Bowling Corporation of America, Inc. d/b/a Algonquin Bowling Center, Inc., and Edgar Meyer *and* Building Service Employees International Union, AFL–CIO, Local No. 557. Case 9–CA–4332

April 23, 1968

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

On February 12, 1968, Trial Examiner William Seagle issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending dismissal of the complaint, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision 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 powers in connection with this case to a three-member panel.

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 Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner as modified below.

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 Trial Examiner, and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[1] We do not adopt the Trial Examiner's construction and application of *Strucksnes Construction Co., Inc*, 165 NLRB 1062, and *Fontana Bros.*, 169 NLRB 368. However, we adopt his alternative basis for dismissing the allegations of the complaint respecting Respondent's conduct in polling its employees as to whether they signed union authorization cards.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

WILLIAM SEAGLE, Trial Examiner: Upon a charge and an amended charge filed, respectively, on July 5 and 15, 1967, a complaint issued by the Regional Director for Region 9 on October 12, 1967, and the answer of the Respondent denying the commission of any unfair labor practices, the duly designated Trial Examiner heard this case at Louisville, Kentucky, on December 13, 1967.

It was alleged in the complaint that the Respondent had violated Section 8(a)(1) of the Act by various acts of interference, restraint, or coercion, and Section 8(a)(3) of the Act by discharging one Ben W. Grundy.

Subsequent to the hearing, counsel for the General Counsel filed a brief with the Trial Examiner, and counsel for the Respondent filed a reply to this brief in the form of a letter of comments.

Subsequent thereto, counsel for the Charging Party moved to dismiss the charges in the case on the ground that the parties had negotiated a contract, and counsel for the General Counsel filed a motion in opposition thereto. The motion to dismiss on the ground stated is denied. I shall, as indicated below, recommend, however, that the complaint be dismissed on the merits.

Upon the record so made, and in view of my observation of the demeanor of the witnesses, I hereby make the following findings of fact:

I. THE RESPONDENTS

In the caption of this proceeding, it is made to appear that one corporation, Bowling Corporation of America, Inc., does business in the name of another corporation, Algonquin Bowling Center, Inc. (hereinafter referred to as Algonquin). This would be highly anomalous. In fact, Algonquin, which is a Kentucky corporation, engaged in the operation of a bowling alley in Louisville, Kentucky, is a wholly owned subsidiary of Bowling Corporation of America, Inc., which is headquartered in New York City, and the true parties to the proceeding are both the parent corporation and Algonquin, its subsidiary,[1] who must be regarded as joint employers.

During the past 12 months, which is a representative period, Algonquin's gross volume of business exceeded $500,000. During the same period, Algonquin purchased supplies and materials valued in excess of $50,000 from firms located in the State of Kentucky, which, in turn, purchased these goods, in interstate commerce, directly from firms located outside the State of Kentucky.

The Respondent, Algonquin, admits that at all material times it has been an employer engaged in commerce or in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

[1] By motion made at the hearing the name of Edgar Meyer was dropped as a party.

II. THE LABOR ORGANIZATION INVOLVED

Building Service Employees International Union, AFL–CIO, Local No. 557, is a labor organization which has sought to organize the employees of the Respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Violations of Section 8(a)(1) of the Act*

The organizational campaign in the present case commenced in the late spring of 1967, after some of the Respondent's employees had approached Thomas M. Bond, Jr., an International representative of the Union. The attempt to secure signatures of employees to union authorization cards was launched about June 1, 1967, and under date of June 10, 1967, counsel for the Union wrote a letter to Algonquin, requesting recognition of the Union. This letter did not come to the attention of Edgar A. Meyer, the general manager of Algonquin, however, until June 15. When the Union's letter requesting recognition had arrived, Meyer had been on vacation but on June 15, Jack Schroder, his assistant, had telephoned Meyer to tell him of the arrival of the Union's letter. Meyer remembered the date of this telephone call because it happened to be Schroder's birthday, and he was planning to attend his birthday party.

Although the attendant circumstances are rather obscure, it seems that the Union not only wrote the letter requesting recognition but also sent a lawyer for Algonquin a list of the names of the employees who, purportedly, had signed union authorization cards, as well as copies of these cards. Meyer called his superiors in the holding corporation, and informed them of the attempt to organize the employees, and, pursuant to instructions, which he must have received from them, apparently, questioned all the employees as to whether they had been approached by the Union and signed union authorization cards. At this time, Algonquin had 30 to 40 employees, working in three shifts. Some of the employees admitted that they had signed union authorization cards but others, when shown copies of their purported cards, denied that they had signed them. These denials led Meyer to believe that some of the signatures to the authorization cards had been forged. After talking to each employee, Meyer recorded in a notebook what each employee had told him, and from those employees who denied that they had signed union authorization cards, Meyer requested statements to that effect. From what the employees told him, Meyer, apparently, came to the conclusion that the two most active employees in securing signatures to union organization cards had been Lawrence Ballard and Richard Flatt. Both of them were employed as mechanics but Ballard was the head mechanic.

