

American Sink Top & Cabinet Co., Inc. and Millmen-Cabinet Makers Industrial Carpenters Union Local No. 550, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Cases 32-CA-977, 32-CA-1163, and 32-RM-33

May 21, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND MURPHY

On January 10, 1979, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed exceptions and a supporting brief.

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, as modified herein.

We adopt the Administrative Law Judge's findings that Respondent violated the Act by encouraging and inducing its employees to prepare and sign a decertification petition, by unlawfully interrogating an employee, and by unilaterally disavowing the post-contract operation of the grievance procedure. We are modifying his recommended Order, however, requiring processing of the Union's grievance over the termination of Richard Davis under the grievance and arbitration procedure of the expired contract, including arbitration if appropriate.

The Administrative Law Judge relied on *The Hilton-Davis Chemical Company*, 185 NLRB 241 (1970), to support his ruling that Respondent does not have to submit to the arbitration procedure of the expired contract. *Hilton-Davis* held that parties are not required to submit grievances to arbitration during the post-contract hiatus in the event that the grievance process does not settle the dispute before that stage. The rationale in *Hilton-Davis* [at 242] was that "arbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." Inasmuch as the agreement to arbitrate is a matter of mutual consent, the Board reasoned, the lapse of that agreement due to contract expiration is a bar to the agreement's enforcement.

In *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977), however, the Supreme Court held that,

where the parties to a collective-bargaining agreement have agreed to subject certain matters to a grievance and arbitration process, "the parties' obligations under their arbitration clause survive[s] contract termination when the dispute [is] over an obligation arguably created by the expired agreement." *Id.* at 252. That obligation is not terminated merely by the parties' failure to expressly cover this situation. As the Court stated generally in *Nolde*, in the "absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract." *Id.* at 253.

The contract herein expired on May 1, 1978. On July 24, 1978, Respondent discharged Richard Davis. On July 27, 1978, the Union, by letter, demanded that Respondent commence a grievance hearing in the matter of Davis whose discharge it claimed violated the contract. Respondent refused the Union's request, stating that "inasmuch as we do not have a valid union contract, we do not utilize the grievance procedure in any termination." The expired contract provided for a grievance committee and, in the event of deadlock at the committee level, referral to arbitration. The Administrative Law Judge found an 8(a)(5) violation, but did not order arbitration.

The grievance's basis is "arguably"—at least—the contract, and there is no reason to conclude that the parties had intended the arbitration provisions to end with the contract's term. In light of *Nolde*, we shall order the arbitration of the discharge of Richard Davis if appropriate.

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, as modified below, and hereby orders that the Respondent, American Sink Top & Cabinet Co., Inc., Hayward, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

1. Substitute the following for paragraph 2(a):

"(a) Upon request, bargain collectively with Local 550 as the exclusive bargaining representative of all employees in the appropriate unit described above concerning rates of pay, hours of work, and other terms and conditions of employment, including the termination of Richard Davis under the prevailing grievance and arbitration procedure; and embody any understanding reached in a signed document."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which all sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

The National Labor Relations Act gives all employees the following rights:

- To organize themselves
- To form, join, or support unions
- To bargain as a group through a representative they choose
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT change prevailing terms and conditions of employment without first giving Millmen-Cabinetmakers Industrial Carpenters Union Local 550, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, a chance to bargain over such changes, and WE WILL NOT otherwise refuse to bargain collectively with Local 550 as the exclusive bargaining representative of our employees in this appropriate unit:

All production and maintenance employee employed at our Hayward, California, facility; excluding all other employees, office clerical, guards, watchmen, executives and supervisors as defined in the Act.

WE WILL NOT encourage and induce our employees to prepare and sign petition expressing their desire no longer to be represented by Local 550 or any other labor organization, nor will we otherwise unlawfully solicit our employees to abandon their support of any labor organization.

WE WILL NOT interrogate employees whether anyone from a labor organization has been "harassing" them.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, upon request, bargain collectively with Local 550 as the exclusive bargaining representative of all employees in the appropriate unit described above concerning rates of pay, hours of work, and other terms and conditions of employment, including the termination of Richard Davis under the prevailing grievance and arbitration procedure; and embody any understanding reached in a signed document.

