

Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL-CIO (Sands Point Nursing Home) and Kenneth McCarthy and Geraldine Esnes and United Industry Workers Local 424, a Division of United Industry Workers District Council 424. Cases 29-CB-9393, 29-CB-9403-2, and 29-CB-9515

May 31, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On December 15, 1995, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed limited exceptions and a brief in support, and a brief in support of the judge's decision.

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

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 and to adopt the recommended Order as modified and set forth in full below.¹

In addition to the violations found by the judge, we find that Respondent Local 144 also violated Section 8(b)(1)(A) by its agent Rafael (Tito) Vargas' statement to employees that Respondent Local 144 would find out who signed cards for rival Local 424 and would sue those employees. This constitutes a threat to the employees for exercising their Section 7 rights. The complaint specifically makes that allegation, and the judge credited employee Geraldine Esnes' testimony that Vargas made the threat. See *Utility Workers Local 1-2 (Consolidated Edison)*, 312 NLRB 1143 fn. 2 (1993).

We also find that Respondent Local 144 violated Section 8(b)(1)(A) by threatening unspecified reprisals against employees when Vargas told them that Respondent Local 144 "has their ways." Vargas' statement was a response to employee Elaine Baxter's observation that it sounded as if Vargas was threatening the employees when he told them that Respondent Local 144 would find out who signed cards for the rival Local 424, that Respondent would get even with the employees, it would sue them, and they would end up with no medical insurance and possibly no job. See *Motion Picture Studio Mechanics Local 52 (Michael Levee Productions)*, 238 NLRB 19, 21 (1978).

We shall modify the judge's conclusions of law, Order, and notice accordingly.

¹We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB No. 23 (May 8, 1996).

AMENDED CONCLUSIONS OF LAW

Add the following as paragraphs 7 and 8 to the judge's conclusions of law and renumber the subsequent paragraph.

"7. The Respondent violated Section 8(b)(1)(A) of the Act by threatening to sue employees if they join, support, or assist Local 424.

"8. The Respondent violated Section 8(b)(1)(A) of the Act by threatening employees with unspecified reprisals by stating that 'the Union has their ways.'"

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL-CIO, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Telling employees that they were not allowed to sign cards for Local 424, and telling them that they should retrieve those cards.

(b) Threatening employees that those employees who signed cards for Local 424 would have no medical insurance and possibly no job.

(c) Threatening employees with physical harm, by telling employees that the Respondent was "into breaking legs" or "we'll break your legs."

(d) Threatening employees that the Respondent would find out who signed cards for Local 424 and would "get even" with employees, and would file charges against employees to remove them from the Respondent, because they signed cards for Local 424.

(e) Threatening to sue employees if they join, support, or assist Local 424.

(f) Threatening employees with unspecified reprisals by stating that "the Union has their ways."

(g) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business office and meeting hall copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places including all places

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director for Region 29 sufficient copies of the notice for posting by Sands Point Nursing Home, if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees that they are not allowed to sign cards for Local 424, or tell them that they should retrieve those cards.

WE WILL NOT threaten employees that those employees who signed cards for Local 424 would have no medical insurance and possibly no job.

WE WILL NOT threaten employees with physical harm, by telling employees that we are “into breaking legs” or “we’ll break your legs.”

WE WILL NOT threaten employees that we would find out who signed cards for Local 424 and would “get even” with employees, and would file charges against employees to remove them from Local 144 because they signed cards for Local 424.

WE WILL NOT threaten to sue employees if they join, support, or assist Local 424.

WE WILL NOT threaten employees with unspecified reprisals by stating that “the Union has their ways.”

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME AND ALLIED SERVICES UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Tracy Belfiore, Esq., for the General Counsel.
Burton M. Epstein, Esq. (Vladeck, Waldman, Elias & Engelhard, P.C.), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge and a first amended charge filed in Case 29-CB-9393 by Kenneth McCarthy, an individual, on November 4, 1994, and January 10, 1995, respectively, and based on a charge and a first amended charge filed in Case 29-CB-9403-2 by Geraldine Esnes, an individual, on November 15, 1994, and January 5, 1995, respectively, a consolidated complaint was issued on February 24, 1995, against Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL-CIO (Respondent or Local 144).

