

Dec.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NO. 87-5(CE) |
| |) | |
| UNITED FOOD & COMMERCIAL |) | DECISION NO. 278 |
| WORKERS UNION, LOCAL 480, |) | |
| AFL-CIO, CLC, |) | FINDINGS OF FACT, CONCLU- |
| |) | SIONS OF LAW AND ORDER |
| Complainant, |) | |
| |) | |
| and |) | |
| |) | |
| HAWAIIAN MILLING CORPORATION |) | |
| (HAWAII MEAT COMPANY FEEDLOT), |) | |
| |) | |
| Respondent. |) | |
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| In the Matter of |) | CASE NO. 87-6(CE) |
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| WORKERS UNION, LOCAL 480, |) | |
| AFL-CIO, CLC, |) | |
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| (HAWAII MEAT COMPANY FEEDLOT), |) | |
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| Respondent. |) | |
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FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On March 20, 1987, the UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 480, AFL-CIO, CLC [hereinafter referred to as the Complainant], filed an Unfair Labor Practice Complaint with the Hawaii Labor Relations Board [hereinafter referred to as the Board], designated as Case No. 87-5(CE). In its complaint, Complainant alleged that HAWAIIAN MILLING CORPORATION (HAWAII

MEAT COMPANY FEEDLOT) [hereinafter referred to as Respondent] engaged in or was engaging in unfair labor practices in violation of Subsections 377-6(1) and (4), Hawaii Revised Statutes [hereinafter referred to as HRS]. More particularly, Complainant alleged:

On or about February 24, 1987, the Company through it's (sic) agent, Cody Lee Marks (sic), foreman, questioned employees Eduardo Fuentes and James Hardin in regards to union activities. The question asked by Cody Lee Marks (sic) was "are you going out on strike?", (sic) employees replied "don't know." Cody Lee Marks (sic) than (sic) said "if you go out on strike, guarantee you going get fired."

After being duly served with a copy of the Complaint, Respondent filed its Answer on April 6, 1987. Respondent essentially denied the allegations of the complaint and alleged that any statements made by Respondent or its agents were protected under Section 377-16, HRS, as an exercise of Respondent's right to freedom of speech. The answer further alleged that the complaint failed to make out a prima facie case that Respondent had refused to bargain collectively because the allegations of the complaint were unrelated to any negotiations between Complainant and Respondent.

On March 24, 1987, Complainant filed another Unfair Labor Practice Complaint against Respondent which was designated as Case No. 87-6(CE). Therein, Complainant alleged that:

On or about March 20, 1987 and thereafter, the employer through it's (sic) agent Poxey Leong, made a threat regarding the continuing employment of employee Ronald Joseph, "Remember, you have to come back", (sic) while Ronald Joseph walked the picket line.

Respondent filed its Answer on April 6, 1987 denying the allegations of the complaint and again alleging that any statements made are protected under Section 377-16, HRS, as an exercise of free speech. The answer also alleged that on its face, the complaint did not establish a prima facie case of a Section 377-6, HRS, violation as there was no threat or coercion of an employee in the exercise of their rights.

At the prehearing conferences held in these matters, Case Nos. 87-5(CE), 87-6(CE) and 87-7(CE) were consolidated for hearing and disposition. Subsequently, however, at the hearings on the above-entitled cases, it became clear that Case No. 87-7(CE) would more appropriately be consolidated with another pending case. Hence, counsel for Complainant made a motion to sever Case No. 87-7(CE) from these cases and for good cause shown, the Board granted such motion.

A hearing was held in these matters on April 23, 1987 and briefs were submitted by the parties.

On April 6, 1988, the Board issued its Proposed Findings of Fact, Conclusions of Law and Order. Thereafter, on April 18, 1988, Complainant filed its Exceptions to the Proposed Findings and Conclusions. Respondent filed its Memorandum in Opposition to the Exceptions on June 13, 1988 and a hearing was held on June 15, 1988 to entertain oral arguments on the exceptions.

