American Wholesalers, Inc. *and* Textile Workers Union of America, AFL–CIO, Petitioner. Case 5–RC–8312

June 6, 1975

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, JENKINS, AND KENNEDY

Pursuant to 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 the objections on which a hearing was held on July 16 and 17, 1974,[1] and the Hearing Officer's report recommending that the objections be overruled in their entirety. The Board has reviewed the record in light of the Employer's exceptions and brief, and the Petitioner's answering brief, and hereby adopts the Hearing Officer's findings[2] and recommendations that the Employer's objections be overruled in their entirety.[3]

Unlike our dissenting colleague we would not order a new election. While we do not recommend the use of testimony from a prior hearing for cross-examination at a hearing *de novo,* we believe it clear from the report of the new Hearing Officer that credibility at this hearing *de novo* was resolved independently of the prior record, and we conclude that the Hearing Officer's references to the demeanor of certain employer witnesses made appropriate allowance for some confusion in their testimony due to the length of time since the actual campaign occurrences in early 1973.[4] In addition, the hearing *de novo* gave ample opportunity to both parties to prepare the case by reinvestigating and discussing the material expected to be covered, an evenhanded approach that was denied by the postponement of cross-examination at the original hearing.

Assuming, however, that the Hearing Officer had credited the mostly generalized threats testified to by employer witnesses Harrell, Barrier, Merrill, and Werts,[5] we think this case is appropriately governed by *Owens-Corning Fiberglas Corporation,* 179 NLRB 219, 222, 223 (1969), relied on by the Hearing Officer. That case included a number of "heated statements" which showed a clash of personalities, and three anonymous phone calls threatening the welfare of each recipient's family, the only violent gesture being the tearing off and trampling of a "Vote-No" button by two employees who had been drinking. The Board noted the lack of actual physical violence, the extended length of campaigning incident to an original election with two runoff elections, and the large electorate which had witnessed "vigorous displays of emotional involvement among individuals of differing views." The Board concluded that the employees had become accustomed to such partisanship and knew how to react. Although this case has an electorate of only 109 and involves no repeat campaigns, on this record we conclude that the employees recognized the statements by pro-union supporters—made in a climate of no violence whatever—as overzealous partisanship rather than meaningful threats. We are convinced that the laboratory conditions for this election were not substantially affected and that a free choice of representative was possible.[6] Accordingly, the Petitioner will be certified.

[1] The election was conducted on February 9, 1973, pursuant to a Decision and Direction of Election issued by the Regional Director for Region 5. The tally of ballots showed that, of approximately 109 eligible voters, 63 voted for, and 41 against, the Petitioner, and 2 cast challenged ballots, an insufficient number to affect the results. The Employer timely filed objections to conduct affecting the results of the election. A hearing on the objections was held on April 19 and May 3 and 4. The Hearing Officer issued his report on June 22, recommending that the Employer's objections be overruled in their entirety and that an appropriate certification issue. The Employer filed timely exceptions to the Hearing Officer's report. On October 12, the Regional Director for Region 5 issued a Second Supplemental Decision and Certification of Representative in which he adopted the Hearing Officer's report, overruled all of the Employer's objections, and certified the Petitioner. Thereafter, the Employer timely filed a request for review of the Regional Director's Second Supplemental Decision on the ground, *inter alia,* that prejudicial error resulted from the Hearing Officer's deferral of cross-examination of the Employer's witnesses. The Board in its Decision on Review (210 NLRB 499, issued May 9, 1974) found that the deferral of cross-examination of the Employer's witnesses constituted prejudicial error, and, therefore, remanded the case to the Regional Director for a hearing *de novo* on Objections 1 through 9, before another Hearing Officer. Thereafter, a hearing was duly held in Washington, D.C., on July 16 and 17, 1974, as above recited. On October 11, 1974, the Hearing Officer issued his report. Thereafter, the Employer filed timely exceptions and a brief.

[2] The Employer excepts, *inter alia,* to the findings of the Hearing Officer on the ground that he erred in crediting certain testimony It is the established policy of the Board not to overrule a Hearing Officer's credibility resolutions unless they are clearly in error. *The Coca-Cola Bottling Company of Memphis,* 132 NLRB 481, 483 (1961); *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957). We find insufficient basis for disturbing the credibility resolutions in this case

[3] In our opinion, the Employer's exceptions raise no material or substantial issues of fact or law which would justify reversing the Hearing Officer's findings and recommendations.

