Wichita Eagle & Beacon Publishing Co., Inc. ***and*** **Wichita Newspaper Guild, affiliated with The Newspaper Guild.** Case 17–CA–5359

September 18, 1973

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND PENELLO

On March 8, 1973, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and 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 briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Austin Farley, a "utility editor" who regularly worked 3 days a week as a nonsupervisory employee and substituted 2 days a week and during vacations for supervisory employees, is a supervisor within the meaning of Section 2(11) of the Act. The complaint further alleges that Respondent, acting through Farley, filed the decertification petition in Case 17–RD–470 and thereby violated Section 8(a)(1) of the Act. Farley's conduct in initiating the decertification petition and soliciting employee signatures is not alleged as a separate unfair labor practice. In fact, a complaint alleging such conduct, occurring more than 6 months prior to the filing of the initial charge on October 10, 1972, is barred by Section 10(b) of the Act.

The Administrative Law Judge found that Farley was not a supervisor within the meaning of Section 2(11) of the Act. He further found that even if Farley were a supervisor, his conduct in filing a decertification petition could not be attributed to Respondent. Accordingly, the Administrative Law Judge concluded that Respondent did not violate Section 8(a)(1) of the Act by Farley's filing of the decertification petition and recommended that the complaint be dismissed. Without passing on these findings, we agree that the complaint should be dismissed.

The facts, as more fully described in the Decision of the Administrative Law Judge, show that on January 4, 1971, American Newspaper Guild, AFL–CIO,[1] was certified as the exclusive bargaining representative of Respondent's news and editorial department employees. Negotiations between the parties began in March 1971. As of January 5, 1973, the date of the hearing herein, no agreement had been reached on a collective-bargaining agreement.

In December 1971 Farley contacted the Board's Regional Office for Region 17 and inquired as to what he had to do to have the Union decertified. He testified that he was disturbed by the absence of any noticeable accomplishments made by the Union in representing the unit employees to that time. Thereafter, he participated in the preparation and then the circulation of a decertification petition among the unit employees for their signatures.

On April 10, 1972, Farley, entirely on his own and without any direction, suggestion, or encouragement by Respondent, filed the aforementioned decertification petition in Case 17–RD–470.

On April 17, Respondent, at a negotiating session with the incumbent Union, advised the Union that it would continue negotiating with the Union despite the filing of the petition, unless and until it was proven that the Union no longer enjoyed majority status.

On April 20, Farley withdrew the petition.

The above facts clearly demonstrate that the conduct involved herein was so minimal and isolated that we find it does not furnish sufficient basis for either a finding of a violation of the Act or issuance of a remedial order. While a supervisor's conduct in filing a decertification petition has been held to constitute a violation of the statute requiring remedial action,[2] we find that the conduct alleged to be attributable to Respondent in the circumstances herein could not have a sufficient impact upon unit employees to warrant a finding that Respondent unlawfully interfered with their statutory rights freely to select their bargaining representative and to bargain collectively through such representative. For the petition was withdrawn 10 days after its filing and Respondent continued to bargain with the Union during its brief pendency. Any impact that the filing of the petition might have had upon the employees, therefore, has been substantially remedied by Respondent's conduct in continuing to bargain with the Union and in expressly informing the Union that it would continue to recognize the Union until such time as it was proven that the Union was no longer the employees' bargaining representative. Furthermore, any vestige of adverse effect the filing of the petition might have had was removed when Farley withdrew the petition 3 days later. Finally, Farley's filing of the petition was

[1] After the certification in Case 17–RC–6446, American Newspaper Guild changed its name to The Newspaper Guild. The Wichita Newspaper Guild, the Charging Party herein, is an affiliate of The Newspaper Guild.

[2] Cf. *Suburban Homes Corporation,* 173 NLRB 497.

the sole act alleged in the complaint to be unlawful. To find, as the General Counsel urges, that this violated Section 8(a)(1) of the Act in the circumstances here would be straining at gnats to "remedy"—what?

Accordingly, and upon the entire record, we have concluded that this case does not warrant exercise of the Board's remedial powers and should not have been processed.[3] Therefore, the complaint should be dismissed.

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 be, and it hereby is, dismissed in its entirety.

