Student Transportation of America, Inc. *and* International Brotherhood of Teamsters, Local 115, Petitioner. Case 04–RC–113131

August 3, 2015

DECISION AND DIRECTION

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

The National Labor Relations Board, by a three-member panel, has considered the objections and determinative ballots to an election held on November 14, 2013, and the judge's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 24 for and 23 against the Petitioner, with 11 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has, for the reasons set forth below, adopted the judge's findings[1] and recommendations only to the extent consistent with this Decision and Direction.

We agree with the judge's recommendation to overrule the challenges to the ballots of Matthew Smith and Traci Williams.[2] We disagree, however, with his recommendation to overrule the Petitioner's Objection 8, in which the Petitioner alleged that Vice President Timothy Krise threatened that, if the Petitioner won, the Employer could walk away from its contract with the Bristol Township School District (Township). Contrary to the judge, we believe this objection has merit for the reasons stated below.

The Employer provides transportation services to school districts from facilities throughout the United States. Pursuant to its contract with the Township, the Employer manages all of the bus drivers for the Township, most of whom are directly employed by the Employer. The Petitioner seeks to represent a unit of "[a]ll full-time and regular part-time drivers and mechanics employed by the Employer at the [Township] facility."

Vice President Krise was the Employer's primary spokesman at a series of voluntary meetings management held with employees before the election. Approximately 20 to 30 employees attended each meeting. The judge credited the uncontroverted testimony of driver Barbara Hansell regarding Krise's statements at the meetings.[3] Hansell testified that, at two of the meetings, while discussing "what would happen if the Union got in," Krise stated that the Employer "had it written into [its] contract" with the Township that the Employer "could walk away" from the contract if operations "became too costly."[4] On cross-examination, Hansell indicated that Krise also stated that he wanted the facility to succeed and "wanted to be in for the long haul." Both meetings occurred slightly more than a month before the election.

Applying the standard set forth in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the judge found that Krise's statements regarding the Employer's contract with the Township were not objectionable.[5] According to the judge, Krise's statements were similar to other statements that the Board has found unobjectionable.[6] The judge found that, although Krise "[stated] in effect that if unionization resulted in too much in the way of additional costs, STA could cancel its contract with the Township," Krise neither stated nor implied "that unionization would necessarily cause STA to walk away from the contract and close the facility." Further, he found that Krise's additional statements—that he wanted to be

[1] The judge was sitting as a hearing officer in this representation proceeding. The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt pro forma the judge's recommendation that the Petitioner's challenges to the ballots of John Evans and Rebecca Kurtz be sustained. The Employer agreed at the hearing that the other seven employees whose ballots were challenged were not eligible to vote.

The Petitioner additionally filed 10 objections, but withdrew Objections 7 and 10 during the investigation. In the absence of exceptions, we adopt pro forma the judge's recommendation to overrule the Petitioner's Objections 3 and 4. Members Johnson and Hirozawa adopt the judge's recommendation to overrule the Petitioner's Objections 1, 2, and 5; Member McFerran finds it unnecessary to pass on these objections. Member McFerran also finds it unnecessary to pass on the Petitioner's Objections 6 and 9; Member Johnson would overrule these objections; and Member Hirozawa would sustain Objection 6.

[3] The judge additionally drew an adverse inference from the Employer's failure to call Krise as a witness.

[4] Our dissenting colleague points out that Krise misstated the relevant provision of the Employer's contract with the Township, which actually permitted the Township, not the Employer, to terminate the agreement if it became too costly. Regardless, the Employer is responsible for the actual, credited statements Krise made to employees. See *Labriola Baking Co.*, 361 NLRB 412, 413 (2014).

[5] The judge also relied on Sec. 8(c) of the Act as a basis for finding Krise's statements unobjectionable. We disagree with this reliance. The Board has long held that Sec. 8(c) does not apply in representation cases. E.g., *Kalin Construction Co.*, 321 NLRB 649, 652 (1996), citing *Dal-Tex Optical*, 137 NLRB 1782, 1787 fn. 11 (1962), and *General Shoe Corp.*, 77 NLRB 124, 127 fn. 10 (1948).

[6] See *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1074–1075 (2004) (testimony about employer's reference to a "possibility of plant closures if there is a Union due to costing the Company money" too vague to warrant overruling election); *Enjo Architectural Millwork*, 340 NLRB 1340, 1340–1341 (2003) (statement that employees should "think twice" before supporting the union not a threat of closure).

in it for the long haul and that he wanted the facility to succeed—mitigated any negative impact that his statements about the Township contract may have had.

