Warren W. Parke, d/b/a Parke Coal Company *and* United Mine Workers of America, Petitioner. Case 25–RC–5882

July 28, 1975

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 25 on December 13, 1974, an election by secret ballot was conducted on December 23, 1974, under his direction and supervision among the employees in the stipulated unit.[1] At the conclusion of the election, the parties were furnished with a tally of ballots which showed that there were approximately 16 eligible voters and 15 cast ballots, of which 6 were for, and 8 against, the Petitioner. There was one challenged ballot, a number insufficient to affect the results of the election. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional Director caused an investigation to be made of the objections. Thereafter, on February 5, 1975, the Regional Director issued and served on the parties his Report on Objections. In his report, the Regional Director recommended to the Board that all objections be overruled, and that the appropriate certification be issued. Thereafter, the Petitioner filed timely exceptions to the Regional Director's report.

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.

The Board has considered the Regional Director's report,[2] the Petitioner's exceptions, the Employer's answering brief, and the entire record in this case and makes the following findings and conclusions:

In the course of the Regional Director's investigation of the objections which Petitioner initially filed to the election, the Petitioner alleged certain additional objectionable conduct. In support of this allegation, Petitioner proffered two witnesses who testified in pertinent part that at a meeting of employees on December 21, 1974, the Employer said, among other things, that "if the union won the election, he didn't know how long he could operate"; and that in response to an employee's inquiry about insurance benefits, which the Employer had allegedly promised prior to the filing of the petition,[3] the Employer said "we are still going to get it."

The Regional Director found that "nothing contained in the testimony of [the two witnesses] indicates that any objectionable statements were made at the December 21, 1974 meeting." With respect to the Employer's promise to implement insurance benefits, the Regional Director concluded "there is no evidence that the Employer did any more than continue in its promise made to employees, before the petition was filed. Such consistent action cannot be viewed as objectionable, especially in that an employee's question prompted the reply." We disagree on both counts.

In our view, the Employer's statement that "if the union won the election, he didn't know how long he could operate" constituted an implied threat of plant closure. Contrary to our dissenting colleague, we do not find this testimony in conflict with the testimony of another employee that the Employer said during the course of the December 21 meeting that "if the union won the election he did not know how long they would let us work before they closed us down." For, the threat that the plant would be closed by the Employer was clear in either statement whether couched in terms of direct Employer action or Employer action induced by animus toward the Union and the employees, and neither witness contradicted the testimony of the other. Accordingly, we cannot agree with our dissenting colleague that a further hearing is necessary.

As was stated by the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc.*,[4] the standard to be used in evaluating employer predictions as to the adverse effects of unionization is that "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 . . . ." There is no evidence here that the Employer's statement was based on fact, or that the possibility of plant closure was a demonstrably probable conse-

[1] The parties stipulated that the following unit was appropriate

All full-time and regular part-time production and maintenance employees of the Employer's Petersburg, Indiana mine including truck drivers and equipment operators, but excluding all office clerical employees, all professional employees, all guards and supervisors as defined in the Act

[2] In the absence of exceptions thereto, the Board adopts, *pro forma*, the Regional Director's recommendation that the Petitioner's Objections 1 and 2 be overruled

[3] Petitioner alleged in its Objection 1 that on November 8, 1974, the Employer promised employees insurance benefits and a possible wage increase The Regional Director recommended this objection be overruled because "this conduct occurred, if it occurred, prior to the filing of the petition." No exceptions were filed to this recommendation.

[4] 395 U.S. 575, 618 (1969).

quence of such fact beyond his control. In these circumstances, we conclude that the statement was an implied threat of plant closure for the purpose of inducing the employees to vote against the Union in the forthcoming election. As such, it constituted interference with a free choice by employees in the election.[5]

Further, we find that the Employer's promise of insurance benefits to employees during that same meeting constituted a promise of benefits for the purpose of inducing employees to abandon their support for the Union. The evidence adduced during the Regional Director's investigation establishes that upon learning of the Union's organizational activities the Employer, on November 8, 1974, promised its employees higher wages and insurance benefits, and at the same time told the employees that it would not run a union mine. Because this incident occurred prior to the filing of the petition, under long-established Board precedent it could not be specifically relied upon as grounds for objection to the election.[6] However, the *Ideal Electric* rule does not preclude consideration of these statements in evaluating statements made during the critical period. As the Board stated in *Stevenson Equipment Company,* 174 NLRB 865 at 866, fn. 1 (1969), although "the rule in *Ideal Electric and Manufacturing Company,* 134 NLRB 1275, 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."

