TNT Logistics North America, Inc. *and* Local 299, International Brotherhood of Teamsters.[1] Case 7–RC–22671

August 26, 2005

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to a mail-ballot election held June 9 through 29, 2004, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 17 for and 17 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and, contrary to the hearing officer's recommendation, has decided to overrule the Petitioner's Objections 1 and 3 and to certify the results of the election.[2]

Objection 1: Employer's Alleged Threat of Job Loss

The Employer operates a multistate truck transport and delivery service for predominantly large corporate customers. The unit employees are delivery drivers who work exclusively on the Employer's Home Depot account in the State of Michigan, and in the Toledo, Ohio area. The drivers deliver "big ticket" items from various Home Depot stores to retail customers' residences. The contract between the Employer and Home Depot expires in October 2005.

Steve Cook, a unit delivery driver, serviced various Michigan Home Depot stores. On May 26, 2004,[3] Supervisors Mike Floyd and Chris Haynes radioed Cook while he was on a delivery and asked to meet with him. The three met at a Speedway gas station near Cook's delivery route and talked for about 20 minutes.

During their discussion, Haynes and Floyd told Cook that he was required to attend a "town hall" meeting that the Employer was sponsoring that night. Cook then discussed various issues with Floyd and Haynes, including the prospect of employee union representation. Floyd asked Cook, "[W]hat would make things better?" When Cook replied that his wage rate was a big concern, Floyd responded that if the Union were selected, it would not be better. During the discussion, Haynes also volunteered that "Home Depot doesn't like the Union; that if the Union comes in we wouldn't have a job with Home Depot." At some point, Cook asked whether Home Depot would terminate its contract with the Employer if the employees selected the Union. Haynes replied, "Home Depot does not have any union carriers doing home delivery services."

At a town hall meeting on May 27, the Employer's general manager, Steve Gundlach, discussed with employees the advantages and disadvantages of union membership.[4] During the meeting Gundlach indicated that if the Petitioner was voted in, there was a "possibility" that Home Depot would not renew its contract with the Employer. When asked whether employees would be placed on other routes if the Home Depot contract were lost, Gundlach replied, "[F]irst of all we haven't lost the contract and secondly, I can't answer that question for you exactly now because I don't have the answer for that." At no point did Gundlach inform employees that there was no chance that they could be transferred to other employer accounts.

The hearing officer found that Haynes' May 26 comments to Cook that Home Depot did not like the Union, and that employees servicing the Home Depot account would not be able to drive for Home Depot were the Union elected, exceeded the limits of an employer's protected speech.[5] We disagree. Having carefully reviewed the record, we find that Supervisor Haynes' statements, when taken in context, together with the comments the following day by General Manager Gundlach, did not exceed the bounds of permissible campaign statements.

It is well settled that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). Applying this standard to the facts presented

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO, effective July 25, 2005.

[2] 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 the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule the Petitioner's Objections 2, 4, 5, and 6 and the first part of Objection 3.

[3] All dates are in 2004, unless otherwise indicated.

[4] There is no evidence concerning the town hall meeting of May 26.

[5] The hearing officer also concluded, however, that Gundlach's May 27 statements were not objectionable.

here, we find, contrary to the hearing officer and our dissenting colleague, that the Petitioner's Objection 1 should be overruled.

With regard to the supervisor's statement that "if the Union comes in we wouldn't have a job with Home Depot," we note initially that Haynes told Cook that Home Depot does not do business with unionized carriers. No party disputes the accuracy of Haynes' comment that Home Depot was not union friendly and did not have any union carriers, or the testimony that the Employer's contract with Home Depot was due to expire in October 2005. Inasmuch as these statements are uncontroverted, we view them as objective fact.[6] Based on these circumstances, Haynes predicted that Home Depot would cease doing business with the Employer if the Employer's employees selected the Union. Home Depot's possible actions were beyond the Employer's control. Furthermore, Haynes made no threats, nor were his comments interspersed with comments against the Union. We find that, in this context, Haynes' statement would reasonably be understood as nothing more than an expression of personal opinion as to what Home Depot, a client of the Employer, might do in the event of the Employer's unionization. Making this possibility known to employees does not constitute objectionable conduct.[7] Accordingly, in these circumstances, we find that Haynes' statement conveyed his personal "belief as to demonstrably probable consequences beyond [the Employer's] control," based on objective fact, which is permissible under *Gissel.*