We disagree. "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, supra at 618. An employer may lawfully communicate to his employees "carefully phrased" predictions based on "objective facts" as to "demonstrably probable consequences beyond his control" that he believes unionization will have on his company. Id. However, if there is "any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him," the statement is a threat of retaliation. Id.[7] As the Supreme Court has explained, we "must take into account the economic dependence of the employees on their employer[], and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." Id.

In evaluating party conduct during the critical period, the Board applies an objective standard under which conduct is found to be objectionable if it reasonably tends to interfere with employee free choice. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004), citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). As to the objection at issue here, the Board has long considered "the threat of job loss through plant closure [to have] a seriously coercive effect on employees' freedom of choice in the election of a collective-bargaining representative." *Hedstrom Co.*, 235 NLRB 1193, 1195 (1978), enfd. 629 F.2d 305 (3d Cir. 1980) (en banc), cert. denied 450 U.S. 996 (1981). In determining whether election misconduct warrants setting aside the election result, the Board considers (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of the misconduct by the opposing party to cancel out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See *Cedars-Sinai*, supra; see also *Lake Mary Health & Rehabilitation*, 345 NLRB 544, 545 (2005).

We find that employees could reasonably infer from Krise's statements that, if the Petitioner won the election, the Employer's costs necessarily would rise and cause the Employer to walk away from its contract with the Township, leaving the drivers out of work. Although Krise did not directly threaten employees with job loss, a threat need not be direct in order to be coercive. See *Portola Packaging*, 361 NLRB 1316 (2014); *Sunnyland Packing Co*., 106 NLRB 457, 461 (1953) (threats are no less coercive because expressed in veiled or indirect terms), enfd. 211 F.2d 923 (5th Cir. 1954). In this case, Krise implied to the employees that, in the event of a Petitioner victory, the Employer might respond by terminating the contract with the Township—its only client—and thereby leave the drivers without jobs.

This was not, as the judge and our dissenting colleague have suggested, the sort of vague prognostication linking job loss to potential rising costs that employees would be unlikely to perceive as a threat. Rather, by making a *concrete* reference to the Employer's contractual prerogative to sever its relationship with the Township, which was the sole customer for the unit's school bus driving services and thus the ultimate provider of work for employees in the bargaining unit, Krise pointedly asserted the Employer's ability to deprive employees of their jobs. Having been advised that the Employer possessed a specific mechanism by which it could unilaterally terminate the contract irrespective of the Township's needs or wishes, employees thus would have heard the threatening subtext that the Employer might well decide to exercise this prerogative in the event that the Petitioner was voted in.

Although our dissenting colleague argues that there is insufficient context in the record to infer a threat aimed at unionization, we note that the judge found that Krise made an explicit link between potential new costs *due to unionization* and the Employer's exercise of its right to walk away from the Township contract: Krise "stated in effect that if unionization resulted in too much in the way of additional costs, [the Employer] could cancel its contract with the Township." Given that the record thus establishes, with reasonable precision, the content of Krise's statement, which we conclude constitutes a threat standing alone, we do not believe further context is necessary here to make out objectionable conduct.

Significantly, although an implication of job loss might not be deemed a threat if framed as a factually based prediction of circumstances beyond an employer's control, Krise's statements were not based on objective facts. The Employer points to no contractual language

[7] See also *Eagle Transport Corp*., 327 NLRB 1210, 1211 (1999).

permitting the Employer to unilaterally walk away if costs get too high. See *Daikichi Corp.*, 335 NLRB 622, 623–624 (2001) (in an unfair labor practices case, finding unlawful the statement that company might be unable to continue part of its operations in the event of unionization because the company would lose its ability to compete successfully if all the demands of the union were met, but where there was no evidence that union had made any demands). Nor was there evidence that unionization of this workplace would lead to significant new costs. In fact, under the terms of the contract, the parties agreed that the Township would offset 50 percent of the Employer's actual additional labor costs resulting from a unionization drive or a new collective-bargaining agreement. Given that Krise's statement about the contract was inaccurate, and that the contract in fact provided for additional support from the Township in the event of unionization, there was no objective basis for his veiled threat that the Employer could abandon its contract with the Township due to rising costs that he implicitly associated with union victory in the election. Krise's statements, therefore, lacked an objective basis and did not predict demonstrably probable consequences beyond the Employer's control.[8]

Further, the circumstances surrounding the threat would tend to accentuate rather than mitigate its coercive effects. Krise, a vice president at the Employer, was a high-ranking official, and, as such, his comments would have carried extra weight. He made these comments at a companywide (albeit voluntary) meeting, and thus the dissemination of the statements was widespread (i.e., 20–30 employees, likely close to half of the 64-person voting unit). Finally, he made the threat at least twice during the critical period, and the very close election results (i.e., a one-vote margin) further weigh in favor of overturning the election.[9] We disagree with the judge and our dissenting colleague that Krise's statements that he was in it for the long haul mitigated the effect of his statements, as they could have just as easily been interpreted as implying that the Employer's desire to remain in operation might be thwarted if the Petitioner were voted in.

