

Turner Shoe Company, Inc. and Carmen Athletic Industries, Inc. and Sindicato Puertorriqueno de Trabajadores affiliated with United Food and Commercial Workers International Union, AFL-CIO,¹ Petitioner. Case 24-RC-6247

April 30, 1980

**DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION**

**BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND TRUESDALE**

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 24 on January 10, 1979, an election by secret ballot was conducted on February 15, 1979, under the direction and supervision of the Regional Director for Region 24, among the employees in the stipulated unit. At the conclusion of the election, the parties were furnished a tally of ballots which showed that, of approximately 724 valid ballots, 178 were cast in favor of the Petitioner, 514 were against the Petitioner, and there were 32 challenged ballots. The number of challenged ballots was not determinative of the results of the election. Thereafter, the Petitioner filed timely objections to the election.

After an investigation, the Regional Director on March 23, 1979, issued his Report and Recommendation on Objections and Notice of Hearing wherein he ordered a hearing pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, to resolve the issues raised by the objections. On May 21, 1979, a hearing was conducted in which all parties participated. On August 2, 1979, the Hearing Officer issued her Report and Recommendations on Objections to Election wherein she recommended that the Petitioner's Objection 1 be sustained and that a second election be conducted. The Hearing Officer also recommended that the Petitioner's Objections 2 and 3 be overruled. Thereafter, the Employer filed timely exceptions to the Hearing Officer's recommendation that Objection 1 be sustained and that a second election be conducted. No exceptions were filed to the Hearing Officer's recommendation to overrule the Petitioner's Objections 2 and 3.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

¹ The name of the Petitioner, formerly Sindicato Puertorriqueno de Trabajadores affiliated with Amalgamated Meat Cutters of North America, AFL-CIO, is amended to reflect the change resulting from the merging of Retail Clerks International Union and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

The Board has considered the Hearing Officer's report, the Employer's exceptions thereto, and the entire record in this case, and makes the following findings:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The following unit, as stipulated by the parties, constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees, including shipping and receiving employees, employed by the Employer at its facilities in Aguadilla, Puerto Rico, but excluding all office clerical employees, guards and supervisors as defined in the Act.

5. The Board has considered the Hearing Officer's report and the Employer's exceptions and brief, and hereby adopts the Hearing Officer's findings and recommendations except as hereafter modified.

Although the Hearing Officer found that none of the Employer's conduct was objectionable in and of itself, she further found that the overall impact of the Employer's campaign speeches and literature created a coercive atmosphere which interfered with the results of the election. We agree with the Hearing Officer's recommendation that the election be set aside but also find, contrary to the Hearing Officer, that specific conduct by the Employer constituted objectionable conduct. As set forth more fully below, we find that the Employer engaged in objectionable conduct by making threats of plant closure and loss of jobs, and that, within the context of such threats, the Employer's repeated statements about strikes, plant closure, and loss of jobs had a coercive impact on the employees which also interfered with the results of the election.

The Employer conducted a vigorous campaign against the Union consisting of speeches² and distribution of campaign literature. Between January

² The Employer delivered its first speech on December 6-7, 1978, and emphasized the themes of strikes, plant closing, and loss of jobs resulting from unionization. Since this speech was made prior to the filing of the operative petition involved herein, it cannot serve as a basis for setting aside the election. However, it has been considered insofar as it provides background in evaluating the Employer's post-petition conduct. *Stevenson Equipment Company*, 174 NLRB 865, 866, fn. 1 (1969).

22-29, 1979, the Employer delivered a speech in both Spanish and English to small groups of employees. In this speech the Employer made several statements associating the Petitioner³ with strikes, plant closings, and loss of jobs.

Shortly after this speech, the Employer distributed a campaign leaflet entitled "The Death of a Shoe Factory" and a leaflet which described plant closings where employees had been represented by the Amalgamated Meat Cutters Union. The leaflet was printed in the form of a prayer card distributed at Catholic funerals and stated in Spanish:

OBITUARY (DEATH NOTICE)

DEAD: Dorado Shoe Co., Augadilla, P.R.

BORN: 1965

UNIONIZED BY: Meat Cutters Union, 1970
Three Week Strike

DEAD: 1971

The Meat Cutters Union alleges that if it goes into a plant it guarantees your job.