MEMBER FANNING, dissenting:

The Union began its organizational campaign at the Employer's publishing plant in the spring of 1970. In August of that year it filed a petition for an election and in November an election for the news and editorial employees was directed by the Regional Director. The Union won the election which was held on January 6, 1971, and Board certification issued the same month. Negotiations between the parties began in March 1971, but as of January 5, 1973, the date of the hearing herein, no agreement had been reached.

Rather, during the period of negotiations several significant events occurred. First, in August 1971 the Union charged that the Company had committed unfair labor practices and these were found by an Administrative Law Judge, whose findings were subsequently affirmed by the Board in September 1972. Second, in December 1971, about a month before the end of the certification year, Austin Farley, a regular part-time city editor and assistant city editor, contacted the Board's Regional Office to ascertain the procedure to decertify the Union. Thereafter he obtained the help of six or seven unit employees, including three whom he supervised, to prepare and circulate a decertification petition to all unit employees during the latter part of March and early April 1972. At the same time, Farley helped prepare and distribute a notice to the employees urging decertification of the Union and advising them to contact him or another named employee to get their names on the decertification petition then circulating. As a consequence of these efforts, on April 10, 1972, Farley filed the decertification petition. Management was at all times aware of Farley's efforts to secure the Union's decertification, but made no attempt to divorce itself from such activities. On April 20, with no explanation from the Company, the petition was withdrawn.

The General Counsel has alleged, and I agree, that Respondent violated Section 8(a)(1) of the Act by the conduct of its supervisor in filing the decertification petition. The mere fact that this is all the General Counsel alleges as unlawful does not mean it stands alone in pristine purity of purpose.

The background of this case shows that Respondent has always been strongly opposed to the organization of its employees. Its negotiations with the Union, after the latter was certified, have been fruitless. As indicated above, there is a recent history of other unfair labor practice litigation in the midst of which a supervisor was the main mover in inducing unit employees, including those working under him, to frustrate and obstruct the collective-bargaining process by filing a petition to decertify the Union. I cannot, as do my colleagues, consider Respondent's conduct "minimal and isolated." Like my colleagues, I have neither the time nor the desire to strain at gnats, but, unless I have read this record wrong, the majority, fearful of gnats, has swallowed a camel.

In my opinion, the impact of Farley's conduct on unit employees was substantial and obvious. The filing of the petition was the means selected by the Respondent to oust the Union from its representative status and must have been so understood by the employees. This is not the sort of conduct that should be condoned or excused. Nor do I believe that the impact on the employees was minimized because the Respondent announced that it would bargain until the Union no longer represented them or because Farley withdrew the petition 3 days later.

Accordingly, I dissent. I would find the violation alleged and would provide the standard remedy in the hope that it would be effective and mitigate the damage done to collective bargaining and the Section 7 rights of these employees.

[3] *American Federation of Musicians, Local 76, AFL–CIO (John C. Wakely)*, 202 NLRB No. 80. In our view, the above simple statement of facts is sufficient to show what an unnecessary and unwise investment of agency resources this entire proceeding has been.

DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Administrative Law Judge: This case presents two issues: Is Austin G. Farley, an individual employed by Respondent, a supervisor within the meaning of Section 2(11) of the Act, and, if so, may Respondent be held in violation of Section 8(a)(1) of the Act by reason of Farley's filing a petition seeking to decertify the above-named Union, the Charging Party herein, despite the absence of any evidence that Respondent encouraged, spon-

sored, or took any part whatsoever in the filing of the petition. The charge in the case was filed on October 10, 1972,[1] and amended on November 16. Pursuant thereto, complaint issued on November 20. Hearing was held in Wichita, Kansas, on January 5, 1973.

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by General Counsel, Respondent, and the Charging Party, I make the following:

FINDINGS OF FACT

I. THE FACTS

Respondent is engaged in the publication, sale, and distribution of daily newspapers with its main office and principal place of business in Wichita, Kansas.[2] On January 4, 1971, American Newspaper Guild, AFL–CIO, was certified as the exclusive bargaining representative of all employees of Respondent in the news and editorial department with the usual exclusions.[3] Thereafter, an unfair labor practice charge was filed by the Union alleging that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, and pursuant to such a charge, as amended, a complaint issued against Respondent on January 11, 1972, and a hearing was held on March 2 and 3. Shortly thereafter, Administrative Law Judge Ramey Donovan (whose official title at the time was Trial Examiner) issued a Decision in which he found that Respondent had violated Section 8(a)(1) and (3) of the Act and in which he recommended appropriate remedial action. Respondent filed exceptions to that Decision and, on September 29, the Board issued its Decision and Order adopting Administrative Law Judge Donovan's findings and conclusions and his recommended Order. *Wichita Eagle & Beacon Publishing Co., Inc.,* 199 NLRB No. 50. I have taken official notice of that decision. As indicated therein, negotiations between the Union and Respondent began in March 1971; however, no details of the negotiations as of the time of the hearing before Administrative Law Judge Donovan are set forth. Nor were details of the negotiations presented in the hearing before me. All that appears is that no agreement had been reached on a collective-bargaining contract as of the date of the hearing.

On April 10, Austin G. Farley filed a petition with the Board in Case 17–RD–470, requesting that a decertification election be held for the purpose of decertifying the Union as the representative of the employees in the unit described above. On April 20, the petition was withdrawn.

Austin Farley was first employed by Respondent in November 1966 as a reporter. He worked for Respondent in various capacities until October 1970, when he resigned. He was rehired in September 1971 as a copy editor, a position not contended to be supervisory. Shortly thereafter, Farley was given additional duties, such as substitute makeup editor or wire editor and occasional reporter assignments. In January 1972, Farley became the regular substitute for the city editor on Sundays and the assistant city editor on Mondays, and he occupied these positions as regular substitute at the time he filed the decertification petition. Respondent admits that the city editor and assistant city editor are supervisors within the meaning of Section 2(11) of the Act.

The city editor is in charge of the city desk which is responsible for all news relating to Wichita. Normally, the city desk has about 15 reporters on duty and 4 clerks. The city editor posts work schedules for the reporters who gather news and prepare stories which are turned in to the city editor who checks the stories for accuracy, style, commonsense, and the like. The city editor may rewrite a story, request the reporter to rewrite it, or simply reject the story. All news stories of the day, in hand or anticipated, are gathered into a news budget daily by the city editor who meets with the managing editor to discuss the budget. At this budget meeting, the managing editor, in consultation with the city editor, will decide which of the stories in the budget will appear on page one. Stories not appearing on page one may be relegated to the city page, or not used at all. Some stores are marked for future use, or for special editions. After the budget has been adopted, the city editor will contact the reporters and advise each of decisions made which relate to his particular assignments.

The city editor has the authority and responsibility for making assignments to the reporters. Assignments arise in a variety of ways and are governed by a variety of factors. Of course, the primary function of reporters is to gather news. To perform this function, certain reporters are assigned to special beats (e.g., police beat, court beat). Some reporters are specialists in certain fields and are usually assigned to cover news in those fields. Apart from assignments to gather news, there may be assignments to do features on ideas originating either from management, the reporter himself, or some other source. Assignments may also consist of instructing reporters to expand their coverage and reporting on news items to which they have previously been assigned. All these matters are subject to the supervision of the city editor.

According to the testimony, when Farley is acting city editor on Sundays, he performs the same duties as the city editor and has the same responsibilities. He has the authority to assign work to reporters; however, only three reporters and two clerks are employed in the news room on Sunday. He participates in the budget meeting with the managing editor, but where the weekday city news budget is 15 stories, the Sunday budget is 6.

When Farley is acting assistant city editor on Mondays, the city room is also his responsibility in the absence of the city editor.

II. ANALYSIS AND CONCLUSIONS

As noted in the beginning, this case presents two issues: Was Farley a supervisor at the time he filed the petition in Case 17–RD–470, and, if so, is Respondent accountable for

[1] Unless otherwise indicated, all dates appearing hereinafter are in 1972.

[2] Jurisdiction is not in issue. The complaint alleges, the answer admits, and I find that Respondent meets the Board's jurisdictional standard for the assertion of jurisdiction over newspapers.

[3] I have taken official notice of the Regional Director's Decision and Direction of Election in Case 17–RC–6446, pursuant to which election was held and the Union certified. Subsequent to certification, American Newspaper Guild changed its name to The Newspaper Guild. Wichita Newspaper Guild, the Charging Party herein, is an affiliate of The Newspaper Guild.

his doing so despite the absence of any evidence that it played any part in his doing so.

