IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gary W. Muffley, Regional Director of the Ninth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Petitioner,

v.

DaNite Holdings, Ltd., d/b/a DaNite Sign Co.,

Respondent.

Case No. 2:10-cv-605

Judge Graham

ORDER AND INJUNCTION

The Regional Director of the National Labor Relations Board petitions the court for a temporary injunction under Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j). The Director alleges that Respondent DaNite Holdings has unlawfully withdrawn recognition of the Unions that represent employees at DaNite's sign-manufacturing facility in Columbus, Ohio. An injunction is sought to require DaNite to recognize and bargain exclusively with the Unions, pending the adjudication of the Director's complaint against DaNite before the NLRB. For the reasons stated below, the petition is granted.

I. Background

The following recitation of facts is taken from the administrative record, which both sides agree should be what this court looks to in deciding whether to grant the injunction. See Ahearn v. Jackson Hosp. Corp., 351 F.3d 226, 237 (6th Cir. 2003) ("Indeed fact-finding is inappropriate in the context of a district court's consideration of a 10(j) petition.").

The Sheet Metal Workers' International Association and the International

Brotherhood of Electrical Workers have represented bargaining unit employees at DaNite since 1980. The bargaining unit includes employees involved in the production, installation, and repair of signs, and it currently consists of about 22 employees. The most recent collective bargaining agreement expired on May 31, 2009 (though the CBA was not signed, it is undisputed that DaNite and the Unions abided by its terms).

DaNite and the Unions have bargained over a new CBA but have not reached an agreement. The primary obstacle is over a "union security" clause, under which all employees would be required to be union members in good standing and the employer would agree, when requested by the Unions, to discharge employees who fail to pay their union dues. The last bargaining efforts were made in February 2010. (Transcript of June 28, 2010 Hearing, p. 33, Testimony of Tim McCord).

On March 5, 2010, the president and owner of DaNite, Tim McCord, called a workplace meeting of employees in the bargaining unit. He announced that DaNite would no longer recognize the Unions and would no longer remit union dues or make contributions to pension plans. (Tr., pp. 38-39, McCord Testimony). McCord made the same announcement in an email to the Unions. (General Counsel's Ex. 16).

At the meeting, McCord distributed a new handbook for production employees. The handbook contained provisions on wages, health insurance, retirement plans, and the non-recognition of unions. The handbook stated that an employee could be terminated for failing to keep confidential his discussions with management about wages. (General Counsel's Ex. 3).

McCord also announced at the meeting the creation of a "Moving Forward Team." He appointed four employees to serve initially on the Team, with the expectation that all employees would eventually serve a six-month term. The purpose of the Team is to facilitate communication between employees and ownership about work environment issues, employee benefits, and employee productivity. (April 5, 2010 McCord Aff., p. 4).

The Moving Forward Team has met at least three times. Topics of discussion have included: whether wage increases should be merit-based, how to increase productivity, possible changes in health insurance coverage, and whether incentives should be in the form of monetary compensation or increased benefits. (Tr., pp. 42-46, McCord Testimony).

Since the March 5 meeting, employee Kim Smith, a Union steward, has had his hours reduced and pay rate changed. Smith works in a specialty area of creating and repairing neon signs. Citing a reduction in demand for neon work, DaNite unilaterally reclassified Smith as a part-time employee and informed him that he would be paid a lower rate for non-neon work he performs. (Tr., pp. 51-56, McCord Testimony).

The Unions filed charges with the NLRB of unfair labor practices. The Regional Director issued a complaint against DaNite, alleging that it had committed unfair labor practices by: withdrawing recognition of the Unions; creating the Moving Forward Team through which to bargain over wages, hours, and other conditions of employment; issuing an employee handbook to replace the CBA; and changing Smith's wages and hours. The complaint was heard by an administrative law judge on June 28 and 29, 2010.

