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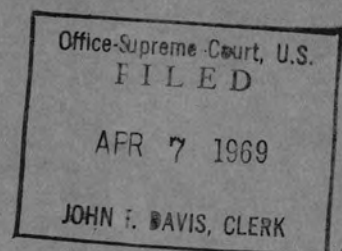
Supreme Court of the United States

October Term, 1968

In the Matter of:

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:
THE SINCLAIR COMPANY, :
:
Petitioner; :
:
vs :
:
NATIONAL LABOR RELATIONS BOARD, :
:
Respondent. :
-----X

Docket No. 585



Pl. 2

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Place Washington, D. C.

Date March 27, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Lawrence G. Wallace, Esq.

on behalf of Respondent 25

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X
4 THE SINCLAIR COMPANY, :

5 Petitioner; :

6 vs. :

No. 585

7 NATIONAL LABOR RELATIONS BOARD, :

8 Respondent. :

9 - - - - -X
10 Washington, D. C.
11 Thursday, March 27, 1969

12 The above-entitled matter came on for further argu-
13 ment at 10:30 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 ABE FORTAS, Associate Justice
23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

25 (The same as heretofore noted.)
- - -

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 585, The Sinclair Com-
3 pany, petitioner; versus the National Labor Relations Board.

4 Mr. Wallace, you may continue with your argument.

5 FURTHER ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

6 ON BEHALF OF RESPONDENT

7 MR. WALLACE: Thank you, Mr. Chief Justice, and may it
8 please the Court:

9 I said yesterday that Section 8(a)(1) of the Labor Act,
10 when read together with Section 8(c), prohibits the employer
11 from coercively interfering, by threat or reprisal, with employee
12 free choice in selecting a bargaining representative.

13 Now, of course, Congress never said in the Act, or
14 in its legislative history, that the threat of reprisal need be
15 in any particular form of words, or that it need be confined
16 within the compass of a single communication in order to be an
17 unfair labor practice.

18 Congress was concerned with substantial rights, and
19 did not create any such loopholes in this Act.

20 Now, in this case, we are not dealing with an employer
21 who was so ill-advised as to threaten his employees in blatant,
22 unequivocal terms; but the Board also has a responsibility, in
23 protecting the rights that Congress has guaranteed, to determine
24 whether an employer who has carefully avoided the utterance of
25 any specific, overt threat, has nevertheless intimidated his

1 employees by getting the message across in the totality of what
2 is said that there is a real threat of company reprisal if they
3 should select the union.

4 In assessing whether the employer's communications
5 were calculated to have that effect, and more importantly, whether
6 they were likely to be understood by the employees as such a
7 threat, the Board, of course, tries realistically to take into
8 account all the circumstances, including any factors that may
9 make the employees especially susceptible to employer intimidat-
10 tion.

11 As Judge Hayes of the Second Circuit, who is a long-
12 time and distinguished scholar of labor law, has suggested in a
13 dissenting opinion, "It is not always easy for those of us who
14 are in a profession which shows no signs of obsolescence, and
15 which offers a wide variety of employment flexibility, to
16 appreciate that the insecurities of workers who are not so
17 fortunately situated can make them painfully vulnerable to the
18 pressures of equivocal or veiled threats by their employers."

19 Now, one additional word of background may be illumi-
20 nating before turning to this record.

21 The particular kind of threat involved in this case,
22 the threat of plant closure, has long been recognized as one of
23 the most flagrantly coercive and destructive of employee free
24 choice. In one of the leading opinions in this entire field,
25 Franks Brothers against the Labor Board, in Volume 321 U.S., in

1 a unanimous opinion delivered by Mr. Justice Black, the Court
2 singled plant closure out for special emphasis in the following
3 language:

4 "Before the election was held, petitioner conducted
5 an aggressive campaign against the union, even to the ex-
6 tent of threatening to close its factory if the union won
7 the election."