Flatt and Ballard (in the order named) were the only two witnesses—apart from Ben W. Grundy, the alleged discriminatee in the case—who were called by counsel for the General Counsel in his effort to establish acts of interference, restraint, or coercion that would be violative of Section 8(a)(1) of the Act. I credit, however, Meyer's own account of his activities, and I regard the testimony of Flatt, Ballard, and Grundy as attempted embellishments of what actually happened. The embellishments may have been perfectly innocent—due to no more than the inability of the rather inarticulate witnesses to express themselves. It is not too difficult to perceive how Meyer's questions to the employees to tell him whether they had been approached by the Union and had signed union authorization cards would be converted into an invitation to tell him everything they knew about the Union, or even into threats to discharge any employee who had signed a union authorization card. Grundy in his testimony also produced a threat which seems unintelligible. Grundy testified that when he denied to Schroder, Meyer's assistant, that he had signed a union authorization card, Schroder remarked: "You are going to fly the coop, you are going to fly the coop, boy." Asked to explain what Schroder could have meant by that, Grundy testified: "I don't know what he meant." I believe this whole incident to be a product of Grundy's imagination.

The closest approach to a threat seems to have occurred in the case of Ballard. Like the rest of the employees, Ballard was asked by Meyer whether it was his signature that appeared on the copy of his union card. At first Ballard denied that it was his signature but a day or two later he admitted it. Asked to explain his behavior in this respect, Ballard declared: "As I said, at that time, I didn't think any of them were supposed to have the cards, you see, as far as the company goes, so I thought they were phony, actually, that's what I thought, but I did take a close look at the signature, and it was my signature, no doubt about it." In the latter part of June, Meyer confided to Ballard that "he was sending the names of people signing cards to the Home Office and didn't know what they would do about it," and added that "there wouldn't be any damn union getting in there." Meyer made it clear, however, that this was only his personal opinion. On another occasion, Meyer jokingly remarked to Ballard that "if something didn't get straightened out, we would end up in jail or something like that." Apparently, Meyer was referring to an injunction that the Union was supposed to be getting against harrassment of the employees. Meyer was indeed accustomed to talking freely to the employees with whom he was on a first-name basis. Finally, Meyer remarked one day to Ballard that he might have to let him go because of his activity in connection with the union authorization cards. Ballard was, however, a supervisory em-

ployee within the meaning of Section 2(11) of the Act, and the threat to fire him for the stated reason was not a violation of Section 8(a)(1) of the Act. To be sure, Flatt also testified that in a conversation that he had with Meyer pertaining to what the home office in New York would do about those who had signed union cards, that Meyer had said "he was afraid they were going to get rid of Larry Ballard, the head mechanic, on this occasion because his name was on the record." If this was a threat, it was not, however, a threat to discharge Ballard for his refusal to participate in the commission of unfair labor practices but for engaging in activities which were inconsistent with his status as a supervisor.[2]

So far as Meyer's questioning of the employees as to whether they had signed union authorization cards is concerned, the case bears a strong resemblance to *Blue Flash Express, Inc.*, 109 NLRB 591, in which the Board abandoned the doctrine that interrogation is *per se* unlawful, and declared that "the test is whether, *under all the circumstances*, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of the rights guaranteed by the Act. The fact that the employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees—a purpose which was legitimate in nature—to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to union organization" (emphasis supplied). Recently, in *Strucksnes Construction Co., Inc.*, 165 NLRB 1062, the Board further refined the *Blue Flash* doctrine as follows: "*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" (emphasis supplied). It is apparent that Meyer in polling the employees did not do so by secret ballot, and did not give any formal assurances against reprisal. He thus did not observe the technical requirements laid down in *Struksnes*. But the Board did not hold or declare in this case that the failure to observe each and every requirement would lead in all cases to a finding of violation of Section 8(a)(1) of the Act[3] and it seems to me that the circumstances of the present case are so unusual that no violation should be found. A poll by secret ballot would have been meaningless when the Union itself had voluntarily turned over copies of its authorization cards to the Respondent, and Meyer, assuming that he was aware of the requirement, would hardly have supposed that explicit assurances against reprisal were necessary when he was checking on the cards that the Union itself, which claimed to represent the signatories, had put into his hands. In view of the rather informal relations between Meyer and the employees, moreover, formal assurances would, in any event, have been less in order. It is my view that Meyer in polling the employees did not violate Section 8(a)(1) of the Act. It is also my view that by requesting statements from the employees who *denied* that they had signed union authorization cards Meyer was only seeking to protect the Respondent's rights. Meyer would have violated the Act only if he sought statements repudiating their signatures from those employees who admitted that they had signed union authorization cards. If I am in error as to these views, however, it would still seem to me that no remedial action would be necessary, in view of the contractual relations into which the Respondent and the Union have, apparently, entered.

