Conagra, Inc., d/b/a Northern States Beef *and* United Food and Commercial Workers Union, Local 73A, AFL–CIO–CLC, Petitioner. Case 18–RC–15232

May 28, 1993

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held March 27, 1992, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 78 for and 57 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations, and finds that a certification of representative should be issued.

In support of its objections, the Employer has alleged that the hearing officer made a procedural error by referring its motion to enforce a subpoena duces tecum to the Regional Director who thereafter denied the motion, rather than referring the matter to the Board. The Employer has maintained that the decision on whether to institute subpoena enforcement proceedings is within the sole province of the Board acting directly rather than through a delegation. We disagree.

Under Section 3(b) of the National Labor Relations Act, the Board is authorized to delegate to the Regional Directors its power under Section 9 of the Act regarding representational matters. The Board may review a Regional Director's action, but that review does not stay the action unless specifically so ordered by the Board. The Board's Rules and Regulations, Section 102.65(a), state, in pertinent part, that motions made prior to the transfer of the case to the Board shall be filed with the Regional Director, or, if made during the hearing, with the hearing officer. Further, the Regional Director may rule on all motions filed with him or he may refer them to the hearing officer for ruling.

In the case at hand, we find that the Regional Director properly exercised his delegated authority. See *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1309–1310 (9th Cir. 1978). Therefore, after reviewing the record and giving due consideration to the Employer's motion, we adopt, in its entirety, the attached Regional Director's order denying the Employer's motion that subpoena enforcement proceedings be instituted. In addition, we note that the Board in its review process has addressed the Employer's concern that the matter at issue be presented to the Board and that the Employer has not been prejudiced in any manner.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Foods and Commercial Workers Union, Local 73A, AFL–CIO–CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its plant at 316 Third Avenue, Edgar, Wisconsin; excluding all office clerical employees, quality assurance employees, sales persons, graders, computer operators-programmers, panel board operators, logic system operator, manifestors, checkers, dispatchers, plant clericals, scalers, ground beef formulators, buyers, electronic scales technician, medical department employees, night sanitation employees, janitors, truck spotters and washers, managerial employees, professional employees, guards and supervisors as defined in the Act.

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In support of Objection 4, the Employer has asserted that the hearing officer has allowed hearsay testimony regarding statements made by Bob Logan and Mike Hart to be admitted into the record as an exception to the hearsay rule, and therefore, by not relying on those statements in his report, the hearing officer directly contradicted his previous evidentiary ruling. We disagree. ''Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies.'' *Alvin J. Bart & Co.*, 236 NLRB 242 (1978). In the instant case, we note that the hearing officer acknowledged this principle when he admitted the hearsay testimony into the record by stating that the testimony would not necessarily lend credence to whether the objectionable conduct had in fact occurred. The Employer has contended that the hearsay statements were also being offered to prove the degree of anxiety and fear that allegedly existed in the plant prior to the election. However, as the only evidence proffered by the Employer to show the nexus between the alleged atmosphere at the plant was the hearsay statements made regarding the alleged objectionable conduct, we find that the hearing officer properly discounted the testimony.

We correct the following inadvertent errors made by the hearing officer under the ''Preliminary Matters'' section of his report: (1) in par. 1, the subpoena material was requested up to the date of the hearing on November 18, 1992; (2) also in par. 1, even though the Employer's attorney did make a request by letter to the Regional Director and the General Counsel, the Regional Director had yet to receive it by the time he issued his order denying enforcement of the subpoena; and (3) at the end of the third paragraph, the reference should read ''(See 102.66(c) of the Board's Rules and Regulations).''

APPENDIX

REGIONAL DIRECTOR'S ORDER DENYING EMPLOYER'S MOTION THAT SUBPOENA ENFORCEMENT PROCEEDINGS BE INSTITUTED

On November 10, 1992, the Employer served a subpoena duces tecum on a ''qualified representative'' of the Petitioner, seeking the production of the following materials at a hearing on the Employer's objections, which opened November 18, 1992:

> (1) All monies paid to employees [of the Employer] from January 1, 1992 to the present.
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> (2) Names, dates, rented, and amounts of rent paid for all facilities rented for Union meetings with [Employer's] employees from January 1, 1992 to the present.
>
> (3) Records showing attendance by [Employer's] employees at any Union meeting from January 1, 1992 to the present.

At the hearing, the Petitioner failed to produce the materials called for in item 3. At that time the Employer modified item 3 to seek only a listing of employees attending the March 25, 1992 union meeting. John Eiden, a representative of the Petitioner, testified at the hearing that, if a sign-in list were maintained at the March 25 meeting (and other representatives of the Petitioner testified that it was), he was unable to find it; that it would have been maintained in a box that he carried with him during the campaign which also contained literature and newspaper articles regarding the campaign; that that box had been lost after the campaign, and for that reason, he was unable to produce the sign-in list, had one actually been maintained. Although Eiden would have been the individual with possession of the sign-in sheet had one been maintained, Eiden conceded that he did not ask the other business agents involved in the campaign whether they had the list.

The Employer's attorney, believing that Eiden's denial of the existence of such material was suspicious stated he could not accept it; that he wanted to hear the witness make such a denial before a Federal judge; and, although not indicating on what basis he believed that such testimony would be changed if made before a Federal judge, asked that the hearing officer refer to me his motion that enforcement of the subpoena be sought (only as to the March 25 list). The hearing officer did so.

In support of its Objection 4, the Employer contends that at the March 25, 1992 union meeting, unnamed employees who voiced opinions against representation were attacked and physically assaulted; and that the Petitioner's representatives did nothing to disavow the conduct or to stop the attack.

It is not clear why the Employer needs a listing of employees who attended the March 25 meeting. It could be in order to identify the potential participants in the altercation, had one occurred, or potential witnesses to it. The Employer contends that things are too busy at the plant to question the employees pursuant to *Johnnie's Poultry Co*., 146 NLRB 770 (1964).

The Employer has not set forth a reasonable basis to believe that the subpoenaed document exists. Further, no reason appears why the Employer could not obtain the names of employees who were assaulted or were witnesses thereto without the subpoenaed list. The Employer knew the names of several employees who attended the March 25 meeting and the names of employees allegedly assaulted, and yet didn't call them as witnesses. Further, three business agents who attended the meeting were called as witnesses by the Employer; and three employees, one an alleged participant, were called as witnesses by the Petitioner and were subject to cross-examination by the Employer. Finally, providing an employer the names of employees attending a union meeting, not unlike providing names of employees signing union authorization cards, is contrary to established Board policy. This is especially true where, as noted, the Employer had available for examination several individuals who had attended the meeting and, moreover, could have obtained the information it sought by other means.

Finally, I find that the interests of employees in not having the fact that they attended a union meeting revealed to their employer far outweigh the employer's rights to obtain that information where, in the circumstances here, the Employer could have obtained the evidence it sought by other means, and had access to witnesses at the hearing who had attended the meeting in question.

At the meeting the Employer indicated an intention to also formally request in writing that enforcement be sought in this matter. As yet, the Employer has failed to do so. However, all factors relevant to such a request are set forth in the record of the hearing, which, as the Employer requested, has been carefully considered.

Based on the foregoing, I find that insufficient basis exists for seeking enforcement of the Employer's subpoena, and therefore the Employer's motion that enforcement be sought is denied.