Thereafter, based on a charge filed in Case 29-CB-9515 by United Industry Workers Local 424, a Division of United Industry Workers District Council 424 (Local 424) on March 21, 1995, a consolidated amended complaint was issued on May 3, 1995, against Respondent.¹

The complaint alleges essentially that on October 31, 1994, Respondent’s agent made various threatening statements to employees in violation of Section 8(b)(1)(A) of the Act. Respondent’s answer denied the material allegations of the complaint, and on November 2, 1995, a hearing was held before me in Brooklyn, New York.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Sands Point Nursing Home (Employer), a sole proprietorship having an office and place of business at 1440 Port Washington Boulevard, Port Washington, New York, is engaged in the operation of a 130-bed nursing home providing long-term health care to the public. During the past year, the Employer derived gross revenues in excess of \$100,000, and purchased and received at its facility medical supplies, fuel oil, and other goods and materials valued in excess of \$50,000 directly from firms located outside New York State.

Respondent admits and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

¹ Respondent’s answer denied knowledge or information concerning the filing and service of the charges and amended charges. An examination of the documents, including the receipts and affidavits of service, establishes the proper filing and service of all the charges and amended charges.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

Respondent has represented the licensed practical nurses, nurses aides, and housekeeping employees of the Employer for a number of years.

In about the fall of 1992, Local 424 unsuccessfully attempted to organize those employees. It tried again in about October 1994, when on about October 24, Local 424's agents distributed authorization cards at the facility.

Rafael (Tito) Vargas, Respondent's business agent and its admitted agent, became aware of the organizing drive, and visited the Employer's premises on October 31, and spoke to the employees during their lunch hour in the employees' dining room.

Vargas spoke generally to the employees and then approached a single table. His remarks will be discussed separately.

Remarks to Employees Generally

Geraldine Esnes, a licensed practical nurse, was seated at lunch with Kenneth McCarthy, a maintenance employee, and with nonunit employees Dina Ellenbogen, a registered nurse, and Michelle Dtugokenski, a social worker. A total of about 15 to 20 employees were present in the dining room.

Esnes testified that Vargas entered the room and began yelling that he heard that the employees had signed cards for Local 424. He told them that they were "not allowed" to do that, and that whoever signed such cards should attempt to retrieve them. Vargas added that Respondent would find out who signed the cards and it would "get even" with the employees. He also said that Respondent would sue them, and when they "got done" with them, they would have no medical insurance and "possibly" no job.

Esnes stated that employee Elaine Baxter told him that it sounded like he was threatening the workers, and Vargas replied that "the union has their ways."

McCarthy testified that Vargas said that he was "disgusted" with the employees for signing cards for Local 424, and told them to recover their cards, adding that if they do not reclaim their cards, they would lose their benefits. Vargas also stated that Respondent was "going after" two people, against whom charges would be filed in order to remove them from that union.

Ellenbogen testified that she heard Vargas shouting to employees that they would lose their jobs and benefits if they signed cards for another union or if they "wanted to go with another union."

Remarks at Esnes' Table

At that point, Vargas approached the table at which Esnes and the others were seated. He apparently did so because Ellenbogen and Dtugokenski were engaged in conversation. He told those at that table to "shut up" because their talking interfered with his presentation. Ellenbogen and Dtugokenski then left.

Esnes stated that Vargas said that he heard that McCarthy had initiated the Local 424 organizing drive. McCarthy denied being involved in the campaign, and replied that in 1992 he was "blamed" for the same thing and that Respondent put him "through hell," adding that he would not "take

the rap" for it this time. Vargas replied that he would "respect that."

Vargas then said that it was probably one of those "lousy" licensed practical nurses who brought in Local 424. Esnes remarked that she heard that in the last campaign, a licensed practical nurse had been accused of bringing in Local 424 and that her car's tires were slashed. Vargas replied that Respondent does not slash tires anymore—"we're into breaking legs."

McCarthy testified that Vargas told him that he was very "disgusted" with him, and asked him why he was helping Local 424 organize. McCarthy asked him what he was talking about. Vargas replied that he was told that McCarthy was assisting Local 424. McCarthy stated that Esnes mentioned the alleged prior tire slashing incident, to which Vargas replied that "we don't resort to tire slashing, we'll break your legs."

Neither Esnes nor McCarthy reported the threats to the police or sought protection from any source.