Based upon a full review of the record in this case, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 480, AFL-CIO, CLC, is a labor organization which is certified as the exclusive bargaining representative of Respondent's full-time and part-time employees.

Respondent HAWAIIAN MILLING CORPORATION (HAWAII MEAT COMPANY FEEDLOT) is and was, for all times relevant, an employer as defined in Subsection 377-1(2), HRS.

Eduardo Fuentes testified on behalf of Complainant regarding Case No. 87-5(CE). Fuentes began working for Respondent on or about May 6, 1986 as a laborer and was promoted to a yard utility worker at the time of the strike. Transcript of hearing, dated April 23, 1987 [hereinafter referred to as Tr.], pp. 10-11. Fuentes indicated that his immediate supervisor was Cody Lee Mark and his foreman was Greg Souza. Tr., p. 12. Fuentes testified that on or about February 24, 1987, while working in the yard with Cody Lee Mark and Greg Souza fixing feed pump cables, Mark asked him if the union went on strike would Fuentes go with the union. Fuentes responded, "I don't know yet." Mark allegedly responded, "If you go on strike, guarantee you get fired." Fuentes did not respond to Mark and Mark allegedly added, "You are a dumb fool if you go on strike. I thought you were smart." Tr., pp. 13-15.

Fuentes further testified that he attended a union meeting that afternoon which was held outside the Respondent's company gate. The meeting was held in the open so that he could be seen by anyone. Tr., pp. 15-16.

On cross-examination, Fuentes testified that Souza was his boss and Mark was Souza's boss. Tr., p. 16. He then testified that Mark first asked him, "What's going on with the Union, you have a meeting for that day." Tr., p. 17. Fuentes testified that he told Mark, "I don't know yet," to which Mark responded, "If the Union will strike, will you go with [them]?" Tr., p. 17. Fuentes testified he again told Mark, "I don't know yet," but admitted that Mark told him, "You should try to imagine what's happening with your family if you . . . if you go on strike." Tr., p. 18. Fuentes still claimed that Mark told him, "[I]f I go . . . I go on strike, guarantee I get fired," and "You're really a dumb fool if you go on strike. I thought you were smart." Tr., pp. 18-19.

Fuentes also testified under examination by the Chairperson that after he was finished with work that day, he asked his union president Wayne Miyashiro if Cody Lee Mark had the right to fire him if he went on strike. Fuentes testified that Miyashiro laughed at him and told him that the company would have no right to fire him. Tr., p. 24.

Wayne Miyashiro, president of Complainant Union, testified that he recalled speaking with Mr. Fuentes on or about February 24, 1987 regarding remarks made by Cody Lee Mark. He testified that the conversation with Fuentes took place in the afternoon after work between 3:00 and 4:00 during a meeting held for Respondent's employees outside the gate of the company. Tr., pp. 27-28.

Ronald Joseph also testified for Complainant. Joseph testified that he was originally hired in a yard utility position and had worked for the company approximately five and one-half years. He also worked as a cowboy, but held the yard utility position because of an injury. Tr., pp. 33-34.

Joseph testified that on or about March 20, 1987, he was picketing the main gate of Respondent's facility when he noticed that Poxy Leong, whom he described as a secretary, was attempting to leave by the side gate. Tr., p. 37. Joseph then began picketing in front of Leong's vehicle. She attempted to pass him when he took a step backward and told her, "Wait, when I make my circle, I'll go back to my starting point, I'll flag you through." Tr., p. 39. Leong, after observing him step backward told him, "You can't do that." Tr., pp. 39 and 69. Joseph testified that he told her, "Well, I just did, because you're not showing respect to my line." Leong responded after getting out of the car, "But you cannot walk backwards." Joseph responded, "Hey, you show respect to me and I'll show respect to you." Tr., p. 39.

Leong left her car and went over to the police officer who was standing nearby at the time. Joseph remained in front of the empty automobile while she talked to the police officer. Tr., pp. 39-40.