8 Part of the record which the Board was dealing with in
9 this case is cogently summarized, I believe, in the petitioner's
10 brief, and I would like to read a few short sentences at the
11 bottom of page 5 and the top of page 6:

12 "During this same period, 1952 to 1965, changes were
13 made in weaving industry equipment. The company's looms
14 were automated to the point where they could be run without
15 an operator. Electric clutches and fingers were added,
16 which made it much easier to operate, and some skills for-
17 merly needed were eliminated.

18 "Although it was not unusual to have apprentices in
19 1952, the situation changed in the industry after that time
20 because of automation. The company had had no apprentices
21 since 1952."

22 The question, then, was whether the employer's com-
23 munications to this group of employees whose skills had become
24 technologically outmoded to a substantial degree, were likely
25 to have had a coercive effect by conveying a threat of reprisal.

1 Now, the Board relied on the purport and effect of
2 these communications as a whole, rather than on any particular
3 statements, and they are rather diffusively spread over the
4 record. It is difficult to present, in the course of an oral
5 argument, the communications as a whole, but I will attempt to
6 make a quick survey of them.

7 Relying upon the Board's findings in its opinion, at
8 first, and the distillation that it made of these communications,
9 from the record, if I can begin as background with the earlier
10 communications starting on page 172 of the appendix, in the find-
11 ings, and there were findings in the Board's opinion, in the
12 first speech made to all of the employees when the President of
13 the company first learned of the union's organizing campaign,
14 long before any demand for recognition had been made, he spoke,
15 toward the bottom of page 172, of the company's financial con-
16 dition, indicating that ever since the last strike, the shop
17 had been running on thin ice.

18 He emphasized that if the company could not agree to
19 the union's demands, the union's only weapon is a strike, and
20 pointed out that, while he did not intend to close, a strike
21 could lead to a closing of the plant.

22 He also told the group that the wireweavers' craft
23 was a small one; that it would be difficult for them to find
24 other jobs, because it was not like finding a job as a machinist;
25 that many of them did not have the education, which would make

1 it difficult for them to find another job; and that many of them
2 were getting too old to go out and find new jobs.

3 Continuing on page 174, he said that he did not think
4 the Lindsey organization, the new owners, were going to be con-
5 cerned if, through contract negotiations with the union, our
6 people went on strike; that a strike could close respondent's
7 plant and nothing would prevent Lindsey from having respondent's
8 weaving work done at Lindsey's plant in Ohio and Mississippi.

9 He also stated that respondent was subject to foreign
10 competition; that it was conceivable that if the plant was
11 closed, under any circumstances, that some of the work would go
12 to foreign companies; and that respondent had handled foreign
13 wires in the past.

14 He pointed out that all they had to do was to look
15 around Holyoke if they thought a strike could not close respon-
16 dent's plant.

17 Continuing with a letter sent on November 5th to all
18 of the employees, on page 175, in the text of this letter he said
19 that the new ownership is interested in profits and not pressure.
20 They have no ties with Holyoke or Massachusetts.

21 Skipping down, "The union promises you a lot, but what
22 can they deliver except pressure and the threat of a strike?"
23 He then stated, "I do not believe the threat of a strike will
24 cause the new owners any loss of sleep; however, a long strike
25 would be bad for me because I would like to remain in Holyoke."

1 Next I would like to turn to 178 in these findings,
2 getting into the period within 30 days before the election, upon
3 which the Board directly relied, in a letter of November 30th
4 addressed to all the wireweavers. Reading from page 178, the
5 third line: This letter warns that:

6 "A strike can still close the Holyoke plant, but other
7 plants can pick up the work and that the new ownership is
8 interested in profits and not pressure."

9 He then points out that "The Teamster Union cannot do
10 anything to improve our profit position, but can only make big
11 demands which the company cannot meet, and then call you out on
12 strike, because a strike is a union's only weapon to enforce its
13 big demands."