Thus, considering the Employer's promise of insurance benefits for employees in response to an employee's question at the December 21 meeting, in light of the initial promise the Employer made to provide such benefits in response to the Union's organizing effort, it is clear that the Employer was simply reaffirming its initial promise to provide higher insurance benefits in order to induce the employees to reject the Union.

We do not see the situation presented here as substantially different from those cases where an employer, in response to a union's organizational efforts among its employees, accelerates a plan to grant a wage increase by granting it during the critical preelection period. In those cases, the Board has repeatedly held the grant to be unlawful, even though the employer's decision to make the grant was made in the pre-critical period, because the decision was made or accelerated to counteract the Union's organizational efforts and therefore was unlawfully motivated.[7] As the Board stated in *United Foods, Inc.,* 170 NLRB 1489, 1490 (1968):

> [A]lthough the decision to grant the increase was made prior to the filing of the RC petition, the later statements concerning the "wage increase" occurred after the filing of the petition and constitute an independent basis supporting the Trial Examiner's finding, which we adopt, that Respondent engaged in conduct requiring that the election be set aside. *The Ideal Electric and Manufacturing Company,* 134 NLRB 1275.

The reaffirmance of the promise, we think, is no less objectionable than the original promise and has the same effect with respect to influencing the employees' determination as to whether they need representation or not.[8]

[5] See, e.g., *Wabash Transformer Corp., Subsidiary of Wabash Magnetics, Inc.,* 215 NLRB No. 101 (1974) (ALJD).
[6] *The Ideal Electric and Manufacturing Company,* 134 NLRB 1275 (1961).
[7] See, e.g., *Bechtel Corporation,* 200 NLRB 975, 978–979 (1972); *Scantlin Electronics, Incorporated,* 201 NLRB 888, 891 (1973)
[8] *United Foods, Inc., supra*

For all the above reasons, we find, contrary to the Regional Director, that the Employer engaged in objectionable conduct by its statements to employees at the December 21 meeting it held with employees. Accordingly, we hereby sustain the Petitioner's objection and set aside the election, and we shall direct that a second election be conducted.[9]

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

[9] Although Chairman Murphy joins in the decision to set the election aside, she does so solely on the basis of the Employer's reaffirmance of its prior improperly motivated, and pre-critical period, promise to provide insurance benefits to employees at the December 21 meeting with employees.

Unlike her colleagues, she would not find that the Employer threatened plant closure at the same meeting on the present state of the record. The only evidence adduced with respect to such a threat came by way of two employees' statements. One averred.

> [The Employer] also said that even though there were rumors going around that he had a buyer for his mine, it was not true because he had not been contacted about selling his mine and he did not have a buyer for it. He said that if the union won the election he didn't know how long he could operate. . . .

The second employee stated in relevant part:

> [The Employer] mentioned that word had been out that he had a buyer for the mine and he wanted to make it clear that he had not had an offer and was not thinking about selling it He said that if the union won the election he did not know how long they would let us work before they closed us down. He mentioned that they may let us work a week or a month but that he didn't know. . . .

The Regional Director assumed this testimony was true, *arguendo,* for purposes of determining whether Petitioner had made out a *prima facie* case of objectionable conduct, and concluded that it had not. Although Chairman Murphy would find the first employee's testimony to establish a *prima facie* case of objectionable conduct, she would find it necessary to send the issue to hearing before a Hearing Officer who could make findings of fact and credibility resolutions, inasmuch as the more specific testimony of the second employee as to what the Employer said in this regard would appear to indicate that the Employer was only suggesting that the Union may have had some reason of its own for terminating the Employer's operations and that there was no suggestion by the Employer that it would take such action in reprisal for the employees' selecting the Union to represent them Under these circumstances, it is not at all clear, in Chairman Murphy's view, which of the employees' differing versions of what was said at the meeting is the more accurate, or for that matter if either version would eventually be credited. Accordingly, she would require a hearing before ruling on whether a threat to close the plant was made at the meeting.