

Comet Electric, Inc. and International Brotherhood of Electrical Workers, Local 323, AFL-CIO, Petitioner. Case 12-RC-7404

September 20, 1994

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, DEVANEY, BROWNING, AND COHEN

The National Labor Relations Board has considered objections to an election held March 21, 1991,¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 10 against the Petitioner, with 16 challenged ballots.²

The Board has reviewed the record in light of the exceptions and brief, and has adopted the hearing officer's findings and recommendations³ only to the extent consistent with this decision.

The Petitioner's Objection 6 contends that the Employer interfered with the employees' free choice by requiring their attendance at a "captive audience" speech after their normal quitting time, without providing them full compensation for the time spent at the meeting and without distributing the employees' paychecks until the meeting concluded.

The following facts are not in dispute. On the morning of March 14, 1 week before the election, the Employer told its employees to report back to the shop at 3 p.m. for a meeting. The employees' regular quitting time is 4 p.m. Virtually all of the employees reported for the meeting, as instructed. At the meeting, which lasted from 3 to 5 p.m., the Employer's two co-owners made an antiunion speech to the assembled employees. None of the employees left the meeting or asked to leave while it was in progress.

Although the employees regularly receive their paychecks on Thursdays at 4 p.m., on March 14, a Thursday, the employees were not paid until the meeting

concluded at 5:30 p.m. As employee Allan Osier explained, "[D]uring this meeting they hadn't paid us so we wanted to get paid so everybody stayed."

Osier testified that after the meeting he suggested to several of his coworkers that they include the time spent at the meeting on their weekly timecards. Two employees claimed 3 hours for attending the meeting, another employee claimed 2 hours, and a few claimed 1 hour. Most employees, however, did not claim any time for the meeting.

None of the employees received full compensation for the time spent at the meeting. Employees who did not specifically request payment past 3 p.m. received nothing. Employees who requested payment for 1 to 3 hours for the meeting received only 1 hour of pay for the period 3 to 4 p.m. The Employer refused to pay any employee for the 1-1/2 hours spent at the meeting beyond the employees' regular 4 p.m. quitting time.

On the following payday, which was the day of the election, Osier requested to see his timecard and noticed that the time he had claimed for the meeting had been changed from 3 hours to 1 hour. When he asked about this change, the Employer's bookkeeper said "she could not pay everybody for that meeting and she said—and something to the effect that I started this all and she would not pay me for it."

On these facts, the hearing officer found it unnecessary to decide whether refusing to pay employees for time spent at a captive audience speech beyond their regular quitting time and failing to distribute paychecks until the meeting ended would constitute objectionable conduct. The hearing officer instead concluded that there was "no factual basis" to support such an objection. He noted that employees who asked to be compensated for the meeting were paid for 1 hour. He also found that no employee requested his or her paycheck before the meeting began or during the meeting, and that there was no evidence that such request, if made, would have been denied.

Contrary to the hearing officer, we find Objection 6 to be well supported by the record. Initially, we reject any implication in the hearing officer's report that the employees' attendance at this meeting was voluntary. Thus, on March 14, the Employer explicitly directed the employees to return to the shop at 3 p.m. to attend the meeting. The meeting then began during the employees' workday, when the Employer had the recognized authority to direct its work force, including requiring their attendance at company meetings. Further, although the employees' shift ended at 4 p.m., the meeting continued thereafter without interruption, tender of paychecks, or assurances from the Employer that employees were free to leave. In these circumstances, it is unlikely that employees would feel free to stand up and leave at their normal quitting time, in the midst of the Employer's presentation.

¹All dates are in 1991 unless otherwise indicated.

²The Board, in an unpublished Order dated August 28, 1991, adopted the Acting Regional Director's recommendation that the challenges to eight ballots be sustained, that the challenge to one ballot be overruled, and that the seven remaining challenges be resolved by a hearing. At the hearing, the parties stipulated that six of the remaining challenged voters are ineligible to vote, and that the other remaining challenged voter is eligible. In light of this disposition, the two challenged ballots cast by eligible employees are not determinative, and it is unnecessary to open and count their ballots.

³We agree with the hearing officer's recommendation to overrule Petitioner's Objection 9 concerning the consumption of alcohol near the polling place for the reasons stated in the hearing officer's report. Members Browning and Devaney note in addition that there was no clear proof that the Employer purchased and/or provided the alcohol.

Rather, employees reasonably would fear that by walking out during the owners' speech against the Union, they would publicly identify themselves as union supporters and invite retaliation.⁴ In addition, because the Employer withheld the employees' paychecks during this meeting, it is unreasonable to expect employees to leave before being paid. Accordingly, we find that employee attendance at the March 14 meeting was mandatory, and that employees were compelled to remain for its entire 2-1/2-hour duration.

In addition to requiring its employees to attend the meeting, we find that the Employer did not pay them for their attendance. Thus, as noted above, it is clear that the Employer's speech continued well past the normal 4 p.m. quitting time, and that no employee was compensated for the 1-1/2 hours between 4 and 5:30 p.m. Indeed, most employees were not even paid for the 1 hour of the meeting that occurred during the 3 to 4 p.m. portion of their usual workday.

