Struksnes Construction Co., Inc. *and* International Union of Operating Engineers, Local No. 49, AFL-CIO. Case 18-CA-1696.

June 26, 1967

SUPPLEMENTAL DECISION AND ORDER

On September 28, 1964, the National Labor Relations Board issued its Decision and Order in this case, finding that the Respondent had not violated Section 8(a)(5) and (1) of the National Labor Relations Act, and dismissing the complaint.[1] On November 4, 1965, the United States Court of Appeals for the District of Columbia Circuit set aside the Board's Decision and Order insofar as it pertained to the Respondent's alleged violation of Section 8(a)(1) by polling its employees, and remanded that aspect of the case to the Board for further consideration not inconsistent with the opinion of the court.[2] Thereafter, a brief on the remanded issue was filed by the Respondent, which has been duly considered.[3]

The Board in the original Decision herein found the poll in issue lawful under the test set forth in *Blue Flash Express, Inc.*[4] The court, however, expressed the view, in its opinion, that the Board's finding that the poll satisfied the criteria established in *Blue Flash Express* was not enough to justify the Board's conclusion that the poll was not violative of the Act. The court also pointed out that the Board had made no attempt to reconcile its conclusion in this case with its findings of unlawful polling in *The Lorben Corporation* and *Johnnie's Poultry Co.*[5] The court stated, with regard to the scope of its remand that:

> We think the Board should come to grips with this constantly recurring problem for the protection of the employees as to their section 7 rights and for that of an employer acting in good faith. It would seem that the Board could, in the exercise of its expertise, develop appropriate policy considerations and outline at least minimal standards to govern the ascertainment of union status, or even in given permissible situations, the desire of the employees respecting a contract with the Union.

Accordingly, it is necessary, pursuant to the court's remand, (a) to indicate the considerations on which polling issues will be resolved by the Board in future cases, and (b) to review the Board's determination that the Respondent's poll in the instant case was not violative of the Act.

A. *Standards Applicable to Determining the Legality of Polls*

We have, in accord with the court's directive, reviewed Board and court decisions, as well as articles by scholars in this field,[6] in order to establish standards which may be used as guidelines to determine whether a poll is lawful.

In our view any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights. As we have pointed out, "An employer cannot discriminate against union adherents without first determining who they are."[7] That such employee fear is not without foundation is demonstrated by the innumerable cases in which the prelude to discrimination was the employer's inquiries as to the union sympathies of his employees.

It was the Board's original view that an employer's poll of his employees was in and of itself coercive and therefore a *per se* violation of Section 8(a)(1).[8] Some courts disagreed with that view, and the Board in *Blue Flash* established the rule that whether a poll interferes with, restrains, or coerces employees "must be found in the record as a whole," and that the time, place, personnel involved, information sought, and the employer's known preference must be considered.[9] The Board found the poll in *Blue Flash* lawful on the ground that (1) the employer's

---

[1] 148 NLRB 1368, Member Brown dissenting Thereafter, the case was reconsidered on motion by the Union On March 25, 1965, the Board issued an order denying the motion

[2] *International Union of Operating Engineers, Local 49, AFL-CIO (Struksnes Constr. Co.)* v. *N.L.R.B.*, 353 F 2d 852 (C A.D C) Judge Edgerton, dissenting, would have found the Board's Decision supported by substantial evidence on the record considered as a whole The court agreed with the Board that the Respondent had not violated Section 8(a)(5), and on January 4, 1966, issued an amendment to its judgment denying review of that aspect of the case

[3] The Charging Party filed a request for oral argument which is hereby denied as the record, in our opinion, adequately presents the issues and the positions of the parties

[4] 109 NLRB 591.

[5] *The Lorben Corporation*, 146 NLRB 1507, enforcement denied 345 F 2d 346 (C A. 2), Judge Friendly dissenting, *Johnnie's Poultry Co*, 146 NLRB 770, enforcement denied 344 F 2d 617 (C A 8)

[6] See, for example, Seng, *Employer May Violate Sec. 8(a)(1) in Attempting to Ascertain Union Majority Status*, Notre Dame L Rev. (April 1966); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L Rev 38 (November 1964), Wirtz *The New National Labor Relations Board, Herein of "Employer Persuasion,"* 49 N U L Rev. 594, 598 (1954), Melson, *Labor Law Interrogation of Employees Concerning Union Activities*, 17 Okla L Rev 207 (1964); Note, *Interrogation of Employees as an Unfair Labor Practice*, 62 Yale L.J. 1258 (1953)

[7] *Cannon Electric Company*, 151 NLRB 1465, 1468.

