KMS Corporation *and* International Brotherhood of Electrical Workers, Local 640, Petitioner. Case 28-RC-3547

May 30, 1979

DECISION AND DIRECTION

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

Pursuant to the authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered determinative challenges and objections in an election held on October 25, 1978,[1] and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions[2] and briefs, and hereby adopts the Hearing Officer's findings and recommendations.[3]

Unlike our dissenting colleague, we do not believe that the statement made by the Petitioner's business manager, Glynn Ross, to employee James Nail on the day of the election warrants setting the election aside.[4] In the first place, Nail had already voted when Ross accosted him and, therefore, Ross' remarks could not have affected his vote. Second, the statement was totally unrelated to the election or its outcome[5] but, rather, was personal in nature—uttered because Ross believed that Nail had called one of the Petitioner's agents a liar. Third, almost immediately after Ross made the remark to Nail—in the presence of union organizer Brewer—the latter assured Nail that Ross' remark was not intended as a threat. Thus, the brunt of Ross' remarks was promptly blunted by the Petitioner. Finally, although Nail told several employees who had not yet voted about Ross' remarks to him, there is no basis for inferring that this could reasonably have affected the outcome of the election. Indeed, it is reasonable to assume that employees who heard about the so-called threat would be more likely to vote against, rather than for, the Petitioner.[6] Thus, it cannot be said that the Petitioner benefited in any way from Ross' action. In all these circumstances, we do not believe that Ross' statement warrants setting the election aside, and we agree with the Hearing Officer's recommendation that the Employer's Objection 4 be overruled.

DIRECTION

It is hereby directed that the Regional Director for Region 28 shall, pursuant to the Board's Rules and Regulations, Series 8, as amended, within 10 days from the date of this Decision and Direction, open and count the ballots of Ernest McGrath and Robert Lanning, and thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of such ballots, and, if said tally indicates that the Petitioner was designated by a majority, issue a certification of representative. Should the revised tally of ballots fail to disclose that the Petitioner has been designated by a majority, the election conducted on October 25, 1978, shall be set aside and said Regional Director shall conduct a second election at such time as he deems the circumstances permit a free choice on the issue of representation.

MEMBER MURPHY, dissenting in part:

A high-ranking union official threatened an employee on the election day with physical harm because of the employee's statements in conflict with the Union's position during the campaign. Despite the obvious coercive impact of the statements on unit employees who had not voted, my colleagues refuse to sustain the objection, the Employer's Objection 4. In doing so my colleagues indicate that all union threats are by their nature unobjectionable in that they are likely to persuade voters against the union. I strongly disagree with their conclusion and must therefore dissent.

In this objection the Employer alleged that on the election day an agent of the Union told an employee leaving the polling area that anyone who calls a "brother" a liar better not go out drinking alone.

According to the credited testimony, agents of the Union met with five employees 1 or 2 days prior to the election. One of the agents, Daniel Woodward, told the employees that if the Union won the election all the employees would be admitted into the Union either as journeymen or apprentices, regardless of their age. Employee James Nail, who had previously applied for membership in the Union and was rejected, indicated to Woodward that he could not believe this statement or that it would be that easy to

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The revised tally was 10 for, and 10 against, the Petitioner; there were 3 challenged ballots.

[2] The Employer and the Petitioner excepted to certain credibility resolutions made by the Hearing Officer. It is the established policy of the Board not to reverse a hearing officer's credibility resolutions, when they are based on his observation of the demeanor of witnesses as they testify at the hearing, unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record in this case and see no basis to reverse the Hearing Officer's credibility resolutions.

[3] In the absence of exceptions thereto, we adopt *pro forma* the Hearing Officer's recommendation that the Petitioner's Objection 5 be overruled and the Employer's request to withdraw its Objection 10 be approved.

[4] At a meeting with five employees 1 or 2 days before the election, Nail disputed certain assertions made by union organizer Woodward. On the day of the election, after Nail had voted, Ross told Nail that anyone who calls a "brother" a liar had better not go out drinking alone.

[5] See *Hickory Springs Manufacturing Company*, 239 NLRB 641 (1978).

[6] *Ibid.*

obtain membership in the Union. Nail asked Woodward for assurance in writing. Woodward indicated that he could not do that.

On election day, Nail voted during the morning polling session. As he was leaving the polling area and proceeding to his car, Nail was approached by James Brewer, an organizer for the Union. Brewer told Nail that he wanted Nail to meet someone. Nail accompanied Brewer to a nearby car. As Nail approached, Glynn Ross, the Union's business manager, got out of the car and was introduced to Nail by Brewer. Ross immediately started to Nail, "I hear that you called one of my brothers a liar." Nail denied calling anyone a liar. Ross then stated that he had a policy that was taught to him long ago and that he would pass it on to Nail—that anyone calling one of his brothers a liar better not ever be caught out drinking alone. Nail then asked Woodward, who was seated in the car, "Don, did I actually call you a liar?" Woodward nodded yes. Nail again denied that he had called Woodward a liar, stating that he may have disagreed with him or found what he had stated hard to believe. Ross then asked Nail some unrelated questions and concluded the conversation by telling Nail that he would be talking to him in a couple of weeks.