Later Events

On November 3, Local 424 filed a petition for representation in Case 29-RC-8391.²

Esnes testified that about 2 months after the dining room incident, Vargas told her that McCarthy was withdrawing his charge against Respondent, and asked whether she would do the same. Esnes replied that she did not believe that in exchange for her union dues the workers should be threatened by Respondent in the manner in which they were. Vargas answered that he was very angry at the time, and apologized for what he said, adding "things like this happen."³

Respondent's Evidence

Vargas stated that he did not think that the employees were being disloyal to Respondent by participating in the organizing campaign and signing cards for Local 424. Rather, he believed that they were "confused" and did not know what they were becoming involved with, and were not aware of the effects of their actions. He further stated that he believed that the employees should have informed him of their interest in Local 424.

Vargas testified that during the dining room meeting he told the employees that they should not be signing cards for Local 424, and he discussed with them what could happen if that Union was successful in an election and ultimately represented them. He told them the "consequences" and "repercussions" of such events.

He testified that he informed the workers that if Respondent was replaced by Local 424, they would no longer have benefits through Respondent, and since no contract would immediately be in effect, they would not have benefits

² The unit sought included licensed practical nurses, nursing assistants, orderlies, dietary employees, maintenance employees, maids, porters, and laundry employees.

³ On February 2, 1995, McCarthy requested withdrawal of his charge, but rescinded that request by letter received by the Regional Office on February 18. Esnes dated Vargas' request to her to withdraw her charge in about late December 1994. I credit Esnes' testimony. Vargas' knowledge of McCarthy's interest in withdrawing the charge must have predated McCarthy's sending of his letter, or Esnes was mistaken, in this minor way, as to when Vargas asked her to withdraw her charge.

through Local 424 either. He therefore told them that during the period when they had no contract, any benefits they received would be at the discretion of the Employer, which undoubtedly would be inferior to those they enjoyed with Respondent.

Vargas denied coercively directing employees not to sign cards for Local 424, and also denied threatening employees in any way.

Employee Joan Brower, who is Respondent's delegate at the nursing home, was present with Vargas during his talk to employees. She testified that Vargas did not threaten employees in any way. However, she stated that Vargas told the employees that they would lose Respondent's medical benefits if Local 424 replaced it as their bargaining representative through an election.

Esnes, McCarthy, and Ellenbogen denied that Vargas told the employees at the October 31 meeting that if Local 424 became the employees' representative they would lose benefits from Local 144, or that there would be a long period of time when Local 424 would have to negotiate with the Employer.

Credibility

Respondent attacked the credibility of Esnes and McCarthy, asserting that they are biased against Local 144.

Esnes, a supporter of Local 424, was represented by Local 144 3 years ago at her prior place of employment, during which Local 144 apparently told the employees to attend an emergency meeting. The nurses and nurses aides left their duty stations, whereupon the employer suspended them for 8 days, and threatened them with the loss of their jobs and their licenses for engaging in an illegal strike.⁴ Esnes blamed her suspension on Local 144. On several occasions she complained to Local 144 about her loss of pay, and sent a letter to it in March 1993 demanding that a copy of the collective-bargaining agreement between it and her prior employer be sent to her.

McCarthy admitted being "instrumental" in the 1992 attempt at organization by Local 424, and supporting its campaign in 1994, but denied that he was hostile to Respondent, and in October 1994 bore no animosity toward that Union.

However, at the time of the hearing McCarthy conceded having a "grudge" against Respondent because of his inability to obtain medical payments for a family member which he believed that he was entitled to. He was unhappy with the service given him by Respondent, and had also, prior to the opening of this hearing, filed a charge against Respondent, alleging that it had not represented him fairly regarding his discharge by the Employer in July 1995.

I find that the interest in Local 424 by Esnes and McCarthy, and their dissatisfaction with Local 144 was not of such a magnitude to cause them to give false testimony here. This is especially so where their testimony was corroborated by neutral witness Ellenbogen, and is supported by Esnes' uncontradicted testimony that Vargas apologized for his statements.

Further, I fully credit the testimony of Esnes and McCarthy, which was essentially mutually corroborative. They testi-

⁴The fact that Esnes, at first denied that her license was at risk, but then readily admitted such when shown her letter to Respondent, does not damage her credibility at all.

fied about matters which undoubtedly made a great impression on them. They testified in a clear, convincing manner in detail about the dining room incident. Their testimony was also corroborated by independent witness Ellenbogen, who testified about the initial remarks of Vargas. Notwithstanding Respondent's argument to the contrary, it is clear that she left the room prior to Vargas' threat of bodily injury, and therefore did not hear that statement.

