

Beaver Bros. Baking Co., Inc., d/b/a American Beauty Baking Co. and American Bakery and Confectionery Workers International Union, AFL-CIO and Blair Kelly. Cases 6-CA-3455 and 6-CA-3518

July 20, 1972

SECOND SUPPLEMENTAL DECISION  
AND ORDER

BY MEMBERS FANNING, JENKINS, AND  
PENELLO

On May 23, 1968, the Board issued its Decision and Order finding that the Respondent, Beaver Brothers Baking Co., Inc., d/b/a American Beauty Baking Co., violated Section 8(a)(1), (3), and (5) of the Act.<sup>1</sup> While enforcement of the Board's order was pending in the United States Court of Appeals for the District of Columbia, the Board moved to withdraw the record in order to consider certain issues raised as a result of the Supreme Court's decision in *N.L.R.B. v. Gissel Packing Co.*<sup>2</sup> The court remanded the record for further proceedings in the light of the *Gissel* decision. In a Supplemental Decision and Order,<sup>3</sup> the Board reaffirmed its prior decision of May 23, 1968.<sup>4</sup>

The Board found that the Union had 42 clearly valid cards, 12 more than a majority, and therefore the Union represented an uncoerced majority of the Respondent's employees at all times material herein.

The Board also found that the Respondent violated Section 8(a)(1) by certain unlawful acts which were fully detailed by the Trial Examiner in his original Decision, attached to our original Decision and briefly summarized by the Board in the original Decision. The Board further found that these violations of the Act by the Respondent were substantial enough to support an inference of bad faith on the part of the Respondent in its refusal to recognize the Union as representative of an uncoerced majority of its employees in an appropriate unit. The Board, having found that the Union represented an uncoerced majority in an appropriate unit of Respondent's employees at all times material therein and that during the period of the Union's organizational effort Respondent engaged in unlawful conduct which conduct had for its purpose the impeding and coercion of employees in the exercises

of their statutory rights guaranteed by Section 7 of the Act, concluded that the Respondent's refusal to bargain collectively with the Union was in violation of Section 8(a)(5) and (1) of the Act.<sup>5</sup> The Board issued a bargaining order. The Board, in addition, found that the Respondent discriminatorily discharged three employees in violation of Section 8(a)(3) and (1) of the Act. However, the Board adopted the Trial Examiner's finding that four employees, Beatty, Hoar, Goss, and Coudriet, who were discharged by Respondent for flagrant misconduct during a strike, were rightfully discharged and that such misconduct barred their reinstatement. The Board ordered the Respondent to cease and desist from the unfair labor practices found and ordered the Respondent to bargain in good faith and to take certain affirmative action, which, in pertinent part, required the Respondent to reinstate three striking employees to their former or equivalent positions.

The Board in its first Supplemental Decision (182 NLRB 861), having taken into consideration the principles enunciated in the *Gissel* decision,<sup>6</sup> found that the bargaining order previously issued to remedy the Respondent's unfair labor practices was appropriate to remedy the violations of Section 8(a)(5) and (1) of the Act affirmed its previous order.

On January 27, 1971, the Circuit Court of Appeals, District of Columbia,<sup>7</sup> enforced all of the Board's order set forth in 171 NLRB 700, except as it related to the alleged violations of Section 8(a)(5) of the Act. It remanded to the Board for further consideration the following two issues:

(1) That the Board take additional evidence proffered by the Company and rebuttal evidence proffered by the other parties as to the alleged coercion in obtaining the authorization cards from the employees and make such additional findings on the issues that it deems appropriate. In admitting this evidence and making these findings the Board was to be guided by the principles announced in the *Gissel* decision;<sup>8</sup> and (2) the Board was to reconsider its findings as to employees Beatty, Hoar, Goss, and Coudriet in the light of decisions following *Thayer Co.*,<sup>9</sup> i.e., *Local 833, UAW-AFL-CIO*,<sup>10</sup> and *Kohler Co.*,<sup>11</sup> and make such additional findings as it deemed appropriate.

The court further ordered that the Board make such amendments to its original order (171 NLRB

<sup>1</sup> 171 NLRB 700

<sup>2</sup> 395 U.S. 575

<sup>3</sup> 182 NLRB 861

<sup>4</sup> 171 NLRB 700

<sup>5</sup> The Board found that the employees' strike following Respondent's refusal to bargain was, in light of Respondent's unlawful acts, an unfair labor practice strike from its inception

<sup>6</sup> *N.L.R.B. v. Gissel Packing Co.*, *supra*

<sup>7</sup> *American Beauty Baking Co.*, 171 NLRB 700, *enfd* in part *sub nom American Bakery & Confectionery Workers International Union v. N.L.R.B.*, 76 LRRM 2560, 64 LC § 11,460

<sup>8</sup> *N.L.R.B. v. Gissel Packing Co.*, *supra*

<sup>9</sup> 213 F.2d 748 (C.A. 1), cert. denied 348 U.S. 883

<sup>10</sup> 300 F.2d 699 (C.A. D.C.), cert. denied 370 U.S. 911

<sup>11</sup> 345 F.2d 748 (C.A. D.C.), cert. denied 382 U.S. 836

700) as it deems appropriate in view of the additional findings on remand.