Nail returned to his car to await the return of another individual who was still in the polling area. Brewer approached Nail and told him, "I hope you didn't think that what just took place was a threat. I kind of think you took it that way and we didn't mean it to be that way." Nail answered that he did take the statement to be a threat. Thereafter, Nail returned to the Employer's jobsite and related the incident to several employees who had yet to vote.

The Hearing Officer found that, because the threat was made "in the heat of battle" and Brewer afterward informed Nail that the statement was not intended as a threat, the incident was insufficient to constitute objectionable conduct. I cannot agree.

The Board has long held that statements made to employees by union representatives which are reasonably calculated to interfere with the employees' exercise of freedom of choice exceed the permissible bounds of preelection activities. *G. H. Hess, Incorporated,* 82 NLRB 463 (1949); *Professional Research, Inc., d/b/a Westside Hospital,* 218 NLRB 96 (1975). Here, the statement by Ross, an important and high-ranking union official, was directly related to Nail's perceived antiunion activities during the campaign and hence the election, and would tend to cause the employees who had not yet voted to assume that the Union was willing to physically harm any employee who opposed it or voted against it in the election.

Furthermore, the coercive impact of the threat was not dissipated by Brewer's "assurance" that it was not intended as a threat. Indeed, the fact that Brewer found it necessary to attempt to assure Nail that Ross had not meant what he said not only belies the very assurance made, but also shows that the three union representatives[7] were fully aware that Ross' statement was threatening and that it correctly would be interpreted by Nail (or any other employee) as such. In these circumstances, Brewer's so-called assurance that no threat was intended is as ludicrous as if Brewer had tried to tell Nail that Ross really had meant to wish him well. Consequently, the majority's finding to the same effect has no more substance in reality than Brewer's clumsily contrived assurance.

Moreover, it is significant that Ross, himself, made no attempt personally to retract the threat or dispel its thrust. Instead, he appears to have resorted to the rather transparent and ineffective ploy of sending Brewer, one of his "lieutenants," purportedly to make amends. But as noted, Brewer's "assurance" did not constitute a meaningful retraction of the threat but was, at best, merely a perfunctory attempt to lessen its coercive effect and, at worst, a mockery of the message it ostensibly conveyed. In any event, the prospective voters to whom the facts concerning the threat were disseminated were well aware that Nail had spoken out in the meeting with Woodward to dispute one of the Union's key campaign promises, and, thus, that the threat was directly related to both that event and promise. The harsh message carried by the threat thus was clear to them: Oppose the Union and suffer possible physical harm. And coming to their attention as it did just before they voted, it would have tended to have had the greatest coercive restraint imaginable on their exercising their free choice in the election.

Rejecting this analysis, my colleagues have apparently entered into a new era in which unions are now free to make any and all threats without fear that any election which the union wins will be set aside. Thus, in *Hickory Springs,* 239 NLRB 641, they refused, over my protest, to set aside an election on the ground that the threats "neither relate to events surrounding or concerning the election nor were they calculated to coerce employees to vote for the Petitioner." Here the threat unquestionably related to events surrounding the election—the election campaign—so now my colleagues conclude that that does not matter since the threat was "personal in nature" (are not all threats?) and thus "unrelated to the election or its outcome . . . ," a conclusion which is beyond reason in light of the circumstances here.

If that were not enough, my colleagues then go on to strongly suggest that even if they viewed the

[7] Ross, Brewer, and Woodward. In considering the likely impact of the threat, I also deem it significant that three of the Union's representatives were involved in the incident.

threats as related to the election or its outcome they would not set the election aside. Thus, they find that those who heard the "threat would be more likely to vote against, rather than for, the Petitioner," citing *Hickory Springs*. My colleagues thus clearly state that union threats cannot be said to affect an election in favor of the union since the normal reaction of voters faced with such threats would be to vote against the union. Presumably, in their view, the stronger the threat the more likely that this would be the result. Thus, unions now apparently have a free hand to threaten voters in any way they wish. After all, according to currently "fashionable view" prevailing at the Board, the likely result will be that the employees will vote against the union and therefore such threats cannot affect the outcome. Quite frankly I am astounded, and in fact shocked, by this approach to our elections. It may be that some voters may vote against the union following the threats. It is also quite likely that some voters out of fear of reprisal will vote for the union. The same can be said with respect to threats made by employers. One thing, however, is clear: It is impossible to know with any certainty how many will vote which way as a result of the threat. But it safely can be said that voters will be affected by the threat, and where the party making the threat ends up having its position sustained by the voters there is at least a strong possibility that that was the reason. In the past the Board has set elections aside in these circumstances rather than engage in any unwarranted speculation. I would continue to do so. Accordingly, I would sustain the Employer's Objection 4.

Inasmuch as I find that the Employer's Objection 4 is meritorious, and concur with my colleagues that Petitioner's Objections 6, 7, and 8 also are meritorious, I would set aside the election and direct a second election.[8]

[8] Since I would set the election aside regardless of its outcome, I find it unnecessary to determine the merit of the challenges to the ballots of Ernest McGrath, Robert Lanning, and Doug Pasquan.