In sum, where, as here, the threat involves one of the most fundamental aspects of employment conditions—i.e., job security—a single, widely disseminated threat can be sufficient to overturn election results in a very close election. See *Center Service System Division*, 349 NLRB 729, 745 (2005) ("The threat of job loss is one of the most flagrant examples of interference with Section 7 rights."). We find that Krise's veiled threat of job loss if employees voted in favor of the Petitioner reasonably tended to interfere with employee free choice in this election.

Accordingly, we remand the case to the Regional Director to open and count the ballots of Matthew Smith and Traci Williams, within 14 days from the date of this Decision and Direction, and issue a revised tally. If the revised tally of ballots shows that the Petitioner received a majority of the eligible votes, the Regional Director shall issue a certification of representative. Alternatively, if the revised tally shows that the Petitioner has not prevailed in the election, the election shall be set aside and a second election shall be directed.

DIRECTION

IT IS DIRECTED that the case is remanded to the Regional Director for Region 4 for further appropriate action consistent with this Decision and Direction.

MEMBER JOHNSON, dissenting.

I would adopt the judge's recommendation to overrule Petitioner's remaining ballot challenges and objections. I dissent from the majority's reversal of the judge's overruling of Objection 8, which alleges that the Employer engaged in objectionable conduct when, more than 1 month before the election, Vice President Timothy Krise mentioned that the Employer "had it written into [its] contract" with the Township that the Employer "could walk away" from the contract if operations "became too costly." Unlike the majority, I do not believe this statement constitutes a threat of retaliation if the employees voted in favor of the Union.

Krise either misstated a provision of the Employer's contract with the Township or was misunderstood by the witness, Hansell, who testified that he said that it was the Employer (rather than the Township) that could walk away from the contract. Although the contract does not expressly permit the Employer to unilaterally walk away if costs become too high, it does contain a provision permitting the Township to do so. Article XIII—termination provision, section (a) of the contract provides that the Township may terminate the contract if it "determines, in its reasonable discretion, that it lacks adequate funds to pay" for the services under the contract. Thus, while Krise may have misspoken, I disagree with

[8] Moreover, the cases on which the judge relied in reaching a different result—*Enjo* and *Miller*—are distinguishable, as the employers in those cases did not make false or inaccurate representations to support their statements, as Krise did here. Further, as stated above, the threat here was not the same as raising a generic, self-evident possibility that if costs go up, there might be some sort of negative consequences. Krise specifically invoked the Employer's ability to terminate its Township contract, which was the sole source of the unit's work.

[9] The Board gives significant weight to the closeness of an election in deciding whether misconduct warrants setting the election aside. *Hopkins Nursing Care Center*, 309 NLRB 958, 959 (1992).

my colleagues' attenuated inferences that he implicitly threatened to walk away from the contract and cause employees to lose their jobs.

Additionally, no testimony establishes the specific context in which Krise made the statement—that is, what the specific nature of the discussion was at the time of his statement or that Krise actually connected rising costs to unionization. I would not infer such a connection, nor infer that the subtext of his comment was a retaliatory threat to abandon the contract if the Union came in, given the lack of more specific testimony about what else was said or the immediate context in which it was said.

Furthermore, as the majority concedes, Krise never mentioned laying off employees or closing the facility. In fact, to the extent Krise mentioned any future action, he told employees that he was in it "for the long haul" and that he wanted the facility to succeed. As the judge found, these comments would have mitigated any negative implication his statement referencing the contract may have had. Indeed, it is difficult to see how employees reasonably would have understood Krise as implicitly threatening them with job loss when he expressly told them that he intended to remain "for the long haul."

Krise's vague, abbreviated comment—which merely misstated a provision of the Employer's contract with the Township and does not mention unionization, layoffs, or closure—is insufficient to constitute a threat of reprisal if the employees voted for the Union. Contrary to my colleagues, *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1074–1075 (2004) (manager's statement regarding the possibility of "a layoff, if the Union came in, and [that the company] really couldn't afford it" too vague to constitute a threat) is indistinguishable. See also *Ohio New & Rebuilt Parts, Inc.*, 267 NLRB 420, 421 (1983) (owner's statement that he could not afford to increase wages and might "lose a lot of business" if forced to, with no direct link to unionization, too vague to support finding that he threatened to close plant if employees selected union to represent them), enfd. on other grounds 760 F.2d 1443 (6th Cir. 1985), cert. denied 760 F.2d 1443 (1985).

Accordingly, I would adopt the judge's recommendation to overrule Petitioner's Objection 8 along with the other objections and issue an appropriate certification.