

**Chardan, Inc., d/b/a Perfect Art and Knitgood Workers Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL-CIO, (UNITE) and United Production Workers Union, Local 17-18.** Cases 29-CA-22767 and 29-RC-9054

October 24, 2000

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN AND HURTGEN

On March 28, 2000, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party 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,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Chardan, Inc., d/b/a Perfect Art, Maspeth, New York, its officers, agents, successors, and assigns, shall take the action as set forth in the Order as modified.

1. Insert the following for paragraph 1(g).

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

2. Insert as paragraph 2.

<sup>1</sup> The Respondent 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*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> Member Hurtgen agrees that the election should be set aside, but based solely on the judge's findings that the Respondent violated Sec. 8(a)(1) by: (1) the threat to close its facility; (2) the implied preelection promise of a postelection wage increase; and (3) the coercive interrogation of employee Castillo. Contrary to his colleagues, Member Hurtgen finds no merit in the allegations that the Respondent unlawfully solicited and made an implied promise to correct grievances, created the impression of surveillance, and threatened unspecified reprisals for voting for UNITE.

<sup>3</sup> The judge omitted a cease-and-desist provision from the recommended Order and notice and all affirmative provisions from the recommended Order. We have amended the Order and notice to include those provisions.

“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 Maspeth, New York facility copies of the attached notice marked “Appendix.”<sup>7</sup> Copies of the notice on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 16, 1999.

<sup>7</sup> If this Order is enforced by a judgment of the 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.”

“(b) 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.”

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election in Case 29-RC-9054 shall be set aside, and this case is remanded to the Regional Director for Region 29 to conduct a new election at a time and place to be determined by him.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES  
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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives  
of their own choice

To act together for other mutual aid or protection  
To choose not to engage in any of these protected  
concerted activities.

WE WILL NOT interrogate our employees about their membership in, or their activities on behalf of, Knitgood Workers Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL–CIO (UNITE).

WE WILL NOT create the impression that our employees' union activities are being surveilled.

WE WILL NOT solicit grievances from our employees concerning wages, hours, and other terms and conditions of employment to induce our employees not to select the UNITE as their collective-bargaining representative.

WE WILL NOT promise to increase benefits and improve terms and conditions of employment to our employees to induce them not to select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with unspecified reprisals because of their membership in, or their activities on behalf of, UNITE.

WE WILL NOT threaten our employees to close our business operations because of their membership in, or activities on behalf of, UNITE.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

#### CHARDAN, INC., D/B/A PERFECT ART

*Scott Kardel, Esq.*, for the General Counsel.

*Michael Kaufman and David Greenhaus, Esqs. (Kaufman, Schneider, & Bianco)*, of Brooklyn, New York, for the Respondent.

*Leila, Maldonado Esq.*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on November 29 and 30, 1999, in Brooklyn New York.

On June 3 and August 3, 1999, unfair labor practice charges were filed by Knitgood Workers Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL–CIO (UNITE) (the Union) against Chardan, Inc., d/b/a Perfect Art, (Respondent). On August 5, 1999, a complaint issued alleging that Respondent had engaged in various violations of Section 8(a)(1) of the Act.

On June 26, 1998, a representation petition was filed by the Union. United Production Workers Union, Local 17–18 (the Intervenor), was an intervenor in this petition. On May 27, 1999, an election was held which was won by the Intervenor. The Union filed timely objections to the election on August 17, the Acting Regional Director issued a report on the objections ordering that certain objections, which were consistent with

those allegations alleged in the complaint be consolidated. The remaining objections were either withdrawn, or overruled.<sup>1</sup>

Respondent is a New York corporation with its place of business located in Maspeth, New York, where it is engaged in the manufacture, sale, and distribution of picture frames. Respondent, annually, in the normal course of its business, sells and distributes products valued at in excess of \$50,000 directly to points located outside the State of New York. It is admitted, and I find, that Respondent is an employer, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find, that the Union and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

Respondent employs 31 unit employees. These employees are supervised by Tuli Appel and Ari Schnapp, Respondent's highest level of supervisory employees. It is admitted, and I find, that Appel and Schnapp are supervisors within the meaning of Section 2(11) of the Act.

During the period of late April to May 26, 1999, the day before the election, Respondent conducted at least two meetings with its employees for the sole purpose of discussing the disadvantages of voting for the Union. There is no evidence that the Intervenor was discussed during these meetings, or at any other time. All employees were required to attend these meetings which were held during working hours in Appel's office. Appel was the primary speaker and spoke in English. Schnapp translated Appel's statements into Spanish. Most of Respondent's employees are Spanish-speaking employees.

