

**Twin County Grocers, Inc. and Nancy Hanks. Case
22-CA-8258**

September 12, 1979

DECISION AND ORDER

**BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO**

On May 21, 1979, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in this case on March 6, and a complaint issued on May 8, 1978. The hearing was conducted in Newark, New Jersey, on November 1 and 2, 1978. General Counsel alleges that Respondent Employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by instructing employees that they could not engage in any discussions about union matters while at the Employer's facility and by discharging employee Nancy Hanks. Respondent denies that it violated the Act and, in addition, alleges that Hanks was a supervisor beyond the protection of Section 8(a)(1) and (3) of the Act. Upon the entire record, including my observation of the witnesses and after due consideration of the briefs of counsel, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

Respondent Company maintains its principal office in Edison, New Jersey, where it is engaged in the purchase, sale, and distribution of groceries and related products. It is

undisputed and I find and conclude that Respondent Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. It is also undisputed and I find and conclude that Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

Nancy Hanks, the Charging Party, testified that she was hired as a "mail clerk" by company Office Manager Marion Gugliuzzi during February 1976. Some 7 months later, about September 1976, Hanks was "promoted to supervisor of the mailroom" by company Industrial Relations Director William Henry. According to Hanks, Henry "asked me would I like to become the supervisor of the mailroom"; "He said that Pam was not working out as the supervisor, so they didn't want her to be supervisor any more . . ."; "I asked him what were they going to do if I didn't take it [and he] said they would probably hire somebody from outside"; and "so I said okay." There were about four persons "working in the mailroom." Hanks was then given a \$15 weekly pay increase. See Respondent Exhibit 2, the Employer's "change-notice" form showing Hanks' promotion and raise. There was no union activity at the Employer's Edison facility during this initial period.

Hanks testified that her mailroom duties included receiving, sorting and distributing mail, running errands, making copies on the Xerox machine, collating looseleaf price books, and making minor repairs on the Xerox machine. Hanks noted that she was not given any "training" when promoted to "supervisor." Hanks claimed that all personnel in the mailroom performed similar duties. However, certain mailroom workers also performed specific additional tasks such as "switchboard relief operator" and "typing bulletins." Hanks also claimed that she did not interview, hire, or fire employees in the mailroom. However, Hanks acknowledged that she had been "asked her opinion a couple of times" as to the advisability of hiring certain job applicants. Hanks was also "asked [her] opinion . . . how the girls were doing." In addition, Hanks admittedly filled out performance evaluation forms for the mailroom personnel. See General Counsel Exhibits 6 and 7. During June 1977 Hanks evaluated employee Rita Richardson and recommended a \$25 weekly pay increase for the employee. Hanks also evaluated employees Susan Duffy and Janet Gebel and recommended similar increases for them. Later, during November 1977, Hanks again evaluated employee Richardson noting that this employee "is capable of taking over as a mailroom supervisor" and recommending a \$25 weekly pay increase for her. Hanks also evaluated employee Susan Presutti about this same time and recommended a \$20 weekly pay increase for her. Hanks further evaluated employee Tina Korfman and made a similar pay increase recommendation for her. The specific amounts of the wage increases which were recommended by Hanks were later reduced by upper management.

Hanks further testified that if any person in the mailroom "wanted to take a day off," he or she "would either speak to [Hanks] or speak to" Office Manager Marion Gugliuzzi. Hanks explained:

I always went to Marion [Gugliuzzi]. If I had told somebody that they could take a day off and Marion

had disapproved it, I don't think I would have been able to.

Hanks recalled that she was informed when employees were being transferred from the mailroom to other sections at the facility. On one occasion Hanks assertedly had recommended a particular employee for a transfer instead of another worker, and Hanks' recommendation was not followed.

