

Nouveau Elevator Industries, Inc. and Local 1, International Union of Elevator Constructors, AFL-CIO

New York Elevator Inc. and Local 1, International Union of Elevator Constructors, AFL-CIO

Nouveau Elevator Industries, Inc., Nouveau Industries, Inc. and Elevator Industries Association, Inc., and its Employer Members, and Local 1, International Union of Elevator Constructors, AFL-CIO, Petitioner. Cases 29-CA-21999, 29-CA-22005, 29-CA-22027, 29-RC-8701, and 29-RC-8732

September 9, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On May 4, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The Petitioner/Charging Party filed exceptions and a supporting brief. The Employers/Respondents and the Intervenor¹ each filed an answering brief.

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,² and conclusions,³ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

IT IS FURTHER ORDERED that Cases 29-RC-8701 and 29-RC-8732 are remanded to the Regional Director for Region 29 for the purpose of issuing the appropriate certifications.

Kevin Kitchen, Esq., for the General Counsel.

Michael J. DiMattia, Esq., for the Respondents.

Jonathan Walters, Esq., for the Charging Party/Petitioner.

Norman Rothfeld, Esq., for the Intervenor.

¹ Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO is the Intervenor in this proceeding.

² The Petitioner/Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In adopting the judge's conclusions, we find it unnecessary to rely on his discussion of pension benefits in fn. 3 of his decision or on the isolated nature of statements allegedly made by Supervisor Tom Vrankovic to employee Paul Dinardi. We note that the judge discredited the testimony of Dinardi concerning those statements.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on March 2 and 3, 1999.

All parties agree and I find that the respective employers are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

For a long period of time before 1996 (at least 40 years), various employers who were members of the Elevator Industries Association, Inc. had a collective-bargaining relationship through that Association with Local 3, International Brotherhood of Electrical Workers. (The Intervenor in these cases.) The most recent collective-bargaining agreement covering this unit runs from March 2, 1997, through February 27, 2000.

In addition, the employees of Nouveau Elevator Industries, Inc. and Nouveau Industries, Inc. have also been represented by Local 3, in separate bargaining units. The two Nouveau companies, while not being members of the Employer Association, nevertheless had contracts which were essentially the same as the contract between the Association and Local 3.

On October 29 and December 16, 1996, Local 1, International Union of Elevator Constructors, AFL-CIO filed petitions in Cases 29-RC-8701 and 29-RC-8732. For a period of time, the processing of those petitions was held in abeyance pending resolution of claims by the incumbent union, Local 3, before the AFL-CIO pursuant to its no-raiding provisions. As that failed to resolve the matter, a hearing was commenced in the Regional Office of the Board on October 27, 1997. (One year after the petitions were filed.)

In the meantime, when the collective-bargaining agreements with Local 3 expired, that union engaged in a strike which lasted from October 1996 to March 2, 1997. During the strike, employers, to the extent possible, used managerial and supervisory personnel to do work normally done by the striking employees. A key issue of that strike dealt with the fact that the Local 3 pension trust was underfunded and the Union sought increased contributions to make up the deficit.

After what appears to have been a somewhat stormy hearing, the Regional Director, on March 26, 1998, issued a Decision and Direction of Election. In that decision, the Regional Director ordered elections in three separate bargaining units as follows: **Unit A** was a multiemployer unit consisting of the various hourly employees employed by 25 companies who were members of the Elevator Industries Association, Inc. **Unit B** consisted of certain categories of hourly paid employees employed by Nouveau Elevator Industries Inc. And **Unit C** consisted of certain categories of hourly employees employed by Nouveau Industries, Inc.

On May 4, 1998, Local 1 filed a special request for leave to appeal from the Regional Director's Direction of Election. The substance of the appeal was that Local 1 sought to have the election conducted by a mail ballot. This was rejected by a majority of the Board on August 27, 1998, in 326 NLRB 470. In the meantime, manual elections were held on May 28 and 29, 1998, and the ballots were impounded.

