

Bill's Institutional Commissary Corporation and General Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local 270, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Ind Case 15-CA-3239

December 27, 1972

SECOND SUPPLEMENTAL DECISION
AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
FANNING AND JENKINS

On May 23, 1972, Administrative Law Judge¹ Thomas A. Ricci issued the attached Second Supplemental Decision² in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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 attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

CHAIRMAN MILLER, concurring separately

I concur in the result herein on the basis of the law of the case, and primarily because I believe it is time to end this fruitless litigation.

Over 5 years ago, on September 29, 1967, an election was held in which the Union received a majority of the valid votes cast.

We are here trying to evaluate the results of a hearing held in March 1972, pursuant to an October 1971 order of remand by the Fifth Circuit Court of Appeals, in which the employees were testifying as to whether they knew—in 1967—that certain wage rates set forth in a preelection union flyer were taken from a union contract in New York or whether they might have believed they were from a contract in the New Orleans area. We are supposedly enlightened by testimony by one employee that he has no recollection of the union letter at all, and by two employees that no one told them where the wage rates applied. And so, the Administrative Law Judge, in some

doubt about just what it was the court wanted determined, concluded that three votes are apparently questionable in the view of the court, the election is under a cloud, the Respondent's refusal to bargain during these 5 years was justified, and the complaint should be dismissed.

And so, a work force which thought it was effectively choosing a bargaining representative in a secret-ballot election 5 years ago is now told that it didn't, and their freedom of choice in the matter is supposed to have been vindicated. I fear that instead the practical result is that freedom of choice has been frustrated by a highly technical application of a principle which ought to be applied only in much more aggravated cases than this one.

This kind of frustration by delay and belabored examination of minutiae seems to be what too frequently results when we—or, as here, the courts—insist too upon a purist's view of what parties may be permitted to say in election campaigns.

Particularly in the face of recent preliminary empirical studies which appear to show that "for the great bulk of employees the campaign may not be significant in altering an initial predisposition to vote for or against union representation,"⁴ this kind of a belated microscopic examination of alleged campaign impurities would seem to me to have little to do with effective and practical administration of the Act.

But such is the law of this case, and to prolong the litigation further in yet another lengthy attempt to persuade the court of the futility of this kind of exercise would also add little to an effectuation of the Act's purpose so far as these long-waiting parties are concerned.

And so, I reluctantly concur.

¹ The title of Trial Examiner was changed to Administrative Law Judge effective August 19, 1972.

² On June 14, 1968, the Board issued its original Decision and Order herein (171 NLRB 1427) finding that Respondent had violated Sec. 8(a)(5) of the Act. Thereafter, on November 10, 1969, the United States Court of Appeals for the Fifth Circuit issued its opinion (418 F.2d 405) remanding the case to the Board. On November 17, 1970, the Board issued its Supplemental Decision and Order (186 NLRB 597) again finding and concluding that Respondent had violated Sec. 8(a)(5) of the Act. Thereafter, on October 26, 1971, the court of appeals again remanded the case to the Board for further proceedings in conformity with the court's remand (449 F.2d 694).

³ We find it unnecessary to pass on the Administrative Law Judge's discussion regarding the procedural question as to the burden of proof. Rather, in agreement with the Administrative Law Judge, we are of the opinion that the principle of law applied by the Administrative Law Judge conforms to the law of the case under the court of appeals remand.

⁴ The National Labor Relations Board Voting Study: A Preliminary Report. The Journal of Legal Studies, published by the University of Chicago Law School, Volume I (2) June 1972, 233 p. 241.

SECOND SUPPLEMENTAL DECISION

THOMAS A. RICCI, Trial Examiner. This is a refusal-to-bargain case, in which, following a Board election and an

admitted refusal by the Respondent to recognize the certified Union, the Board found a violation of Section 8(a)(5) of the Act and ordered the Company to bargain. In enforcement proceedings, the United States Circuit Court of Appeals for the Fifth Circuit denied enforcement and remanded the case for hearing. Following a remand hearing, the Board reaffirmed its unfair labor practice finding and again ordered the Respondent to bargain. 186 NLRB 597. Again in enforcement proceedings the court remanded the case for taking further testimony. 449 F.2d 694. The hearing was held at New Orleans, Louisiana, on March 23, 1972, all parties were represented, and the General Counsel and the Respondent thereafter filed briefs with the Trial Examiner.¹

FINDINGS AND RECOMMENDATIONS

The Issue

This entire proceeding, now spanning a 5-year period, arose from, and at every stage reverted back to, a letter sent the employees by the Union a week before the election. Ten names were on the eligibility list, the ballot of one man—Ford—was challenged and never opened, another man—Le Doux—did not present himself to vote. Of the remaining eight, six cast votes for the Union and two against. The letter informed the employees of the exact wage scale appearing in a contract then in effect between the Union and another employer engaged in the same kind of business, and added this was “what you should be getting”, “this could be yours”. The letter did not specify that the employer whose contract wages were set out in the letter operated in the New York City area, and not in New Orleans.

