

Hopkins Nursing Care Center and Local 113, Minnesota's Health Care Union, SEIU, AFL-CIO, CLC, Petitioner. Case 18-RC-15115

December 16, 1992

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The National Labor Relations Board by a three-member panel, has considered objections to an election held on November 7, 1991,¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 33 for and 34 against the Petitioner.²

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Direction of Second Election.

The hearing officer recommended that the Petitioner's objections be overruled in their entirety. The Petitioner excepts to the hearing officer's overall findings and recommendations including, inter alia, the overruling of its objection IVC. This objection alleged certain coercive conduct, and during the course of the hearing on this objection, evidence was discovered indicating that the Employer threatened to retaliate against nursing assistants Hill and Schrupp by imposing more onerous working conditions on them because of their efforts on behalf of the Union. The Petitioner contends that the hearing officer, in finding that conduct de minimis, failed to consider the closeness of the vote and to apply the relevant standard for evaluating threats, which is whether such threats have a tendency to coerce and to affect the results of the election. We find merit in this exception, and we shall set aside the election based on the Petitioner's objection IVC.

The following findings are based on the credited testimony of nursing assistants Hill and Schrupp. On October 31, about 1:50 p.m., Director of Nurses Rosemary Jellen, Assistant Director Cathy Decheine, and Night Supervisor Nancy Lanz were gathered at the Employer's East desk. Jellen had just finished reading a newspaper article regarding the election campaign at Hopkins that quoted comments by Hill and Schrupp.

¹ All dates are 1991 unless indicated otherwise.

² The initial tally showed 31 for and 32 against the Petitioner with 4 determinative challenged ballots. On November 13, the Petitioner filed timely objections to the election. Thereafter, the parties entered into a stipulation regarding disposition of the challenges. On November 29, the Acting Regional Director approved the stipulation and issued an Order directing the opening of the challenged ballots. On December 2, the above revised tally of ballots issued. Finally, on December 19, the Regional Director issued a Report on Objections and order directing a hearing.

When Hill and then Schrupp arrived just before completing their shift, Jellen attempted to question them about the article, but Hill and Schrupp refused to discuss it at the nursing desk and in front of the patients. After Hill and Schrupp had punched out and were walking down the corridor toward the exit, Jellen followed them, waving the newspaper article. Again, she attempted to draw Hill and Schrupp into a conversation about the article but they refused. As Hill and Schrupp neared the exit, Jellen yelled at them stating, that "they would . . . float all over this building." The hearing officer found that Jellen also asked them who had "the most seniority, Schrupp or Hill" and told them that "if there were no seniority, then the floating policy would go into effect and they would float to work on different stations."

The hearing officer also found that employees, like Hill and Schrupp, who had more than 5 years of seniority did not have to "float,"³ and thus that Jellen was threatening them with the loss of a benefit that they enjoyed by virtue of their seniority. Nevertheless, she concluded that the threat was de minimis because it was isolated, it was made in a public hallway to two open union supporters who did not change their positions, and no evidence was presented of general dissemination. We disagree with her conclusion.

We find that Jellen's threat to "float" Hill and Schrupp "all over the building . . . to work on different stations" was not de minimis but constituted serious, objectionable conduct. The hearing officer erroneously relied on the fact that the threat did not change Hill and Schrupp's views. Their subjective reaction is irrelevant.⁴ The test, an objective one, is whether the conduct of a party to an election has the tendency to interfere with the employees' freedom of choice.⁵ We find that the test is met here, given the nature of the threat, the fact that Jellen, as director of nursing, had the power to effectuate the threat, the proximity in time of the threat to the election, and the closeness of the election.⁶

³ When employees "float," they are assigned to work at different nursing stations. Employees with at least 5 years of seniority do not "float." They are regularly assigned to the same work station.

⁴ The Board has long held that "the subjective reactions of employees are irrelevant to the question of whether there was, in fact objectionable conduct." *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). Accord: *Van Leer Containers*, 298 NLRB 600 fn. 2 (1990), enfd. 943 F.2d 786 (7th Cir. 1990); *Picoma Industries*, 296 NLRB 498, 499 (1989).

⁵ *Baja's Place*, 268 NLRB 868 (1983); *Weyerhaeuser Co.*, 247 NLRB 978 fn. 7 (1980); *Liberal Market*, 108 NLRB 1481, 1482 (1954).

⁶ *Copps Food Center*, 296 NLRB 394 (1989) (threat to discharge and blackball an employee if she signed a union card was not de minimis because of the seriousness of the conduct, the proximity to the election, and the closeness of the vote). The hearing officer's reliance on *Metz Metallurgical Corp.*, 270 NLRB 889 (1984), is misplaced. That case is factually distinguishable. There the alleged conduct occurred 17 days before the election and involved an isolated

Jellen's threat was directed at Hill and Schrupp in retaliation for their remarks in support of the Petitioner as reported in a newspaper article, at a time, 1 week before the election, when the threat was still likely to be fresh in their minds and the minds of any other employees who heard it. Further, the coerciveness of the threat was accentuated by Jellen's open resentment of their remarks and of them for making the remarks public,⁷ as demonstrated by her pursuing them down a hallway while waving the article about, after they had refused to discuss the article with her at the nursing station. When they again declined to talk about it, she yelled the threat at them as they were leaving the building. Finally, a switch of but one vote would have altered the election outcome.⁸ In this regard, the hear-

conversation between a low-level supervisor and one employee. There were 139 employees in the unit and the Petitioner lost the election by 24 votes. Under those circumstances, the Board concluded that the conduct could not have affected the results of the election.

⁷In her testimony, Jellen admitted that she was "unhappy with the article because it would reflect on the facility's reputation in the community."

⁸The revised tally of ballots was 33 for and 34 against the Union with no remaining challenges to be resolved. The Board gives great weight to the closeness of the election in deciding whether conduct is objectionable. *Phillips Chrysler-Plymouth, Inc.*, 304 NLRB 16

ing officer ignored evidence that several employees who were in the general area when Jellen yelled the threat out after the departing figures of Hill and Schrupp, were likely to have overheard it.⁹ But even if the threat only was heard by Hill and Schrupp, we would find that the other circumstances described above, suffice to establish that the threat reasonably had the tendency to interfere with their free choice because it tended to restrain and coerce them in the exercise of their Section 7 rights.¹⁰

Accordingly, we shall set the election aside and direct that a new election be conducted.

[Direction of Second Election omitted from publication.]

(1992); *Copps Food Center*, supra; *RJR Archer, Inc.*, 274 NLRB 335, 336 (1985).

⁹Indeed, employee William Gorackowski testified that he was on his way out of the building and that he observed Jellen and heard her yelling at Hill and Schrupp about the article. We also note that the Board, in some circumstances, may infer dissemination in close elections. See *Emerson Electric*, supra, 247 NLRB at 1370 fn. 14.

¹⁰*Heartland of Lansing Nursing Home*, 307 NLRB 152 (1992). *Copps Food Center*, supra. Because we have sustained objection IVC, we find it unnecessary to pass on the Petitioner's exceptions to the hearing officer's recommendation to overrule its remaining objections.