Fieldcrest Cannon, Inc. *and* Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC, Petitioner. Case 11–RC–5776

October 30, 1998

SUPPLEMENTAL DECISION AND DIRECTION OF THIRD ELECTION

BY MEMBERS FOX, LIEBMAN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 12 and 13, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision, Order, and Direction of Second Election issued by the Board on August 25, 1995. (318 NLRB 470.) The revised tally of ballots is as follows: 2194 for and 2563 against the Petitioner, with 316 challenged ballots, an insufficient number to affect the results.[1]

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations[2] regarding Objection 19, and finds that the

[1] The original tally of ballots showed 378 challenged ballots. On October 2, 1997, the Regional Director for Region 11 issued a report on challenged ballots, in which he recommended that the challenges to the ballots of 62 employees whose names did not appear on the list of eligible voters be sustained and that the Board issue a revised tally of ballots reflecting that the challenged ballots are not sufficient in number to affect the results. No exceptions were filed to the Regional Director's report. Accordingly, the revised tally of ballots is as stated above.

[2] In adopting the hearing officer's recommendation to direct a new election, we rely only on his findings regarding Objection 19. We find it unnecessary to pass on his findings regarding the other objections, or to reach the parties' exceptions to those other findings.

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 as they relate to Objection 19.

We agree with the hearing officer that there is no merit in the Employer's contention that, under *Texas Meat Packers*, 130 NLRB 279 (1961), the conduct alleged in Objection 19 can only be litigated in an unfair labor practice proceeding, not a representation proceeding. See *ADIA Personnel Services,* 322 NLRB 994 (1997), cited by the hearing officer. In its exceptions, the Employer argues that the hearing officer's reliance on *Siemens* is misplaced. According to the Employer, the conduct alleged in *Siemens* (threat to freeze wage increases and bonuses) "was on its face objectionable," whereas the conduct alleged in Objection 19 is proper unless "improper motivation [is] shown," and "[t]his requires an unfair labor practice charge." We disagree.

Improper motivation is not a necessary element of objectionable surveillance. Indeed, the hearing officer's recommendation to sustain Objection 19 is not based on a finding of improper motivation. Rather, the hearing officer properly focused on whether the Employer had a legitimate reason for its conduct. For example, the hearing officer found that the Employer's "unexplained and unusual supervisory presence outside the door to the [union] meetings, especially in greater numbers than are required for the starting, timing, and stopping of the meetings," conveyed an impression of surveillance. The hearing officer's analysis is entirely consistent with that used by the Board in other representation cases presenting surveillance issues. E.g., *Red Lion*, 301 NLRB 33 (1991) (Board reversed hearing officer's impression-of-surveillance finding where employer's conduct was justified by valid business reason of which employees were aware). Accordingly, the hearing officer did not err in finding the Employer's conduct to be objectionable in the absence of an unfair labor practice charge.

In adopting the hearing officer's recommendation to sustain Objection 19, we find it unnecessary to rely on his comment in fn. 92 that an employer's instruction to its supervisors to monitor employee protected activity, standing alone, is unlawful and objectionable. Such employer conduct is not the basis for the hearing officer's recommendation to sustain Objection 19.

In its exceptions, the Employer argues, inter alia, that the hearing officer's recommendation to sustain Objection 19 is inconsistent with a statement in the penultimate paragraph of his report on Objection 3 to the effect that the decline in attendance at the union response meetings was not a product of any employer action. The Employer, however, has failed to consider the hearing officer's statement in its proper context.

Objection 3 alleges that the Employer failed "to give the Union adequate notice of, and equal time and facilities for the Union to respond to, addresses made by the Employer on the question of union representation, as required by the Fourth Circuit Judgment." The hearing officer concluded that these allegations lacked merit and that the relatively minor problems the union experienced responding to the Employer's meetings had no effect on the election results. Accordingly, he recommended that Objection 3 be overruled. Thus, the hearing officer's statement in his discussion of Objection 3 that he could not "conclude that the decline in attendance [at the Union meetings] was a product of any Employer action" must necessarily be read in the context of the hearing officer's ultimate conclusion that the Employer had adequately complied with the court's directives pertaining to union responses to Employer campaign presentations. In essence, Objection 3 and the hearing officer's statement related only to logistical or procedural concerns.

By contrast, Objection 19 alleges "[s]urveilling, and creating the impression of surveillance, of employees . . . entering and leaving the Union's speeches." In his consideration of Objection 19, the hearing officer specifically found that the Employer "engaged in a pervasive and purposeful program of surveillance of its employees while they attended the union response meetings ordered by the Board and the court" and that the Employer's conduct "inhibited employee attendance at the response meetings, thus effecting the results of the election to a significant degree."

Accordingly, we find no merit in the Employer's contention that the hearing officer's report is internally inconsistent.

Member Brame emphasizes that the Employer's surveillance did not consist of isolated actions by possibly overzealous supervisors which might have affected only a small portion of the voting unit. The hearing officer found that in some plants supervisors were under orders to list the names of employees attending the union response meetings (this included explicit written instructions from the human resources manager in Plant 4). There was record evidence that supervisors in 7 of the 13 plant groups voting in the election repeatedly engaged in surveillance at the union response meetings of those 7 affected plant groups. It appears that supervisors engaged in surveillance at most, if not all, of the approximately 174 union response meetings for those plant groups. These meetings were scheduled to cover approximately 3100 of the approximately 5530 employees eligible to vote. The Employer's failure to repudiate its conduct before the election (*Golden Poultry Co*., 271 NLRB 925, 926–927 (1984)) and the pervasive nature of the credited conduct thus supports the hearing officer's recommendation that the Board conduct a new election.

election must be set aside and a new election held.[3]

[Direction of Third Election omitted from publication.]

[3] We agree with the hearing officer's recommendation that a new election be conducted. Our decision to direct a new election does not affect the order of the Court of Appeals for the Fourth Circuit enforcing our 1995 decision, providing special access remedies, which remains in effect and governs this case. *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 63 (4th Cir. 1996), enfg. 318 NLRB 470 (1995).

As the Union has excepted to the hearing officer's failure to order that the notice of the new election include, pursuant to *Lufkin Rule Co.*, 147 NLRB 341 (1964), a statement of the reason for the second election being set aside, we order that such language be included in the notice of the new election. See NLRB Casehandling Manual (Part Two), Representation Proceedings, sec. 11452.1.