UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

GARNER/MORRISON, LLC

and Case 28–CA–21311

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL #15, LOCAL UNION #86, AFL-CIO-CLC

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS

and Case 28–CB–6585

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL #15, LOCAL UNION #86, AFL-CIO-CLC

DECISION ON REMAND

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: I issued the underlying decision in this matter on December 21, 2007. Based on exceptions filed by both the General Counsel and the Charging Party Painters Union, followed by briefs in support and subsequent replies, the Board issued its decision on January 21, 2009 (353 NLRB No. 78). In that decision it ordered a portion of the case remanded for the purpose of making a credibility finding concerning the purportedly coercive nature of a question company co-owner Chris Morrison asked employee Gary Servis on or about April 9, 2007. [1] The incident occurred about a week after the April 2 meeting at the Marriott Hotel, where events occurred which were a major focus of the original decision.

Though principally aimed at certain allegations under §8(a)(2) and §8(b)(1)(A), the complaint also alleged Respondent had committed a variety of independent §8(a)(1) violations during the meeting. These included claims of unlawful surveillance, expressions of futility directed toward continued representation by the Painters Union, improper polling, and coercive interrogation. I recommended dismissal of all those allegations as well as dismissing the interrogation allegation concerning Servis which occurred the following week. The Board upheld the dismissal of all the §8(a)(1) allegations concerning what took place at the meeting

[1] All dates are 2007, unless otherwise noted.

except for the allegation of unlawful surveillance. Finding that a credibility resolution needed to be made before it could rule upon the Servis interrogation matter, it remanded that portion of the case for such a determination.

On February 26, 2009, I conducted a conference call with counsel for the parties. Participating were counsel for the General Counsel, counsel for Respondent Carpenters and counsel for Respondent Garner/Morrison. The Charging Party Painters, though invited to participate, chose not to do so. During that call I inquired whether the parties wished to offer additional evidence and/or whether they wanted to file supplemental briefs. All parties declined the opportunity, saying they preferred to have the remanded issue decided on the record as made and on the briefs previously filed. Accordingly, the remanded portion is ripe for decision.

Some Background

The April 2 Marriott Hotel meeting had been called to introduce Respondent's painters and tapers to the Carpenters Union in the wake of the lawful lapse of the prehire collective bargaining contract Respondent had with the Charging Party Painters Union. [2] That contract had been the source of certain fringe benefit plans, including a health plan and a retirement plan. Respondent's purpose was to transfer the painters and tapers into the pre-existing Carpenters Union bargaining unit which already provided a wage and benefit structure for its carpentry craft employees, including those who worked in wall construction. On its face, the Carpenters Union appeared to be the §9(a) exclusive representative of the carpentry craft employees and had been since before Respondent signed a §8(f) agreement with the Painters on April 15, 2004. Certainly, the Carpenters collective bargaining contract contained language which both Respondent Employer and Respondent Carpenters deemed sufficient under *Staunton Fuel & Material, Inc.*, 335 NLRB 717, 719 (2001) to warrant §9(a) status.

In that factual context, Respondent Carpenters, at Respondent Garner's behest, conducted the April 2 meeting to deal with the effects of the non-renewal of the Painters prehire contract. At that gathering, the thrust of all of the group-aimed communication was to emphasize the need to change from the Painters health and retirement plans to the Carpenters health and retirement plans since the Carpenters contract had become the only remaining collective bargaining contract. Any objective review of the Carpenters PowerPoint program shown to the group leads to that conclusion. Indeed, nothing in that program even mentioned the need for the employees to authorize the Carpenters to collectively bargain for them. In addition, see the testimony of James "Bryan" Boyles in the footnote regarding what he was told

[2] See generally, §8(f) of the Act and the seminal decision in *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. den. 488 U.S. 889 (1988).

the meeting's purpose and import were: [3] Indeed, Boyles had been instructed to get the staff to the meeting but was not to speak about the Carpenters fringe benefits because he would have been unable to explain them. Explanations were to take place at the meeting, as in fact they did.

