Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of:

THE SINCLAIR COMPANY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Docket No. 585

Pt. 1

Place Washington, D. C.

Date March 26, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

The Sinclair Company, Petitioner,	:	
v.	:	No. 585
National Labor Relations Board, Respondent.	:	

Washington, D. C.
Wednesday, March 26, 1969.

The above-entitled matter came on for argument at 1:55 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, AssociateJusti ce
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice

APPEARANCES:

EDWARD J. SIMERKA, Esq.
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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 585, The Sinclair Company, Petitioner, versus National Labor Relations Board.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Simerka.

ORAL ARGUMENT OF EDWARD J. SIMERKA, ESQ.

ON BEHALF OF PETITIONER

MR. SIMERKA: Mr. Chief Justice and members of the Court, may it please the Court, we would like to get immediately into the reason why we are here.

In December of 1965, the Teamsters lost an NLRB election which was held among employees classified as journeymen Wire Weavers at our applicant plant in Holyoke, Massachusetts.

They voted seven against the union and six for the union.

Now even though the union lost the election the Labor Board ordered us to bargain with it. And why did the Labor Board do this? They did it because of our words, because of what we said to our employees prior to the conduct of this election.

Unlike the other cases that have been heard this afternoon there were no discharges. There was no interrogation. There was no surveillance. There were no promises of benefit by the employer in this case.

Now during the organizing campaign, the President, David Sinclair, made two speeches to the employees and he wrote about eight letters for handbills. Now in its decision, the Board could not find a single statement, couldn't find a single sentence or a single communication which they could characterize as being unlawful.

So instead, what the Board said, in effect, was that even though each of the employer's statement was lawful by itself, considered subsequently, we, the Board in our expertise sitting here in Washington will decide that the totality of all these lawful statements, however, are unlawful and are coercive and that is why we are here.

It is our position that our communications to our employees were lawful and protected and not only by Section 8(c) of the Taft-Harley Act but also by the First Amendment to the Constitution.

We would like to meet the issues head-on, and if I may I would like to direct the Court's attention to page 21 of the Board's brief.

The Board's attorney call attention on page 21 of their brief to fi-e points that allegedly were made by President Sinclair in petitioner's communication. I am using the term Board's attorney advisedly because the Board nowhere indicated that it relied on these five points or upon any other points.

The only finding that we have from the Board is that by Petitioner's series of communications that when they were considered as a whole that these were coercive but the Board at no time ever indicated as to what it was specifically that we had said that merited prescription.

That is why I point to page 21 of the Board's brief because the Board's attorney point to five points which they say we made and it is these five points I gather which allegedly made our communication coercive in the Board's view.

Now, of course, the Board's attorneys merely expanded upon an approach taken by the Court below which did much the same thing, relying on four points. Again, there is no evidence relied on by the Board.

Now we submit that each of the five statements or points that are referred to in the Board's brief were lawful and protected by Section 8(c) and by the First Amendment to the Constitution.

Point No. 1, for example, is that the 1952 strike left the company in a state of continuing financial difficulty. Now, of course, the facts in our case are that we did have a union for journeymen and at that time apprentice wire weavers up until 1952 when there was a 13-week strike.

And then our communication told the employees that the 1952 strike of 13-week's duration had left the company in a continuing state of financial difficulty and we submit

that this statement is perfectly lawful and proper under Section 8(c) of the Act.

By no stretch of the imagination can it be claimed to contain a threat of force or reprisal on our part and certainly is not a promise of benefit.

Further the statment is amply supported by the record and I point out that this Court has held that no test of truth can be administered either by judges or juries or by administrative agencies when questions of free speech are involved, but the record does support this statement and it shows that the financial difficulties over the years became so severe that in 1964 President David Sinclair was forced to sell.

Now we assume that even the Board will agree with us that statement No. 1 which the Board is relying on is a statement lawful and protected under 8(c) and under the First Amendment.

Q What page of the brief did you say that was on?

A It is on page 21, your Honor, of the Board's brief.

The second statement that the Board relies upon is a statement that the petitioner stated that a union would make unreasonable demands which the company couldnot meet. And then its only recourse would be a strike. Well, I am not going to quibble over the wording.

