HCF Inc. d/b/a Shawnee Manor *and* District 1199 SEIU, The Health Care and Social Service Union, AFL–CIO, Petitioner. Case 8–RC–15261

August 27, 1996

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on September 1, 1995, and the Regional Director's supplemental report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 68 for and 61 against the Petitioner, with 5 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations as further discussed below, and finds that a certification of representative should be issued.

1. The Employer has excepted, inter alia, to the Regional Director's finding that an employee who allegedly made threats of violence in the course of soliciting union authorization cards was not a special agent of the Union under *Davlan Engineering*, 283 NLRB 803 (1987). We agree with the Regional Director that under the circumstances presented here, the card solicitor was not a special agent of the Union.

In support of Objection 1, the Employer presented evidence that, on the day before the election, a bargaining unit employee approached another employee and solicited her to sign a union authorization card. The card solicitor allegedly stated that the employee had better sign a card because if she did not, the Union would come and get her children and it would also slash her car tires. In recommending that Objection 1 be overruled, the Regional Director found that the card solicitor was not a special agent of the Union under *Davlan* because the statements allegedly made by the employee did not involve representations about the Union's fee-waiver policies. In its exceptions the Employer argues that *Davlan* is not limited to statements concerning fee-waiver policies, and should apply to threats of violence made in the course of card solicitation.

In *Davlan*, the Board stated that ''in the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers *or other purported union policies* that they make in the course of soliciting.'' 283 NLRB at 804 (emphasis added). Although the Employer is correct that *Davlan* encompasses statements made during card solicitation concerning purported union policies other than fee-waiver statements, we do not agree with the Employer that it encompasses threats of union violence under the circumstances presented here. In our view, alleged threats of violence, even when made in the course of card solicitation, cannot be construed by any reasonable person as representing ''purported union policies.''[1] Thus, where, as here, threats of union violence made by card solicitors cannot reasonably be viewed to be within the scope of their authority, a special agency relationship does not arise, and such threats are not attributable to the Union. Accordingly, we shall evaluate such conduct under the third party standard. We agree with the Regional Director that, viewed under the standard for third-party conduct, the evidence presented by the Employer, even considered cumulatively, is insufficient to warrant setting aside the election. *Westwood Horizons Hotel*, 270 NLRB 802 (1984).

2. The Employer has excepted to the Regional Director's failure to apply the Board's *Sewell Mfg. Co.*, 138 NLRB 66 (1962), analysis to its evidence concerning appeals to racial prejudice.[2] In recommending that Objection 2 be overruled, the Regional Director found that the alleged racial remarks were made by a prounion employee and could not be attributed to the Union. He further noted, citing *Benjamin Coal Co.*, 294 NLRB 572, 573 (1989), that the rule in *Sewell* ''concerns prejudiced campaign propaganda issued by a party to the election, not expressions of employee bias independent of the party's own actions.'' In its exceptions the Employer argues, inter alia, that *Sewell* applies to third-party conduct and that under that standard the election should be set aside.

Even assuming arguendo that *Sewell* is applicable to conduct by third parties standing alone, we do not find the remarks made in this case sufficient to warrant setting aside the election under that standard. The evidence presented by the Employer, even if credited, does not rise to the level of a sustained appeal to racial prejudice. The remarks do not seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals.[3] Because we find the remarks did not so in-

[1] Cf. *Jet Port Express*, 284 NLRB 739 (1987) (Employee was not a special agent of the union when he wagered a six-pack of beer on the outcome of the election because the conduct ''could not have been construed by any reasonable person as representing 'union policy''' and it was not alleged to have occurred during card solicitation.)

[2] The Employer presented evidence that during the critical period an employee told other employees that ''she thought some of the Employer's nurses treated black employees worse than white employees.'' (Evidence was also presented concerning similar remarks made outside the critical period.) There were also rumors that the election was a ''black-white'' issue.

[3] See *Coca-Cola Bottling Co.*, 273 NLRB 444, 445 (1984) (''The question of whether employees have been unfairly treated, for what-

flame and taint the atmosphere in which the election was held that ''a reasoned basis for choosing or rejecting a bargaining representative was an impossibility,''[4] we agree with the Regional Director that Objection 2 should be overruled.[5]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for District 1199 SEIU, The Health Care and Social Service Union, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees, including licensed practical nurses, medical records clerks, patient fund coordinators, maintenance employees, activity aides, certified nursing assistants, physical therapy aides, cooks, food service workers, maintenance assistants, housekeeping and laundry employees but excluding all registered nurses, professional employees, department heads, managers, guards and supervisors as defined in the Act.

MEMBER COHEN, dissenting in part.

I would hold a hearing to resolve factual issues relating to whether the card solicitor was a special agent of the Union. These issues would include: whether the Union gave the cards to the solicitor, with the understanding that she would solicit employees to sign them; whether the Union permitted or acquiesced in the solicitations. See *Davlan Engineering*, 283 NLRB 803, 804 (1987). If the evidence establishes that there was such agency, I would then consider the issue of whether threatening conduct by the agent, in the course of such solicitation, should be regarded as union conduct for purposes of passing on objections to an election.

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ever reason, is always a legitimate topic of discussion in a union campaign.'').

[4] *Sewell*, 138 NLRB at 72.

In view of the fact that *Sewell* is distinguishable, Chairman Gould finds it unnecessary to decide whether he agrees with the Board's holding in *Sewell*.

[5] In *Carrington Health Care Center v. NLRB*, 76 F.3d 802 (6th Cir. 1996), the court remanded for a hearing regarding whether union campaign cartoons may have blatantly exploited the prejudices of the voters. Here, as noted and unlike *Carrington*, there is no showing that the Union was responsible for any of the alleged employee remarks. Further, viewing the Employer's evidence in the light most favorable to the Employer, as the court did in *Carrington*, we have found no basis to conclude that there was a sustained appeal to racial prejudice.