Allis-Chalmers Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Case 13–CA–19918

13 February 1986

SECOND SUPPLEMENTAL DECISION

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND STEPHENS

On 15 January 1985 Administrative Law Judge Claude R. Wolfe issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions[1] to the decision. The Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board affirms its original Decision and Order (252 NLRB 606 (1980)).

[1] We agree with the judge's refusal to entertain evidence of employee turnover. We, therefore, find it unnecessary to reach the Charging Party's cross-exceptions to the judge's exclusion of the Union's evidence concerning the Respondent's recognition of the Union and negotiations with it.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Alan M. Kaplan, Esq., for the General Counsel.
Charles I. Cohen, Esq., for the Employer.
Irving M. Friedman, Esq., for the Union.

SUPPLEMENTAL DECISION

CLAUDE R. WOLFE, Administrative Law Judge. Pursuant to remand by the United States Court of Appeals for the Seventh Circuit[1] "for such action as [the Board] may consider appropriate in the circumstances," the National Labor Relations Board (the Board) on April 11, 1984, directed that a hearing be held on the Employer's objections to union conduct that allegedly affected the results of the representation election in Case 13–CA–15189.[2] The Board further directed that the hearing be held "on the issues remanded by the Court." The court's remand of June 16, 1982, noted that it would not enforce the Board's Order in 252 NLRB 606 (1980), because the Board had adopted a Regional Director's finding and conclusions without seeing the evidence relied on by the Regional Director. The court did not specify any particular objection on which evidence should be entertained, but Judge Eschbach, concurring, observed that the Employer had made "well-pleaded allegations" that "an influential member of the bargaining unit had been paid to wear a campaign button on the eve of the recognition election." In the absence of other specific reference by the court or Board, I am persuaded that all the objections were remanded for reconsideration and hearing when warranted. All parties were represented by able counsel who were provided with and took opportunity to examine and cross-examine witnesses during the hearing before me on August 7, 30, and 31, and October 16, 1984. On the entire record,[3] and after considering the posttrial briefs of the parties, I make the following findings and conclusions.

The Objections

The Employer's objections read as follows:

> 1. The Petitioner has for several months now nationally stated and emphasized it is not bound by and will not comply with the President's Wage and Price Control Program. The Petitioner, throughout the present election campaign, has continued to voice this policy to employees of the Employer. Further, the Petitioner has told employees the only way they could receive wage and benefit improvements in excess of the Wage Guidelines would be to select the Petitioner as their bargaining agent. This campaign tactic on the part of the Petitioner is an attempt to exploit NLRB processes to flout the Anti-Inflation Wage Guidelines (a program of another agency of the government). Additionally, throughout the election campaign, the Petitioner stated the Employer has less latitude than the Petitioner in bargaining because the Petitioner said it was not bound by the Wage Guidelines. This is not only an exploitation of the Wage Guidelines but is in direct contradiction of the entire Wage Guideline Program. To allow such a result would be tantamount to sanctioning the Petitioner's goal of undercutting this paramount program reflecting public policy. This result would be especially unacceptable because it would allow the use of one government process for the purpose of thwarting another government process.

[1] *NLRB v. Allis-Chalmers Corp.*, 680 F.2d 1166 (7th Cir. 1982).

[2] The election in Case 13–RC–15189 was conducted on August 31, 1979, pursuant to a Stipulation for Certification Upon Consent Election in an appropriate unit, with the tally of ballots showing 96 votes for the Union, 81 against, and 2 challenged ballots. The appropriate unit is:

> All warehouse employees and warehouse maintenance employees of the Employer now located at 1500 North Raddant Road, Batavia, Illinois 60510, but excluding all office clerical employees, plant clerical employees, truck drivers, professional employees, guards and supervisors as defined in the Act.

[3] The Union's motions to strike in its posttrial brief are denied. On November 27, 1984, my order issued making 99 corrections in the record. No objection or exception to that order has been received.

