

**Contech Division, SPX Corp. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, Petitioner. Case 7-RC-20485**

December 19, 1995

**DECISION AND DIRECTION OF SECOND ELECTION**

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 12, 1995, 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 154 for and 196 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations,<sup>1</sup> and finds that the election must be set aside and a new election held.

The Petitioner filed six objections to the election. The hearing officer recommended sustaining (1) that part of Objection 1 alleging Employer predictions of loss of customer business as an inevitable result of a union victory; (2) Objection 3 (alleging Employer threats that it would close the plant and go out of business, or that customers would remove work from the Employer if the Union won the election); and (3) Objection 5 (alleging Employer confiscation of union literature). We agree with the hearing officer, for the reasons fully set forth in his report, that Objection 5 should be sustained. We also agree with him, for the reasons set forth below and in his report, that those parts of Objections 1 and 3 alleging Employer predictions of loss of customer business as an inevitable result of a union victory should be sustained. Accordingly, we direct that the election be set aside and that a second election be conducted.<sup>2</sup>

I. FACTS

The Employer produces automotive parts for TRW, Ford Motor Company, and other automotive suppliers

<sup>1</sup> Member Cohen finds it unnecessary to pass on the hearing officer's recommendations regarding Objections 1 and 3 as he agrees that Objection 5 should be sustained.

<sup>2</sup> The hearing officer recommended overruling the remaining objections. We reject the Petitioner's exception and we adopt the hearing officer's recommendation to overrule Objection 6. In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations to overrule that part of Objection 1 alleging Employer threats and predictions of strikes and violence if the Union won the election, and Objections 2 and 4.

at the Employer's Dowagiac, Michigan plants 1 and 3 involved in this proceeding.

On November 17, 1994,<sup>3</sup> 3 days after the Union filed the representation petition in this case, Employer Human Resources Manager Dwayne Weber distributed a letter to employees asserting, among other things, that over two-thirds of the 600 plants that had closed in Michigan over the past 2 decades had union work forces.

One of the Employer's election campaign handouts to employees contained a reprinted newspaper article concerning Ford's removal of their manufacturing dies from a struck supplier's plant in Indiana. In the margins of the reprinted pages, the Employer emphasized two statements from the article, as follows: "DIES OWNED BY FORD MOTOR COMPANY," and "THE DIES WOULD HAVE STAYED AT THE PLANT ANOTHER FOUR YEARS IF THE STRIKE HAD NOT OCCURRED." The Employer also emphasized in the margin that the union involved in the article was the UAW—the Petitioner in this case. Another of the Employer's campaign handouts to employees contained a reprint of a 1982 letter from one of the Employer's customers to the Employer's then-general manager, in which the customer states that it had "*closed its doors . . . due to union difficulties*" (emphasis in handout as distributed by the Employer). On the back page of both of the above handouts, the Employer printed the following message, in large print: "SAY NO TO THE POSSIBILITY OF LOST CUSTOMERS, LOST JOBS, LOST PAY, LOST BENEFITS, AND OTHER TROUBLES—VOTE NO."

Also during the critical period, the Employer showed a series of videos to the employees, in small group meetings. One video dealt with strikes and plant closings at plants where employees were represented by unions, focusing primarily on the UAW.

Around Christmas, the Employer removed production of a Ford part (identified as MN-12) from its Dowagiac, Michigan facility involved in this proceeding, and assigned production of it to its Auburn, Indiana facility, which is not involved in this proceeding. The Employer did not, however, provide the Dowagiac employees with an explanation for why production of this Ford part was being removed from the facility. Director of Manufacturing Joe Barry testified that although he normally would have considered it important for morale purposes to let the Dowagiac employees know why production of a part was leaving the plant, he did not, in this instance, issue any explanatory communication to the employees, and he offered no reason at the hearing for not having done so.

The Employer also manufactures rack and pinion housing castings for TRW at the Dowagiac facility, using TRW's manufacturing dies in the process. Manu-

<sup>3</sup> All dates are November 1994 through January 1995 unless otherwise stated.

facture of this product constitutes about 90 percent of the output of plant 1 and about 15 percent of the output of plant 3. The Employer's 5-year contract with TRW for the manufacture of this product was scheduled to expire on December 31, 1995, about a year after the scheduled election. A few days after the Union filed its representation petition on November 14, the Employer and TRW began negotiations for a successor contract, to continue production of TRW's castings. During this first negotiating session, TRW's director of purchasing, Gary Mahon, told the Employer's director of sales and marketing, Robert Davis, that TRW wanted to postpone continued contract negotiations until the Employer's union representation issue as well as some longstanding quality and delivery issues between the Employer and TRW were resolved.

