

American Steel Building Company, Inc. and International Association of Bridge, Structural and Ornamental Ironworkers, Shopmen's Local Union No. 507. Case 27-CA-7250

26 April 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 11 June 1982 Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

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,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Contrary to the judge, we do not find *Struksnes Construction Co.*, 165 NLRB 1062 (1967), dispositive of the case, as there is no evidence that the Respondent, by its question, sought to ascertain whether a majority of employees supported the Union. Rather, we find that the Respondent's question was the sort of interrogation which by its nature would reasonably tend to coerce employees in the exercise of their Sec. 7 rights. However, we agree with the judge that, under all circumstances, the conduct, while technically in contravention of the Act, does not warrant a remedy.

In Chairman Dotson's view, the Respondent's remarks to employees do not constitute unlawful interrogation. He finds that this question appears to be rhetorical and was only part of a lawful speech made to all employees at an open meeting.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard at Denver, Colorado, on February 25, 1982, based on an amended complaint alleging that American Steel Building Company, Inc., called Respondent, violated Section 8(a)(1) of the Act by interrogation of its employees, threat of plant closure, and creation of an impression among its employees that their union activities were under surveillance, and did therefore inter-

fere with, restrain, and coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

On the entire record,¹ my observation of witnesses and consideration of posthearing briefs, I make the following

**FINDINGS OF FACT AND RESULTANT CONCLUSIONS
OF LAW**

On March 12, 1981, two representatives of the International Association of Bridge, Structural and Ornamental Ironworkers, Shopmen's Local Union No. 507, appeared at Respondent's plant and voiced a claim of representation to Plant Manager Kenneth Hendrickson.² This was rejected and soon a petition was filed as Case 27-RC-6189, ultimately to be dismissed on April 23 as premature.³ At 2:40 p.m. the following day of March 13, Hendrickson assembled the approximately one dozen rank-and-file employees to speak to them from prepared notes. Admitted Supervisors Timm Armstrong and Charlie Langley were also present. The notes from which Hendrickson spoke read as follows:

Employees Talk 3-13

I. Talk because yesterday 2 assholes named Willet [sic] & Asmus stopped in from the Ironworkers Union & claimed they represented you. I didn't believe—asked them to get out.

¹ The transcript of the proceeding runs 125 pages. As officially presented, the single original folio bore a hand-written note pinned to the front. It read:

From: Fed. Rep. Service, Denver, Colorado

Note—

This is the orig. transcript—the method used is a computerized system—We won't be doing this again if we can avoid it.

Thanks—

B. Ford

The cryptic ending of this note must refer to the transcript's quality, which is unprecedentedly poor. It beggars any prospect of individual corrections, for all manner of oddity is present as to vocabulary, grammar, syntax, continuity, and a fair capturing of much that was uttered. However, these defects are largely confined to colloquy, as for example at p. 48, l. 15 where even the speaker is misidentified. As to essential examination of witnesses, I have carefully reviewed my own extensive notes and reflected closely on circumstances of this fairly recent hearing. From this I am satisfied that salient testimony is sufficiently set forth, and that key assertions and denials reflect what was actually advanced by the four witnesses appearing during this short half-day case. For these reasons, and without expressing an opinion on whether this transcript represents fulfillment of contractual obligations, I believe it is minimally sufficient to skirt the inviting possibility that on due process grounds the matter must be reheard.

² All dates and named months hereafter are in 1981, unless shown otherwise.

³ Respondent is a Colorado corporation having ties that were not fully developed in this record to a parent entity of the same name in Texas. Respondent maintains its office and place of business in Aurora, Colorado, and there engages in the manufacture and sale of steel buildings. In the course and conduct of such business it annually sells and ships products valued in excess of \$50,000 to customers located outside Colorado, while purchasing and receiving goods and materials valued in excess of \$50,000 directly from suppliers outside Colorado. On these stipulated facts I find Respondent to be an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. In its original form the complaint implicitly alleged that Shopmen's Local Union No. 507, sometimes called the Union, was a labor organization with the meaning of Sec. 2(5) of the Act, and I am satisfied that this has been adequately established from the record as a whole and may thus be a conclusion of law.

II. I don't like unions. I don't think there will ever be a union here because after you think about it, you'll decide you don't need or want a union. If anyone thinks they need a union to work, they may be at the wrong place.

