

Omni Manor, Inc. d/b/a Windsor House C & D and Service Employees International Union, Local 627, AFL-CIO, CLC, Petitioner. Case 8-RC-14422

November 30, 1992

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held February 27, 1991, and the hearing officer's report and recommendations on their disposition (pertinent portions of the report are attached). The election was conducted pursuant to a Decision and Direction of Election by the Regional Director for Region 8. The tally of ballots shows 67 for and 59 against the Petitioner, with 2 challenged ballots, a number insufficient to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings¹ and recommendations, and finds that a certification of representative should issue.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the Service Employees International Union, Local 627, 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 nursing aides/assistants, nursing aide coordinators, assistant nursing aide coordinators, dietary aides, cooks, housekeepers, infection control aides, laundry employees, physical therapy aides, occupational therapy aides, activity aides, maintenance employees and licensed practical nurses employed by the

¹The 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 a 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 support of the hearing officer's finding that the prounion employees involved in the conduct alleged in Objection 2 are not union agents, we rely additionally on *S. Lichtenberg & Co.*, 296 NLRB 1302 at fn. 4 (1989), and *NLRB v. Herbert Halperin Distributing Corp.*, 826 F.2d 287 (4th Cir. 1987), enfg. 281 NLRB No. 1 (Aug. 11, 1986) (not reported in Board volumes).

With respect to Objections 6-8, Members Oviatt and Raudabaugh agree with the hearing officer that the Employer failed to present sufficient evidence at the hearing in support of its position that a petition circulated by the Petitioner, claiming support, contained substantial numbers of forged signatures. Therefore they find it unnecessary to rule on the hearing officer's finding that the petition was not objectionable whether or not all the signatures on it were genuine.

Employer at its Windsor House C & D facility located at 1735 Belmont Avenue, Youngstown, Ohio, excluding all administrators, directors of nursing, head nurses, social service consultants, dietary supervisors, registered dietitians, aides supervisors, housekeeping/laundry supervisors, activities directors, medical record consultants, professional employees (including registered nurses), office clerical employees, guards and supervisors as defined in the Act.

MEMBER OVIATT, concurring.

I concur in my colleagues' decision to adopt the hearing officer's findings and recommendations to overrule the Employer's objections. I write separately, however, to explore the agency issue raised in Objection 2.

Objection 2 covers two incidents where, the Employer alleges, prounion employees who were the Petitioner's agents forcibly removed buttons and other insignia from the clothing of antiunion employees. The hearing officer first addressed the question whether two of the prounion employees, Thomas and Heard, were in fact the Petitioner's agents. He found that Thomas and Heard were among the 23 members of the union organizing committee at the Company. He also found that Thomas had participated in passing out union buttons on one occasion, had served as the observer at the election, and had, after the election, been chosen as a member of the union negotiating committee. The hearing officer noted that Heard had been chosen as an alternate representative on the negotiating committee and had told two other employees that he was trying to "organize a union."

The hearing officer, in finding that Thomas and Heard were not agents of the Petitioner, stressed that the Petitioner's International representative, Timko, was responsible for the organizing campaign and that she was present at the Employer's facility on a regular basis throughout the campaign and frequently passed out literature to the employees as they arrived for work. The hearing officer also emphasized that the organizing committee had no formal structure and that its membership was open to anyone who attended the Petitioner's meetings on a regular basis. None of the committee members was paid. The hearing officer also observed that there was no evidence that the Petitioner had authorized, condoned, or was aware of the actions attributed to Thomas and Heard.

Even a cursory review of the case law makes clear that it does not take much evidence for the Board to find that an antiunion employee is an agent of the employer. See, e.g., *Roskin Bros.*, 274 NLRB 413, 421 (1985) (rank-and-file employee who was perceived by other employees as manager's "right-hand man" relaying instructions to employees was employer's agent); *Einhorn Enterprises*, 279 NLRB 576 (1986)

(clerical employee who had access to payroll records and who relayed confidential information from management to rank-and-file employees and relayed to management employee requests for raises was management's agent). See also *Star Kist Samoa, Inc.*, 237 NLRB 238, 244-246 (1978) (five members of the community who formed antiunion group were agents of the employer because the employer had met with the group and provided it with campaign literature, and had not thereafter sufficiently disavowed the group's activities).