At the end of the PowerPoint presentation, the employees were all told that to avoid a gap in their health coverage, they should fill out the cards and forms the benefit plans needed in order to provide coverage. They were directed to the back of the room where most of them did so. As that was in progress, Carpenters organizers, in a separate process, also solicited the employees' to sign authorization cards.

During that process, Servis would not be stampeded into giving up his long-time Painters benefits. He gave the following testimony to counsel for the General Counsel:

Q [By Ms. ANZALONE] Okay, what did you say to Chris [Morrison] -- what was the conversation you had with Chris, as it was breaking up?
A Well, I was kindly (sic) [kind of] getting a little pressure about signing up right then, and I -- and I wouldn't do it right off the bat, and there was kind of a -- there was a little salesmanship going on, and I said, "No, I don't jump on anything right away. I am going to think about it a little bit before I do anything," and I -- you know, I have been a member with Local 86 for a lot of years, and I wasn't ready to say, "No, I am going to jump right off of the bat." I wanted to think about it, and -- and they -- there was a little bit of pressure. You know, not strong arm pressure, by any means, but there was, like, "You know, this is a good deal. Sign up."
I am going, "No, let's wait a little bit, and I will think about it."
[Chris] said, "Hey, if he doesn't want to sign up, he will sign up when he wants to."
That was all that was said between me and Chris, at that point.

Thus, at the meeting itself, Respondent's Morrison, rather than coercing Servis in any manner, was shielding Servis from what may have been regarded as strong fringe benefit salesmanship (a "good deal") being pressed on him by a Carpenter representative. Morrison's message to the Carpenters was: 'Leave Servis be; he knows how to make up his own mind.' [4] Counsel for the General Counsel, in her brief, argued that the salesmanship was excessive. I did not agree and the Board found no coercion.

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[3] Boyles is Respondent's field superintendent. He testified:

Q (By Ms. ANZALONE) Okay and what did Mr. Garner said to you?
A He said that we're going to have a meeting, you know, to discuss the medical and the pension benefits that the Carpenters had and he said he would like everybody to be there. You know, he said everybody needs to be there to hear what -- what is going to be said.
Q Did he tell you anything else you can remember?
A He told me not to say what the meeting was about because I'm not versed in what the benefits are actually and the pension I have. I'm a member but I just -- I don't really know what the pension benefits are.
* * *
Q BY MR. BARRETT: Mr. Boyles, my name is Gerry Barrett. I'm the Lawyer for [Painters] Local 86. I have a few questions for you.
Now, if I'm understanding your testimony this morning, you were told the meeting -- the purpose of the meeting was to inform the members about the fringe benefits, the health insurance and the pension. Is that correct?
A Yes.
Q But the meeting was much different than that, wasn't it?
MR. SHANLEY: Objection.
JUDGE KENNEDY: Overruled.
THE WITNESS: I would say no.

[4] It will be recalled that Servis is Chris Morrison's brother-in-law.

The remanded allegation of the complaint, ¶6(e) directed to April 9, asserts "On or about April 9, 2007, the Respondent Employer, by Morrison, interrogated employees about their union membership and sympathies."

Before further explication of the facts, however, it should be observed that even a casual reading of the record demonstrates that Servis and other witnesses tended to conflate the card-signing requirements of the health plan with the signing requirement of a union authorization card. When pressed, Servis was able to draw the proper distinction, but it was clear to me that at least his ordinary thinking did not much concern itself with the difference. Because of that casual imprecision, any accurate understanding requires an inquiry into the surrounding context. And, of course, the problem is compounded by the passage of time which did dim memories, as can be seen in Servis's testimony quoted below.

