Terry Machine Co., a Division of S.P.S. Technologies, Inc., Employer and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 155, Petitioner Case 7–RC–21581

March 28, 2011

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

The issue before the Board in this case involves Employer objections to an election.[1] The Employer alleges that its area coordinators are statutory supervisors and that some of them engaged in objectionable, prounion conduct during the representation campaign prior to the election. Assuming without deciding that the area coordinators are statutory supervisors, we find for the reasons set forth herein that the effect of any prounion solicitations they engaged in was mitigated by the Employer's own conduct and did not materially affect the election's results. Accordingly, we overrule the Employer's objections and reaffirm the Board's prior certification of the Union.

I. BACKGROUND

This case has a lengthy procedural history. The Petitioner seeks to represent a unit that includes, inter alia, the Employer's area coordinators, whom the Employer contends are statutory supervisors. The Regional Director conducted a preelection hearing on the area coordinators' status, but he was unable to resolve it on the record before him and thus concluded that they should vote subject to challenge. At the election, the Employer challenged the ballots of seven prounion area coordinators, while the Union challenged the ballots of five other voters whom it also claimed were supervisors. The Employer also filed objections asserting that the prounion activities of the seven area coordinators tainted the election and the Petitioner's showing-of-interest petition. After a hearing, the hearing officer recommended overruling the Employer's objections without resolving the area coordinators' supervisory status. He assumed for the purpose of his report that the area coordinators were statutory supervisors, but found that their prounion activities were not objectionable. With further reasoning, the Board adopted the hearing officer's recommendations and certified the Union.[2]

Subsequently, the General Counsel issued a complaint, alleging that the Employer refused to bargain with the Union, and the Acting General Counsel then filed a motion for summary judgment. While the motion was pending, the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), which rejected the Board's interpretation of the term "independent judgment," as used in Section 2(11) of the Act, in determining whether an individual is a statutory supervisor, id. at 713, and the Board issued its decision in *Harborside Healthcare*, 343 NLRB 906 (2004), setting forth the standard for determining whether a supervisor's prounion activity is objectionable. Consequently, the Board denied the pending motion for summary judgment, reopened the record in the representation case, and remanded the case to the Regional Director to consider (1) the area coordinators' supervisory status in light of *Kentucky River*, and (2) whether, if the area coordinators were supervisors, their prounion conduct interfered with the results of the election under *Harborside*. The Regional Director, in turn, referred the case to the hearing officer to issue a second report based on the then-existing record.

In his second report, the hearing officer recommended finding that the area coordinators were statutory supervisors but that their challenged prounion conduct was not objectionable under *Harborside*. The Employer and the Petitioner then filed exceptions with the Board. While these exceptions were pending, the Board issued its decisions in *Oakwood Healthcare*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), in light of the Supreme Court's

[1] The National Labor Relations Board, by a three-member panel, has considered the objections and the hearing officer's second and third reports recommending disposition of them. The election was conducted in 1999 pursuant to a Decision and Direction of Election. The initial tally of ballots showed 76 for and 66 against the Petitioner, with 12 challenged ballots. In his first report, the hearing officer recommended that the challenges to seven ballots be sustained unless the Petitioner filed exceptions. In the absence of exceptions, the Board then adopted that recommendation, which made the remaining five ballots no longer determinative. See *Terry Machine Co.,* 332 NLRB 855 fn. 3 (2000).

[2] *Terry Machine Co.,* supra. It ruled on the challenged ballots as set out in fn. 1 above.

decision in *Kentucky River*. These decisions addressed the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11). The Board then remanded this case to the Regional Director for consideration of the area coordinators' supervisory status under these cases.[3] In turn, the Regional Director ordered the hearing reopened on the supervisory issue as well as "on the issues raised by the Board's decision in *SNE Enterprises*,"[4] which issued after the Board's remand in this case and applied *Harborside* retroactively to evaluate allegedly objectionable conduct of prounion supervisors.[5]

Subsequently, the hearing officer issued his third report in which he reaffirmed his recommendation that the area coordinators were statutory supervisors. He now found, however, that their solicitation of signatures on two sets of petitions constituted objectionable, coercive conduct and materially affected the outcome of the election. He thus recommended that the Board now revoke the Union's certification, set aside the election's results, and direct a second election. As indicated, and for the reasons that follow, we disagree with that recommendation and instead certify the Union.

II. ALLEGED OBJECTIONABLE CONDUCT

A. Facts

As noted, we accept for the purpose of our analysis that at the time of the election the area coordinators were statutory supervisors. Seven of the eleven area coordinators were actively involved in the Union's organizing drive. Together, these seven oversaw the work of approximately 74 employees, about half of the eligible voters. Some, if not all, of these area coordinators signed and then solicited signatures from employees for the showing-of-interest petitions and a second petition (the "55% petition"), which sought commitments from employees to vote for the Union.

