

The James Textile Corp. and Local 148-162, International Ladies' Garment Workers' Union, AFL-CIO.
Case 22-CA-3530

June 7, 1972

**SUPPLEMENTAL DECISION
AND ORDER**

BY MEMBERS FANNING, JENKINS, AND
KENNEDY

On July 28, 1970, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,¹ finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and ordered that the Respondent cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices. The Board also found that Respondent did not violate Section 8(a)(1) and (5) of the Act by refusing on and after May 7, 1968, to recognize and bargain with the Union. Thereafter, on September 23, 1971, the United States Court of Appeals for the Third Circuit reversed the Board's finding that the Respondent did not violate Section 8(a)(5) of the Act and found ". . . that the employer's refusal on May 7, 1968, to recognize Local 148 was an unfair labor practice in violation of Section 8(a)(5) of the Act."² The court remanded the case to the Board for reconsideration in order that the Board may determine an appropriate remedy in light of the court's finding an 8(a)(5) violation of the Act. Thereafter, both Respondent and Charging Party filed statements of position on remand.

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 case to a three-member panel.

In its initial decision the Board found that, in Respondent's antiunion campaign and in an effort to undermine the union's strength, the Respondent violated Section 8(a)(1) by: interrogating employees concerning their membership in or support for the Union; threatening employees that others had been discharged and they might be discharged or suffer other economic reprisals if they became members of or supported the Union; interfering with employees' contacting a union representative on their own time in front of the plant; and promising benefits of possible scholarships for employees' children to dissuade support of the Union. In addition, the Board also found that the Respondent violated

Section 8(a)(3) and (1) of the Act by discriminatorily terminating employee Joaquin Gutierrez (King) on June 3, 1968, and not thereafter reinstating him because of his union activities and desires. With respect to the 8(a)(5) allegation of the complaint, the Board found that the Employer did not violate the Act when it refused to recognize the Union possessing authorization cards from a majority of employees because the Employer was awaiting a Board decision on its obligation to continue to bargain with a sister union which represented employees before removal of the plant. In these circumstances, the Board reasoned that to find such violation would be in derogation of its own processes. Finally, as the record failed to establish a clear majority on or after May 20, a time when the legal impediment was removed, the Board did not reach the question of whether the conduct found violative of the Act would otherwise warrant the issuance of a bargaining order.

The court did not disturb the Board's findings that Respondent had violated Section 8(a)(1) and (3) in its efforts to undermine union strength. However, the court rejected the Board's conclusion that the pending proceedings involving Local 62 sanctioned the Company's refusal, on May 7, to recognize Local 148-162. The court noted that, on that date, the latter union had unquestionably been designated as the representative by a majority of the Company's employees. The court further observed that the Company had had no dealings with Local 62 for 5 years, that the contract between the Association and Local 62 had almost certainly expired by then, and that, "if conceivably some rights conferred by the 1963 contract survived in 1968, the New Jersey local could more appropriately and conveniently administer them for a New Jersey shop as a successor representative." The court concluded that, in these circumstances, "we can discover no rational basis for apprehension by the Board that to have accorded recognition to Local 148 as bargaining representative effective May 7, 1968, would have been 'in derogation of the Board's processes.'" Finally, the court added that no consideration of fairness to the Employer impedes a holding that its conduct on May 7, 1968, was an unfair labor practice and pointed out that the purpose and the motivation of the Employer in denying union recognition were "grossly improper." In this regard, the court stated:

On May 7, 1968, the employer here refused to bargain with a union that had duly qualified for recognition under Section 9(a). And since the reason for this refusal was to gain time to achieve employee disclaimer of the union, the intention of

¹ 184 NLRB No 70

² *Local 148-162 International Ladies' Garment Workers' Union, AFL-CIO*

[The James Textile Corp.] v. NLRB, 450 F.2d 462 (CA 3)

the employer to flout and violate the statutory mandate is clearly established.

In remanding the case to us for determination as to an appropriate remedy in light of the finding that the Employer's refusal on May 7, 1968, to recognize Local 148 violated Section 8(a)(5) of the Act, and presumably in light of the view that the Employer's refusal was calculated to gain time to achieve employee disclaimer of the union as revealed by its total pattern of unlawful conduct, the court appears to have narrowly limited the scope of our review. Thus, the court states:

Whether, in light of whatever has occurred since May 7, 1968, bargaining with the Union should now be required, as in *Franks Bros. Co. v. N.L.R.B.*, 1944, 321 U.S. 702, or not required, as in *N.L.R.B. v. Fansteel Metallurgical Corp.*, 1939, 306 U.S. 240, will be for the Board to decide.

Having accepted the remand, and having reviewed this case within the narrow limits proscribed by the court, we find that a bargaining order is the appropriate remedy for the 8(a)(5) violation found by the court. Thus, in our view, this case more closely parallels *Franks Bros. Co.* than *Fansteel Metallurgical Corp.*

In *Fansteel* there was an unlawful sitdown strike. The employees who engaged in such unlawful conduct were discharged and the Court refused to reinstate said employees on the ground that their conduct was unprotected. Thereafter, the Court found that the employer would not then be compelled to bargain with the union because the subsequent unlawful events destroyed the union's right to rely on its majority as a basis for a bargaining order. In sum, the Court concluded that majority status and right to recognition may be voided by subsequent unlawful conduct and discharge of the union supporters.