Servis was first asked by the General Counsel to describe whether he had a conversation with anyone in management "after the meeting" concerning whether he had "signed a card." Not only was the time frame not set, the question was latently ambiguous as both health cards and authorization cards had been put into play. Plus, there were two (perhaps three) conversations to which Servis could correctly respond. The first answer Servis gave assumed that counsel was asking about a conversation about a month after the meeting when another co-owner, Travis Garner, sought to clarify a payroll question. The testimony:

Q [By Ms. ANZALONE] I want to ask you -- a question about a conversation that you had after the meeting.
A [Witness SERVIS] Okay.
Q Did you ever have a conversation after this meeting with anyone in management, as to whether you had signed a card?
A Yes, I had.
Q And when was that?
A I would say, it was probably, maybe, a month after the presentation, Travis called me and asked me if I had signed up with the Carpenters Local, and I had not done so, at that time.
Q He called you on the phone?
A Yes.
Q Okay, and what, specifically, were the words that he was saying?
A He asked me if I had signed up with the Carpenters Local, at that point, and I said, "No," I had not.
Q Anything else that you can recall he said?
A No, he just said, "Okay," he just needed to know. I guess it was for dues that was being paid in, because I wasn't on the check-off list, at that point.
Q And any other conversation that you had with anyone in management, that you can recall, about whether you had signed up or not yet?
A No, not until I had decided to sign up, and that was around -- I would say it was getting close to June, or maybe the end of May, when I finally did sign up, and I told Chris [Morrison] that I was afraid of losing my insurance, and I didn't not want to have insurance, so I needed to – if he wasn't paying into Local 86 any longer, I needed to have it paid in for me, to one of the unions, so...
Q And who initiated that conversation?
A I did.

At that point the General Counsel had not successfully focused Servis upon what had happened on April 9, for he better remembered that he hadn't signed an authorization card until almost 60 days after the April 2 meeting and that he'd spoken to Morrison around the same time concerning losing his health insurance. It is fair to say that his memory was primarily focused

on that time frame, not what happened on April 9.

As a result, counsel for the General Counsel the brought the date to bear; subsequently she presented Servis with the affidavit he gave during the investigation:

Q Okay, do you recall having a conversation around the 9th of April with Chris Morrison about whether or not you had made any decisions about signing a card yet?
A I think he asked me if I did, or maybe I just volunteered that I had not signed up with them yet.

Servis's uncertainty and the "volunteered" portion of his answer did not fit the theory of the case, so she went on:

Q BY MS. ANZALONE: I am handing you a copy of the affidavit that you signed during the investigation of this case, and I am asking you to take a look at Paragraph No. 5 of that affidavit. Just read it to yourself.
[Witness complied.]
A Okay.
Q Okay, do me a favor. Can you turn it over for me; just flip it over.
A Yeah.
JUDGE KENNEDY: She don't want you to read from it.
Q BY MS. ANZALONE: I don't want you to read from it, so if you can just flip it over, without looking at it.
A Oh, sure, Ma'am.
Q Okay, after you have read that, does that help you remember this conversation?
A Oh, yes, I think that -- that was true. I think it was, yeah, that he did ask me if I had signed up for the Carpenters. I couldn't remember if I had spoken to him, or if he had said it to me, but, yes.
Q Okay, and where did that conversation happen?
A You know, I talk with my bosses so many times on the phone and I see them in person, to be honest with you, I don't remember where it happened.
Q Oki, do you want to take another look at it, or having looked at it, you don't recall where it happened.
A No, I don't recall.

I permitted Ms. Anzalone to read from the affidavit and she did so: "Paragraph No. 5 reads, 'Around the week after this meeting, this would be the week of 4-9-2007, Chris Morrison approached me at the shop and asked if I had made any decisions yet and signed a card for the Carpenters Union. I said I had not made up my mind yet. He said, 'Okay.' I asked, if I stayed with Painters Local 86 what happens, and he said, 'We will not be paying benefits through them anymore, but I could remain employed, no problem, and he would be paying benefits for me through the Carpenters Local #1506.'"

Finally, there is Morrison's firm denial that about April 9 he asked Servis whether he had signed an authorization card. He responded that that he had not, but that he did ask if Servis had signed up for the health plan.

