

ARA Living Centers Company d/b/a Poplar Living Center and Teamsters Local Union No. 307, I.B.T.C.W. & H.A., AFL-CIO, Petitioner. Case 27-RC-6938

December 13, 1990

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 5, 1989, and the Regional Director's report recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 32 for and 28 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief,² has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

In its exceptions, the Employer contends that the Regional Director erred in rejecting Objection 1, which pertains to the Petitioner's picketing at the Employer's Eventide facility without having previously served notices in compliance with Section 8(g) of the Act. In particular, the Employer faults the Regional Director for relying on *Holt Bros.*, 146 NLRB 383 (1964), in which the Board rejected Holt's argument that the union which had petitioned for an election among Holt's employees had engaged in objectionable conduct by virtue of its entry into a contract with an employer's association that contained a clause prohibited by Section 8(e) of the Act. (The clause required, *inter alia*, that the contract "apply to subcontractors performing work off the jobsite.")³ The Employer argues that the present case is distinguishable from *Holt Bros.* because the alleged violation here "is unlawful *con-*

duct and not the mere maintenance of a contract provision on a piece of paper" (emphasis in original).

We find this a distinction without a difference. The gist of the Board's rationale in *Holt Bros.* was that only those unfair labor practices which pose a threat of "restraint and coercion of employees" can logically serve as a ground for setting aside an election. Section 8(e) does not fall in that category, the Board held, because it deals "only with the terms of agreement between an employer and a labor organization, regardless of whether it is publicized to employees." The same is true of Section 8(g), which was enacted to assure that arrangements could be made for the continuity of patient care in the face of strikes and picketing at health care institutions,⁴ and thus has no significant connection with the restraint and coercion of employees. It is true that the Board in *Holt Bros.*, noted "the absence of any allegation that the [petitioning union] sought to utilize the contract with the employer association to influence the employee choice of a bargaining representative" (*id.*), and that the Employer in the present case argues that Petitioner had sought to use the Eventide picketing to influence employee choice in the Poplar election. In our view, however, that caveat in *Holt Bros.* need not be read as anything more than the Board's prudent avoidance of a broader than necessary holding. It is conceivable that an unlawful 8(e) clause might be used to threaten employees of a nonunion employer with a loss of jobs stemming from their employer's loss of contracts and thereby might be viewed as bringing the union's conduct within the ambit of "restraint and coercion." The Board evidently did not wish to decide such a case before it was presented. But the Employer here has suggested no way in which the Petitioner's publicizing of its Eventide picketing to the Poplar employees threatens to restrain or coerce them or any other employees.⁵ Thus, this case is unlike *Glover Bottled Gas*, 275 NLRB 658 (1985), on which the Employer chiefly relies, because in that case the conduct that occurred at one location and was publicized at another consisted of discriminatory discharges of union supporters—unfair labor practices which are prohibited because of their effect on the rights of employees.⁶

¹ In the absence of exceptions, we adopt, *pro forma*, the Regional Director's recommendations to overrule Employer Objections 2, 4, 5, and 6.

² In adopting the Regional Director's recommendation to overrule Objection 3, regarding alleged conduct by nurses who the Employer now asserts are supervisors, we emphasize that the parties stipulated to the inclusion in the appropriate voting groups of "all registered nurses," and "all licensed practical nurses." The Employer in its objections for the first time contended that "charge" nurses are supervisors, notwithstanding the fact that LPNs served as election observers for both parties without objection, and that all LPN and RN charge nurses cast unchallenged ballots in the election. The Board "has long held that it will not entertain postelection challenges, or objections which are in the nature of postelection challenges." *Prior Aviation Service*, 220 NLRB 460, 461 (1975), and cases cited at *fn.* 3. The Board has also held that statements made by supervisors who have been included in the unit by the parties generally do not violate Sec. 8(a)(1). *Craft Maid Kitchens*, 284 NLRB 1042, 1043 (1987). See also *Cal-Western Transport*, 283 NLRB 453 (1987).

³ Holt had both "field and shop mechanics," working "in and out of [its] shops" at various locations. *Id.* at 384. Thus, its off-site operations could have fallen within the coverage of the alleged 8(e) clause if it operated as a subcontractor for any member of the employer association in question.

⁴ See *Hospital Employees District 1199 (Parkway Pavilion Healthcare)*, 222 NLRB 212 (1976).

⁵ It is therefore immaterial whether, in publicizing the picketing, the Petitioner was merely responding to the Employer's communications on the subject (as the Regional Director suggests in his report), or whether, as the Employer asserts, the Petitioner had at least announced its intent of showing videotapes of some of the March picketing to Poplar employees before the Employer gave its own videotape presentation.

⁶ The Employer also contends that the April 9 picketing was carried out in a coercive manner that was witnessed by employees from the Poplar facility. We find no basis for this objection, even assuming the truth of the allegations in Administrator Dunkley's affidavit, on which the Employer appears principally to rely. Dunkley's account of the alleged jostling and attempts by picketers to prevent him from videotaping them indicates that the incident began when three or four picketers stood near him, with signs placed in front of him. Dunkley also asserts that someone in the crowd, whom he does not otherwise

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IT IS CERTIFIED, that a majority of the valid ballots have been cast for Teamsters Local Union No. 307,

identify, yelled at him "We're going to get you," after someone else had yelled "Look out Dunk." The statements and instances of physical contact in other cases on which the Employer relies in making its coercion argument here all occurred in contexts which gave them a much more coercive character. In *Teamsters Local 115 (Oakwood Chair)*, 277 NLRB 694 (1985), for example, on which the Employer principally relies, a picketer knocked a camera carried by a strike replacement to the ground and crushed it. Furthermore, the judge, whose findings were adopted by the Board, noted that some of the statements made to the employer's managers might be deemed innocuous had they not occurred in a context which made them "clearly threats of harm" to people and property. No such clear threats appear in Dunkley's account.

IBTCWHA, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following unit:

All employees employed by ARA Living Centers Company, d/b/a Poplar Living Center, at its Casper, Wyoming, facility including all licensed practical nurses, all nurses aides, dietary employees, housekeeping and laundry employees, the maintenance assistant and van driver, activities employees, and all registered nurses, excluding office clerical employees, guards, and supervisors as defined in the Act.