Our colleague says that "nothing in the record substantiates the prediction" that Home Depot would cancel its contract with the Employer if the Employer's employees voted to unionize. We disagree. The uncontroverted facts are that (1) Home Depot does not like using unionized carriers; (2) Home Depot does not use any unionized carriers; and (3) the Employer's contract with Home Depot would expire in October 2005. Although there was no certainty that Home Depot would not renew its contract with the Employer if the Employer's employees voted for unionization, we think that the above unrefuted facts furnished an ample basis for a reasonable prediction that Home Depot would so act.[8]

Furthermore, even assuming, as our dissenting colleague contends, that Haynes' prediction had some threatening aspect when uttered to Cook on May 26, it would have lost this aspect the very next day, when General Manager Gundlach—an official of higher authority than Haynes—indicated to employees, including Cook, that it was not certain that Home Depot would terminate its relationship with the Employer if the employees unionized.[9] Gundlach's uncertainty as to Home Depot's course of action would have underscored to all employees, and to Cook in particular, that Home Depot's actions were entirely outside the Employer's control, further removing any threatening tendency Haynes' earlier prediction might have had.[10]

Accordingly, under all of these circumstances, we overrule Petitioner's Objection 1.

Objection 3: Solicitation of Grievances and Implying that Grievances Would be Remedied

As described above, during the May 26 meeting at the gas station, Floyd asked Cook, "[W]hat would make things better?" Cook responded that pay-per-hour was his big concern. Floyd replied that if the Union came in, it would not be any better.[11] He also stated that "things were under negotiations," that he "would not confirm one way or another if anything was positive," that it was just all under negotiations between the Employer and Home Depot to raise the drivers' hourly pay.

The hearing officer found that Floyd's statements constituted an improper solicitation of employee grievances. Accordingly, the hearing officer recommended that Objection 3 be sustained.[12] We disagree.

[6] See *Storall Mfg. Co.,* 275 NLRB 220 (1985) (Board viewed employer's statement, that customers were stockpiling in expectation of unionization and that orders had been falling since advent of union, as fact, inasmuch as the statement's accuracy was not challenged by the General Counsel), enfd. 786 F.2d 1169 (8th Cir. 1986).

[7] The Board's decision in *Tri-Cast, Inc.,* 274 NLRB 377 (1985), makes clear that the Respondent's statement here was not objectionable. In *Tri-Cast*, the employer told employees that if, as a result of unionization, it had to bid higher or customers felt threatened because of strikes, the company would lose business and jobs. The Board found that the employer had accurately represented what others outside its control might do. The Board said: "Higher bids or customer feelings of dissatisfaction because of problems caused by union strikes can lead to lost business and lost jobs." [274 NLRB at 378.] The Board found no objectionable conduct in "[m]aking these reasonable possibilities known to employees."

[8] The cases cited by the dissent are distinguishable precisely because the Employer here set forth the objective facts. Contrary to the assertion of the dissent, we do not ignore these cases. They are simply different in this critical respect.

[9] There are no exceptions to the hearing officer's finding that Gundlach's statements at the May 27 meeting were lawful. We therefore find it unnecessary to analyze, as our dissenting colleague does, the lawfulness of Gundlach's statements in light of *Tellepsen Pipeline Services Co.*, 335 NLRB 1232 (2001), enfd. in relevant part 320 F.3d 554 (5th Cir. 2003).

[10] This statement is not alleged as a threat that representation by the Union would be futile.

[11] We agree with the hearing officer that the objection was timely raised because it was independently discovered by the Board agent in the course of investigating the Petitioner's objections. See *Senior Care Fountains,* 341 NLRB 1004 (2004).

[12] We agree with the hearing officer that the objection was timely raised because it was independently discovered by the Board agent in

First, we find that the gas station meeting was consistent with the Employer's established practice of soliciting employee concerns, a practice it had followed before the Union arrived on the scene. Prior to the onset of any organizational efforts by the Petitioner, the Employer maintained an open door policy, under which employees would discuss work related issues and concerns directly with management. In addition, during ride-alongs employees were encouraged to discuss work issues with their supervisors. The gas station meeting between the two supervisors and Cook was therefore consistent with the Employer's established past practice which it followed before the union campaign. Accordingly, although there was a union organizing campaign in progress, the Employer was entitled to utilize its established open door policy to deal with employee grievances so long as it did not expressly or implicitly promise to remedy them. See *Wal-Mart Stores, Inc.,* 340 NLRB 637 (2003) (an employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign).

