1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board *and* Rosemary L. Stevenson

Pinebrook Nursing Home *and* Rosemary L. Stevenson, Petitioner. Cases 22–CB–6305 and 22–UD–301

December 6, 1991

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On November 26, 1990, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board, its officers, agents, and representatives, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held in Case 22–UD–301 be set aside and a second election be conducted.

[Direction of Second Election omitted from publication.]

CHAIRMAN STEPHENS, concurring.

Nothing in the Act necessarily prevents a union from abandoning its role as collective-bargaining representative or informing employees that it will no longer act as their bargaining representative should the employee decide to revoke the union-security provisions of the contract.[1]

I agree, however, that the Respondent violated Section 8(b)(1)(A) by threatening employees that they would lose their representation and ''union job security'' if they voted to rescind the Respondent's authority to rehire union membership as a condition of employment. The violation exists in this case because at least one of the Respondent's communications to the unit employees could reasonably be construed as threatening that the Respondent would remain in place as the unit representative but would not properly represent the employees if they voted to discontinue the union-security provision in the contract. Thus, in a circular distributed at a union meeting and posted on its bulletin board at Pinebrook, the Respondent stated, inter alia:

> 1115's ability to *fully and properly represent* you will be seriously hampered and everything that has been gained with 1115 can be in serious jeopardy. [Emphasis added.]
>
> *Voting NO*: Means that you want to continue 1115's ability to properly represent you on wages, hours, benefits, job security and employee grievances.

In view of the foregoing, I do not view the Respondent's actions as indicating only that, in the event it lost the election, it would *unequivocally* relinquish its status as bargaining representative.[2] Rather it could reasonably be construed as unlawfully threatening that the Respondent would not fully enforce the contract and that employees would lose contractual benefits such as grievance processing if they voted for deauthorization. Such threats clearly restrain and coerce employees in the exercise of their Section 7 rights.

[1] 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 Drywall 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.

We adopt the judge's finding that the Respondent violated Sec. 8(b)(1)(A) by threatening employees that it would no longer represent them if they voted to deauthorize the union-security provisions of its collective-bargaining agreement with the Employer. In this regard, we assume that a union could cease representing employees, particularly if it became economically infeasible to represent them. (See the discussion in *Teamsters Local 42 (Grinnell Fire Protection)*, 235 NLRB 1168, 1169 (1978).) We further assume that a union could inform employees of this possible economic consequence. However, in the instant case, the Respondent failed to provide the bargaining unit employees with objective evidence that without the agreement's union-security provisions, it would not be economically feasible for it to represent the employees. Absent such objective evidence, the Respondent's preelection threat to walk away from its representational obligations if the election resulted in deauthorization constitutes restraint and coercion of the employees' Sec. 7 right to participate in the deauthorization election. See, e.g., *Steelworkers Local 1397 (U.S. Steel Corp.)*, 240 NLRB 848 (1979).

We further find, in agreement with the judge, that the Respondent's statement to employees that they would lose their ''union job security,'' made in the context of the unlawful threat to walk away from its representational obligations, constituted a violation of Sec. 8(b)(1)(A) of the Act.

[1] *Dycus v. NLRB*, 615 F.2d 820, 826 (9th Cir. 1980), enfg. sub nom. *Teamsters Local 42 (Grinnell Fire Protection)*, 235 NLRB 1168 (1978). See also *NLRB v. Circle A & W Products*, 647 F.2d 92 (9th Cir. 1981), cert. denied 454 U.S. 1054; *American Sunroof*, 243 NLRB 1128 (1979).

[2] To be valid, a disclaimer must be unequivocal and not asserted for an improper purpose. *Dycus v. NLRB*, supra. A disagreement with the unit employees over whether a union should remain the representative following cancellation of the union-security clause is not an improper purpose. *NLRB v. Circle A & W Products*, supra, 647 F.2d at 926–927.

authorization. Such threats clearly restrain and coerce employees in the exercise of their Section 7 rights.

Dorothy C. Karlebach, Esq., for the General Counsel.
Richard M. Greenspan, Esq., of White Plains, New York, for 1115 Hospital Employees.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. These cases were consolidated for hearing as they both pertain to whether 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board (Respondent) unlawfully threatened employees of Pinebrook Nursing Home (Pinebrook) and thereby improperly influenced the outcome of the election conducted in Case 2–UD–301. In Case 22–CB–6305, Respondent is alleged to have engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by having threatened: (1) not to represent those employees who voted in the election; (2) not to represent those who ceased paying union dues if Respondent lost the election; (3) to cause the discharge of those who ceased paying union dues if Respondent lost the election; (4) employees with loss of benefits if Respondent lost the election; (5) not to represent the employees if Respondent lost the election.