AMERICAN SINK TOP & CABINET CO., INC.

DECISION

I. STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This consolidated matter was heard before me in Oakland, California, on November 2, 1978.

The charge in Case 32-CA-977 was filed on June 1, 1978, and that in Case 32-CA-1163 on August 18, both by Millmen-Cabinetmakers Industrial Carpenters Union Local 550, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union). An amended consolidated complaint, covering both cases and superseding an earlier complaint that had issued in Case 32-CA-977, issued on September 25. It alleges certain violations by American Sink Top & Cabinet Co., Inc., (Respondent)¹ of Section 8(a)(1) and (5) of the National Labor Relations Act (Act).

An election in Case 32-RM-33 was held on May 26, 1978, among Respondent's employees in this unit:

All production and maintenance employees employed by Respondent at its Hayward, California, facility; excluding all other employees, office clerical, guards, watchmen, executives and supervisors as defined in the Act.²

The election derived from a petition filed by Respondent on February 10, 1978, and a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 32 on March 31. The election tally was three votes for and three against the Union.

The Union filed objections to the conduct of the election on May 31, 1978. By an order dated August 8, the Board adopted the report of the Acting Regional Director recommending that all but one of the objections be overruled and that the other be heard before an administrative law judge in consolidation with the hearing in Case 32-CA-977 because of the similarity of issues. The Regional Director accordingly issued an order on August 17 consolidating Case 32-CA-977 and Case 32-RM-33 for purposes of hearing; and, coincident with the issuance of the amended consolidated complaint on September 25, issued a further order consolidating those two matters with Case 32-Ca-1163.

¹ Respondent's name as thus set forth is in accordance with the General Counsel's unopposed motion to amend, made and granted during the hearing.

² The complaint alleges, the answer admits, and it is concluded that this is an appropriate unit for the purposes of the Act.

Post-trial briefs were filed for the General Counsel, Respondent, and the Union.

II. JURISDICTION

Respondent is a California corporation engaged in the manufacture of sink tops and cabinets at a plant in Hayward. It annually purchases materials of a value exceeding \$50,000 directly from outside California, and concededly is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

III. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

IV. ISSUES

The complaint alleges in substance that, on February 3, 1978, Respondent encouraged and induced its employees to sign a petition seeking the Union's decertification as their bargaining representative, thereby violating Section 8(a)(1); and that one of its agents interrogated an employee about the Union on April 11, 1978, further violating Section 8(a)(1). The complaint also alleges that, in July 1978, Respondent unilaterally eliminated the grievance procedure established by a recently expired bargaining contract between it and the Union, thereby violating Section 8(a)(5) and (1).

The answer denies any wrongdoing.

The objections matter raises the questions whether the election should be set aside and, if so, whether the election should be rerun or the election petition instead dismissed.

V. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent and the Union were party to a bargaining contract covering the employees in the above unit and effective from May 1, 1976, to May 1, 1978.

On the morning of February 2, 1978, Respondent's president and general manager, Alfred DePoe, and a labor relations consultant retained by Respondent, Kenneth White, met with the six unit employees. White, after being introduced by DePoe, did most of the talking. First announcing that it was a "voluntary meeting," and that the employees were free to return to their jobs if they wished,³ White stated in substance:

It is my understanding that you gentlemen are most dissatisfied with the Union, and would like to know what could be done, if anything, to become free of the requirement to be union members, pay dues, and be burdened with the jurisdiction of a contract. Your company is also most unhappy with the Union, and believe[s] we would all be better off as a nonunion employer.

³ No one did.

White explained that the matter could be brought to a vote if 30 percent of the employees were to file a signed petition with the NLRB expressing their wish to escape union representation. White said that the employees could file such a petition themselves, or they could give it to him and he would file—"it's strictly up to you to do what you want." He then gave the telephone numbers of the San Francisco and Oakland regional offices of the NLRB, and invited the employees to call to verify the information he had given them.

