IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4943

SUNBELT MANUFACTURING, INC.,

Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Review and cross-petition for enforcement
of an order of the National Labor Relations Board
15 CA 11527 & 15 CA 11572

June 21, 1993

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Sunbelt Manufacturing, Inc. ("Sunbelt"), appeals a National Labor Relations Board ("NLRB") determination that Sunbelt violated sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), (3). Finding that substantial evidence in the record supports the NLRB's decision, we enforce its order.

---

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Sunbelt manufactures plastic products in Monroe, Louisiana. In March 1991, the Amalgamated Clothing and Textile Workers Union (the "union") began an attempt to unionize the plant. Lamon Holmes, a six-year Sunbelt employee, tried to gather support for the Union by approaching fellow employees, both while they were working and during breaks. When Sunbelt learned of Holmes's activities, it verbally warned him to stop soliciting during work time.

On April 4 and 5, 1991, Sunbelt's president, David Cattar, held regular "Presidential Round Table" meetings, where management and employees exchanged ideas. Cattar allowed no discussion of the union at these meetings. On April 19, Sunbelt conducted regular shift meetings. These meetings focused on issues emerging from the union campaign. When some employees indicated that they did not understand collective bargaining, Cattar engaged two employees in a role-playing exercise to illustrate how the process worked. During this exchange, an employee asked how low wages could drop if the union were elected. Cattar responded that Sunbelt legally could pay minimum wage, $4.25 an hour.[1]

Holmes did not attend the shift meeting. The next day, Holmes's immediate supervisor, James Williams, approached Holmes and told him that had Holmes attended the meeting, he would better

[1] The union initially charged that Cattar's actions violated the NLRA. The Administrative Law Judge ("ALJ") found that Cattar's actions did not constitute unfair labor practices and dismissed all charges against Cattar. The NLRB affirmed this finding.

understand the collective bargaining process. Holmes responded that if the employees voted for the union, wages would rise. Williams continued to emphasize that although benefits could increase with unionization, they also could decrease.

Holmes testified in front of the ALJ that this was not the first discussion he had had with Williams about the effects of unionization. He testified that Williams approached him at his work station three times during the previous week, starting on April 11, to discuss the union. Once, Williams stated that Sunbelt "was going to shut the plant down." Another time, Williams told Holmes and two other employees that, "Cattar was going to cut the wages to $4.25 or shut the plant down and move somewhere else." Williams finally challenged Holmes to bring in some written proof that Sunbelt could not reduce wages if unionization occurred.

On April 22, Williams asked Holmes whether he had found the requested information. Holmes replied that he had not. Later in the day, Williams again started a conversation about the union. Holmes and Williams decided to go to another supervisor's office to look at a book about collective bargaining.

While they were walking, Williams turned and asked Holmes, "[D]o you really think we would lie to you about these kind of things?" Holmes then pointed his finger at Williams's chest and called Williams a "god damn liar." Williams told Holmes he was being insubordinate. Both then proceeded to supervisor Randy Adams's office. Nobody else witnessed the exchange.

Later that night, Williams reported the incident to Russell

McMullen, the plant manager. The next day, McMullen summoned Holmes to his office. Adams and Williams already were there. McMullen told Holmes that Williams claimed Holmes had called him a "god damn liar." Thinking they were joking about the importance of the affair, Holmes started to leave. McMullen told Holmes that this was a serious matter and then suspended him for three days.

On April 27, Holmes met McMullen and Adams at the plant. McMullen told Holmes that he was terminated. Two days later, Holmes made an appointment to meet with Cattar. On May 1, Holmes met Cattar and explained his discussions about the union with Williams. He also denied having called Williams a "god damn liar."

Cattar set up a meeting for Holmes with Mike Danhert, a Sunbelt vice president. Danhert told Holmes that a witness claimed to have heard Holmes curse Williams. Holmes had no contact with Sunbelt after this conversation. His April 27 termination stood.

Later in the union campaign, an anti-union employee asked Paul Perkins, a quality control manager, to film anti-union handbilling.[2] On May 15, the day before the union election, Perkins videotaped about eight anti-union employees handing out flyers at the plant entrance. The next day, Perkins again videotaped the plant entrance. This time he filmed five or six union organizers in addition to several anti-union employees. The next day, Perkins also videotaped employees as they accepted or declined flyers. After the votes were tabulated on May 17, Perkins

[2] Perkins previously had videotaped other Sunbelt activities, including Christmas events and birthday parties.

played the video he had made at a pizza party held by anti-union employees. Sunbelt never announced to its workers the reason for the videotaping.[3]

The union lost the two-day election. No objection was filed to the election, and it was certified on May 28, 1991.

The union filed unfair labor charges against Sunbelt on May 10, 1991, and July 5, 1991, alleging that Sunbelt had violated sections 8(a)(1)[4] and 8(a)(3)[5] of the NLRA by terminating Holmes because of his union activities, by threatening employees with wage reductions and plant closure, and by conducting unlawful surveillance in videotaping employees engaged in handbilling. The consolidated complaints were tried before an ALJ in January 1992.

