

Werthan Packaging, Inc. and Rick Holt, Petitioner and Paper, Allied-Industrial, Chemical and Energy Workers International Union, (PACE), AFL-CIO. Case 26-RD-1104

August 26, 2005

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to an election held on November 17 and 18, 2004, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 92 for and 113 against the Union, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and, contrary to the hearing officer's recommendation, has decided to overrule the Union's Objections 1, 2, and 14, and to certify the results of the election.¹

Background Facts

The Employer operates a facility in Nashville, Tennessee, where it manufactures and prints various sizes of paper and plastic bags for pet food. The Union won an election conducted in April 2000, and was certified as the bargaining representative of the Employer's production and maintenance employees.

On June 22, 2004,² a decertification petition was filed. The election was scheduled for November 17 and 18 in the following unit:

Included: All production and maintenance employees including group leaders, lead persons, truck drivers and plant clerical employees employed by the Employer at its Nashville, Tennessee, facility.

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Union's Objections 4, 5, 6, 9, 11, and 12, and parts of Objections 1 and 14.

The Union's Objection 1 alleged that the Employer threatened job loss if the Union won the election. Objection 2 alleged that the Employer interrogated employees concerning their membership and activities on behalf of the Union, and Objection 14 alleged that the Employer threatened and coerced employees because of Union activities and threatened dire consequences if the employees selected the Union.

² All dates hereafter refer to 2004.

Excluded: All office clerical employees, confidential employees, professional employees, human resource assistants, sales representatives, customer service representatives, graphics coordinator, marketing manager, process planner, guards, and supervisors as defined in the Act.

On October 24, 2004, almost a month before the election, Night Shift Supervisor Jethro Martin approached employee Geraldine Graham while she was in the large bags area making boxes. Graham was wearing a pronoun button. Martin asked her if she wanted one of the "vote no" buttons that he held in his hand. Graham replied that she did not want one because she was for the Union. Martin told Graham that if she did not vote no she would lose her job. Employee Collins observed Martin offering the "vote no" button but did not hear any of the conversation.

About November 16, the day before the election, Martin approached employees Marcus Bostick, Ricky Golden, and Gene Newby while they worked at their machine. Martin asked them how they were going to vote. The three employees had not previously indicated how they intended to vote, and did not answer his question.

Also, the day before the election, Converting Manager Carlos Adkisson approached employee Felisa Stokes while Stokes was sorting through bags in the large bag area. Stokes had worked for the Employer for 8 months and was wearing a union button for the first time. Adkisson asked Stokes if she had filled out a union card. She replied, "yes." Adkisson informed Stokes that it was in her best interest and in her family's best interest that the Employer wanted her to vote "no." Adkisson then wrote something on her clipboard. Stokes then observed Adkisson walk up to another employee and appear to talk to her and write something down on the clipboard. Stokes saw Adkisson repeat this process with about 25 employees.

Hearing Officer's Findings

The hearing officer found that the Employer engaged in objectionable conduct that could affect the outcome of the election. First, he found that Martin engaged in objectionable conduct by interrogating Graham and by threatening her with job loss if the Union won the election, and by interrogating employees Golden, Bostick, and Newby about their union sympathies.

Further, the hearing officer found that Adkisson's remark (that it was in Stokes' and her family's best interest to vote "no") was threatening and coercive. In this context, he found that Adkisson's questioning open union

supporter Stokes as to whether she had filled out a union card was also objectionable.

Finally, the hearing officer found that although Stokes admitted she could not hear the conversations that Adkisson had with about 25 employees after leaving Stokes, it was logical and reasonable to believe that Adkisson was inquiring about the voting intent of the other eligible voters because that was, in essence, her inquiry of Stokes. Therefore, the hearing officer found that Adkisson's conversations with them were objectionable.

