Wells Aluminum Corporation, Sidney Division *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW. Cases 9–CA–29131, 9–CA–29810, 9–CA-29877, and 9–RC–15953

February 11, 1999

SUPPLEMENTAL DECISION AND ORDER ON REMAND

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On November 30, 1995, the Board issued its decision in this case[1] in which it adopted the administrative law judge's findings that Wells, the Respondent Employer, had committed certain unfair labor practices and his recommendation to overrule Wells' objections to the election held November 14, 1991.[2] Having overruled Wells' objections to the election, the Board certified the Union as the exclusive collective-bargaining representative of the unit employees at Wells' Sidney, Ohio facility. Thereafter, Wells filed a petition for review with the U. S. Court of Appeals for the Sixth Circuit, and the Board filed a cross-petition for enforcement of its Order.

On April 28, 1997, the Sixth Circuit, in an unpublished opinion,[3] reversed and remanded the case to the Board with a direction that the Board provide "a reasoned resolution of factual questions surrounding the origin and initiation of the outsourcing issue and Wells' unfair labor practice charge that the union was guilty of making improper threats and/or offering improper inducements for pro-union votes in the election." On August 25, 1997, the court denied the Board's petition for rehearing, and on September 2, 1997, the court issued its mandate in this case. On September 25, 1997, the Board advised the parties that it had accepted the remand and invited them to file statements of position with respect to the issues raised by the remand. Both Wells and the Union filed statements of position.[4]

The Board has delegated its authority in this proceeding to a three-member panel.

The factual issues remanded by the court to the Board for resolution concern Wells' Objection 1 to the election in which Wells asserted that

> 1. The Union, through Representative Robert Hamons, threatened employees with loss of work and jobs if they did not select UAW as their representative.[5]

Before addressing the specific factual issues presented by the court's remand, however, we shall briefly set out the facts, as found by the judge, from which Wells' Objection 1 arises; the judge's conclusions based thereon; and the Board's reasons for adopting the judge's recommendation that Wells' Objection 1 be overruled.

By way of factual context, at the time of the events in question, the Union already represented a unit of employees at Navistar, a company which subcontracted (or outsourced) a significant amount of work to Wells, much of which was performed by the Wells employees whom the Union sought in the instant case to represent. In his decision, the judge set out the facts surrounding Wells' Objection 1 as follows:

> On October 4, 1991, [Wells' Operations Manager] Miller posted an open letter to employees on the bulletin board, Charging Party/Petitioner's Exhibit 1, in which he states, among other things, "do you believe the UAW would be more concerned about its hundreds of members at Navistar and stopping the out-sourcing there [to Wells] or would it care about the future of our plant and the lives [of] the fifty or so of us?" Miller testified that he posted the open letter in response to inquiries of about 10 employees.
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> On October 7, 1991, the Union held a meeting for Respondent's employees. [Employee] Hess, who attended the meeting, testified that one of the employees present asked Union Representative Robert Hamons if some of Respondent's Navistar work, the door projects, would be moved back to Navistar; that Hamons said that if the Union was voted in, it would

[1] *Wells Aluminum Corp.*, 319 NLRB 798.

[2] The results of the election were 30 votes for, and 25 against, the Union.

[3] Nos. 95–6691/96–5111.

[4] On January 7, 1999, Wells filed a motion that the court deny the Board's petition to enforce the certification of representative for the reason that the Board had failed to comply with the court's mandate. On January 14, 1999, the court issued an Order that the Board respond to Wells' motion by February 2, 1999. The Board filed its brief in opposition to Wells' motion with the court on February 2, 1999.

[5] In addition to filing an objection to the election based on Hamons' conduct as described in its Objection 1, Wells also filed an unfair labor practice charge against the Union in Case 9–CB–8057, in which it alleged that this same conduct violated Sec. 8(b)(1)(A) of the Act. On November 29, 1991, the Acting Regional Director declined to issue a complaint based on this charge. On June 30, 1992, the General Counsel affirmed the Acting Regional Director's dismissal of the charge and by letter of August 27, 1992, denied Wells' July 8, 1992 Motion for Reconsideration of the denial of the appeal. Under Sec. 3(d) of the Act, the General Counsel's decision as to whether a complaint should issue is not reviewable. Thus, no complaint ever issued in Case 9–CB–8057, and that case was neither litigated nor considered in the underlying proceeding. As noted above, however, Hamons' conduct at issue in the "CB" case is the same conduct which Wells alleged as objectionable in its Objection 1 in Case 9–RC–15953.

