

In the Matter of UNDERWOOD MACHINERY COMPANY *and* INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (C. I. O.)

Case No. 1-C-2629

AMENDED DECISION

AND
ORDER

December 15, 1948

On July 30, 1947, the Board issued its Decision and Order in the above-entitled proceeding.¹ Thereafter, the Respondent filed a petition for reconsideration in which it requested, *inter alia*, that the Board modify or set aside certain parts of its findings, conclusions, and order, including the finding that Leo Griffin's duties before the election did not constitute him a supervisory employee. On June 25, 1948, the Board denied the petition.²

It now appears that the Board, in reaching its decision as to Griffin's status, inadvertently overlooked certain relevant evidence in representation case No. 1-R-2044, the record in which was incorporated in the present proceeding. In view of this evidence, and on the record as a whole,

IT IS HEREBY ORDERED that the Decision and Order of July 30, 1947, be, and it hereby is, amended by striking therefrom the Section numbered "2" and substituting in lieu thereof the following:

2. The Respondent also contends, in justification of its refusal to bargain, that the Union does not represent an uncoerced majority of the employees in the bargaining unit. In support of this contention it offered to prove at the original hearing that some of its supervisory employees engaged in specified pro-union activities both before and after the election of November 17, 1944, "and in general interfered with the employees' freedom of choice and in their determination as to whether or not they wanted a union to represent them for the purposes of collective bargaining." The Trial Examiner denied the offer of proof, but we subsequently

¹ 74 N. L. R. B. 641.

² 77 N. L. R. B. 1386.

reopened the record for the purpose of receiving evidence with respect to the alleged interference. In doing so, however, we did not decide, nor should our action be construed as holding, that an employer can, as a matter of right, urge the misconduct of his supervisors in interfering with an election as an excuse for refusing to bargain with the certified representative of his employees. On the contrary, we are convinced that such a holding would be both inequitable and administratively unsound. Not only would it permit an employer to profit by wrongdoing for which under our decisions he himself is responsible but it would deprive our certifications of the finality necessary for effective enforcement of the Act. Furthermore, it would serve as an invitation to anti-union employers to permit or actually encourage supervisors to interfere in the organizational activities of the rank-and-file employees in order later to avail themselves of such conduct to avoid or defer the performance of their statutory obligation to bargain.⁶

At the same time we are not unmindful of the fact that the interests of the employees as well as of the employer are involved. Therefore, although we reject the Respondent's position that it is entitled to assert its own alleged wrongdoing as a defense in an 8 (5) proceeding, we nevertheless may, on our own motion, investigate or consider allegations of such interference when it seems necessary to do so, regardless of how the matter comes to our attention.^{6a} We therefore have given the Respondent an opportunity to present evidence in support of its allegations, not on the theory that it is entitled as a matter of right to urge its own wrongdoing as a defense, but in order that we may determine what action, if any, is needed to protect the interests of the employees.^{6b}

On the evidence adduced at the supplemental hearing, we agree with the conclusion of the Trial Examiner in his Supplemental Intermediate Report that it does not appear that there was such interference by supervisors with the election, or with the em-

⁶ Cf. *E. Anthony & Sons v. N. L. R. B.*, 163 F. (2d) 22 (App. D. C.), cert. denied, 332 U. S. 773.

^{6a} As stated in *Matter of Maywood Hosiery Mills*, 64 N. L. R. B. 146, we will set aside an election if it appears that the employees have been precluded from exercising a free choice of representatives by antecedent conduct or episodes which were coercive in character and so related to the election in time or otherwise as to have had a probable effect upon the employees' action at the polls.

