

**Service America Corporation and Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Case 25-CA-17864**

May 31, 1990

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On February 9, 1990, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to reaffirm its Order previously issued in this case on August 15, 1986, and reported at 281 NLRB 81.

**ORDER**

The National Labor Relations Board reaffirms its Order previously issued in this case on August 15, 1986, and reported at 281 NLRB 81.

<sup>1</sup> 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.

Further, in its exceptions the Respondent contends that employee turnover and the passage of time since the representation election require the Board to set aside the election and order a second election. We find no merit in this contention. See *Bridgeport Fittings*, 291 NLRB 358 (1988), *Einhorn Enterprises*, 282 NLRB 248, 249 (1986), enfd. 843 F.2d 1507, 1509 (2d Cir. 1988).

In part (c) of his decision, in his discussion regarding dissemination of the alleged threat, the judge mistakenly referred to Rodney Burns rather than Chris Watson.

*Ann Ryboit, Esq.*, for the General Counsel.  
*Leslie Robert Stellman, Esq. (Littler, Mendelson, Fastiff & Tichy)*, of Baltimore, Maryland, for the Respondent.  
*Steven Chestnut, Esq.*, of Indianapolis, Indiana, for the Charging Union.

**DECISION**

**STATEMENT OF THE CASE**

ROBERT T. WALLACE, Administrative Law Judge. Upon a charge filed by the Union on March 5, 1986, a complaint was issued on March 10, 1986, alleging that

Respondent Service America Corporation<sup>1</sup> (SAC) refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act. The case was the subject of a summary judgment decision on August 15, 1986; a petition for judicial enforcement on December 19, 1986; and a remand by the Court of Appeals for the Seventh Circuit on March 7, 1988.

As framed by the Board's Order of June 27, 1988, the issue before me is whether a close election won by the Union on September 5, 1985,<sup>2</sup> was invalidated by alleged conduct and agency status of employee Rodney Burns, thereby freeing SAC from any bargaining obligation.

The case was heard at Indianapolis, Indiana, on April 25 and 26, 1989. Based upon the entire record including my observation of the witnesses and after due consideration of briefs filed by the General Counsel and SAC, I make the following

**FINDINGS OF FACT**

**Burns' Alleged Statement**

The only evidence of unlawful conduct on the part of Burns derives from another employee, Chris Watson. He was a night chef in the SAC commissary in Indianapolis in 1985 and lead driver at the time of hearing.

Watson testified that about a week before the election<sup>3</sup> between 3:30 and 4 a.m. he went out to a staging area adjacent to the loading dock to lock milk cooler. Hearing laughter from the dock area, he approached to within 2 or 3 feet of at least three drivers who were loading their vehicles. He could not see them because they were around a corner. He paused for at least a couple of minutes to hear what they were saying. At first he was not paying close attention because they were laughing and talking about "other things." Then he heard Burns say that "people who were not for the Union could be terminated or get hurt."<sup>4</sup> At that point the drivers resumed laughing and Watson withdrew into the commissary.<sup>5</sup>

Testifying further, Watson claims he then met another chef (Hai Nguyen) and told him he had just been threatened by Burns; and he proceeded to tell Nguyen what Burns had said. Later that same morning he successively told other employees what happened including Nelma

<sup>1</sup> Although Service America Corporation was a subsidiary of Allegheny Beverage Corporation when the complaint issued, it was subsequently sold by Allegheny and the latter appears to have no significant involvement in this case.

<sup>2</sup> The Union received 24 votes, 20 votes were cast against representation, and there was one nondeterminative challenged ballot.

<sup>3</sup> In an affidavit given on October 2, 1985, Watson states that the incident in question occurred 2 weeks before the election.

<sup>4</sup> This version of Burns' statement appears in Watson's affidavit of October 2, 1985. At the hearing he gave other versions, quoting Burns as having said "guys can be terminated or get hurt" (Tr. 193), "the union can hurt people or get [them] terminated" (Tr. 193), and "people that was for the union was either going to be terminated, or going to get hurt" (Tr. 208).

