

**Action Advertising Co., Inc. and Detroit Mailers
Union No. 4, International Mailers' Union, Inc.
Case 7-CA-8500**

February 28, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING
AND KENNEDY

On October 12, 1971, Trial Examiner William J. Brown issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions 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 authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order, to the extent consistent herewith.

1. The Trial Examiner found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union sympathies.

2. The Trial Examiner also found that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to recall from layoff employees James and Douglas Story. We find merit in Respondent's exceptions to these findings.¹

James Story and his brother Douglas Story were employed by Respondent in its mail advertising department. On February 10, 1971² at the end of the workday, Richard Rogers, Respondent's president, told the Storys that he would have to lay them off temporarily for lack of work.³ James Story then asked about the Troy Shopper job that still had to be completed and was told to report to work with his brother on the following Tuesday, February 16. When they reported, Rogers told them that there was not enough work, adding that the Company could not afford a union and that they would make more money without the Union. James Story asked about the Troy Shopper job, and Rogers said that they were laid off indefinitely.

The Trial Examiner concluded that the Storys were discriminatorily laid off, basing his decision on Rogers' antiunion statement and the fact that between the time of the initial temporary layoff and the indefinite layoff on Tuesday, February 16, Rogers learned of James

Story's support for the Union. Thus, the Trial Examiner found that Rogers, in refusing to recall the Storys, was motivated at least in part by his opposition to the Union. We do not agree.

The record shows that between the dates of the initial and final layoffs of the Storys, Rogers also laid off and did not recall employees McCormick, Smith, and Lamore, the only other full-time employees in the department. In dismissing the allegation that these three employees were discriminatorily refused recall, the Trial Examiner observed that "[t]here appears no doubt but that the Company was unsuccessful in retaining the volume of business in the mailing department that would be sufficient to furnish employment at the pre-February level of employment." There is no question that Respondent's business in its mail advertising department fell off drastically. In fact, the little work that remained was completed by Rogers himself and a nondepartment employee. While it is true that Rogers indicated to the Storys his opposition to unions,⁴ we are satisfied that the reason for not recalling them, as well as the other employees, was the drastic decline in business. We therefore find that Respondent was motivated by economic rather than discriminatory reasons in not recalling the Storys. Accordingly, we shall dismiss the remaining 8(a)(3) allegations of the complaint.

3. Having concluded that Respondent did not violate Section 8(a)(3) of the Act, we are not satisfied that there remains sufficient basis for sustaining an 8(a)(5) finding and bargaining order. In our view, the 8(a)(1) violations clearly fall within the category described by the Court in *Gissel*,⁵ as "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." Accordingly, we shall dismiss the 8(a)(5) allegation of the complaint, and shall refrain from entering a bargaining order as a remedy for the minimal 8(a)(1) violations.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Action Advertising Co., Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from coercively interrogating employees as to their sympathies respecting labor organizations during the course of a labor organization's organizational efforts among company employees, or in any like or related manner interfering with, restraining,

¹ No exceptions were filed with regard to the Trial Examiner's dismissal of similar allegations concerning Respondent's failure to recall employees Sharon McCormick, James Lamore, and Kathleen Smith.

² All events occurred in 1971.

³ The record shows, and no contrary contention was made, that the layoff was economically motivated.

⁴ The Trial Examiner found that such statement was not a threat of "layoff, discharge, or a refusal of recall" in violation of Sec. 8(a)(1).

⁵ *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575, 615.

or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Post at its Detroit, Michigan, plant copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board"

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT coercively question employees concerning their feelings with respect to Detroit Mailers Union No. 4, International Mailers' Union, Inc., or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the National Labor Relations Act, as amended.

ACTION ADVERTISING
Co., Inc.
(Employer)

Dated _____ By _____ (Title)
(Representative)

This is an official notice and must not be defaced by anyone.

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

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boule-

vard, Detroit, Michigan 48226, Telephone 313-226-3200.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

WILLIAM J. BROWN, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, hereinafter referred to as the "Act," came on to be heard at Detroit, Michigan, on August 11 and 12, 1971. The original charge of unfair labor practices was filed February 18, 1971, by the above-indicated Charging Party, hereinafter sometimes referred to as the "Union"; the complaint herein was issued May 10, 1971, by the General Counsel of the National Labor Relations Board, acting through the Board's Regional Director for Region 7. It alleged, and the duly filed answer of the Respondent, Action Advertising Co., Inc., hereinafter sometimes referred to as the "Company", denied the commission of unfair labor practices within the scope of Section 8(a)(1), (3), and (5) of the Act.

