Dresser Industries, Inc. *and* Operating Engineers Local Union No. 3, AFL-CIO. Cases 32-CA-99 and 32-RC-13 (formerly Cases 20-CA-11736 and 20-RC-13552)

May 8, 1979

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

On August 24, 1977, the National Labor Relations Board issued a Decision, Order, and Direction of Second Election in the above-entitled proceeding,[1] finding that Respondent had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by interrogating its employees concerning the employees' union activities; creating an impression that its employees' union activities were under surveillance; soliciting employee grievances; threatening employees with plant closure in the event they chose to be represented by the Union; threatening to take away certain benefits; and granting wage increases to discourage support of the Union. The Board ordered that Respondent cease and desist therefrom and take certain affirmative action. Subsequently, the United States Court of Appeals for the Ninth Circuit enforced in part, and denied enforcement in part, the Board's Order.[2]

Thereafter, on August 28, 1978, Respondent filed with the Board a motion for reconsideration, requesting that the Board reconsider its previous Direction of Second Election in light of the decision of the court of appeals.

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.

Respondent alleges, in substance, that the Board's Direction of Second Election should be vacated since that direction was premised upon findings which were reversed by the court. Specifically, the Board found the Direction of Second Election warranted because there was an interrogation and promise of benefits to an employee in the critical period, in addition to the prepetition conduct, which the Board characterized as "[a] background of earlier widespread threats, interrogations, impression of surveillance, and solicitation of grievances."[3]

The court, however, reversed certain of the Board's findings of interrogations of employees, solicitation of grievances, surveillance of employees' union activities, and threats to cease operating, on the ground that these particular findings were not supported by substantial evidence on the record as a whole. The Court adopted the Board's findings that Respondent's plant manager's visit to the home of four employees constituted unlawful interrogation; that Respondent's supervisors unlawfully interrogated employees on other occasions; and that Respondent impermissibly threatened layoffs and loss of benefits if the Union was chosen as the employees' bargaining representative. Respondent, however, contends that those findings are insufficient to warrant setting aside the election. Respondent further contends that the single instance of unlawful conduct which occurred during the critical period is an isolated incident unrelated to the earlier 8(a)(1) violations, and that its impact, if any, upon the outcome of the election was *de minimis*.

The Board found, and the court agreed, that prior to the filing of the petition in the instant case Respondent's plant manager and a supervisor visited four employees at their homes on the evening of May 7, 1976, with the stated purpose of finding out what complaints the employees had. Also in the prepetition period Respondent's supervisors threatened loss of benefits if the Union was elected, and unlawfully interrogated two employees, one of whom, Nichols, was later again unlawfully interrogated during the critical period. In light of these findings, we find no merit in Respondent's contentions.

Respondent correctly cites *The Ideal Electric and Manufacturing, Company*,[4] for the proposition that the Board will not consider instances of prepetition conduct as a basis upon which to set aside an election. However, as we noted in *Stevenson Equipment Company*,[5] the *Ideal Electric* rule does not preclude consideration of conduct occurring before the petition is filed where, as here, such conduct adds meaning and dimension to related postpetition conduct. Applying the *Stevenson* principle to the facts of the instant case, it readily appears that Respondent's prepetition activities—interrogations and threats—were designed to defeat unionization of its facilities. Further examination of Respondent's prepetition conduct reveals that the critical period interrogation of and promise of benefit to Nichols by a supervisor was a continuation of Respondent's earlier attempts to thwart unionization.

Respondent further argues that the incident in the critical period was isolated. We disagree. In light of the number and severity of Respondent's illegal acts *before* the filing of the petition on May 18, 1976, Respondent's contention that the single postpetition vio-

[1] 231 NLRB 591 (1977).
[2] *N.L.R.B.* v. *Dresser Industries, Inc.*, 580 F.2d 1053 (1978).
[3] 231 NLRB 591, fn. 1.
[4] 134 NLRB 1275 (1961).
[5] 174 NLRB 865, 866, fn. 1 (1969); See also *Warren W. Parke, d/b/a Parke Coal Company*, 219 NLRB 546, 547 (1975).

lation is isolated is not supported in either fact or law. Rather, the single violation of Section 8(a)(1) of the Act which occurred during the critical preelection period is but an extension of Respondent's consistent pattern of antiunion conduct that has now been enforced by the court of appeals.