During one of these April–May meetings, employee Bernardo Melendez credibly testified that Appel told his employees that the Union represented the employees at Crystal Art, a nearby employer engaged in the same business as Respondent, and that negotiations between Crystal Art and the Union had taken 5 years and in the end, Crystal Art was going to close its doors, and that the same thing could happen with Respondent. Melendez also credibly testified that at another meeting, Appel told his employees that he was angry at the Union, that the employees of Crystal Art were going to be unemployed very soon, and that the Union had killed Crystal Art. Appel admitted that he told his employees that Crystal Art was closing because of the Union. Appel could not recall if he told his employees that the Union "had killed Crystal Art." However, he did not deny making such statement.<sup>2</sup>

<sup>1</sup> During the trial of this case, counsel for the General Counsel moved to withdraw the 8(a)(1) allegation alleged in par. 11 of the complaint. This motion was granted.

<sup>2</sup> Melendez impressed me as a credible witness. I was impressed with his demeanor. He testified in a forthright manner during both his direct and cross-examination. His testimony on cross-examination was essentially consistent with his direct testimony. Appel did not impress me as a credible witness. I was not impressed with his demeanor. His testimony was very general and often vague. For example, in connection with the complaint allegation described above he testified that:

I basically told them that I felt that look what happened to Crystal Art, that UNITE, (the Union), you know, what happened with the fact that all these promises, you know, and the fact that Crystal Art was going to close down.

The Board's guideline for distinguishing between a legitimate prophecy and a threat was set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). The Court stated: "a prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is an implication that an employer may or may not take action solely on his 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, and as such without the protection of the First Amendment." *Supra* fn. 58 at 618.

It is clear to me that Appel's statements during his employee meetings concerning the plant closure of Crystal Art and the possible effect on Respondent were not based on objective facts nor were they accompanied by any explanation of an economic necessity for closing. Accordingly, I conclude that Appel's statements to his employees that Respondent might have to close for the same reason as Crystal Art, was a clear threat to close his plant if the Union was selected by the employees as their collective-bargaining representative. I conclude such threat is a clear violation of Section 8(a)(1).

Rafael Aravelo, a unit employee of Respondent credibly testified that in one of the April-May employee meetings in Appel's office attended by all unit employees, the subject of wage increases was brought to Appel's attention by various employees. Aravelo credibly testified that in response to these inquiries, Appel told the employees that if the employees needed a raise it was not necessary to bring in a union to represent them; that Respondent's doors were always open.<sup>3</sup> Appel testified at one point that he couldn't give the employees a raise at this time because it was against the law. However, he then went on to say:

We have to wait. Wait a little bit longer. Wait a little bit longer.

Given Aravelo's credible testimony, Respondent's unlawful threat to close his shop if the Union was selected as the collective-bargaining representative, and the unlawful conduct described below, I conclude that Appel's statement:

We have to wait. Wait a little bit longer. Wait a little bit longer.

---

Again, I didn't want the employees just to only hear one side of the story. I wanted them to know the whole side of the story. . . . I stated, again, I stated the regarding UNITE, you know, that they had attacked me personally and I also, I stated the fact that, you know, said to them look, you know, look what's going on over here. They're not telling, you know, they're not saying the whole truth.

I do not find Appel to be a credible witness.

<sup>3</sup> I find Aravelo to be a credible witness. I was impressed with his overall demeanor. His testimony impressed me as forthright. Moreover, his testimony was essentially consistent on both cross and direct examination. Appel's testimony was generally vague as to this subject, except as set forth above immediately following this footnote.

could be reasonably construed by his employees that if the Union is not selected by the employees as their collective-bargaining representative he would give the employees a raise.

Thus, the credible testimony of Aravelo and the admission of Appel establish that Respondent solicited grievances, and impliedly promised to correct those grievances, especially an implied promise to grant a wage increase, if the employees did not select the Union as their collective-bargaining representative. Accordingly, I conclude that Respondent violated Section 8(a)(1) by soliciting grievances calculated to leave the impression that favorable action would later be taken, in order to induce its employees not to select the Union as their collective-bargaining representative. *Color Tech Corp.*, 286 NLRB 476, 486 (1987); *K-Mart Corp.*, 316 NLRB 1175, 1177 (1995).

Respondent contends that its conduct was not unlawful since it was merely a continuation of an established open-door policy. However, there is no evidence that Respondent ever held employee meetings soliciting grievances about wages and other terms and conditions of employment prior to the Union's organizational campaign. *K-Mart*, *supra* at 1177.