A. Union didn't pay for Bldg. Buy land, provide jobs, sign paychecks.

B. Promise a lot but deliver little.

C. Don't have to pay to work here.

D. Claims card are confidential and for getting election. More than that—might mean a union represent an employee. Not always confidential because *cards* can be exposed at NLRB Trial.

III. Because these two guys claim to represent you—was anybody really contacted by the union? You don't have to answer, & nothing will happen to you if you do or don't, I just can't believe they represent you.

IV. —My opinion—too early for union to try to get in.

A. Haven't shipped anything.

B. Only skeleton workforce in training stage—hopefully pick up—hire many more.

C. Unions fail to adequately represent employees, sometime cause companys to lose money.

D. None of you need to pay money to outside union people to work here.

E. My opinion, never be union here because don't need one, and given time you'll agree.

F. Top notch attorney to help if we need to go to hearing or Election.

V. —Close—I'll be around to answer questions.

He testified that these were prepared on the basis of telephone consultation with Texas-based legal counsel, and that the entire presentation took about 10 minutes. Hendrickson maintained that he did not depart in any appreciable way from the theme of these notes, and he expressly denied threatening to close the plant should the claiming Union be voted in as a collective-bargaining representative. Hendrickson testified that he emphasized making inquiry to the assembled employees about whether or not they had been contacted by the union representatives only as a matter of his own curiosity, and that employee Dale Isaacson had comfortably signified to having been contacted without elaborating on what he was told or his own position on the matter other than that he had nothing to hide. Hendrickson was essentially corroborated by Steve Miller, formerly a rank-and-file employee but now a shop foreman, and by Timm Armstrong, now Respondent's other shop foreman, each of whom testified that no threat of plant closure had been uttered.

The General Counsel relies on the testimony of Dellis Trent, a former receiving clerk who worked for Respondent from early March until August. Trent testified that Hendrickson's speech was generally along the lines carried in his notes, but that he had also remarked on a likelihood of closing down the plant should the Union's claim materialize. Trent's testimony included a specific recollection that Hendrickson had emphasized how it did not matter whether employees responded to his inquiry

about being contacted, because he would find this out anyway.⁴

A resolution of credibility is paramount to the outcome of this case. In the order of testifying, I first credit Hendrickson on demeanor and other grounds. He was sufficiently forthright that I believe his denial of having uttered a plant closing threat or that he created an impression of surveillance.⁵ It is essentially true that what he spoke was taken from the notes, and no hint of such a remark appears therein. He projected as having a highly institutionalized business leaning, and to have adequately acquainted himself with the pitfalls of speeches to employees. A further point, self-serving though it is, concerns the fact that he sought to obtain expert guidance on the matter of labor relations rhetoric, as to this his demeanor characteristics tie back in because he seemingly abided this guidance to the letter. As to Trent, I believe he is honestly mistaken in his recollection. On demeanor grounds he appeared susceptible to suggestion, and his recollection was further flawed by recalling a pizza and beer conclusion to the Hendrickson speech, a point credibly denied by two other witnesses. The two thus referred to are Miller and Armstrong, who each persuasively denied that Hendrickson had mentioned the spectre of a plant closing simply because a union might come in.⁶ I note that the General Counsel has shown bias and self-interest to their testimony, yet each in his own way displayed a demeanor that inspired some confidence in their recollections. This is particularly true because each made the valid point that a precarious future with Respondent would have been both clearly remembered and might well have altered their own employment plans at Aurora. Miller was cross-examined vigorously about gaps, disparity, or ambiguity between his investigatory affidavit and his testimony. I note this illuminating effort, but must observe contrarily that it incorrectly assumes a rank-and-file employee would have *both* inclination and skill at collaborating in the preparation of a comprehensive affidavit for administrative case purposes. This simply does not square with realities of the workplace, or with usual involvement by employee witnesses in the investigatory process. In particular regard to Miller, I am satisfied that his demeanor characteristics lent credence to his version both of what was and what was not said. Armstrong was even more impressive as a witness in terms of pure demeanor, and I am influenced by his

⁴ On this point Hendrickson had anticipatorily testified that he told the employees how authorization cards typically used by unions did not necessarily retain their confidential character and could, through NLRB proceedings, conceivably result in that assurance not being "the entire truth."

⁵ The latter subject was denied somewhat obliquely, with Hendrickson's most pertinent testimony being that he said "nothing to imply that."