The Board having accepted the court's remand issued an order on April 1, 1971, remanding the case to the Trial Examiner for further hearing in accordance with the court's remand as to the coercion of employees in the obtaining of authorization cards.

The Trial Examiner on October 29, 1971, after a hearing, issued his Supplemental Decision, attached hereto, in accord with the Board's remand order, finding that the Union had obtained 37 valid cards in a unit of 59 employees, which constituted 7 more than a required majority.<sup>12</sup> The Trial Examiner, in arriving at his finding of 37 valid cards, excluded the cards of 3 employees, Gerald Stein, Richard Burge, and Roland Stone, by striking from the record their previous testimony authenticating their cards for the reason that they did not appear at the hearing herein, so that Respondent was precluded from cross-examining them as to alleged coercion as required by the court's and Board's remand orders. The Trial Examiner further found that the cards of employees Moore and McConnaughey were invalid as having been obtained by coercion.

The General Counsel and the Respondent filed timely exceptions and supporting briefs.

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.<sup>13</sup>

The Board has considered the record and the Trial Examiner's Supplemental Decision in light of the exceptions and briefs and the court's remand and has decided to affirm the Trial Examiner's rulings,<sup>14</sup> findings, and conclusions and to adopt his recommended Order, except as modified herein.

The Trial Examiner found, and we agree, that the Union represented an uncoerced majority of Respondent's employees at the time of the Union's demand for recognition. The Trial Examiner further found that the cards of employees Moore and McConnaughey were obtained by coerced methods and consequently were invalid for the purpose of selecting a bargaining representative. The General Counsel excepts to this finding. We find merit in this exception.

### Moore

The Trial Examiner based his finding that the

<sup>12</sup> The Board in its initial decision did not count five cards allegedly obtained by coercive methods. However, the Board found that 42 cards had been validly obtained by the Union, thus, giving the Union a 12-card majority in a 59-employee unit.

<sup>13</sup> In view of the fact that the above-described second issue remanded by the court to the Board in this case concerns only Board action, it is

signature of this employee to an authorization card was obtained as a result of a "somewhat ambiguous" statement by a fellow employee, Condron. A close reading of Moore's testimony as Respondent's witness shows that Moore was approached by employees Condron and Paden and was asked to sign a card. At the time, as Moore testified, "they just asked me if I would sign the card, and says nobody will get hurt, there won't be no trouble, that was all that was said to me, that I remembered of." Subsequently, under questioning by the Trial Examiner, Moore testified as follows:

(Trial Examiner): At the time you signed the card, were you told only if you signed the card nothing would happen to you?

(Moore): Yes, well, no, not exactly that way, they just said sign the card, and there won't be anything happen to you.

(Trial Examiner): You mean because you signed the card, nothing happened to you?

(Moore): *And nobody would find out about it.* [Emphasis supplied.]

It appears from the record that Moore was disturbed during the union campaign and was reluctant to sign a card. However, it cannot be inferred from his testimony that he feared the Union because if he signed a card (or did not do so) the Union would certainly know about it. It can be just as readily inferred that what he feared was the Respondent's knowledge of his having signed a card, and that it is to this attitude that Condron's remarks were addressed. Thus, Condron's remarks were in the nature of reassurance rather than coercion. This latter inference is supported by record facts showing that Moore signed the card, attended the union meeting on September 21, 1965, when the strike vote was taken, joined the picket line for 2 hours, and then returned to work.

In view of all the circumstances we do not find employee Condron's alleged remarks to be coercive. Further, the record is devoid of any evidence that Condron was an agent of the Union so as to bind it in any way or that the Union ratified the statement.<sup>15</sup>

Accordingly, we conclude and find that Moore's card was a valid card and should be counted toward establishing the Union's majority.

### McConnaughey

This employee appeared as a witness at the first remand hearing before the Trial Examiner and

considered, *infra*

<sup>14</sup> We agree with the Trial Examiner's ruling that the issue as to alleged misrepresentation in obtaining cards was not raised in the court's remand order nor in our order of remand to the Trial Examiner.