[4] We note that lack of corroboration played a significant part in this discrediting

[5] Werts was credited in part by the Hearing Officer. Werts and Brown, another employer witness, each testified concerning employee Skeeter saying on separate occasions that if the Union did not come in he was going to take a piece of the building with him. The remark itself was found ambiguous by the Hearing Officer. Similarly, the Hearing Officer found that Skeeter said, about a week before the election, that anyone who did not vote for the Union needed a bullet in his head, a remark found noncoercive in the casual context in which it occurred. Not credited was the uncorroborated account of employer witness Weese that he was told by employee Hildebrand that he (Weese) would be beaten up if he attended another union meeting. The Hearing Officer noted that Weese apparently supported the Union and did not explain why his presence was considered undesirable. Also, Weese had related this to his supervisor, but no corroboration ensued

[6] Member Kennedy relies on *Sonoco of Puerto Rico, Inc.,* 210 NLRB 493 (1974), where a Board panel set aside an election because of threats alone. We would point out, however, that *Sonoco* involved a unit of only 19

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Textile Workers Union of America, AFL–CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

> All production and maintenance employees, including truck drivers, schedulers, production payroll clerks, production ticket sorter, log tag clerk, cafeteria employees, employed by the Employer at its Landover, Maryland, location, excluding office clerical employees, order clerks, payroll clerks, professional employees, guards and supervisors, as defined in the Act.

MEMBER KENNEDY, dissenting:

I do not agree with my colleagues that a valid election was held in this case. I would set aside the election and order a new election.

This case is again before the Board after a second hearing. In its Decision on Review after the first hearing,[7] the Board found that the Hearing Officer in the first hearing committed prejudicial error by permitting the Petitioner to defer the cross-examination of the Employer's witnesses from the first day of the hearing until the hearing convened 2 weeks later.

In his report on the prior hearing, the first Hearing Officer based his credibility resolutions with respect to certain objections, in part, on the testimony given on deferred cross-examination by the Employer's witnesses. The Board found that the deferral of cross-examination of the witnesses could have had a real effect on the witnesses' subsequent recollection of these facts testified to previously in their direct examination. The Board held:

> We are persuaded that the Hearing Officer's ruling permitting deferral of cross-examination of the Employer's witnesses constituted prejudicial error. As urged by the Employer, an essential element of due process requires that governmental rules, regulations, and procedures be applied evenhandedly and uniformly and any departure from such equality of treatment should be predicated upon reasonable and articulated grounds. The orderly and normal presentation of testimony in Board preceedings, absent unusual circumstances not present here, requires that cross-examination of witnesses follow their testimony on direct. This traditional procedure affords all concerned an equal opportunity to test the witnesses' testimony given on direct, which frequently in legal proceedings is previously unknown to opposing parties. The Hearing Officer's ruling herein, deviating from the normal procedure in order to give Petitioner an opportunity to further investigate the substance of the testimony given by Employer's witnesses was, in our opinion, unwarranted. It not only gave the Petitioner an undue advantage in preparing its case *but it could have had a real effect on the witnesses' subsequent recollection of facts testified to previously in their direct examination.* [Emphasis supplied.]

The Board therefore concluded that the first Hearing Officer's "ultimate credibility resolutions regarding the testimony [of these witnesses] may have been affected by the circumstances flowing from his erroneous procedural ruling," and remanded the case to the Regional Director for a hearing *de novo* on the objections before another Hearing Officer. The Board ordered that the new Hearing Officer should issue a new report containing findings of fact and resolutions of credibility.

Thereafter, another hearing was held before another Hearing Officer, who issued the present report, to which the Employer has filed the present exceptions and the Petitioner its answer. The Employer contends that the second Hearing Officer has committed prejudicial error by his rulings allowing the Petitioner to cross-examine the Employer's witnesses by using the record of their testimony given at the prior hearing. The Employer therefore contends that it was thereby denied a truly *de novo* hearing, to which it was entitled by the express command of the Board.

I agree with the Employer's contentions. At the first hearing held in April and May 1973, these

employees, 13 of whom were told at a union party the day before the election that all 13 "had to vote for" the union or there would be blows and slaps; the next morning a prounion employee showed another employee his injured finger and said that "the same would happen to those who did not comply with the pact to vote for the Union." Also, several weeks earlier an employee had been told that "he" would be beaten up if he did not vote for the union. The vote was 11 for and 8 against. In our opinion, the degree of personalization of threats and the fact that they were directed to three-fourths of the unit so shortly before the election distinguish the *Sonoco* decision from the facts of this case.

Surely our colleague will agree that the Board's standard for permissible employee comment during an election campaign has never been limited to rational debate. We are dealing with human beings who vary greatly in their mode of expression. Opinion expressed in violent phraseology is not unusual. It may be cause for setting aside an election but cannot be viewed in a vacuum. The context here is a preelection period without physical violence of any sort, and the verbal expressions here in issue—covering a period of a month—were in our judgment far more generalized than personal in their thrust. Unlike our colleague, we view the threats to "anyone who voted against" or "those who did not vote for" as impersonal, or generalized, and as such not to be taken literally in the circumstances of this case.