Noting that the difference of 11 votes would have changed the election outcome, the hearing officer found that the combination of a threat of job loss, a threat of unspecified reprisal, and interrogations of 30 employees, including the 25 employees that Stokes observed Adkisson talking to, interfered with the employees' free choice in the election. The hearing officer further found that, even if the alleged interrogations of the 25 employees were not considered, the election should be set aside. He found that Martin's threat to Graham of job loss alone was sufficient to set aside the election. Additionally, given Adkisson's threat to Stokes and the interrogations of five employees, the hearing officer concluded that the case was even stronger for setting aside the election.

Analysis

We agree with the hearing officer that Martin engaged in misconduct by interrogating Graham and threatening her with job loss, and by interrogating employees Golden, Bostick, and Newby concerning their union sentiments.³ However, as explained below, we find, contrary to the hearing officer, that Adkisson did not threaten Stokes, and that the evidence failed to establish that Adkisson interrogated 25 other employees about the Union. We further conclude, contrary to the hearing officer, that considering the Employer's conduct as a whole, a new election is not warranted.

Adkisson's Conduct

Contrary to the hearing officer, we cannot conclude that Adkisson's statement to Stokes that it was in Stokes' and her family's best interest that the Employer wanted her to vote "no" constituted an impermissible threat. An employer's telling an employee that it would be in that person's or family's "best interest" to vote against the union, unaccompanied by threats, is too vague to warrant a finding that the employer was threatening the employee.⁴ At most, Adkisson was expressing her opinion

³ In agreeing with the hearing officer that Martin engaged in misconduct, we note that the Employer filed exceptions only to the credibility findings with respect to Martin's conduct.

⁴ See *Goldtex, Inc.*, 309 NLRB 158, 163 (1991) (supervisor's statement to employee "that it would be in his best interest to vote no, that

that Stokes and Stokes' family did not need the Union. Adkisson was free to express the view that unionization would not be in the best interests of the employees and their families. There is nothing to suggest that this would be because of reprisals visited on the employees because of unionization. Accordingly, we find that Adkisson's statement to Stokes was not objectionable.

As stated above, the hearing officer found that Adkisson's questioning of Stokes was objectionable. We need not pass on this finding because, even assuming the conduct was objectionable, it was limited to Stokes and, as more fully explained below, would not warrant a new election, considered either by itself or in conjunction with other objectionable incidents.⁵ We reject the hearing officer's finding that Adkisson improperly interrogated 25 other employees about their union sympathies. "[T]he burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. . . . An objecting party must show by specific evidence not only that the improper conduct occurred, but also that it interfered with the employees' exercise of free choice" *Sonoma Health Care Center*, 342 NLRB 933 (2004). That burden has not been met. As the hearing officer found, there is no evidence concerning the content of the conversations Adkisson had with the 25 employees she talked with after speaking to Stokes. All Stokes witnessed was Adkisson approaching employees, and then writing something down on a clipboard. None of the 25 employees testified. Contrary to the hearing officer, we are unwilling to infer from this paucity of evidence that Adkisson must have interrogated the 25 employees about their union sentiments. To do so would be mere speculation, which we find insufficient to satisfy the Union's burden of establishing objectionable conduct.

Contrary to our dissenting colleague, *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), does not compel a different result. In *Harborside*, the Board concluded that, based on the record evidence, it was reasonable to infer that a supervisor who had threatened certain identified employees with job loss if the union lost the

the Union could not do anything but charge dues," not coercive), enfd. mem. 16 F.3d 409 (4th Cir. 1994); *Thomas Industries*, 255 NLRB 646 (1981) (captive-audience speech in which employer indicated it did not want the union, and that "it would be in [the employees'] best interest if there is no union here" not coercive absent other promise or threats), enf. denied on other grounds 687 F.2d 863 (6th Cir. 1982); *Liberty Mutual Insurance Co.*, 194 NLRB 1043, 1044-1046 (1972) (memo to employees stating that selecting a union "would not be to your best interest and, in fact, could deter and hamper your personal relation with your Company" is at most an argument containing no threat or warning).