On September 17, 1998, the ballots were counted in the three elections and the results were as follows:

In **Unit A**, there were approximately 1553 eligible voters of which 940 cast ballots for Local 3 and 349 cast ballots for

Local 1. Accordingly, Local 3 obtained a majority by a substantial margin and the number of challenged ballots would not have effected the outcome of the election.

In **Unit B** (Nouveau Elevator Industries), each union obtained 30 votes in a unit of 77 and there were three challenged ballots. Thereafter, the Regional Director held that two of the ballots should remain unopened and that one be opened and counted. As this voter voted for Local 3, the Region issued a revised tally of ballots on January 7, 1999, showing that Local 3 had obtained a majority of the valid votes counted.

In **Unit C** (Nouveau Industries), the tally of ballots showed that of approximately 116 eligible voters, 43 cast their votes for Local 1 and 57 cast their votes for Local 3. There were two challenged ballots but these were not sufficient in number to affect the results of the election.

On September 21 and 23, Local 1 filed timely objections to the elections, contending that certain conduct by supervisors of New York Elevator and the Nouveau Companies affected the outcome of the elections. Local 1's position was that this conduct was sufficiently coercive so as to nullify the results of the three elections.

The conduct alleged in the objections was essentially the same as that alleged in the unfair labor practice charges filed back in May 1998, shortly before the elections were held. In this regard, the charges and amended charges in Cases 29-CA-21999 and 29-CA-22005, were filed against the two Nouveau Companies on May 8 and 12 and August 11, 1998. The charge and amended charge filed against the Association was filed on May 20 and August 11, 1998.

Complaints based on the charges were issued by the Regional Director on September 21, 1998, and were consolidated for hearing with the objections mentioned above. In substance, the complaints alleged:

1. That on or about May 8, 1998, Respondent Nouveau, by its supervisor, Dennis Damone, threatened employees that even if Local 1 won the election, the companies would (a) refuse to negotiate and bargain with Local 1, (b) that there would inevitably be strikes, (c) that the companies would engage in unspecified reprisals if the employees engaged in a strike, (d) that the Companies would refuse to pay any benefits to Local 1, because there would be extensive and lengthy litigation concerning that Union's representative status, (e) that there would be loss of employment caused by shifting operations between Nouveau Elevator and Nouveau Industries in order to avoid representation by Local 1, and (f) that the companies would close and reopen in the future with Local 3 as the recognized union.

2. That on or about on various dates in April and May 1998, New York Elevator by its supervisor, Tom Vrankovic (a) threatened employees by stating that if they selected Local 1, they would lose their current employment, and (b) telling employees that if they wore Local 1 insignia they would be directed to report to the Company and to a board composed of Local 3 representatives.

3. That on or about various dates in April and May 1998, New York Elevator, by Jim Halstead, (a) interrogated employees regarding their union membership or support, (b) threatened that the Company would terminate substantial numbers of employees or eliminate certain job classifications if Local 1 won the election, and (c) threatened to close its operations and reopen under another name in the future.

These allegations are the only allegations of conduct that are relied on by Local 1 in support of its objections. It contends that even though the conduct involved the employees of only 2 of the 26 involved employers, that conduct because of its alleged dissemination among employees of the other employers, affected all three elections.

I note that the conduct alleged insofar as New York Elevator, which employs about 170 employees, was supported by the testimony of only one person, Paul Dinardi, who at the time, was an assistant supervisor and if not a supervisor as defined in the Act, considered himself as someone who was midway between management and the bargaining unit employees. His testimony as to the statements allegedly made by Vrankovic was to the effect that at times, there were other unidentified employees present. Regarding statements allegedly made by Halstead, Dinardi testified that no one else was present and that he did not reiterate Halstead's remarks to anyone else.

I also note that insofar as the alleged conduct involving Nouveau, this involved a single transaction, occurring on May 8, 1998, and involved at most three to four employees of Nouveau Elevator and perhaps two employees of Nouveau Industries.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

A. Nouveau Industries/Nouveau Elevator

There are two companies involved here; one Nouveau Industries and the other Nouveau Elevator. And although there is common ownership, there exists two separate bargaining units and accordingly there were two separate elections amongst the respective Company's employees.

