

Mantrose-Haeuser Company and Attleboro Joint Board, Retail, Wholesale, Department Store Union, AFL-CIO. Cases 1-CA-26765 and 1-RC-19320

February 21, 1992

DECISION, ORDER, AND CERTIFICATION
OF RESULTS OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case present the issue whether a statement made in a 19-page campaign document mailed by the Respondent to employees 1 to 2 days prior to a representation election constituted an unlawful threat to freeze wages and benefits in violation of Section 8(a)(1) of the Act.¹

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, and conclusions only to the extent consistent with this Decision and Order.

The Respondent is engaged in the manufacture and distribution of shellac at its place of business in Attleboro, Massachusetts. A representation petition was filed by the Union on September 8, 1989. The Union lost the Board-conducted election on October 19, 1989, in a unit of 67 of the Respondent's employees.² The Union filed the instant objections³ and unfair labor practice charge, which the General Counsel consolidated for hearing.

The Respondent's antiunion campaign ended with the mailing of a 19-page document entitled "The Decision is Yours" to all unit employees 1 to 2 days prior to the election. The complaint alleges that the following language contained on page nine of the document constitutes an unlawful threat to freeze wages and benefits:

WHEN BARGAINING FOR A FIRST CONTRACT DOES BEGIN, IT CAN BE A LONG, COMPLICATED AND TECHNICAL PROCEDURE WHICH CAN GO ON FOR MONTHS, A YEAR . . . OR LONGER.

WHILE BARGAINING GOES ON, WAGE AND BENEFIT PROGRAMS TYPICALLY REMAIN

¹On June 22, 1990, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

²Out of the 67 eligible voters, 30 votes were cast for the Union and 30 votes were cast against the Union.

³The Union originally filed five objections to the election but later withdrew all but the one that is coextensive with the alleged unfair labor practices at issue here.

FROZEN UNTIL CHANGED, IF AT ALL, BY A CONTRACT.

IF THE UNION WINS, YOU TAKE THE RISKS . . . YOU WILL HAVE TO "WAIT AND SEE" IF ANYTHING HAPPENS WITH WAGES AND BENEFITS. THE UNION, HOWEVER, IS FREE TO BEGIN COLLECTING DUES RIGHT AWAY. [Emphasis in original.]

Relying primarily on four Board cases,⁴ the judge found that the above language amounted to a threat in violation of Section 8(a)(1) because the message communicated by the Respondent to employees was that wage and benefit programs would remain frozen during the potentially long period of negotiations. The judge noted that the Respondent granted Christmas bonuses and annual merit raises in December of each year, that the language in the document was ambiguous as to whether the December bonuses and wage increases would be given, and that any ambiguity should be resolved against the author of the document.

For the reasons set forth below, we disagree with the judge and find that, in the context of the circumstances presented here, the language contained in the Respondent's campaign literature which the judge found unlawful does not constitute a threat within the purview of Section 8(a)(1).

At the outset, we note that the Respondent's statement appeared in a 19-page document which was devoid of any other unlawful or objectionable statements. In addition, the statement appeared only in the 19-page document, even though the Respondent distributed several additional campaign materials to employees. Further, during this entire time period, there were no other allegations of unfair labor practices or objectionable conduct committed by the Respondent.

We also note that the Respondent did not say that preexisting benefits would be lost if the Union won the election. The Respondent's statement was that wage and benefit programs would be *frozen*. The statement implies only that wages and benefit programs would not change. The Respondent's conduct is consistent with this view. Thus, the Respondent had a past practice of granting predetermined wage increases following probationary and training periods. That practice continued during the campaign. Similarly, the Respondent had a practice of giving Thanksgiving turkeys and a Christmas party. The Respondent said that this practice would continue. Finally, the Respondent had a past practice of granting a Christmas bonus and annual merit increases in December. William Mischel, who was the vice president and general manager of the

⁴*Gould, Inc.*, 260 NLRB 54 (1982); *Alpha Cellulose Corp.*, 265 NLRB 177 (1982), enfd. mem. 718 F.2d 1088 (4th Cir. 1983); *North Electric Co.*, 225 NLRB 1114 (1976), enfd. 588 F.2d 213 (6th Cir. 1978); *299 Lincoln Street, Inc.*, 292 NLRB 172 (1988).