When it comes to the conduct of prounion employees, however, it would appear that the Board moves somewhat more cautiously in deciding whether the employees are union agents. Thus, where an employee is the original, and a principal, proponent of the union, but does not specifically serve as the union spokesman or as an employee contact for the union, the Board will find that the employee is not a union agent. See, e.g., *Season-All Industries*, 276 NLRB 1247, 1252 (1985). In one case where a prounion employee had served as one of a seven-member in-house organizing committee and had solicited support among the employees, answered their questions, given them the union representative's business card, distributed union literature, kept the paid union organizer informed of events at the plant, and served as the union's election observer, the Board held that the employee was not a union agent because he did not approve the contents of union literature and had no input into campaign strategy. See *Advance Products Corp.*, 304 NLRB 436 (1991).

I realize that paid union organizers cannot realistically control rank-and-file employee union advocates to the same extent that an employer can control a supervisor, for example. In my view, however, where the union encourages the establishment of an in-plant organizing committee and directs the committee's work, the organizing committee members are union agents when they proceed to do what the union has directed them to do. In these circumstances, the union organizer has, in my view, an obligation to advise and caution employee union adherents that they must not threaten or coerce their fellow employees in attempting to persuade them to join the union. When the union learns of such threats and coercion, I believe that the union has an obligation to disavow that conduct and to do what it can to remedy it in the same way an employer is required to remedy such conduct. In this we would ensure that the employer and the union are provided with a level playing field. If the union organizer does not satisfy these minimal obligations, I would be inclined to attribute any in-plant organizing committee member misconduct to the union.

In this case, I shall reluctantly go along with the hearing officer's determination that Thomas and Heard

are not the Petitioner's agents. I do not rely on the fact, however, that union organizer Timko was often present at the plant and directed the organizing campaign onsite. It is certainly possible that even with a paid union organizer regularly present, prounion employees could be clothed with sufficient authority to make them union agents when they solicit on the Union's behalf. I rely, instead, on the loosely knit nature of the "organizing committee," which any employee could join if he or she regularly attended the Petitioner's meetings, and which was in no way structured by the Petitioner. Further, although the Petitioner apparently had available at its meetings literature and buttons that employees could pick up and give to others, the Petitioner did no more than that—it did not give specific directives to the employees present with respect to approaching their fellow employees. As did the hearing officer, I also rely on the fact that the Union did not condone—indeed, was not even aware of—Thomas' and Heard's organizing activities. Finally, there is no evidence that Thomas and Heard were perceived by the employees to be the main union proponents. On these facts, I agree with the hearing officer's conclusion that Thomas' and Heard's conduct was not attributable to the Petitioner.

Finding that Thomas and Heard were not the Petitioner's agents, the hearing officer quite properly proceeded to consider their conduct and that of other rank-and-file employees under a third-party standard. See *Westwood Horizons Hotel*, 270 NLRB 802 (1984). He found that the incidents covered in the objection were insufficient to support a finding that they created an atmosphere of fear and coercion. I agree. Accordingly, I concur in my colleagues' decision to affirm the hearing officer and to overrule the objections.

APPENDIX

THE OBJECTIONS

Objection 2

In this objection, the Employer asserts that the Petitioner through its officers, agents, and those acting on its behalf forcibly removed buttons and other insignia from the clothing of employees who supported the Employer, thus creating an atmosphere of fear, intimidation, and coercion.

In support of this objection the Employer presented employees Darlene Smith, Sally Hall, and Patricia Posterli, all licensed practical nurses employed by the Employer at the facility.

Smith testified that sometime near Martin Luther King day in mid-January 1991,¹ while inside the home, employee Rosa Thomas gave her a button with Martin Luther King's picture on it; the union name was printed on the bottom of the button. Other union supporters were wearing these buttons that day, having received them outside the facility as they came to work. Thomas allegedly handed a button to Smith at the

¹ All dates herein refer to 1991 unless otherwise indicated.

south nursing station of the facility, a patient care area frequented by bargaining unit employees. Smith further testified that LPN Sally Hall was with her at the time and that both of them received buttons from Thomas. According to Smith she noticed that there was a "Union logo" on the button after she received it, so she put a piece of tape across that portion of the button before putting it on. When Thomas noticed the piece of tape, she allegedly took it away from Smith, telling her that if she wasn't going to wear it "the way it was" then she couldn't have it. Smith testified that Thomas grabbed the button from her hand and that she also grabbed one from Hall.

In further testimony, Smith related that she received a mailing after the election which named Rosa Thomas as a member of the negotiating committee. She also testified that Thomas was known to her as one of the principal union organizers and that several unidentified employees talked to her about the incident after it occurred.