The elections were scheduled to take place on May 28 and 29, 1998, and the evidence shows that each union campaigned vigorously. The evidence also shows that the Company was interested in maintaining its collective-bargaining relationship with the incumbent union, Local 3.

On May 8, 1998, Dennis Damone, a supervisor of Nouveau Elevator, visited a jobsite at One Chase Manhattan Plaza, where some of Nouveau Industries' employees were situated. Two witnesses, Kevin McGhean and Robert Marrerro, were called to support the allegations. Dennis Damone, who I find to be a credible witness, testified on behalf of the company.

In substance, the credited testimony establishes that when Damone arrived at the site, with perhaps one or two Nouveau Elevator employees, there was a group of about four or five Nouveau Industry employees present, one of whom, Richie Pedia, wearing a Local 1 button, started asking questions of Damone and began arguing in favor of Local 1. Among the points Pedia made was that the Local 1 wages and benefits, including an annuity benefit, were better than those obtained by Local 3.

In response, Damone said that he wasn't sure what would happen to the benefits accrued under Local 3's pension plan and whether those could be legally transferred to Local 1, especially as the Local 3 plan was underfunded. Damone states that he asked how Local 1 could promise that employees would immediately be covered under its health plan inasmuch as the company could not make contributions into that fund until such

time as it had a contract with Local 1.⁴ Further, he said that if Local 1 won the election, the Company would be required to deal with that Union and would have to cease making contributions to Local 3's health plan; the implication being that if Local 1 won the election, there might be a period of time when health benefits might not be available. (According to McGhean, Damone's statements regarding the health benefits were the most significant part of this conversation and probably persuaded some of the employees present to stick with Local 3.)

Damone told the employees that if Local 1 won the election in either unit, the Company would bargain with that Union but that if an agreement wasn't reached, the Union could engage in a strike whereupon the Company would utilize supervisors, managers, and strike replacements to do the work. He told them that if there was a strike by Local 1 the Company could get strike replacements from Local 3 or temporarily subcontract out the work to Local 3 shops.

According to Damone, he also questioned how seniority would work if the men voted for Local 1, and what would happen if there was a layoff; would seniority be, in effect, dovetailed or end-tailed.

In my opinion the credible evidence in this case is that Damone did not tell employees that a strike would be inevitable if Local 1 won the election or that the Company would refuse to bargain or deal with Local 1. I also conclude that Damone did not threaten employees with loss of jobs or make threats that the company would close or transfer its operations if Local 1 were to prevail in the election. To the extent that Damone related his opinions, these were (a) legitimate questions as to how pension and welfare benefits and seniority status would be handled if there was a transition from Local 3 to Local 1 representation, and (b) that he made permissible statements regarding how the company would respond if Local 1 engaged in a strike in support of its contract demands. Damone's statements regarding the health and pension benefits were not, in my opinion, threats to withhold or terminate such benefits in the event that Local 1 won the election. Rather they were legitimate questions as to how such benefits would or could be paid if the company was compelled to stop making payments to Local 3 funds by virtue of a certification issued to Local 1⁵ and how such benefits, particularly health benefits, could be paid for and be given during a hiatus when there was no contract yet with Local 1.⁶

⁴ In its campaign literature, Local 1 promised that if it won the election the employees would be covered by its health benefit plan immediately after the vote. While this was not explored, it is likely that this could be read to mean that Local 1 would fund these benefits out of its own pocket until such time as it succeeded in obtaining contracts from the Employers.

⁵ Pursuant to Sec. 8(d) of the Act, if an election is conducted and the Board issues a certification wherein the existing recognized union is defeated, then its collective-bargaining agreement is automatically nullified. That being the case, a company would be compelled under Sec. 302 to cease making any payments pursuant to such contract to any fund administered by that Union.