<sup>5</sup> Watson surmises that the drivers knew he was nearby because (1) light was emitted when he opened the commissary door, (2) the door slammed shut as he entered the staging area, and (3) keys on his belt jangled when he walked, and he opines that the "threat" was meant to be heard by him because everyone knew he was against unionization.

McClintock, Kathy Gross, Kathy Mahler, and Karrie Slick; as well as Branch Manager Terry Harger.

I am not persuaded that any threat occurred.

Watson's testimony differs in significant respects from statements in an affidavit given by him in 1985 shortly after the election and from accounts given by other witnesses called by SAC. For example, in the affidavit he states that he told Nguyen that Burns had threatened him "but that is all I told him and I did not tell him what . . . [Burns] had said." For his part, Nguyen agrees that Watson did not relate the content of the threat, and Nguyen adds that Burns did not tell him where or when the threat was made. Again, in his affidavit Watson avers that he did not tell employees Mahler and Slick until several days after the alleged incident that he did not mention who made the threat, that he told them it occurred not on company premises but "Someplace else," and that Mahler was the one who reported the threat to Branch Manager Harger. Mahler's testimony accords with Watson's affidavit account. Also in that affidavit he claims not to have told employee Gross until a few days later adding: "all I told her was that I had been threatened by . . . [Burns] and the others [drivers]." Gross confirms that account and she states that Watson did not tell her where Burns made the threat.

In view of those variances, I conclude that Watson's testimony is unreliable. In addition, I reject the affidavit account finding it difficult to believe that a person who felt threatened with physical harm would fail promptly to tell others regarded as friends details concerning the time, place, and content of the threat. Further, Watson admits in the affidavit that he told Mahler and Slick that the threat occurred "someplace" other than on company property; and his explanation for that variance ("there were other employees working in the commissary who were strong for the union and I didn't want them to overhear") makes no sense at all. He could have lowered his voice, stopped talking, or taken other protective action. He did not have to misrepresent the claimed site of the incident.

#### Agency

In light of the Board's directive on remand, I have also considered evidence relative to Burns' alleged status as an agent of the Union in the event that, on review, it is determined that he did utter an unlawful threat; and I find he was not an agent.

Two officials of the Union (Doug Schmidt and Danny Moussette) conducted the 1985 campaign; and three employees, each of whom worked in a different area of the SAC facility, served as their primary contacts and sources of information throughout the campaign: Knight, who worked in the warehouse; Engelking, who was a maintenance man; and Brenda Welch, who worked in the commissary. Employee witnesses unanimously identified Knight and Engelking as the perceived leaders of the campaign among the work force.

Between June 19 and August 30, 1985, a total of five organizational meetings of employees were held. At least one union official was in attendance at each. The Union's office is located in the same city as the SAC facility, and between meetings the officials made themselves readily

accessible to the SAC work force. Both officials informed employees as to how they could be contacted at their office, and Moussette provided his home telephone number. All literature disseminated during the campaign was authored by them. Although Knight and Engelking may have distributed some handbills to employees at work, the Union had access to employee names and addresses by virtue of the *Excelsior* list it had received the year before and the majority, if not all, of the Union's literature was sent by mail.

The totality of Burns' union activity during the campaign consisted of the following:

- a. He was 1 of 29 employees who executed authorization cards.
- b. He was 1 among 18 employees who volunteered to serve on the Union's organizing committee.
- c. He attended three of the five meetings conducted by the Union.
- d. At most, he asked two employees if they wished to sign an authorization card.