II. Discussion

Section 10(j) of the NLRA authorizes the Board, upon issuance of a complaint charging that any person has engaged in an unfair labor practice, to petition a United States district court "for appropriate temporary relief or restraining order." 29 U.S.C.A. § 160(j). The availability of a § 10(j) injunction gives "the Board a means of preserving the status quo pending completion of its regular procedures, which might be ineffective if immediate relief cannot be granted." Calatrello v. Automatic Sprinkler Corp. of Am., 55 F.3d 208, 214 (6th Cir. 1995) (internal quotation marks and citations omitted). In deciding whether to grant the petition, "district courts are *not* to adjudicate the merits of the unfair labor practice case. The question of whether a violation of the Act has been committed is a function

reserved exclusively to the Board, subject to appellate court review of final Board orders." Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26, 28 (6th Cir. 1988).

To issue a § 10(j) injunction, a district court must find that "(1) there is 'reasonable cause' to believe that unfair labor practices have occurred, and that (2) injunctive relief with respect to such practices would be 'just and proper.'" Ahearn, 351 F.3d at 234 (quoting Schaub v. West Mich. Plumbing & Heating, Inc., 250 F.3d 962, 969 (6th Cir. 2001)).

A. Reasonable Cause

The director's burden to show reasonable cause is "relatively insubstantial" and "requires only that the Board's legal theory underlying the allegations of unfair labor practices be substantial and not frivolous and that the facts of the case be consistent with the Board's legal theory." Ahearn, 351 F.3d at 237 (internal quotation marks and citations omitted). In reviewing the facts, "a district court 'need not resolve conflicting evidence between the parties' or make credibility determinations." Id., 351 F.3d at 237 (quoting Schaub, 250 F.3d at 969). Rather, reasonable cause is shown "so long as facts exist which could support the Board's theory of liability." Schaub, 250 F.3d at 969. See also Glasser v. ADT Sec. Services, Inc., No. 09-1829, 2010 WL 2196084, at *2 (6th Cir. June 2, 2010) ("'[T]he Board must present enough evidence in support of its coherent legal theory to permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board.'") (quoting Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 371 (11th Cir. 1992)).

The conduct of DaNite is not disputed. McCord's own testimony supports the Director's version of the facts. It is undisputed that DaNite withdrew recognition of the Unions, created the Moving Forward Team, issued a new employee handbook, and changed Smith's wages and hours.

The Director's legal theory that DaNite has committed various unfair labor practices is consistent with the facts of the case. The first alleged unfair practice is DaNite's

withdrawal of recognition of the Unions. Under § 8(a)(1) of the NLRA, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the Act, including the right to organize, join, and bargain through labor unions. 29 U.S.C. § 158(a)(1). Under § 8(a)(5), it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).

DaNite argues that it had a right to withdraw recognition because the Unions had lost majority support. "In order to comply with Section 8(a)(5) of the Act, an employer may only withdraw recognition where the union has actually lost the support of the majority of the bargaining unit employees." Vanguard Fire & Supply Co., Inc. v. N.L.R.B., 468 F.3d 952, 957 (6th Cir. 2006) (internal quotation marks and citations omitted). According to DaNite, the Unions have lost majority support because only 7 of the 22 employees in the bargaining unit are dues-paying members.

Whether the Unions have actually lost majority support is an issue committed to the Board. As the Director points out, evidence showing that less than a majority of employees in the unit are union members is not equivalent to showing a loss of majority support. See Henry Bierce Co., 328 NLRB 646, 649 (1999) ("[I]t is well settled that unit employees' nonmembership in a union does not establish that those employees do not want the Union to be their collective-bargaining representative."), *aff'd in relevant part*, 234 F.3d 1268 (6th Cir. 2000). Employees are sometimes content not to pay membership dues even though they support the union and benefit from its representation. See In re Trans-Lux Midwest Corp., 335 NLRB 230, 232 (2001) ("[T]he number of members or financial supporters of an incumbent union is not necessarily the same as the number of employees continuing to support union representation.").

The Director has made a substantial showing, sufficient for purposes of obtaining a § 10(j) injunction, that the Unions have not lost support. Following the March 5 meeting,

at least 12 employees signed authorization cards for the Unions to be their bargaining representative. Two laid-off employees on recall status signed authorization cards as well.

