votes for and 89 votes against the Petitioner, with 1 challenged ballot.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations.

Only Petitioner's Objections 6 and 9 are at issue.[1] We address each below.

Objection 9

Petitioner's Objection 9 alleges that the Employer threatened all employees and eligible voters by distributing literature that portrayed a union organizer announcing that the Company had closed. The hearing officer recommended that the objection be sustained. We adopt the recommendation for the reasons set forth below.

Shortly before the election, Plant Manager Mike Romano distributed a newsletter entitled the "Romano Gazette" (Gazette) to employees.[2] A cartoon appeared in the second column of the last page of the Gazette. It was titled "Sheet Metal Workers' Union Organizer" and showed a gleeful man banging his fist on a table. Under the picture appeared the statements "We won the strike! We brought the Company to its knees! It Closed." Below, in larger font, appeared the exhortation "Please Vote No To The Sheet Metal Workers' Union." (See appendix.)

The hearing officer found that the cartoon was coercive and therefore objectionable because it conveyed the message that the Employer's plant would close if the employees chose union representation. We agree. An employer may predict the precise effects it believes unionization will have on its company; however, the prediction must be "carefully phrased on the basis of objective fact." *Gissel Packing Co. v. NLRB*, 395 U.S. 575, 618 (1969). Here, as the hearing officer found, the cartoon's message was not based on objective fact. It was, instead, an unsupported prediction of strikes and plant closure should the employees select the Union as their bargaining representative.[3]

The Employer argues that the Gazette was a lighthearted "tongue-in-cheek" mock newspaper, and the cartoon was merely a mock comics section. Even if true, this explanation fails the *Gissel* test. The cartoon, humorously intended or not, still encourages employees to vote against the Union by predicting plant closure.

Moreover, the cartoon was not the only place in the Gazette where strikes and closings were mentioned. Thus, in the column just preceding the cartoon, the Gazette asserted that, "[t]he strike is how the union enforces its demands at the table. A weak union—one that people vote for but don't intend to join—is many times not that effective at the table. But there is still the threat of a strike."[4] Further, a text box on the first page of the Gazette also quoted a supervisor as saying, "I was a union steward. . . . The union wasn't the answer. It caused problems. Bargaining didn't go well. My whole department closed."

We find that these comments strongly reinforce the message of the cartoon that the Union would resort to crippling strikes if it won the election, which would cause the plant to close. Clearly, these comments belie the Employer's contention that the cartoon was harmless and not intended to be taken seriously.

Accordingly, we adopt the hearing officer's recommendation sustaining this objection.

Objection 6

Although we find that Objection 9 is a sufficient basis on which to set aside the election, we also affirm

[1] In the absence of exceptions, we adopt the hearing officer's recommendations that Petitioner's Objections 1–5, 10, and 12, and Employer's Objection 2 be overruled and that the challenge to the ballot of William deLlacer be overruled. (The remaining objections were withdrawn.)

[2] The testimony indicates that the Gazette was passed out to employees a few days before the election, but the exact distribution date is unclear.

[3] See *Quamco, Inc.,* 325 NLRB 222 (1997). There, the employer erected a "UAW Wall of Shame" on which it hung posters in the shape of tombstones bearing "RIP" and the names of UAW-represented factories that had closed. On the day before the election, the employer hung a tombstone poster with the name "Eldorado" and a "?" on it. The Board found the tombstone display to be an objectionable threat because, without providing explanations or objective facts, "the clear implication of the display was that the fate of the plant would be thrown into question if, and only if, the employees chose union representation." Id. at 223.

[4] The lead article on p. 1 asserted that "[r]eports are that many employees don't intend to vote in the election on March 16th because they don't intend to join." This assertion proved to be unfounded as 180 out of 190 eligible voters participated in the election.

the hearing officer's recommendation sustaining Petitioner's Objection 6. We address the Employer's exceptions below.

Objection 6 alleged that the Employer, by and through its agents, "threatened and intimidated an employee and eligible voter by suggesting that he would suffer adverse consequences for displaying a Union bumper sticker on his car parked outside of management's office." In support of this objection, the Petitioner presented uncontroverted evidence that, several days before the election, employee James Cribb was unable to park in his normal spot and parked in front of the office. The following day, which was no later than 3 days before the election, his supervisor, Nicky deLlacer, asked what he was doing by parking his truck decorated with prounion stickers in front of the office and wearing a similarly decorated hardhat. DeLlacer told Cribb that Cribb was "digging himself a hole."