At the hearing the parties appeared and participated as noted above with full opportunity to present evidence and argument on the issues. Subsequent to the close of the hearing written briefs were recovered from the General Counsel and the Company and have been fully considered. On the entire record herein and on the basis of my observation of the witnesses, I make the following:

FINDINGS OF FACT

I THE BUSINESS OF THE COMPANY

The pleadings and evidence establish and I find that the Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, is engaged at its principal place of business in Detroit, Michigan, in the preparation and distribution of advertising materials. During its fiscal year ending October 31, 1970, admittedly a representative period, the Company furnished advertising services within the State of Michigan and valued in excess of \$50,000 for Great Scott Supermarkets, a retail grocery chain in Michigan which, during the calendar year 1970, a representative period, had gross revenue exceeding \$500,000 and purchased and received directly from sources outside the State of Michigan food products and other materials valued in excess of \$500,000. I find, as the Company concedes, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings, as amended, and the evidence establishes and I find that the Union is a labor organization within the purview of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Introduction to the Issues

This case concerns events occurring during the course of attempts of Company employees to organize on behalf of and secure company recognition of the Union as their exclusive collective-bargaining representative in a unit consisting of all full-time and regular part-time production and maintenance employees, including shipping and receiving employees but excluding all distributors, office clerical employees, professional employees, guards and supervisors as defined in the Act. Although the Company's answer has denied the appropriateness of this unit, a position not iterated in the Company's posthearing brief, it seems clear, to be, and I find it an appropriate one since the evidence establishes it as a homo-

geneous and identifiable group of employees engaged in production and list maintenance, embracing all employees except supervisors and distribution employees, the latter group consisting of casual and nonregular groups recruited almost daily and transported to perform their distribution functions entirely away from the Company's premises. I find that the unit in which the Union sought recognition is an appropriate one within the purview of Sections 9 and 8(a)(5) of the Act.

On January 28, 1971, employees James¹ and Douglas Story and James Lamore, employees of the Company's production and list maintenance department consulted the Union seeking representation for purposes of collective bargaining. On the occasion of that visit all three signed union authorization cards.² Thereafter, it is alleged in the complaint, the Company engaged in various acts of interference, restraint, and coercion respecting self-organization of employees, refused to recall laid-off employees in reprisal for their union activity, and unlawfully refused to bargain collectively with the Union.

B. *Interference, Restraint, and Coercion*

1. Interrogation

a. *Marian Jones*

The answer has denied the supervisor status of Marian Jones who is alleged in the complaint to be a supervisor and to have, on or about February 11 and 12, 1971, coercively interrogated employees respecting their union activities, sympathies, and desires. The evidence indicates that Marian Jones, who at one time served as a corporate officer, apparently merely as a statutory titleholder, is close to the borderline of supervisory status. While the evidence offered by the General Counsel to establish her supervisory is far from conclusive, I am persuaded that it does, if ever so slightly, preponderate in favor of the conclusion that she was at material times a supervisor within the purview of Section 2(11) of the Act. In reaching this conclusion I rely on the credited testimony of employee James Story that he reported to Marian Jones and received his work orders from her and on the credited testimony of Kathleen Smith that Marian Jones assigned her work and notified her of a cut in her hours of employment. I also credit Kathleen Smith's testimony that Marian Jones told her that she was sorry that she had to lay off employee Sharon McCormick and Smith's testimony that she was herself laid off by Marian Jones for lack of work after previously being kept on full-time work by Marian Jones. In appraising the status of Marian Jones I also am convinced that the indicia of supervisory status are to be found in the

credited testimony of Sharon McCormick that Marian Jones assigned her work, promised her a raise in pay if she arrived at her regular work time and was the one who laid her off.

The General Counsel alleges and the Company denies that Marian Jones coercively interrogated employees Kathleen Smith and Sharon McCormick on February 10 and 11. Kathleen Smith, a union supporter, testified that on the night of February 11, Marian Jones telephoned her at home, informed her that the Story brothers were trying to get a union in at the Company but that the Company was too small for a union and twice asked her what she thought about unions. Marian Jones did not testify and I credit Smith's account of this conversation and find that by it the Company engaged in an unfair labor practice within the purview of Section 8(a)(1) of the Act.