^{6b} Although the Respondent alleged that the interference complained of took place without its knowledge until such time as it filed its petition to vacate the certification in the representation proceeding, the record shows, as the Trial Examiner has found, that the Respondent had knowledge *before* the election of at least some of the matters on which it now relies—namely, the activities of Griffin. Having failed to file objections to the election within the time prescribed by our Rules and Regulations, the Respondent would, in any event, not be entitled as a matter of right to urge the matters of which it then had knowledge as a defense in this proceeding.

ployees' freedom of choice therein, as to require us to vacate our certification of the Union.⁷ The evidence offered by the Respondent on this issue related to the conduct of Jesse Bowser and Leo Griffin. Bowser was foreman of the erection and maintenance department and was admittedly a supervisory employee; but the only conduct on his part which can be regarded as coercive was his statement to Griffin that Griffin would have to join the Union. As this incident took place early in September 1944, over 2 months before the election, and stands in isolation, we agree with the Trial Examiner that it was not so related to the election as to have had a probable effect upon the employees' action at the polls.^{7a}

The supervisory status of Griffin before the election is in dispute. On the record as a whole, we are convinced, as the Respondent contends, that at all times material hereto Griffin was the assistant foreman of the erection and maintenance department and, as such, a supervisory employee within our definition of that term.^{7b} The record shows also that Griffin joined the Union soon after it was organized and thereafter served as shop steward for his department and as a member of the union bargaining committee; that he told various employees that he was in favor of the Union; and that he wore a "vote yes" button on the day of the election.

However, these activities do not appear to have been coercive in character. We do not believe, therefore, that the evidence with respect to Griffin's activities is sufficient to overcome the presumption that the employees' ballots, cast in secrecy and under the safeguards provided by our procedure, reflected the true desires of the employees.⁸

⁷ Although he did not concur in the Board's action reopening the record, Mr. Houston agrees with the conclusion reached that the Respondent violated Section 8 (5) of the Act.

^{7a} Although there is evidence that Bowser was present when the employees of the erection and maintenance department selected Griffin as their shop steward, there is nothing in the record to indicate that he in any way participated in that selection or voiced any choice or indicated any partiality in favor of the Union at the time.

^{7b} In so finding, we rely particularly upon the evidence in Case No. 1-R-2044, the record in which was incorporated in the present proceeding. Although Griffin testified then, as well as later, that he had never been formally notified that he was an assistant foreman, he admitted among other things that he "took charge" of the department on Bowser's orders whenever Bowser was off; that he carried out the duties usually performed by assistant foremen; that he had, on occasion, recommended the hiring and discharge of employees; and that at least in some instances his recommendations were adopted. In addition, Frank Underwood, the Respondent's president, testified that Griffin was an assistant foreman since early in 1944.

⁸ There is no evidence, for example, that Griffin solicited memberships in the Union, and Griffin specifically denied having done so. In this respect, therefore, the case is clearly distinguishable from *Matter of Toledo Stamping & Manufacturing Company*, 55 N. L. R. B. 865; *Matter of Robbins Tire & Rubber Company, Inc.*, 72 N. L. R. B. 157; *Matter of Parkchester Machine Corporation*, 72 N. L. R. B. 1410; *Matter of Wells, Inc.*, 68 N. L. R. B. 545, in which we either dismissed petitions for the investi-

IT IS FURTHER ORDERED that paragraph 7 of the Board's Order Denying Petition for Reconsideration, dated June 25, 1948, insofar as it refers to the finding concerning Griffin, be, and it hereby is, amended so as to grant the petition to the extent indicated by the new findings and conclusion set forth above in the amendment to Section 2 of the original Decision and Order, dated July 30, 1947. In all other respects, the original Decision and Order of July 30, 1947, and the Order Denying Petition for Reconsideration, dated June 25, 1948, except as amended or modified herein, are hereby reaffirmed.

MEMBERS MURDOCK and GRAY took no part in the consideration of the above Amended Decision and Order.

gation and certification of representatives, set aside elections, or dismissed allegations of violation of Section 8 (5), because of the participation of supervisors in union organizational drives.

Mr. Houston believes that, granted Griffin's supervisory status, evidence of his activity, as noted, is incompetent and inadmissible for the reasons stated in his dissenting opinion in the *Robbins Tire & Rubber Company, Inc.* case, *supra*.