Each of the union meetings were held at the union hall or a local hotel. Burns did not assist in arranging these meetings nor did he publicize them among the work force. While the union officials sat at a table in front of the audience at each meeting, Burns sat in the audience. He did not wear or distribute union insignia or paraphernalia, he had no contact with any union official other than at the meetings and he never served as a conduit of information between any employee and the Union. Burns neither telephoned nor met with coworkers after work to solicit their support for the Union. Neither he nor any other employee was compensated monetarily or otherwise by the Union for their participation in the campaign. At no time did the union officials introduce Burns to anyone as a union spokesperson, contact, or agent, nor did Burns misrepresent himself as such to anyone.

At a meeting attended by 15 employees on June 24, Schmidt and Moussette solicited volunteers to serve on an "organizing committee." They told the employees that members' names would be provided SAC to ensure proof that it knew of their union activity; and by letter of June 26, the Union did so.<sup>6</sup> Everyone in attendance volunteered to be on the committee. In actuality, the committee had no role in the campaign. Twenty-seven of the 29 authorization cards received by the Union were executed prior to the formation of the committee. Committee members did not distribute union literature nor did they wear or distribute insignia.

General principles of agency law govern the determination of an employee's agency relationship with a union. An individual will be deemed a general agent if such authority was expressly, impliedly, or apparently conferred by a principal, and the principal will be liable for the conduct of the agent regardless of whether the specific acts performed by the agent were actually au-

<sup>6</sup> The letter identified 15 employees, including Burns, as having authorized the Union to serve as their collective-bargaining agent, and it cautioned SAC that any action taken against them because of union activity was a violation of law, citing Sec 7 of the Act. No mention was made of an organizing committee.

thorized or subsequently ratified, so long as the agent acted within the general scope of his authority, *Longshoremen Union*, 79 NLRB 1487 (1948); *Teamsters Local 886*, 229 NLRB 832 (1977).<sup>7</sup>

In the context of an organizing campaign, a general agency will not be found solely because of membership in an organizing committee, or the solicitation of authorization cards, or because an employee is a vocal union supporter, *Pierce Corp.*, 288 NLRB 97 (1988); *United Builders Supply Co.*, 287 NLRB 1364 (1987); *Tennessee Plastics*, 215 NLRB 315 (1974); *Owens-Corning Fiberglas Corp.*, 179 NLRB 219 (1969).

It is undisputed that at no time did the Union, through speech or impliedly through conduct, confer upon Burns the authority to act as its agent. Nor did the Union engage in any conduct from which employees might reasonably have perceived Burns as its agent. Burns himself did not, through language or conduct, imply that he was authorized to act on behalf of the Union. In *Pierce Corp.*, supra, the Board found that an employee whose organizational activities exceeded those of Burns in both degree and kind was not an agent of the union. The employee in *Pierce* was 1 of 22 members of the union's organizing committee, and one of its more active members. As in the case at hand, the union notified the employer of the identity of committee members. The employee advised coworkers of union meetings, distributed union literature, provided the union with information for the preparation of such literature, solicited authorization cards, and wore union insignia. The Board concluded that the employee was not a general agent of the union because, as here, it maintained control of the campaign throughout; its official was readily accessible to employees; and at no time was the employee held out to coworkers as a person empowered to represent the union.

Similarly, in *United Builders Supply Co.*, supra, the Board concluded that an employee who was an active and vocal union adherent, who arranged 18 to 25 union meetings and publicized them among the work force, who distributed authorization cards, and who telephoned employees at home to solicit their support for the union, was not an agent of the union. The Board concluded that the union had not abdicated control of the campaign and had made it clear to employees that it had its own spokesman apart from employee-union activists.

The evidence in the case at hand indicates that Burns was no more active in the campaign than other rank-and-file employees who executed cards, attended meetings, and expressed pronoun sentiments to coworkers. Consequently, Burns was not an agent of the Union.

In addition, the evidence indicates that the Union did not condone or ratify misconduct on the part of any employee during the campaign. At meetings Union Officials Schmidt and Moussette each admonished employees to avoid arguments and confrontations. On one occasion when an employee reported a threatening comment

made to her by another, Schmidt advised the employee to ignore the remark. At no time prior to the election was the Union apprised of the alleged threat attributed to Burns. The allegation became known to the Union only through the SAC's postelection objections.

