Willey's Express, Inc. *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Truck Drivers Union Local #170, Petitioner. Case 1–RC–18231

31 May 1985

DECISION AND DIRECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The National Labor Relations Board has considered determinative challenges in and objections to an election held 13 September 1984 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 10 for and 10 against the Petitioner, with 2 challenged ballots.

The Board has reviewed the record in light of the Employer's exceptions and brief and the Petitioner's answering brief and adopts the hearing officer's findings and recommendations[1] only to the extent consistent with this Decision and Direction.

The Employer has excepted, inter alia, to the hearing officer's recommendation that its Objection 11 be overruled. For the reasons set forth below, we find merit in this exception.[2]

At all times material herein, the Employer has provided vision and dental insurance to the unit employees. These insurance benefits have been provided through the Employer's participation in the Northern New England Benefit Trust. One of the trustees for this trust fund is the Employer's president Gibbons. The trust fund is composed of both employer and union trustees. According to Gibbons, the unit employees are legitimately covered under this trust fund because the Employer is already a contributor to the fund, through its collective-bargaining agreement with a sister local, Teamsters Local 633, for certain employees of its Concord, New Hampshire location. Gibbons testified that the status of contributor entitles the Employer to include under the fund's coverage the nonunion employees at its Shrewsbury, Massachusetts terminal involved herein.

The Employer's Objection 11 states:

> The Union brought pressure upon the Northern New England Trust to terminate the vision and dental portion of the Employer's insurance program for its non-Union employees which included the voters in this election. The Union's effort was designed to disqualify those drivers from such insurance because of their non-Union status and to present the Union as the only source of comparable insurance coverage.

The hearing officer found, as supported by the record, that approximately a week before the election, Union Business Agent Foley became aware that the unit employees were receiving the dental and vision insurance benefits. Foley then proceeded to investigate to ascertain if the Employer's participation in this trust fund as it pertained to its Shrewsbury terminal employees was legal. After some investigation, Foley told employee Butch Flynn, a few days before the election, that the Shrewsbury terminal employees were illegally covered under the trust fund. Foley also reported this matter to various union officials, including his superior, Teamsters International Vice President McCarthy. Contrary to Gibbons' testimony, Foley testified that he believed that an employer participating in the fund had to be a party to a collective-bargaining agreement specifically covering the unit employees before insurance benefits could be extended to them.

The hearing officer found that Foley's investigation as to the legality of the Employer's participation in the insurance fund did not interfere with or coerce employees in the exercise of a free choice in deciding whether or not they desire union representation. On this basis, the hearing officer recommended that the Employer's Objection 11 be overruled. In its exceptions to the hearing officer's recommendation, the Employer contends that the hearing officer erred when she failed to find Foley's conduct constituted an implied threat to employees that they would lose their current insurance coverage unless they chose union representation. We agree.

We find that Foley's statement to employee Flynn is coercive and reasonably tended to interfere with the election. The statement is objectionable regardless of whether the trust fund coverage for the unit employees is in fact illegal; whether Foley, in another context, otherwise had a right as a union representative to activate an investigation of the Employer's participation in the fund; and

[1] We adopt the hearing officer's recommendation that the challenges to the ballots cast by employees John Hulse and Robert Richard be overruled. We thus agree with the hearing officer's findings that Hulse and Richard are regular employees as opposed to casual employees and are therefore eligible voters. Contrary to the Employer's assertions, the record evidence does not support the claim that the parties intended that "regular" in the unit description of the Stipulated Election Agreement be limited to the meaning urged by the Employer. Rather, on the basis of the record before us, it appears that the parties' use of the term was the meaning commonly applied by the Board. Therefore, like the hearing officer, we have applied the Board's traditional community-of-interests standards in resolving the unit placement issues involving Hulse and Richard.

[2] In view of our disposition of this case, we find it unnecessary to address the Employer's other exceptions and to pass on its remaining objections. No exceptions were filed with respect to the hearing officer's recommendations to overrule the Petitioner's objections.

whether any action was taken by the trust fund to terminate such benefits at any time.

In light of Foley's actions, we find that his statement is comparable to the employer threats found in *Sure-Tan*.[3] In *Sure-Tan*, the Board adopted the administrative law judge's findings and held that the employer had illegally threatened its employees—who were undocumented aliens—when it asked them if they had immigration papers or "green cards."[4] The Board found that the employer's inquiry conveyed a thinly veiled threat to notify the Immigration Service because they had supported the union. The employer's inquiry in *Sure-Tan* occurred shortly after the union had won a representation election among these employees. In *Sure-Tan*, it made no difference that the employees involved were undocumented aliens and, in a different context, the employer's inquiry might have been proper.

What appears critical in *Sure-Tan* is the timing of the employer's remarks in relation to influencing union support. That same factor is present in the instant case. Foley's statement to Flynn admittedly was made a few days before the scheduled election. The record reveals that Flynn, in turn, relayed Foley's statement to at least one other employee, Norman Lamothe. Lamothe testified that, prior to the election, he discussed with several other employees the Union's opinion that they were illegally covered under the trust fund. Thus, it was inevitable for these employees to infer that there was only one sure way to keep these insurance benefits—vote for union representation.

For the reasons above, and noting the closeness of the election,[5] we find, contrary to the hearing officer, that the conduct of Union Business Agent Foley warrants setting aside the election and directing a second election in the event that the revised tally of ballots, which includes the ballots of Hulse and Richard, shows that the Union has received a majority of the valid ballots cast.

DIRECTION

IT IS DIRECTED that the Regional Director, within 10 days of the date of this Decision and Direction, open and count the ballots of John Hulse and Robert Richard, prepare a revised tally of ballots, and have it served on the parties. In the event that the revised tally of ballots shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall issue a certification of results pursuant to the Board's Rules and Regulations. In the event that the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, the following will be applicable.

[Direction of second election omitted from publication.]

IT IS FURTHER DIRECTED that the case is remanded to the Regional Director for Region 1 for further processing consistent with this decision.

[3] *Sure-Tan, Inc*, 234 NLRB 1187, 1190–1191 (1978), enfd in relevant part, sub nom. *NLRB v Sure-Tan, Inc*, 672 F 2d 592 (7th Cir 1982), affd in part, revd in part, and remanded sub nom *Sure-Tan, Inc. v NLRB*, 104 S.Ct. 2803 (1984)

[4] Ibid

[5] *Rexall Corp*, 272 NLRB 316 (1984)