In Case 2–UD–301, the Petitioner filed objections to conduct affecting the results of the election held in that case; those objections are based on essentially the same alleged threats at issue in Case 22–CB–6305.

I heard this case on April 23, 1990, in Newark, New Jersey. On the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The pleadings establish that Respondent is a labor organization as defined in Section 2(5) of the Act.

The employees involved in this case are employed by Pinebrook which operates a nursing home in Englishtown, New Jersey. In its operations annually, it meets the Board's jurisdictional standard for nursing homes.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Pinebrook and Respondent have a collective-bargaining agreement, effective from June 17, 1989, through June 17, 1992, which covers a unit of all employees, including nurses aides and LPNs at the Englishtown facility. That agreement contains a provision, permitted by the Act, that employees must be members of Respondent as a condition of continued employment.

Rosemary Stevenson is an LPN at Pinebrook's facility and was, in late 1989, a shop steward for Respondent. On November 9, 1989, she filed the petition in Case 22–UD–301.

The threats involved in these cases are alleged to have been made during visits to Pinebrook's facility by Respondent's business agents Edith Lohlein and Robert Blount and by its area coordinator, Nathaniel Hall, and in a campaign circular distributed by Respondent.

B. *The Alleged Threats*

Two nurses aides, Ceola Pitts and Roberta Flagg, testified for the General Counsel that, at a meeting they attended in the main dining facility at Pinebrook in November 1989, Lohlein in effect asked the employees which of them supported the petition in Case 22–UD–301 and then told them, in essence, that they would have no representation if they voted in favor of that petition.

Pitts also testified that, at a meeting on December 7, 1989, at Pinebrook, Hall told the employees that if ''[they] go through with this petition, [they] won't have [a] representative to represent [them].''

Stevenson testified for the General Counsel that, on December 6, 1989, Blount met informally with several aides and said then that they would lose their job security ''if the election was voted'' and that Pinebrook would then be free ''to do anything to the employees.''

Dorothy McLawhorn, a nurses aide, testified for the General Counsel that Hall told her, just after she had voted in the election held in Case 22–UD–3 on January 4, 1990, that if Respondent ''is removed from representing [the employees, the owners] could do anything [they choose] to do.''

Stevenson further testified that at a union meeting held on January 2, 1990, Respondent's director of organizing, Fred Trippi, passed out a circular reading as follows:

> To: Pinebrook Nursing Home Employees.
> From: 1115 Nursing Home and Hospital Employees Union
>
> January 4, 1990, will be decision time, as to whether you want to continue union security that you are presently enjoying on the job or to withdraw and lose your present union security.
>
> *Voting YES*: Means thay you want to withdraw *and discontinue ''1115's union security provision in the union contract.''* That you are presently enjoying as a condition of employment. This further means;
>
> 1. You will lose the union job security and representation that you presently have.
> 2. Your condition of employment and job security will be in management's control.
> 3. 1115's ability to fully and properly represent you will be seriously hampered and everything that has been gained with 1115 can be in serious jeopardy.
>
> *Voting NO*: Means that you want to continue 1115's ability to properly represent you in wages, hours, benefits, job security and employee grievances. *Vote NO and continue to* keep everything you have gained with Local 1115.

Other witnesses for the General Counsel testified that this circular was posted on Respondent's bulletin board at Pinebrook.

Trippi did not testify. Stevenson's account as to the circular is thus uncontroverted.

Lohlein, Blount, and Hall denied that they ever told Pinebrook's employees that Respondent would no longer represent them if they persisted with their efforts to deauthorize

Respondent and Pinebrook from continuing the contractual union-security provisions in effect. I find their accounts unpersuasive in view of the explicit language of the circular set out above. Further, I find other relevant testimony given by Lohlein, Hall, and Blount to be improbable. Thus, Lohlein testified that a petition was being circulated among Pinebrook's employees but denied that she asked what the petition was all about. Hall testified that he probably did ask about the petition but he also related that he did not know that the petition pertained to deauthorizing the union-security provisions of Respondent's contract. Blount testified that he had no knowledge of a petition even though he had come to Pinebrook then to take over as Respondent's representative. It strikes me as improbable that these agents of Respondent, insofar as dealing with Pinebrook is concerned, were that indifferent to a matter as vital to Respondent as union dues.