⁵ Even assuming that Adkisson impermissibly interrogated Stokes, it would not render objectionable her statements to Stokes discussed above.

election did not limit her discussions with other employees to permissible opinions regarding unionization. In *Harborside*, the evidence established that this supervisor spoke to many employees on numerous occasions about the union. In her discussions, she repeatedly threatened several employees that they could lose their jobs if the union lost the election. Further, the Board noted that one of the threatened employees testified that the supervisor repeated to other employees the remarks that the supervisor had made to her.⁶

In addition to making these direct threats of job loss, the supervisor also spoke to another employee and “numerous” other, unidentified employees about the union. These conversations took place on the job, in the smoking area and in the parking lot, and included the supervisor’s numerous references to “job security” and her need to be able to “count on” these employees to vote for the union. Given this context—the outspoken and aggressive nature of the supervisor’s discussions with named employees and others—the Board concluded that it was not unreasonable to infer that the supervisor threatened other employees.

The facts here are markedly different from those in *Harborside*. Thus, the only record evidence of Adkisson’s conduct is that she told one employee that the employee and her family would be better off without the Union—a clear reference to a supervisor’s lawful opinion that the Union would not bring any economic gain for the employee—and asked the employee, who was wearing a union button, whether she had filled out a union card. Although Adkisson allegedly then talked to 25 additional employees, as noted above, not one of those employees was called as a witness to recount what Adkisson may have said to him or her. This lack of evidence stands in stark contrast to *Harborside*. There, the pervasive supervisory misconduct, coupled with the fact that the employee who was threatened testified that the remarks the supervisor made to her were repeated by that supervisor to other employees, warranted an inference that the supervisor threatened the other employees. By contrast, there is clearly no evidence that Adkisson’s question was repeated. And, under *Harborside*, there is not even evidence here that Adkisson talked to others about the Union. Under the circumstances here, the Union has not borne its burden of establishing objectionable conduct.⁷

A new election is not warranted.

As discussed, Martin interrogated Graham and threatened her with job loss, and he interrogated Golden, Bos-

tick, and Newby. And we assume *arguendo* that Adkisson interrogated Stokes. However, this conduct does not require that a new election be held.

In determining whether misconduct could have affected the results of the election, the Board has considered the number of objectionable incidents, their severity, the extent of dissemination, and the size of the unit.⁸ The Board has also found that isolated instances of interrogations or threats, which were not disseminated to the other unit employees, could not reasonably affect the results of the election.⁹

Here, as discussed above, the Employer’s objectionable conduct consisted of a single threat and at most five interrogations. A total of five employees, including Stokes, were directly affected by the Employer’s improper actions. There were approximately 200 unit employees. There is no evidence that the employees who were interrogated or the one who was threatened disseminated those acts to other unit employees.¹⁰ Further, the Union lost the election by 21 votes. Thus, the record does not establish that the Employer’s conduct affected a determinative number of employees, or that it was otherwise so pervasive as to warrant a new election. Accordingly, we overrule the Union’s Objections 1, 2, and 14 and shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Paper, Allied-Industrial, Chemical and Energy Workers International Union, (PACE), AFL-CIO and that it is not the exclusive representative of these bargaining unit employees.

⁸ See *Super Thrift Markets*, 233 NLRB 409 (1977); *Caron International, Inc.*, 246 NLRB 1120 (1979).

⁹ *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001) (employer’s asking employee how she would vote and stating that if employee voted for the union her pay would be cut was unlawful and objectionable interrogation and threat; however, because the conduct was isolated given large size of unit, lack of evidence of dissemination, and lopsided vote, Board concluded that it could not have affected the results of the election); *Caron International*, *supra* (threat of discharge to a single employee in a unit of 850 employees in over five locations too minimal to warrant invalidating the election, where no showing that the threat was disseminated). Further, *Community Action Commission of Fayette County*, 338 NLRB 664 (2002), relied upon by the hearing officer to find that a threat of job loss alone constituted objectionable conduct warranting setting aside an election, is distinguishable because in that case a single vote was determinative and the threat was disseminated to other unit employees.