As the court of appeals found, Respondent committed several violations of Section 8(a)(1) of the Act between May 4 and July 22, 1976, a period slightly exceeding 2 months. Specifically, a supervisor inquired of an employee whether the latter intended to attend a union meeting and stated that he would tell the plant manager of the employee's action. Respondent's plant manager and a supervisor visited the homes of four employees after working hours to elicit any complaints the employees had and to discuss the disadvantages of a union; and another supervisor interrogated yet another employee about the Union and threatened reprisals such as layoffs and mine closure if the employees selected the Union to represent them. Finally, this same supervisor approached an employee only a few days before the election, interrogated him regarding the employee's predisposition toward the Union, and promised him a raise.

Under these circumstances, we cannot agree with our dissenting colleague that the statements made by Mine Foreman Johnson to employee Nichols on July 15 were casual and isolated in nature and therefore do not constitute grounds for a second election. The Board has repeatedly held that statements made prior to an election can reasonably be expected to be repeated and discussed by employees.[6] In addition, we note that at the time of the election there were 41 employees in the unit and that the Board has set aside elections where the ratio of violations to employees was higher than in the instant proceeding.[7] Furthermore, as we indicated in our original decision in this case,[8] we may legitimately assess the impact of coercive statements on the basis of the closeness of the election results. In view of the fact that the Union lost the election herein by only a single vote, we find the conclusion inescapable that Respondent's unlawful conduct affected the results of the election.

We do not believe that the recent decision of the court of appeals should lead to a different conclusion simply because it finds that some of Respondent's actions prior to the filing of the petition did not violate the Act. As indicated in this Supplemental Decision, a significant portion of that conduct has been found violative, and we continue to be of the view that the prepetition conduct in this case lends additional meaning to Johnson's unlawful statements that were made just 1 week before this close election.[9]

Accordingly, we reaffirm our earlier holding that the first election must be set aside and that a second election be directed, and therefor shall deny Respondent's motion.

ORDER

It is hereby ordered that Respondent's motion for reconsideration be, and it hereby is, denied as lacking merit.

MEMBER MURPHY, dissenting:

Contrary to my colleagues, I would grant Respondent's motion for reconsideration.

In the original decision in this case, I joined my colleagues in finding that Respondent had committed several violations of Section 8(a)(1) of the Act.[10] However, in light of the decision of the court of appeals that many of the 8(a)(1) violations as found by the Board were not supported by substantial evidence in the record as a whole, our Direction of Second Election is unwarranted, for, the single 8(a)(1) violation which occurred in the critical period had a minimal impact, if any, on the outcome of the election.

As the majority concedes, most of Respondent's conduct which would otherwise be objectionable occurred *prior* to the filing of the petition in the instant case. However, the majority has relied on this prepetition conduct erroneously to find that the sole violation of Section 8(a)(1) of the Act which occurred in the critical period warrants the direction of a second election, notwithstanding the well-settled rule that prepetition conduct cannot be the basis for setting aside an election.[11] Indeed the majority misstates the holding of the court in asserting that "the court . . . found . . . several violations of Section 8(a)(1) of the Act between May 4 and July 22, 1976, a period slightly exceeding 2 months." What the court found, in fact, was a number of 8(a)(1) violations between May 4 and May 17, 1976 (prior to the filing of the petition), and one violation on July 15, approximately 2 months later. The election was held on July 22.

The majority circumvents the *Ideal Electric* rule by

[6] *Sol Henkind, an Individual, d/b/a Greenpark Care Center*, 236 NLRB 683 (1978); *Super Thrift Markets, Inc. t/a Enola Super Thrift*, 233 NLRB 409 (1977); *Montgomery Ward & Co., Incorporated*, 232 NLRB 848 (1978); *Intercontinental Manufacturing Company, Inc.*, 167 NLRB 769 (1967); *Standard Knitting Mills, Inc.*, 172 NLRB 1122 (1968).

[7] *Id.* See also *Custom Recovery, Div. of Keystone Resources, Inc.*, 230 NLRB 247 (1977).

[8] *Dresser Industries, Inc.*, *supra* at fn. 1. See also *Heartwood Avenue Corporation d/b/a The Heartwood*, 225 NLRB 719 (1976).