⁶ Presumably, if Local 1 replaced Local 3 as the representative, any payments previously made into a Local 3 pension fund would not be transferable to Local 1's pension plan and although employees who had a vested interest in the Local 3's plan would have an entitlement to a pension assuming that they met the qualifying eligibility requirements, they would have to start over as new employees in Local 1's plan unless they had, in the past, worked for a Local 1 shop and had accumulated some vested interest in that Union's plan.

B. New York Elevator

New York Elevator is a member of the Elevator Industries Association, Inc. As such, it is part of a multiemployer bargaining unit which, along with 24 other employer-members, has designated the Association to be its agent for purposes of collective bargaining and the administration of the labor contract. Its employees were part of the association wide voting unit which consisted of about 1550 plus employees in which Local 3 beat Local 1 by a vote of 940 to 349.

Although not specifically named as a Respondent in the unfair labor practice charge or complaint, New York Elevator is a proper party as the Respondent named is the Elevator Industries Association, Inc., and its employer members. Accordingly, if any of New York Elevator's agents committed unfair labor practices, it is my opinion that, in the context of this complaint, it can be charged and found to have violated the Act.

New York Elevator is broken down into two departments; one consisting of about 55 to 60 employees is the maintenance department and the other, modernization, consists of about 80 employees. The total complement of the Company consisting of about 140 employees, is less than 10 percent of the multiemployer bargaining unit.

As noted above, the only witness who testified about events at New York Elevator was Paul Dinardi, an assistant supervisor who worked with Tom Vrankovic, one of three supervisors in the maintenance department. Dinardi's principle function was to act as a trouble shooter, who because of his expertise, was sent around to tackle difficult jobs. From time to time, he also filled in as a supervisor when Vrankovic was absent, but this appears to have been a temporary measure. Dinardi did not have the power to hire, fire, discipline, or otherwise directly affect the employment status of other persons who worked for the Company. Although he was asked by Vrankovic to give his opinion on the abilities of other mechanics, the evidence does not convince me that he could effectively recommend any specific actions vis-a-vis employees. Dinardi, as opposed to Vrankovic was an hourly paid employee who was covered by the Local 3 collective-bargaining agreement. He did, however, receive a premium of \$1.50 per hour over and above the journeyman's rate, in consideration for his role as an assistant supervisor.

Based on the evidence in this record, I would characterize Dinardi as a leadman and not as a supervisor within the meaning of Section 2(11) of the Act. *Cassis Management Corp.*, 324 NLRB 324 (1997).

Dinardi testified that in May 1998, he had two conversations with Jim Halstead who is the head of maintenance. He asserts that during the first conversation, Halstead asked him something to the effect of whether he was ready to go with Local 1 or if he was ready for the vote. Dinardi states that during the second conversation, Halstead said that if the employees voted to change to Local 1, the work force would be reduced by 23 percent in order to offset the costs of such a move. He also claims that Halstead said that because of the difference in the contractual rates between Local 1 and Local 3, the Company would eliminate, altogether, the position of helper.

Halstead credibly denied the assertions made by Dinardi. He testified that he was aware that Dinardi was a supporter of Local 1, having seen that Dinardi had placed a Local 1 button on his toolbox. He also testified that in conversations with Dinardi, he said that inasmuch as Local 1 wasn't trying to organize all of the elevator shops, there would still be plenty of shops

to compete with the Company if the employees voted for Local 1. Halstead testified that he said that remaining Local 3 shops would have a competitive advantage because their contract rates were lower than the Local 1 contract and that if Association shops changed from Local 3 to Local 1, there could be withdrawal liability wherein companies would be liable for any unfunded liabilities to the Local 3 pension fund. In this context, Halstead states that he did say that some of the smaller shops might not be able to afford this and might be put out of business. (New York Elevator was one of the larger shops.)

In both conversations between Dinardi and Halstead, there were no other employees present and Dinardi testified that he did not tell any other employees what was said.