Second, the credited testimony establishes that Floyd made no promises in connection with soliciting Cook's concerns. Floyd merely indicated the fact that the drivers' pay rates were under negotiation between the Employer and Home Depot. These remarks could not reasonably be construed as either an express or implicit promise to remedy Cook's pay complaints if he did not vote for the Union. Accordingly, Floyd's comments were not objectionable. *Maple Grove Health Care Center,* 330 NLRB 775 (2000), *Uarco, Inc.*, 216 NLRB 1, 2 (1974) (solicitation of grievances itself, not unlawful; rather, it is employer's explicit or implicit promise to remedy them that impresses upon employees the notion that union representation is unnecessary).

Because we find that the evidence does not support the hearing officer's finding that the Employer engaged in objectionable conduct by soliciting grievances from Cook and promising to remedy them, we overrule Petitioner's Objection 3.

As the Petitioner has failed to secure a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Local 299, International Brotherhood of Teamsters, and that it is not the exclusive representative of these bargaining unit employees.

the course of investigating the Petitioner's objections. See, *Senior Care Fountains*, supra.

MEMBER LIEBMAN, dissenting.

The election in this case, which turned on one vote, should be set aside. The majority finds that the statements of Supervisor Chris Haynes did not threaten an employee with job loss, despite the lack of any demonstrated, objective factual basis for Haynes' prediction that the Employer would lose its only customer, Home Depot, if the Union were voted in. In the majority's view, the prediction was unobjectionable because it "reasonably would be understood as nothing more than an expression of personal opinion as to what client Home Depot might do in the event of unionization." But under the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), as consistently applied by the Board, it is *not* enough for an employer to frame his statement as an "expression of personal opinion." Rather, in the words of the *Gissel* Court, a "prediction must be carefully phrased *on the basis of objective fact* to convey an employer's belief as to demonstrably probable consequences beyond his control." 395 U.S. at 618 (emphasis added). Contrary to the majority's view, this objective-factual-basis requirement simply has not been satisfied here—at least as the Board has long applied the test.

I.

The essential facts are straightforward: Supervisors Mike Floyd and Chris Haynes called Steve Cook, a delivery driver, and asked him to meet them at a gas station. Cook, whom the hearing officer found credible based on his straightforward answers as well as his demeanor, testified that he and Floyd, "discussed the fact that the contract between TNT and Home Depot was going to expire this October and they are under negotiations on improving the relationship between the employees of TNT and Home Depot." He testified that Floyd asked him, "[W]hat would make things better," and after he answered "pay per hour," Floyd replied, "[I]f the Union came in it wouldn't be any better." According to Cook, Haynes said, "[T]hat if the Union comes in we wouldn't have a job with Home Depot." Cook elaborated later, explaining that Haynes stated that:

> Home Depot does not like the union, they don't have any union contractors. If the union comes in they will not renew their contract with TNT.

At a "town hall meeting" with employees the next day, Steve Gundlach, the Employer's general manager for Indiana, Pennsylvania, Florida, Kentucky, and Michigan, was asked repeatedly whether Home Depot would terminate its contract if the drivers unionized. In contrast to Haynes' contract-loss prediction, Gundlach testified that

because no such information had come to him, all he could answer each time was, "I don't know the outcome because it is a contract business and I don't know." He also conceded that "the Union really didn't have anything to do with what was going on with the relationship. It had more to do with the service between ourselves and our customer, Home Depot."

The hearing officer correctly found Haynes' comments objectionable because they were unaccompanied by "any" objective facts.

II.

This case is controlled by the often-quoted principles set out by the Supreme Court in *Gissel*, supra:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased *on the basis of objective fact* to convey an employer's belief as to *demonstrably* probable consequences beyond his control. . . .

395 U.S. at 618 (emphasis added). Applying *Gissel*, the Board has found predictions of customer loss lawful where they are supported by objective fact.[1] But where an objective factual basis is lacking, the Board has repeatedly found such predictions improper.[2] It is well established, in turn, that the burden of proof is upon the employer to demonstrate that its prediction is based on objective fact. See, e.g., *Schaumburg Hyundai, Inc*., 318 NLRB 449, 450 (1995); *Blaser Tool & Mold Co., Inc.*, 196 NLRB 374, 374 (1972). The majority's position is contrary to established precedent, which it essentially ignores.

