

2. By dominating, interfering with the formation of, and contributing support to the Committee, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

5. The Respondent has not violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the Steelworkers

6. By discharging Dolf Walker, the Respondent has not engaged in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act.

[Recommendations omitted from publication]

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Relations Act, we hereby notify our employees that:

WE WILL NOT dominate, interfere with, or contribute support to the committee or any successor thereto, or any other labor organization

WE WILL NOT interrogate our employees with respect to their union activities

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, C.I.O., or International Association of Machinists, A.F.L., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

WE hereby disestablish the committee as the representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, hours of employment, or other conditions of employment, and we will not recognize the Committee, or any successor thereto, for any of the foregoing purposes.

POE MACHINE & ENGINEERING COMPANY, INC.,
Employer.

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

**NATIONALLY FAMOUS MARY JANE SHOES, INC.¹ and
CHICAGO JOINT BOARD, RETAIL, WHOLESALE & DE-
PARTMENT STORE UNION, CIO. Case No. 13-CA-1127.
February 26, 1954**

DECISION AND ORDER

On December 14, 1953, Trial Examiner Robert L. Piper issued his Intermediate Report in the above-entitled pro-

¹ The Employer's name appears as amended at the hearing.

ceeding, finding that the Respondent had engaged in a certain unfair labor practice alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed a motion to dismiss the complaint and a supporting brief. The General Counsel filed a statement on Respondent's motion to dismiss complaint, in which he agreed to the requested dismissal. The charging Union filed a brief in support of the Trial Examiner's findings and recommendations.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's motion and the General Counsel's statement thereon, the briefs, and the entire record in the case, and hereby adopts the findings and conclusions of the Trial Examiner only to the extent consistent with the following dismissal of the complaint.

As set forth in the Intermediate Report, the sole conduct of the Respondent alleged to have been unlawful was a speech made by its store manager to the assembled employees very shortly before a Board-conducted election, during which he urged them to vote against the Union, while at the same time refusing an opportunity to the union representative similarly to address the employees. The Trial Examiner correctly found that there was no demand by the Union to address the employees but only a request by one of its representatives to be admitted to the meeting in the store.

Relying on certain earlier decisions of the Board, the Trial Examiner found that the manager's speech, although concededly containing no threats or promises of benefit and therefore entirely protected by Section 8 (c) of the Act, nevertheless constituted an unfair labor practice. The Respondent maintained no no-solicitation rule of any kind in the store. Accordingly, regardless of what the Union may have demanded of the Respondent, and regardless of the timing of the store manager's remarks, we find, in accordance with the Board's recent decision in Livingston Shirt Corp.,² that the activities of the Respondent's store manager were not violative of any section of the statute. Accordingly, as the case contains no other element of improper conduct chargeable to the Respondent, we hereby grant the Respondent's motion to dismiss the complaint, and we shall dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

² 107 NLRB 400. Although Member Murdock dissented therein, he now deems himself bound by the majority decision.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

A charge having been duly filed and served, a complaint and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and an answer having been duly filed by Nationally Famous Mary Jane Shoes, Inc.¹ (hereinafter called Respondent), a hearing involving allegations of an unfair labor practice in violation of Section 8 (a) (1) of the National Labor Relations Act, as amended (hereinafter called the Act), 61 Stat. 136, was held in Chicago, Illinois, on September 1, 1953, before the Trial Examiner.

In substance the complaint alleges that one-half hour before a Board-conducted representation election, Respondent at a meeting on its property delivered a speech to its employees urging them to vote against the Union, and that during the course of the meeting, Respondent refused to permit a representative of the Union to attend the meeting and address the employees, thereby interfering with, restraining, and coercing employees in the exercise of the rights guaranteed by the Act. At the hearing all parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file briefs and proposed findings of fact and conclusions of law. Counsel waived argument, and briefs have not been received from any party.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Delaware corporation which maintains its principal office in Chicago, Illinois, and operates a place of business on State Street in Chicago, where it is now and has been engaged in the retail sale of shoes. Respondent is an affiliate of Mary Jane Stores of Illinois, Inc., Respondent is a subsidiary of John Irving Shoe Corporation, Boston, Massachusetts, which operates retail stores in Virginia, Delaware, and Kentucky, and during the year 1952 shipped products of approximately \$18,000,000 in value to buyers in various States and purchased materials valued at approximately \$11,000,000, most of which were shipped to it from States other than the State in which the stores which used the materials were located. Respondent admits, and I find, that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

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

III. THE UNFAIR LABOR PRACTICES

The only issue in this case is one which has become known as a "Bonwit Teller" situation. The facts are substantially undisputed, were for the most part stipulated by the parties, and were also found by the Board in the previous representation case involving the same parties and conduct.² At 7 p. m. on May 13, 1952, a consent election among Respondent's employees was held to determine their choice of a bargaining representative. All but 3 of the eligible employees worked at Respondent's State Street store in Chicago. This store was closed to the public at 6 p. m., but for the next 30 to 60 minutes the employees were engaged in removing displays from the windows. On the day of the election, John Gilbert, manager of the State Street store, asked the employees to remain on the premises before going to the polls in order to listen to a speech which he wanted to read to them. Each employee was advised

¹By motion of the General Counsel in conformity with the answer filed by Respondent, the correct name of Respondent was substituted for that contained in the original caption, Mary Jane Stores of Illinois, Inc.