<sup>15</sup> *Jas. H. Matthews & Co.*, 354 F.2d 432 (C.A. 8), *Bronze Alloys Co.*, 120 NLRB 682.

identified the card he signed. The Respondent contended at the same hearing that McConnaughey was coerced in signing a card. The Trial Examiner in his first Supplemental Decision pursuant to the Board's initial remand made the following finding, which was adopted by the Board:

Respondent claims that Clinton McConnaughey was also coerced into signing a card. The only evidence produced at the prior hearing bearing on this contention consisted of Beaver's [Company President] testimony to the effect that McConnaughey informed him he was being harrassed to sign a card, and that he, Beaver, assured him it was up to him to decide whether or not to sign. It appears that McConnaughey thereafter signed a card despite Beaver's assurances. In the absence of proof of any specific threats against McConnaughey, and in view of the assurances given him by Beaver, which would have neutralized such threats, if any, I find Respondent has not established by a preponderance of the evidence that he was coerced into signing his card. [171 NLRB at 723.]

McConnaughey, although subpoenaed, was unable to appear at the instant hearing because of illness. The parties stipulated that an affidavit by McConnaughey, previously given to Respondent, be admitted in evidence as past recollection recorded. His affidavit states that a day or two before the election he was approached by another employee, Seth Smith, and asked to sign a card. He then states that another employee, John Paden, told him that anyone who did not sign a card would be out of a job when the Union came in.<sup>16</sup> Subsequently, on the night of September 21, 1965, McConnaughey states he was walking to work and two other employees, Lester Bobb and Bud Gilbert picked him up and gave him a ride to work and during the ride the two employees talked to him about signing a card. McConnaughey did not remember which of the two employees at the time said to him "King you might as well sign a card, practically everybody else signed, it's no use, you might as well sign too." McConnaughey then states that on September 22, he rode to work with employee Goss who asked him to sign a card and that although Goss said nothing to him he signed a card based upon what he had previously heard about losing his job if the Union came in and about the fact that everyone else had signed a card.

In all the circumstances, we cannot find that the alleged statement made by employee Paden<sup>17</sup> was

the decisive factor in causing McConnaughey to sign a card,<sup>18</sup> particularly in view of the assurance given him by the Company's president as found by the Trial Examiner. Accordingly, we conclude and find, contrary to the Trial Examiner, that McConnaughey's card was a valid authorization card and must be counted toward the Union's majority.

Accordingly, we find and conclude that Moore's and McConnaughey's authorization cards were valid authorization cards. Therefore the Union had 39 valid authorization cards in an appropriate unit of 59 employees.

#### REMEDY

The Board in its initial decision of May 23, 1968 (171 NLRB 700), found that the American Bakery and Confectionery Workers International Union, AFL-CIO, the Charging Party, represented an uncoerced majority in an appropriate unit of Respondent's employees, and was entitled to recognition as their exclusive collective-bargaining representative; and that, in the absence of any convincing evidence that Respondent had any reasonable basis upon which it could validly assert a good-faith doubt, the Respondent's refusal to recognize the Union was in violation of Section 8(a)(5) of the Act. Accordingly, we issued a bargaining order. In our first Supplemental Decision,<sup>19</sup> we reconsidered the case in the light of the standards set forth in the Supreme Court's opinion in *Gissel*. After careful reexamination of all the facts we concluded that a bargaining order was warranted. Therefore, we reaffirmed, for the reasons stated in our Supplemental Decision, the bargaining order previously issued to remedy the Respondent's unfair labor practices. Thereafter, the court affirmed all portions of the Board's decision with the exception of that part as it relates to our finding of a violation of Section 8(a)(5) of the Act, and remanded in part for our consideration the Section 8(a)(5) violation.

Pursuant to the court's remand we remanded for further hearing before a Trial Examiner the issue as to whether the authorization cards obtained by the Union were coercively obtained. The Trial Examiner having duly rendered his Supplemental Decision and made his recommended order finding that the Union obtained a majority of valid cards and Respondent's refusal to recognize it as the exclusive bargaining representative of its employees in the appropriate unit violated Section 8(a)(5) and (1) of the Act. We

<sup>16</sup> The affidavit is not clear as to when Paden is alleged to have made this statement.

<sup>17</sup> There is no evidence in the record showing that Paden was an agent of the Union or that the Union ratified his allegations *Jas H Matthews & Co., supra, Bronze Alloys Co., supra*

<sup>18</sup> The affiant's other alleged reason for signing the card was that he was

told that practically everyone else had signed a card, cannot be construed as a misrepresentation since the record discloses that at the time he signed the statement was in fact true. Further, it is to be noted that McConnaughey signed the card the day after the strike began

<sup>19</sup> 182 NLRB 861

adopt the Trial Examiner's findings, except as modified above. We shall therefore reaffirm our previous order that the Respondent bargain with the Union as the collective-bargaining representative of its employees.

The court also remanded the case for the purpose of determining whether certain employees should be ordered reinstated under the doctrine of the *Thayer* decision.<sup>20</sup> It further noted its decision in *Local 833, UAW-AFL-CIO*,<sup>21</sup> and *Kohler Co.*<sup>22</sup> These decisions, in substance, provide that where an employer who has committed unfair labor practices discharges striking employees for unprotected acts of misconduct, the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the striking employees' misconduct in determining whether reinstatement would effectuate the policies of the Act.