During the meeting, White asserted variously that the Union had been found to have illegally picketed Respondent in 1975, and that Respondent had "suffered badly" as a result;⁴ that the Union had won only 2 of over 100 arbitration proceedings it had brought against Respondent, and that this had cost a "substantial amount of money," some of which had come from the employees' union dues; that the Union "had abused" two of the employees during an arbitration the preceding day, and that this meeting had been called because those employees "were unhappy with the Union";⁵ and that the standard union contract contained many provisions that were inapplicable to Respondent's operation.

DePoe and White eventually left the meeting to permit the employees to discuss the matter among themselves. A while later, they were told that the employees needed more time to reach a decision. White suggested that they talk it over with their families and otherwise consider the matter with care, and the meeting ended.

DePoe and White met again with the six employees the following morning, February 3. White answered assorted questions about NLRB election procedure, and proposed caption language for a petition to be signed by the employees. His testimony:

I said it should be in your own handwriting, it should be dated, you should sign your full name and use any kind of verbiage you want, to accomplish what you are after, if this is your desire. You can be very formal about it—say, we the undersigned no longer desire representation by Local 550, et cetera, et cetera. Or you can simply say we don't want the Union anymore, we no longer want the Union. Words to this effect would be sufficient.

⁴ In *Millmen-Cabinet Makers, Industrial Carpenters Union Local 550, etc. (Diamond Industries)*, 227 NLRB 196 (1976), the Union was found to have unlawfully picketed Respondent in 1975 in furtherance of a dispute with a firm doing a great deal of business with Respondent.

⁵ After an arbitration hearing in October 1977, two of the employees, Delbert Kisner and Roy Vargas, expressed to DePoe their displeasure with the Union, Vargas asking: "How the hell do we get out of the Union?" After a grievance hearing on February 1, 1978, Vargas again indicated to DePoe that he wished there were a way out of the Union. DePoe's testimony that Kisner also complained about the Union after the February 1 hearing is discredited, Kisner having credibly testified that he expressed such a sentiment to DePoe only once—after the October arbitration matter. Also discredited is Vargas' testimony that the first meeting began "when we approached—all of us as a group—approached Fred DePoe and requested, how do we go about trying to get out of going, you know, nonunion [sic]." Vargas was generally a disorganized and unimpressive witness, and, although called by the General Counsel, plainly was sympathetic to Respondent. Beyond that, there was no corroboration from any source that the employees went to DePoe as a group to seek the Union's ouster.

To someone's question what Respondent was "going to do" for the employees if they voted the Union out, White responded that, while the law forbids promises in the circumstances, he "just happened" to have a contract "that had been negotiated with the employees, directly, after a union had been decertified" at a firm he represents in southern California. He added that "we could probably work something out like that." White said he would prepare a similar document for Respondent's situation, and DePoe stated that it would be available for employee examination before the May 1 expiration of the union contract.⁶ The sample document was then passed around, White commenting that it was far less cumbersome and more relevant than the standard union contract.

One of the employees voiced apprehension about the low wages set forth in this document, prompting White to emphasize that it was merely illustrative "of what could be accomplished," and DePoe to declare that Respondent "would be foolish . . . not to keep up with the industry" as concerns wage levels. White cautioned at this point that DePoe was "fringing on making a promise," repeating that no promises could be made at that time. Even so, when one of the employees asked about the effect of decertification on health-and-welfare coverage, DePoe replied that he "assumed" that the existing coverage for nonunit personnel could be extended to the unit employees, and would talk to Respondent's insurance agent about that; and, in answer to a question about the effect of decertification on pension coverage, DePoe said that, although Respondent did not have a pension plan for its nonunit people, it did have an IRS-approved profit-sharing plan, the implication being that this, too, could be extended to the unit employees.⁷

DePoe and White at length left the meeting, whereupon all six employees signed a petition dated February 3 and bearing this caption: "We no longer wish to be represented by the Millmen Union Local # 550." The petition was delivered to DePoe and White, either in DePoe's office or upon their return to the meeting. Whichever, the meeting ended at that point.⁸

As previously stated, Respondent filed the petition for election in Case 32-RM-33, 1 week later (on February 10), submitting the employee petition in support of it.⁹

⁶ Richard Hillmann is credited that White said he would prepare a similar document, and that DePoe said it would be available before May 1. DePoe testified that he was asked if Respondent could put "something in writing," and replied that it could not—that the employees would "just have to trust that we will be fair at the time that we . . . have a chance to write our own contract." Hillmann's testimony in this regard carried conviction and plausibility, especially dovetailed with the April 11 conversation between him and DePoe, developed later.