Q [By Mr. BOWLES] At some point in time, did you have a discussion with Gary Servis about anything to do with the Carpenters?
A [Witness MORRISON] After?
Q After the April 2 meeting?
A Yes, I did. Gary had said at the meeting that he wanted to think about [it], and then, I think a week or so later, I asked him if he had, just in conversation, I asked him if he had signed for his health and welfare.
Q Did you ask him anything to do with signing up for Carpenters Union membership?
A No.
Q Did you ask him if he had signed a Carpenters authorization card, for Carpenters representation?
A No.

Analysis

As observed in the previous decision, Arizona is a right-to-work state where collective bargaining contracts cannot lawfully mandate union membership under a threat of job loss; nor, of course, can a union lawfully hold hostage an employee's job where the employee has not assigned his/her bargaining rights to the union.

And it must be observed, assuming one takes the affidavit as Servis's best recollection, that version includes Morrison's simultaneous statement that Servis would keep his job no matter what. Since they are brothers-in-law, the statement on its face carries with it very little coercion. To the extent Morrison asked a question, it was unaccompanied by any hint of threat, nor is there evidence that Morrison was responding to any Carpenters pressure to get Servis in the fold.

However, a comparison of Servis's testimony with what he said in the affidavit does not disclose a substantive difference. In his testimony, he said Morrison asked if he "had signed up with the Carpenters;" in the affidavit he said Morrison asked "if I had made any decisions yet and signed a card for the Carpenters Union." In either case it was Morrison's follow-up concerning the Carpenters sales efforts concerning switching health plans the week before. It was at that meeting where Servis had first learned of the coming health care gap and his balk at that time was clearly focused on that issue, for it was one which involved his family. No doubt spousal discussion was required before any decision could be made; hence, his initial hesitation.

As I observed above, Servis (and others) have displayed a tendency to conflate the two types of card. Morrison may have been imprecise as well when he asked what Servis had done on April 9. He may well, as he said, have been referring to the health plan, but asked something ambiguous ("Have you signed up yet?" "Have signed up with the Union?"). Since the April 2 meeting was aimed at fringe plans and since Servis had declined the fringe plans, in that context such a question would objectively have no ambiguity to him. But, this casual vagueness was common to everyone. "Sign up" or "sign with the union" meant two separate things in an employer qua employee framework (and vice versa)– either the health plan or a bargaining authorization.[5] It is no surprise, then, that both inexact questions and inexact answers occur in these casual conversations. There simply was, and is, no great care taken by anyone with respect to this kind of conversation.

[5] As opposed to an employer qua union context, where the phrase might refer to signing a collective bargaining contract. That usage can be seen elsewhere in the record.

Certainly the affidavit taken by the Board investigator does not pin it down. That is probably because Servis himself could do no better; he recalled the conversation accurately, imprecise as it was. Either way, the conversation is still about benefits, not union membership or sympathies. And, of course, the two do not necessarily equate, especially given Arizona law. Certainly Servis understood Morrison's statement that his job was safe, no matter what he did regarding the choices the Carpenters were offering.

Even so, the affidavit could be interpreted slightly differently, to something more in tune with the General Counsel's theory. The affidavit says:

> Chris Morrison approached me at the shop and asked if I had made any decisions yet and signed a card for the Carpenters Union. I said I had not made up my mind yet. He said, 'Okay.' I asked, if I stayed with Painters Local 86 what happens, and he said, 'We will not be paying benefits through them anymore, but I could remain employed, no problem, and he would be paying benefits for me through the Carpenters Local #1506.'

Here, Servis says Morrison first asked him if he had signed a card for the Carpenters, without saying what kind of card. Then he says Morrison told him they would be paying his [health] benefits through the Carpenters. One implication that could be drawn therefrom is that a card was not necessary to obtain benefits, meaning that the only card Morrison could be asking about was an authorization card.