Sally Hall testified with respect to the incident, generally corroborating the testimony offered by Smith. However, I note significant differences between their testimony, specifically regarding whether or not Thomas "grabbed" the buttons back from them and whether or not the piece of tape was ever placed on the buttons. According to Hall, after she received the button from Thomas she told Thomas that she was *going to* place a piece of tape across the union words. When she said that, according to Hall, Thomas asked her to give it back, telling her she could not have it if she was going to tape out the Union words." Hall then handed the button back to Thomas. Hall had no knowledge concerning the manner in which Smith returned the button to Thomas because she did not see the transfer. Hall further testified that Thomas had no further conversation with her regarding the pin after it was returned and she did not report the incident to any of her supervisors. According to Hall, she only mentioned the incident to one other employee. Finally, Hall confirmed that they never actually put tape on the pin before she handed it back to Thomas.

Evidence concerning a second incident came from Smith and from LPN Patricia Posterli. According to Smith, this second incident occurred near the beginning of February, approximately 3 to 4 weeks before the election. Smith testified that she and Posterli had made paper signs containing the legend "SEIU—JUST SAY NO" and pinned them on the front of their blouses. As they were walking down the hall toward the gift shop, they encountered a group of about 10 employees. As they passed the group, an unidentified employee ripped the sign from her blouse. In addition, employee Ernestine Phillips ripped the sign from Posterli's blouse. Smith further testified that the unidentified person approached her and asked her "What the hell I was wearing that for" before taking it from her. This incident occurred in the presence of about 10 employees, many of whom were wearing union buttons, most of whom laughed after the incident occurred. In addition, Smith testified that after the sign was removed the employees moved in closer to them, making it difficult to find a path through them. After the incident, Smith testified that she and Posterli went to the office and discussed the incident with the director of nursing. Smith also testified concerning employees who approached her after the incident and asked her about it. She identified orderly Onre Richmond and nursing assistant Marge Kather, both of

whom allegedly told her that they did not support the Union but that they were afraid to tell anyone about it. I note that neither Richmond nor Kather were called to testify by the Employer. Finally, Smith testified that employee Donald Heard, an orderly at the nursing home, was among those standing in the group. According to Smith, Heard tried to convince her to sign a union authorization card early in the union campaign and told her that he was the employee who "pretty much started this whole Union business."

Posterli testified to corroborate Smith's testimony. According to Posterli, she and Smith were walking toward the gift shop sometime in early February when Phillips approached her, read what she had pinned on her uniform, and pulled it off. She further testified that Phillips asked her "what she was doing wearing that" before she pulled the pin off. After the pin was removed, approximately 10 employees gathered around them to see "what was going on." After the incident, according to Posterli, she told Phillips: "I don't tell you what to wear on your uniform and you don't tell me what to wear on mine." After she said that, Phillips apologized and handed the button back to her. She also testified that she wasn't physically afraid of Phillips, that she knows her, that she felt fairly comfortable around her. However, Posterli did admit that the other employees in the group worked the day shift and that she didn't know them very well. Posterli further testified that several people, eligible voters, asked her about the incident after it occurred and that several of those employees, including orderly Richmond, said that they did not support Union but were afraid to tell anyone. Posterli also related an earlier conversation with Heard, who told her: "As you have probably heard, I am trying to organize a Union here." She testified that this conversation occurred the first time Heard approached her about the Union in December 1990. On cross-examination Posterli testified that she wore a button which said "Support the Company—Vote NO" during the 10 days preceding the election. In addition, she testified that "more than 10" other employees also wore the buttons. She also testified that Phillips' nickname is "Tiny" because she is a small person; she estimated her height at "five feet."

The Petitioner presented Rosa Thomas, who testified concerning the incident described by Smith and Hall. According to Thomas, Smith and Hall asked her for the pins after she started her shift. When she gave them the pins, they "started to tape them up." She asked why they were doing that and they responded that they didn't support the Union. Thomas then asked them for the pins back saying that "If you are going to tape it up, give it back." Both pins were voluntarily given back to her and she denied taking them away from the employees. On cross-examination, Thomas testified that she attended union meetings but did not speak during them, that she was not aware of her election as a member of the Union's negotiating team, and that she did not ask employees to support the Union during the campaign. She further testified that she was an observer for the Union during the election and that she received the buttons from the Union. However, she did not distribute any petitions for the Union nor did she solicit any signatures on petitions or on authorization cards for the Union during the campaign.