The facts are undisputed. The dispute is over the conclusion to be drawn from those facts. At the outset, it is important to note that the fact that Farley regularly substitutes for the city editor and assistant city editor does not, of itself, establish that he possesses supervisory authority when he is acting in their stead. *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950. In order to find that Farley is a supervisor, it must appear that he possesses supervisory authority when he is acting in their stead. Although the issue is not entirely free from doubt, I conclude that he does not.

Any decision respecting Farley's status depends on a clear understanding of the basis of the city editor's supervisory status. Insofar as hiring is concerned, it does not appear that the city editor has the authority to hire employees. City Editor Geary testified she did not feel she had the authority to fire, but she believed she could make effective recommendations to fire an employee assigned to the city desk, although she had never exercised the authority. It is clear that her belief was justified and that the editor is looked to by higher management for reports and recommendations regarding the job performance of the employees assigned to the city desk, and any recommendations she would make must be deemed effective recommendations. As to Farley's responsibility in this regard, Managing Editor Ashley admitted discussing the abilities of some reporters with Farley and admitted that he would take Farley's judgments into consideration in reviewing an employee's job performance. Ashley indicated further, however, that discussions of the work performance of employees with Farley would be infrequent, that normally he would get information of this sort from the city editor. Presumably, although he did not say so, Ashley could also get information of this sort from the assistant city editor. In light of these circumstances, I would not deem the fact that Ashley discussed with Farley the work performance of individuals sufficient basis for holding that Farley made effective recommendations affecting the status or benefits of employees.[4]

The city editor's supervisory status inheres not only in her authority to make effective recommendations affecting the status and benefits of employees, but also in her responsibility for the direction of the city desk. In this connection, as noted earlier, the city editor has 15 reporters for whom she is responsible and whose work must be supervised. Apart from supervising the quality and quantity of their work product, her principal responsibility appears to lie in making assignments.

While the witnesses testified that as acting city editor Farley is in charge of and responsible for the operations of the city desk and has the same authority as the city editor, such testimony is not dispositive of his status as a supervisor unless the evidence establishes that in meeting this responsibility he is called upon to direct employees under circumstances requiring the use of independent judgment. While the city editor's direction of the news desk may require that she use independent judgment and her direction may for this reason constitute responsible direction of employees, it does not necessarily follow that her substitute's responsibilities require the exercise of independent judgment. It is clear here that Farley's duties and responsibilities fall far short of the regular city editor's. For one thing, he does not make up the work schedules, but works with the schedule prepared by the city editor. For another, he has 3 reporters in contrast with the city editor's 15. None of the regular beat reporters is on duty and no regular beat assignments are made. The news budget consists of 6 stories in contrast with 15 during weekdays, and on the majority of the stories decisions have been made to develop and publish them by the city editor (in consultation with the managing editor) before Sunday. New stories will develop as news is made, so to speak, and with regard to those Farley will make assignments, but from the very fact that it is "hot news," plus the fact that he has only three reporters on duty, there is only limited opportunity for the exercise of independent judgment. As Farley described it, "Primarily it was a protective thing that reporters were there to react to situations and as it occurred." True there are two clerks on duty, but the record does not show what they do (except write obituaries) or what direction, if any, Farley is required to give them.

The record contains references to assignments by the city editor, or acting city editor, to photographers. It is clear, however, that these are not assignments in the sense used when assigning work to reporters. Rather, certain stories are slated to include photographs and a photographer will be assigned to take them. However, the assignment is not made by the city editor. As the Regional Director's Decision and Direction of Election indicates, photographers are subject to the supervision of the chief photographer. The only role of the city editor is to authorize photographic work with a news story. The city editor does not supervise the photographers.

As noted earlier, an important function of the city editor is to gather news stories and prepare a news budget for discussion with the managing editor. Farley participates in such budget meetings as acting city editor, but little weight can be attached to this function in light of the fact that the news budget on Sunday is so limited in size. Apart from that, the budget meetings call more for the application of professional skills than for the exercise of supervisory authority.