B. *The Discharge of Grundy*

Ben W. Grundy, whom Algonquin is accused of discharging on July 10, 1967, because of his union activity, was hired as a porter on May 3 but he did not actually start to work until May 6, 1967. Thus, at the time of his discharge, he had been employed only for a little over 2 months.

Grundy was one of three porters employed at this time on the night shift, the other two being Tommy McCall and Billy Slaughter. McCall was dependent on Grundy, who drove a battered 1956 Chevrolet, for his transportation to the bowling alley.

During the brief period of his employment, Grundy failed to report for work on four different occasions: May 20, June 5, June 10, and July 10. The night porters worked under the supervision of Harold Lee, and during the night of May 20, Grundy's sister had telephoned to Lee to tell him that Grundy was sick. When Grundy was absent from work on June 5, nobody called to tell Lee that Grundy would be unable to come to work. The next night Lee had a talk with Grundy to impress upon the latter the importance of calling in when he was unable to come to work. Grundy told Lee that he had been sick the night before. On this occasion Lee told Grundy that he was a good worker but that he had to have him on the job. When, on June

[2] See, for instance, *Vanderbilt Products, Inc*, 129 NLRB 1323, 1331, *Leonard Niederriter Company, Inc.*, 130 NLRB 113, 114–115, and *Southwest Shoe Exchanges Company*, 136 NLRB 247, 248.

[3] In the still more recent case of *Fontana Bros.*, 169 NLRB No. 56, the Board declared that it had revised the *Blue Flash* criteria in *Strucksnes* to hold that "an employer would be permitted to ask his employees whether or not they wished to be represented by a certain labor organization, *only* under five enumerated safegards" [emphasis supplied] I assume that the insertion of the "only" in this dictum is an inadvertence, and that the Board does not intend to impose the five safegards in every case without exception, for it is plain from *Strucksnes* that the safegards may not be required in unusual circumstances

10, Grundy was absent from work again without calling in, it was a Saturday night, which was the busiest night at the bowling alley. When Grundy came in the following night, Lee reminded Grundy that he had been warned once already but Grundy promised that he would be sure to call in the next time, and Lee decided to give Grundy another chance.

Grundy was at work the night of June 19, but he was involved in another kind of dereliction. Employees at the bowling alley were not allowed to go behind the snackbar. But Grundy went behind the snackbar that night, and appropriated half a loaf of bread. This was reported to Lee by one of the employees by the name of Barlow.

When Grundy failed to report for work the night of July 20, which was a Sunday, and which was also a very busy night at the bowling alley, Lee and Tommy McCall were involved in a deception. It was raining heavily that night and Lee who was at the back porch of the bowling alley—Lee was not on duty that night but was bowling—saw McCall come up to the back porch soaking wet. McCall told Lee that he had had to take a taxi to get to work because Grundy had been unable to pick him up. However, James Ray Neal, one of the bowling alley security guards, who had caught sight of Grundy's jalopy, which he had seen many times in observing the parking of employees' cars, called the attention to Lee, whose back was truned, to the fact that he had just seen Grundy's car, although someone had reported to the control desk that Grundy was sick in bed. This aroused Lee's suspicions, and he aaked McCall how it happened that if he had come to work in a taxi, the taxi had not brought him to the front door like any other passenger. McCall could not answer this very pertinent question, and Lee knowing how impecunious the porters were—they had to borrow 10 cents to buy a bar of candy—became convinced that he was being deceived. This conviction was raised to the level of a certainty in Lee's mind the following morning when Billy Slaughter, the third porter, told him that Grundy had just come and picked McCall up. Lee discussed Grundy's conduct with Meyer, who left it up to Lee whether to discharge Grundy, and Lee discharged him.