¹⁰ One employee, Valorie Collins, as noted above, saw Martin offer Graham a “vote no” button but could not hear the conversation. Although Collins testified that five or six employees were in plain view, there is no evidence that those employees saw or heard the incident.

⁶ *Id.*, slip op. at 6 fn. 14.

⁷ Thus, contrary to the dissent’s assertion, we are not applying a “double standard” in evaluating prounion or antiunion supervisory conduct.

MEMBER LIEBMAN, dissenting in part.

The majority's failure to set aside the election here, based on the conduct of supervisor Carlos Adkisson, raises questions about whether the Board now applies a double standard: one for prounion supervisory conduct and one for antiunion supervisory conduct. The majority assumes, but does not find, that Adkisson impermissibly interrogated employee Alisa Stokes about her support for the Union. It finds, erroneously, that Adkisson did not also threaten Stokes (choosing, curiously, to decide this issue, while not deciding the interrogation issue). Finally, the majority refuses to infer that Adkisson interrogated 25 other employees, whom he approached immediately after interrogating Stokes, speaking to them and writing something down on a clipboard—just as he had with Stokes. The majority's approach stands in sharp contrast to the Board's recent decision in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). There, the majority inferred that a prounion supervisor threatened certain employees, based solely on the supervisor's statements to other employees. *Id.*, slip op. at 6.

I.

The evidence shows that Adkisson, a high-level manager,¹ approached Stokes at her work station and asked whether she had filled out a union card. Stokes was wearing a union button. When Stokes answered affirmatively, Adkisson told her that it was not in her best interest, or that of her family, to vote for the Union. Adkisson then wrote something down on his clipboard. Next, Stokes saw Adkisson approach another employee, talk to her, and make a notation on his clipboard. According to Stokes, Adkisson did the same thing with about 25 employees, although Stokes did not hear what he said. The Employer offered no explanation for Adkisson's actions.

II.

As did the hearing officer, I would find that Adkisson unlawfully interrogated Stokes, threatened her, and then went on to interrogate 25 other employees. *Harborside*, it seems to me, compels this last inference.

A.

First, it is clear, despite the majority's unwillingness to say so, that Adkisson unlawfully interrogated Stokes. Although Stokes was wearing a union button at the time, there was no legitimate reason for Adkisson to inquire as to whether she had signed a union card. See *Mast Advertising*, 286 NLRB 955, 959 (1987). In these circumstances, I would find Adkisson's questioning to be coer-

¹ Adkisson is the Respondent's converting manager and is responsible for supervising about 140 employees.

cive under the standard set forth in *Rossmore House*, 269 NLRB 1176 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985).

B.

Second, Adkisson's comment to Stokes—that voting for the union was not in the best interests of her or her family—was also coercive, particularly when considered in conjunction with the objectionable interrogation of Stokes. Employer statements that might be permissible considered in isolation can become improper if uttered in the context of other unfair labor practices (or objectionable conduct) that “impart a coercive overtone” to the statements. *Reno Hilton*, 319 NLRB 1154, 1155 (1995) (citations omitted).² Here, Adkisson obviously was seeking to sway Stokes from her just-reaffirmed support of the Union, which was elicited impermissibly. He made no attempt to persuade her by reasoned argument. Instead he made a bare, blunt reference not only to her best interest, but to the best interest of her family. Referring to Stokes' family clearly implied that her support for the Union could have personal economic consequences. And given Adkisson's status as high-level manager, he was in a position to ensure such consequences. Under all the circumstances, then, Adkisson's statements would reasonably be understood as a threat of unspecified reprisals.³

C.