We made a statement substantially of that nature in the course of a pre-election campaign. But we submit that anyone knows that this statement, that is, that if the company cannot meet unreasonable demand that the union's only recourse is a strike, is a true statement. It doesn't take Board expertise to determine this.

Now, we submit that a statement of this nature also is lawful and protected under Section 8(c) and the First Amendment to the Constitution. To the extent there may be involved a charge that a union or the union or the Teamsters Union would make an unreasonable demand we submit that this is lawful and protected.

It is a statement relevant to the issues. And in Linn against Plant Guards this Court recognized that a wide scope was to be given in a pre-election campaign with charges and counter-charges. And it doesn't take Board expertise to know that unions do make unreasonable demands. Everyone knows that. This is the name of the game.

This is the basis upon which negotiations start in any labor-management context. The people in the plant know this. And particularly these people in this plant knew it because they had all been union members.

I should amend my statement. A majority of them have been members of the union back in 1952 and anyone who negotiates labor contracts as I have know that, also.

Now, in addition, here there was a background of a strike over unreasonable demands in 1952. The majority of the employees involved in this election campaign went through the 1952 strike. They knew what the unreasonable demands were back in 1952 that led to that strike.

We submit that neither 8(c) nor the Constitution permits the Board to shield employees from something they already know. Basically this is the substance of statement No. 2 which is relied upon by the Board.

Now, what else did we do according to the Board's attorneys? Three, according to the Board's attorneys we pointed out to the employees that such a recourse, that is, unreasonable demand was to be expected from the Teamsters Union which was a strike-happy outfit led by racketeers.

Again, your Honors, we submit that there is no threat or force or reprisal in this statement and that it is fully protected by Section 8(c) and by the First Amendment to the Constitution.

Now, what does the record show with regard to facts? It shows first of all that the union that was organizing us was in effect the same union that struck us for 13 weeks in 1952.

In 1952 our people were represented by the AWWPA, the American Wire Weavers Protective Association which had merged with or been absorbed by the Teamers Wire Weavers

Division which was the entity within the Teamsters Union that sent the initial letter to our employees and began its attempt to organize them in July 1965.

So the AWWPA which had been swallowed up by the Teamsters was the organizing entity. The authorization cards sent out to the employees authorized the International Union to represent these people and it also authorized the International to designate or charter any other local to represent them.

The organizational attempts started with the International and the first recognition demand came from the International on August 17. It was a request made not only by the International but on behalf of the International as shown by our response to it.

Any statements with respect to racketeering is certainly amply supported by Senator Kennedy's book, The Enemy Within, which we sent to our employees had records of Senate investigating committees and the reference to the Teamsters being a strike-happy outfit was supported in our letter to our employees by our "Directly from Mr. Hoffa himself," in connection with an organizing campaign among telephone installers where he told these people that either they should be ready to do warfare with their employer for six or nine months or not come into the Teamsters Union at all.

We submit that certainly we have a right to

disseminate these facts to our employees with respect to the Teamsters Union. There is no threat of force or reprisal. We submit that our statements were lawful under Section 8(c) and under the First Amendment.

Q And both the Board and the Court below disagreed with you? Is that right?

A The Board, yes, based on its totality doctrine the Board did not as I pointed out earlier, did not take these five points because they did not tell us what it was we had said.

The Board said merely through their expertise the totality of our communication were coercive.

The Court of Appeals did follow this type of analysis and set forth four different points which we submit do not support the Board's order in any event or its findings.

However, the Court below merely deferred to the Board's expertise and to the test of substantial evidence and we submit that in both of these respects the Board expertise was not a proper standard and, of course, should have reviewed the record itself to determine whether or not there were any improper statements and that substantiality of the evidence was not a criterion, particularly here when the facts were undisputed and all that was involved were the interpretation or conclusions to be drawn from the facts.

Again, I point to this Court's decision in Linn

against Plant Guards where this Court pointed out that a great leeway was to be afforded to the combatants or contestants in a pre-election campaign for vigorous vehement and caustic comment.

Now apparently the Board's attorneys do not consider that points 1, 2 and 3 add up to an unlawful totality, because they have gone on to No. 5. And I assume that 1, 2 and 3 would not be sufficient in the Board's view to constitute a violation of the Act.