Joseph testified he heard her complain to the police officer about his walking backwards on the line. Joseph said he heard the police officer say, "Yeh, well he did that because you didn't show respect to his line. You didn't stay there and

wait." The police officer also told her if she had sat there and waited, Joseph would have made his circle and then Joseph would have flagged her through. The police officer also told her, "Why don't you just go back to your car and be patient, everything will work out." Tr., p. 40.

Leong left the police officer and came back towards the car and as she approached Joseph, he testified that she said, "Remember, you got to come back to work here." Tr., pp. 40 and 69. Joseph said he responded, "I know." Joseph testified at that point he felt she was threatening his job because of what she said and that her tone of voice was very angry. Tr., p. 41.

Cody Lee Mark testified on Respondent's behalf. Mark testified that he spoke with Fuentes in February 1987 in the cowboy shack in the morning. Mark testified that he said to Fuentes, "I just told him that think about his family if he--if he does--was thinking about going on strike." Mark testified that Fuentes replied, "Well, he mentioned that he had, so to speak, loyalty to Max, to go whichever way Max, you know, was going." Mark then stated to Fuentes, "Max won't feed your family if you did go on strike." Tr., pp. 63-64. Mark denied telling Fuentes what would happen if he went on strike and further denied telling Fuentes that he would be fired if he went on strike. Tr., p. 64.

Zelia or "Poxy" Leong also testified on behalf of the Respondent. Leong testified to basically the same facts as Joseph regarding the picketing incident at the side gate. Tr., pp. 68-69. Leong was in a hurry to leave the company premises

to help her husband with a stalled car. Tr., pp. 76-77. Leong admits that she told Joseph, "You just remember you have to come back to work." Tr., p. 69. Leong further explained that she was trying to tell Joseph that they would have to work together some day, and she did not want there to be any ill-will between the two of them. Tr., p. 70.

Leong is a secretary and works in the office. She does not hire or fire the cowboys and she has no supervisory responsibility over the yard utility workers. Along with the other secretary, she types the general manager's correspondence. Tr., pp. 67-68 and 71. She also testified that she has access to the employees' personnel files and is the office manager. Tr., pp. 73-76.

CONCLUSIONS OF LAW

Complainant alleges that Respondent violated Subsection 377-6(1), HRS.¹ This provision states as follows:

§377-6 Unfair labor practices of employers. It shall be an unfair labor practice for an employer individually or in concert with others:

- (1) To interfere with, restrain, or coerce the employer's employees in the exercise of the rights guaranteed in section 377-4;

* * *

¹Although the Unfair Labor Practice Complaint filed in Case No. 87-5(CE) also alleges a violation of Subsection 377-6(4), HRS, Complainant's Brief addresses only Subsection 377-6(1), HRS, violations. As there are no facts and no arguments to support a Subsection 377-6(4), HRS, violation, that charge is dismissed.

Section 377-4, HRS, defines the rights of employees as follows:

§377-4 Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall also have the right to refrain from any and all such activities, provided that employees may be required to join a union under an all-union agreement as provided in section 377-6(3).

Complainant alleges that Cody Lee Mark, an agent of Respondent, unlawfully interrogated Fuentes regarding his union activity and thereafter threatened him stating that he would be terminated if he engaged in any strike. Complainant further argues that Leong similarly violated the foregoing statute by threatening Joseph who was walking the picket line.

With respect to the conversation between Fuentes and Mark, Mark completely denies making any statement regarding the strike, except for a comment regarding reflection about Fuentes' family during a strike. Assuming arguendo, that Mark indeed made the statements as alleged by Fuentes, Respondent argues that these statements do not violate Chapter 377, HRS. With regard to the statement made by Poxxy Leong, Respondent argues that she should not be considered an agent of Respondent as she does not have any administrative or managerial responsibilities. Moreover, in considering the context of the statement, Leong's isolated statement to Joseph during a disagreement over his

manner of picketing, does not constitute a violation of the Hawaii Employment Relations Act.

