

FPA Medical Management, Inc. and United Health Care Employees NUHCE, AFSCME, AFL-CIO. Case 28-CA-14461

August 3, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On June 10, 1997, the National Labor Relations Board issued an unpublished Decision and Certification of Representative in Case 28-RC-5480 in which United Health Care Employees (the Union) was certified as the exclusive collective-bargaining representative of a unit of certain nonphysician medical support staff employees employed by FPA Medical Management, Inc. (the Employer or the Respondent). The Board adopted the Regional Director's recommendation that the Employer's election objections be overruled, and, more specifically, adopted his findings that the supervisory status of the Employer's physicians had been fully litigated as part of a bargaining unit determination in an earlier representation proceeding, Case 28-RC-5449, and those physicians had been found to be employees; that therefore, consistent with the earlier case and without need of further litigation, the physicians were not the statutory supervisors of the staff employees; and that, accordingly, the physicians' conduct in support of the Union had not improperly influenced the staff employees' election choice.

On October 22, 1997, the Board issued a Decision and Order in the instant unfair labor practice proceeding,¹ in which it concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. The Board found, *inter alia*, that the supervisory status of the physicians had been fully litigated in Case 28-RC-5449, in which the Board found the physicians not to be supervisors, and that further litigation of this issue would not be permitted in these circumstances. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Thereafter, the Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross application for enforcement of its Order. On September 29, 1998, the court issued its opinion granting the petition for review, denying the cross application for enforcement, and remanding to the Board.² In the court's view, the Board traditionally has applied its "no relitigation" rule in 8(a)(5) refusal-to-bargain cases to preclude relitigation of an issue that could have been raised in an earlier representation proceeding involving the same employer,

¹ 324 NLRB 802.

² Sub nom. *Thomas Davis Medical Centers v. NLRB*, 157 F.3d 909.

union and bargaining unit.³ In the instant case, the court opined, the Board appeared to have expanded its no-relitigation rule by holding that an issue resolved in an earlier representation proceeding determining the boundaries of one bargaining unit could not be relitigated in a later representation case involving a different bargaining unit. Accordingly, the court remanded this unfair labor practice case for the Board to explain its expansion of its "no relitigation" rule in these circumstances under Board precedent, or to provide an acceptable explanation for its departure from that precedent. The court also stated that "[i]f the Board cannot do so, it must reconsider the staff supervision issue, as appropriate," in the instant case. 157 F.3d at 914.

The Board accepted the court's remand and invited the parties to file statements of position regarding the issues raised by the court's opinion. Thereafter, the General Counsel, the Union, and the Respondent all filed statements of position with the Board.

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

I.

As the court noted, the Board's previous decision in this case found, in effect, that the instant unfair labor practice case was "related" to the representation proceeding in Case 28-RC-5449 involving the physicians' unit and that therefore the Respondent was precluded from relitigating the supervisory status of the physicians in this case involving the support staff unit. We acknowledge that the Board made this finding without adequate explanation. As noted by the court, the Board has traditionally applied its "no relitigation" rule in cases where the bargaining unit in both the unfair labor practice case and the representation case are the same.⁴

In their statements on remand, the General Counsel and the Union contend that Board precedent supports the extension of the "no relitigation" rule to cases involving the same employer and union but different units. The Respondent contends that Board and court precedent weighs against such an extension.

We find, however, that we need not decide this issue. Rather, as discussed below, we find that, even assuming that the physicians are statutory supervisors, and viewing the evidence in the light most favorable to the Respondent, the Respondent has failed to meet its burden of

³ See Sec. 102.67(f) of the Board's Rules and Regulations. See also *Shadow Broadcast Services*, 323 NLRB 1002 (1997), cited by the court.