The Petitioner also presented testimony from International Organizer Debra Timko. In her testimony she indicated that it was her responsibility to lead the organizing campaign. In

addition, she testified that negotiating committee members as set forth in Employer Exhibit 3, were elected to those positions after the election. Specifically, she testified that a meeting was held on March 5 to select negotiating committee members and that the results of that election were communicated to the employees in the letter of March 8. On cross-examination Timko testified that the organizing committee was composed of approximately 23 employees. According to Timko, the committee was a group of workers who showed their commitment to building the Union by their regular attendance at meetings in the early days of the campaign. Their function was to build support for the Union inside the nursing home. Timko encouraged them to distribute literature and buttons and to persuade people to join the Union. However, there is nothing in her testimony which indicates that members of the organizing committee had any formal duties, nor does her testimony establish that the Union provided any financial support to members of the organizing committee. Finally, no evidence was offered to indicate that the members of the organizing committee were given or possessed actual authority to act in any capacity on behalf of the Union.

The Petitioner did not present any witnesses regarding the incident related by Smith and Posterli. Therefore, in the absence of any testimony to the contrary, I must credit the version of that incident as related by them.

In order to resolve this objection, it is first necessary to consider whether the evidence, as related above, supports a finding that Thomas, Phillips, and/or Heard were agents of the Petitioner. The only evidence offered by the Employer regarding Thomas is her participation in passing out buttons on one occasion, her service as Petitioner observer, and her postelection choice as a member of the negotiating committee. Heard was chosen as an alternate representative and allegedly told Smith and Posterli that he was trying to "organize a union." The Employer offered no evidence in an effort to establish that Phillips was an agent of the Petitioner.

With regard to this issue, I find that neither Thomas Phillips nor Heard were agents of the Union. Clearly, the testimony established that International Representative Timko was responsible for the organizing campaign. Although all three were members of the 23-member organizing committee, the evidence establishes that this committee had no formal structure (for example, officers or subcommittees) and that its membership was open to anyone who attended the Petitioner meetings on a regular basis. All of the members, it appears, gave their support voluntarily and without pay. In addition, Timko was present at the Employer's facility on a regular basis throughout the campaign and her presence and availability was well known to the employees because she frequently passed out literature to them as they arrived for work. Finally, there is no evidence that the Union either authorized, condoned, or was even aware of the actions attributed to Thomas, Phillips, and Heard. I therefore conclude that this conduct, if it occurred, is not attributable to the Union. *Cambridge Wire Cloth Co.*, 256 NLRB 1135, 1139 (1981); *Firestone Steel Products*, 235 NLRB 548 (1978).

Therefore, the alleged conduct complained of by the Employer must be considered under the standard for third party conduct set forth in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In that case, the Board held that the standard is: "whether the misconduct was so aggravated as to cre-

ate general atmosphere of fear and reprisal rendering a free election impossible."

In the instant case, the Employer has presented testimony covering two isolated incidents between small numbers of employees on opposing sides of an emotional issue during a 90-day election campaign. The incidents, even if I credit the testimony of the Employer witnesses, occurred about 45 days and 30 days before the election. They involved, at most, three pro-Employer employees. There were no threats made by prounion employees. Again, crediting Employer witnesses Smith and Hall, I find that the Rosa Thomas incident contained no coercive conduct. The testimony of Smith and Hall is in conflict regarding whether Thomas grabbed the pins from them when she learned that they intended to deface them but that is immaterial. I find and conclude that the mere act of retrieving the pins once Thomas learned that the employees intended to cover the union name did not constitute any form of conduct which would justify a conclusion that an atmosphere of fear and coercion was created by the employee involved especially in light of Thomas' testimony which I credit that the employees asked for the buttons.

In like manner, the incident involving Smith and Posterli, while arguably more serious in nature, does not rise to a level contemplated by the Board in *Westwood*, supra. Thus, no physical violence occurred, none of the prounion employees made any threats to the employees wearing the signs, and the one identifiable employee who removed the sign apologized and gave it back. In addition, while it did occur in the presence of, at most, 10 other employees, it also occurred almost 4 weeks before the election. There is no testimony on this record establishing that the incident became the subject of general discussion throughout the facility in the intervening weeks. In addition, the employees involved and numerous other pro-Employer employees felt no fear when they wore pro-Employer buttons for the 10 days immediately preceding the election. In those circumstances and based on the above conclusions, I can only find that this incident, like the first, was too minimal to have interfered with the conduct of a free and fair election. *Klean Brite Laboratories*, 292 NLRB 747 fn. 2 (1989); *Cafe LaSalle*, 280 NLRB 379 fn. 1 (1986).