In the Circuit Court of Appeals, District of Columbia Circuit, the Court held that the Wage Guideline Program did not contravene the policy of the National Labor Relations Act. The Court then concluded that, during this cruel period of inflation, everyone should support the President's Program as an act of good citizenship. *AFL–CIO v. Kahn*, 600 F.2d (D.C. CIR. 1979). The Employer has scrupulously observed the requirements of the Anti-Inflation program with respect to both prices and pay rates since its inception.

Therefore, the Petitioner's election campaign conduct with regard to the Wage Guidelines amounted to an unlawful promise of gain that would bring no sanction to the Petitioner and employees whom it sought to represent, but if achieved would result in undermining of the government's program, and exposure to the Employer of the loss of millions of dollars in government contracts. The Employer was thus faced with an unconscionable and basically unfair dilemma. On this basis alone, absent other acts of misconduct enumerated below, the election should be set aside. The other grounds are ample.

2. The Petitioner's conduct throughout the election campaign was pervaded with misstatements of fact as well as misrepresentations of several types. This conduct commenced very early on in the campaign and continued until the last moments. These misstatements and misrepresentations ranged from modest, to a higher grade, and to monumental items. The Employer generally did not have an opportunity to respond, but even in selected cases that it had this opportunity, many of the items would have been virtually impossible to respond to or rebut because of their breadth and technical complexity. Examples of misrepresentations and misstatements in roughly ascending order of magnitude include:

a. Incorrect wage and cost-of-living data was presented to employees by the Petitioner with respect to the Employer's facility at Minneapolis, Minnesota.

b. The Petitioner purposely misstated the number of holidays for employees at International Harvester.

c. The Petitioner purposely misrepresented the Employer's policy as to annual pay adjustments, pay progression to the job rate, and job classifications, both as to particular employees and as to generic job functions. A rebuttal of these misrepresentations, even if it had been available, would have been so complex and time consuming that if done without the greatest extent and degree of care would have caused great confusion.

Taken together, the various examples of misrepresentations and misstatements enumerated in this paragraph depict the total plan of the Petitioner to engage in such diverse and widespread misstatements and misrepresentations so as to unlawfully affect the election results.

3. The Petitioner throughout the campaign purposely used threats, coercion, intimidation, and promises to gain support. Examples of this improper conduct include:

a. The Petitioner told employees that newly hired employees were hired by the Employer to vote "No" in the election and then would be let go immediately after the election.

b. The Petitioner misled employees to believe that there would be a large layoff after the election if the Petitioner lost in aid of the Petitioner's effort to be elected.

c. Several employees were induced by bribes to wear UAW buttons. Other employees were told that by wearing a UAW button they had shown the Employer they supported the Petitioner and that, if the Petitioner lost the election, the employees would be fired by the Employer because they were known supporters of the Petitioner. Therefore, it was essential that the Petitioner must win the election.

d. The Petitioner granted payment for support and corresponding display of support for the Petitioner.

e. The Petitioner promised employees there would be no strike if the Petitioner won the election. This proposition is utterly contradicted by the demonstrated strike history of the Petitioner with the Employer.

These widespread acts of government program exploitation, threats, coercion, intimidation, and promises on the part of the Petitioner reflect nothing short of a massive planned course of misconduct geared to influence the election results. Such conduct is, however, obviously unlawful and is cause to set aside the election. The question may well be presented whether in this context a proper election can be held at this time.

Objection 1

Assuming arguendo that the facts related in Objection 1 are accurate, I am persuaded that the Employer's novel argument that it is an unlawful promise of gain for a union to claim that it was not bound by the Government existing wage guidelines and the only way for employees to get wages and bnefits in excess of the guidelines was to select the Union as their representative is without merit. The statement that the Union was not "bound" by the guidelines is perfectly true, and its presentation of itself as the only agent through which employees would get higher wages and benefits is pure campaign propaganda of a type employees may reasonably be expected to be capable of evaluating. Objection 1 is overruled.