In a December captive audience speech, Manufacturing Director Barry brought up the subject of TRW's relationship with the Employer, telling the employees that TRW would not sign a contract for production of the castings until after the election. In a separate captive audience speech, Manufacturing Manager Brad Farver again raised the subject of TRW's attitude toward unionized suppliers, referring to a letter from TRW to the Employer, and indicating to the employees that TRW executives did not want to work in companies that had unions, and telling them that TRW had communicated a concern to the Employer about the possibility of the Employer becoming unionized. Farver, however, declined to elaborate when asked by employees at this meeting to explain his comments about why TRW would not want to deal with the Employer if it became unionized. Nor did the Employer explain to the employees that product quality and delivery issues were contributing factors in TRW's hesitancy at entering into a long-term renewal contract.

During a series of late December meetings with groups of employees called to show an antiunion video depicting strike violence, Barry and Farver each brought up the subject of the Employer's above-contract renewal negotiations with TRW. Barry told the employees that the negotiations had been suspended "until we got some of our problems behind us." Farver told the employees that TRW had postponed long-term agreements "until our issues are resolved."

During the 2 weeks immediately preceding the election, the Employer displayed large poster photographs of closed manufacturing plants. These posters remained on display in both plants until just before the election. Then, on January 10, 2 days before the election, the Employer distributed a handout signed by Human Resources Manager Weber that explained that all of the plants pictured in the posters were in Michigan and were now closed, that all of the employees who had worked in those plants were now laid off, many permanently, and that in each instance the laid off em-

ployees had been represented by a union. Weber's memo went on to state that since 1987, there had been a reduction of almost 400 unionized (UAW) jobs at the Employer's parent company plant in Muskegon, Michigan, and that within the past year, 105 unionized jobs were lost when the Employer's parent company closed the Ravenna, Michigan plant because of "ineffective operation." The memo said that the point was simple: **"A UNION DOES NOT PROVIDE JOB SECURITY."**

In the meantime, about a week or two before the election, Supervisor Mark Hunsberger told at least three or four employees individually that the Employer was known for correcting its mistakes, and that TRW had sent one of its dies to another company to see if they could produce the part.

On January 9, 3 days before the election, the Employer's president, Al Zagotta, sent a letter to all employees in which he informed them that the Employer was in a "very critical stage in its relationship with certain key customers like TRW, Ford, and Saginaw." Zagotta's letter continued:

I am concerned that if the Dowagiac plant develops a reputation for not being a dependable supplier—because of labor problems, a UAW-led strike, or even the possibility of a strike every time the contract comes up for renewal—our customers may become nervous and look elsewhere for another source for their parts.

There is, however, no objective factual evidence to support Zagotta's implication to employees that the Employer's customers "become nervous" as a result of the mere presence of a union.

In a captive audience speech to employees on January 10, 2 days before the election, Division Manager Gary Walker emphasized that the Employer was "greatly concerned about the impact the union could eventually have on our customers like TRW and our ability to compete." He also referred to what he termed the "horrendous strike record of the UAW," "the 100's [hundreds] of closed plants in Michigan and the hundreds of thousands [of] UAW members who lost their jobs . . . as a result of inefficient operation and UAW-led strikes." Walker told the employees that from what he had personally seen, "the UAW is always at the heart of conflict." Walker told the employees about three plants owned by the Employer's parent company in Western Michigan (which were also described in Human Resource Manager Weber's January 10 memo to employees, distributed the same day as Walker's captive audience speech), which were unionized and either partially or totally shut down because they were allegedly no longer competitive.

Also on January 9 and 10, during the same 2-day period when Zagotta and Walker made their above

statements to the employees, and just a few days before the January 12 election, TRW Quality Representative Jack Fannon made a very thorough inspection tour of the Employer's Dowagiac facility, accompanied by an entourage of Employer managers and supervisors—all of which was highly visible to the employees.

## II. ANALYSIS AND CONCLUSIONS

The Supreme Court has cautioned that while an employer may make a prediction to its employees about the precise effect that it believes that unionization will have on the company:

[T]he prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [the employer's] control or to convey a management decision already arrived at to close the plant in case of unionization. . . . If there is any implication that an employer may or may not take action solely on its own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion . . . . [A]n employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal taken solely on his own volition."<sup>4</sup>

Applying these principles to the facts in this case, we agree with the hearing officer that parts of the Employer's speeches, statements, and other communications had a reasonable tendency to create and reinforce an atmosphere of fear among the employees that a union victory could result in loss of work, jobs, and customers, and in-plant closure.