Grundy protested his innocence of any serious derelictions but I find it impossible to believe him. He claimed that he suffered from arthritis, which periodically could affect any part of his body, although he was only 51 years old, and that he also suffered from a gun wound in his left knee, as well as from various miseries in his stomach, about which he was very vague, however. He was even more vague about which of his afflictions would account for any particular absence, and admitted that at least one of his absences—on June 5— was due to the fact that he was engaged in helping a cousin move rather than to any illness. Although he was sure that it was trouble with his left knee that was the cause of his absence the night of July 10, he testified both that he was in bed that night and that he was not in bed that night but sitting around in an effort to limber up his leg. He was also sure that he had called in every time that he had failed to report for work and that Lee would confirm that[4] but Lee, who followed him to the stand, failed to do so, or to confirm a good deal else to which Grundy had testified. So far as the incident of his taking the bread from behind the snackbar is concerned, Grundy admitted to taking two slices of bread—presumably to make a meat sandwich—but denied that he had taken half a loaf. He also denied driving McCall to work the rainy night of July 10, but in the process of making this denial only involved himself in another of his many contradictions. He testified that he did not know how McCall had been able to get to work the night of July 10, "whether by bus or cab." But in his prehearing statement he had deposed that McCall had obtained a cab the night of July 10.

Grundy's pragmatic attitude toward telling the truth was also manifested in several other ways. He concealed the fact that he suffered from arthritis in filling out his employment application. "I didn't figure that was any of their business," he explained. In testifying concerning the bread incident, he gave vent to his indignation by declaring: "Mr. Barlow is a snitcher, that's what he is."

Both in its substance and in its manner of delivery Lee's testimony concerning his reasons for discharging Grundy carried conviction, and I fully credit his testimony. Quite apart from the bread incident and the attempted deception in which Grundy and McCall were involved, Lee would have had good reason to discharge Grundy. In a period of a little over 2 months, Grundy had been absent from work no less than four times, and at least two of these absences had occurred during particularly busy nights, and after repeated warnings had been given to him. Even if Grundy is assumed to have been genuinely ill on each one of the four occasions, the fact would remain that his absences would be causing inconvenience to his Employer, particularly when he failed to notify the latter on two of these occasions so that other arrangements could be made in time.

The case presented on behalf of the General Counsel appears to be exceptionally weak and unconvincing. When Grundy was discharged on July 10, the organizational campaign of the Union had already run its course, and the Union had already made its request for recognition. Meyer knew who the union adherents were since the Union had turned over to him the names of its claimed membership. Grundy's name would appear as a signer of a union authorization card. But this would

[4] "Mr Lee can tell you that," were Grudy's exact words.

represent the sum total of Grundy's union activity. He had not signed up anybody else, nor had he been active in the union drive in any other way. While, conceivably, Meyer and Lee could have selected even an inconspicuous member of the Union as a victim, this would have made little sense in the circumstances of the present case.

Counsel for the General Counsel pretends to find glaring contradictions and other infirmities in the case of the Respondents. This is due partly to the fact that he believes Grundy, whose testimony I do not credit, and partly to what seems to me to be faulty logic on his part. I perceive, for instance, no contradiction between the testimony of Meyer and of Lee on the question of who actually made the decision to discharge Grundy. Meyer testified that it was Lee who terminated Grundy and that Lee did not discharge the latter on his instructions. Lee testified that he discussed with Meyer the question whether Grundy should be discharged, and that he decided to discharge Grundy after Meyer had left the decision to his discretion. The testimony of Meyer and Lee on this question is perfectly consistent.

I also do not find particularly significant the fact that Slaughter, the third porter, was not called as a witness. In the first place, as already indicated, I do not regard the fact that Grundy drove McCall to work the night of July 10 as the crux of the case. In the second place, the Respondents did call Neal, the security guard, as a witness, and had reason to regard his testimony as sufficient. In the third place, it is not affirmatively established that at the time of the hearing Slaughter was still employed by Algonquin. If he was so employed, his testimony was equally available to the counsel for the General Counsel as a rebuttal witness.

Finally, it seems to me that counsel for the General Counsel makes altogether too much of the fact that Meyer, as well as Lee, once "complimented" Grundy on his work. These "compliments" came in the midst of strictures on Grundy's absences and all that either Meyer or Lee said about Grundy's work was that it was satisfactory when he chose to report for work.

CONCLUSIONS OF LAW

1. Bowling Corporation of America, Inc., and Algonquin Bowling Center, Inc., are joint employers engaged in commerce or in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Building Service Employees International Union, AFL–CIO, Local No. 557, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the activities described in section III(A) of this decision the Respondents have not interfered with, restrained, or coerced its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and have not, therefore, committed unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

4. By discharging Ben W. Grundy on July 10, 1967, the Respondent has not discriminated with respect to the tenure of his employment, and it has not, therefore, committed an unfair labor practice affecting commerce within the meaning of Section 8(a)(3) of the Act.

RECOMMENDED ORDER

In view of my findings of fact and conclusions of law, I recommend that the Board enter an order dismissing the complaint.