Although the hearing officer acknowledges that employees may not have been fully compensated for attending the March 14 captive audience speech, he concludes that any loss they suffered was monetary and would not be remedied by setting aside the election. We disagree, and we conclude that the election should be set aside. In this regard, we note that the captive audience speech was occasioned by the Union's campaign. Because of that speech, employees were required to give uncompensated time to the Employer. In addition, the employees were required to endure the uncompensated meeting as a condition of receiving the pay that was due them. In these circumstances, employees would reasonably perceive that the Union's campaign had caused them to suffer an economic detriment. Although under *Peerless Plywood*⁵ and its progeny, the Employer was privileged to conduct a captive audience meeting for its employees on March 14, by failing to pay employees for the time spent in the meeting and by delaying their paychecks, it effectively punished them for seeking union representation.

Under these circumstances, we find that the Employer interfered with employee free choice by requiring employees' attendance at a captive audience speech without fully compensating them for the time spent at the meeting, and without distributing their paychecks until the meeting concluded. Accordingly, we sustain Petitioner's Objection 6, set aside the election, and direct that a second election be conducted.⁶

⁴Cf. *House of Raeford Farms*, 308 NLRB 568, 570-581 (1992), enf'd, 7 F.3d 223 (4th Cir. 1993).

⁵*Peerless Plywood Co.*, 107 NLRB 427, 429 (1953).

⁶Member Devaney would find the Employer's conduct with respect to the captive audience speech objectionable under all the circumstances. Thus, in addition to factors identified by his colleagues, Member Devaney notes that the employees were required to remain at the workplace and listen to the antiunion speech on their own time after the workday had ended under coercive circumstances in which

[Direction of Second Election omitted from publication.]

MEMBER STEPHENS, dissenting.

I think the hearing officer correctly overruled the Petitioner's objection to the manner in which the Employer conducted a "captive audience" speech.

Except for the 24-hour period preceding an election, it is not unlawful for an employer to subject its employees during working time to such antiunion remarks. In the instant case, a week before the election, 1 hour before quitting time, on a day when paychecks are distributed (normally at the close of business at 4 p.m.), the owners of the Employer assembled its work force to deliver such a campaign speech. However, the problem which gives this case its novel twist is that the owners apparently became too loquacious: They did not conclude the meeting at 4 p.m., but continued talking for another hour and a half. As the hearing officer found, no employee left the meeting before it ended, but there is no evidence that the Employer prevented any employee from leaving after 4 p.m. Likewise, there is no evidence that the owners offered to distribute the paychecks prior to the end of the meeting, but neither is there any evidence that the owners would have withheld checks from anyone who had attempted to depart anytime after 4 p.m. While it is true that the owners did not offer to pay the employees for staying beyond the normal quitting time, it is also true that no employee who made a claim for any time after 3 p.m. was paid less than he would have expected to earn for working a regular shift that day.

In my view, this hearing record is simply too ambiguous to support my colleagues' factual finding that the employees were "compelled" to attend the entire meeting, much less their legal conclusion that the employees reasonably perceived the union campaign as causing the infliction of economic punishment. To be sure, had the Petitioner, as objecting party, presented evidence that employees were subjected to real economic deprivation¹ or trapped into submitting to one-on-one barrages of antiunion rhetoric either during or after working hours, the Board might well be justified in finding objectionable conduct.² However, given the

they would reasonably fear that any attempt to leave would mark them as union supporters and subject them to the risk of reprisals. In this regard, Member Devaney also notes that the Employer specifically tied its refusal to fully compensate employees for the time spent at the meeting to Osier's protected activities in encouraging his coworkers to request full compensation.

¹Cf. *Martin Industries*, 290 NLRB 857 (1988) (withholding regular annual wage increase during representation campaign without giving employees lawful explanation violates the Act). I would not equate failure to give an expected pay increase with the Employer's apparent failure here to take scrupulous care that the employees were compensated for every minute spent listening to the speech.

²Cf. *Peoria Plastic Co.*, 117 NLRB 545, 547 (1957) (home visits by high company officials urging rejection of the union found objectionable regardless of whether the officials' actual remarks were co-

inadequacy of the record, I think the majority has

ercive); *General Shoe Corp.*, 97 NLRB 499, 501 (1951) (ordering employees individually into managers' offices to be lectured about why they should oppose the union found objectionable). I do not see the group meeting involved in the present case as having an equivalent coercive potential.

³The party challenging an election has the "burden of showing by specific evidence at the hearing that 1) improprieties occurred, and 2) that they interfered with the employees' exercise of free choice to such an extent materially to have affected the election results." *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1343 (9th Cir. 1987), citing *NLRB v. Krafcor Corp.*, 712 F.2d 1268 (8th Cir. 1983). See also *NLRB v. Mattison Machine Works*, 365 U.S. 123 (1961) (burden of proof upon objecting party to show prejudice to the fairness of

failed to set out a clear theory of how the employees have been coerced in their choice of bargaining representative.³

the election); *Caron International*, 246 NLRB 1120 (1979) (even if conduct is violative of the Act, under the circumstances it may be of such a de minimis nature as to not affect the results of the election).

With respect to Member Devaney's reliance on alleged retaliation against employee Osier's "protected activities in encouraging his co-workers to request compensation," I note that the Petitioner has never urged this distinct theory in support of its objection. It has simply argued that the Employer implicitly required the employees to stay beyond quitting time and that failure to pay employees extra for this was objectionable.