The second alleged unfair labor practice relates to the Moving Forward Team. An employer may not "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C.A. § 158(a)(2). DaNite argues that the Team was not a labor organization under § 2(5) of the NLRA because it did not deal with wages, hours, or working conditions. But the Director has adduced the testimony of McCord and several employees in substantial support of the theory that the Team was used as a vehicle to bargain over compensation, benefits, and working conditions.

The Director next alleges that DaNite committed an unfair practice under § 8(a)(5) by issuing an employee handbook that was not a product of collective bargaining. The handbook dealt with wages, health insurance, retirement plans, and the non-recognition of unions. DaNite does not address this alleged violation in its brief, and the court finds that the Director's legal theory is substantial and not frivolous.

Finally, the Director contends that DaNite committed an unfair labor practice by unilaterally reducing Smith's wages and hours. DaNite counters that it had no duty to bargain about this because it stemmed from a lack of demand for neon-sign work. Again, however, the decision as to DaNite's duty to bargain is committed to the Board. The Director has demonstrated substantial support for his theory that DaNite unlawfully reduced Smith's wages and hours by not first bargaining with Smith's representative Union.

In sum, the Director has satisfied his burden of showing that there is reasonable cause to believe that DaNite has committed unfair labor practices.

B. Just and Proper

The requirement that injunctive relief be just and proper "turns primarily on whether a temporary injunction is necessary to protect the Board's remedial powers under

the [NLRA]." Ahearn, 351 F.3d at 239 (internal quotation marks and citations omitted). Interim injunctive relief is often appropriate in cases where the employer has withdrawn recognition of the union and refuses to bargain. See Frye v. Speciality Envelope, Inc., 10 F.3d 1221, 1226-27 (6th Cir. 1993). The court in Frye adopted the reasoning employed by the First Circuit in such cases: "[T]here was a very real danger that if [the employer] continued to withhold recognition from the Union, employee support would erode to such an extent that the Union could no longer represent those employees. At that point, any final remedy which the Board could impose would be ineffective." Asseo v. Centro Medico del Turabo, 900 F.2d 445, 454 (1st Cir. 1990). See also Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 49-50 (1987) ("Having the new employer refuse to bargain with the chosen representative of these employees disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.) (internal quotation marks and citations omitted).

DaNite's only response is that an injunction is unnecessary because the Moving Forward Team has not met recently. But there is no assurance that it will not meet again. According to McCord, the Team's meetings were disrupted because of the death of a management-level employee who served on the Team. (Tr., p. 40, McCord Testimony). Short of an injunction, there is nothing to prevent DaNite from resuming this alleged unfair labor practice. And even if the Team does not meet again, injunctive relief is still needed to maintain the status quo as to the rest of the alleged unfair labor practices.

III. Injunction

The Director's petition for an injunction under Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j), is GRANTED.

Respondent DaNite is enjoined during the pendency of the administrative proceedings from refusing to:

(a) recognize and bargain in good faith with the Unions as the exclusive collective-bargaining representative of its employees in the following unit:

> All production employees, including journeymen and apprentice production lead persons, sheet metal fabricators, setup mechanics and welder, maintenance mechanics, machine operators, and trainees, excluding supervisors and managers as defined in the Act.

(b) notify and bargain to agreement or good faith impasse with the Unions before making any changes in the terms and conditions of employment of unit employees.

DaNite is further ordered to:

(c) rescind, upon the Unions' request, any changes to the terms and conditions of employment made after March 1, 2010;

(d) post copies of this order at DaNite's Columbus, Ohio facility in all locations where employer notices to unit employees customarily are posted; postings shall be maintained free from obstruction or defacement;

(e) grant reasonable access to agents of the Regional Director of Region 9 of the Board to monitor compliance with the posting requirement; and

(f) file with the court within 20 days of this order a sworn affidavit from a responsible DaNite official detailing how DaNite has complied with the terms of this injunction; a copy of the affidavit must be provided to the Regional Director of Region 9 of the Board.

It is so ordered.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: July 30, 2010