Respondent during the election campaign, testified without contradiction that he told employees that *the amounts* of the Christmas bonus and merit increases were subject to negotiation with the Union if the Union won the election. Thus, the Respondent was saying that the past practice of granting bonuses and amounts would continue. The *amount* would be subject to negotiation. That statement correctly described the Respondent's obligations.⁵

Finally, we note that the word "frozen" was preceded by the word "typically," which modified and limited its meaning, thereby reducing the possibility that employees would reasonably perceive the statement as a threat that their wages and benefits would be lost. In addition, the fact that the statement was made in a third-person context further reduced the possibility of its perception by the employees as a threat.

We therefore conclude that, in the circumstances presented here, the Respondent's statement regarding wages and benefits "typically remain[ing] frozen" contained in campaign literature mailed on the eve of an election did not constitute a threat in violation of Section 8(a)(1) of the Act, and accordingly, that the election should not be set aside.⁶

ORDER

The complaint is dismissed.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for the Attleboro Joint Board, Retail, Wholesale, Department Store Union, AFL-CIO, and that it is not the exclusive representative of these bargaining unit employees.

CHAIRMAN STEPHENS, concurring.

I agree with my colleagues that the Respondent did not unlawfully threaten its employees by distributing campaign literature which included the observation that during collective bargaining "wage and benefit programs typically remain *frozen* until changed, if at all, by a contract." In so finding, however, I would acknowledge that this unadorned statement is ambiguous, especially when immediately followed by assertion that with a union victory, the employees "take the *risks* . . . [they] will have to 'wait and see' if anything hap-

pens with wages and benefits." (Emphasis added.) By definition, a risk is "the possibility of loss, injury, disadvantage, or destruction." Webster's Third New International Dictionary (1971). Thus it is plausible to read the sentences in isolation as suggesting a causal link between a union victory and a "loss" of what the employees otherwise might be reasonably expect to receive in the way of customary wage increases.

When faced with such equivocal campaign rhetoric, the Board commonly resorts to an examination of the surrounding circumstances to determine whether it conveys an implied threat.¹ As suggested by my colleagues, the Employer's campaign is otherwise devoid of unlawful conduct that would indicate an intent to retaliate against the employees for voting in a union. For example, Vice President Mischel apparently communicated to employees the legal constraints against making threats.² And, there is testimony to the effect that various employees were told that the various fringe benefits would remain in place and that the employees would get their raises, but that they would be subject to negotiation with the union.³

In this context, I am not persuaded that the written statement in question constituted an implied unlawful threat or that it would be reasonably perceived as one.

¹ See generally *Auto Workers (Kawasaki Motors) v. NLRB*, 834 F.2d 816 (9th Cir. 1987). Thus, in some circumstances, comments referring to a "freeze" may well indicate an employer's retaliatory intent withhold periodic wage increases from employees simply because they have chosen union representation. *Frank's Nursery & Crafts*, 297 NLRB 781 (1990). In other circumstances, however, an employer may be simply alluding to the fact that the advent of a union in the workplace will interject an additional, perhaps time consuming step in the process by which customary wage increases are implemented. *Fiber Industries*, 267 NLRB 840, 853 (1983).

² Tr. 147-164.

³ Id.

Carol Sax, Esq. and Deidre D. Hamlar, Esq., for the General Counsel.

Donald C. Moss, Esq., of New York, New York, for the Respondent.

James O. Hall, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On October 19, 1989, Attleboro Joint Board, Retail Wholesale, Department Store Union, AFL-CIO (Charging Party or Union) lost an election to represent a unit of employees of Montrose-Haeuser Company (Respondent).