14 He then asks, "Can you afford a long strike when you
15 know the Holyoke plant has been given a second chance to stay
16 in business and furnish jobs for all of us?"

17 I would like to turn directly to the employer's last
18 communications during the two days before the election. First
19 of all, a leaflet which was distributed to the wireweavers two
20 days before the election, and which appears on page 137 of the
21 appendix, in a fold-out. It begins, you will note, on page 137
22 of the appendix, with a cartoon showing a grave being prepared
23 for the Sinclair Company, surrounded by tombstones marked with
24 the names of other companies in the area that had closed down,
25 and underneath the cartoon, among the comments is the statement

1 "The Holyoke-Springfield industrial graveyard is filled with
2 companies which died under union pressure."

3 Then on the next page, on the reverse side, in the
4 first column, under the heading, "Many were sick when the union
5 doctor came in." It says, "Some of the industrial corpses were
6 already sick when the unions came in with big promises to the
7 employees of what the unions could do for them. These companies
8 needed higher production and better quality to meet the stiffer
9 competition. Union doctors gave them bloodletting strikes, re-
10 stricted production, and higher labor costs. The result, as you
11 see as you look around, was the death of these companies."

12 Then on the following page, which continues the leaf-
13 let, page 139, under the caption, "Our history is not bright.
14 Against a background such as ours, your dreams of union miracles
15 can be dangerous to your real job security. We don't know what
16 the future holds for any of us, but you can be sure the new
17 owners of Sinclair Company are looking for profit, not Operation
18 Holyoke Rat Hole into which to pour dollars without hope of
19 profit."

20 The final page pictures five factories in the area
21 which have closed down, with, among the captions, "Unions furnish
22 no job security here."

23 I testimony, however, on pages 40 and 41 of the
24 appendix, the employer admitted that he had no basis for believ-
25 ing that unions or union activities had had anything to do with

1 the closing of any of these plants, despite the representations
2 in this leaflet.

3 Q What has been the history of labor relations in
4 this company?

5 A There had been a union prior to 1952, an indepen-
6 dent union which is now affiliated with the Teamsters, Wire-
7 weaving Union. There had been a 13-week strike, after which the
8 plant reopened on a nonunion basis, until this present contro-
9 versy in 1965.

10 Q That was before the new management came in.

11 A That was before the company was sold to Lindsey
12 Wireweaving, but the President of Sinclair, the wholly-owned
13 subsidiary, is the same man who was the manager when it was an
14 independent company. He is the son of the founder.

15 Finally, I would like to turn to the note cards intro-
16 duced into evidence by the company, which were the basis of the
17 final speech to the wireweavers on the day before the election.
18 These begin on page 162 of the appendix, and I would like to,
19 naturally, read selectively in the limited time we have.

20 Beginning on page 163, in the middle of Card 5, "What
21 can they do?"-- meaning the union -- "Demand higher wages and
22 expensive welfare and pension plans, which could lead to even
23 larger losses than we have had," -- although on page 69 of the
24 record, I might point out, President Sinclair testified that the
25 company made a profit in fiscal year 1965, not losses -- "can

1 call you out on strike, you people know what it is like, you
2 have had strike experience. I don't think our new ownership
3 will lose a minute's sleep over whether the union threatens the
4 company with a strike. They have made it clear to me that they
5 look for a profit and not a hole to pour money down. If we have
6 to negotiate with the Teamsters and cannot reach agreement on a
7 contract under which we can make money, they can care less about
8 the threat of strike."

9 Continuing on the next page, in the middle of Card 9,
10 "Now I would be the last one to blacklist you getting another
11 job if this plant closed by strike, but the Teamsters can't
12 guarantee you another job either. Again let's look at facts
13 head-on. No one likes to admit he is getting older. We are all
14 Jack Bennys. We are never going to be over 39. We don't look
15 that way to an employment manager. Most companies probably have
16 a large number of applicants, are young, have better educations,
17 and certainly a lot better insurance rating than you and I. They
18 can be hired for a lot less money. True, you have experience,
19 but it is limited to a particular, small craft. I assume, in
20 case we are forced to shut down because of a strike, that some
21 other plant will pick up our business. This is not necessarily
22 so. Pressure is still on from foreign wireweavers. Maybe three
23 months from now I will be forced to sell foreign wires if the
24 Teamsters Union stops our production. You all know we have had
25 to handle foreign wires in the past."

