

Buedel Food Products Co. and Grocery and Food Products Processors Canneries Frozen Food Plants Sugar Processors Confectioners and Vending Miscellaneous Drivers and Salesmen, Warehousemen and Related Office Employees Union, Local No. 738, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Petitioner. Case 13-RC-17494

October 31, 1990

ORDER REMANDING PROCEEDING TO HEARING OFFICER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered the hearing officer's report recommending disposition of objections filed by the Employer to an election held July 22, 1988. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots, issued after the Employer withdrew its challenge of one ballot and it was opened and counted, shows 7 for and 4 against the Petitioner, with 1 challenged ballot, a number which, as explained below, may be sufficient to affect the results.

The Board has reviewed the record in light of the Employer's exceptions and brief and has adopted the hearing officer's findings¹ and recommendations² only to the extent consistent with this remand.

Contrary to the hearing officer, we find that a threat to burn bargaining unit employee Gabriel Soria's car if he did not vote for the Petitioner could have, under certain circumstances, created a sufficient "atmosphere of fear and reprisal" to warrant setting aside the election. Former employee John Shields' threat was directed at Soria "with the obvious aim of influencing him to vote for the Union" and it was a specific threat to do substantial damage. *Steak House Meat Co.*³ Sub-

¹The Employer 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 find no basis for reversing the findings.

²In considering the hearing officer's recommendation to overrule the Employer's objections, we do not rely on any determination of whether bargaining unit employee Gabriel Soria took seriously former employee John Shields' threat that Shields would burn Soria's car if he did not vote for the Union. See *Duralam, Inc.*, 284 NLRB 1419 fn. 2 (1987).

Unlike the hearing officer, we do not find testimony about Shields' conduct outside the critical period necessarily irrelevant to the determination of whether he had a propensity for violence, so long as the described conduct occurred within a reasonable time prior to the election. Such evidence is admissible as background evidence insofar as it casts light on conduct within the critical period. We find it unnecessary, however, to rely on that evidence in finding that the threat to Soria created an atmosphere of fear and reprisal sufficient to affect this election.

³206 NLRB 28, 29 (1973). The cases cited by our dissenting colleague are distinguishable. In *Bell Trans.*, 297 NLRB 280 (1989), the Board noted that the incident in question would reasonably be viewed as a personal dispute between two employees, which was not tied to the election. In *Duralam, Inc.*,

sequently Soria told employee Juan Hernandez about Shields' threat. Much hinges therefore on whether Hernandez, the challenge to whose ballot has not been resolved, is a member of the bargaining unit.

We must consider that two votes, Soria's and Hernandez', were influenced by Shields' intimidation. We must also allow for the possibility that the seven votes for the Petitioner included Soria's and that Soria might have voted against the Petitioner absent the intimidation. In that eventuality, the tally would have been 6 to 5 in favor of the Petitioner, and Hernandez' vote would then be determinative.

Consequently we remand this case solely for a determination of whether Hernandez' vote should be counted. If Hernandez is found to be a member of the bargaining unit, the election should be set aside because Shields' intimidation would make it "impossible" that a tally in favor of the Petitioner reflected the free choice of a majority of the employees.⁴ On the other hand, if Hernandez is not a unit employee, the threat to Soria would not be sufficient grounds to set aside the election because the Petitioner would have won no matter how Soria voted.

ORDER

It is ordered that the above-captioned proceeding be remanded so that a hearing may be held for the limited purpose of considering all relevant evidence and making credibility determinations, findings of fact, conclusions of law and recommendations concerning whether employee Juan Hernandez is a member of the bargaining unit in order to determine whether the election should be set aside.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing shall prepare a supplemental report that contains resolutions of the credibility of the witnesses, findings of fact, conclusions of law, and recommendations pertaining to the bargaining unit status of employee Juan Hernandez and its effect on the election results. Copies of the Supplemental Report shall be served on the parties, after which the provision of Section 102.69 of the Board's Rules and Regulations shall be applicable.

MEMBER DEVANEY, dissenting.

I disagree with my colleagues' finding that former employee Shields' threat to employee Soria could have created an "atmosphere of fear and reprisal" sufficient to warrant setting aside election. I agree with the hear-

284 NLRB at 1420, the majority emphasized that the only statement that could be characterized as a specific threat had been "neutralized" by being exposed by another employee as mere "empty boasting and posturing." Similarly, in *John M. Horn Lumber Co.*, 280 NLRB 593 (1986), in adopting the hearing officer's report, the majority appended pertinent portions which emphasized that there was no evidence that one of the two incidents in question was linked to the election and that the other, when viewed in the context of the behavioral norms of the particular workplace, could not objectively be taken as coercive.