[8] See cases to that effect cited in *Blue Flash Express, Inc*, *supra* It is well established that an employer, in questioning his employees as to their union sympathies, is not expressing views, argument, or opinion within the meaning of Section 8(c) of the Act, as the purpose of an inquiry is not to express views but to ascertain those of the person questioned *Martin Sprocket & Gear Co, Inc* v. *N.L.R.B.*, 329 F.2d 417 (C A 5); *N L R.B* v *Minnesota Mining & Mfg Co*, 179 F 2d 323 (C.A 8)

[9] The Board in *Blue Flash* stated its agreement with, and adoption of, this test as laid down by the court in *N.L R B* v *Syracuse Color Press, Inc.*, 209 F 2d 596 (C.A 2)

sole purpose was to ascertain whether the union demanding recognition actually represented a majority of the employees, (2) the employees were so informed, (3) assurances against reprisal were given, and (4) the questioning occurred in a background free from employer hostility to union organization.

Although the courts have not disapproved of the Board's *Blue Flash* rule, some of the courts have disagreed with the Board on the application of the rule in specific cases, and a few courts have adopted their own tests for determining whether a poll was lawful under *Blue Flash*.[10] The result has been to create considerable uncertainty in this area of labor-management relations.[11] Furthermore, our experience since *Blue Flash* indicates that that rule has not operated to discourage intimidation of employees by employer polls.

As recent Board decisions have emphasized, there are clearly uncoercive methods for an employer to verify a union's majority status. An employer faced with a union demand for recognition may normally refrain from according recognition;[12] he may also request proof of majority status;[13] or he may file a petition,[14] or suggest that the union do so,[15] and await the outcome of a Board election.[16]

We have therefore determined, in the light of all the foregoing considerations, and in accord with the court's remand, to adopt the following revision of the *Blue Flash* criteria:

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

The purpose of the polling in these circumstances is clearly relevant to an issue raised by a union's claim for recognition and is therefore lawful. The requirement that the lawful purpose be communicated to the employees, along with assurances against reprisal, is designed to allay any fear of discrimination which might otherwise arise from the polling, and any tendency to interfere with employees' Section 7 rights. Secrecy of the ballot will give further assurance that reprisals cannot be taken against employees because the views of each individual will not be known. And the absence of employer unfair labor practices or other conduct creating a coercive atmosphere will serve as a further warranty to the employees that the poll does not have some unlawful object, contrary to the lawful purpose stated by the employer. In accord with presumptive rules applied by the Board with court approval in other situations,[17] this rule is designed to effectuate the purposes of the Act by maintaining a reasonable balance between the protection of employee rights and legitimate interests of employers.

On the other hand, a poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate interest of the employer that would not be better served by the forthcoming Board election. In accord with long-established Board policy, therefore, such polls will continue to be found violative of Section 8(a)(1) of the Act.[18]

B. *The Polling Issue in the Instant Case*

The record establishes that the Union organized the employees at the Respondent's construction jobsite in July and August 1963. The Respondent, although aware of the Union's organizing, did not interfere and, in fact, hired men it knew to be members of the Union. By August 7, 1963, a majority of the 26 employees had become members of the Union, but some had joined while employed at other projects years before, and some were delinquent in their dues payments. The Union's first demand for recognition and a contract was made on August 7, upon the Respondent's attorney, as Struksnes himself was out of town. The attorney informed

---

[10] See *N L R B.* v *Firedoor Corporation of America*, 291 F 2d 328 (C A 2), *Bourne Co.* v. *N L R B*, 332 F 2d 47 (C.A 2); *N L R.B.* v *Camco Incorporated*, 340 F 2d 803 (C A 5), *N L R.B.* v. *Protein Blenders, Inc*, 215 F 2d 749 (C A 8), *N L R.B* v. *Roberts Brothers*, 225 F 2d 58 (C A 9) See also *S H. Kress & Company* v. *N L.R.B.*, 317 F 2d 225 (C A 9), *N L R.B* v *Larry Faul Oldsmobile Co., Inc*, 316 F 2d 595 (C A. 7), *N.L.R B* v *Lorben Corporation, supra*

[11] Such uncertainty is illustrated by the fact that the Court of Appeals for the District of Columbia Circuit, in reversing the Board in the instant case, indicated approval of the Board's Decisions in the *Lorben* and *Johnnie's Poultry* cases, and agreement with Judge Friendly's dissent in *Lorben*, while the Courts of Appeals for the Second and Eighth Circuits denied enforcement of the Board's Decisions in both those cases.