The ALJ carefully considered all of the evidence. In making his credibility determinations, the ALJ noted that, for the most part, both Holmes and Williams testified in a "thoughtful and conscientious manner," but at times, each "var[ied] from giving a full, correct, and accurate account of what had taken place." He

---

[3] Only one pro-union employee, Ike Byrd, apparently knew the reason for the videotaping.

[4] Section 8(a)(1) states, "It shall be an unfair labor practice for an employer))

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]"

29 U.S.C. § 158(a)(1).

Section 157 preserves a host of employee rights, including the right to self-organization, to form, join, or assist labor organizations, and to engage in collective bargaining through representatives of their own choosing. See 29 U.S.C. § 157.

[5] Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]" 29 U.S.C. § 158(a)(3).

credited Holmes's testimony that Williams approached him three times between April 11 and April 19 to discuss the union and inform him that wages would decrease or the plant would close if unionization occurred.

The ALJ did not credit Holmes when he denied calling Williams a "god damn liar." Instead, the ALJ believed Williams's version of that incident. He did not believe that Williams had not discussed the effects of unionization in any meaningful fashion until after the April 19 shift meeting. The ALJ found that Sunbelt, through Williams, had violated section 8(a)(1) by threatening Holmes that wages would decrease or the plant would close if the employees voted for the union.

The ALJ also found that Sunbelt terminated Holmes because of his union activities. He reached this conclusion after hearing testimony that showed that Sunbelt treated Holmes differently from other employees. Sunbelt argued that it fired any employee who directed profanity at a supervisor. It then produced two examples of employees fired for cursing at supervisors. The ALJ found that each of these instances included profanity directed at a supervisor plus something else. Jeffrey Brown was fired for telling his supervisor that he was "full of shit" and, according to the supervisor's testimony, for refusing to obey a direct order. According to vice president Caldwell's review of the records, Ronnie Rayford was discharged for cursing at a supervisor and for

making a threat to a supervisor.[6]

Perhaps most importantly, the ALJ heard testimony from two other Sunbelt employees concerning a third employee, Tony Milletello, an anti-union activist. One employee testified that Milletello told his supervisor, "Man, I'm tired of this fucking shit. Y'all are always fucking over me." The other employee testified that Milletello told another supervisor that Sunbelt "ought to do something about that motherfucker back there."

The ALJ found that this testimony showed that Sunbelt did not terminate all employees who directed profanity at a supervisor. He decided that Sunbelt used Holmes's "god damn liar" statement as a pretext to discharge him for his union activities.

Finally, the ALJ determined that the videotaping at the plant around election time violated section 8(a)(1) because an employer's photographing of its employees constitutes unlawful surveillance. No evidence existed that Sunbelt ever told the general work force the reason for the videotaping. As such, the videotaping by Perkins "necessarily" tended to interfere with employees in the exercise of their section 7 rights.

The ALJ found that Sunbelt violated section 8(a)(1) and (3) by threatening employees with reduced wages or plant closure if they voted to unionize, by firing Holmes because of his union activities, and by videotaping employees at the plant during the election. The ALJ ordered Sunbelt to stop threatening employees,

[6] Rayford told his supervisor, "I swear on my mother's and father's graves I will fuck you up."

to stop surveillance of employees, and to reinstate Holmes with lost earnings and benefits. The NLRB reviewed and affirmed the ALJ opinion and order and is now before this court seeking enforcement of its order.[7]

II.

We must take the NLRB's factual findings as conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). We shall enforce the NLRB's order if, after a full review of the record, we are able conscientiously to conclude that the evidence supporting the NLRB decision is substantial. NLRB v. Mini-Togs, Inc., 980 F.2d 1027, 1032 (5th Cir. 1993). We shall enforce an NLRB decision "if the choice is reasonable, even though we might reach a contrary result if deciding the case de novo." Mueller Brass Co. v. NLRB, 544 F.2d 815, 817 (1977) (citations omitted). The NLRB and its ALJ are due deference when a factual finding rests on the credibility of witnesses. Mini-Togs, 980 F.2d at 1032.

Our review of the record shows that substantial evidence supports the NLRB's and its ALJ's determination in this case. Substantial evidence exists in the record that shows that Sunbelt supervisor Williams threatened Holmes with reduced wages or plant closure if unionization occurred, Sunbelt discharged Williams because of his union activity, and Sunbelt violated section 8(a)(1)

[7] The NLRB determined that Sunbelt's videotaping only "reasonably")) not "necessarily")) tended to interfere with employees in the exercise of their section 7 rights.

by videotaping handbilling at the plant around the time of the election.