² John Irving Stores of Chicago, Inc., 101 NLRB 82.

that he could stay or not as he chose. Information concerning this meeting was also relayed to the eligible employees in the outlying stores, and 2 of these employees attended the meeting. In all 16 employees attended the meeting at which Gilbert read the speech. The store closed at 6 p. m. and the employees began to pull the window displays. About 6:25 p. m. all of them went to the lower floor to attend the meeting called by Gilbert. At the time the store closed Henry B. Anderson, president of the Union, and another representative of the Union were waiting on the sidewalk in front of the store to distribute leaflets to the employees as they left the store urging that they vote for the Union. Because of the glass display windows, Anderson was able to see into the store. About one-half hour after the store closed he saw all of the employees go downstairs except one, who remained at the head of the stairs. When Anderson observed this, he went to the door of the store and called to that employee, Don Tribble, and asked him if a meeting of the employees was occurring. When Tribble replied that there was, Anderson asked him if Gilbert was conducting the meeting. Tribble replied that Gilbert was. Anderson then asked Tribble to go downstairs and ask Gilbert to permit Anderson to attend the meeting. Tribble did so and a few minutes later came back and told Anderson that Gilbert had replied that Anderson could not attend the meeting. As previously found by the Board in the prior representation case, this refusal by Gilbert was made in the presence of the assembled employees. The meeting lasted for about 15 minutes, during the course of which Gilbert read to the assembled employees a speech urging them not to vote for the Union as their bargaining representative. There was no contention to the contrary made, and it is undisputed, that the speech was not coercive or in violation of the Act. It was also undisputed that Respondent did not have in force or effect a no-solicitation rule. Although the employees were given an opportunity to ask questions after the speech, no questions were asked. The meeting broke up about 6:45 p. m., whereupon some of the employees returned to work on the window displays and others left the store and proceeded to the Board's polling place. The voting took place as scheduled shortly after 7 p. m. While the employees were leaving the store Anderson was handing leaflets to them. He saw and spoke to Gilbert at that time and asked him if Tribble had spoken to him about Anderson's attending the meeting. Gilbert replied that Tribble had, and Gilbert told Anderson that he had no business there.

It is alleged in the complaint that by the foregoing conduct Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act. It is also alleged in the complaint that Anderson requested permission of Gilbert to address the employees. However, there is no proof in the record to sustain this allegation, and it was not found by the Board in the previous representation case involving the same parties and conduct. Thus, the issue is whether Respondent, by calling a meeting of its employees upon company time and premises shortly before an election, by urging its employees to vote against the Union in a speech which in and of itself did not violate the Act and contained no threats of force or reprisal or promises of benefits, and by refusing to permit the attendance at such meeting of a union representative, violated by the Act. Respondent advanced the various defenses heretofore considered by the Board in the numerous cases decided by it since the establishment of the "Bonwit Teller" doctrine, including the fact that the Union did not specifically request an opportunity to address Respondent's employees. Beginning with the Bonwit Teller case,³ the Board has considered the instant issue and related problems in a series of both representation and complaint cases. In the Bonwit Teller case, the Board decided that refusing to permit the union an opportunity to address the employees under substantially similar circumstances, i. e., upon the employer's premises, interfered with the employees' rights guaranteed by the Act for two reasons: Because it amounted to a discriminatory application of an existing no-solicitation rule, and because it denied the union an equal opportunity to reply to the speech of the employer, thus interfering with a free and untrammelled exercise of the franchise rights guaranteed by the Act. In that case there was an existing rule against solicitation upon the employer's premises. The Court of Appeals for the Second Circuit affirmed the Board's finding that the conduct of the employer in the Bonwit Teller case constituted interference within the meaning of the Act,⁴ but only upon the ground that it constituted a discriminatory application of the no-solicitation rule in existence, and disagreed with the Board's conclusion that absent such a rule it would still constitute interference because it denied an equal opportunity to the union to reply to

³Bonwit Teller, Inc., 96 NLRB 608.