Additional support for a finding that Farley did not possess supervisory authority within the meaning of Section 2(11) of the Act as acting city editor is found in the evidence regarding his assignment to the job. Farley was hired as copy editor and utility man. He worked several months as copy editor with various other assignments before he was assigned the job of acting city editor and assistant city editor. The only notice given of his assignment as acting city editor and assistant city editor was the posting of his name on the work schedule in that position. He was not told that he had any supervisory authority or what his responsibilities were. The nature of the assignment and his experience were such that he knew what his duties and responsibilities were; however, the casual manner of his assignment argues against a finding that he was being vested with supervisory

[4] Compare *Doctors' Hospital of Modesto, Inc., supra,* 12; compare, also, Clark, assistant chief photographer, in the Regional Director's Decision and Direction of Election, Case 17–RC–6446.

authority.[5] Farley did not receive a wage increase because of this assignment. He is hourly paid, whereas the city editor is salaried, and receives shift differential pay as do other employees.

Finally, there is the matter of Farley's duties and responsibilities as acting assistant city editor on Mondays. In my judgment, this assignment added nothing to his duties and responsibilities to require a finding he was a supervisor. The assistant city editor's own supervisory status (as described in the Regional Director's Decision and Direction of Election in Case 17–RC–6446) is largely derivative from his substituting for the city editor in her absence; however, he does so on a continuing basis and is a full-time assistant, not a part-time substitute like Farley. As acting assistant city editor, Farley would be responsible for the city desk principally on Monday evening after the city editor went home (8 p.m. to 11 p.m.). Assistant Chief Photographer Clark was responsible for night operations in his section and yet was deemed not to be a supervisor by the Regional Director in Case 17–RC–6446.

For all the foregoing reasons, I conclude that as acting city editor and assistant city editor Farley did not possess supervisory authority and was not a supervisor within the meaning of Section 2(11) of the Act.

In view of the foregoing conclusion, there is no basis for finding that Respondent violated the Act by Farley's filing of the decertification petition. The record is devoid of evidence that Respondent played any part in the filing of the petition and the sole basis for imputing responsibility to Respondent is that Farley was Respondent's agent because he was a supervisor. Even had I found Farley to be a supervisor, I would not find that Respondent is liable for his filing of the decertification petition. True, in *Suburban Homes Corp.,* 173 NLRB 457, the Board found that Respondent violated Section 8(a)(1) of the Act because a decertification petition was filed by a supervisor, although Respondent disputed the allegation that he was a supervisor. However, the Board there concluded that the decertification petition was "intended to frustrate and obstruct the collective-bargaining process" and was "but the final step in an unlawful plan designed to oust the Union as bargaining representative of the employees." In this case, after the decertification petition was filed, Respondent did not withdraw recognition; rather, it expressly stated that it intended to continue recognizing the Union until such time as it was proven that it was no longer the bargaining representative of its employees.

In this case also, Farley's status as a supervisor was in dispute, but with this difference, that on 3 days a week he was employed in a position included in the certified unit. In these circumstances, although Farley would be excluded from the unit entirely were he found to be only a part-time supervisor,[6] there is no more reason to believe that employees regarded his conduct as having been undertaken as an agent of Respondent than there is to believe that they regarded his conduct as that of a fellow employee.[7] Apparently, the limitations of Section 10(b) of the Act barred General Counsel from alleging in the complaint that Farley's conduct in soliciting signatures to support a decertification petition was violative of Section 8(a)(1) of the Act, but General Counsel was not precluded from inquiring into Farley's conduct for background purposes and no evidence was adduced that in soliciting signatures Farley represented himself as acting in a supervisory capacity and on behalf of management. Accordingly, were Farley found to be a supervisor, I would nevertheless recommend dismissal of the complaint.

Conclusions of Law

1. Wichita Eagle & Beacon Publishing Co., Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Wichita Newspaper Guild, affiliated with The Newspaper Guild, is a labor organization within the meaning of Section 2(5) of the Act.
3. At the times material herein, Austin G. Farley was not a supervisor within the meaning of Section 2(11) of the Act.
4. General Counsel has failed to establish by a preponderance of evidence that Respondent violated Section 8(a)(1) of the Act.

RECOMMENDED ORDER [8]

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that the complaint be dismissed in its entirety.

[5] Farley testified he had the authority to permit employees on his Sunday shift to go home early and he exercised the authority Under what circumstances he did so was not brought out. Such authority, exercised on a basis not described in the record either as to circumstance or frequency, is, without more, insufficient basis for finding that Farley is a supervisor within the meaning of the Act when acting city editor.

[6] *Doctor's Hospital of Modesto, Inc. supra*

[7] Compare *Seaboard Packing Company,* 107 NLRB 1295.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.