Area Coordinator Robert Logan testified that he asked "maybe ten" employees to sign the initial showing-of-interest petition and that about 75 percent signed. Logan additionally spent "probably" 2 days during break times soliciting employee signatures for the second petition. He had "no idea" if the number was more than 20. He did not testify if any of those he solicited worked in his area. Area Coordinator Scott Hartwick oversaw an area of approximately 12 employees and solicited signatures for both petitions. He testified that he had "no idea" how many signatures he solicited. He spent "probably one day" soliciting signatures for the second petition. Each employee he asked to sign did so. One of the employees he solicited worked in his area. Area Coordinator Don Hensley testified that he solicited at least three signatures for the initial petition.[6] Logan testified that he believed all seven prounion area coordinators solicited signatures for the 55-percent petition.

In response to the organizing drive, the Employer engaged in an extensive antiunion campaign. That campaign included mandatory companywide meetings; meetings in which the Employer's president, along with each employee's shift supervisor and other management personnel, met with each employee to urge a "No" vote and to promise to try to correct problems; four antiunion video showings; distribution of antiunion buttons to wear at work; antiunion postings; and home mailings, including UPS air packages the week of the election. Twelve representatives traveled from the corporate office to campaign against the Union. Area coordinators who supported the Employer's position came into the prounion area coordinators' work areas and directly campaigned against the Union. During his meetings with employees, the Employer's president told them that the prounion area coordinators did not represent the company's position. The Employer also sent letters to employees' homes stating, inter alia: "As most of you know, some of the area coordinators have supported the union. The law prohibits them from campaigning for a union." One letter also asserted that those "pushing" for the union were "dividing us," that the Union "will make it more difficult for us to resolve problems," and that any changes resulting from unionization likely would be delayed until the area coordinators' supervisory status was resolved.

In the week before the election, upper management met with the prounion area coordinators and threatened to terminate them if they did not drop their union support and campaign for the Employer instead. After the threat, some of the prounion area coordinators spoke at union meetings and continued to wear union insignia.

[3] *Terry Machine Co.*, 348 NLRB 919 (2006).

[4] 348 NLRB 1041 (2006).

[5] No party challenged the Regional Director's decision expanding the scope of the remand.

[6] Area Coordinator Miles testified that he asked three employees wearing union paraphernalia whether they had had a chance to sign the 55-percent petition.

The Employer's threat was widely disseminated to employees on the shop floor, at an organizing committee meeting, and a general union meeting.

B. The Hearing Officer's Report

In his third report, the hearing officer found that the area coordinators engaged in "extensive solicitation of signatures on the authorization petitions." While he could not determine how many employees signed petitions as a result of the direct efforts of the area coordinators, he concluded that the area coordinators' involvement in obtaining signatures was "pervasive" and the number of signatures obtained by them was enough to affect the outcome of the election. As to mitigation, he found

> no record evidence that the Employer addressed or disavowed the area coordinators' solicitation of signatures on the authorization petitions. Consequently, the Employer's campaign did not sufficiently mitigate the coercive solicitation of petition signatures from a significant portion of the unit.

C. Analysis

In its initial decision certifying the Union, the Board applied then-current law to find that the area coordinators' conduct, including the signature solicitation, was not objectionable. For the purpose of this analysis, we are only concerned with the area coordinators' solicitation of employee signatures on the two prounion petitions, and do not disturb the earlier decision overruling the rest of the Employer's objections. [7]

In *Harborside*, supra, 343 NLRB at 909, the Board formulated a two-step inquiry to apply in cases involving objections to an election based on prounion supervisory conduct. The first step considers whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. The second step considers whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election.

As to the first prong, the Board in *Harborside* held that "absent mitigating circumstances" the supervisory solicitation of authorization cards—and by analogy petition signatures—has "an inherent tendency to interfere with an employee's freedom to choose whether to sign or not," and thus "may be objectionable." Id. at 911. The Employer's antiunion stance, however, can be a mitigating circumstance and is relevant to the second prong of the *Harborside* test—that is, "whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election." Id. at 914. Thus, an employer's antiunion campaign may mitigate the coercive effect of impermissible prounion supervisory conduct. Pertinent to our analysis here, if higher management learns of the supervisory conduct and takes timely and effective steps to disavow it as to all of the employees, the effects of the conduct may be mitigated. Id.