Thus, as the hearing officer found, in the absence of an explanation from the Employer to the employees for the removal of production of Ford's MN-12 part, the reprinted newspaper article distributed to employees about Ford's removal of their manufacturing dies from a struck supplier's plant in Indiana took on added significance for the employees, and would tend to suggest to them that the removal of production of Ford part MN-12 from the Employer's Dowagiac facility may have been related to the presence of the Union.

As the hearing officer also found, Barry and Farver put the blame for the postponement of the renewal of the TRW contract on the presence of the Union and the election. We also agree with the hearing officer's finding that given the nature of Hunsberger's statement that the Employer's largest customer was trying out al-

ternative suppliers, this statement probably would have been widely disseminated throughout the unit.

Additionally, the hearing officer found, and again we agree, that the comments to employees by Barry and Farver about the postponement of contract renewal negotiations with TRW, and Hunsberger's comments to employees about TRW trying out alternative suppliers, all raised by these Employer officials in the context of the Employer's campaign against the Union, would reasonably lead the employees to conclude that TRW's relationship with the Employer was in jeopardy because of the Union, and that the outcome of the election could determine whether the TRW contract was renewed.

As the hearing officer further found, in the context of the statements of Barry, Farver, and Hunsberger, which gave the employees reason to believe that TRW and Ford were already retreating from their relationship with the Employer because of the Union, Walker's statements in his January 10 speech had a reasonable tendency to make the employees fear that a union victory could result in loss of work for the Employer.

The hearing officer also found that the impression conveyed to the employees by the comments of Barry, Farver, and Hunsberger was further amplified—intentionally or not—by TRW Representative Fannon's highly visible quality inspection tour just a few days before the election, which in turn (1) gave added weight to Zagotta's stated concern that the Employer's customers would become nervous about the Union's presence, and (2) provided additional context for Walker's expressed concern about whether the Employer's relationship with TRW would be affected by the outcome of the election. Thus, the hearing officer found that the Employer created an atmosphere in which Zagotta's and Walker's end-of-campaign statements to employees would reasonably have been understood by them as an implicit prediction that work and jobs would be lost if the Union won the election. We agree with the hearing officer, and we find that the record does not establish that this prediction is based upon objective facts beyond the Employer's control, and that it thus constitutes an objectionable threat of lost customers, warranting the setting aside of the election.

As seen, the Employer's president, Zagotta, told employees that if the plant developed a reputation for undependability "because of labor problems, a UAW-led strike, or even the possibility of a strike . . . our customers may become nervous and look elsewhere." The Employer argues that Zagotta "did not imply that the presence of the UAW *alone* would *definitively* cause Contech's customers to become nervous," but instead only told them that the customers "*may*" become nervous, and then only "*if*" the plant got a bad reputation because of, *inter alia*, the "*possibility*" of a

<sup>4</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619 (1969) (citations omitted).

strike. Thus, argues the Employer, Zagotta never threatened that adverse consequences would be deliberately inflicted by the Employer if the Union won the election. But we find that, under the totality of the campaign circumstances set forth above, the employees could reasonably infer from Zagotta's statements that customers, or at least work, would be lost if the Union won the election. The Supreme Court's closing guidance in *NLRB v. Gissel*, supra, is particularly applicable here:

[An employer] can easily make his views known without engaging in "brinkmanship" when it becomes all too easy to "overstep and tumble [over] the brink". . . . At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.<sup>5</sup>

The Employer argues further that Zagotta's and Walker's statements are unobjectionable under *NLRB v. Pentre Electric*, 998 F.2d 363 (6th Cir. 1993). We do not agree, because we find that case substantially distinguishable from this one.

In a speech to employees about a month before the election in *Pentre*, the employer's president and owner, Luff, said that specified customers of the employer did not use union contractors. He told the employees that he therefore thought that if they chose to be represented by a union, three of the employer's current customers would stop doing business with the employer. He also told them that he thought the company would not have the same customer base if the employees chose to be represented by a union, and that he did not know how the company would go about getting another customer base to replace it. Luff also told the employees that they would not have the jobs they had now if they had been represented by a union, and that he thought that it would be very difficult for them to get work if they chose to be represented by a union.

Luff also told the employees, however, that he thought the company could "make it," that it had been successful for 6 years and he wanted to keep it that way, and that he thought it would prosper.