The record shows that the alleged unprotected activities for which the four strikers were discharged fall into the following categories; individual acts of assault, threats, destruction of property, and other misconduct. The record also shows that all of the alleged misconduct occurred in a context of flagrant unfair labor practices on the part of the Respondent. We shall determine, therefore, whether or not the unprotected conduct of the four discharged strikers, when weighed against Respondent's flagrant unfair labor practices, was sufficient to preclude our ordering their reinstatement. In this regard, the Trial Examiner set forth in his Decision, attached to the Board's initial Decision, substantially all of the incidents relied upon by Respondent in discharging the four employees, as well as the evidence pertaining thereto. Accordingly, we need not recount all of these numerous incidents and the evidence related thereto. We shall briefly set forth such misconduct and in doing so shall weigh the same against the Respondent's unfair labor practices and determine whether such misconduct outweighs Respondent's unfair labor practices. After such a careful "balancing" we shall determine whether or not the policies of the Act would best be effectuated by ordering reinstatement for all or any one of the four individual strikers. In considering the strike misconduct of these four employees we rely upon the findings of the Trial Examiner which we have previously adopted.

1. *John Beatty*: This employee was a leading exponent of the Union's organizational campaign. On or about September 25 or 26, 1965, Beatty warned nonstriking employee Holdridge that his life was in danger and 2 days later Beatty threw a rock into the truck being driven by Holdridge which

broke a window next to Holdridge's face. On September 30, Beatty halted nonstriking office employee Roslyn Norwood's car, in which she was carrying another nonstriking employee to work, at the bakery driveway. After allowing Norwood to proceed, Beatty marred her car by scraping it with a rock. Beatty, on October 1, threw a rock at a company truck being driven by a nonstriking employee and smashed the truck's mirror. The following day Beatty threw a stone at a company official's car while the official was transporting two nonstriking employees to work, breaking the right front window. Beatty was involved in further incidents of misconduct, such as removing chrome with a screwdriver from a nonstriking employee's car, and pulling out supports from a conveyor used for unloading flour at the company plant.

2. *Charles Hoar*: This employee on September 30, 1965, while engaged in the pastime of throwing rocks, threw one that hit the Respondent's Vice President Dilliplane on the thigh necessitating hospitalization for a period of 5 days as a precautionary measure because of Dilliplane's preexisting heart condition. On September 22, Hoar threatened nonstriking employee Shore, who was attempting to pick up bakery products from waiting trucks in another firm's parking lot. With the help of other striking employees Hoar succeeded in preventing the pickup and threatened to break things up one way or another. On October 8, Hoar interfered with a tractor-trailer being driven by a nonstriking employee to the extent that the tractor-trailer was disabled and had to be towed away.

3. *Gerald Goss*: On September 26 this employee, accompanied by two other striking employees, intercepted a company truck driven by a company supervisor accompanied by two nonstriking employees. The company truck had gone to pick up a load of Pepperidge Farm products from one of the latter's trucks which had parked in the parking lot of a local inn. Goss and the other strikers forced the supervisor and the two nonstriking employees to leave without the bakery products and threw stones and hit the company truck. Goss then proceeded to push the unloaded products over a bank. On October 22, Goss was seen throwing rocks at a Swift & Co. truck delivering lard to the bakery. Goss admitted throwing tacks and roofing nails on the Company's parking lot.

4. *Allen Coudriet*: This employee was a probationary employee who had been employed for 1 week prior to the strike and whose probationary period was 90 days. On October 1, 1965, Coudriet stoned

<sup>20</sup> *NLRB v Thayer Co.*, 213 F 2d 748 (C A 1), cert denied 348 U S 883

<sup>21</sup> *Local 833, UAW-AFL-CIO v NLRB*, 300 F 2d 699 (C A D C),

cert denied 370 U S 911

<sup>22</sup> *Kohler Co. v. NLRB*, 345 F 2d 748 (C A D C), cert denied 382 U.S. 836

two of the Company's trucks, driven by nonstriking employees as they were leaving the bakery premises. He dared one of the drivers to get out of his truck and asserted that he, Coudriet, would take care of him right there and then. As a result of Coudriet's rock throwing, the left side window and windshield of one of the trucks were broken thus endangering the nonstriking truckdriver.