[9] We strongly disagree with the dissent's contention that our decision extends the principles expressed in *Stevenson Equipment*, *supra*, and *Warren W. Parke*, *supra*, to the point where they create a complete exception to the *Ideal Electric* rule. We think the text above clearly indicates that we are not lending undeserved significance to Respondent's conduct that occurred prior to May 18, 1976, the date the petition was filed. Rather, we refer to that conduct only to put Johnson's unlawful postpetition statements in the proper perspective.

[10] 231 NLRB 591 (1977).

[11] *The Ideal Electric and Manufacturing Company, Inc.*, 134 NLRB 1275 (1962).

its misconstruction of *Stevenson Equipment Company*. In *Stevenson*, the Board stated in a footnote that "[w]hile we agree . . . that the rule in *Ideal Electric and Manufacturing Company* . . . forbids specific reliance upon prepetition conduct as grounds for objecting to an election, such conduct may properly be considered insofar as it lends meaning and dimension to related postpetition conduct."[12] The meaning of this statement is clear: there was then, as now, no intent to depart from the *Ideal Electric* principle, nor was there intent to create another exception to the rule.[13] The majority is creating a complete exception to *Ideal Electric* from what was intended as a limited qualification. And by considering the prepetition conduct under the guise of the *Stevenson* test, my colleagues have, in effect, evaded the *Ideal Electric* principle and expanded *Stevenson* beyond its intended parameters.

In this case the conduct in the preelection period is not sufficiently connected to the single, isolated postpetition violation of Section 8(a)(1) to warrant the majority's extension of *Stevenson* in order to avoid the *Ideal Electric* rule. In this regard, it is significant that the court of appeals concluded that the Board's findings that Respondent violated Section 8(a)(1) of the Act by interrogating employee Stocking, creating the impression of surveillance, threatening to close its mine, soliciting grievances, and granting a wage increase because of the presence of the Union were not supported by substantial evidence. In light of the court's failure to find these violations, the casual interrogation and promise of benefits in the critical period is an isolated act which does not warrant setting aside the results of the first election.

The majority cites several cases in footnote 6 of its opinion for the proposition that "statements made prior to an election can reasonably be expected to be repeated and discussed by employees." However, in each of those cases the Board found the statements at issue to constitute either threats of reprisal for union activity or threats *plus* interrogation, and, thus, such cases provide little or no support for the majority's holding here. The majority cites no cases where, in the absence of any evidence on the issue, the Board has found dissemination of a single isolated interrogation and implied promise of benefit. Indeed, when dealing with an isolated remark such as the one at issue here, and where no evidence is adduced that the statement was repeated and discussed by other unit employees, a contrary inference is more reasonable. This is particularly so, where, as here, the promise of benefit was by its terms applicable only to the employees to whom it was made.[14]

Acceptance of the majority's argument, *per se*, extends *Stevenson* and lends undeserved significance to the acts occurring prior to May 18, 1976, the date the petition was filed in this case. The majority has examined the prepetition conduct under the guise of *Stevenson* because it occurred, not because it bears any relationship to the earlier events. However, Stevenson stands only for the proposition that objectionable conduct occurring prior to the filing of the petition may lend "meaning and dimension" to the post-petition conduct. This does not imply that anything which happens in the period before the petition is filed is to be considered to buttress or lend significance to conduct which occurs after the filing of the petition and before the election. Accordingly, I find that Stevenson is inapposite.

On the basis of the foregoing, I find that Respondent's motion has merit and would issue a Notice To Show Cause why the Direction of Second Election should not be rescinded and the results of the first election certified.

[12] 174 NLRB 865, 866, fn. 1 (1969).

[13] There are instances where the Board has recognized exceptions to the *Ideal Electric* rule. For example, in *Gibson's Discount Center, A Division of Scrivner-Boogaart, Inc.*, 214 NLRB 221 (1974), the Board held that a prepetition offer to waive initiation fees in contravention of *N.L.R.B. v. Savair Manufacturing Company*, 414 U.S. 270 (1973), was sufficient grounds for setting aside an election, and in *Willis Shaw Frozen Express, Inc.*, 209 NLRB 267 (1974), the Board set aside an election based on egregious acts of violence committed in the prepetition period. Clearly, neither of these exceptions is applicable here.

[14] In these circumstances, my colleagues' conclusion that the single incident of unlawful conduct "affected the results of the election" is neither "inescapable" nor readily perceived, or, for that matter, very likely.