Hanks, at the time of her discharge in February 1978, was the most senior person in the mailroom and was paid \$150 per week. The other mailroom workers were "making about \$115 to \$120" per week. Hanks claimed that "work assignments" in the mailroom "were really routine and everybody shared most of the work." However, Hanks acknowledged that she "did consider it [her] responsibility to make sure that the work was done and if there were any problems in the way the work was done to try to do something about that." Hanks also acknowledged that she "wrote the procedures manual as to how the mailroom work was to be handled." Hanks noted that if new mailroom workers "had any questions as to how the work was to be done . . . they came [to her]" and she "did train them." Moreover, Hanks recalled that "whenever special projects came along which were assigned to the mailroom [Gugliuzzi] would ask [her] to train and instruct the other girls with respect to the special project." Further, Hanks recalled that she spoke to Office Manager Gugliuzzi about an employee's absenteeism and tardiness record.

Hanks attempted to serve as an observer for Teamsters Local 863 in the Board-conducted representation election on or about July 21, 1977. She also attempted to vote in this election and in a second election on or about September 30, 1977. She was challenged by the Company as a supervisor in both elections. In addition, as Hanks further testified:

I do recollect referring to myself as a supervisor once. [it] was after the second election when I had some problems in talking to the other clerks in the mailroom and I remember saying, if you want me to be a supervisor, I will be the supervisor, I will tell you what to do.

In addition, Hanks recalled that during the Union's organizational campaign, Industrial Relations Director Henry had warned her:

I [Hanks] was not protected under the Act in speaking . . . about the Union, to encourage people to join the Union. He said that to encourage people to join the Union might—that I was a supervisor and that this might influence the election.

Mailroom employee Rita Richardson testified that Hanks was her "boss in the mailroom"; Hanks had "trained [her] to do the work"; and the mailroom employees "considered [Hanks] to be their supervisor in the mailroom." Mailroom employee Susan Presutti testified that Office Manager Gugliuzzi "told" her when she, Presutti, started her employment that Hanks was "the boss or the supervisor in the mailroom"; that she, Presutti, posed "questions" or "problems" concerning her work to Hanks; that she, Presutti, filled out a timecard each day and Hanks later "put her initials on it" and sent it on "to payroll." Presutti also testified that if she wanted a day off:

I would go to Nancy and ask her and then Marion would have to be informed of its also.

* * * * *

[U]sually, Marion left the decision up to Nancy whether we [were] needed, whether there was going to be enough people there to handle what was going on for the day.

Industrial Relations Director Henry testified that:

Hanks performed the duties of a supervisor in that she controlled three or four people continuously thereafter. She was involved in their hire, she was involved in the reporting on the performance of their duties. She was involved in their training. She instructed them what to do. She allocated the work to be done. She sat at the one desk in the position of titular leadership so to speak for the operation. She was in charge. She gave them instructions as to what time they were to report to work and the duties they were to perform during the day and the method in which they were to perform them and determined which person would perform what duties and gave them instruction throughout the course of the day as to how they would be done.

Further, Henry noted that Gugliuzzi, as office manager, is "responsible for the operation of the mailroom through a mailroom supervisor." Henry added:

[Gugliuzzi] is responsible for the telecommunications, she is responsible for the messengers, she is responsible for the employee benefits administration—which is the primary activity which takes her time up. She does recruiting of office personnel, screening, selecting, interviewing of office personnel, in conjunction with the respective managers or supervisors who are to receive these new people.

Gugliuzzi, in turn, is responsible to Henry.¹

Much of the testimony pertaining to the alleged supervisory status of Hanks is not in dispute. However, insofar as the testimony of Hanks differs with the testimonies of Henry, Gugliuzzi, Richardson, and Presutti as summarized and quoted above, I credit the testimonies of Henry, Gugliuzzi, Richardson, and Presutti as more accurate and reliable. Hanks' testimony was, at times, unclear and confusing. And I note in this respect that the above testimonies of Henry, Gugliuzzi, Richardson, and Presutti are in significant part mutually corroborative and are in part substantiated by the testimony of Hanks as well as by uncontroverted documentary evidence of record.