⁶ On the more esoteric third branch of the case, I have already credited Hendrickson's denial of having made remarks that would create an impression of surveillance. More importantly, the only way this could be established is through Trent's narration that Hendrickson predicted he would come to know of any card signers. Trent places this in context of the employee group being mute to Hendrickson's inquiry about whether business agent Earl Willett or district representative Frederick Asmus had approached employees, whereas it is clear that Isaacson spoke up boldly and generated a brief dialogue which was devoid of words that would form a basis for showing that the impression of imminent, undetectable, or ultimate surveillance was being created among employees.

credible description of how employees return to work immediately after the Hendrickson speech and that a pizza and beer treat had occurred several weeks later when Respondent celebrated its first shipment of products. The General Counsel has explained for the record that former employee Forrest Dalton was expected to testify, but disappointingly would not present himself. What is left however is only the testimony of Trent in support of amended complaint paragraphs V(b) and (c), and I find this to be unreliable and insufficient to form substantial probative evidence in support of such allegations.

There remains the issue of assertedly unlawful interrogation of employees. Here the General Counsel relies on *Struksnes Construction Co.*, 165 NLRB 1062 (1967), and numerous other cases in which the Board has remedied questioning of employees about circumstances of an aborning campaign toward unionization. Respondent counters that this matter does not under any view of the facts constitute a violation, and in the alternative that it is isolated in nature and fundamentally without reasonable grounds to pursue. There is no basis not to view *Struksnes* as despositive of the issue, except that every case has its own unique facts.⁷ Here the action of Hendrickson on March 13 was hasty, haughty, and technically violative of the Act. Absent carefully structured safeguards the abrupt probing of employees about underlying steps of union organizers is inhibiting toward their right of choice under Section 7. However, it must be increasingly asked whether every violation, from what may be a vast reservoir on the basis of verbalisms alone as they emanate in tens of thousands of covered workplaces, must be remedied. This concern was often expressed by former Board Member Penello, in his connec-

tion of the problem to agency resources and an assessment of the capacity of prudent working person to field and filter certain types of managerial statements. See *Peerless Food Products*, 237 NLRB 161 (1978), and *Postal Service*, 242 NLRB 228 (1979). Without more to this case I propose that it end here, with the hope of a chastened employer and a fresh basis for any labor organization to appropriately engage in time-honored approaches to employees leading to their own collective expression of free choice on the subject of representation.⁸ The work force was incomplete on March 13, and since has increased to a normal operating complement by the hire of persons not present for Hendrickson's speech. The Union elected to press its petition to a full disposition, and an allegation of Dalton having been unlawfully discharged was dismissed followed by upholding of such action on appeal. Traditional notice-posting would seem artificial, futile, and confusing to employees under the circumstances, plus being an unnecessarily extravagant drain on both public and private resources. I am influenced in the making of a recommended disposition by rationale of the United States Court of Appeals for the Ninth Circuit in which, by unpublished order declining to enforce in *NLRB v. Blanchard*, No. 79-7112, filed August 11, 1980, in relation to *Blanchard Construction Co.*, 234 NLRB 1035 (1978), where an 8(a)(1) violation was found, the court wrote the "challenged" incidents were of "minor significance" not serving purposes of the Act through enforcement. Accordingly, I render a conclusion of law that Respondent's unlawful interrogation of employees on March 13 concerning whether or not they were contacted by Shopmen's Local Union No. 507 does not warrant remedial action, and I issue the following recommended⁹

ORDER

The complaint is dismissed in its entirety.

⁷ Contrary to what the General Counsel anticipated, Respondent did not brief the case as a "polling" of employees issue, but instead pressed other authorities, the most intriguing of which were *Bulk Haulers*, 200 NLRB 389 (1972), and *Spearin, Preston & Burrows*, 248 NLRB 1384 (1980). The latter is distinguishable on its facts, while as to the former Respondent seems not to have observed that a Supplemental Decision and Order issued in keeping with reversal and remand by the U.S. Court of Appeals for the District of Columbia in *Teamsters Local 633 v. NLRB*, 509 F.2d 490 (1974). Accepting "law of the case" based on standards set forth in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), the Board re-examined interrogation of employee McKay by Supervisor Therriault and found it to be coercive within the meaning of Sec. 8(a)(1). *Bulk Haulers*, 219 NLRB 244 (1979).

⁸ I expressly disapprove of Hendrickson's unwarranted calumny in referring to his antagonists as "assholes," but consider this impertinence is overshadowed by larger considerations.

⁹ 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.