

Kmart Corporation and Truck Drivers, Oil Drivers, Platform Workers and Filling Station Attendants Local 705, International Brotherhood of Teamsters, AFL-CIO. Case 33-CA-10802

February 6, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On September 30, 1994, the Board issued a Decision and Order¹ finding that the Respondent, Kmart Corporation, violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit. The Respondent timely filed a petition for review with the United States Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement. By order dated August 11, 1995,² the court denied enforcement of the Board's Order and remanded the matter to the Board with instructions that the Board more fully address contrary evidence introduced by the Respondent. Specifically, the court expressed concern that the hearing officer's decision, which the Board adopted without comment, did not adequately discuss testimony from four employees who claimed to have been photographed or videotaped as they were refusing leaflets distributed by union adherents.³

On September 26, 1995, the Board notified the parties that it had accepted the court's remand and would take appropriate action consistent with the remand. The Board also invited the parties to submit briefs stating their positions. The General Counsel, the Respondent, and the Charging Party each filed statements of position on remand.

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

At issue is whether the Union's action in photographing and videotaping leafletting on the days before, and the morning of, the election reasonably tended to interfere with the employees' free choice in the election. The Board found previously, in agreement with the hearing officer, that it did not. For the reasons stated below, we adhere to the Board's original decision, taking into account the specific categories of evidence that the court directed us to consider.

Background

The Union won an election held July 23, 1993, by a vote of 219 to 212 with 4 challenged ballots, an in-

sufficient number to affect the results. Among the objections timely filed by the Respondent was an allegation that the Union interfered with the election by photographing or videotaping, for possible future retaliation, the automobile license plates of employees who refused to accept handbills from union supporters. After a hearing, the hearing officer found, and the Board agreed, that the videotape and photographs "were of such a benign and innocuous nature as not to reasonably tend to interfere with employees' free and uncoerced choice in the election."

The events at issue occurred during an organizing campaign at the Respondent's distribution facility on the days preceding the July 23 election. During the campaign, supporters of the Union would gather along Spruce Street, the street that runs perpendicular to the Respondent's entrance drive, to offer leaflets to employees arriving at or departing from work. On July 21 and 22, the Union also positioned a 13-foot-tall inflatable rat, decorated with a large "K," near the Respondent's entrance.⁴

There is no dispute that representatives of the Union took photographs and videotape of the activity at the Spruce Street entrance during the 2 days preceding and on the morning of the election. The evidence shows that Union Representatives David Keaton and Sergio Ocegüera took a total of 21 photographs of the handbilling and the inflatable rat, and Union Representative Alan Nourie took approximately 15-20 minutes of videotape on the evening prior to and the morning of the election. Nor is there any dispute that a news photographer for the Kankakee Daily Journal was also photographing activity at the entrance to the Respondent's facility on the evening of July 22 and the morning of the election.

Keaton and Nourie testified that they took pictures and videotape, respectively, as souvenirs of the campaign, which was notable for its large size and the use of the inflatable rat. Cathy Thomas, head union organizer for the campaign, testified that she directed Ocegüera to take four photographs of the Respondent's security guards for the purpose of recording instances when the guards observed the Union's handbilling. The photographs and videotape themselves corroborated the testimony of the union representatives as to the subjects they intended to record. Although employees' cars entering the Respondent's premises appear in a small number of the photographs, and briefly on the videotape, it is clear from the photographs that the target of the photographs was the rat or the leafletters, not the employees' cars. Indeed, as noted by the hear-

¹ 315 NLRB No. 17 (not published in Board volumes).

² 62 F.3d 209.

³ The court expressed no opinion, however, as to whether the Union's conduct would be sufficient to upset the results of the election.

⁴ The Union borrowed the rat from the Kankakee Building Trades Council to symbolize the Respondent's use of private investigators to report on its employees. The Union removed the rat prior to the election on July 23.

ing officer, none of the drivers or licenses of the cars can be easily identified from the photographs.

Nevertheless, four unit employees testified that they feared retaliation by the Union after they were photographed rejecting leaflets proffered by the union supporters. However, none of the four witnesses could identify the photographer, and two of the witnesses could not state with any degree of certainty that they were actually photographed. Specifically, Durl Rahn and William Meyer saw a flash but did not actually see the camera directed at them. Rahn admitted that he "assumed" the photographer was taking a picture of him; Meyer conceded that the photographer could have been taking a picture of something else. A third witness, Raymond Ramos, testified that, after he refused a union flyer, someone took two pictures of him and another followed him with a video camera for approximately 30 seconds. Roberta White contended that she was videotaped by a union agent on a signal from another union agent when she refused literature.

We find this evidence insufficient to establish objectionable conduct. As noted above, none of these 4 employees is visible in any of the 21 photographs or the 15 minutes of videotape introduced at the hearing, thereby calling into question the employees' perceptions that they were the subjects of the photography. Because none could identify the photographer, it is just as likely that the flashes they saw came from the news photographer as from any of the union representa-

tives.⁵ Moreover, all four employees made no secret of their opposition to the Union during the campaign, and none could point to any objective basis to support their contention that they had reason to fear reprisal from the Union.⁶ 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). Moreover, dissemination of such speculation is insufficient to invalidate an election. See, e.g., *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 796 fn. 6 (7th Cir. 1991).

Under these circumstances, we find that the testimony of the four employees is insufficient, as a matter of law, to demonstrate that the photographing and videotaping by union agents which occurred on the days preceding and the morning of the election reasonably tended to interfere with employee free choice in the election. Accordingly, we adhere to the Board's original Decision and Order.

ORDER

The National Labor Relations Board affirms its original Decision and Order (315 NLRB No. 17 (Sept. 30, 1994)).

⁵ There is no contention that the news photographer is an agent of the Union.

⁶ See *NLRB v. Lovejoy Industries*, 904 F.2d 397, 402 (7th Cir. 1990) (the Board may reasonably discount "professions of fear from employees who do not or cannot explain its basis").