During the week before the election in *Pentre*, the employer's vice-president and co-owner, Meehan, met with about 10 employees in separate one-on-one conversations. He told each of them that in the employer's industry, electrical contracting, the work that the employer was doing was traditionally done by open shop companies, and that the employer was not doing union work and was not competing against union contractors. Meehan also told them that almost all of the employer's large customers were strictly open shop companies, that it would be difficult for the employer to keep these particular customers if it became a union contrac-

tor, that if the employer became a union contractor it would have to establish new customers, and that he was not prepared to reestablish the company with a new customer base.

The court found, contrary to the Board, that the executives' statements were protected under Section 8(c) of the Act, and thus not in violation of Section 8(a)(1). The court noted early in its analysis that "it is often difficult in practice to distinguish between lawful advocacy and threats of retaliation."<sup>6</sup> The court found, however, that the executives' statements in question were nothing more than predictions about the consequences of the employer's unionization, and that there was nothing in the record to show that these predicted consequences were driven by the employer's desire to punish its employees for voting in favor of the union.<sup>7</sup> More specifically, while the court recognized that Section 8(c) does not protect employer predictions about the effects of unionization if they have a reasonable tendency to have a coercive effect on the employees, it found that the reasonable tendency of the statements of the employer's executives was not coercive in effect.<sup>8</sup> In this regard, the court noted that Luff simply and accurately told the employees that most of the employer's customers did not employ union contractors, that he consequently predicted that the employer would therefore lose customers and would have to build a new customer base if the union won the election—and that he did not intimate that the employer would close the plant as a result of union animus. In short, the court found that Luff conveyed nothing more than his analysis of the likely economic consequences of unionization of the employer, in light of his knowledge of the employer's customers and competitors, and on the basis of matters outside of his control. The court also noted that Luff made no threats and did not intersperse his comments with comments against the union. In fact, as the court particularly noted, Luff even told the employees that the company *would prosper*, and that he and Meehan wanted to continue the company on its successful course.

There were simply no such words of encouragement from the Employer or its executives in the case at hand, and the Employer's words of discouragement and predictions of adverse consequences of unionization were, unlike in *Pentre*, continuous, pervasive, and clearly far more extensive than the remarks of Luff and Meehan in *Pentre*.

More particularly, and unlike in *Pentre*, the Employer here created and reinforced an overall atmosphere of fear among the employees that a union victory could result not only in loss of work and customers, but in plant closure itself. In the midst of all

<sup>5</sup> Id. at 620 (citation omitted).

<sup>6</sup> 998 F.2d at 369 (citation omitted).

<sup>7</sup> Id.

<sup>8</sup> Id.

this, and particularly around the same time that the Employer was warning the employees that TRW would not renew its long-term production contract until after the election, the Employer, at Christmas-time, inexplicably removed production of a *Ford* part from its Dowagiac facility. The employer in *Pentre* engaged in no such comparable conduct in the context of its warnings about the possible loss of customers resulting from unionization. Indeed, the Employer here followed its failure to explain the removal of production of the Ford part around Christmas with a display of large poster photographs of closed manufacturing plants, which it left on display until just before the election, at which time it then (1) explained to the employees that these had all been unionized plants, and (2) told several employees that TRW had already actually shifted some of its production away from the Employer. There was no comparable employer conduct in *Pentre*.

Thus, unlike in *Pentre*, it was not until the Employer had set the stage with the above conduct, statements, and messages that, only 3 days before the election, President Zagotta told the employees that the Employer was at a “very critical stage in its relationship with certain key customers like TRW, Ford, and Sagi-

naw,” and that the Employer’s customers “may become nervous and look elsewhere for another source for their parts” if the Dowagiac plant developed a reputation for undependability because of, among other things, “labor problems . . . or even the possibility of a strike.” The full-blown inspection visit from TRW to Dowagiac in the last remaining days before the election gave the employees actual notice of the asserted “nervousness” of one of the Employer’s biggest customers.

Clearly, then, the circumstances addressed by the court in *Pentre* are substantially different in scope and intensity from those created by the Employer here. Unlike in *Pentre*, in the final analysis, there is no evidence here that the Employer’s customers would cease being customers simply because the Employer was unionized. The Employer’s asserted belief that its best customers would desert it in the face of unionization is not, in our view, supported by the record, and, unlike the court’s assessment of the remarks in *Pentre*, does not convey the Employer’s belief as to demonstrably probable consequences beyond its control.

[Direction of Second Election omitted from publication.]