Discussion

Counsel for Respondent argues that Hanks was at all times material to this case a supervisor beyond the protection of Section 8(a)(1) and (3) of the Act. A "supervisor" is defined in Section 2(11) of the Act as:

¹ Office Manager Gugliuzzi's testimony substantiates in part the above testimony of Henry.

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Actual existence of true supervisory power is to be distinguished from abstract, theoretical or rule-book authority. It is well settled that a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with a "title and theoretical power to perform one or more of the enumerated functions." *N.L.R.B. v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959). What is relevant is the actual authority possessed and not the conclusory assertions of a company's officials. And while the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive,² Section 2(11) also "states the requirement of independence of judgment in the conjunctive with what goes before." *Poultry Enterprises, Inc. v. N.L.R.B.*, 216 F.2d 798, 802 (5th Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one of the functions in Section 2(11) of the Act. The exercise of some supervisory tasks in a merely "routine," "clerical," "perfunctory," or "sporadic" manner does not elevate a rank-and-file employee into the supervisory ranks. *N.L.R.B. v. Security Guard Service, Inc.*, 384 F.2d 143, 146-149 (5th Cir. 1967). Nor will the existence of independent judgment alone suffice; for "the decisive question is whether [the individual involved has] been found to possess authority to use [his or her] independent judgment with respect to the exercise (by him or her) of some one or more of the specific authorities listed in Section 2(11) of the Act." See *N.L.R.B. v. Brown & Sharpe Manufacturing Company*, 169 F.2d 331, 334 (1st Cir. 1948). In short, "some kinship to management, some empathetic relationship between employer and employees, must exist before the latter becomes a supervisor for the former." *N.L.R.B. v. Security Guard Service, Inc.*, *supra*, 384 F.2d at 149.

Applying these principles to the credible evidence of record here, I find and conclude that Charging Party Hanks was at all times pertinent to this case a supervisor within the meaning of Section 2(11) of the Act. Thus, as found *supra*, Hanks was given the authority to direct the operation of the Company's mailroom employees. She assigned duties and instructed employees on work procedures. She trained new employees, prepared a mailroom procedures manual, made recommendations to upper management concerning the hiring of new employees, evaluated the work performances of employees, and recommended to upper management wage increases for employees. I note that although

upper management did not grant employees the specific wage increases which were recommended by Hanks, the employees were in fact granted wage increases following her recommendations. The employees in the mailroom were told by upper management when they were hired that Hanks was their boss and supervisor. They regarded Hanks as their supervisor. They looked to her for advice and training. They went to her for time off and she set their hours. She would initial their timecards and forward them to the payroll section. Indeed, if Hanks were not a supervisor the mailroom employees worked for the most part without any supervision.

Further, Hanks was repeatedly apprised by upper management that she was a supervisor. She was paid more than the rank-and-file workers. She had the only desk in the mailroom. And she was restricted by upper management in her attempt to engage in organizational and union activities because she was a supervisor.

In sum, Hanks sufficiently possessed the authority to use her independent judgment with respect to the exercise by her of one or more of the specific authorities enumerated in Section 2(11) of the Act. She responsibly directed the rank-and-file mailroom workers and effectively recommended action. The exercise of such authority by her was not of a merely routine or clerical nature but required the use of her independent judgment. She was therefore a supervisor at all times pertinent to this case and beyond the protection of Section 8(a)(1) and (3) of the Act.

It is unnecessary for me, under these circumstances, to discuss further the evidence pertaining to the alleged Section 8(a)(1) and (3) violations. These alleged violations and related testimony pertain only to Hanks (see G.C. brief, pages 11-16), and since she is beyond the protection of these provisions the complaint must be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent Company has not violated Section 8(a)(1) and (3) of the Act as alleged.

ORDER³

I recommend that the complaint herein be dismissed in its entirety.

³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

² Cf. *West Penn Power Co. v. N.L.R.B.*, 337 F.2d 993, 996 (3d Cir. 1964).