[12] *Hammond and Irving, Incorporated*, 154 NLRB 1071 Cf. *Joy Silk Mills, Inc*, 85 NLRB 1263, 1264, enfd. 185 F 2d 732 (C A D.C.), cert denied 341 U.S 914; *Irving Air Chute Company, Inc, Marathon Division*, 149 NLRB 627

[13] *Aaron Brothers Company of California*, 158 NLRB 1077 Cf *Fred Snow, et al, d/b/a Snow & Sons*, 134 NLRB 709, enfd. 308 F 2d 687 (C A 9); *Gruber's Food Center, Inc*, 159 NLRB 629; *Keller Plastics Eastern, Inc*, 157 NLRB 583

[14] See Section 9(c)(1)(B) of the Act

[15] *Aaron Brothers Company of California, supra* Cf *Bernel Foam Products Co, Inc*, 146 NLRB 1277

[16] *Clark Printing Company, Inc*, 146 NLRB 121

[17] *Ray Brooks* v. *N.L.R B*, 348 U S 96 (certification year); *Frito-Lay, Inc*, 151 NLRB 28 (continuation of established majority status); *N L.R B.* v *United Steelworkers of America, CIO (Nutone, Inc)*, 357 U.S. 357, *N L.R B.* v *The Babcock & Wilcox Company*, 351 U.S. 105, *Republic Aviation Corporation* v. *N L R B.*, 324 U.S. 793, *Walton Manufacturing Company*, 126 NLRB 697, enfd 289 F 2d 177 (C.A. 5) (employer no-solicitation and no-distribution rules).

[18] *N.L.R.B* v. *My Store, Inc*, 345 F 2d 494 (C A 7); *N.L.R B* v *Lindsay Newspapers, Inc*, 315 F 2d 709 (C A 5), *Mallory Plastics Company*, 149 NLRB 1649; *Phillips Manufacturing Company*, 148 NLRB 1420.

Struksnes of this demand upon his return. Two days later, the Respondent by letter asked the Union, "in preparation to discuss your labor agreement," about the number of employees who were members "as of a specific date." The Union replied that it represented 20 employees.

On August 13, Struksnes and two supervisors polled the employees, asking them to sign a paper indicating whether they wanted the Respondent "to bargain with and sign a contract with" the Union, and assuring them that it made no difference to the Respondent how they voted. The results of this poll were that 15 signed in the "No" column, 9 in the "Yes" column, and 1 refused to sign. The Respondent then informed the Union that a majority of the employees did not want it to negotiate with the Union.

The Board found the poll lawful because (a) its sole purpose was to ascertain whether the Union represented a current majority; (b) the employees were given assurances against reprisal; (c) the evidence failed to establish that the employees answered untruthfully but, even if they did, their answers did not result from any threats of reprisal; and (d) the polling occurred in a background free from hostility toward the Union.

The court's opinion indicates disapproval of this polling procedure, particularly because of the Respondent's failure to call a meeting of the men to explain the purpose of the poll, and the fact that each man's vote was made known to the Respondent and was made a matter of record.

We have reviewed the circumstances of this poll in the light of the court's opinion and remand order and also of the rule established herein. In view of the failure of the Respondent to inform its employees of the purpose of the poll and the nonsecret manner in which the employees were polled, the Respondent's conduct would probably be found unlawful if this case were now before us for an initial determination under the new rule. We are satisfied, however, that in the special circumstances of this case no remedial order is warranted. Thus the poll previously was found lawful by the Board under the *Blue Flash* rule, which was in effect at the time the events herein occurred.[19] Moreover, as the court noted in its opinion, the work at the jobsite where the poll was taken apparently was scheduled to be concluded within 3 months after these events took place, which was more than 3 years ago. All things considered, we find in these circumstances that effectuation of the purposes of the Act does not require a remedial order. Accordingly, we shall reaffirm the Board's original Decision and Order dismissing the complaint in its entirety.

ORDER

It is hereby ordered that, upon reconsideration, the original Decision and Order in this proceeding be, and it hereby is, reaffirmed.

MEMBER BROWN, concurring:

I approve my colleagues' formulation of the polling criteria, and now also join them in dismissing that aspect of the complaint. See 148 NLRB 1368, 1372.

[19] The Board found the polls in *Lorben* and *Johnnie's Poultry*, *supras*, unlawful under the *Blue Flash* rule because of coercive factors present in those cases which were not present in this case Thus, in *Lorben*, the employer had no legitimate purpose in taking the poll and failed to assure the employees against reprisal; and in *Johnnie's Poultry*, the employer threatened to shut down rather than have a union in the plant, inquired of employees as to where union meetings were held and who was present, interfered with the Board's processes by inquiring about statements given to Board agents, and unlawfully refused to bargain