Objection 2

To the extent the objections allege misrepresentations by the Union, they are without merit. At hearing, over the Employer's objection, I excluded evidence with respect to these alleged misrepresentations. The Employer excepts to this ruling. Upon reflection, I adhere to my

ruling for the following reasons. The initial decisions of the Regional Director in 1979 and the Board in 1970 with respect to the alleged misrepresentations were based on that standard found in *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), and *General Knit of California*, 239 NLRB 619 (1978). If that standard were still the law my ruling would be in error, but that standard was expressly rejected in *Midland Life Insurance Co.*, 263 NLRB 127 (1982). The Board, in *Midland*, stated it would "no longer probe into the truth or falsity of the parties' campaign statements," and misleading campaign statements would not be sufficient basis to set an election aside.[4] In *Metropolitan Life Insurance Co.*, 266 NLRB 507 (1983), the Board held that the rule in *Midland* applied to misrepresentations of law as well as those of fact. In *Certain-Teed Corp.*, 271 NLRB 76 (1984), the Board explained that its statement in *Midland* that the rule announced was to be applied "to all pending cases in whatever stage" was an expression of "our preference that *Midland National* be applied retroactively to all pending cases, including those in the judicial stage."[5] There is no evidence of any unusual circumstance in this case that would militate against the retroactive application of *Midland*. The Employer's proffering examples of "egregious," "serious," "substantial," and "pervasive" misrepresentations in its able brief have, for the purposes of this decision, been treated as offers of proof. In my opinion, the examples proffered, viewed objectively, are no more than routine campaign propaganda posing no discernible exception to the *Midland* rule. The same conclusion applies to those documents pertaining to alleged misrepresentations which are part of the Appendix to the court placed in evidence before me as Respondent's Exhibit 3. Applying Midland, as I believe I must, Objection 2, which consists of allegations of misrepresentations, is overruled.

Objection 3

From the record before me, it appears that Judge Eschbach's comments quoted above refer to an incident on the morning of election day, August 31, 1979. On that morning, employee Emma Anthony, in response to their question why she was wearing a union button, told personnel department employees Valerie Lavery and Arlene Currier that she was being paid to wear it. She did not say who was paying or how much. Although I find that Anthony made the foregoing statements, and despite her reluctance to acknowledge her pretrial affidavit, I credit her uncontradicted denial that she was in fact paid for wearing the button and note there is no evidence any other employee was paid to wear a button. She has not been shown to have been an influential member of the bargaining unit or an agent of the Union, or to have been so considered by her fellow employees. Anthony's statement is not attributable to the Union. Moreover, it was made to two employees who were not members of the bargaining unit in which the election was conducted, and there is no evidence that Anthony's claim of payment was made known to any unit employee before he or she voted. On the foregoing, I conclude that Anthony's statement to Lavery and Currier has not been shown to be true; is not attributable to the Union; had no effect on the election whatsoever; and does not warrant setting aside the election.

There was testimony with regard to rumors being circulated among the employees by other employees. The most common was to the effect, although stated in several different ways, that the Employer hired new employees in the belief they would vote against the Union and would separate them once the election was over. To the extent it is possible, on the vague testimony before me, to place the various repetitions and variations of this rumor in time, it appears most, if not all, of these communications testified to occurred prior to the July 13, 1979 filing of the petition in Case 13–RC–15189 and are therefore not objectionable.[6] There is no showing that any of the employees passing the rumors were acting as union agents when they did so,[7] and, even if they were, statements of this sort have been long held to be unobjectionable because employees are capable of evaluating them and they contain no threats within the power of the Union to carry out.[8]

In March or April 1979, Louise Alhert, an employee, told another employee, Mary Manning, that if she did not sign a union card, she would not have a job when the Union came in, and that if the Union did not get in, there would be a slowdown and employees who had been hired would be laid off. Both statements are unobjectionable because they were made before the petition was filed.

There was considerable discussion among the employees, both pro- and antiunion, about the possibility of strikes, with one employee suggesting there might be one after the election. The record contains no indication of objectionable conduct by anyone in this regard.