In Case 9–RC–15953, after an investigation in which, inter alia, the three employees later referred to by the court at p. 3 of its opinion submitted statements, the Acting Regional Director issued his Report on Objections, Order Directing Hearing and Notice of Hearing on September 11, 1992, in which he concluded that Wells' objections to the election, including its Objection 1 at issue here, raised "substantial and material issues of fact and law which can best be resolved by a hearing." Subsequently, the Region consolidated Case 9–RC–15953 for hearing with Cases 9–CA–29131, 9–CA–29810, and 9–CA–29877.

> not try to take them from Wells because both would be union shops but if the Union was not voted in, then the UAW would try to take the door project out of Sidney and take it over to Navistar in Springfield, Ohio; that at the time about one-half of the work in the Respondent's plant was Navistar work; that 25 to 30 employees attended this meeting; and that 25 to 30 of the employees who voted in the election would be affected by a removal of the Navistar work. Subsequently, Hess testified that the employee asked the question referring to what was stated in Miller's aforementioned October 4, 1991 open letter; that 30 percent of Respondent's work at the time involved the Navistar door; and that the next morning he discussed with five or six other employees the possibility that if the Union was not voted in certain of Respondent's work would be lost. In a letter to the Board dated July 28, 1992 (R. Exh. 34), Hamons explained that when an employee asked a question about the aforementioned passage of Miller's October 4, 1991 open letter, he answered
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> > that most jobs were sourced by the bidding procedure in todays [sic] competitive manufacturing arena, but he felt that the UAW would be less inclined to take work from the Sidney plant if they were members of the UAW but the UAW did not have the final say in the sourcing of work.[6]

In support of its Objection 1, Wells contended on brief to the judge that Hamons' statement, made to over half the voting unit, constituted a threat of economic reprisal which interfered with employee free choice in the election. Relying on *Van Leer Containers*, 298 NLRB 600 (1990), Wells further asserted that such threats were grounds for overturning an election.[7]

As explained by the judge, "the burden of proving that an election should be invalidated because of objectionable conduct rests with the party filing the objections, in this case [Wells]."[8] In finding that Wells had not met its burden of establishing that Hamons' statement at issue here was objectionable, the judge also relied on *Van Leer,* 298 NLRB 600 (1990), enfd. 943 F.2d 786 (7th Cir. 1991), which the judge found "similar to the [case] at hand."[9] In overruling the employer's objection in *Van Leer*, the Board concluded that

> the [union's November 30, 1984] letter, read as a whole, provides an unambiguous explanation of the Union's legal obligation to represent only employees who have selected it as their representative—an explanation given, not gratuitously, but in response to questions raised by communications to employees from sources other than the Union.[10]

Finding that the Board's "reasoning" in *Van Leer* "would apply with equal force here," the judge concluded that Wells' Objection 1 did "not supply a reason for overturning the election."[11]

In adopting the judge's finding that Hamons' statement regarding outsourcing was not objectionable, the Board relied specifically on the facts that the remarks were made at a single union meeting, that they were made in response to a question from an employee, and that this incident took place 3 days after Miller had posted the open letter to employees. The Board found such circumstances similar to those in *Van Leer Containers v. NLRB*, 943 F.2d at 790, since "it was the employer, and not the union, that introduced the issue into the campaign, and there was no evidence of a 'pattern of coercion by the Union to convince the employees that a "Yes" vote would preserve their jobs."[12]

The specific factual issues presented by the court for resolution are (1) what was the origin of the outsourcing issue, i.e., did Wells introduce the outsourcing issue into

[6] *Wells Aluminum Corp*., 319 NLRB at 801.

[7] Id. at 816. In *Van Leer*, 298 NLRB at 601, the employer filed a number of election objections after the union won the December 4, 1984 election. In his report on objections, the Regional Director described the basis for employer's Objection 2, which was similar to Wells' Objection 1 at issue here:

> Petitioner threatened the Employer's employees that if it lost the election at the Employer's facility in Canton, Mississippi Petitioner would attempt, through the unfair labor practice charge in Inland Steel Container Co., Case 15–CA–8983, to either have the employees' jobs in Canton transferred back to New Orleans [where the Inland Steel plant was shut down] or in the alternative, utilize its efforts to have laid-off employees in New Orleans replace those at the Employer's facility in Canton, as part of the remedy in Case 15-CA-8983.

The employer contended that it was the petitioner who referred the employees to the unfair labor practice charge and that the petitioner's conduct was tantamount to a threat of job loss unless the Canton employees selected the petitioner to represent them.

[8] Id. at 815, quoting *Chicago Metallic Corp.,* 273 NLRB 1677, 1704 (1985).