From Dinardi's own testimony, there is a failure of proof regarding the interrogation allegation as he was not sure if Halstead asked him about his feelings for Local 1 or if he was ready for the vote. Moreover, as Dinardi was an open union supporter who for a substantial period of time before the election displayed a Local pin, any questions directed to him about his opinion of the two unions could hardly be considered coercive. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Based on the credited testimony of Halstead, it appears that Halstead's remarks should not be construed as threats of reprisal but rather as legitimate opinions of economic consequences protected by Section 8(c) of the Act. That is, Halstead's remarks should reasonably be construed as his opinion, made to one other person, that if association members shifted from Local 3 to Local 1, and if they had to pay higher rates and be potentially liable to Local 3's pension fund for unfunded liabilities, some of the smaller companies might be forced out of business. Such comments, under these circumstances, do not reasonably imply that the Respondent would take action on its own initiative or that it would retaliate against employees for selecting Local 1 as their representative. Therefore, it is my opinion that such statements, by themselves, are not violative of the Act under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). See also *Gravure Packaging*, 321 NLRB 1296, 1299 (1996), and *CPP Pinkerton*, 309 NLRB 723 (1992).

Dinardi also testified that over a period of time before the election he had about 10 conversations with Tom Vrankovic during which the topic of the Unions came up. He could not recall when these conversations took place and although testifying that on some occasions other employees were present, Dinardi could not state which employees were present at any of the conversations and could not state at which conversations employees were present. Thus, it is impossible to determine if any other employees were present at any conversation when an alleged illegal statement was made.

Dinardi's testimony was that at some of these conversations, Vrankovic told him that voting for Local 1 would be a bad move and that employees would lose their jobs or be disciplined. Dinardi states that at some conversations Vrankovic said that the Company would close its doors and either stop doing business altogether or open up again under another name. Dinardi also testified that Vrankovic told him that if employees were seen wearing Local 1 buttons, they could be called up to the shop in front of not only the Company but also Local 3 and answer charges. No other employee was called by either the General Counsel or Local 1 to corroborate Dinardi's testimony

either as being a witness to such a conversation or being told about such a conversation.

Although Vrankovic was not called by the Respondent as a witness, the cross examination of Dinardi revealed some flaws making his testimony somewhat unreliable. Although testifying, in effect, that he was warned of some kind of possible reprisal if he displayed a Local 1 button, the fact is that Dinardi openly displayed, without adverse consequence, such a button for several months before the election as did many other employees of the Company. Secondly, although Dinardi testified on direct examination that Vrankovic said that the company would close its doors, he testified on cross-examination that Vrankovic did not say this but said that some of the other association shops might close and open under new names. Moreover, Dinardi concedes that he did not make such an assertion in a pretrial affidavit that he gave to the Board's investigator.

Given the inconsistencies between Dinardi's testimony on direct and cross-examination, and the failure to produce any corroboration of his testimony, the probability is that Dinardi conflated the substance of the conversations he had with Halstead and Vrankovic. In any case, I think it is probable that Vrankovic, if he said anything at all, probably said the same things as Halstead, and gave an opinion as to the possibility that some of the smaller association shops might be forced out of business if they had to pay higher Local 1 rates and became liable for unfunded Local 3 pension liabilities. These opinions were not conveyed by Dinardi to any other employees in the voting unit.

Assuming that Dinardi's testimony regarding his conversations with Vrankovic should be taken at face value, it is my opinion that in the context of these proceedings, any such statements were isolated. That is, any improper remarks made by Vrankovic to Dinardi were made to a single individual (who was an assistant supervisor), and there is no evidence that these remarks were either directly heard by any of the 1500 other employees in the bargaining unit, or that they were transmitted by Dinardi to anyone else.

CONCLUSIONS OF LAW

1. The Employers have not violated the Act in any manner alleged in the complaint.

2. The Employers have not engaged in any objectionable conduct warranting the setting aside of the elections. *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991); *Baja's Place*, 268 NLRB 863 (1984).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The complaint is dismissed.

The representation in Cases 29-RC-8701 and 29-RC-8732, should be remanded to the Regional Director of Region 29, for the purpose of issuing the appropriate certifications.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.