I credit the accounts given by the General Counsel's witnesses.

There is no evidence that Respondent explicitly had threatened not to represent these unit employees of Pinebrook who actually voted or those who ceased paying union dues nor is there any direct evidence that Respondent threatened Pinebrook employees with loss of benefits. There is, however, merit to the other complaint allegations.

In telling the employees that they would lose their ''union job security'' if they voted against Respondent's wishes, Respondent certainly raises the spectre that their jobs could well depend on the outcome of that election. I find that Respondent thereby threatened them with loss of their jobs in order to dissuade them from voting to deauthorize Respondent from entering into or maintaining contractual union-security provisions.

A different legal issue is posed by Respondent's warning that the employees could face a loss of representation if they voted adversely to Respondent's interests. A union can walk away, as the General Counsel concedes in the brief, from its representational obligations by telling employees that it can no longer afford to represent them without a full dues-paying complement of employees. The General Counsel urges, however, that the evidence supports a finding that Respondent unlawfully told the unit employees that it will no longer represent them if they take part in an election which results in deauthorizing the union-security provisions. The credited evidence, more precisely, establishes that Respondent informed the Pinebrook employees that they would lose representation if the election resulted in deauthorization. In *Brewery Workers (Miller Brewing Co.)*, 195 NLRB 772 (1972), the Board held that the union there restrained employees in the exercise of their rights under Section 7 of the Act by telling them that they had to sign dues-checkoff authorization cards if they want ''the contract enforced to the letter.'' The instant case presents a closely analogous factual situation and I, therefore, find that Respondent, in notifying the Pinebrook employees that they would lose representation if they voted to rescind Respondent's authority to contract for union-security clauses, thereby further restrained and coerced those employees in the exercise of their rights under Section 7 of the Act.

III. THE OBJECTIONS

The threats alleged as unfair labor practices, discussed above, are essentially the same as those contained in the objections, filed by petitioner, to the election results in Case 22–UD–301. The tally of ballots in that case showed that, of 87 unit employees, only 27 voted in favor of withdrawing Respondent's authority—17 short of the number required for such withdrawal.

Based on my findings above that Respondent restrained and coerced employees in the exercise of their Section 7 rights by telling them that they would lose ''their union job security'' and representation by Respondent if the election resulted in a withdrawal of Respondent's authority to contract for a union-security clause, I find that Respondent thereby improperly influenced unit employees with respect to their rights to freely vote in that election.

CONCLUSIONS OF LAW

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

2. Respondent is a labor organization as defined in Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act by having informed Pinebrook employees that their union job security would be lost and that Respondent would not represent them if they voted to rescind the authority given Respondent to contract with Pinebrook to require employees to remain dues-paying members in order to continue in Pinebrook's employ.

4. By the conduct set forth in paragraph 3, above, Respondent engaged in conduct which improperly influenced Pinebrook employees respecting their right to freely decide whether to rescind Respondent's authority to agree with Pinebrook that they must continue to be dues-paying members of Respondent as a condition of continued employment with Pinebrook and Respondent thereby engaged in conduct which warrants setting aside the results of the election held in Case 22–UD–301.

5. Respondent did not engage in any alleged unfair labor practice other than as found above.

On the basis of the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees of Pinebrook Nursing Home with loss of their union job security and of representation by Respondent if Respondent's authority to require, under its agreement with Pinebrook that membership in Respondent be a condition of employment is rescinded in a Board-conducted election.

(b) In any like or related manner restraining or coercing Pinebrook employees in the exercise of their rights under Section 7 of the Act.

[1] 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.

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

(a) Post on its bulletin boards at Pinebrook Nursing Home and at its own principal office in Westbury, New York, copies of the attached notice markd ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places 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) Mail signed copies of the attached notice to all employees in the bargaining unit it represents at Pinebrook.

(c) Additional copies of the attached notice shall be signed by a representative of Respondent and sent to the Regional Director for Region 22, for posting by Pinebrook, if willing, in places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If 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.''

IT IS FURTHER RECOMMENDED that unfair labor practice allegations in the complaint which have not been found to have merit are dismissed.

IT IS ALSO FURTHER RECOMMENDED that the results of the election in Case 22–UD–301 are set aside and a new election is to be conducted.

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 threaten that you will lose your job security or representation by us if you withdraw our authority in a Board-conducted election, to require, under our contract with Pinebrook Nursing Home that union membership be a condition of employment.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

1115 NURSING HOME AND HOSPITAL EMPLOYEES UNION, A DIVISION OF 1115 JOINT BOARD