[9] Id. The critical, allegedly objectionable, language in *Van Leer Containers*, 298 NLRB at 603, was contained in Union Representative Hubert Coker's November 30, 1984 letter to employees, specifically, the fifth paragraph, which stated:

> If a majority of the employees vote NO on December 4, then we will not be *legally bound by law* to represent the employees in Canton, Mississippi. Therefore, our sole obligation will be to the Union members in New Orleans should the Judge rule in the Steelworkers favor. [Emphasis in original.]

[10] *Van Leer Containers*, 298 NLRB at 600 fn. 2.

[11] *Wells Aluminum Corp*., 319 NLRB at 816.

[12] Id. at 798 fn. 2. The Board went on to explain that

> [w]ere we to accept [Wells'] position on this objection, any employer whose work force is the target of an organizing campaign by a labor organization that represents the employees of another company that contracts out work to the targeted employer would be able, by injecting the subcontracting issue into the campaign, to put the union in an untenable position. Giving inquiring employees an honest answer that reflects the union's obligation to seek to protect the job security of employees it represents would put the union at risk of having any election victory set aside on the employer's objection.

the election debate through its October 4, 1991 open letter to employees, or was that letter a response to concerns expressed by employees; and (2) was Hamons' statement alleged as objectionable "volunteered," or was it a response to Wells' open letter or to employee questions regarding the outsourcing issue. We shall now consider these factual issues. After resolving these factual issues,[13] we shall reconsider whether the judge correctly overruled Wells' Objection 1 to the election in light of our factual findings. In doing so, we shall be mindful of the court's concerns, as set out at pages 4–5 of its opinion:

> The Board looks closely to the more usual unfair labor practice charge by a union that an *employer* has threatened employees or wrongfully promised benefits to defeat the union's organizing efforts. We think that a union's threat or promise of benefits to prospective voters should be viewed just as carefully to determine whether it had a substantial effect in a close election. If Hamons volunteered the statement attributed to him by witnesses and by the Board, we would be disposed to sustain Wells' objection. This might well constitute a direct threat of dire consequences if the union did not prevail and also a promise of benefits if it did. We cannot indicate an appropriate finding or conclusion in this respect for lack of specific findings by the ALJ and the NLRB.[14]

It is within this larger context that we now address the factual issues remanded by the court for resolution.

The first factual issue identified by the court is whether Wells introduced the outsourcing issue into the election through its October 4 open letter, or whether that letter was itself a response to concerns expressed to Miller by employees. The only testimony in the record as to the reason for the October 4 letter is that of Miller himself. He testified that an article had appeared in a Springfield newspaper "about a pending lawsuit, UAW against Navistar, for outsourcing Delco Remy at the time" and that about 10 employees asked him "what [the word outsourcing] meant and the things that were associated with it." Miller testified that he wrote the open letter "[r]ather than go around to each employee and give the answer." On the basis of Miller's uncontradicted testimony, we find that he posted the October 4 open letter in response to inquiries from concerned employees and the newspaper article.

We shall now address the second factual issue remanded by the court for resolution, i.e., whether Hamons' statement alleged here as objectionable was "volunteered," or rather was said in response either to Wells' open letter or to employee questions regarding the outsourcing issue, or both. The only testimony as to whether the statement was volunteered is that of employee Randy Hess. As set out above, the judge stated in his decision that Hess, who was present at the October 7 meeting, testified that "one of the employees present asked . . . Hamons if some of [Wells'] Navistar work, the door projects, would be moved back to Navistar." As Hess further testified, it was in response to this question that Hamons explained that "if the Union was voted in, it would not try to take them from Wells because both would be union shops but if the Union was not voted in, then the UAW would try to take the door project out of Sidney and take it over to Navistar in Springfield, Ohio."[15] Thus, the record establishes that Hamons' statement alleged as objectionable was not volunteered. Since, as in *Van Leer*, supra, the record establishes that it was "given, not gratuitously, but in response to questions raised by communications to employees from sources other than the Union," this should be the end of the inquiry.

As noted above, however, the court requested that the Board also resolve whether Hamons' statement was in response to Wells' "own actions, in contradistinction to actions initiated by its own employees." In making this request, the court indicated that "[i]f the statements by

[13] Although the court stated at p. 6 of its opinion that it believed that a remand similar to that in "*Van Leer I,*" 841 F.2d 779 (7th Cir, 1988), was required here, we find that such a remand is not necessary because the record contains sufficient evidence to resolve the factual issues set by the court for resolution. In this regard, we note that here, in contrast to *Van Leer I* , a hearing has already been held in Case 9–RC–15953 and a record established regarding Wells' objections to the election.

