

Levitz Furniture Company of Santa Clara, Inc. and Retail Store Employees Union, Local 428, Retail Clerks International Association, AFL-CIO. Case 32-CA-2 (formerly 20-CA-8632)

March 7, 1978

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND TRUESDALE

On June 12, 1974, the National Labor Relations Board issued a Decision and Order¹ in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, and ordering Respondent to cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices. Thereafter, on June 26, 1974, Respondent filed a motion for reconsideration moving that the Board withdraw the Decision and Order, set aside the election in the underlying representation case, and direct a new election. By Order dated July 23, 1974, the Board denied Respondent's motion.

On October 29, 1974, the Board applied to the United States Court of Appeals for the Ninth Circuit for enforcement of its Order. On February 17, 1976, the court denied enforcement and remanded the proceeding to the Board for further proceedings, including a determination of whether or not (1) the cards offering to waive initiation fees and the context of their dissemination influenced the employees to the extent that the offer constituted a campaign tactic that fell partially or wholly under the penumbra of conduct proscribed by *N.L.R.B. v. Savair Manufacturing Company*, 414 U.S. 270 (1973), and (2) the offer of initiation fee waiver was in fact the offer of a nonexistent benefit amounting to a misrepresentation prohibited by *N.L.R.B. v. Gorbea, Perez, and Morell*, 328 F.2d 679 (C.A. 1, 1964). On June 4, 1976, the court denied the Board's petition for rehearing and entered its judgment August 19, 1976.

On November 16, 1976, the Board remanded the instant case to the Regional Director for Region 20 for further proceedings consistent with the Ninth Circuit's remand. Pursuant to the aforesaid order of remand, a hearing was held before an Administrative Law Judge where all parties appeared and were afforded full opportunity to present evidence and to examine and cross-examine witnesses.

On November 9, 1977, Administrative Law Judge Martin S. Bennett issued the attached Decision in this proceeding. Thereafter, Respondent filed excep-

tions and a supporting brief, and the Union filed a brief in support of the Decision.

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,² and conclusions³ of the Administrative Law Judge. Accordingly, we affirm the original Order of the Board, including the requirement that Respondent bargain with the Union as the representative of the employees in the appropriate unit as therein described.

ORDER

Based on the foregoing, and the entire record in this case, the National Labor Relations Board hereby affirms its Order issued in this proceeding on June 12, 1974, at 211 NLRB 417.

¹ 211 NLRB 417.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

³ While we agree with the Administrative Law Judge's rejection of Respondent's contention concerning the effect the passage of time has on the presentation of evidence, we do not agree with his additional comment that Respondent was "estopped" from making such a contention.

DECISION

STATEMENT OF THE CASE

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard at San Jose, California, on June 15, 1977. The complaint, issued on October 15, 1973, and based upon a charge filed by Retail Store Employees Union, Local 428, Retail Clerks International Association, AFL-CIO, herein the Union, alleges that Levitz Furniture Company of Santa Clara, Inc., herein Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. As described below, interim judicial maneuvers have delayed the processing of this case. Briefs have been submitted by the Union and Respondent.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

The Respondent, Levitz Furniture Company of Santa Clara, Inc., is a California corporation which maintains an office and sales facility in Santa Clara, California, where it is engaged in the retail sale of furniture. It enjoys annual gross sales in excess of \$500,000 and purchases and receives

goods and products valued in excess of \$50,000 directly from suppliers located outside the State of California. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Retail Store Employees Union, Local 428, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Introduction — Sequence of Events

After an election by secret ballot among all employees at Respondent's Santa Clara facility, excluding guards and supervisors, the Regional Director certified the Union as the representative of these employees in said unit on or about July 17, 1973, and issued a bargaining order, *inter alia*, reported at 211 NLRB 417.

Respondent has consistently refused, thereafter, to bargain with the Union contending that the certification was improper on the grounds of its preelection misconduct. This in essence concerned a purported offer by the Union to waive initiation fees during the Union's organizational drive, within the meaning of *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973).