The Company Dorado Shoes was a very successful company when it was organized by the Meat Cutters Union. In 1970, six months later, the Meat Cutters Union called the employees to a strike at the Company which lasted three weeks.

Six months thereafter, one year after the Meat Cutters Union came into the Company, the Meat Cutters Union negotiated a close out of the plant.

WHY DID THIS HAPPEN?

Because the plant could not successfully compete in the shoe industry and the plant closed. This was the death of a shoe factory.

LESSON:

Our job security depends on the working together as a team and of the mutual cooperation and ability to produce shoes of quality at competitive prices so that we can sell our shoes to our customers.

BUT NOT WITH UNION PROMISES

VOTE NO

The pamphlet on plant closings was also printed in Spanish and stated:

Job security is very important for you. What job security does the Meat Cutters give its members? You be the judge.

³ In its speeches and campaign literature the Employer did not specifically refer to the Petitioner by name, but rather referred to the Amalgamated Meat Cutters Union, the former name of the Union with which the Petitioner is affiliated.

CLOSING OF PLANTS, CLOSING OF PLANTS, CLOSING OF PLANTS

The Meat Cutters Union was the representative of these plants that closed recently.

CLOSED-Swift & Co., Scottsbluff, Nebraska; **Swift & Co.,** Wilson, N.C.; **Hygrade Packing Co.,** Richmond, Va.; **Goetz Packing,** Baltimore, Md.; **Clayman Packing,** Philadelphia, Pa.; **Swift & Co.,** Telleston, Arizona; **Hygrade Packing Indianapolis, Inc.;** **Swift & Co.,** Nashville, Tenn.; **Dukeland Packing,** Baltimore, Md.; **Swift & Co.,** Kearney, N.J.; **Dorado Shoe Co.,** Aguadilla, P.R.; **G. H. Meyer Sons,** Richmond, Virginia; **Marhoeffer Co.,** Muncie, Indiana (Pictures of plants with the words **CLOSED** across the picture itself.)

What job security did the employees of these plants receive from the Meat Cutters Union?

Vote No.

The final aspect of the Employer's campaign was a speech delivered to groups of employees in Spanish and English on February 13, 1979, 2 days before the election. After telling its employees that unionization could mean strikes, plant closure, and loss of jobs, the Employer stated near the end of the speech that "If we are not careful a disaster could hit and we could lose it all."

In evaluating the Employer's campaign conduct we must carefully balance the Employer's right to express its views on the subject of unionization with the right of its employees to make a reasoned decision regarding unionization in an atmosphere free of coercion and threats. In *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969), the Supreme Court pointed out that:

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, 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 or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, fn. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to

economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

In *Gissel*⁴ the Court found the employer, in its election campaign, had informed its employees that other area plants had closed because of unionization, that the union was strike happy, and that the union would probably engage in a strike which would result in plant closure and a loss of jobs. The Court further found, in agreement with the Board, that there was no record support for the employer's underlying assumptions that the union would have to strike or that other area plants had closed because of unionization. In the absence of an objective basis to support its message of probable strikes and plant closure, the Court found that the employer's statements were not permissible predictions of economic consequences but were implicit threats of job loss and constituted objectionable conduct sufficient to set aside the election.

Our evaluation of the campaign conduct of the Employer in the instant case reveals a striking similarity to the conduct of the employer in *Gissel*. The Employer's campaign was geared to convey to its employees the message that unionization would lead to strikes, plant closure, and loss of jobs. Thus, the Employer distributed a pamphlet entitled "The Death of a Shoe Factory" which related the "death" of a nearby factory subsequent to unionization. Although the pamphlet did not directly attribute the closing of the factory to unionization, the graphic presentation of the plant closing in the form of an obituary notice was a clear attempt to communicate by form if not by words a clear message to employees—unionization caused a nearby plant to close and unionization would likewise cause the Employer to close its plant. Similarly, in its February 13 speech, 2 days before the election, the Employer told its employees that the Union was strike happy, unionization could lead to a long and costly strike, striking employees could be permanently replaced, other area union plants had been forced to close, and if the employees were not careful "a disaster could hit" and everything could be lost. The Employer's reference to an impending disaster just 2 days before the election conveyed the not too subtle message that a vote for the Union would lead to a strike and permanent strike replacements or plant closure and a resulting loss of jobs. Thus, the Employer sought to take advantage of employee concerns about job security and

informed its employees that the only way to protect their jobs was to vote against the Union.

