Kleen-Test Products, a division of Meridian Industries, Inc. *and* Midwest Region, Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC, Petitioner. Case 30–RC–5009

April 9, 1991

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held March 23, 1990, and pertinent portions of the attached hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 34 for and 27 against the Petitioner, with no remaining determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.[1]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Midwest Region, Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production, maintenance and warehouse employees, employed by the Employer at its Brown Deer, Wisconsin plant; excluding office clerical employees, quality control employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

MEMBER OVIATT, concurring.

I concur in the decision to overrule the Employer's Objection 1, but I do so on a ground that is far narrower than that adopted by the hearing Officer.

Objection 1 alleges that the Union's agent, William Semons, a supervisor, directed and/or ratified impermissible supervisory solicitation of authorization cards, campaigning, electioneering, and other improper conduct. The facts developed at the hearing show that Semons was hired as a machine operator in July 1988 and was promoted in August 1988 to the position of ''line supervisor'' on the second shift. It is not now disputed that in this position Semons was a statutory supervisor. The hearing officer found that he was the ''highest authority figure'' during most of the shift, and that his duties included, among others, initialing and verifying employee timecards, approving employee requests to leave work early, and excusing their absences. The hearing officer also found that Semons was introduced to second-shift employees as their supervisor, and that these employees in fact considered him to be their supervisor.

About 1 year later, on August 28, 1989, the second shift was eliminated, and Semons was transferred to the first shift where he again worked as a rank-and-file machine operator, but without a reduction in pay. There he continued until December 7, 1989, when he went on sick leave.

On January 22, 1990, Semons was recalled to the second shift where he served as a supervisor until the second shift was discontinued on March 2. At that time, Semons was terminated.

The election was held on March 23, 1990, 3 weeks after Semons' termination. During the organizational campaign Semons signed a union authorization card and attended meetings where he spoke favorably about having a union and talked individually to employees about the need for employees' sticking together. Further, after he returned to work as a second-shift supervisor in January 1990, during the critical period, Semons campaigned for the Union and distributed authorization cards. He also provided transportation for employees to attend union meetings, and attended those meetings himself. Along with two other employees, Semons signed a February 22 letter addressed to employees inviting them to join the union organizational efforts.

The hearing officer overruled the objection because he believed that Semons' conduct could not ''reasonably have coerced or lured employees into supporting the Union.'' Among other things, the hearing officer relied on the following: (1) much of the Union's campaign groundwork was laid by nonsupervisors; (2) there was no evidence showing that Semons, when he was a supervisor, threatened anyone with retaliation for opposing, or promising benefits for supporting, the Union; (3) because of Semons' ''limited supervisory role'' (there was no evidence that Semons could promote, transfer, recommend wage increases, assign overtime, evaluate, discipline, or schedule employees' hours), the employees on the second shift could not reasonably perceive him as having the authority to ''effectuate significant rewards or punishments.''

I cannot accept this part of the hearing officer's analysis. The question is whether the employees whom Semons supervised could be coerced into supporting the Union because they feared future retaliation by Semons or because they anticipated his rewarding them in the future. See *Sil-Base, Co*. 290 NLRB 1179 (1988). Thus, the fact that the groundwork for the Union's campaign was laid by others is immaterial to

[1] Contrary to our concurring colleague, we find that the hearing officer's analysis of Objection 1 is in conformance with Board precedent. See *Sil-Base Co*., 290 NLRB 1179 (1988); *Cal-Western Transport*, 283 NLRB 453 (1987).

the question whether, when Stevenson actively joined that campaign and promoted it, he conveyed to his supervisees that it would be wise for them to support the Union if they wanted to be in favor with him. Similarly, the mere fact that as a supervisor Semons did not make an actual threat or promise does not in my opinion necessarily ameliorate his supervisees' concerns about avoiding retaliation by, or receiving future rewards from, Semons.

Most importantly, I disagree that Semons' union activity is somehow diminished by his not having certain indicia of supervisory authority. No one now disputes that Semons is a 2(11) supervisor. This being so, I do not consider it appropriate to count the number of indicia of supervisory authority among the 12 listed in Section 2(11) that Semons possesses, for the Act does not discriminate among these indicia of supervisory authority. Thus, one cannot be a one-twelfth supervisor, or a one-sixth supervisor, or a one-third supervisor, depending on the type of authority listed in Section 2(11) that the particular supervisor possesses. In finding him to be a statutory supervisor, the Regional Director observed that Semons' duties were similar in nature to those of the first- and third-shift statutory supervisors, and that the employees knew that he was their supervisor and was in charge of the second shift. That should be enough to put Semons in the position of someone who the employees could perceive as having the ability to affect the terms and conditions of their employment.