[14] At pp. 6–7 of its opinion, the court further explained that:

> If the NLRB's rationale in adopting the ALJ's decision is based on Hamons' statement being "in response to questions raised by communications to employees from sources other than the Union," then we believe the Board should also consider whether Wells' statement was likewise merely responsive to such questions from its own employees . . . [Further, t]here is no factual determination about whether the union representative's statements were, or not, responsive to Wells' letter, and no discussion about whether Wells' letter was initiated by Wells to attempt to gain an unfair advantage, or whether it was "in response to questions raised by communications" from concerned employees. If the statements by Hamons were, in effect, not instigated or caused by reason of the employer's own actions, in contradistinction to actions initiated by its concerned employees, we would be concerned that any UAW suggestions or warnings that Wells' employees could or would lose their jobs if they did not vote for union representation might constitute an unfair labor practice and might vitiate the election.

[15] For the purposes of this decision, we shall credit Hess' testimony regarding Wells' Objection 1 to the election. In so doing, we observe that Hess' testimony regarding Objection 1 was not contradicted at the hearing and that Hamons, who was present at the hearing, did not testify under oath regarding the events at issue. In these circumstances, we are reluctant to credit Hamons' post-hearing version of the events at issue as set out in his July 28, 1992 letter to the Region. We do not agree, however, with the court's view, as set out at p. 6, fn. 2 of its opinion, that "[t]he ALJ apparently gave credence to the UAW explanation." We infer, rather, that the judge found it unnecessary to resolve this issue because he found that under either version of events Hamons' statement was a lawful explanation of the Union's legal obligations to the employees whom it represented and was therefore not objectionable.

Hamons were, in effect, not instigated or caused by reason of the employer's own actions . . . we would be concerned that any UAW suggestions or warnings that Wells' employees could or would lose their jobs if they did not vote for union representation might constitute an unfair labor practice and might vitiate the election."[16] We now address this issue.

Obviously, Hamons' statement at issue here was immediately responsive to the employee question as to what would happen "if some of [Wells'] Navistar work, the door projects, would be moved back to Navistar." As stated by the judge, however, Hess subsequently testified "that the employee asked the question *referring to what was stated in Miller's aforementioned October 4, 1991 open letter*."[17] Thus, the employee question was raised within the context of "the employer's own actions." Given this context, we find that Hamons' statement was not only an immediate answer to the employee question, but also a response to the issues raised by Wells' open letter regarding outsourcing and where the Union's loyalty would lie if the Union represented both the Wells and Navistar bargaining units, issues which would have been of concern to all bargaining unit employees after Wells posted its open letter.

Thus, the Union statement at issue here was made in response to an employee who asked specifically whether certain of Wells' Navistar work "would be moved back to Navistar," and this question incorporated employee concerns regarding outsourcing and Union loyalty as set out in Wells' open letter. That open letter from Wells, though perhaps not initiated to gain what the court termed an "unfair advantage" (see fn. 14, above), certainly was intended to gain an "advantage" in the campaign. In this context, we find that Hamons' response was a fair rejoinder and, in effect, a truthful explanation of the Union's obligation to represent fairly only those bargaining units whose employees had chosen the Union to represent them. Even if Coker's November 30, 1984 letter in *Van Leer*, supra, "was a clearer exposition of the union's responsibilities in such a situation as this,"[18] we note that Hamons' answer was in immediate response to a specific employee question, and that that question specifically asked whether certain work would be moved back to Navistar. In these circumstances, we do not fault Hamons for giving a specific and concrete answer regarding what the Union would "try" to do if it were the representative only of the employees at Navistar and not of the Wells employees.

Finally, while employees may have feared after Hamons' statement at the October 7 meeting that they would lose their jobs if the Union lost the election, such a reaction does not here convert a truthful explanation of the Union's obligations into a threat of job loss. A union is obligated to try to act in the interests of employees whom it represents, and Hamons' answer to the questions concerning the work outsourced from Navistar was a truthful reflection of that obligation. It cannot be that a dishonest answer or a refusal to respond to the question was the proper unobjectionable course.

ORDER

Having decided the factual issues remanded to us by the court for resolution, and having reconsidered Employer's Objection 1 in light of these factual findings as well as the concerns expressed by the court in its opinion, we affirm the Board's overruling of Employer's Objection 1 in *Wells Aluminum Corp.,* 319 NLRB 798 (1995).

[16] See fn. 14, above.

[17] *Wells Aluminum Corp.,* 319 at 801 (emphasis added). The relevant testimony is set out at Tr. 662–663:

> JUDGE WEST: Did any employee or anyone at the meeting ask a question referring to what was stated in that letter?
> [HESS]: About the movement of the —
> JUDGE WEST: Yes.
> [HESS]:I think Carlinda asked it.

[18] Nos. 95–6691/96–5111 at 5.