Section 377-6(1), HRS, makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the free exercise of their Section 377-4, HRS, rights. Section 377-4, HRS, guarantees employees the right "to form, join, or assist labor organizations . . . and to engage in lawful, concerted activities for the purpose of collective bargaining" In examining an employer's conduct under Subsection 377-6(1), HRS, then "the test is not whether the language or acts were coercive in actual fact, but whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate." Corrie Corp. v. NLRB, 375 F.2d 149, 153, 64 LRRM 2731 (4th Cir. 1967).

It is well-settled that the questioning or interrogation of employees about their union sentiments is not per se unlawful provided such questioning is not coercive. Standard-Coosa-Thatcher Carpet Yarn, Inc. v. NLRB, 691 F.2d 1133, 111 LRRM 2987 (4th Cir. 1981).

In Case No. 87-5(CE), Eduardo Fuentes testified as to statements allegedly made by Cody Lee Mark:

1. What's going on with the union; you have a meeting for that day.
2. If the union will strike, will you go with them?
3. You should try to imagine what's happening with your family if you . . . if you go on strike.
4. If you go on strike, guarantee you get fired.

5. You're really a dumb fool if you go on strike.
I thought you were smart. Tr., pp. 16-19.

Assuming arguendo, that we believe these statements were made by Mark, we find that on their face, four of the five statements are non-coercive.

In G & H Products, Inc. v. NLRB, 714 F.2d 1397, 114 LRRM 2107 (7th Cir. 1983), the Court recognized that it was well within the rights of employers to engage in discussions with their employees about the inclinations or intentions to join a strike. In that case, the Court held that it was not a violation of the Labor Management Relations Act [hereinafter referred to as LMRA]² when the supervisor asked a probationary employee if he intended to join an illegal strike upon the completion of his probationary period. The Court found that the company had an interest in maintaining production in view of the imminence of the strike. In Banker's Dispatch Corporation, 233 NLRB 54, 96 LRRM 1610 (1977), the NLRB found no violation of the LMRA where the employer asked employees whether they intended to work after a union agent told the employer about a possible wildcat strike. In accord is Mobile Home Estates, 259 NLRB 182, 109 LRRM 1123 (1982), where the employer did not violate the LMRA when it asked the employee whether he would work during the strike after a strike became imminent. The employer there was merely trying to determine whether there were enough employees to run the plant during the strike. Hence, based on the foregoing cases, we find

²The LMRA is the federal counterpart of Chapter 377, HRS.

Mark's questioning of Fuentes regarding his union sentiments and whether he would join a strike to be non-coercive.

In addition, we find that Mark's statements regarding recognition of the hardship to Fuentes' family if he joined a possible strike non-coercive, based on the holding in NLRB v. Sparton Manufacturing Co., 355 F.2d 523, 61 LRRM 2301 (7th Cir. 1966). In that case, the Court reviewed allegations that a respondent employer had threatened its employees with reprisals if they signed union cards. The speech which the Board reviewed was, "Be careful about what you sign--don't sign anything unless you know what you are signing and what it might mean to you, your family or your fellow employees." The last sentence of the speech was, "Remember you do not have to and should not sign a card under any circumstances, unless you want the union to be your agent." The Court thereupon ruled that it was unreasonable for the Board to have inferred that the employees construed the speech as a whole or any part thereof as threatening. Hence, the Board's order was overturned. Moreover, in Embossing Printers, 268 NLRB 710, 115 LRRM 1110 (1984), the NLRB held that the employer did not violate the LMRA when after the employee stated that the strike would depend on the progress of negotiations, the supervisor stated that he hoped he would not see the employee "out on the picket line." That statement could have implied that the supervisor hoped there would be no strike and picketing.