1 Then on the next page, at the end of Card 12, "I have
2 given you the facts today, and by mailings, as I know them to
3 be. It is not a rosy picture for you or for me. Now the deci-
4 sion is up to you. Perhaps you feel I am exaggerating or bluff-
5 ing. I am deadly serious and I am deeply concerned."

6 And the final sentence: "To you and your dependents,
7 this is one of the most important elections in which you will
8 ever vote."

9 We believe that on this record, in the circumstances
10 of this community and this audience, the Court of Appeals cor-
11 rectly held that it was permissible, perhaps not required, but
12 permissible for the Board to conclude that the atmosphere of
13 free choice which Congress has ordained for representation
14 elections had been undermined by an implied threat, a threat
15 that the employer anticipated that it would not be able to be
16 able to agree to a contract with the union, and anticipated
17 making other arrangements for its wireweaving needs; if the union
18 should win the election, that this would lead either to the
19 closure of the plant or to the transfer of the wireweaving opera-
20 tions elsewhere.

21 Under the Act, this was a judgment for the Board to
22 make, subject, of course, to the safeguards of judicial review.
23 It is the sort of judgment that the Board is required to make in
24 a very large number of cases every year.

25 For example, during fiscal 1967, more than 8,000

1 representation elections were conducted by the Board, and during
2 the same year, objections were filed with the Board to 1369 such
3 elections.

4 Q Mr. Wallace, are you going to talk about the
5 authorization cards here?

6 A I am, Your Honor, in just a moment, if I may.

7 In evaluating such objections, the Board has shown
8 appropriate solicitude for the statutory rights of employers
9 under Section 8(c) to express their views during the campaign.
10 For example, at a 1966 decision concerning Ameress Corporation
11 in Volume 162 of the NLRB Reports, the Board held that the fol-
12 lowing inaccurate and intemperate criticism of the union was
13 privileged under this section, a statement by a supervisor that
14 the company did not want the union in, that "all they was good
15 for was blowing up people's houses and kidnapping their kids,
16 and that they was run by nothing but a bunch of gangsters."

17 The Boards decisions also have upheld the right of an
18 employer to explain realistically to his employees that his
19 business situation is unfavorable and precludes increases in
20 their compensation or other benefits so long as this is done in
21 a non-coercive way.

22 The employees in such a situation might still wish to
23 select a bargaining representative to protect them against re-
24 ductions of benefits or loss of employment. Of course, we do not
25 claim that the Board has been infallible in its judgments in

1 every one of the many cases requiring it to draw the line be-
2 tween protected expressions of views and implied threats, but
3 we do claim that in the present case, the Board's conclusion was
4 an unremarkable one. It was a clearly warranted implementation
5 of the Congressional mandate for protection of employee free
6 choice from the threat of economic coercion by the employer and,
7 indeed, we think the case would become remarkable only if this
8 Court were to convert this record into a script which thereafter
9 could be used by employers with impunity to intimidate their
10 employees.

11 Q What do you mean by that? If we didn't decide
12 for you, this would be a bad precedent?

13 A Well, I mean that this record would be pub-
14 lished, and I am certain it would be used in counseling as to
15 representations that could be made in the course of these cam-
16 paigns, and as to which the Board could not make a judgment that
17 coercion had unlawfully had occurred.