I concur in the decision to overrule Objection 1, however, because: (1) Semons was terminated 3 weeks before the election; and (2) the Employer notified the employees more than a week before the election that it was disavowing and repudiating Semons' unauthorized prounion activities and gave assurances to the employees that they need not fear retaliation from Semons in the event the Union lost the election. Thus, before the election, Semons' relationship with the employees he supervised was severed, and the Employer disavowed Semons' remarks. See *Rocky Mountain Bank Note Co*., 230 NLRB 922, 923 (1977).[1] On this limited ground, I would overrule the objection.

[1] The Union filed a charge on March 5 alleging that Semons was discriminatorily laid off for his union activities; the charge was not dismissed until May 31. I note, however, that in its exceptions the Employer does not allege that any employee knew about the charge or otherwise understood that Semons might be reinstated.

APPENDIX

Objection No. 1

That the Union constituted as its agent, William Semons, a supervisory employee of the Company, and directed and/or ratified impermissible supervisory sponsorship, solicitation of authorization cards, campaigning, electioneering and other improper conduct.

Background

William Semons was hired in July 1988 as a machine operator at the Employer's Mequon, Wisconsin plant. On August 22, 1988, he was promoted to the position of line supervisor.[2] The Employer, which is engaged in the manufacture of fabric softener sheets, subsequently moved its Mequon operation to Brown Deer, Wisconsin.

As a second shift line supervisor, Semons' duties included the routine assignment of work, initialing and verifying employee timecards, approving employee requests to leave work early, excusing their absences and maintaining daily production records. He was introduced to employees as their supervisor and was considered by employees to be their supervisor. While break periods were of fixed duration, Semons nonetheless announced the beginning and end of breaks. He possessed keys to the shop and offices and could activate the security system.

On the other hand, Semons did not hire, fire or evaluate employees, and there is no evidence of his having disciplined anyone. He once recommended that a temporary employee, Doris Coleman, be released because she had been absent without calling in. The employee was in fact discharged about 1 month later for ''excessive absences.'' Semons did not promote employees, recommend wage increases or schedule overtime. The record does not reveal that Semons ever denied an employee request to leave work early or marked an employee's absence as ''unexcused'' on absentee reports which he passed to Richard Nelson, the general manager, with the exception of Coleman's. Semons was the highest authority figure on the second shift during most of the shift, which lasted from 3 p.m. to 11 p.m. However, Nelson did not usually leave the plant until 5 p.m. and usually returned each evening at about 10:30 p.m. Semons occasionally called Nelson at home during the shift if he experienced problems.

On August 28, 1989, the second shift was eliminated and Semons was brought to the first shift in the capacity of machine operator without a reduction in pay. After having spent about 2 weeks on the first shift, Semons, along with Michael Binns and James Hardy, were summoned by Nelson who suggested that each of the three men rotate in the position of first shift supervisor to assist in determining who would be best able to fill the position. Semons indicated that he did not want to be a supervisor and soon Michael Binns was appointed to the position. The appointment was announced to employees on a bulletin board notice. Semons performed the bargaining unit work of machine operator until December 7, 1989, when he went on sick leave. Semons did not perform supervisory duties on the first shift other than his exercise of judgment in production matters related to his expertise and experience in operating and repairing machinery. Moreover, there were no assurances made that Semons would again assume a supervisory position. I therefore conclude that Semons was not a supervisor while on the first shift.

On January 22, 1990, Semons was recalled to the second shift to serve as the supervisor. The shift was established to

[2] The Regional Director determined that Semons was a statutory supervisor in his position as line supervisor, which determination the Board adopted in the absence of exceptions and to which I am thus bound. The record evidence does not indicate that Semons' supervisory duties differed markedly during the periods he served in that capacity; prior to August 28, 1989 and subsequent to January 22, 1990.

produce bulk packing to redress an imbalance of material used in production by the first shift, and was, by all appearances, to be a temporary shift. Semons supervised this shift until its discontinuance on March 2, at which time Semons was terminated allegedly for lack of work.[3]

Union Activities

The Union organizational campaign began in about late October 1989. Semons soon signed a union authorization card and attended meetings. He spoke favorably toward having a union at meetings and to employees individually, stressing the need for employees to stick together. Semons' signature was not among those of 22 members of the self-described organizing committee on a letter to the Company dated December 20, 1989; a time when he was on sick leave. After Semons returned to work as the second shift supervisor on January 22, 1990, his union activities continued unabated. He attended union meetings, provided transportation to employees to such meetings, campaigned for the Union and distributed a few authorization cards. He signed a letter along with two other employees dated February 22, 1990, addressed to employees at the Employer's Port Washington, Wisconsin plant, inviting them to join the Union organizational efforts.