⁷ DePoe and White are credited that DePoe spoke in terms of a profit-sharing plan, DePoe credibly testifying that Respondent had no pension plan for its nonunit personnel. Roy Vargas, who testified that the reference was to a pension plan, seemed susceptible to confusion and is discredited.

⁸ That the February 3 meeting followed the sequence just described is inferable from White's testimony that the discussion of wages and health-and-welfare and pension coverages "could have been" before he and DePoe left the meeting, and that the meeting ended "immediately" after the employees turned over the paper they had signed.

⁹ In its brief, Respondent cites two other "objective grounds" for filing the petition—the displeasure with the Union expressed by Delbert Kisner and Roy Vargas, mentioned above in fn. 5, and the employees' continued working despite the Union's 1975 picketing, mentioned above in fn. 4. The record being silent on the latter point, Respondent asks that judicial notice be taken

On April 11, 1978, DePoe asked one of the employees, Richard Hillmann, if anyone from the Union had been "harassing" him. The apparent reference was to Otis Howard, an assistant business representative for the Union, who was picketing the premises at the time. Hillmann replied that Howard "has been talking to me," then asked if, before the election, the employees would be able to see a contract of the sort mentioned by White and DePoe during the February 3 meeting. DePoe answered that "the law says I can't do anything until after the election"; that the employees would "just have to trust that we will be fair at the time that we . . . have a chance to write our own contract."¹⁰

On July 24, 1978, Respondent informed one of its employees, Richard Davis, that he was being terminated. Davis had suffered an injury several months before, and had not been on the active payroll since. The Union responded by sending a letter to Respondent, dated July 27, demanding that it "convene a grievance committee hearing into this discharge." The demand was refused, White explaining in a letter to the NLRB: "Inasmuch as we do not have a valid union contract, we do not utilize the grievance procedure in any termination." The old union contract contained a grievance-arbitration procedure providing for the convening of a grievance committee—consisting of two representatives from the Union and two from management—within 5 days of a demand for same, and for referral to arbitration in the event of a deadlock at the committee level.

B. Conclusions

While it is permissible in some circumstances for an employer to impart information to employees of procedures to escape union representation, it is concluded that Respondent's activities leading to the February 3 employee petition went beyond that and consequently violated Section 8(a)(1) as alleged.

Thus, after announcing near the outset of the February 2 meeting that Respondent was "most unhappy with the Union" and believed that everyone would be "better off" if it were out of the picture, White embarked upon a recital intended to discredit the Union. Then, during the meeting of February 3, White not only suggested caption-language for an employee petition, but held out the prospect of a contract such as one "that had been negotiated with the employees, directly, after a union had been decertified" at a plant in southern California. Also on February 3, and still before the employee petition had been signed, DePoe spoke of extending the nonunit health-and-welfare and profit-sharing coverages to the unit employees, and gave assurances that wages would "keep up with the industry," should the Union be ousted.

It is plain, then, that far from being purely informational, the two meetings culminating in the employee petition had

of the decision concerning that picketing, cited above in fn. 4. That decision establishes that there indeed was no work stoppage in 1975 (227 NLRB at 196), but further establishes that the Union informed the employees in advance of the picketing that they were "to report to work as usual and perform the required services" as though there were no picket line. 227 NLRB at 199.

¹⁰ As mentioned above in fn. 6, DePoe testified that he made this remark during the February 3 meeting, not on April 11. The context of the April 11 conversation, coupled with the earlier credibility resolutions concerning February 3, compels the conclusion that the remark was made on April 11.

the impermissible purpose and effect of encouraging and inducing the employees to register their displeasure with the Union in a way enabling Respondent to file for a decertification election. See, generally, *Holly Manor Nursing Home*, 235 NLRB 426, 428-429 (1978); *Quality Transport Inc.*, 211 NLRB 198, 206 (1974); *Allou Distributors, Inc.*, 201 NLRB 47 (1973).