⁴Id.

ing officer that under the standard set forth in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), the election here should not be set aside. Thus, I would certify the Petitioner as the representative of the employees in the bargaining unit.

The facts, as found by the hearing officer, are uncontroverted. Between 1 and 2 weeks before the election, Soria encountered Shields, who by then no longer worked for the Employer, at a location away from the worksite. Shields told Soria that if he did not vote for the Union, Shields would burn Soria's car. Soria told his wife, a nonunit employee of the Employer, and Hernandez, who voted in the election but has been challenged as a supervisor, of the incident.

As a threshold matter, I share my colleagues' view that the hearing officer correctly found that the conduct described above was not attributable to an agent of the Petitioner and that it is governed by the standard for determining whether third-party conduct is sufficiently aggravated to render "a free election impossible." *Westwood Horizons Hotel*, supra at 803.¹ However, I view the facts here as clearly indicating that Shields' threat does not constitute such aggravated conduct, and I find no evidence to indicate that the incident created a general atmosphere of fear and coercion.² Thus, the threat occurred about 10 days before the election, was disseminated only to Soria's wife, who is not a unit employee, and to Hernandez, whose challenged ballot is not determinative of the outcome here. In addition, the threat was unaccompanied by physical violence or damage to property and was not rejuvenated before the election. Moreover, the incident occurred away from the Employer's facility, lasted only a few seconds, involved a threat directed at Soria alone rather than at other employees who did not support the Petitioner,

¹ Like my colleagues, my analysis does not rely on the hearing officer's comments concerning whether Soria took Shields' threats seriously. *Duralam*, 284 NLRB 1419, 1428 at fn. 2.

² Because I do not view the incident at issue here as sufficiently aggravated to create a general atmosphere of fear and coercion, I need not reach the issue of the relevance of facts of Shields' prior history to his ability to make good on his threat to Soria.

and was not witnessed or condoned by any representative of the Petitioner. All of these factors have been cited in cases in which the Board has found threatening conduct by third parties insufficient to overturn an election.³ These cases instruct that isolated single incidents like Shields' threat to Soria, while unquestionably regrettable, simply do not cast sufficient doubt on the integrity of the electoral process to warrant invalidation of the election. By contrast, where the Board has found that third-party threats have interfered with an election, the conduct at issue has been more serious in nature and has been widely known in the unit.⁴ Thus, in light of precedent, I view my colleagues' analysis as not in accordance with the *Westwood Horizons* standard. Accordingly, I respectfully dissent.

³ See, e.g., *Bell Trans*, 297 NLRB 280 (1989) (employee supporter of a union refused to admit to a union meeting an employee perceived as antiunion, slapped the employee, shouted obscenities, and threatened to kill another employee, the incident was found too isolated to create a general atmosphere of fear and reprisal); *Duralam, Inc.*, 284 NLRB 1419 (1987) (even where election was close, threats not sufficient to overturn election); *John M. Horn Lumber Co.*, 280 NLRB 593 (1986), revd. 859 F.2d 1242 (6th Cir. 1988) (single physical assault and separate undissemminated threats not sufficient to set election aside, despite close tally).

⁴ See, e.g., *Picoma Industries*, 296 NLRB 498 (1989) (election set aside where threat that employee's car would be blown up if she did not vote for the union was witnessed by 20 other employees and accompanied by numerous other threats that continued to election day); *Electra Food Machinery*, 279 NLRB 279, 280 (1986) (election set aside where threats against numerous antiunion employees were scrawled on workplace walls and widely disseminated and were accompanied by verbal threats to individual employees); *Lovilia Coal Co.*, 275 NLRB 1358, 1359 (1985) (election set aside where threats to kill employees and to blow mine up were widely disseminated and were rejuvenated at time of election); *RJR Archer, Inc.*, 274 NLRB 335, 336 (1985) (election set aside where threats that employee's house and van would be burned and that another employee's family would be harmed were widely disseminated and the latter employee was subjected to a campaign of anonymous telephone calls).

I find *Steak House Meat Co.*, 206 NLRB 28 (1973), cited by the majority, clearly distinguishable from the instant case. There a number of threats were made to a 16-year-old employee some 2 weeks to several days prior to the election, including a threat to kill the employee made by another employee who was brandishing a knife at the time, a subsequent threat by the other employee that he would get back at the employee if he voted against the union, and a threat by an additional employee, who had been present during the first incident, that the employee should vote yes or just not vote and that he would get even with the employee if the union lost the election. The Board, in setting aside the election, emphasized the age of the employee at whom the threats were directed and the aggravated nature of the conduct. While not condoning the threat here, I find it falls short of the conduct in *Steak House*.