On the other hand, in *Franks Bros.*, there was no unlawful conduct by the employees. After the demand for recognition the employer conducted an aggressive campaign against the union even to the extent of committing several unfair labor practices. In the meantime, during the normal course of business, the union's original membership had been replaced, leaving the union with less than a majority. Despite the union's loss of majority, and as the replacement of these employees was not occasioned by their own unlawful conduct, the Court entered a bargaining order to permit the bargaining relationship to function for a reasonable time. In sum, in *Fansteel*, where loss of majority was attributable to the employees' misconduct, no bargaining order lies. On the other hand, as in *Franks Bros.*, where loss of majority cannot be attributable to any unlawful or unprotected conduct of the union supporters but

such loss occurs in the normal course of business during a time when the employer is embarked on a course of action in flagrant disregard of the statute and employee rights to union representation, a bargaining order will lie.

In the instant case, it was found that the Union had a majority on May 7, 1968, when it made its demand for recognition. The court found that it was entitled to recognition, and the Respondent's refusal to recognize the Union was a breach of its statutory duty to bargain. Moreover, there is no evidence in the record of any unlawful conduct by the Union or by its supporters which led to its loss of majority status as in *Fansteel Metallurgical Corp.* To the contrary, here, as in *Franks Bros.*, loss of union majority occurred in the normal course of business at the same time the Respondent was unlawfully refusing to recognize the Union and at the time the Respondent was embarked upon a "grossly improper" course of conduct, as found by the court, ". . . to gain time to achieve employee disclaimer of the union . . ." Accordingly, we must conclude, in light of the findings of the court and the record evidence, that the teaching of *Franks Bros.* is applicable and that a bargaining order is required to remedy the 8(a)(5) violation found by the court.

Although the court appears to have restricted the Board's review of this case within the confines of *Fansteel Metallurgical Corp.* and *Franks Bros.*, we note in passing that the Respondent's course of unlawful conduct would also warrant a bargaining order under the Supreme Court's holding in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575.

In this regard the Respondent's relentless campaign to defeat the Union's organizational efforts consisted not only of serious and extensive acts of interference, restraint, and coercion against its employees in violation of Section 8(a)(1), but included the discriminatory discharge of a leading union adherent in violation of Section 8(a)(3). These unfair labor practices were not only flagrant and coercive in nature but, as the court found, were designed "to achieve employee disclaimer of the union." In our view, it is unlikely that the effect of these unfair labor practices could be neutralized by conventional remedies which would insure a fair election. We therefore find that the employees' desires as expressed through the authorization cards in possession of the Union on May 7, at the time of Respondent's unlawful rejection of the union demand for recognition, are a more reliable measure of their stand on the issue of representation and that the policies of the Act will be better effectuated by the issuance of a bargaining order. Accordingly, under the holding of *Gissel*, we would also issue a bargaining order.

SUPPLEMENTAL ORDER

In view of the foregoing, and on the basis of the record as a whole, the National Labor Relations Board affirms its Decision and Order of July 28, 1970, as amended below:

1. Insert the following as paragraph 1(a) of the Order and renumber the following paragraphs accordingly:

“(a) Refusing to bargain collectively in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Local 148-162, International Ladies’ Garment Workers’ Union, AFL-CIO, as the exclusive representative of the employees in the appropriate unit described below:

All production, maintenance, shipping, receiving and cutting department employees employed at Respondent’s North Bergen, New Jersey, plant, excluding office clerical employees, professional employees, salesmen, porters, guards, and all supervisors as defined in the Act.

2. Insert the following as paragraph 2(a) of the Order and renumber the following paragraphs accordingly:

“(a) Upon request, bargain collectively in good faith with the above-named Union as the exclusive representative of all employees in the appropriate unit, and embody in a signed agreement any understanding reached.”

3. Substitute the attached notice for the notice attached to the original Decision and Order.

APPENDIX

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

Following a trial in which the Company, the Union, and the General Counsel of the National Labor Relations Board participated and offered their evidence, it has been found that we violated the Act. We have been ordered to post this notice and to abide by what we say in this notice.

WE WILL bargain collectively in good faith, upon request, with Local 148-162, International Ladies’ Garment Workers’ Union, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment and other terms and conditions of employment and, if an understanding is reached, we will

sign a contract containing such understanding. The bargaining unit is:

All production, maintenance, shipping, receiving and cutting department employees employed in Respondent’s North Bergen plant, excluding office clerical employees, professional employees, salesmen, porters, guards, and all supervisors as defined in the Act.

WE WILL offer Joaquin Gutierrez (King) his former job with all his rights and any backpay due him.

WE WILL NOT ask our employees about their union membership, support, or sympathies.

WE WILL NOT warn employees that other employees have been discharged because of the Union or that employees may be discharged because of the Union or that we will take economic reprisals against them if the Union is successful in organizing the plant.

WE WILL NOT interfere with employees who may wish to contact a union representative on their own time outside the plant.

WE WILL NOT hold out the possibility of benefits for employees’ children in order to discourage employees from supporting the Union. All our employees are free to become or remain union members.

THE JAMES TEXTILE
CORP.
(Employer)

Dated _____ By _____ (Representative) (Title)

We will notify immediately the above-named individual, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

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, Federal Building, 16th Floor, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-2100.