We have carefully considered each of the above-described incidents of flagrant and deliberate assaults upon a company official and nonstriking employees, the destruction of company and other property, and the threats to nonstrikers, in conjunction with the Respondent's unfair labor practices. Also, as directed by the court's remand, we have carefully weighed one against the other. However, here, unlike other aspects of misconduct which we considered in our initial decision as to three other striking employees who had been discharged by Respondent,<sup>23</sup> we conclude that the foregoing acts of violence, threats of violence, and deliberate destruction of property engaged in by the above-named strikers outweigh the Respondent's unfair labor practices. While we realize that some of these acts of misconduct by the above-named strikers may have been provoked by the Respondent's flagrant unfair labor practices, the injuring of an official, the wanton destruction of property, and the threats to nonstriking employees and others were also, in part, the result of personal grievances and vindictiveness, a cause for misconduct which we cannot condone. This conduct, by the aforementioned strikers, has in our opinion rendered questionable the ability and fitness of these employees for future satisfactory employment at the Respondent's bakery. We are of the opinion that regardless of the advantages which occurred to the Respondent as a result of its unfair labor practices, they are more than offset by the potential harm to collective bargaining which would follow from our condonation of this type of violent misconduct and an order of reinstatement for these employees. Therefore, after balancing all the relevant factors, we find that it would not effectuate the policies of the Act to reinstate these strikers who engaged in the above-described acts of violence, destruction of property, and actual threats of physical harm.<sup>24</sup> Accordingly, having considered all the foregoing factors in the light of the decisions we were directed to follow by the court, we affirm the findings made in our prior decision of May 23, 1968 (171 NLRB 700), wherein we found that employees Beatty, Hoar, Goss, and Coudriet were discharged for cause.

#### CONCLUSIONS OF LAW

We reaffirm our previous conclusion of law that Respondent's refusal to recognize and bargain with

the Union based upon its majority status as exclusive bargaining representative of its employees in the unit found appropriate constituted a violation of Section 8(a)(5) and (1) of the Act.

#### SECOND SUPPLEMENTAL ORDER

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board adopts as its order the recommended Order of the Trial Examiner in his Supplemental Decision, and we thereby reaffirm our original order, that the Respondent, American Beauty Baking Co., Inc., d/b/a Beaver Bros. Baking Co., Lewiston, Pennsylvania, its officers, agents, successors, and assigns, shall cease and desist as previously ordered and take the affirmative action requiring Respondent to bargain with the Union, American Bakery and Confectionery Workers International Union, AFL-CIO, as collective-bargaining representative of its employees in the appropriate unit previously found together with such other affirmative action ordered by the Board.

<sup>23</sup> Floyd Lester, Blair Kelly, Richard Burge

<sup>24</sup> Cf. *Kohler Co.*, 148 NLRB 1434, 1452

#### TRIAL EXAMINER'S SUPPLEMENTAL DECISION

##### STATEMENT OF THE CASE

WILLIAM W. KAPEL, Trial Examiner: This supplemental proceeding came on to be heard on June 2, 3, 22, and 23 and August 10, 1971, pursuant to an order of the United States Court of Appeals for the District of Columbia dated January 27, 1971, remanding the within proceeding to the Board, and stating, *inter alia*:

... that the Board take additional evidence proffered by the company and rebuttal evidence proffered by the other parties on the alleged coercion in obtaining the authorization cards from the employees and make such additional findings on this issue it deems appropriate. In admitting this evidence and making these findings, the Board will be guided by the principles announced in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 604-609 (1969).

In accord therewith, the Board on April 1, 1971, ordered that the record in the within proceeding be reopened, and that a further hearing consistent with the court's remand be held before a Trial Examiner for the purpose of receiving evidence proffered by the Company and rebuttal evidence proffered by the other parties on the issue of alleged coercion in the obtaining of union authorization cards from the employees. On May 12, 1971, the Regional Director for Region 6 directed that a further hearing be

held on May 17, 1971, which was thereafter rescheduled to June 2, 1971.<sup>1</sup>

Counsel for the General Counsel and Respondent appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses and to submit documentary evidence. Briefs received from the General Counsel and Respondent have been duly considered. Upon the entire record of the remanded proceeding herein, the briefs, and my observation of the testimonial demeanor of the witnesses, I make the following:

#### SUPPLEMENTAL FINDINGS OF FACT

##### I. BACKGROUND AND HISTORY OF THE PROCEEDING: THE ISSUE INVOLVED

On August 11, 1966, the Trial Examiner issued his original decision in which, *inter alia*, he recommended the dismissal of an 8(a)(5) violation based on the failure of the General Counsel to prove that the Union had obtained a majority of properly authenticated authorization cards. Following the filing of exceptions, the Board on December 16, 1966, ordered the record herein to be reopened and a further hearing held before the Trial Examiner for the sole purpose of adducing further evidence bearing on the authenticity of purported employees' signatures on certain union authorization cards that were offered and admitted at the prior hearing. In the hearing held on the remand on March 28, 1967, the Trial Examiner over Respondent's objections ruled that its cross-examination of the 29 employee-witnesses who testified concerning the authentication of the signatures on their union cards was restricted by the terms of the Board's remand order solely to the authentication of the card signatures. A supplemental decision was thereafter issued in which it was found that although the Union obtained a properly authenticated majority of cards, its coercive tactics were sufficiently widespread to taint and invalidate all of the cards. The prior recommended dismissal of the 8(a)(5) violation was, therefore, reaffirmed on the ground that it had not been established that the Union had obtained an uncoerced majority of cards. Following the filing of exceptions by the General Counsel, the Union, and Respondent, the Board issued a decision<sup>2</sup> on May 23, 1968, in which it reversed the Trial Examiner's recommended dismissal of the 8(a)(5) violations and found insofar as pertinent herein that the Union had obtained an uncoerced majority of union authorization cards, thereby obligating the Respondent to recognize and bargain with the Union, and its refusal to do so violated Section 8(a)(5) of the Act. Although the Respondent in its exceptions specifically raised the ruling of the Trial Examiner with regard to the extent of its cross-examination of witnesses, the Board made no reference in

its decision thereto, thereby *sub silentio* impliedly affirming his ruling. While enforcement of the Board's Order was pending in the United States Court of Appeals for the District of Columbia, the Board moved to withdraw the record in order to consider certain issues raised by the Supreme Court's decision in *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575. The court then remanded the record for further proceedings in the light of the *Gissel* case. By a Supplemental Decision and Order, 182 NLRB No. 122, the Board reaffirmed its prior decision of May 23, 1968.

As indicated above, the court of appeals remanded the proceeding for the purpose of affording the parties an opportunity to proffer additional evidence as to alleged coercion in obtaining the cards from the employees who testified at the prior remanded hearing but whose cross-examination was limited to authentication of their card signatures in conformance with the Board's first remand. Accordingly, the only issue involved herein relates to said alleged coercion.

It appears that as a result of the Board's first remand the signatures of 32 employees were authenticated and their cards validated for the purpose of designating an exclusive bargaining representative. Twenty-nine of these employees appeared at the remanded hearing herein and testified. Their cross-examination was limited as related above. The three other employees were in Vietnam serving in the Armed Forces. The signatures of their cards were authenticated by a handwriting expert. The General Counsel agreed to produce the 29 employees whose cross-examination was limited, but declined to produce the 3 employees whose absence from the country had precluded them from testifying at the remanded hearing. Respondent, thereupon, moved to compel the General Counsel to produce them. The motion was denied, but Respondent was granted permission to produce them as its own witnesses with the right to adduce their testimony by way of cross-examination after first allowing them to relate the circumstances surrounding the signing of their cards.<sup>3</sup> The General Counsel was unable to locate and/or produce 3 of the 29 employees whose cross-examination had previously been limited.<sup>4</sup> Ruling on Respondent's motion to strike their testimony was reserved at the hearing. The motion is hereby granted and their testimony authenticating their card signatures is stricken from the record and their cards invalidated. Respondent subpoenaed the three employees who were in Vietnam at the time of the first remand hearing. Two of them, Alan Coudriet, and Kenneth Steward appeared and testified. The third one, Kenneth Stine, failed to appear, but the parties stipulated concerning his testimony as related above.

<sup>1</sup> The last of the available witnesses were heard on August 10, 1971. The hearing was then adjourned *sine die* pending arrangements between counsel concerning the testimony of two prospective witnesses, Clinton McConnaughey, who was ill, and Kenneth Stine, who failed to honor a subpoena. Pursuant to stipulation of the parties, they agreed that Clinton McConnaughey, if called to testify, would assert an inability to recall the circumstances attending the signing of his union card, and that his affidavit of December 15, 1965, be admitted in evidence as past recollection recorded, that

Kenneth Stine, if called to testify, would assert his inability to recall the circumstances attending the signing of his union card, and that the record should be closed in the within matter. The aforesaid stipulation is hereby admitted in evidence as Joint Exh 1. McConnaughey's affidavit is admitted as Resp Exh 50, and the record herein is hereby closed.

<sup>2</sup> 171 NLRB No 98

<sup>3</sup> See *Bryant Chucking Grinder Company*, 160 NLRB 1526, 1527, fn 2

<sup>4</sup> They are Gerald Stein, Richard Burge, and Roland Stone

II. THE SUPPLEMENTAL EVIDENCE ADDUCED AT THE  
HEARING HEREIN

Twenty-two of the 29 witnesses<sup>5</sup> who appeared and testified or whose testimony was stipulated were unable to recall the circumstances surrounding the signing of their cards claiming that the lapse of time had dulled their memory. Their testimony did not reveal any coercion in the signing of their cards. Many of them also testified at variance with their prehearing affidavits regarding where or when they signed their cards or who solicited them. These affidavits, however, were taken about 5 years before and had not been seen by the affiants since then. I do not regard the variances as significantly bearing on the issue of coercion.