Sunbelt primarily argues that we should not abide by the ALJ's credibility determinations because at times he credited part of some witnesses's testimony, while at other times he discounted their testimony. Specifically, Sunbelt points out that although the ALJ noted that he did not believe Holmes's denial that he called Williams a "god damn liar," the ALJ went on to credit Holmes's testimony that Williams badgered him about the effects of unionization three times prior to the April 19 shift meeting. Sunbelt would have us disregard the ALJ's credibility resolutions, basically applying the principle of "falsus in uno, falsus in omnibus."

As we previously have noted, we grant due deference to an ALJ's credibility determinations. Mini-Togs, 980 F.2d at 1032. See also NLRB v. Proler Int'l Corp., 635 F.2d 351, 355 (5th Cir. Unit A Jan. 1981) ("Credibility resolutions are peculiarly within the province of the trial examiner and the National Labor Relations Board . . . ."). In NLRB v. Florida Citrus Canners Coop., 288 F.2d 630, 638 (5th Cir. 1961), rev'd on other grounds, 369 U.S. 404 (1962), we stated that while an examiner should carefully scrutinize the statements of a witness whose veracity is put in question, an "examiner is not required to apply the maxim, falsus in uno, falsus in omnibus." In NLRB v. Universal Camera Corp., 179 F.2d 749, 754 (2d Cir. 1950), vacated on other grounds, 340 U.S. 474 (1951), Judge Learned Hand instructed that it "is no reason for

refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

We refuse to set aside the ALJ's determinations in this case. His careful consideration of the witnesses)) including paying particular attention to each witness's demeanor, gesticulations, and tone of voice)) convinces us that the ALJ was more than capable of discerning the truth in the testimony of Holmes and Williams.

Holmes testified that Williams approached him three times after April 11 and told him that Sunbelt would cut wages or close the plant if the employees voted to unionize. Williams testified that he had no meaningful discussions about the union with Holmes before April 19. The ALJ was in the best position to resolve the conflicting testimony. He determined that Sunbelt, through Williams, threatened Holmes in violation of section 8(a)(1). Substantial evidence supports this conclusion.[8]

Sunbelt next argues that the ALJ erred in finding its discharge of Holmes an unfair labor practice because Sunbelt fired any employee who directed profanity at a supervisor. The ALJ found that Sunbelt tolerated in others the type of conduct for which it terminated Holmes.

---

[8] Sunbelt asserts that Williams's comments were simply expressions of his personal opinion, not threats. In NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969), the Court noted that an employer could make a prediction about the effects of unionization on the company. The prediction, however, must be based on "objective fact" that would reasonably be the economic consequences of unionization, not a threat of voluntary economic retaliation. Id. at 618-19. Williams's comments, lacking any basis in fact related to Sunbelt's situation, fall into the realm of threat of economic retaliation.

The record shows that two employees testified that an anti-union employee, Tony Milletello, directed far worse profanity at a supervisor than Holmes's "god damn liar" comment, yet was not terminated. In addition, the ALJ convincingly distinguished the two situations Sunbelt presented to show that it terminated any employee who cursed at a supervisor.

First, the record shows that a supervisor testified that he fired an employee, Jeffrey Brown, for refusing a direct order in addition to using obscene language. Second, Caldwell testified that his review of the records indicated that Ronnie Rayford was discharged for threatening a supervisor in addition to directing profanity at a supervisor. Substantial evidence supports the ALJ's determination that Sunbelt would not have discharged Holmes in the absence of his union activities.

Finally, substantial evidence supports the NLRB'a determination that Perkins's videotaping of the plant around the time of the election reasonably tended to interfere with employees in the exercise of their section 7 rights. In the absence of proper justification, photographing employees engaged in union activities violates section 8(a)(1). NLRB v. Aero Corp., 581 F.2d 511, 512 (5th Cir. 1978). See also Kallmann v. NLRB, 640 F.2d 1094, 1098 n.5 (9th Cir. 1981). This sort of "pictorial recordkeeping tends to create fear among employees of future reprisals." F.W. Woolworth Co., 1993 NLRB LEXIS 428, at *4 (Apr. 27, 1993). See also Value City Dep't Stores, 1991 NLRB LEXIS 1147, at *64 (Sept. 24, 1991) (videotaping picketers intimidates employees in

violation of section 8(a)(1)).

Although Sunbelt contends that it had a justification for one of its managers to videotape activity)) the film was being made as a memento for anti-union employees)) no evidence in the record shows that Sunbelt ever informed its employees of this reason. The fact that one pro-union employee did know of the purpose of the videotape does not suffice to impute knowledge to the rest of the employees.

The NLRB reasonably found that the videotaping of employees engaged in handbilling at the front entrance of the plant on the day of an election may have tended to inhibit employees in exercising their right to accept or refuse literature. The NLRB's determination that Sunbelt engaged in unlawful surveillance is supported by substantial evidence.

III.

In conclusion, because we have determined that the NLRB's and the ALJ's findings are supported by substantial evidence, we DISMISS Sunbelt's petition for review and GRANT enforcement of the NLRB's Order in full.