I reject that interpretation for two reasons. First, we know that the health insurance company required a card as part of its application procedure. Such cards had been distributed during the April 2 meeting and Servis no doubt still had one in his possession. So Morrison's supposed statement should not be constricted by affidavit to refer only to an authorization card. Second, at that point, from Morrison's standpoint, Servis's signature on an authorization card was entirely unnecessary to Respondent's purpose of changing unions. The new contract with the Carpenters had already been signed a week earlier. Indeed, from his point of view, no painter or taper had ever needed to sign a Carpenters authorization card. That the Carpenters had sought and obtained them on April 2 was simply something which had happened, but was not important to Morrison. He would not have said otherwise to Servis and it is improbable for Servis to have heard such a thing.

Accordingly, I find that the affidavit is not particularly reliable in describing what was said. Its shortcomings may be due to Servis's own shortcomings or it may be due to a scrivener's compression of concepts. Whatever the reason, I do not rely on it since it can't mean what the General Counsel says. Neither, of course, can his live testimony be construed as the General Counsel urges.

Yet even without regard to all that, I credit Morrison's denial that he asked Servis on April 9 if he had taken steps to become a member of the Carpenters Union. As mentioned above, Servis's membership was not Morrison's concern. Morrison did have a family interest, however, in making certain that his sister's family continued to be covered by a health insurance plan. Both Morrison's demeanor and probability lead to that conclusion.

Furthermore, Servis seems to agree. He said he finally signed up for the health plan at the end of May. Moreover, his reluctance to switch his membership from the Painters to the Carpenters was well known. When he finally chose to switch, it was almost 2 months after the April 2 meeting and he remembered quite well what impelled him to do so. Respondent's decision to no longer pay for the Painters health plan had finally become clear to him. Although

not entirely clear, he seems also to have signed an authorization card at that time, although neither card is in evidence. The main point of this observation is to reemphasize that the health plan was the main topic of any conversation throughout this period. The only exception was Travis Garner's payroll question in late April concerning whether Servis had signed a dues checkoff form, so that he could correctly draw Servis's paycheck. [6]

Yet, the General Counsel characterizes the April 9 exchange this way: "This exchange – a reiteration of the 'join the Carpenters or lose your benefits' approach, undoubtedly had a tendency to coerce Servis in the exercise of his free choice." Clearly, there is no evidence that the two were tied together in that manner. Morrison never said Servis must join the Carpenters and Servis knew he was not required to do so. Nor did Morrison's question make any inquiry about Servis's union sympathies, which were already well-known. Moreover, membership and health coverage are mutually exclusive in any event, right-to-work state or no.

So whatever happened on April 9, it had little or nothing to do with an interrogation about Servis's membership in the Carpenters Union. Moreover, whatever was said, I am unable to find an element of coercion insofar as §7 rights are concerned. It certainly had no direct impact on Servis's decision approximately 7 weeks later. And, to the extent the General Counsel argues that there was an indirect effect, the facts are too tenuous to support the contention.

Accordingly, I shall again recommend that ¶6(e) of the complaint, the subject of the remand order, be dismissed for failure of proof. To the extent that the proof required a credibility analysis, the version argued by Respondent is more plausible, given the General Counsel's witness's overall inability to provide contextual support for the allegation. To the extent demeanor is involved, Morrison's forthright denial is more persuasive than Servis's failure of recollection and inconclusive testimony.

Conclusions of Law

1. The General Counsel's evidence in support of paragraph 6(e) of the complaint is insufficiently reliable to support the allegation.

2. To the extent that Respondent's Morrison interrogated its employee Servis, his question had no reasonable tendency to interfere with, restrain or coerce Servis in the exercise of the rights guaranteed him under §7 of the Act and therefore did not violate §8(a)(1) of the Act.

Based upon these findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

[6] The complaint does not address this incident and it is beyond the scope of the remand. In any event, it would be noncoercive as a legitimate administrative question concerning payroll deductions.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Paragraph 6(e) of the complaint is dismissed.

James M. Kennedy
Administrative Law Judge

Dated, Washington, D.C. April 13, 2009