

Sub-Zero Freezer Company, Inc. and Sheet Metal Workers' International Association, AFL-CIO, Local No. 485. Case 28-CA-7286

29 June 1984

DECISION AND ORDER

On 24 January 1983¹ the Regional Director for Region 28 of the National Labor Relations Board issued a complaint and notice of hearing in the above-entitled proceeding, alleging that the Respondent has violated Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act.

The complaint alleges in substance that on 16 December 1982, following a Board election in Case 28-RC-4102, the Union was duly certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate; and that, commencing about 11 January 1983, and at all times thereafter, the Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed. Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) On 1 February 1983 the Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 18 February 1983 the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 25 February 1983, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. The Respondent thereafter filed a response to the Notice to Show Cause.

In its answer to the complaint and its response to the Notice to Show Cause, the Respondent repeats the argument, first raised in the representation proceeding, that conduct occurred during the preelection period which interfered with the election. The Respondent maintains that the conduct included, inter alia, threats to employees and property damage, which resulted in an atmosphere of fear and reprisal such that a free and fair election could not be conducted. The Respondent thus contends that it, in good faith, doubts that the Union represents a majority of the Respondent's employees in the appropriate unit. The General Counsel argues

that all material issues have been previously presented to, and decided by, the Board, and that there are no litigable issues of fact requiring a hearing.

Our review of the record herein, including the record in Case 28-RC-4102, discloses that, pursuant to the Stipulated Election approved by the Regional Director 27 April 1982, an election was conducted 4 June 1982. The tally of ballots shows 36 votes cast for, and 34 against, the Petitioner; there were no challenged ballots. On 11 June 1982 the Respondent timely filed objections to conduct affecting the results of the election. On 16 June 1982 the Regional Director issued an order directing hearing and notice of hearing. On 16 July 1982, after a full hearing, the hearing officer issued his "Report and Recommendations on Objections to Conduct Affecting the Results of the Election," recommending the overruling of the Respondent's objections in their entirety. On 26 July 1982 the Respondent filed with the Board its exceptions to the hearing officer's "Report and Recommendations on Objections to Conduct Affecting the Results of the Election." On 16 December 1982 the Board, with former Chairman Van de Water and Member Hunter dissenting, issued its Decision and Certification of Representative, reported at 265 NLRB 1521, in which it adopted the hearing officer's findings and recommendations in Case 28-RC-4102, and certified the Union as the exclusive collective-bargaining representative of the unit found appropriate.

On further consideration, for the reasons fully set forth in the dissenting opinion of our original decision, reported at 265 NLRB 1521, we agree with the Respondent that conduct occurred which resulted in an atmosphere of fear and reprisal such that a free and fair election could not be conducted. Having reached this conclusion, we cannot let stand a certification of representative premised on an election that was conducted in such an atmosphere. While we share our dissenting colleague's concern with stability in law and finality in litigation, at the same time we believe that the just resolution of questions presented to the Board is our primary duty. Therefore, while reconsideration of issues in technical refusal-to-bargain cases may, in some instances, cause delays or involve changes in Board law, we are not willing to grant a Motion for Summary Judgment that would result in an order requiring an employer to bargain with a union that has not attained the status of majority representative from a free and fair election.

Accordingly, we shall vacate our Decision and Certification of Representative in Case 28-RC-4102 (265 NLRB 1521), dismiss the complaint in

¹ On 25 January 1983 the Regional Director for Region 28 issued an Erratum correcting the case number listed in the complaint.

the instant proceeding, revoke the certification issued in Case 28-RC-4102, and remand Case 28-RC-4102 to the Regional Director for Region 28 for appropriate action consistent with the decision herein, including the direction of a new election if desired by the Petitioner.

ORDER

It is hereby ordered that the Decision and Certification of Representative in Case 28-RC-4102 (265 NLRB 1521) is vacated.

IT IS FURTHER ORDERED that the certification issued in Case 28-RC-4102 is revoked and that Case 28-RC-4102 is remanded to the Regional Director for Region 28 for appropriate action consistent with the decision herein, including the direction of a new election if desired by the Petitioner.

MEMBER ZIMMERMAN, dissenting.

I would grant the General Counsel's Motion for Summary Judgment in this technical test of certification. In 1982, the Employer's objections alleging conduct resulting in an atmosphere of fear and reprisal were the subject of a full hearing before a hearing officer of the Board who issued a report recommending the overruling of all objections. In December 1982 the full Board considered the Respondent's exceptions to the hearing officer's report and issued a Decision and Order,¹ adopting the hearing officer's findings and certifying the Union. Former Chairman Van de Water and Member Hunter dissented.

The parties, therefore, have received the fullest opportunity to litigate the issues concerning the representative status of the Union and have in fact done so. My colleagues in the majority do not dispute this. Nor do they dispute that the Respondent is attempting to relitigate these matters in a refusal-to-bargain case—a practice which is normally prohibited under the *Pittsburgh Glass Co.* rule.² They have simply decided to reconsider the underlying representation case and adopt the position of the dissent in that case.

Although I do not doubt my colleagues' authority to do this, I do question the wisdom of exercising that authority in this case. The sole reason that

relitigation is being permitted here is a change in the composition of the Board from the time the representation case was litigated to the time the test of certification occurred. Certainly the Act allows for shifts in the law when the composition of the Board changes, and undoubtedly Congress intended for the Board to respond to changing times and conditions. It is, therefore, inevitable that a certain degree of instability in Board law will arise as new Members enter into the decision-making process. At the same time, however, such changes undermine the goals stated by a long succession of Board Members of maximizing the voluntary settlement of cases and minimizing the litigation of labor disputes. Those goals call for giving due regard for both stability in the law and finality in litigation. Avoiding unnecessary instability and uncertainty is critical to the efficient administration of the Act.

Early in my tenure at the Board I took the position that factors favoring stability outweighed those favoring reconsideration of the issues in technical refusal-to-bargain cases. In *Bravos Oldsmobile*, 254 NLRB 1056 (1981), I found that selective application of the rule against relitigation of representation issues could cause far greater damage than that which might result if the representation matter was improperly decided. I decided that, in all unfair labor practice cases testing certification, I would not allow relitigation of the representation matters even if I had dissented on the underlying representation case or would have decided the case differently had I participated in it.

A great deal can be gained by applying this form of *res judicata* to the Board's processes. When changes in the Board occur, the parties could at least be certain that decisions already made at the representation level are final. The wisdom of this approach is particularly apparent here where there was a full hearing on the representation issue and a dissenting opinion which apparently sets forth what is now the view of the current Board. The reviewing court will have both the record in the hearing and the dissenting opinion before it for full consideration. In these circumstances, the Board would lose very little in applying the rule of *res judicata* and would contribute greatly to the orderly administration of the Act during a period of change.

¹ Reported at 265 NLRB 1521 (1982).

² *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).