The fourth point the Board points to is a statement to the effect that another strike could result in closing of a plant, as Lindsay would shift work to its Mississippi and Ohio plants if the Sinclair Company did not make a profit.

Q What was the charge in this case?

A The charge in this case, your Honor?

Q The unfair labor practice charge?

A The charge is an 8(a)(1) charge. Initially there were charges of 8(a)(1), (3) and (5). The 8(a)(3) was never litigated. It was dismissed administratively.

Then the hearing proceeded on charge of 8(a)(1) and 8(a)(5).

Q Yes.

A And the 8(a)(5) charge, of course, is based wholly and solely on the evidence again of our words to our employees. There is not a scintilla of evidence.

Q What is the basis for holding that you violated 8(a)(1) because you violated 8(a)(5)?

A No, it is the other way around.

Q That is what I thought.

This is an independent violation of 8(a)(1), without the words you use violated 8(a) work.

A Right, then the same words are used by the Board.

Q What is the rationale for saying that without violating the other sections you can violate 8(a)(1)?

A I am not sure that I follow.

Q They said the words you use violated 8(a)(1).

A Yes. The Board's theory is that a violation of 8(a)(5), for example, or 8(a)(3) -- or I should put it the other way a violation of 8(a)(1) is subsumed in a violation of 8(a)(3), for example.

If there is an unlawful discharge this violates not only 8(a)(3) but also 8(a)(1). In this case the Board is turning it around.

They say that a violation of 8(a)(1), of 8(a)(5) I should say, is subsumed in the violation of 8(a)(1).

Q I think they are saying that because you violated 8(a)(1) you refused to bargain by not recognizing the authorization cards because by the violation of 8(a)(1) you have really vitiated the chances of a fair election.

Specifically, what is the rationale for saying you violated 8(a)(1) by using some words against the employers when you haven't violated 8(a)(3)?

It is just this coercive? Any kind of coercive word? This violates 8(a)(1)? Well, forget 8(a)(3). Just tell me why is this form of words violate 8(a)(1)? What sections of rights are being interfered with by using these words?

A Well, it is our contention that nothing that we said violated Section 8(a)(1).

Q What is the Board's view of it, do you know?

A We have sought in vain, your Honor, to try to find out what the Board's view is. Because the Board's decision does not tell us.

Q They said it was coercive?

A They collected a series of little excerpts from what we said and they listed them in their opinion and then they said all of these foregoing speeches and communications when considered as a whole are unlawful. Then the Board made one finding relating to July 5 to December 9, the date of the election and made a second finding that related only to the period from November 8 to December 9.

And The Board reached the same conclusion in both cases. The second finding limiting it from November 8 to December 9 was made initially for the purpose of establishing

findings upon which the election could be set aside.

Because Jackson's conduct is not considered as justifying setting aside an election unless it occurs on or after the date the election petition is filed. So that is the reason for the November 8 date.

Other than the Board's statement that the totality of our communications violated the act we have no way of knowing what the basis of this conclusion is.

The Board never pointed to any specific statement and said, on such and such date you made a certain statement and this statement threatened or coerced the employees or that you threatened reprisals and the facts are completely to the contrary which the Board has completely ignored because we repeatedly told our people that we would not close our plant and that we would fulfill our duty to bargain with the union if they selected one.

The entire thrust of our conversations with our people was that there was a possibility that if this same union that had once represented our people and had already once before called a strike over unreasonable demands, if this union came in and did the same thing then there was a possibility that there would be adverse consequences to all concerned because the company was not in position to agree to any unreasonable demand.

Now the Board characterizes our comments as predictions.

Well, there is nothing in what we said where we even went so far as to predict that anything of this nature would result. We never predicted. We discussed the possibility. It was a possibility that if the union was selected and if the union made unreasonable demands upon us in negotiating context and if we were unable to meet these demands and if they called a strike then there was a possibility that this plant might close.

We never predicted that any of this would happen. We repeatedly said we did not intend to close. President Sinclair repeatedly indicated to the employees that what was involved was his life. It was his job. It was his family business and his final speech to the employees he said that he would do his levelbest to keep the Sinclair Company in business and growing.