On February 17, 1976, the Court of Appeals for the Ninth Circuit denied enforcement and remanded the matter to the Board for further proceedings specifically under *Savair, supra*, and whether the offer of a waiver of initiation fees was, in fact, an offer of a nonexistent benefit amounting to a misrepresentation as prohibited in *N.L.R.B. v. Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679 (C.A. 1, 1964). As I read the decision of the court, it seeks solely supplemental factual findings in these two areas.

Initially, Respondent has contended that over 5 years have elapsed since the election which presents considerable difficulties to the parties, particularly it. Not only with the vote 57 for the Union and 56 against, it also points to the extensive turnover in the unit with approximately 19 persons still employed of the 121 at the time of the election. Its argument as to the passage of time does not impress me because it was caused solely by the doing of Respondent and, in fact, I deem Respondent estopped from making such a contention at this time.

In *Savair*, the court refused to enforce a Board Order directing an employer to bargain with a labor organization which won an election after offering to waive initiation fees for all employees who signed cards before the election. The court was of the belief that this allowed the labor organization to buy endorsements and paint a false portrait of employee support during its election campaign.

The Board has in a number of cases since held that a waiver of initiation fees during an organizational campaign is objectionable only if limited to the period prior to the election and that it must be unambiguous. See, e.g., *B.F. Goodrich Tire Company, a Division of the B. F. Goodrich Company*, 209 NLRB 1175 (1974). In *N.L.R.B. v. Con-Pac, Inc.*, 509 F.2d 270 (C.A. 5, 1975) the court enforced a Board bargaining order in a case where the facts were very

close to those herein. It stated that the Union had merely declared that there would be no initiation fees at all and that there would be no dues until the employees had ratified a union contract. Relying thereon, the court distinguished *Savair*. There is other support for this view. See *N.L.R.B. v. Wabash Transformer Corporation*, 509 F.2d 647 (C.A. 8, 1975).

The instant record discloses that the Union has not charged an initiation fee for 30 years prior to the signing of a contract. On February 23, 2 days prior to the final election, the Union sent a letter to all employees on the *Excelsior* list pointing out that the election scheduled for Friday, February 25, was a crucial one. There is nothing in the letter which exceeds the bounds of Section 8(c) of the Act. There is a footnote which stated that a card was being enclosed which was a guarantee that they would not have to pay an initiation fee to join the Union. It may be noted that the Union has customarily collected initiation fees only from employees who have joined the Union after a contract has been signed. The card states on its face "no initiation fee required," there is no place thereon for the signature of an employee, and, on the reverse side, it states only that the bearer whose name is to be inserted on the front will not be required to pay initiation fees until a union agreement has been signed. It provides for the signature of the secretary-treasurer of the Union and states that it will be recognized as valid only if presented no later than 30 days after a contract with the employer is in effect. There is also evidence that not one of these cards was returned to the Union, this warranting the inference that even opponents of the Union saw no implied endorsement thereof by simply retaining the cards at the time of the election.

Turning back to the contention of Respondent that due to the turnover of employees it was unable to adduce as much evidence as it desired concerning the understanding of employees of the application and extent of the offer to waive initiation fees, Respondent did adduce the testimony of three employees; namely, Frank Tarango, Salvatore Bongiorno, and Robert Miller, as to the purported attempt by the Union to influence the course of the election by creating the impression that waiver of initiation fees was conditioned upon endorsement of the Union prior to the election. As the Union argues, and I agree, their testimony was insubstantial, vague, and contradicted, and it is not credited.

Thus, Tarango initially testified on direct examination that an unknown person claiming to be a representative of the Union stated to a group of employees at a meeting at the apartment of an employee that employees signing membership cards after the election would have to pay initiation fees. Upon cross-examination, Tarango stated that he could recall neither the month nor the year in which this meeting took place. He further testified, and this bears upon the language in the decision by the court of appeals, that this alleged offer had no effect upon his vote. This would appear to meet the criterion stated by the court of appeals in the last paragraph of its Decision. Moreover, it does not appear whether Tarango ever signed an authorization card because no such cards are in evidence.