Further supporting the testimony of Esnes and McCarthy is the fact that Esnes gave uncontradicted testimony that following this incident, Vargas asked her to withdraw her charge, whereupon she said that he had threatened the workers, and he apologized to her for his remarks. Vargas' apology lends credence to the fact that the threatening remarks were made as testified by the General Counsel's witnesses. The fact that Esnes could not remember the circumstances surrounding the filing of her charges does not impair her credibility at all.

Regarding the threat of bodily injury, the fact that neither employee notified the police of the threat or sought protection therefrom does not negate the fact that the threat was made. They pursued the matter further through the filing of the instant charges.

I do not credit the testimony of Vargas where it conflicts with that of the General Counsel's witnesses. It is clear that he was offended by the employees seeking another union to represent them. He stated that he believed that the employees should have informed him of their desire for other representation. Both he and respondent witness Brower testified only in limited and conclusionary terms as to what Vargas was alleged to have told the employees. I cannot credit their testimony over the detailed testimony of the General Counsel's witnesses.

Analysis and Discussion

The complaint alleges that Respondent, by Vargas' conduct on October 31, threatened employees with (a) loss of employment benefits, (b) loss of their jobs, (c) a lawsuit, (d) physical harm, and (e) unspecified reprisals. The complaint further alleges that Respondent threatened to get even with employees if they joined, supported, or assisted Local 424, and that Respondent coercively directed employees not to sign cards for Local 424.

As set forth above, I have credited the testimony of Esnes, McCarthy, and Ellenbogen. I find and conclude that Vargas' remarks were coercive, and tended to restrain employees from engaging in their Section 7 right to undertake union activities in support of a rival union. The statements were plainly coercive, inasmuch as they reasonably implied that Respondent would take adverse action against the employees who signed cards for Local 424. *SMI of Worcester, Inc.*, 271 NLRB 1508, 1526 (1984).

Therefore, I find that Respondent violated the Act in the following respects by Vargas' remarks.

(a) By telling employees that they were not allowed to sign cards for Local 424, and telling them that they should retrieve those cards. In this connection, I note that Vargas admitted telling them that they should not be signing cards for Local 424. *Great Plains Beef Co.*, 241 NLRB 948, 971 (1979).

(b) By threatening employees that those employees who signed cards for Local 424 would have no medical insurance

and possibly no job. *SMI*, supra; *Peninsula Shipbuilders' Assn.*, 237 NLRB 1501, 1505 (1978). I have rejected the testimony of Vargas that he explained to the employees that the replacement of Local 144 would leave them without representation until a contract was negotiated, and that the Employer could therefore provide inferior benefits for them. Even if I accepted such testimony, the threat came from Respondent:

I have considered that the threatened loss of employment benefits involved conduct which Respondent attributed to a third party, the Employer. Nonetheless, I am persuaded the threat is "coercive" within the meaning of Section 8(b)(1)(A), inasmuch as it is a threat of the loss of existing employment benefits which was expressed to the employees by the labor organization which is the exclusive collective-bargaining agent of the employees to whom it was addressed. Under these circumstances, the threat was reasonably calculated to "coerce" the employees, within the meaning of Section 8(b)(1)(A), and would have this calculated effect without regard to whether the employees were told by employees that the Employer, rather than Respondent, might implement the threat. [*Bay Cities Metal Trades Council*, 306 NLRB 983, 985-986 (1992).]

(c) By threatening employees with physical harm, by telling employees that Respondent was "into breaking legs" or "we'll break your legs" in the context of a discussion of what Respondent would do to employees because they signed cards for Local 424. *General Iron Corp.*, 218 NLRB 770 (1975); *Walter J. Barnes Electrical Co.*, 188 NLRB 183 (1971).

(d) By threatening employees that Respondent would find out who signed cards for Local 424 and would "get even"

with employees, and would file charges against employees to remove them from Respondent.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. Respondent violated Section 8(b)(1)(A) of the Act by telling employees that they were not allowed to sign cards for Local 424, and telling them that they should retrieve those cards.

4. Respondent violated Section 8(b)(1)(A) of the Act by threatening employees that those employees who signed cards for Local 424 would have no medical insurance and possibly no job.

5. Respondent violated Section 8(b)(1)(A) of the Act by threatening employees with physical harm, by telling employees that Respondent was "into breaking legs" or "we'll break your legs."

6. Respondent violated Section 8(b)(1)(A) of the Act by threatening employees that Respondent would find out who signed cards for Local 424 and would "get even" with employees, and would file charges against employees to remove them from Respondent because they signed cards for Local 424.

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

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]