Smith also credibly testified that on the following day Marian Jones approached her and employee Sharon McCormick in the plant's middle room and asked them what they thought of unions; Smith referred to the talk of the previous evening and expressed lack of knowledge on the subject. Sharon McCormick testified that the same question was put to her by Jones and that she gave the same answer as Smith.

Marian Jones did not testify and I find, in accordance with the credited testimony referred to above that by her questioning of employees Smith and McCormick on February 12, the Company engaged in unfair labor practices within the scope of Section 8(a)(1) as alleged in paragraph 8(a) of the complaint.

b. *William W. Fields*

The complaint alleges and the answer denies that Fields is a supervisor within the meaning of Section 2(11) of the Act and engaged in coercive interrogation of employees constituting an unfair labor practice within the purview of Section 8(a)(1) of the Act. I find no evidence adduced to establish Fields participation in unfair labor practices and General Counsel's brief refers to none. I recommend dismissal of the allegations of paragraph 8(a) of the complaint relating to Fields.

2. Threats of plant closing and discharge

The complaint alleges and the answer denies that on or about February 16, Company President Richard Rogers threatened employees with plant closure, layoff and discharge unless they refrained from membership in and/or support of the Union. It appears from General Counsel's brief that the allegations relate to utterances made by Rogers to employees James and Douglas Story in the company office on February 16. James and Douglas Story reported for work, after a short layoff, on February 16. On that occasion, according to James Story, Rogers told them that there was not enough work and that he couldn't afford the Union. He also, according to James Story said that they would make more money without the Union. Finally, when James Story asked about running a substantial and scheduled job on the addressing machine, Rogers, according to James Story, said that he would have to lay them off indefinitely. I cannot conclude from this testimony that the evidence preponderates in favor of the conclusion that on the occasion in question Rogers threatened the Storys with layoff, discharge or a refusal of recall unless they refrained from Union activity.

C. *Discriminatory Refusal of Recall*

The complaint alleges and the Company's answer admits that employees James and Douglas Story, Sharon McCormick, Kathleen Smith, and James Lamore were laid off in the period February 10 to 16. The complaint alleges and the

¹ The Company contends that James Story was a supervisor at all material times but the evidence convinces me that he was not endowed with the authority to exercise discretion and independent judgment in matters affecting the status or conditions of other employees. Hired in at the lowly rate of a bill-hiker, he was transferred to mailing only because his feet could not stand up to the bill-hiking task. He was the first worker assigned to the Magnacraft mailing machine and thus the one who instructed other employees in its operations, I conclude however that his relation to other employees assigned to the Magnacraft was that only of a fellow-employee with superior acquaintanceship with operation of the machine and that he did not at any time possess the authority to act, with discretion and independent judgment, on behalf of management in hiring, discharging or otherwise affecting the employment status of fellow workers. In this connection, I credit the testimony of James Story that no one in authority at the Company ever informed him that he had authority to hire and fire employees.

² The Union authorization cards are clear and unambiguous designations of the Union as the collective-bargaining agent of the signers. Subsequently, on February 11, employees Sharon McCormick and Kathleen Smith signed authorization cards

answer denies that the layoffs and subsequent continuing refusal to recall were in reprisal for the employees' support of the Union.

James Story credibly testified that toward the end of the workday on February 10 Rogers called him and his brother Douglas to the office and said he would have to lay them off temporarily for lack of work. James Story then inquired about the Troy Shopper job, a relatively substantial amount of work, and Rogers instructed James and his brother, Douglas, to return and do the job on the following Tuesday. They reported on the 16th for the assigned work and were told by Rogers that there was not enough work, adding that the Company couldn't afford a union and that they would make more money without the Union. When James Story asked specifically about the Troy Shopper job, Rogers said that they were laid off indefinitely. In the interim between the assurances of work on February 10 and the layoff on February 16, the Company acquired knowledge of James Story's relatively strong support of the Union through attendance at the representation case hearing where, on February 12, James Story acted as an assistant to the union representative. I credit James Story's account that in the course of the February 16 discussion Rogers told him that the Company could not afford to operate with the Union and that they would make more money without it. It is my conclusion that the refusal to recall from layoff of James and Douglas Story was motivated at least in part by Rogers' opposition to union organization of his employees, as appears from the utterances of Rogers on February 16, and that his actions constituted unfair labor practices within the scope of Section 8(a)(3) and (1) of the Act.