Even assuming that the area coordinators' prounion conduct satisfied the first prong of the *Harborside* analysis, we find that it was mitigated by the Employer's campaign actions. The Employer engaged in an aggressive antiunion campaign. It explicitly disavowed the area coordinators' support for the Union to all employees by asserting, in letters sent to employees' homes, that the law prohibited the area coordinators from campaigning for the Union, and by informing employees in face-to-face meetings that the prounion area coordinators did not represent the company's position. These explicit disavowals and the Employer's widely disseminated termination threat to the area coordinators relieved any potential continuing pressure employees might have felt to vote consistent with their petition signatures. Further, in light of the Employer's threat of discharge, the employees would not view the area coordinators as the ones to whom they should be responsive. As the Board previously found, "the employees were aware that these area coordinators might soon be incapable of either rewarding them for supporting the Union, or punishing them for not doing so."[8]

Given the Employer's extensive antiunion campaign, including its explicit disavowals of the area coordinators' support for the Union, the hearing officer plainly erred in focusing narrowly on the fact that the Employer did not specifically disavow their solicitation of employee signatures. Contrary to our dissenting colleague, moreover, our finding of mitigation is not undercut by the fact that employees learned of that discharge threat from the coordinators, rather than from the Employer. The circumstances here make clear that employees would reasonably tend to credit the coordinators that the threat had been made and that it was serious.[9]

Under all the circumstances, we find that the Employer mitigated any potentially coercive effect of the prounion

[7] In the prior decision, the Board found that none of several alleged encounters between the area coordinators and employees were objectionable or occurred as the Employer alleged in its objections. *Terry Machine*, supra, 332 NLRB at 856–857. The Employer has excepted to the hearing officer's failure to find that some of this previously ruled-on conduct was objectionable. Its position is that all of the area coordinators' conduct should have been reconsidered when the case was remanded following the *Harborside* decision. While we have reviewed the area coordinators' solicitation of signatures for two petitions in light of the *Harborside* decision, the Board's prior findings on the other allegedly objectionable conduct are not disturbed by that decision, and the Employer has pointed to nothing to warrant reversing them.

[8] *Terry Machine*, supra, at 857–858.

[9] That some coordinators continued to engage in prounion activity does not dampen the mitigating effect of the threat. The threat was made about a week before the election; thus, there was no prolonged period of inaction by the Employer that might have raised doubts about its resolve.

area coordinators' conduct. We thus overrule the Employer's objections.[10]

We also reaffirm the certification of the Union as bargaining representative of the unit employees. We acknowledge the passage of time since the election in 1999. While it is unfortunate, it is attributable to the impact of intervening Supreme Court and Board decisions altering applicable law, and to the delays inherent in the administrative process. To overturn the results of the election on the basis of delay and any intervening turnover would frustrate the previously expressed representation choice and "destroy the finality sought to be given to Board-conducted elections as means of determining representation of employees." *Orleans Storage Co.,* 123 NLRB 1756, 1757 (1959). Cf. *Murphy Bros., Inc.,* 265 NLRB 1574, 1575 fn 3 (1982).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, and its Local 155, 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, including tool room employees, quality control employees, shipping and receiving employees and drivers employed by the Employer at 5331 Dixie Highway, Waterford, Michigan; but excluding office clerical employees, technical employees, confidential employees, managerial employees, temporary employees, professional employees, guards and supervisors as defined by the Act.

Dated, Washington, D.C. March 28, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, DISSENTING.

I would affirm the hearing officer's findings that the area coordinators are statutory supervisors and that their solicitation of signatures for two prounion petitions was objectionable and materially affected the outcome of the election. In this respect, I disagree with my colleagues that the Employer's threat to terminate the prounion area coordinators if they did not stop supporting the Petitioner mitigated the impact of their conduct on employee free choice. The coordinators, not the Employer, made employees aware of this threat and continued thereafter in their public support of the Petitioner, without any repercussion from the Employer. Similarly, I disagree that the Employer's lawful antiunion campaign could have mitigated the impact on employees of solicitation by prounion supervisors who actively opposed that campaign.

Moreover, even if I were to agree with my colleagues that the supervisory conduct did not affect the election, I could not join them in certifying the Petitioner on the basis of an election held in 1999. Although the fault for delay lies squarely with the Board, rather than any party, I believe the time has long since passed when we can regard the results of that election as a reliable indicator of current employees' choice on the issue of collective-bargaining representation. Should the Employer test the validity of the Union's certification by refusing to bargain, obtaining enforcement of a bargaining order is unlikely. See, e.g., *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610, 613 (7th Cir. 1983) (denying enforcement of bargaining order in an elections objections case due in part to Board delays). *NLRB v. Connecticut Foundry Co.,* 688 F.2d 871, 881 (2d Cir.1982) (same). Under these circumstances, the only effective way to protect the employees' rights to choose whether or not to be represented by the Petitioner is to direct a prompt new election.

Dated, Washington, D.C. March 28, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

[10] Although Chairman Liebman dissented in *Harborside*, she applies it here for institutional reasons, and agrees that, under that case, the area coordinators' prounion conduct was not objectionable. Member Pearce did not participate in the decision in *Harborside*. For institutional reasons, he agrees to apply its holding in overruling the Employer's objections.