So we submit that the Board's finding based upon a totality are not supported by the evidence. Our statements are constitutionally protected and are protected by Section 8(c) and there are no threats of reprisal, of course, in anything we said.

Now, in this regard, we point to Senator Taft's explanation in the two legislative history 1627 which we have cited in pages 67 and 68 of our brief where Senator Taft in explaining Section 8(c) said that views, argument or opinion shall not be evidence of an unfair labor practice unless they

contain in themselves a threat of coercion or a promise of benefit.

The Board is urging before this court a subjective task as to regard Section 8(c) as to what the listener believed which amounts to reading Section 8(c) out of the Act entirely.

And it would again turn all speech questions in labor members over to Board expertise and we submit that this is what Congress attempted to prevent when it enacted Section 8(c) in the first place.

And this is what the Board has done here in this case, attempted to substitute expertise for evidence. We submit that our lawful statements cannot be added up to an unlawful totality through Board expertise.

If this can be done by other Boards, they don't have to make any findings, if they don't have to find that a statement is a threat and show that this is supported by evidence, then we submit that we will have a monster of expertise which this court shunned in the Burlington case.

Q Well, if you had said to the employees, if you join this tough aggressive union, then we are going to move the plant south. Would that be coercion in the condemnation of the statute?

A I think if the statement was made if you join such and such union, the plant will be moved south, well I

would say that that was a direct threat to the employees.

Q So that the one possibility here is the Board whether or not whatever you may call it, expertise or what, the Board may have considered that the statement in context amounted to that kind of a statement?

Is that possible?

A Well, your Honor ---

Q And what you are asking us to do is to go through this language that was used and say that the Board was wrong in putting a sinister interpretation on what was non-sinister language.

A In substance that is our position, yes.

Q You have another point about the authorization cards, don't you?

A You mean on the bargaining order aspects of the case?

Q Yes.

A Yes, there is another point in that regard.

The Board in this case having found they committed an 8(a)(1) violation as I said earlier, subsume an 8(a)(5) violation in the 8(a)(1) because there was no other evidence in this case other than the evidence of our words.

And they used our words then as evidence of a number of other things. They used our words in their finding of Section 8(a)(1) as evidence that we did not have a good faith

doubt of the union majority status.

Also, that we did not have a good faith doubt of the appropriate unit. That we sought to gain time in order to defeat the union. That we through our communications that we caused the union to lose support and finally the final and most important finding which the Board made specifically in this case that it would be impossible to conduct a fair second election.

Of course, the Board does this through a boot-strapping technique having found the 8(a)(1) they automatically arrive at the 8(a)(5) because the Board claims the right to infer all these findings of the 8(a)(1). We submit that there is no logical basis for this kind of inference.

I would like to just add a few more comments because my time is about up.

To try to summarize on the bargaining order aspects of the case it it our contention that the question of good faith doubt is really irrelevant and that the Board said so itself in this case.

In its order the Board said that even if we had had a good faith doubt that they would nevertheless have ordered us to bargain anyway. So that the Board itself says that the question of good faith doubt is irrelevant. I think the important aspect in this case and in the others of bargaining order of question is what is the proper remedy for

the 8(a)(1) violation if there is one, in this case. And we deny that there is.

Or what is the proper remedy for the unfair labor practices that have been found and the Courts of Appeals although many of them still using the good faith doubt language have basically directed their attention to this question.

Q I take it it is this sentence at page 191 was adopted by the Board, is that what you are referring to? While a Board election is normally the best method of determining whether or not employees desire to be represented by a bargaining agent whereas here an employer engages in unfair labor practice make it impossible to hold a free election. There is no alternative but to look at the signed authorization cards, as the only available proof of the choice employees would have absent the employer's unfair labor practice?

A Yes.

Q There is no reference here as to whether or not you would have a doubt. I don't find it in that language, do you?

A No, it is not in that line.

Q It is somewhere else?

A It is in the order.

Q Oh, in the order. I beg your pardon.

A Yes, it is in the Board's order and discussions.