⁴ But cf. *HeartShare Human Services of New York*, 320 NLRB 1 (1995) (In pre-election representation case decision, the Board finds that a single facility unit is appropriate, denying the employer the right to relitigate its contention that only an employerwide unit is appropriate, on grounds that the Regional Director had previously found that a unit limited to another similar facility of the same employer was appropriate, and the employer had not requested review of that finding.).

presenting a prima facie case of objectionable election interference.

II.

The Employer⁵ is a health care institution within the meaning of Section 2(14) of the Act, operating facilities in Tucson and Green Valley, Arizona. The Union filed its election petition in Case 28–RC–5480 on December 24, 1996. Thereafter, an election for certain non-physician medical support staff employees was held pursuant to Section 9 of the Act on February 13, 1997. The Union won the election by a vote of 225 to 177. The Employer filed the following objection to the election:

Supervisory and management personnel interference on behalf of the union petitioner in the non-supervisory employees' election decision which likely impaired the employees' freedom of choice in the election.⁶

The Employer submitted six affidavits in support of its objection. All of the affiants were undisputed supervisors or other management officials with responsibilities relating to support staff employees at one or the other of the Employer's Tucson facilities.

Affiant Kris Hall, a supervisor, testified that during the weeks leading up to the election, she observed four of the Employer's physicians in her work area, whom she identified by name. She stated that they were wearing buttons expressing support for the Union.

Affiant Ehab Al-Jamal, a supervisor, testified that, in an incident 1 to 2 weeks before the election, after he had delivered literature supplied by the Employer to areas within his supervision, he was confronted by Karen Smith, one of the Employer's physicians. Their meeting took place in a work area where a number of support staff employees were present and close enough to hear what was said. Al-Jamal stated that Smith spoke loudly of negative legal implications associated with the Employer's conduct (apparently relating to its preelection campaign), and she spoke in support of the Union. Al-Jamal stated that he was able to respond to Smith's statements. He further stated that as she left the area, Smith spoke directly to some employees, telling them that they had the right to think and wear what they wanted. Al-Jamal also testified that he had seen Smith wearing pronoun buttons on many occasions leading up to the election.

Additionally, Al-Jamal testified that he had seen copies of a letter circulating throughout his work area in the weeks preceding the election. A copy of the letter is attached to his affidavit. It is entitled "A Message of Sup-

port from the Thomas-Davis Physicians." It is signed by two of the Employer's physicians, Keith Dveirin and Keith Shelman, identified therein as coordinators for the Union. The letter is directed to the support staff employees. It sets forth a detailed critique of their terms and conditions of employment, and it expresses a bond of solidarity in favor of the Union between the support staff and the physicians.

Finally, Al-Jamal testified that in the week prior to the election, he saw Dveirin speaking to three employees under Al-Jamal's supervision. According to Al-Jamal, the physician said that he wanted all of them to vote for the Union.

Affiant Mary Kallstrom, a supervisor, testified that, about 1 week before the election, she saw Dveirin enter her work area and speak to one of her employees. Kallstrom stated that he identified himself to the employee and said that "we" physicians are "supporting you," and that he hoped that the employee would vote in the election. Kallstrom also testified that she had seen copies of the physicians' "Message of Support" letter throughout her work area during the weeks leading up to the election.

Affiant Shirley Jones, a manager, testified about a confrontation she had with Smith. She stated that 1 or 2 days before the election, Smith walked into her office unannounced, challenged her about assertedly restrictive work rules, and then "lectured" her for 10 minutes within earshot of an employees' working area. Accordingly to Jones, Smith spoke of the necessity for unions in the workplace and accused her of improper campaign conduct. Jones stated that she responded to Smith's accusations and statements. In addition, she noticed that Smith was wearing two pronoun buttons. Jones also testified that she too had seen copies of the "Message of Support" letter throughout her work area in the weeks before the election.

Affiant Dee Noyes, a manager, testified that in the weeks leading up to the election she saw a number of the physicians, including Shelman and Smith, wearing pronoun buttons while they were in areas where Noyes' employees worked. She also stated that she had seen copies of the "Message of Support" throughout her employees' work areas prior to the election.