The employees petition, being unlawfully generated, did not constitute a valid ground for belief by Respondent that the Union had lost the majority inferable from the still-in-effect bargaining contract—"it would be wholly contrary to the purposes of the Act . . . to rely upon the fruits of an unfair labor practice to justify the dishonoring of the bargaining obligation." *Montgomery Ward & Co., Incorporated*, 210 NLRB 717, 717 (1974). See also *The National Cash Register Company*, 201 NLRB 1034, 1035 (1973). It follows, there being no other independent circumstance giving rise to a doubt of majority sufficient to support the petition for a decertification election or a withdrawal of recognition,¹¹ that the election was a nullity and Respondent's bargaining obligation continued unabated. Cf., *Vernon Manufacturing Company and Spencer Industries*, 214 NLRB 285 (1974); *Cantor Bros., Inc.*, 203 NLRB 774, fn. 4 (1973).

It is concluded, therefore, that Respondent was under a duty to adhere to the prevailing terms and conditions of employment even after the May 1 expiration of the bargaining contract, and that it consequently violated Section 8(a)(5) and (1) as alleged when it declined the Union's July request that the Davis termination be treated under the prevailing grievance procedure, and in so doing unilaterally disavowed the continuing operation of the grievance procedure, "inasmuch as we do not have a valid union contract." *Hilton-Davis Chemical Company, Division of Sterling Drug, Inc.*, 185 NLRB 241 (1970).

It is concluded, finally, that DePoe violated Section 8(a)(1) as alleged by asking Hillmann on April 11 if anyone from the Union had been "harassing" him. Interrogation of this sort is normally proscribed, especially as here during the pendency of an election, and there has been no record showing of circumstances removing DePoe's conduct from the general rule.

CONCLUSIONS OF LAW

1. By encouraging and inducing its employees to prepare and sign an antiunion petition, as found herein, Respondent violated Section 8(a)(1) of the Act.

2. By unilaterally disavowing the continuing operation of the prevailing grievance procedure, as found herein, Respondent violated Section 8(a)(5) and (1) of the Act.

3. By asking an employee if anyone from the Union had been "harassing" him, as found herein, Respondent violated Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

¹¹ It is concluded in this regard that the other objective grounds cited by Respondent in support of the election petition, mentioned above in fn. 9, are not adequate for these purposes.

ORDER¹²

The Respondent, American Sink Top & Cabinet Co., Inc., Hayward, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Changing prevailing terms and conditions of employment without first giving Millmen-Cabinetmakers Industrial Carpenters Union Local 550, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, a chance to bargain over such changes, or otherwise refusing to bargain collectively with Local 550 as the exclusive bargaining representative of its employees in this appropriate unit:

All production and maintenance employees employed by Respondent at its Hayward, California facility; excluding all other employees, office clerical, guards, watchmen, executives and supervisors as defined in the Act.

(b) Encouraging and inducing its employees to prepare and sign petitions expressing their desire no longer to be represented by Local 550 or any other labor organization, or otherwise unlawfully soliciting its employees to abandon their support of any labor organization.

(c) Interrogating employees whether anyone from a labor organization has been "harassing" them.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take this affirmative action:

(a) Upon request, bargain collectively with Local 550 as the exclusive bargaining representative of all employees in the appropriate unit described above concerning rates of pay, hours of work, and other terms and conditions of employment, including the termination of Richard Davis under the prevailing grievance procedure;¹³ and embody any understanding reached in a signed document.

(b) Post at its facility in Hayward, California, the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon

¹² All outstanding motions inconsistent with this recommended Order hereby are denied. 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.

¹³ This does not mean, however, that Respondent must submit to the arbitration procedure of the expired contract should the grievance concerning Davis not be resolved at an earlier step. *Hilton-Davis Chemical Company, supra* at 185 NLRB 242-243. See also *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243, 257 (1977) (Stewart dissent). The Union's argument is rejected that the remedy herein should call for Davis' reinstatement with backpay pending compliance by Respondent with the grievance procedure as concerns his termination. There is no reason to believe, nor has there been any showing, that Respondent's misconduct herein will work to its benefit at such time as the grievance is entertained.

¹⁴ In the event that this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the election in Case 32-RM-33 be set aside, and that the petition therein be dismissed.