IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the NATIONAL LABOR RELATIONS BOARD for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	CIVIL ACTION
v.	:	NO. 97-6544
TRACTION WHOLESALE CENTER CO., INC., Respondent.	:	

M E M O R A N D U M

BUCKWALTER, J. December 18, 1997

On October 23, 1997, the National Labor Relations Board (Board) filed a Petition for Injunction Under Section 10(j) of the National Labor Relations Act (the Act) against Traction Wholesale Center Co., Inc. (Traction). By the petition, the Board is seeking a temporary injunction pending final disposition of the charges filed by Teamsters Union Local No. 115, a/w International Brotherhood of Teamsters, AFL-CIO (Union).

The hearing on the charges has already been held before the Honorable George Aleman, Administrative Law Judge. Counsel have agreed that the record of that hearing held from November 3 to November 5, 1997 shall be considered by the court in ruling on

this petition. Neither party offered additional evidence at the hearing held before this court on December 11, 1997.

The reason for the enactment of Section 10(j) of the Act is generally stated as being the congressional recognition that because of the protracted nature of the administrative proceedings, absent the relief provided for in 10(j), a company could accomplish its goal of preventing unionization through the use of unlawful means before a final board order restraining such activity. This would, of course, render the order ineffective for all practical purposes.

Although the standards for granting this petition for injunction are not stated in the familiar terms applicable to injunctive relief in general, it is still clear that Section 10(j) is reserved for the extraordinary case, Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1091 (3d Cir. 1984).

The traditional standard in Section 10(j) cases is that an injunction may only be granted if the Board demonstrates:

(1) There is reasonable cause to believe that an unfair labor practice has been committed; and

(2) The injunction is a just and proper remedy. Eisenberg v. Lenape Products, Inc., 781 F.2d 999, 1003 (3d Cir. 1986).

With those standards in mind, I reviewed the 523 pages of testimony (actually 514 pages as pages 30, 86, 133, 145, 157,

223, 229, 401 and 406 were inexplicably missing from the copy of the transcript submitted by the Board).

In reviewing the record of the hearing before Judge Aleman, I make no credibility determinations. Instead, I review the record to determine whether the evidence offered in support of the unfair labor practices, if believed, substantially establishes those charges. Not surprisingly, there are significant discrepancies in the testimony of the various witnesses but, if believed, there is sufficient testimony to support the charges brought against the company.

The ultimate question then becomes: Is the requested injunction a just and proper remedy?

Injunctive relief is just and proper "where the passage of time reasonably necessary to adjudicate the case on its merits convinces both the Board and the federal courts that the failure to grant injunctive relief might dissipate the effective exercise" of the Board's ultimate remedial power. Kobell at 1091.

This is not an easy determination to make. On the one hand, the Board argues that threatening employees with closure of the business and unlawfully discharging an employee for engaging in union organization activities[1] are hallmark violations which

1. These are two unlawful practices, the testimony of witnesses, if believed, supports. Specifically, the findings suggested by the Board in its submission to the court entitled "Findings of Fact and Conclusions of Law" are supported (continued...)

go to the very heart of the Act and have a lasting coercive impact on employees.

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1. (...continued)
by the testimony, if believed, before Judge Aleman. They are as follows:

(f) On or about April 15, 1997, Respondent, by Scott Adams, engaged in the following conduct at the Philadelphia facility:

(i) Interrogated an employee (Chuck Schiavone) concerning the employee's Union activities and sympathies and the Union activities and sympathies of other employees.

(ii) Threatened the employee (Chuck Schiavone) that Respondent would close its business if the employees selected the Union as their collective bargaining representative.

(iii) Accused the employee (Chuck Schiavone) of disloyalty because the employee had engaged in Union activities.

(iv) Interrogated another employee (Kevin Tryon) concerning the employee's Union activities and sympathies.

(v) In a meeting with employees: (i) made an implied promise of unspecified improvements in the employees' terms and conditions of employment in order to discourage them from supporting the Union; (ii) threatened that Respondent would close its business if employees selected the Union as their collective bargaining representative; (iii) threatened the employees with job loss in order to discourage them from supporting the Union; and (iv) promised that Respondent would supply the employees with uniforms if they refrained from supporting the Union.

(g) On or about April 18, 1997, Respondent, by Jeffrey Cohen, at the Philadelphia facility: (i) solicited its employees' complaints and grievances, thereby promising them improved terms and conditions of employment in order to discourage them from supporting the Union; (ii) promised that Respondent would help them "in any way"; and (iii) told them that he knew that Respondent could give them more than the Union.

(h) On or about June 3, 1997, Respondent, by Jeffrey Cohen, Joseph O'Donnell and Scott Adams, in a meeting with employees at the Philadelphia facility: (i) told employees that Respondent had work clothing for them which could not be distributed because the employees were seeking Union representation; and (ii) promised the employees that they "would go on to bigger and better things" if they voted against Union representation.

(i) On or about April 15, 1997, Respondent discharged its employee Chuck Schiavone.