Affiant Leticia Ruiz, a supervisor, testified that she attended a staff meeting at one of the Employer's Tucson clinics. Ruiz stated that during the meeting, one of the physicians stood and spoke extensively in support of having a union at the Employer's facilities. Ruiz stated that this meeting occurred just prior to the *physicians'* Board election in Case 28–RC–5449. That election took place on December 5, 1996.

We will *assume*, for the purpose of evaluating the Respondent's objection, that the Employer's physicians are statutory supervisors. The question before us then is whether the physicians' campaign activities in support of

⁵ The Respondent was the "Employer" in the representation case. Therefore, we shall so describe the Respondent in discussing the representation case issues.

⁶ In fact this was the first of two objections the Employer filed. The second was a boilerplate-language "catch-all" allegation. The Regional Director overruled this as unsupported by any evidence. This second objection is not at issue on remand from the court.

the Union improperly influenced the medical support staff employees' choice, and thereby interfered with the election. The Board recently restated the applicable legal standard:

The prounion activities of statutory supervisors may constitute objectionable conduct warranting setting aside an election in two situations: (1) when the employer takes no stand contrary to the supervisors' prounion conduct, thus leading the employees to believe that the employer favors the union; or (2) when the supervisors' prounion conduct coerces employees into supporting the union out of fear of retaliation by, or rewards from, the supervisors. [Footnote citation omitted.]

Sutter Roseville Medical Center, 324 NLRB 218 (1997). See also *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879 (1999).⁷

It is undisputed in this case that the Employer took a stand opposing the Union and that the staff employees were well aware of it. Thus, the specific question to be answered is whether the physicians' prounion conduct coerced the employees either by retaliatory threats or promises of benefits. The Employer's six affidavits establish that physicians wore prounion buttons regularly in the weeks leading up to the election. The evidence also establishes that there were two confrontations between Smith and management officials concerning campaign matters and related legal issues. Both occurred not long before the election and in circumstances where staff employees were in a position to overhear. Further, copies of a campaign letter, the "Message of Support," were circulated to the unit employees in the time preceding the election. Finally, on different occasions in the time before the election, physicians told staff employees that they could wear what they want, think what they want, and that they all should vote for the Union.

⁷ Member Hurtgen issued a dissenting opinion in *Millsboro*. However, he notes that this case differs from *Millsboro* in that there is no contention or evidence that any supervisor solicited a card from any employee.

We have evaluated this evidence in the light most favorable to the Employer's position,⁸ and we find that neither the statements made by the physicians nor the campaign letter contain any threats or promises of benefits—explicit or implicit. Further, we find that the physicians' wearing of prounion buttons does not constitute any type of objectionable coercion of the unit employees. Under these circumstances, we find that the Employer has failed to meet its burden of presenting a prima facie case of objectionable election interference.⁹

ORDER

It is ordered that the Board's Certification of Representative in Case 28-RC-5480, dated June 10, 1997, is affirmed.

IT IS FURTHER ORDERED that the Board's Decision and Order in Case 28-CA-14461, 324 NLRB 802, dated October 22, 1997, is affirmed.

⁸ Generally, to be considered objectionable, alleged misconduct must be shown to have occurred between the date of the filing of the election petition and the date of the election itself—the "critical period." See, e.g., *Gibraltar Steel Corp.*, 323 NLRB 601, 603 (1997). Overall, we have found it reasonable in the circumstances of this case to infer that the incidents set forth in the affidavits occurred within the critical period. However, the Ruiz affidavit referred to a physician's prounion expressions of opinion at a meeting which occurred well before December 24, 1996, the date the petition in this case was filed. Thus, this incident took place outside the critical period and does not therefore constitute a basis for setting aside the election.

⁹ See, e.g., *Sutter Roseville Medical Center*, supra; *National Duct Corp.*, 265 NLRB 413 fn. 2 (1982).