Employees Sharon McCormick, Kathleen Smith, and James Lamore were laid off on February 15 and 16 and never recalled. Unlike the situation involved in the layoff of the Story brothers, there were no contemporaneous remarks relating to the Union on the occasion of their layoffs. There is no solid basis in the testimony that would warrant the inference that Rogers knew of their union activity which, in the case of Kathleen Smith consisted solely of signing a card and soliciting Sharon McCormick to sign a card, and in the cases of Sharon McCormick and James Lamore solely in signing Union cards. There appears no doubt but that the Company was unsuccessful in retaining the volume of business in the mailing department that would be sufficient to furnish employment at the pre-February level of employment. I cannot conclude that the evidence preponderates in favor of the conclusion that the refusal to recall McCormick, Smith, and Lamore to their employment from and after February 16 constituted an unfair labor practice as alleged in the complaint.

D. Refusal To Bargain

The complaint alleges and the answer denies the commission of the Company of unfair labor practices in the latter's admitted refusal to recognize and bargain with the Union, from and after, February 11, as exclusive representative of employees in a unit embracing all full-time and regular part-time production and list maintenance employees at its Detroit place of business, exclusive of distributors, office clerical employees, professional employees, guards, and supervisors as defined in the Act. This unit clearly appears to be an appropriate one since it embraces all employees of the Company's mailing department, exclusive of supervisors, and the only company objections appear to be based on individual inclusions and exclusions rather than on the description of the unit. It is clear that on or before February 11, union employees Douglas and James Story, James Lamore, Sharon McCormick, and Kathleen Smith signed union authorization cards

which constitute signed union authorizations from a majority in the appropriate unit.³ The cards are unequivocal authorizations of the Union as the exclusive representative for collective bargaining of the signers. At the hearing in the representation case the Company refused to recognize the Union as the representative of employees in the appropriate unit as found above and contemporaneously engaged in the several instances of unfair labor practices in the nature of interference, restraint, and coercion outlined above. On February 12, at the representation case hearing, the Company refused to bargain with the Union. I conclude that the refusal to bargain, in the circumstances of this case, constituted an unfair labor practice within the scope of Section 8(a)(5) and (1) of the Act.

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section III, above, and there found to constitute unfair labor practices, occurring in connection with the business operations of the Company as set forth 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 such commerce and the free flow thereof.

V. THE REMEDY

In view of the findings set forth above to the effect that the Company has engaged in unfair labor practices affecting commerce it will be recommended that it be required to cease and desist therefrom and, in view of the findings of discriminatory discharge, from any unfair labor practices. *N.L.R.B. v. Entwistle Mfg. Co., Inc.*, 120 F.2d 532 (C.A. 4). It will also be recommended that the Company be required to take such affirmative action as appears necessary and appropriate to effectuate the policies of the Act, including recognition of the Union as exclusive bargaining representative of employees in the appropriate unit, *Colonial Knitting Corp.*, 187 NLRB No. 134, and reinstatement of employees discriminatorily terminated with backpay computed in accordance with the remedial policies set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

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

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the purview of Section 2(5) of the Act.
3. All full-time and regular part-time production and list maintenance employees, including shipping and receiving employees but excluding all distributors, clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for collective bargaining.
4. By refusing from and after February 12 to recognize and bargain with the Union as exclusive representative of employees in the aforesaid appropriate unit. The Company has engaged in unfair labor practices within the scope of Section 8(a)(5) and (1) of the Act.

³ The only employees who worked regularly on mailing and list maintenance in addition to the card signers appear to be supervisory or administrative personnel

5. By refusing to recall from layoff employees James and Douglas Story in reprisal for their activity on behalf of the Union, the Company has engaged in unfair labor practices within the scope of Section 8(a)(3) and (1) of the Act.

6. By interrogating employees respecting their sympathies concerning labor organizations in a context referable to a union organizational campaign at the Company, the Com-

pany has engaged in unfair labor practices within the scope of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the purview of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]