Respondent contends that Donald Moore, Clinton McConnaughey, and Ronald Pandel were coerced. Moore testified that employees William Condron and John Paden solicited him to sign a card, that Condron told him nobody would get hurt and there would not be any trouble, and that he thereupon signed the card and gave it to Condron. A few hours later employee John Beatty, unaware of the fact that Moore had previously signed the card, told him he would lose his job if he didn't sign the card. I find that Condron's remark to Moore, while somewhat ambiguous, was nevertheless couched in terms which could reasonably be construed as intimidating and coercive if he declined to sign a card. I conclude that his card was obtained by coercive tactics and therefore is invalid.

Pursuant to stipulation of the parties, Clinton McConnaughey's affidavit (Resp. Exh. 50) was admitted in evidence as past recollection recorded in lieu of appearing personally and testifying. His affidavit specifically states that a day or two before the strike, John Paden told him that anyone who did not sign a card would be out of a job when the Union came in. A few days later when Gerald Goss asked him to sign a card he did so, based on what had previously been said to him about losing his job. I find that his card was also coercively obtained and therefore invalid for the purpose of designating a bargaining representative.

Ronald Pandel testified that, around the middle of September when he signed his card, he knew of other people who were threatened but that he was not. His affidavit (G.C. Exh. 23) admitted as past recollection recorded confirms his testimony regarding threats, and states further that he signed of his own free will, and that after signing he took a few blank cards and thereafter solicited employee Richard Grove to sign one. His other affidavit (Resp. Exh. 44), also admitted in evidence without objection as past recollection recorded, states that there was a lot of talk that anyone who did not sign a card would be out of work when the Union got in, and that this statement was made to several employees. He also testified that before he signed his card John Beatty told him the

cards were to get the Board to take a vote. Although it appears that some unidentified employees were threatened,<sup>6</sup> the evidence establishes that Paden was not coerced, and I so find.

Respondent also contends that the cards of John Laub, Ronald Pandel, Ronald North, Robert Lukens, and Ray Farrell were obtained by misrepresentations and, therefore, invalidated for the purpose of designating a bargaining agent. Both the court's and the Board's remands specifically refer only to adducing evidence with respect to coercion. There is no reference directly or impliedly with respect to adducing evidence of misrepresentation in the obtaining of cards. On the basis of the remand orders, I find that evidence pertaining to misrepresentation is irrelevant to the issue herein. However, even assuming the relevancy of such evidence under the remand orders, I find that it would be superfluous with regard to Laub's card inasmuch as it has been found to be invalid because coercively obtained.

With respect to Ronald Pandel's card, it appears Beatty told him at the union meeting when cards were being solicited that the cards were to get the Board to take a vote. In response to Respondent's question on cross-examination at a hearing herein as to whether it wasn't a fact that at the meeting Beatty stated the purpose of signing cards was only to get an election, he replied, "As far as I remember." Later on in his testimony he stated that he was not sure whether the word "only" was used. Neither of his prehearing affidavits (G.C. Exh. 23 or Resp. Exh. 44) makes any reference to what was said to him at the time he signed his card. I find the question put by Respondent was framed in such terms as to evoke an affirmative answer. Furthermore, no other employee of the many who attended the meeting and testified stated that the word "only" was used by Beatty in addressing the employees. The card is a single-purpose one designating the Union as bargaining representative with authority to file a petition for bargaining relative to union security between the signatory and the Company. In *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, the Court upheld the *Cumberland Shoe* doctrine<sup>7</sup> that evidence of intention in signing an unambiguous card is not pertinent in the absence of evidence that the signing employee was clearly told that the sole purpose of the card was to bring about an election to determine the status of the Union. The cards herein were unambiguous and were used to authorize the Union to represent the employees in collective bargaining. Nor does the record persuasively establish that Pandel was clearly told the cards were to be used solely for an election. Furthermore, as stated by the Board in *Marie Phillips, Inc.*, 178 NLRB 340: "Where the objective facts, as evidenced by events contemporaneous with the signing, clearly demonstrate that the misrepresentation was the decisive factor in causing an employee to sign a card, we shall not count such card in determining a union's majority." No

<sup>5</sup> These included

Donald Bartlett  
Robert Beatty  
Donald Brown  
William Condron  
John Davies  
Trevor Goss  
David Haines

Glen Conover  
William Pandel  
Floyd Semons  
Christ Yoder  
John Young  
Jerry Zimmerman  
George Lukens

Ronald Heister  
Charles Hoar  
Samuel Kelley  
Ronald North

Robert Lukens  
Sheldon Romig  
Kenneth Stine  
Alan E. Coudriet

<sup>6</sup> In the first decision of the Trial Examiner, five cards were invalidated because coercively obtained

<sup>7</sup> 144 NLRB 1268

such evidence was produced herein. In these circumstances, I conclude that Respondent has failed to prove the alleged misrepresentation.<sup>8</sup> Moreover, even if misrepresentations were found in the case of Pandel it would not affect the result, as indicated *infra*.