The majority treats Haynes' comment "that Home Depot was not union friendly and did not have any union carriers," as well as the testimony that the contract with Home Depot was due to expire, "as objective fact" because they were uncontroverted. But this approach cannot support a conclusion that *Gissel's* objective-factual-basis requirement has been met. The Board's cases make clear that to carry its burden of proof, the Employer was required to prove that Haynes' comment was true; the Union was not required to refute it. See, e.g., *Pentre Electric*, supra, 305 NLRB at 885 (holding that employer "must present evidence confirming the accuracy" of predictions of customer loss and finding violation of Section 8(a)(1) "[b]ecause the record contain[ed] no confirmation of [co-owner's] claims").

Haynes' unsupported comment obviously cannot supply its own *objective* factual basis, contrary to the majority's apparent assertion.[3] Haynes did not demonstrate a basis for his statement at the time, nor (to the extent such

[1] See, e.g., *Eagle Transport Corp*., 327 NLRB 1210, 1210–1211 (1999) (actual customer statements that they might need to make "other arrangements" if unionization occurred); *Gravure Packaging*, 321 NLRB 1296, 1299 (1996), enfd. 116 F.3d 941 (D.C. Cir. 1997) (predictions based on objective facts from customers' questionnaires).

[2] See, e.g., *Systems West, LLC*, 342 NLRB 851, 851, 853 (2004) (supervisor's speculation about customer loss was not objectively based); *DMI Distribution of Delaware*, 334 NLRB 409, 419 (2001) (finding unlawful owner's entirely unsupported claim that two main customers would be ex-customers if the union won); *SPX Corp*., 320 NLRB 219, 223 (1995), enfd. 164 F.3d 297 (6th Cir. 1998), cert. denied 528 U.S. 821 (1999) (employer's belief that its best customers would desert it in the face of unionization not supported by the record); *Reeves Bros., Inc*., 320 NLRB 1082, 1083 (1996) (employer's characterization of effects of unionization was not based on objective facts because it went well beyond statements made in customers' letters); *DTR Industries*, 311 NLRB 833, 833–834 & fn. 5 (1993), enf. denied 39 F.3d 106 (6th Cir. 1994) (employer failed to establish customer policy of terminating contracts on unionization); *Foster Electric,* 308 NLRB 1253, 1259 (1992) (predictions of customer loss by employer's vice president were not grounded in fact); *Pentre Electric*, 305 NLRB 882, 884–885 (1991), enf. denied 998 F.2d 363 (6th Cir. 1993) (employer failed to present evidence confirming claim that customers' preference for nonunion contractors would cause decline in business); *TVA Terminals*, 270 NLRB 284, 288 (1984) (employer's claim that the cotton would not be there if the employees went union was based on speculation and not grounded on any "objective appraisal" made known to employees); *Crown Cork & Seal Co.,* 255 NLRB 14 (1981), enfd. 691 F.2d 506 (9th Cir. 1982) (employer failed to meet burden of providing objective factual basis for statement that unionization would mean increase in labor costs beyond customer's willingness to pay); *Charge Card Assn.*, 247 NLRB 835, 837 (1980), enfd. in relevant part 653 F.2d 272 (6th Cir. 1981) (supervisor's claim that major customers would withdraw patronage if the union succeeded held unlawful because he offered no factual basis for those assertions); *American Medical Insurance Co.*, 224 NLRB 1321, 1329 (1976) (executive vice president's speech not carefully phrased on the basis of objective fact because it made no reference to customer calls stating that the company would be in serious trouble if it dealt with the union); *Hertzka & Knowles*, 206 NLRB 191,194 (1973), enfd. in relevant part 503 F.2d 625 (1974), cert. denied 423 U.S. 875 (1975) (employer failed to produce evidence to show that clients would withdraw business).

The majority tellingly makes no effort to distinguish these illustrative decisions.

[3] The majority's reliance on *Storall Mfg. Co.*, 275 NLRB 220 (1985), enfd. 786 F.2d 1169 (8th Cir. 1986), is misplaced. The Board there never discussed *Gissel*'s objective-factual-basis requirement. The reason is not surprising: the *Storall* Board described the statement in question ("that since union activity began, work orders had been falling back and the warehouses were getting stockpiled") not as a *prediction* of adverse consequences of unionization, but rather as "a *description* of an existing business condition brought on by union activity." Id. at 220 (emphasis added). In that context, the Board observed that the statement's accuracy was "not challenged by the General Counsel." Id. Were the majority's interpretation of *Storall* correct, of course, the decision would be inconsistent with the Board's long-established approach to the burden of proof in *Gissel* prediction cases.

