

American Art Industries, Inc. and General Sales Drivers and Allied Employees, Local Union No. 198, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 12-CA-3577 (1-2) and 12-CA-3697 (1-2)

December 5, 1969

SUPPLEMENTAL DECISION

BY CHAIRMAN McCULLOCH AND MEMBERS
FANNING AND ZAGORIA

On July 31, 1967, the National Labor Relations Board issued its Decision in Case 12-CA-3577(1-2)¹ finding that the Respondent had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. On March 20, 1968, the Board issued a Decision in Case 12-CA-3697(1-2)² finding that the Respondent had committed violations of Section 8(a)(4) and (1) of the Act. In both Decisions, the Board ordered the Respondent to cease and desist from the conduct which it found constituted violations of the Act and to take certain affirmative action. Thereafter, on September 5, 1969, the United States Court of Appeals for the Fifth Circuit entered its order in these cases,³ enforcing the Board's 8(a)(1), (3), and (4) findings; and affirming the Board's finding that the Union, on July 22, 1966, represented a majority of the employees in the appropriate bargaining unit. However, the court remanded for further adjudication the Board's finding that the Respondent violated Section 8(a)(5) and its order to bargain, in the light of the Supreme Court's decision in *N.L.R.B. v. Gissel Packing Company*,⁴ and the Fifth Circuit Court's decision in *N.L.R.B. v. American Cable Systems, Inc.*⁵

Having accepted the remand, the Board, on September 23, 1969, issued a Notice granting permission to the parties to submit statements of position. Such statements were duly filed by the Respondent and the General Counsel.

Pursuant to the provisions of Section 3(b) of the Act, as amended, the Board has delegated its powers in connection with these cases to a three-member panel.

The Board has considered the above-cited Court decisions, the statements of position, and the entire record in these cases, and, for the reasons set forth below, reaffirms its original finding that the Respondent violated Section 8(a)(5) and (1) of the Act and that a bargaining order is necessary to effectuate the purposes of the Act.

The Board and the Court of Appeals have found that the Respondent during the period July 13 through 19, 1966, violated Section 8(a)(3) by discriminatorily discharging four employees because of their organizational activity on behalf of the Union; and violated Section 8(a)(1) by coercively interrogating its employees, threatening to close its plant if a union was brought in, and promising benefits to undermine the Union's organizing drive. The Board and the Court of Appeals have also found that the Respondent on November 23 and 29, 1966, violated Section 8(a)(4) and (1) by discharging two employees because they had testified on behalf of the General Counsel in a Board proceeding. In addition, the Board found that the Respondent's insistence upon an election was not predicated on a good-faith doubt as to the Union's majority status in the light of its serious unfair labor practices, and that the Respondent's refusal to bargain thus violated Section 8(a)(5). The Board, therefore, issued a bargaining order.

In view of the Supreme Court's opinion in *Gissel, supra*, and the Court of Appeals' opinion in *American Cable, supra*, we do not rely upon our earlier finding that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union in the absence of a good-faith doubt of the Union's majority status. We find, rather, that the Respondent's refusal to bargain with the Union violated Section 8(a)(5) because the series of serious unfair labor practices committed tended to undermine the Union's majority status. The coercive effects of the Respondent's continuing serious unfair labor practices cannot be eliminated by traditional remedies, and are of such a nature as to tend to make a fair election improbable, if not impossible. Under these circumstances, the purposes of the Act are better effectuated by reliance on the employees' desires as expressed by signed authorization cards than on the results of any election which might be directed. We also find that the Respondent's extensive violations of Section 8(a)(3) and (1) contemporaneously with its refusal to bargain, and in conjunction with the Respondent's subsequent 8(a)(4) violations, demonstrate the likelihood of the recurrence of unfair labor practices in the future, and render any traditional remedy inadequate assurance of a fair election. We hold this view, assuming the truth of the Respondent's unproved allegation that the Union no longer represents a majority of employees.⁶ To hold otherwise would be to reward the Respondent for its commission of unremedied and continuing unfair labor practices of an extensive and serious nature, and calculated to frustrate employee rights. *N.L.R.B. v. Gissel Packing Company, supra*. See also, *N.L.R.B. v. Katz*, 369 U.S. 736, 748, footnote 16; *N.L.R.B. v. P. Lorillard Company*, 314 U.S. 512, both cited in *Gissel* with approval, for the proposition that a

¹166 NLRB No. 109.

²170 NLRB No. 70.

³*N.L.R.B. v. American Art Industries, Inc.*, 415 F.2d 1223 (C.A. 5)

⁴395 U.S. 575.

⁵414 F.2d 661 (C.A. 5).

⁶We observe that many or all of the unfair labor practice strikers, whom

bargaining order is appropriate despite a subsequent loss of union majority.⁷

the Union represented, may still retain their employee status, despite the Respondent's attempts to replace them. We note that our unremedied order in the instant case requires the Respondent, upon application, to reinstate such strikers, and, if necessary to provide jobs for them, to discharge their replacements.

⁷See also, *Horace Simmons d/b/a Vaca Valley Bus Lines*, 179 NLRB

Therefore, we find that the bargaining order previously issued to remedy the Respondent's unfair labor practices is appropriate to remedy its violations of Section 8(a)(5) as well of Section 8(a)(1), (3), and (4) of the Act, and we affirm it.

No 107, *G.P.D. , Inc.*, 179 NLRB No 31.