IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5293

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

ALBERTSON'S, INC.,

Respondent.

Application for Enforcement of an Order of the
National Labor Relations Board
(16 CA 14717 & 16 CA 14713 2)

(October 18, 1993)

Before SNEED,[*] REYNALDO G. GARZA, and JOLLY, Circuit Judges.

PER CURIAM:[**]

In this labor relations case, respondent Albertson's, Inc. ("Albertson's") opposed the application for enforcement of an order of the National Labor Relations Board ("NLRB"), in which the NLRB found that Albertson's violated § 8(a)(1) and (3) of the National Labor Relations Act by issuing a written warning to an employee for

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[*]Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit sitting by designation.

[**]Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

union solicitation. Because the record does not contain substantial evidence to support the NLRB's conclusion that the warning was directed at legitimate union solicitation, we reverse.

I

Albertson's, a supermarket chain with over 600 stores in eighteen states, maintains a valid "no solicitation" policy that prohibits union solicitation by either non-employees or employees during work times. This policy is posted throughout Albertson's stores. During the summer of 1990, the United Food and Commercial Workers Union, Local 100 ("the union") began an effort to organize employees at Albertson's in the Dallas-Fort Worth area. One of Albertson's employees at its Irving store, Jose Hernandez, became an advocate for union organization, encouraging fellow employees to join in the unionization of the stores.

To this end, Hernandez approached two employees, Sherry Culotta and Tina Olivarez, in a back room while they worked at checking in stock from a delivery truck. Hernandez spoke to them for approximately fifteen minutes, prompting Culotta to leave her work station to complain to the drug manager, David Tinsley. Tinsley said he would do something about it. Subsequently, while Olivarez was working, she was approached by Hernandez who pleaded the union's case, causing Olivarez to complain to Tinsley. Tinsley informed store director Dave Lawson of these complaints.

Hernandez also approached a third employee, Renee Clark, while she was on break. After this encounter, Clark complained to Lawson

that she felt threatened by Hernandez, who had stated that someone had informed the management that there had been union solicitation. According to Clark, Hernandez had told her "that they were going to find out who it was." Lawson reassured Clark that he would look into the matter. The next day, Hernandez again approached Clark, this time while she was working, grabbed her arm and pulled her to one side, inquiring whether she had made her decision about joining the union. When Clark replied that she had not, he told her to decide and let him know. Clark immediately called Lawson, who had witnessed the scene, and complained that she was afraid of Hernandez.

Based on these incidents, Lawson issued a written warning to Hernandez, which Lawson read to Hernandez out loud when he refused to read or sign the warning. The warning reprimanded Hernandez for violating the no solicitation policy, and for creating unrest and disturbance. The warning concluded that "[a]ny further violations of the company no-solicitation policy or threats, intimidation, coercion, retaliation etc. at work toward other employees will result in your immediate termination."

II

The union responded to the warning of Hernandez by filing charges of unfair labor practices, alleging that Albertson's had violated 29 U.S.C. § 158(a)(1) and (3).[1] The Administrative Law

[1] The union also made charges in connection with a second Albertson's store in Watauga, Texas. Albertson's, however, has

Judge ("ALJ") found that Albertson's had violated § 8(a)(1) and (3), reasoning that there were in fact two warnings. According to the ALJ, "the first [warning] issued because of Hernandez's solicitation in violation of [Albertson's] valid [no solicitation] rule, [and] the constructive `second warning' issued for causing `unrest and disturbance.'" The ALJ reasoned that the "first" warning was legitimate, as Hernandez had indeed violated the valid no solicitation policy. The "second" warning, however, was not legitimate according to the ALJ for several reasons. First, the ALJ concluded that the "second" warning was directed at Hernandez's legitimate solicitation on the basis that Lawson assured Clark that he would "see what [he] could do" after Hernandez rightfully approached Clark during break time. Second, the ALJ emphasized that, based on Clark's demeanor at the hearing, she "is a highly sensitive young woman and clearly naive of the realities of trade union organization generally. . . . I find Ms. Clark's reaction to Mr. Hernandez was overwrought." Finally, the ALJ concluded that the use of the word "etc." in the warning was "so obviously vague as a restriction on conducts as to be fatally overbroad and invalid." As a remedy, the ALJ directed Albertson's to rescind the improper portion of the warning.

On appeal, the NLRB affirmed the ALJ's decision, agreeing with the ALJ's conclusion that no intimidation or unrest occurred.

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not appealed the ALJ's decision on these charges.