(j) On or about April 15, 1997, Respondent changed the terms and conditions of employment of its employees by: (i) instituting a policy prohibiting them from taking vans to their homes after work; and (ii) instituting a policy, subsequently abandoned, of requiring employees to punch a time clock before and after their lunch time.

(k) On or about June 3, 1997, Respondent announced that it was withholding a wage increase from its employee Kevin Tryon.

(l) Respondent engaged in the conduct described above in subparagraphs (i), (j) and (k), because its employees, including Chuck Schiavone and Kevin Tryon, were supporting the Union.

Traction, on the other hand, argues that the Board has failed to offer any evidence, beyond the alleged unfair labor practices themselves, that the Board's traditional remedies would not be equally effective as any relief the court could now fashion.

According to Traction, it still operates its four stores and no evidence has been offered to show that this will change. It further appears that the makeup of the proposed bargaining unit remains substantially the same as it was prior to any alleged unfair labor practices. There is no evidence to suggest that this bargaining unit has been destroyed. Thus, if the Board were to reinstate Charles Schiavone, the only employee fired out of the eleven who allegedly signed union authorization cards, that remedy could be as effective as a court-ordered one.

As previously stated, deciding what is just and proper is not easy in cases of this nature. The argument of each side in support of its position can be reasonably rebutted.

Judge Becker, writing a dissent in Eisenberg v. Lenape Products, Inc., 781 F.2d 999, 1007 (3d Cir. 1986) stated, "I agree with the district court that 'some measure of equitable principles comes into play' in determining whether to grant Section 10(j) relief." With that in mind, I think a fair reading of the record reflects that the conduct of Traction was not egregious. The record reveals that Traction had no knowledge of

any Union organizing activities prior to April 15, 1997 and that the managing partners thereafter immediately consulted counsel as to the appropriate way to proceed under the circumstances of their being notified of the Union's demand to be recognized. Further, Traction was in a rather incongruous position with regard to Kevin Tryon, in that it could neither deny nor grant him a raise without possibly committing an unfair labor practice.

Other cases which I reviewed suggest no firm test of what conduct makes the Board's request for injunctive relief just and proper. In Eisenberg, supra, the majority sustained the district court's denial of injunctive relief where the company had fired all nine employees who were "acting concertedly."

In a case cited by the Board recently decided in this court, Hoeber v. KNZ Const., Inc., 879 F.Supp. 451 (E.D. Pa. 1995), Judge Yohn concluded:

> Based on the conduct described above, there is reasonable cause to believe that respondent has violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the NLRA. There is also reasonable cause to believe that respondent's illegal behavior destroyed the status quo that existed just prior to its illegal behavior and undermined the strong pro-Union momentum that had developed among unit workers at KNZ. There is reasonable cause to believe respondent's response to the attempts to unionize was effective in discouraging unionization, consisting as it did of loss of work for two key Union supporters in a unit of seven and effective intimidation of other workers by this example and by threats and other intimidating conduct.

The conduct described in Hoeber, supra, (see pp. 455-458) could certainly be considered egregious. When compared with the finding of this case (see footnote 1), Traction's conduct appears relatively mild. In Hoeber, six in a unit of seven supported unionization. For the two key union supporters, this resulted in a loss of work. With regard to the other members of the unit, various acts of intimidation and threats were imposed upon them by management.

In this case, the bargaining unit was 21, of which, at the most, 11 had signed authorization cards. Traction has challenged three of these cards with arguable merit. Giving the Board the benefit of the doubt, there was at best the slimmest majority for unionization.

All of the above is not my way of condoning any activities that may constitute unfair labor practices. Also, the law of this circuit suggests that the Board is not obliged to prove the employer's conduct was egregious in order to obtain relief. But, I am not convinced that the Board has produced nearly enough evidence to show that the remedies imposed by the NLRB will not be sufficient. And while not conclusive, the nature of an employer's conduct is an important factor in deciding if the court's failure to grant relief might dissipate the effective exercise of the Board's remedial powers.

Again, this is not to suggest that the focus of a hearing of this nature should be on the egregiousness of the employer's conduct. My primary focus in this case as the notes of oral argument would suggest was to determine if the remedial measures of the Board would ultimately fail, thereby requiring the granting of the Board's petition. The Board simply did not provide any concrete evidence, direct or circumstantial, to convince me that it was more likely than not that remedial measures by the Board would fail.

In closing, I note that the unexplained over six months delay (from April 15, 1997 to October 23, 1997) in filing this petition also raises some concern as to whether the injunction is necessary. I realize that case law and the reason behind Section 10(j) to some extent provide a blanket explanation for the delay, but I think it is better practice if the Board in each case gives some explanation for the delay in that case. This case, in particular, on its face, does not appear to be one which would take as long to investigate given the small size of the unit as well as the entire company. Thus, one would expect quicker action by the Board if an injunction were necessary. I recognize that I could be wrong about this, but the Board simply has not offered any explanation for the over six month delay in this case.

An order follows.

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O R D E R

AND NOW, this 18th day of December, 1997,, the Petition for Injunction Under Section 10(j) of the National Labor Relations Act, As Amended (Docket No. 1) is DENIED.

BY THE COURT:

RONALD L. BUCKWALTER, J.