Ronald North signed a card and also picketed for a while during the strike. He testified he was unable to recall what was said to him at the time he signed the card. His prehearing affidavit (taken by Respondent) states that he was told by John Beatty that most of the men had signed cards and others were going to sign, and that he believed he was signing to get a vote. The Board has held "where the only indication of reliance [on a misrepresentation as to how many employees have already signed] is a signer's subsequent testimony as to his subjective state of mind when signing the card, such showing is insufficient to invalidate the card."<sup>9</sup> The record is bare of any evidence that North relied on the alleged misrepresentation.<sup>10</sup> I, accordingly, conclude that North's card can properly be counted in determining the Union's majority status.

The only evidence bearing on the question of misrepresentation concerning Robert Lukens appears in his prehearing affidavit (Resp. Exh. 49) obtained by Respondent, which was admitted as past recollection recorded. It states that Charles Hoar asked him to sign a card, stating that the purpose of the card was to get an election. However, when the Union called the strike, Beatty told him it was for the purpose of getting the Union in and he picketed for 3 or 4 weeks. Based on the *Cumberland Shoe* doctrine, *supra*, relative to the type of card used herein, I find no misrepresentation or other ground sufficient to invalidate his card.

Ray Farrell testified that Seff Smith asked him to sign a card to try and get the Union in. After reading his prehearing affidavit he stated Smith told him that about 90 percent had signed. I conclude as explicated above that there was no misrepresentation proven which would invalidate his card.

### III. CONCLUSIONS

As found *supra*, the cards of Moore and McConnaughey were coercively obtained and consequently invalid for the purpose of selecting a bargaining representative. The Board previously found that even excluding the cards found by the Trial Examiner to have been obtained by coercion, the Union had 42 valid cards, 12 more than a majority in the 59-employee unit. Excluding the coerced cards of Moore and McConnaughey, and the cards of Gerald Stein, Richard Burge, and Roland Stone, whose testimony authenticating their cards was stricken because Respondent was precluded from cross-examining them, there are 37 valid cards designating the Union as

<sup>8</sup> See also *Gissel Packing Co., Inc.*, *supra* at 608, where the Court makes the observation "[T]hat employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)(1)." (Citation omitted.)

<sup>9</sup> *Marie Phillips, Inc.*, *supra* at 340. The Board also held (p. 340), "We continue to believe that a showing, without more of a misrepresentation as

bargaining representative, 7 more than a majority. Assuming that the remand herein included the taking of evidence of misrepresentation with respect to the validity of the cards of the employees involved, and assuming, contrary to the findings made herein, that the five employees named by Respondent signed cards because of misrepresentations made to, and relied on by, them, the Union still would have a majority of two cards. In the light of the prior Board decisions, and its rationale in issuing those decisions, in this proceeding, I am constrained to find that the Union obtained a majority of valid cards and Respondent's refusal to recognize it as the exclusive bargaining representative of its employees in the appropriate unit violated Section 8(a)(5) of the Act.

Respondent contends that the lapse of time before the card signatories herein were cross-examined precluded the ability of many of them to recall the card signing circumstances thereby materially impairing its constitutional right to examine those employees. I find no merit in this contention. The record contains no evidence to indicate that had the card signatories been cross-examined in the Board's first remanded hearing in 1967, they either would have had a better recollection of the signing of their cards in 1965, or their cross-examination would have revealed testimony more favorable to Respondent.

Respondent also asserts that even if it were found that the Union obtained majority status at a material time herein, the passage of 6 years' time and the great employee turnover would make a bargaining order unjust. Respondent, however, does not cite any law in support of its positions. I find no merit in these contentions. See *Bryant Chucking Grinder Company v. N.L.R.B.*, 389 F.2d 565, 568 (C.A. 2), affg. 160 NLRB 1526; and *Horace Simmons d/b/a Vaca Valley Bus Lines*, 179 NLRB No. 107.

On the basis of the foregoing findings, I make the following:

### CONCLUSION OF LAW

Respondent's refusal to recognize and bargain with the Union, based on its majority status, as the exclusive bargaining representative of its employees in the unit found appropriate constituted a violation of Section 8(a)(5) of the Act.

### RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is recommended that Respondent, its officers, agents, successors, and assigns, be required to cease and desist and take affirmative action as heretofore ordered by the Board.

to the number of others who have signed is insufficient to invalidate a clear and unequivocal designation card signed by an employee." Nor will the Board probe into the purely subjective intent of card signers to invalidate their otherwise clear designation cards. *Levi Strauss & Co.*, 172 NLRB No. 57.

<sup>10</sup> Nor is there any evidence to support the claim that the alleged misrepresentation was in fact a misrepresentation.