18 Q Well, if we decided you were right on this issue,
19 there would be nothing improper about that?

20 A Of course, that is true.

21 Q You are telling us that you are right in this
22 case.

23 A It is another way of telling it. That is quite
24 correct.

25 Q You are cautioning us.

1 A That is exactly the point I meant to make. But
2 once it is decided -- it was decided in this case -- that wrong-
3 ful coercion by the employer destroyed the accuracy of the elec-
4 tive process as a measure of employee sentiment, the Board's
5 remedy of a bargaining order, it seems to me, became plainly
6 warranted on the facts of this case.

7 The union had made a very strong showing of employee
8 support by obtaining authorization cards from a large majority
9 of the employees, 11 of the 14 in the bargaining unit. The
10 authenticity of these cards is no longer disputed, and the
11 employer never disputed the authenticity of eight of them. No
12 claim has been made that they were obtained by misrepresenta-
13 tion or coercion.

14 The cards themselves, which are in the appendix on
15 page 109, unequivocally designate the union as bargaining repre-
16 sentative, and include an application for membership in the
17 union.

18 In these circumstances, the employer's coercive power
19 during the election campaign permitted the Board, and it does
20 not always draw this inference, but it permitted the Board to
21 infer that the employer's refusal to bargain in response to the
22 union's request, based on the cards, was motivated not by good
23 faith doubt as to the union's majority status, but motivated
24 primarily by a desire to try, by wrongful means, to dissipate
25 that majority.

1 Q Now here, of course, the union lost the election,
2 didn't they?

3 A That is correct. What I just spoke of was the
4 basis for the Board's finding of an 8(a)(5) violation, a refusal
5 to bargain for which a bargaining order is always the appropriate
6 remedy.

7 The Board held, moreover, in this case, that even in
8 the absence of an 8(a)(5) violation, the bargaining order would
9 have been an appropriate remedy for an 8(a)(1) violation, and is
10 so indicated by the Franks Brothers case, which I have referred
11 to in 321 U.S., in which this Court said that the union had lost
12 its majority because of the employer's coercive threats and none-
13 theless upheld unanimously the bargaining order based on the
14 authorization cards.

15 Q What was the date of that case?

16 A That was in 321 U.S., and it was under the Wagner
17 Act.

18 Q Not under the Taft-Hartley Act.

19 A Not under the Taft-Hartley Act.

20 Because the employer's 8(a)(1) violation in this case
21 could not readily be cured so as to restore the conditions neces-
22 sary for an election, free from the effects of his wrongful coer-
23 cion, the Board was warranted in relying on the decisive majority
24 indicated by the cards as a more accurate showing of employee
25 sentiment than an election would be in the existing circumstances.

1 and thus to decide that the requested right of employees to
2 bargain collectively should be enforced without further delay.

3 This is not a drastic remedy because, as in the case
4 of any bargaining order, there will be opportunities for interest
5 ed persons to request another election to measure any changes in
6 employee sentiment after a reasonable period of time.

7 In sum, therefore, we believe the Court of Appeals was
8 entirely correct in treating this case as a rather routine
9 example of the Board's proper discharge of its statutory respon-
10 sibilities, which is the flavor one gets from the opinion of the
11 Court of Appeals reviewing this record.

12 Thank you.

13 Q Could I ask you a question on these cases which
14 you sketched out as to the Board using its judgment on the total-
15 ity. Has the Board ever been reversed on one of these cases
16 where it approached these unfair labor practices on a totality
17 approach? Has it ever been reversed?

18 A Not to my knowledge, although there have been
19 relatively few cases in which the only wrongful conduct, the only
20 unfair labor practice, was in implied threats of coercion with-
21 out any wrongful interrogations or wrongful discharges.

22 There are two Seventh Circuit cases upholding the Board
23 in such situations that are cited in our brief, and those are the
24 only ones that I know of other than this decision from the
25 First Circuit upholding an order based exclusively on this kind

1 of unfair labor practice.

2 Thank you.

3 (Whereupon, at 10:45 a.m. the argument in the above-
4 entitled matter was concluded.)

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