Finally, based on Adkisson's interrogation of Stokes, it is reasonable to infer that he also interrogated the 25 employees whom he approached after his encounter with Stokes. His actions—speaking to the employees and then writing something down, as he did with Stokes—are strongly suggestive of a systematic interrogation of employees. It would be odd, indeed, if Adkisson had inter-

² See *SKD Jonesville Division L.P.*, 340 NLRB 101, 101 (2003) (finding unlawful supervisor's statement that getting involved with union was not in employee's “best interests,” in light of supervisor's reference to desirability of discharging other workers who had exercised legal right to seek worker's compensation). See also *Daniel Construction Co.*, 264 NLRB 569, 601 (1982) (finding unlawful supervisor's statement that it would be “in . . . best interests” of employees to retrieve signed union authorization cards), *enfd.* 731 F.2d 191 (4th Cir. 1984).

³ The cases cited by the majority in support of its position that Adkisson's comments were not objectionable are easily distinguishable on their facts. None involved a bare statement about “best interests” made in conjunction with the improper interrogation of an individual employee, coupled with a reference to the employee's family. Two cases—*Thomas Industries*, 255 NLRB 646 (1981), and *Liberty Mutual Insurance Co.*, 194 NLRB 1043 (1972)—involved statements made to employees as a group (in a speech and a memorandum). In *Goldtex, Inc.*, 309 NLRB 158, 163 (1991), the supervisor offered an explanation for his statement that it would be in the employee's best interest to vote no: “that the Union could not do anything but charge dues” (i.e., that the Union would be ineffective in improving working conditions).

rogated *only* Stokes, whose union button made her support for the union visible. Adkisson was clearly interested in what employees' union sentiments were, and he was prepared to find out improperly. Interrogating all employees, and not abruptly stopping after interrogating Stokes, was the logical way to pursue that goal. Notably, Adkisson did not testify, and the Employer has offered no alternative explanation for what he was doing.

Contrary to the majority's claim, it is not "mere speculation" to infer that Adkisson interrogated the 25 employees. *Harborside* is instructive on this point. There, the majority found that statements made by a pro-union supervisor to three employees were objectionable. It then observed that it was "not unreasonable to infer that when [the supervisor] . . . spoke to . . . other employees, she did not limit her remarks to permissible expressions of opinion about the Union." 343 NLRB 906, 911 (fn. omitted). On that basis, the majority set aside the election.

Member Walsh and I dissented. We pointed out that the conversations had occurred on separate occasions. *Id.* at 16. And we said:

We doubt that the Board would make a comparable inference about a supervisor's conduct in the context of an employer's antiunion campaign. (If we are wrong, of course, the Board will have to regularly set aside elections where the record establishes that one or more employees were threatened by the supervisor and that the supervisor made undetermined campaign-related statements to other employees.)

Id. This case suggests that Member Walsh and I were correct.

Even under the *Harborside* dissent's view, however, inferring that Adkisson interrogated the other employees is reasonable. This is certainly a stronger case for making that inference than *Harborside*. For here, unlike that case, there is evidence of the circumstances of Adkisson's conversations which suggest their impermissible content. Adkisson went immediately from his conversation with Stokes to the next person, then to the next person, and so on, *seriatim* in the work area, saying something to each employee and then making a notation on his clipboard. This is sufficient evidence from which to infer a pattern and that he made the same pitch as he made to Stokes to each employee he spoke with in turn.

In contrast, the *Harborside* supervisor might well have confined herself to lawful statements; there was no evidence of circumstances that would support an inference that her statements were other than lawful. Her conversations were separate in time, and there was no evidence that she was speaking from a script, for example. Finding her statements objectionable should have required evidence of their actual content, not "mere speculation" about what she said, to borrow the majority's phrase here. In any event, *Harborside*, not the dissent in that case, is Board precedent, and I do not see how the decision can be distinguished meaningfully.

III.

In sum, consistent with *Harborside*, Adkisson's conduct requires setting aside the election in this case. It affected not 5 employees, as the majority finds, but 30—far more than needed to change the outcome of the election, which was decided by 21 votes. Our law with respect to antiunion supervisory conduct must be no less strict than our law with respect to prounion supervisory conduct. Accordingly, I dissent.