Moreover, the NLRB agreed that the "second" warning was in fact tied to Hernandez's permissible solicitation. Finally, the NLRB found, as had the ALJ, that the use of the term "etc." was too vague. Albertson's timely appealed.

III

When reviewing the NLRB's decisions, we must determine whether the record as a whole demonstrates that there is substantial evidence that supports the NLRB's finding. Texas World Service Co., Inc. v. NLRB, 928 F.2d 1426, 1430 (5th Cir. 1991). To meet this substantial evidence standard, there must be sufficient relevant evidence in the record such that a reasonable mind might accept it as adequate to support the conclusion reached. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). Therefore, we accord considerable deference to the NLRB's findings of facts. Texas World Service, 928 F.2d at 1430. Questions of law, however, are reviewed de novo.

The ALJ and the NLRB both concluded that the so-called "second" warning was in fact retaliation against Hernandez for his solicitation within the purview of Albertson's "no solicitation" rule. To support this conclusion, they refer to Lawson's assurances to Clark, who had come to him complaining of Hernandez's unwanted, albeit legitimate, attention, and to the timing of the warning, which came one day after Clark reported Hernandez's protected solicitation. Both the ALJ and the NLRB emphasize their beliefs that Hernandez did not disrupt or interfere with working

conditions; any feelings of intimidation or insecurity were blamed on the naivete and sensitivity of Clark and her misunderstanding of undefined "cultural differences." We disagree. The observations of the ALJ and the NLRB do not amount to substantial evidence supporting the conclusion that the warning was motivated by Albertson's desire to retaliate against lawful union solicitation by Hernandez. Lawson's comment, taken in context, was an assurance to a shaken employee that Lawson would see what he could do to prevent a recurrence of that disturbing incident. There is nothing in the record that connects his comment to the warning. Moreover, the timing of the incident, which the ALJ and NLRB find so suspicious, is of little if any probative value. It is true that Lawson issued a warning one day after Clark complained to him, but it is equally true that Lawson issued the warning after receiving a second far more disturbing complaint by Clark. Again, the ALJ and NLRB make a strained inference that simply because the warning was issued <u>after</u> Lawson discovered that Hernandez was soliciting for the union, the warning must have been the <u>result</u> of the legitimate union solicitation.

In addition, we cannot so casually dismiss the significance of the complaints of the three female employees regarding the intimidation and physically invasive methods employed by Hernandez in his efforts to secure their support for unionization. As respondent succinctly states in its brief, "[i]f it was ever acceptable for an employer or the [NLRB] to ignore the complaints

of women employees on the grounds that they were being overly sensitive, or to let offensive behavior by their male coworkers go unpunished because such behavior was just part of the `male culture,' that time has long since passed." We agree. No one disputes the fact that Hernandez was overbearing in his manner or that he grabbed Clark, pulling her from her cash register. In each instance, the female employee in question immediately left her work station to complain of Hernandez's offensive conduct. Based upon this record, for the ALJ and the NLRB to conclude that Hernandez did not engage in intimidating behavior flies in the face of logic. Because the NLRB's conclusion is not supported by substantial evidence, we hold that the "second" warning was not impermissibly directed at protected conduct.

Next, the NLRB found that the use of the word "etc." in Albertson's warning to Hernandez "left ambiguous and open-ended the nature of any future conduct at work which could result in Hernandez' discharge [and] could reasonably have been construed to include protected instances of solicitation like that in which Hernandez engaged in the breakroom." We disagree. The warning stated that Hernandez would be terminated if he violated the no solicitation policy or if he engaged in conduct amounting to "threats, intimidation, coercion, or retaliation, etc." Termination on either basis would be permissible since Albertson's is not required to tolerate abuse of its employees any more than it must tolerate violations of its "no solicitation" policy.

Moreover, we reject the holding that the use of the word "etc." created an unreasonably vague warning, thereby chilling Hernandez's legitimate union activity. The word "etc." follows a list of terms that clearly refers to a narrow range of abusive or offensive behavior against fellow employees. "Etc." is the abbreviation for et cetera, which is Latin for "and the like." Using the phrase "and the like" following a list of specific items is a quintessential ejusdem generis signal that the list, while non-exclusive, comprises only those additional unnamed items that are "like" the named items. Contrary to the findings of the ALJ and the NLRB, the use of "etc." in Albertson's letter gave Hernandez sufficiently specific warning of the kinds of inappropriate behavior that would not be tolerated.

IV

For the foregoing reasons, the NLRB's application for enforcement of its order is

D E N I E D.