On one occasion one employee told another employee that she was not going to vote in the election. Whereupon, the second employee smiled and drew his finger across his throat. No one else was present. What the enigmatic gesture meant is anybody's guess, but there is certainly nothing in this undated contact between two rank-and-file employees warranting setting an election aside.

The foregoing recitations are the strongest part of the evidence adduced. The record is replete with hearsay, conclusionary statements, and statements proffered without proof of time and place. Even if all these frailties are waived and all hearsay and other foundationless evidence

[4] There is no indication in the case before me that forged documents or altered Board documents, the Board's stated exceptions to the *Midland* rule, were used in the campaign.

[5] Inasmuch as the court has remanded the case to the Board to handle as the Board may consider appropriate it is reasonably arguable that this case is not "in the judicial stage."

[6] *Goodyear Tire Co.*, 138 NLRB 453 (1962).

[7] Employee Kovack credibly testified that a union agent told employees at a union meeting 3 or 4 months prior to the filing of the petition that the Employer would hire new employees to vote against the Union, and these employees would "be fired—would leave afterwards." The rumors may well have stemmed from this prophecy, but it is not objectionable because it occurred before the petition was filed and amounts to nothing more than recognizable speculation.

[8] *Rio de Oro Uranium Mines*, 120 NLRB 91, 94 (1958).

credited, there would still be insufficient evidence to sustain Objection 3 or any significant portion of it.

It cannot be found on the evidence before me that the general election atmosphere was permeated with threats and fear of reprisal require a new election.[9] What we have here is nothing more than a melange of hearsay statements and personal opinions and predictions by rank-and-file employees. None of this conduct has been shown by the Employer to be attributable to the Union, nor has it been shown to be of such a nature that it interfered with the conduct of the election. As the United States Court of Appeals for the Eighth Circuit has succinctly stated: "[Employees'] personal opinion on [the Employer's] motivations must not be viewed as union efforts to improperly influence the election. It would simply not be possible to monitor the personal, informal expressions of every employee who happens to have pro or anti-union inclinations."[10]

Additional Considerations

The Employer urges error in my refusal to entertain evidence of employee turnover. It is established Board law, which I am required to follow,[11] that employee turnover does not support a finding a union has lost its majority because it is assumed, absent contrary evidence, that new employees will be union supporters in the same ratio as those they replace. See, e.g., *Odd Fellows Rebekah Home*, 233 NLRB 143–144 (1977). Moreover, if the Employer's objections are without merit, it has violated Section 8(a)(5) by refusing to bargain with a certified union. It is well settled that a doubt of majority status must be raised in a context free of unfair labor practices. *Celanese Corp.*, 95 NLRB 664, 673 (1951). If the Employer has violated Section 8(a)(5), as I believe it has, the necessary context free of unfair labor practices free contest does not exist.

The Employer also claims prejudice due to the passage of 5 years from election to hearing. There can be little doubt that the witnesses had better memories 5 years ago, but their earlier recollections were memorialized in sworn statements in 1979. From what I could ascertain during the examination and cross-examination of the witnesses, it did not appear that their 5-year-old recorded testimony was any more helpful to the Employer than their current recollections. It may be that uncertainty of the outcome worried the Employer over a long period of time, but I am not convinced that the evidence suffered so great an injury due to the time lapse that the Employer was unable to have a fair and full hearing on its objections.

ORDER

It is recommended that the Employer's Objections to the election in Case 13–RC–15189 be overruled and that the Board's previous Decision and Order[12] be reaffirmed by the Board.

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[9] Compare *Diamond State Poultry Co.*, 107 NLRB 3 (1953), *Poinsett Lumber Co*, 116 NLRB 1732 (1956).

[10] *Six Flags Over Mid-America v. NLRB*, 638 F.2d 59, 60 (8th Cir 1981); and see *Tuf-Flex Glass v. NLRB*, 715 F.2d 291 (7th Cir. 1983).

[11] *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

[12] *Allis-Chalmers Corp.*, 252 NLRB 606 (1980).