Bongiorno testified on direct examination as to receiving the letter and the card several days before the election. He claimed that he did sign a card, but did not recall whether this was the one received in the mail together with the letter of February 23, 2 days before the election on February 25. Moreover, he referred to a meeting held at a local restaurant prior to the February 25 election and that a "Spanish Gentleman" indicated to the audience that those who joined the Union prior to the election would not have to pay an initiation fee. This testimony was directly contradicted by the testimony of David Reiser, vice president of the Union since 1971, who testified that the Union held no meetings at this restaurant prior to the election. However, according to Reiser, a meeting was held at this restaurant after the election at which the alleged "Spanish Gentleman" was present. His name is, apparently, Fernandez and he did not testify.

Robert Miller testified for Respondent, in essence, that in general conversations with fellow workers he received the impression that employees of Respondent who signed union cards prior to the election would not have to pay an initiation fee. He conceded that he was rather "vague" as to the people who did not sign up. Upon cross-examination, he testified that no representative of the Union ever told him that if he signed a card in behalf of the Union prior to the election he would not have to pay an initiation fee.

As the Board noted in *Jefferson Food Mart, Inc., d/b/a Call-A-Mart*, 214 NLRB 225 (1974), an analysis of *Savair* reveals that the conduct with which the Supreme Court concerned itself was not the innocent misunderstandings of employees, but rather the intentional and deliberate waiver or reduction of initiation fees conditioned upon the outcome of an impending election. The Board further pointed out that the test for objectionable conduct perforce had to be an objective one based upon purported representations made to employees prior to the election and not their subjective considerations or misunderstandings. It stressed the fact that it was the potential impact and effect of requiring affirmative action by employees prior to the election which the Supreme Court found objectionable.

The court, in its remand, has made reference to *Gorbea, supra*. In that case, the charter of the international union permitted an initiation fee although none was ever collected in Puerto Rico, the location of the organizational campaign by the local. During that campaign, the Union distributed membership cards bearing a message that those who presently joined would not be required to pay an initiation fee while those who waited until the contract was signed would have to pay same. The first circuit construed

the cards as an offer of a nonexistent benefit and held that this was a misrepresentation. It conceded that an offer to waive initiation fees might be a permissible promotional technique, but that recognition of the Union could not be required when the facts reveal that this was the offer of a nonexistent benefit.

The Union urges, and I agree, that the factual situation in *Gorbea*, which ostensibly constituted the offer of a nonexistent benefit, bears no relationship to the factual situation existing at Respondent in 1972 and 1973 or prior thereto. The uncontradicted testimony of Vice President Reiser of the Union shows that for each year, commencing in 1960 and ending in 1971, the Union collected in excess of \$50,000 in initiation fees from new members who entered employment in a nonorganizational-type context in the industry of which Respondent is a member. The testimony of Reiser is uncontradicted that in stores organized by him, and belonging to the same industry as Respondent, there was a waiver of initiation fees during the organizational campaign and that, subsequent to the signing of a contract, new hires were charged initiation fees. Indeed, in *Gorbea*, the court noted flatly that it agreed with the Board that a preelection promise permitting all present employees, whether they voted for the Union or not, to join without payment of an initiation fee within a reasonable period immediately after the election would not be an improper inducement. As the Union argues, and I agree, this is precisely the situation here.

To sum up, and this is not contradicted, the Union charges initiation fees only after a contract is signed. There is no inducement to an employee prior to voting in a Board election. I therefore find that there is no substantial evidence to support a finding that the cards and the context of their dissemination influenced employees of Respondent to the extent that this was a campaign tactic that fell in any respect within conduct proscribed by *Savair*. I further find, under the very language of *Gorbea*, that there was no offer of a nonexistent benefit amounting to a misrepresentation.

In view of the foregoing, and under all the circumstances, as well as all the evidence presented before me I find that the original Order of the Board was meritorious. Accordingly, I find and recommend, upon a strong preponderance of the evidence, that the original Order of the Board including a requirement that Respondent bargain with the Union as the representative of the employees in the indicated appropriate unit should be reaffirmed by the Board. See *N.L.R.B. v. J. C. Penney Co., Inc.*, 96 LRRM 2391, 2394 (C.A. 5, 1977), and *Certain-Teed Products Corporation v. N.L.R.B.*, 562 F.2d 500 (C.A. 7, 1977).