Not in the order itself, in the discussion the Board says that even if we had had a good faith doubt in this case they would have ordered us to bargain in any event.

Q Did the Board itself write an opinion?

A No. The Board merely adopted the order ---

Q Where is this discussion, in the Board's brief? Is that what you mean?

A No, sir. It is in the Trial Examiner's decision. I have referred to it in the brief as being the Board decision because the Board adopted it.

Q Well, that is what I was referring to. I couldn't find it. The language I read you is the only thing I have been able to come across.

A It is page 198, your Honor.

Q What, 198?

A Yes. It starts about the sixth line down, "Moreover I would recommend the same bargaining order even if the record had warned of the conclusion ..."

Q Thank you. Yes.

Q Did I understand you to concede that if the company had made a statement that if the union won it intended to move its plant and that was a truthful statement, that that would have been ground for holding coercion?

A I didn't get the last words, your HOnor.

Q That would have been ground for holding if

there was coercion on the employees?

A Well, I would say that if an employer goes to employees and says if you vote for this union I will move the plant out that this could be considered a threat under Section 8(c) of the Act.

Q Suppose it was the truth?

A Well, pardon me?

Q Suppose it was the truth? That is what I asked.

A Well, I would say that this would be a threat under 8(c) and could be considered coercive.

Q In other words, he couldn't tell them what he was going to do if they won, if the unions won?

A Well, of course, that would ---

Q If he really intended to do it.

A It -- you would have to consider the fact of the Darlington case or the Darlington decision of this Court as to whether or not you would be legally entitled to make this statement.

Q I don't say that one way or the other. I just ask you what you conceded.

A Yes, I would say that if an employer made a flat statement to employees that if you vote for the union ---

Q And if it wins, if the union wins?

A If the union wins this plant will be moved South?

Q Yes.

A This would be considered to be a threat.

MR. CHIEF JUSTICE WARREN: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

ON BEHALF OF RESPONDENT

MR. WALLACE: Mr. Chief Justice and may it please the Court.

The petitioner in this case has raised a primary contention of the problem of reconciling Section 8(a)(1) with Section 8(c), 8(a)(1) being the section, one of the sections that the Board found the petitioner to have violated. These are set forth on page 43 of our brief in the appendix and perhaps that is a good starting point for assessing the primary contention made here.

Under Section 8(a)(1) of the Act it is an unfair labor practice for an employer to interfere with restrain or coerce employees in the exercise of the rights guaranteed in Section 7, including the right to a free choice in deciding whether they want to select a representative to represent them in collective bargaining.

Under Section 8(c) of the Act, Congress has said that the expressing of any views argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form shall not constitute or be evidence of unfair labor practice under any of the provisions of this Act if such

expression contains no threat of reprisal or force or promise of benefit.

Now run together and in the light of their legislative history we submit that Congress was saying two things, it including both of these provisions in the Act: One, that it wishes to guarantee the employer's right to express his views and this is at all times under 8(c) -- it is not restricted to the period of election -- and the other thing is that Congress wanted to protect the employees who are economically dependent upon the employer from being deprived through threat of reprisal of their freedom of choice in the exercise of their right to choose their bargaining representatives, and to bargain collectively if they so desire.

This prohibition of threats of reprisal which exists in the Act is an integral part of Congress' regulation of the employment relationship, regulation of the manner in which the terms and conditions of employment will be established under the Act.

Q Do you suppose the language of the statute goes no further than what the employer already had a right to do under the First Amendment, or does it go further?

A My view is that it goes further as would be indicated in decisions of this court in other areas of economic regulation where there is not a provision comparable to 8(c) protecting freedom of expression in the relationship,

in the economic relationship. I think, for example, the Federal Trade Commission against Texaco in this term where the Court held that there was inherent coercion in the recommendation by Texaco to its dealers of a particular brand of tires, batteries and accessories certainly the Labor Board would not go this far in the face of 8(c) as the Trade Commission did with this court sustaining it in that case in a similar economic context except for the differences in the statutory provisions.

MR. CHIEF JUSTICE WARREN: WE will recess now.

(Whereupon, at 2:30 p.m. the Court recessed, to reconvene at 10 a.m., Thursday, March 27, 1969.)