Thereafter, on October 24, 1989, the Union filed objections to the election and an unfair labor practice charge against Respondent. On December 15, 1989, the Regional Director for Region 1 issued an order consolidating for trial the unfair labor practice complaint in Case 1-CA-26765 and the Report on Objections in Case 1-RC-19320.

⁵ Cf. *Frank's Nursery & Crafts*, 297 NLRB 781 (1990).

It is well established in the record that these increases were not in the nature of predetermined, fixed benefits, but instead were discretionary as to amount. Thus, had the Union won the election, the Respondent would have been obligated to bargain prior to granting any increases, thereby at least temporarily creating a period during which the bonuses and increases would not be given. *Southwire Co.*, 282 NLRB 916 fn. 1 (1987); *Gerkin Co.*, 279 NLRB 1012 (1986); *Goodman Holding Co.*, 276 NLRB 935 (1985).

⁶ The cases cited by the judge are inapposite. In none of those cases did the employer refrain from other unlawful conduct and continue the status quo as to employment benefits.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), when it threatened to freeze the wages and benefits of employees if the Union won the election in Case 1-RC-19320. The objection to the election is this same threat to freeze wages and benefits.

The General Counsel and Union argue that Respondent violated Section 8(a)(1) of the Act and the election should be set aside because of this violation and a new election ordered. Respondent argues that it did not violate the Act in any way and that the election results should be certified. The results of the October 19, 1989 election were 30 votes for the Union and 30 votes against the Union. Because less than a majority voted in favor of the Union, the Union lost the election. I agree with the General Counsel and the Union.

Trial was held before me in Boston, Massachusetts, on March 21 and 22, 1990.

On consideration of the entire record, to include posthearing briefs filed by the General Counsel, Respondent, and the Union, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Mantrose-Haeuser Company, an unincorporated division of Milmaster Onyx Group, Inc., has had an office and place of business in Attleboro, Massachusetts, where it is engaged in the manufacture and distribution of shellac.

Annually, Respondent, in the course and conduct of its business operations described above, sells and ships from its Attleboro facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Massachusetts and also purchases and receives at its Attleboro facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Massachusetts.

Respondent admits and I find that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

The Union, as noted above, lost an election among a unit of Respondent's employees on October 19, 1989. It was a Board-conducted election. On October 17 and 18, 1989, Respondent mailed to each of the 67 eligible voters a 19-page document entitled "The Decision is Yours." Each page of the document, in evidence as Joint Exhibit 3, is in large, easy to read print. The document was translated into Spanish and Portuguese for those employees who do not read English. Most of the copies were mailed on October 17, 1989.

Each year in November employees received a Thanksgiving turkey from Respondent. In addition, Respondent gave a Christmas bonus around the holidays and threw a Christmas party (sitdown dinner) for its employees. Lastly and

most importantly, Respondent gave its annual yearly raises in December on each year. Employee Perry Denham, who retired right after the October 19, 1989 election, testified without contradiction that these annual wage increases had been given every December for the 25 years he was employed by Respondent. This wage increases and benefits above described were all due within 2 months of the election.

On page 9 of "The Decision is Yours," the following language appears:

WHAT HAPPENS IF THE UNION WINS ?

NOTHING HAPPENS FOR AT LEAST SEVEN (7) CALENDAR DAYS.

THE LABOR BOARD PROVIDES THIS TIME FOR THE FILING OF "OBJECTIONS." IF OBJECTIONS ARE FILED, THE LABOR BOARD WILL CONDUCT AN INVESTIGATION BEFORE THE ELECTION RESULTS CAN BE CERTIFIED AS OFFICIAL. SUCH INVESTIGATIONS TAKE TIME. BARGAINING WOULD NOT EVEN BEGIN UNTIL THE INVESTIGATION WAS COMPLETED AND THE ELECTION RESULTS CERTIFIED.