Further, Mark's alleged statement accusing Fuentes of being a "dumb fool" if he went on strike, is not found here to be

threatening or coercive. In Atlas Metal Parts Co., 252 NLRB 205, 105 LRRM 1582 (1980), the NLRB held that the employer did not violate the LMRA when a supervisor told employees they would be "stupid" to strike rather than work and get paid. There was no evidence there that the remark interfered with the employees' statutory rights.

While we find the collective impact of the foregoing statements is minimal, we do have reservations about Mark's alleged comment, "If you go on strike, guarantee you get fired." Generally, it is a violation of the LMRA where employees are threatened with discharge if they support the union in a strike. Shuck Component Systems, 230 NLRB 117, 95 LRRM 1607 (1977). In NLRB v. Gulf-Wandes Corp., 595 F.2d 1074, 101 LRRM 2373 (5th Cir. 1979), the NLRB found that the employer violated the LMRA where the assistant foreman asked the employee his opinion of strikes. When the employee replied that he did not like strikes, the foreman responded, "that is good, because just between you and me, anyone that does not cross the picket line does not have a job." The NLRB there reasoned that the comment clearly implied that the employer would retaliate against the workers who participated in the job action. In addition, in NLRB v. Nueva Engineering, 761 F.2d 961, 119 LRRM 2317 (4th Cir. 1985), the Board held that the employer violated the LMRA when its vice-president made a speech to employees that contained express threats of economic reprisals. Based on these cases, it appears in the proper context that this statement could be the basis of a finding that the employer guilty of an unfair labor practice.

With respect to the record before us, there is a sharp contrast in the testimonies as to whether Mark actually made these statements to the employee in question. We find nothing in the demeanor of the witnesses to detract from their trustworthiness³ and there was no material inconsistency in the testimony of any witness to determine who was telling the truth. Given Fuentes' testimony and Mark's outright denial of this statement, we are unable to find that the Complainant has sustained its burden of proving the allegations by a preponderance of evidence. We note that the statements in question could have been corroborated by another witness, but he was not produced. Hence, given the state of the evidence before us, we conclude that there is insufficient evidence to find that the Respondent violated Section 377-6(1), HRS, by the alleged statement.

While there is no material difference in the testimony provided by Poxey Leong and Ronald Joseph regarding the picketing incident, we find that her statement does not constitute a violation of Subsection 377-6(1), HRS. Under the test enunciated above, we do not believe that her statement had a reasonable tendency to intimidate Mr. Joseph. Her statement, which we believe to be an isolated remark, was uttered as an expression of frustration in attempting to leave the facility. Moreover, as a secretary, she has no supervisory authority over employees

³As Member Machida was not present for the presentation of live testimonies, he does not join in the credibility assessment of the witnesses insofar as it involves observation of demeanor. However, as he has carefully reviewed the evidence in the record, he has participated fully in the decision.

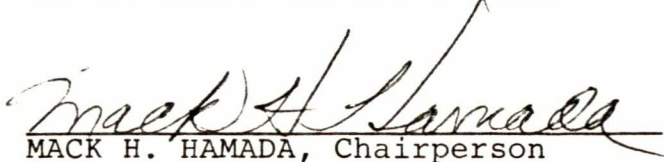
such as Joseph, and, although she has supervisory responsibility over another office clerk, she does not exercise any type of administrative or managerial authority. Although Joseph stated that there was a possibility that she was threatening his job, he nevertheless felt that he was going to return to Respondent's company to work. We find that Leong's statement under the circumstances was non-threatening.

ORDER

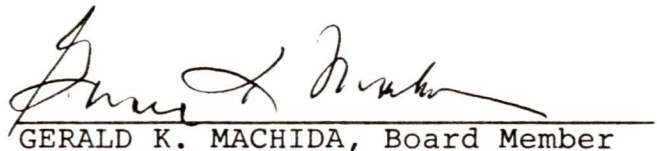
The subject unfair labor practice complaints are hereby dismissed.

DATED: Honolulu, Hawaii, July 18, 1988.

HAWAII LABOR RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES R. CARRAS, Board Member


GERALD K. MACHIDA, Board Member

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