I further conclude that by impliedly promising its employees a wage increase in order to induce them not to select the Union as their collective-bargaining representative, Respondent violated Section 8(a)(1) of the Act. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

Unit employee Carlos Castillo credibly testified that during the election campaign, he had not been active on behalf of either labor organization. Castillo further credibly testified that on or about May 11 he was called into Ari Schnapp's office. As set forth above, Schnapp is an admitted supervisor within the meaning of the Act. During this meeting, Appel was present for a short time then left before the meeting concluded. Appel spoke in English and Schnapp spoke Spanish. Castillo understands English. Castillo credibly testified that Schnapp told him that he heard rumors that he was in favor of the Union.<sup>4</sup> Schnapp then asked Castillo whether he was going to vote for the Union. Castillo told Schnapp that he had not decided how he was going to vote. Schnapp then told him "to think well" on how he was going to vote. He then told Castillo that the Union was no good and that he would like him to vote for Local 17-18.<sup>5</sup>

---

<sup>4</sup> Appel was in possession of an internal union document setting forth those employees in favor of the Union and those in favor of the Intervenor. The document indicated that Castillo was in favor of the Union. Appel did not remember how he came into possession of this document.

<sup>5</sup> I conclude that Castillo was a credible witness. I was impressed with his demeanor. His testimony was forthright. His testimony was consistent on both direct and cross-examination. Moreover, his testimony was detailed and had a strong ring of truth. Additionally, Castillo was still employed by Respondent during the course of this trial.

Appel admitted such meeting took place, but denied that Schnapp questioned him about his support for the Union. As set forth above, I do not find Appel to be a credible witness. Moreover, during this conversation Schnapp spoke to Castillo in Spanish. There is no evidence that Appel either spoke or understood Spanish. Further, Appel admitted that he was not present during the entire conversation. Significantly, Schnapp was not called by Respondent to testify.

The Board has held that an employer's questioning of an employee's union activities is not per se unlawful. In any given case, a determination must be made whether under all the circumstances, the interrogation tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. To fall within the ambit of Section 8(a)(1), either the words themselves, or the context of which they are used, must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176 (1984).

In the instant case Castillo was not an active employee on behalf of either labor organization. The conversation took place in the office of a high-level supervisor to which Castillo was summoned. During this conversation, not only was Castillo questioned about his support for the Union, but as set forth below Schnapp reasonably gave Castillo the impression that his union activities were under surveillance. This is established by Schnapp's statement to Castillo that he heard rumors that he was in favor of the Union. Schnapp, thereafter, threatened Castillo with unspecified reprisals which would include discharge, when he told Castillo "to think well" on how he was going to vote," that the Union was no good, and that he wanted him to vote for the Intervenor.

Applying the standard set forth in *Rossmore House*, supra, to the facts of this case, I conclude that Respondent unlawfully interrogated Castillo in violation of Section 8(a)(1). I also conclude that Respondent created the impression to Castillo that his union activities were under surveillance in violation of Section 8(a)(1). *Peter Vitale Co.*, 310 NLRB 865, 874 (1993); *United Charter Service*, 306 NLRB 150, 151 (1992). I further conclude that Respondent threatened Castillo with unspecified reprisals in violation of Section 8(a)(1). *Leather Center Inc.*, 308 NLRB 16, 28, 29 (1992).

#### The election

Pursuant to a stipulated election agreement, an election was held on May 27, 1999. (Case 29-RC-9054.) The results showed that of 31 eligible voters, 17 votes were cast for the Intervenor, 9 votes were cast for the Union (the Petitioner), 1 vote was cast against the participating labor organizations, and there were 4 challenged ballots. Timely objections were filed by the Union (the Petitioner). On August 17, the Regional Director issued a report. The report concluded that certain objections be consolidated with the complaint here. In view of

my findings that substantial and serious violations of Section 8(a)(1) of the Act were committed by Respondent, I recommend that a new election be held.

#### REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, Chardan, Inc., d/b/a Perfect Art, Maspeth, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their membership in, or their activities on behalf of, Knitgoods Workers Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL-CIO (UNITE).

(b) Creating the impression that its employees' activities on behalf of the Union are being surveilled.

(c) Soliciting grievances from its employees concerning wages, hours, and other terms and conditions of employment to induce its employees not to select the Union as their collective-bargaining representative.

(d) Promising increased benefits and improved terms and conditions of employment to its employees to induce them not to select the Union as their collective-bargaining representative.

(e) Threatening its employees with unspecified reprisals because of their membership in, or their activities on behalf of, the Union.

(f) Threatening its employees to close its business operations because of their membership in, or activities on behalf of, the Union.

---

<sup>6</sup> 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.