[7] 210 NLRB 499.

witnesses were required to test their recollection and testify to events occurring prior to February 9, 1973. The Board in its Decision on Review found that the deferral of cross-examination of these witnesses from April 19, 1973, the first day of that hearing, to May 3 and 4, the second and third hearing dates, a period of some 2 weeks, could have so materially affected these witnesses' recollection of their testimony on direct examination as to affect the first Hearing Officer's credibility resolutions, and therefore constituted prejudicial error. And then at the second hearing, ordered by the Board, on July 16 and 17, 1974, 1-1/2 years after the events testified to took place, Petitioner was again allowed to defer its cross-examination of the witnesses, this time for 14 months. That is precisely the effect of allowing Petitioner to cross-examine these witnesses by use of their testimony given at the prior hearing. My colleagues are willing to permit this, when we were unwilling to allow the Petitioner only a 2-week delay to cross-examine at the first hearing.

The second Hearing Officer's claim that he resolved credibility issues "independently of the prior record" cannot cure the defect of his prejudicial ruling. He made numerous credibility resolutions here based on witnesses' "confusion," "hazy recollection," "poor demeanor," and similar characterizations of their testimony. Just as the credibility resolutions made by the first Hearing Officer could have been so adversely affected that, in the view of the Board, due process required a *de novo* hearing, so also were the present Hearing Officer's credibility resolutions affected by his procedural ruling here. In short, I find that the second Hearing Officer has failed to comply with the Board's order of a *de novo* hearing.

Contrary to my colleagues, there is no basis, other than this self-serving declaration of the Hearing Officer, on which to conclude that he resolved credibility independently of the prior record. While my colleagues are free to "believe" what they wish, there is no objective circumstance in the report to show that the Hearing Officer's reliance on demeanor to resolve credibility "made appropriate allowance" for the confusion induced by cross-examination based on the prior record.

Moreover, I do not agree with my colleagues that the allegedly objectionable conduct, if true, consisted of "mostly generalized threats" and "the employees recognized the statements by prounion supporters—made in a climate of no violence whatever—as overzealous partisanship rather than meaningful threats."

The following threats, if found to have been made, illustrate the inaccuracy of the majority's characterization: Pryor's and Skeeter's alleged threats that anyone who voted against the Union "should" or "would" get a bullet in the head; Pryor's alleged threat, "if the Union doesn't win, I'm going to kill me some son-of-a-bitch"; Skeeter's threats, the first, in the presence of 12 to 15 employees, which the Hearing Officer found were made, but were "vague" and "ambiguous"—"If the Union didn't come in, he was going to take a piece of the building with him" and, the second, in the presence of Brown and an unidentified employee, "If they don't win, I'm going to take part of American Wholesalers with me"; Pryor's threatening remark allegedly made in conversation with Werts, Stevenson, and Ford, "they were going to kick the butts of those who did not vote for the Union"; Pryor's threatening remarks allegedly made to Coombs in the presence of about 15 employees, "If you don't vote for the Union, there is going to be a big mess in the parking lot," or "a lot of people are going to get hurt"; and, finally, Skeeter's threat to another employee, overheard by employee Lee, which the Hearing Officer found was made, but was not coercive in nature, "If anyone didn't vote for the Union [he] needed a bullet in his head." Lee about 3 days later told another employee, Laney, of Skeeter's remark and Laney testified that she later told another employee, Rodgers, about the remark, ". . . that is something that somebody would talk about putting a bullet in your head just because you wanted to vote the way you wanted to vote. . . ."

I am, therefore, of the opinion that the character of the alleged conduct, if found to be true, would be so aggravated as to create an environment of fear and reprisal which would render a free expression of choice of representative impossible, and thus would destroy the laboratory conditions of the election. *Sonoco of Puerto Rico, Inc.,* 210 NLRB 493 (1974).

Contrary to the majority, there is ample evidence here of substantial impact on the unit. At least three of the threats were made to groups of 12 to 15 employees, and other threats were made to groups of 2 or 3 employees. In a unit of approximately 109 eligible voters, I find the impact obviously substantial. Furthermore, how "personal" would the majority like its violence? "If *you* don't vote for the Union, there is going to be a big mess in the parking lot," or "they were going to kick the butts of those who did not vote for the Union," or "if anyone didn't vote for the Union he needed a bullet in his head," would obviously impress anyone to whom these threats were made that the speakers were offering their audience something more than an invitation to rational debate.

The election here is now over 2 years old. I would find it difficult to accept the testimony of any individual with respect to specifics of events occurring over 2 years ago if that testimony was given now

in a true *de novo* hearing. Two of the Board's own Hearing Officers have committed prejudicial error by their procedural rulings in two successive hearings. The ruling of the second Hearing Officer was made in the face of the Board's order for a *de novo* hearing. With matters in this posture, I find it impossible to decide at this late date whether a valid election was held in February 1973, nor can I in good conscience put the parties through another hearing. I am reminded of the words of Lewis Carroll:

> But their wild exultation was suddenly checked,
> When the jailer informed them with tears,
> Such a sentence would have not the slightest effect,
> As the pig had been dead for some years.

Accordingly, I would set aside the election and order a new election.