WHEN BARGAINING FOR A FIRST CONTRACT DOES BEGIN, IT CAN BE A LONG, COMPLICATED AND TECHNICAL PROCEDURE WHICH CAN GO ON FOR MONTHS, A YEAR OR LONGER.

WHILE BARGAINING GOES ON, WAGE AND BENEFIT PROGRAMS TYPICALLY REMAIN FROZEN UNTIL CHANGED, IF AT ALL, BY A CONTRACT.

IF THE UNION WINS, YOU TAKE THE RISKS . . . YOU WILL HAVE TO "WAIT AND SEE" IF ANYTHING HAPPENS WITH WAGES AND BENEFITS. THE UNION, HOWEVER, IS FREE TO BEGIN COLLECTING DUES RIGHT AWAY.

It is alleged that this language sent to every eligible voter in this very close election (30 votes for the Union and 30 votes against the Union) amounted to a threat in violation of Section 8(a)(1) of the Act. I agree. The clear message is that wage and benefit programs will remain frozen during the period of negotiations which can take a long time. It is ambiguous if the December wage increase will go into effect or not and, of course, any ambiguity resolved against the author of the document.

In *Gould, Inc.*, 260 NLRB 54 (1982), the Board held that an employer violates Section 8(a)(1) of the Act if it has a practice of granting merit increases in August of each year but tells its employees before the election that negotiations, in the event the Union wins, can take over a year (going past August) and that wages and benefits remain frozen during this period of negotiations. See also *Frank's Nursery & Crafts*, 297 NLRB 781 (1990).

In *Alpha Cellulose Corp.*, 265 NLRB 177 (1982), the Board at 177-178 stated:

On October 11, 1979, the Union mailed a letter to all employees in the bargaining unit which discussed the procedure for calling a strike, dues, assessments, and the benefits of unionism. On October 16, October

23, and October 30, 1979, allegedly in response to the Union's letter, Respondent mailed letters to its employees. Certain of the statements in those letters are alleged as objectionable, and as unfair labor practices.

1. The October 16 letter from Respondent outlined the collective-bargaining process, and stated, *inter alia*, that "[n]egotiation is a long, drawn-out process that can take months, and in the meantime *all wages and benefits are frozen*. There can be *no wage increase or any benefits improved* by the Company during this period of negotiation."

Respondent argues that the letter merely recited the realities of collective bargaining in response to the Union's earlier letter which "misrepresented" that unionization necessarily meant better wages and benefits for the employees. Respondent asserts that there is no indication in the letter that employees would lose wages and benefits during negotiations or that it would not bargain in good faith. And Respondent claims that, in fact, during negotiations an employer cannot unilaterally implement a benefit without bargaining with the union and the letter apprises the employees of the fact.

We agree with the General Counsel, however, that Respondent violated Section 8(a)(1) of the Act by declaring that wages and benefits would be frozen during the period of contract negotiation. The letter, in fact, not only misinformed the employees as to the law by stating that the negotiations prevented employee wage increases, it also implied that a rejection of the Union would free the Company to grant raises and other benefits. The employees were thereby led to conclude that a penalty was attached to the exercise of their rights in choosing a bargaining representative. We thus find that the portions of the letter discussed above violated Section 8(a)(1) of the Act and were objectionable statements."

In another case, the Board was faced with language similar to the language in this case. The language contained in the Employer's campaign literature was as follows:

Bargaining a union contract does *not* start with wages and benefits you now have. *All of your present benefits and wages are open for negotiations.*

[This letter] is about what actually happens if the union wins the election If the union wins the election, it only means . . . one thing *We do not* have to agree to anything. We do not have to give in to anything Bargaining starts with a blank sheet of paper I can tell you for a fact that Company representatives would *bargain legally* with the union. They would bargain in good faith, but they would *bargain hard*

The Company would bargain in good faith with the union, but you should know that it frequently takes a long time to bargain. This is especially true when you are bargaining with the union for the first time, for a brand new contract, where you have not had one before. No one knows how long those negotiations would last. Sometimes these negotiations go on for months. Sometimes bargaining for a new contract goes on for

over a year. All the time this bargaining was going on, your wages and your benefits would be frozen! . . . Unless there was an agreement between the union and the Company, your wages and benefits would be frozen during negotiations and no one can say how long this wage freeze would last.