Even when the two "incidents" are considered together, it is not possible to conclude that their cumulative effect on unit employees was sufficient to support a finding that an atmosphere of fear and coercion was created. In cases when the Board has found sufficient employee conduct to create such an atmosphere, the threats have been numerous, and have specified violent action: for example, in *Picoma Industries*, 296 NLRB 498 (1989), the prounion employees threatened to blow up an employer supporter's car, to blow up the plant, and to beat up numerous employer supporters. In addition, such cases have involved pervasive conduct of a violent or threatening nature which occurred very near the election; *Westwood*, supra. I can find no case in which the Board concluded that an atmosphere of fear and coercion was created by two isolated incidents in a 90-day campaign, the last occurring a minimum of 4 weeks before the election and without any specific or even general threat of violent action made by an prounion employee. Even crediting the record testimony of the Employer witnesses, there is no basis to overturn the election, and I shall recommend that Employer's Objection 2 be overruled.

OBJECTIONS 6, 7, AND 8

In those objections, the Employer alleges that the Petitioner circulated a petition in the Employer's facility, obtaining signatures on it through threatening, intimidating, and coercive means, forging signatures on the petition all in an effort to create the impression that the Petitioner enjoyed widespread support throughout the Employer's facility.

Before I consider the evidence offered by the Employer in this matter I note that the Regional Director found the following:

With respect to Objection 6, there is nothing inherently objectionable to the Petitioner's circulation and distribution of a petition which demonstrates the widespread support of the Petitioner by bargaining unit employees.

The Regional Director went on to order the hearing on Objections 6, 7, and 8 only because Objections 7 and 8 raise issues of fact which cannot be resolved *ex parte* (p. 4).

In considering those objections, I agree with the Regional Director that the mere distribution of a petition showing employee support is not objectionable conduct. *J. C. Penney Food Department*, 195 NLRB 91 fn. 4 (1972); *Springfield Hospital*, 281 NLRB 643 (1986). I shall, therefore, overrule Objection 6.

However, the question remains regarding whether the Petitioner committed objectionable conduct if it coerced employees into signing the petition or if it forged the signatures of employees on the petition, as alleged in Objections 7 and 8.

On this record, the Employer has not presented any testimony establishing that the Petitioner coerced any employee to sign the petition; in fact, the only testimony on this record regarding the solicitation of signatures is from Timko. According to Timko, she instructed employees who solicited signatures on the petition to merely ask employees if they were going to vote for the Union. If the answer was anything but "yes," then they did not sign the petition. Timko testi-

fied that the purpose of the petition was to give the Union "a general idea . . . of what the vote will be" (Tr. 118). Nothing in this record even alleges, much less establishes, that any coercion, intimidation, or threats were used by anyone who solicited signatures for this purpose. For that reason, I shall overrule Employer Objection 7.

With respect to Objection 8, wherein the Employer asserts that the Petitioner forged signatures of employees on this petition, the Employer offered the written, notarized statements of two employees wherein it is asserted that they did not sign the petition and that they believed that their signatures were copies from another document. The Employer did not present these witnesses to testify at the hearing; thus, the Petitioner was unable to cross-examine their testimony. In addition, it appears from my cursory examination of the signatures on the affidavits and in the petition that there are significant similarities between them. However, I conclude that it is immaterial, given the finding that the distribution of the petition is not objectionable, whether or not all of the signatures thereon are genuine.

In reaching that conclusion, I rely on the Board's conclusion in *J. C. Penney Food Department*, *supra*, that a union's polling of certain eligible voters as to how they were going to vote in the election did not warrant setting aside the election. The Board has further addressed that issue in *Glamonise Foundations*, 197 NLRB 729 (1972), in which it held that a union engaged in organizing employees may legitimately measure its support among the work force while an employer may not do so. Therefore, assuming *arguendo* that some of the signatures on the petition are not genuine—an assumption I am not prepared to make due to the unreliable nature of the evidence offered to support that allegation—that fact would not establish that the Union engaged in any objectionable conduct because the petition itself, no matter how it is used, is not objectionable. I shall, therefore, recommend that Employer Objection 8 be overruled.