DISCUSSION AND CONCLUSION

It is clear that the pro-union conduct of a statutory supervisory may constitute objectionable conduct warranting setting aside an election in two situations. The first is when an employer takes no stand contrary to the supervisor's pro-union conduct, thus leading employees to believe that the employer favors the union. The second is when a supervisor's pro-union conduct could coerce employees into supporting the union out of fear of future retaliation by the supervisor or in order to receive future rewards from the supervisor. *Sil-Base Company*, 290 NLRB No. 157 (1988); *Stevenson Equipment Company*, 174 NLRB 865 (1969). The first situation is not an issue herein, the Employer not denying that it campaigned extensively against the Union following the Union's petition. It is the second situation that will be addressed below.

I am persuaded that Semons' pro-union conduct prior to the election could not reasonably have coerced or lured employees into supporting the Union. As discussed above, Semons was not even a statutory supervisor during the inception and a significant portion of the Union campaign. Thus, much of the groundwork of the campaign was laid by Union supporters without possible supervisory taint. Moreover, there was no evidence that Semons the supervisor in any way personally threatened anyone with retaliation for opposing or promised benefits for supporting the Union. While Semons, as second shift supervisor, may have predicted better benefits for employees with a Union, or suggested that the Employer could reduce benefits without a Union, that is a far cry from proposing to make the changes himself.

Moreover, it would not appear that Semons would reasonably have been perceived by employees as having the authority to effectuate significant rewards or punishments based upon his limited supervisory role. There is no record evidence that he promoted, transferred or recommended wage increases for employees, or assigned them overtime hours. It appears that he routinely approved requests by employees to leave work early without much ado, and he expressed doubt in his testimony that he could have denied such a request. Semons did not evaluate, discipline or schedule hours of employees. While Nelson testified that an employee was terminated pursuant to Semons' recommendations I to not place much credence in this. On March 7, 1989, Semons recommended that the employee be replaced for being absent without having called. She was terminated on April 7, 1989 for excessive absences. The interval between the recommendation and the discharge suggests to me either that the employee's work record and the decision to discharge her were long deliberated by management in making the decision following the recommendation, or that subsequent absences contributed to the discharge decision.

Finally, and perhaps most importantly, Semons was, in fact, terminated as of March 2, well before the election. The Employer issued a notice to employees dated March 14, 1990, in no uncertain terms disavowing and repudiating the unauthorized pro-union activities of Semons. The letter gave assurances that no employee should fear retaliation from Semons in the event of a union defeat in the election.

I cannot envision any employee fearing retaliation from Semons under these circumstances.[4] Moreover, no employee witness at the hearing betrayed such a fear.[5] While the Union's charge on Semons' behalf may have raised the possibility of Semons' reinstatement, the obverse would be a perception that Semons had hardly ingratiated himself with the Employer. Indeed, one employee recalled Nelson's complaint that Semons had lied about his union involvement. Thus, any second shift employee could hardly fail to recognize his or her recourse of appeal to Nelson any of adverse action by a hostile Semons; Nelson being present and accessible to affected employees on a nearly daily basis.

Based upon the foregoing, I conclude that the objection is without merit.

RECOMMENDATION

Having determined that the Employer's Objection No. 1 is without merit, I recommend that it be overruled and a certification of representative issue.[6]

[3] I take administrative notice of a charge filed by the Union on March 5, 1990, alleging that Semons and another employee were discriminatorily laid off because of their union activities. The charge was dismissed by the Regional Director on May 31, 1990. It was determined that Semons was a supervisor, not protected by Section 8(a)(3) of the Act.

[4] *Rocky Mountain Bank Note Co.*, 230 NLRB 922 (1977); *Flexi-Van Service Center*, 228 NLRB 956 (1977).

[5] *Stevenson Equipment*, supra. (conjecture no substitute for evidence).

[6] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report must be received by the Board in Washington, DC by December 13, 1990. Immediately upon the filing of exceptions, the party filing same shall serve a copy with the Regional Director of the Thirtieth Region. If no exceptions are filed, the Board will adopt the recommendation of the Hearing Officer.