a belated showing may be considered)[4] did the Employer adduce evidence at the unfair labor practice hearing in this case. In any case, even if the statement that Home Depot had no unionized carriers were true, it would not permissibly support the further, coercive claim that Home Deport would cancel its contract with the Employer if employees unionized. Nothing in the record substantiates that prediction. Indeed, General Manager Gundlach acknowledged that there was no connection between unionization and retaining the Home Depot contract, which depended on the quality of the service that the Employer provided, not on whether its employees were represented by a union.[5]

Nor do the later statements of Gundlach at an employee "town meeting," cited by the majority, change the equation, particularly given the one-vote electoral margin.[6] Gundlach himself said—citing no objective basis for his claim—that there was a "possibility" that Home Depot would not renew its contract. While his statement was more equivocal than Haynes' flat prediction to Cook, Gundlach did not repudiate what Haynes said.[7] Nor did Gundlach affirmatively assure Cook or other employees that their jobs were *not* in jeopardy as the result of action by Home Depot in response to unionization—just the opposite. Gundlach's hearing testimony itself demonstrates that there was no objective factual basis for any prediction that cast doubt on the future of the Home Depot contract. Gundlach testified that with respect to loss of the Home Depot contract, "I very clearly stated, I was not aware of the outcome of that."

The majority's observation that Gundlach "dispelled any notion that there was a *necessary* connection between a loss of the Home Depot contract and job loss" (emphasis added) misses the point: that, with no demonstrable, objective factual basis for doing so, the Employer linked the possibility of job loss with unionization. As the Board has explained, phrasing a prediction of customer loss conditionally (i.e., that a customer "*could* terminate its contract and that employees *might* lose their jobs") does not make it permissible. Rather, a "prediction of adverse consequences of unionization, however it is formulated, must have an objective basis." *Tellepsen Pipeline Services Co.*, supra, 335 NLRB at 1233.[8] There was no such basis here, and no grounds, under established law, for excusing its absence.

III.

In short, the majority defends the Employer's statements on grounds that actually establish that they were objectionable. Its failure to address a long line of precedent is startling. Today's decision continues an unfortunate recent trend of breaking with precedent to give Employer's greater leeway in making coercive predictions about the effects of unionization.[9] Accordingly, I dissent and would set the election aside, based on Petitioner's Objection 1.[10]

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[4] See *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1342 (2000) (predictions must be "based on simultaneously stated objective fact"). But see fn. 9, infra (citing recent contrary cases).

[5] *Tri-Cast, Inc*., 274 NLRB 377 (1985), cited by the majority, does not support its position. There the employer stated in a letter:

> We are still a young company fighting for new business. If we have to bid higher or customers feel threatened because of delivery cancellations (union strikes) we lose business—and jobs.

The *Tri-Cast* Board found this comment was unobjectionable because it was "couched in terms of what might happen 'if' certain events occur . . . [and thus was] nothing more than the Employer's permissible mention of *possible* effects of unionization." Id. at 378.

The Board has since effectively repudiated such an approach, which is hard to reconcile with precedent. See *Tellepsen Pipeline Services Co.*, 335 NLRB 1232, 1233 (2001), enfd. in relevant part 320 F.3d 554 (5th Cir. 2003) (discussed below). In any case, *Tri-Cast* is easily distinguishable on its facts. Here, Haynes did not simply outline hypothetical outcomes based on the Union's future actions; rather, he made an unconditional prediction that if the Union came in, Home Depot would cancel the contract with the Employer, based on its anti-union animus. Cf. *Tawas Industries*, 336 NLRB 318, 321–322 (2001) (distinguishing *Tri-Cast*).

[6] In assessing objections, the Board considers the closeness of the election outcome. E.g., *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

[7] See, e.g., *President Riverboat Casinos of Missouri*, 329 NLRB 77, 78 (1999) (manager's unlawful prediction of adverse consequences of unionization was not mitigated by different manager's later statement: "In order to effectively negate a prior unlawful statement, a subsequent clarification must, inter alia, be timely and unambiguous, must specifically disavow the prior coercive statement, and must be accompanied by assurances against future interference . . .").

[8] The majority never addresses *Tellepsen Pipeline*.

[9] See *Curwood, Inc.*, 339 NLRB 1137 (2003), enfd. on other issues 397 F.3d 548 (7th Cir. 2005); *Savers*, 337 NLRB 1039 (2002). I dissented in both cases, citing the majority's failure to require that the objective factual basis for the employer's prediction of adverse consequences be demonstrated to employees at the time of the prediction. In both cases, notably, there was at least some factual basis for the prediction, in contrast to this case.

[10] Because I would set the election aside on this basis, I need not pass on Petitioner's Objection 3, which the majority also overrules.