⁴Bonwit Teller, Inc. v. N. L. R. B., 197 F. 2d 640 (C. A. 2).

the employer's speech. However, in cases subsequently decided by the Board, it has specifically reiterated the second ground as a basis for a finding of interference on the part of the employer, and in effect has disagreed with the holding of the Court of Appeals for the Second Circuit. These later cases involve situations where there is no rule against solicitation, and the Board has found interference solely upon the basis that the employer's conduct in refusing to grant the union an opportunity to reply under the same circumstances upon the employer's premises constitutes interference with the employees' rights within the meaning of the Act. In the Biltmore case,⁵ the Board in a representation case reaffirmed the rule it established in the Bonwit Teller case, even though the employer did not have a rule prohibiting solicitation, and set aside the election because the employer refused to permit an opportunity to reply to the employer's speech under the same circumstances. In two subsequent representation cases,⁶ with former Chairman Herzog dissenting for the reasons advanced by the court in its Bonwit Teller decision, *supra*, the Board reaffirmed this position. In the Woolworth case,⁷ the Board found such conduct to be an unfair labor practice, upon the basis of the existence of a rule against solicitation and in accord with the court's decision in the Bonwit Teller case. In the Metropolitan Automobile Parts case,⁸ the Board specifically found that the employer, by making a privileged antiunion speech 2 days before the election and then refusing the union an equal opportunity to reply, violated the Act even though there was no rule against solicitation in existence, and discussed and disagreed with the conclusion of the court in the Bonwit Teller case. Here, as in the preceding representation cases, Mr. Herzog dissented for the reasons advanced by the court, and concluded that the finding of an unfair labor practice should be limited to the situation where a rule against solicitation existed and was discriminatorily applied. In the Gruen Watch Company case,⁹ another representation case, and the Seamprufe and Onondaga cases,¹⁰ both complaint cases, the Board reaffirmed the position set forth in the Metropolitan Automobile Parts case, *supra*.

It is apparent that there are three possible legal conclusions which can be reached in these situations. The first, as expressed in Mr. Reynolds' dissent in the original Bonwit Teller case, *supra*, is that there is no violation of the Act even when the employer has in existence a no-solicitation rule, because of the legislative intent expressed by Congress in adopting Section 8 (c) of the Act, dealing with the right of free speech. The second as expressed by the Court of Appeals for the Second Circuit in its Bonwit Teller decision, *supra*, and by Mr. Herzog in his various dissents thereafter, is that, when there is a rule against solicitation in effect, to deny the union an equal opportunity to reply to the employer's speech upon the employer's premises amounts to a discriminatory application of such no-solicitation rule and hence violates the Act, but disagrees with the conclusion that to do so violates the Act in the absence of a rule against solicitation. The third, the conclusion reached by the Board and to this date in full force and effect, is that the refusal to accord the union an equal opportunity to reply to the employer's speech upon its premises constitutes a violation of the Act for both reasons, namely, because it is a discriminatory application of a no-solicitation rule, if one exists, and in any event, is a denial of an equal opportunity to reply under the same circumstances which deprives the employees of the free exercise of their franchise rights as guaranteed by the Act. At this juncture, it might be well to note that it is established law that, absent special circumstances, it is a violation of the Act to forbid union solicitation upon company property during nonworking hours.¹¹ Hence, the doctrine of the Board permitting no-solicitation rules under special circumstances amounts to a privilege.

While I am of the personal opinion that, as is so often the case, the mean between the extremes here is the soundest rule, i. e., the conclusions reached by the court of appeals and former Chairman Herzog, I must of necessity follow the rule presently established by the Board and set forth in the Metropolitan and later cases. In the previous representation case involving the same parties and conduct,¹² the Board said:

⁵ Biltmore Manufacturing Company, 97 NLRB 905.

⁶ Foreman & Clark, 101 NLRB 40; National Screw & Manufacturing Company of California, 101 NLRB 1360.

⁷ F. W. Woolworth Company, 102 NLRB 581.

⁸ Metropolitan Automobile Parts, 102 NLRB 1634.

⁹ Gruen Watch Company, 103 NLRB 3.

¹⁰ Seamprufe, Inc., 103 NLRB 298; Onondaga Pottery, 103 NLRB 770.

¹¹ Republic Aviation Corporation v. N. L. R. B., 324 U. S. 793.

¹² John Irving Stores of Chicago, Inc., 101 NLRB 82.

We believe that the circumstances under which the manager's speech was delivered to the employees involved herein were prejudicial to the free and fair exercise of that franchise. Not only was the speech so timed as to make a presentation of the Petitioner's views under equal conditions a physical impossibility, but the discriminatory use of the Employer's property was further emphasized to the employees by the refusal to permit the Petitioner's representative to attend the meeting; under such circumstances, a request for an opportunity to address the assembled employees would obviously have been futile. [Footnotes omitted]

Because of this finding by the Board, and because of the Board's holding in the Metropolitan Auto, Seamprufe, and Onondaga cases, I find that Respondent, by engaging in the conduct hereinbefore found, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1 The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce

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

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act

[Recommendations omitted from publication.]

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Chicago Joint Board, Retail, Wholesale & Department Store Union, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act

WE WILL NOT, during a union organization campaign, make antiunion speeches to our employees during working hours on our premises without according, upon reasonable request, a similar opportunity to address our employees to the labor organization against which such speeches are directed

NATIONALLY FAMOUS MARY JANE SHOES, INC.,
Employer.

Dated By
(Representative) (Title)

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