The hearing officer found that these comments would reasonably be expected to have a chilling effect on employees' freedom of choice given the proximity of the incident to the election and the close election results (one-vote margin). In its exceptions, the Employer contends that consideration of all the relevant factors, which the hearing officer failed to do, clearly shows that the remarks were not objectionable. For the reasons set forth below, we affirm the hearing officer.

As the hearing officer found, the proper test for evaluating conduct of a party is an objective one—whether it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg.,* 316 NLRB 716 (1995). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (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; (5) the degree to which the misconduct persists 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 to cancel out the effects 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. See, e.g., *Avis Rent-a-Car,* 280 NLRB 580, 581 (1986).

Here, as the hearing officer found, the proximity of deLlacer's comment to the election and the closeness of the final vote (factors 4 and 8 above) clearly support finding the comments objectionable. Further, the comments were likely to cause Cribb to fear reprisal (factor 2),[5] and they are the kind of comments that would tend to persist in his mind (factor 5). As discussed above, this was also not the Employer's only misconduct (factor 1), and there was no union misconduct to counterbalance that of the Employer (factor 7).

Thus, six of the factors clearly support finding the comments to be objectionable. Two of the three remaining factors (3 and 6) are weaker. Thus, only one employee in the bargaining unit was subjected to the misconduct, and the comment was not disseminated among other bargaining unit employees. Further, the Employer asserts that the remaining factor, the degree to which the conduct can be attributed to the Employer, does not support finding the conduct objectionable since Nicky deLlacer was a first-line supervisor. Without specifically resolving that claim,[6] we find, in any event, that these three factors are outweighed by those discussed above, particularly because a shift of even one vote could have changed the outcome. See *Cambridge Tool Mfg.,* supra; and *Hopkins Nursing Care Center*, 309 NLRB at 959. Cf. *Bon Appetit Management Co*., 334 NLRB 1042, 1043 (2001) (finding isolated interrogation and threat by low-level supervisor not objectionable, citing, inter alia, the sharply lopsided vote).[7]

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[5] Respondent describes this exchange as merely a joke between friends, citing Cribb's testimony that he brushed off the comment a few days later and told deLlacer after the election that he thought deLlacer could have been joking. However, Cribb testified repeatedly that *at the time of the comment* he thought deLlacer was serious. Moreover, as stated above, the test is an objective one. See *Hopkins Nursing Care Center*, 309 NLRB 958 (1992). And such a statement by a supervisor, even if only a word to the wise from a friend, is as likely to interfere with an employee's freedom of choice as an outright threat from a hostile supervisor. See *Beverly Enterprises*, 310 NLRB 222, 240 (1993), enfd. in relevant part sub nom. *Torrington Extend-A-Care Employee Assn. v. NLRB*, 17 F.3d 580 (2d Cir. 1994); *NLRB v. Big Three Industrial Gas & Equipment Co.*, 579 F.2d 304, 311 (5th Cir. 1978), rehearing denied 584 F.2d 389 (1978), cert. denied 440 U.S. 960 (1979).

[6] DeLlacer was an admitted supervisor. As such, his statements are attributable to the Employer. See *Pinkerton's, Inc*., 295 NLRB 538 (1989) ("activities, statements, and knowledge of a supervisor are properly attributable to the employer"); *Colson Equipment, Inc*., 257 NLRB 78, 80 (1981) ("Clayton's remarks can be construed as representing Respondent's position inasmuch as employers are generally held responsible for the conduct of their supervisors"), enf. denied in part on other grounds 673 F.2d 221 (8th Cir. 1982).

[7] In so finding, we reject the Employer's argument that deLlacer's comment was not objectionable because it had no effect on Cribb's vote. As indicated above, such comments are analyzed under an objective standard—whether the conduct of a party to the election has the tendency to interfere with the employees' freedom of choice. Thus, Cribb's subjective reaction is irrelevant. *Hopkins Nursing Care Center*, supra, 309 NLRB at 958 and fn. 4.

Accordingly, we also adopt the hearing officer's recommendation sustaining this objection.

DIRECTION

It is directed that the Regional Director for Region 15 shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballot of William deLlacer and thereafter prepare and serve on the parties a revised tally of the ballots. If the revised tally shows that the Petitioner has received a majority of the votes cast, the Regional Director shall issue a certification of representative. If the revised tally shows that the Petitioner did not receive a majority of the votes cast, the election shall be set aside and a second election shall be conducted.

ORDER

It is ordered that this proceeding is remanded to the Regional Director for Region 15 for further appropriate action.

APPENDIX

Sheet Metal Workers' Union Organizer

We won the strike! We brought the Company to its knees!

It closed . . .

PLEASE VOTE NO

TO THE

SHEET METAL WORKERS' UNION