. . . .
In some instances, unions and companies have bargained and negotiated for a year or even more. This is especially true in a first contract. Unless there is agreement, your wages and benefits are *frozen* by law during this period."

The Board in *North Electric Co.*, 225 NLRB 1114 (1976), enf. 588 F.2d 213 (6th Cir. 1978), concluded that the above language amounted to a threat in violation of Section 8(a)(1) of the Act. In *North Electric Co.*, supra, the election, which the union lost, was set aside and a new election ordered.

It seems clear to me in light *Gould, Inc.*, supra, *Alpha Cellulose Corp.*, supra, and *North Electric Co.*, supra, that page 9 of "The Decision is Yours," which is set forth above, is violative of Section 8(a)(1) of the Act because it threatened employees with a loss of benefits if they selected the Union as their collective-bargaining representative. Clearly a threat to freeze wages and benefits is unlawful and it seems clear that threat to freeze wage and benefit *programs* is likewise unlawful. Does a threat to freeze a wage *program* mean that the December wage increase would be given or not? It is at least ambiguous and the language could reasonably be construed to mean there would be no December wage increase. Any doubt that a threat to freeze a wage *program* is tantamount to a threat to freeze wages was resolved by the Board in *299 Lincoln St.*, 292 NLRB 172 (1988), in which the Board held:

[T]he Respondent also engaged in unlawful conduct when its owner, William Dobson, admittedly stated in his November 18, 1985 speech to employees that they would "at least be subject to a very lengthy period of frozen wages and benefits" if the Union was voted in. Because the Respondent would be obliged, on the Union's demonstration of its majority in the election, to maintain in effect its current wage and benefit policies until negotiations resulted in an agreement on its change or an impasse, Dobson's statement to employees that wages and benefits would be frozen constituted a threat to deprive employees of benefits to which they otherwise would be entitled because they chose union representation. Accordingly, we find that this threat further violated Section 8(a)(1) of the Act. [Emphasis added.]

If a threat to freeze wage and benefit *policies* is unlawful, a threat to freeze wage and benefit *programs* is likewise unlawful.

I note that "The Decision is Yours" was mailed to employees on the eve of the election and Respondent did not gather the employees together to resolve any ambiguity in the document. Hence, the defense of "repudiation" und *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), is not available to Respondent.

This 8(a)(1) threat was not de minimis or isolated. It was communicated to every single eligible voter and went to one

of the most significant factors in employment, i.e., wages and benefits enjoyed by the employees. Does this violation warrant setting aside the election and ordering a new election? Yes.

As the Board noted in *Westek Fabricating*, 293 NLRB 879 fn. 2 (1989):

The Respondent contends that the single violation of Sec. 8(a)(1) here was de minimis and does not warrant setting aside the election. It is well settled that conduct violative of Sec. 8(a)(1) interferes with an election unless "the violations are such that it is virtually impossible to conclude that they could have affected the results of the election." *Enola Super Thrift*, 233 NLRB 409 (1977).

In this case, because the threat was communicated to all eligible voters on the eve of an election which could not possibly have been closer, it is obviously impossible to conclude

that Respondent's 8(a)(1) threat had no effect on the election outcome. The election must be set aside. See also *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce, and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it threatened to freeze the wages and benefits of its employees if they selected the Union as their representative for purposes of collective bargaining.

4. The aforesaid unfair labor practices affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not violate the Act in any other way. [Recommended Order omitted from publication.]