The Respondent objected to the results of the election in the original representation proceeding on the ground that the letter misled the employees as to what a vote in favor of the Union would mean, it reiterated the same position to the Board in the unfair labor practice proceeding and now presses it before the court. With knowledge that the letter in question referred to New York City wages and not New Orleans conditions, both the Regional Director and the Board found nothing improper in it as union campaign literature.

The court took a different view. The language of the two remand opinions can be read in more than one way, with the result that there is an ambiguity as to what the issue to be decided now is. More important, it is not clear what the burden of proof is, and where it lies. And perhaps the illusiveness of the question to be decided, and the proper method for resolving it, is inevitable in the special circumstances of the case as it now stands. What the Respondent wanted, and was denied until it reached the circuit court, was a hearing on its objections. But this is an unfair labor practice proceeding. In a substantial sense, the hearing which the remand calls for is in the nature of a supplemental representation case hearing. Viewed in this light, the burden of proof rests upon the party raising the objections to the results of the election, here the Respondent. In the context of an unfair labor practice case, the

remand could be viewed as an opportunity for either the Respondent to further an affirmative defense, with the burden of proof still resting upon it, or for the General Counsel to advance his burden to establish the merits of the complaint.

The problem is compounded by the nature of the substantive question itself—did distribution of the Union's letter improperly interfere with the election? The Board overruled the objection with knowledge that the wages there set out applied to another part of the country. This means that, in the Board's view, even assuming the employees believed the wages were being paid by somebody in New Orleans, the letter was not reason for setting the election aside. In contrast, the remand several times refers to the letter as “misrepresentation,” indeed as “prima facie misrepresentation.” And the Court phrased the purpose of the remand as “to determine the effect to which the Union's misrepresentation affected the election,” to inquire into “the impact of the misrepresentation.” Does this mean investigation in the representation case sense, that unless the Company proves affirmatively the employees were in fact misled the results of the election stand? Counsel for the Respondent reads the remand order differently, at the start of the hearing, he passed, arguing it was up to the General Counsel to establish anew the validity of the Board's certificate. His position was not entirely without merit, for, if the letter produced by the Company in support of its objections is “prima facie misrepresentation,” it means the burden, whatever it is, shifts to the other side.

In any event, regardless of where the burden of proof may lie, the ultimate objective of the remand hearing remains unclear. If all the eligible employees knew it was New York wages the Union showed them, it seems the court would enforce the Board's bargaining order now. But is it a necessary prerequisite, before the court will deem the election results valid, that it be shown affirmatively that all the employees were in fact correctly informed? If it should develop that a number of employees were never told the truth of the matter, would the court set the election aside without more? Again, assuming ignorance by the employees, need it be shown that the “misrepresentation” influenced them to vote for the Union—the “impact” idea—before the certificate is rejected?

The Question as Viewed by the Parties, and the Facts

Regardless of these considerations, the General Counsel and the Respondent now are in agreement as to the purpose of the court's second remand and as to the pinpointed question which will finally decide this one case. Testimony at the first hearing on remand showed that some employees whose votes were counted in the election were told, at a preelection union meeting, that the wages detailed in the letter were in fact being paid in the New York City area. It is now stipulated that, of the eight employees who cast valid ballots, four attended this meeting. Did the other four also know, before voting, the

¹ A motion by the Respondent, unopposed to correct a typographical error in the transcript is hereby granted.

truth of the matter? On this specific question, the court said, "It is of critical importance to know if the workers not present at this meeting had otherwise learned the truth concerning the contents of the letter." It said the issue is "independent knowledge on the part of the non-attending employees."

In his brief the General Counsel says, "The sole issue herein is whether four employees who were eligible voters in the election in this case had independent knowledge of the fact that a wage scale attached to a union letter to employees was from a contract covering employees in effect in an area other than in New Orleans." The Respondent in substance takes the same position. I see no reason for not taking the same view as to what the court now desires be decided.

The Respondent called three persons who voted in the election, but none of whom had been at the union meeting—Parent, Simon, and Tilley. Parent, no longer with the Company, had no recollection of the letter at all. But it is a fact he did receive a copy at the time because the earlier record otherwise establishes it was mailed to all eligible employees. Simon, still employed, recalled the letter and its attachment, he said there was talk about it among the employees, but that no one ever told him the

wage scale did not apply to the New Orleans area. He remembered somebody telling him "these were the wages that we would be getting." Tilley also remembered the letter. He too testified no one told him anything about where the rates applied, and that it had been his impression they applied in New Orleans.

As stated, the Union won the election 6 to 2. If only 2 votes be shifted from the "yes" to the "no" column, the Union's majority is lost. Did Parent, Simons, and Tilley vote in favor? There is no way of knowing. But they never knew the truth of the matter about the wage scale, they were subject, it may be, to the "prima facie misrepresentation" of which the court remand speaks. From this it follows that three votes were questionable in the view of the court. And, as they could be swing votes, the entire election falls under a cloud. As I understand the law of the case now, the Respondent was never under obligation to bargain with the Union and the complaint must therefore be dismissed.

RECOMMENDED ORDER

I hereby recommend that the complaint be, and it hereby is, dismissed in its entirety.