#### No Prejudicial Atmosphere

Having found that Burns was not an agent of the Union, the remaining question (again assuming a threat to employees who did not support the Union) is whether the threat caused or contributed to an atmosphere of fear or coercion which destroyed laboratory conditions necessary for a free and fair election. *Lovilia Coal Co.*, 275 NLRB 1358, 1359 (1985); *Westwood Horizons Hotel*, 270 NLRB 802 (1987).

In making that determination, the Board considers numerous factors, including the content of the words spoken, whether they were accompanied by physical gesture, the context in which the statement occurred, whether the incident was isolated, and the scope of its dissemination.

Here, the threat was made in the context of light banter between drivers who were busy loading vehicles in early morning darkness and the words used are vague as to (1) when, and even if, dire consequences would ensure ("people . . . *could be terminated or get hurt*" [emphasis added]), and (2) whether physical as well as discharge or other economic discrimination was meant. Further, I am not persuaded that the threat was directed against and meant to be heard by Watson. Admittedly, he was eavesdropping and was not visible from the loading dock. That a door slammed behind him and his keys jangled 2 minutes earlier does not establish that Burns "must have known" he was there, particularly since Burns and other drivers had jangling key clusters, routinely kept their truck engines running to assure trouble-free starts in chill fall weather, and were busy working as they chatted.<sup>8</sup> And as to dissemination, Burns, according to his contemporaneous account, chose not to reveal the content of the threat and where and when it occurred. Instead, he randomly told five friends that a "threat" had been made, and he did not himself find it important enough to report it to management.

I conclude that the threat itself had little or no effect on the outcome of the election. Moreover, I find no prevailing "atmosphere of fear" to which it could have contributed. Indeed, as preelection campaigns go, this one appears relatively tranquil. In that regard, I view as innocuous an earlier outburst by the union adherent

<sup>8</sup> In the absence of a personalized threat, Watson's awareness that Burns "pumped iron" and possessed a 44 caliber (magnum) handgun is without particular significance. In this respect, I credit Burns' claim that he had a permit. Also, there is no evidence that Burns had a reputation for being prone to violence. In that regard, I am aware Burns on August 15, 1985, was given a written warning for being "belligerent and uncooperative" to two female SAC employees and for threatening another with bodily harm. No dates, location names, or other clarifying details are cited therein. Burns denied any misconduct and SAC did not call any witnesses, including the issuing supervisor. In these circumstances, I view the document with suspicion and accord it no weight, especially since it was issued well after the campaign had begun and after Burns had been identified to management as a union supporter.

<sup>7</sup> Sec 2(13) of the Act provides

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling, 29 U.S.C. § 152(13)

Mathes that "[g]uys like you [opponents of unionization] don't give others a chance to vote. We had this bullshit last time, [and] we are not going to have this bullshit this year." Similarly of minimal effect are a claim (1) by Watson that during a 2-day period before the election he was harassed all night long by phone calls at the commissary wherein the caller would just hang up when he answered. Even if the calls occurred,<sup>9</sup> there is no evidence linking them to the campaign and, admittedly, he told no one about them; and (2) by McClintock that during the course of a prior (1984) election campaign: (a)

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<sup>9</sup> Although Watson recalls that Chef Hai Nguyen was present when some of the calls came in, the latter did not recall any incident of that type.

a union official (Moussette) said that people who do not go along with the Union could be "roughed up," and (b) her car sustained two slashed tires in the SAC parking lot. However, absent credible evidence of misconduct during the 1985 campaign, I regard those incidents (assuming they occurred) as too remote to prejudice the result of the 1985 campaign.

#### CONCLUSION OF LAW

For the reasons stated above, I find that Burns was not an agent of the Union and that his conduct had no significant impact on the election held on September 5, 1985.

In light of the limited nature of the Board's remand Order, no further action on my part is called for.