The record in the instant case, like the record in *Gissel*, contains no demonstrable record evidence to support the Employer's message that unionization caused the closure of other area plants or that unionization would lead to strikes, plant closure, job loss, and other unidentified disasters. Therefore, the Employer failed to convey a permissible non-coercive prediction that unionization might lead to an economic dispute that could result in a loss of jobs. Instead, in the context of the employer-employee relationship, the Employer's leaflet in the form of an obituary notice and its February 13 speech constituted threats of plant closure and job loss since "employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts."⁵

We find no merit to the Employer's contentions that it did not threaten its employees with job loss because none of its campaign material or statements directly or explicitly attributed strikes, plant closings, or job loss to unionization. Communications which hover on the edge of the permissible and the unpermissible are objectionable as "[i]t is only simple justice that a person who seeks advantage from his elected use of the murky waters of double *entendre* should be held accountable therefor at the level of his audience rather than that of sophisticated tribunals, law professors, scholars of the niceties of labor law, or 'grammarians.'"⁶ As the Supreme Court has noted, an employer "can easily make his views known without engaging in 'brinkmanship' when it becomes all too easy to 'overstep and tumble [over] the brink,' *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir. 1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees."⁷ The Employer's use of a leaflet in the form of an obituary notice and its reference to an impending disaster are examples of "brinkmanship" which overstepped and tumbled over the brink.

We also find that in the context of these specific threats of plant closure the Employer's repeated statements in its speeches and campaign material associating the Petitioner with strikes, plant closures, and loss of jobs had a coercive impact on the employees. In its January 22-29 speech the Employer told the employees that "the Meat Cutters were involved in 1,235 strikes in the last four years," that "hundreds of plants that the Meat Cutters union was in have closed," and that "25,000

⁴ *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. at 617-619.

⁵ *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. at 619-620.

⁶ *Georgetown Dress Corporation*, 201 NLRB 102, 116 (1973).

⁷ *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. at 620.

Meat Cutters union members lost their jobs." Two days before the election the Employer informed the employees in its February 13 speech that "with 40% unemployment in Aguadilla, the union still does not give one job to one single person," that "the Meat Cutters was one of the most strike-happy Unions," and that although two area plants were union plants, they closed "throwing hundreds of workers out of work." In addition, the Employer's campaign material emphasized the themes of a strike-happy union, plant closures, and the loss of jobs. Within the context of the threats of plant closure and loss of jobs, as found above, we find that the Employer's constant references to strikes, plant closure, and loss of jobs constituted additional objectionable conduct which prevented the employees from exercising their free choice in the election.

Moreover, even if we did not find that the Employer's distribution of the death notice or its threat of an impending disaster constituted specific threats of plant closure, we would find that the overall impact of the Employer's campaign created a coercive atmosphere sufficient to set aside the election. We have found such a coercive atmosphere, even in the absence of a specific finding of

objectionable conduct, in cases where an employer has emphasized campaign themes such as the likelihood of strikes, plant closure, and loss of jobs if the union won the election. *Thomas Products Co., Division of Thomas Industries, Inc.*, 167 NLRB 732 (1967); *Amerace Corporation, ESNA Division*, 217 NLRB 850 (1975). As indicated above, the Employer in the instant case constantly emphasized job security to its employees and attempted to link the Petitioner with strikes, plant closure, and loss of jobs.⁸ Therefore, we find that the Employer's overall campaign created a coercive atmosphere and tended to create the impression that strikes, plant closure, job loss, and other adverse consequences would be a direct result of unionization. Accordingly, we find merit to the Petitioner's Objection 1, and find that a second election should be directed.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

⁸ The record does not support the Hearing Officer's finding that the Employer first interjected the campaign issue of job security on its own initiative. In agreement with the Hearing Officer's further finding, however, we find that the Employer, on its own accord, made job security the dominant theme of its campaign.