

Anvil Products, Inc. and Local Lodge 1923, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 16-CA-4812

January 15, 1975

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On August 27, 1973, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, and ordered the Respondent to cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices.¹ Thereafter, on June 26, 1974, the United States Court of Appeals for the Fifth Circuit affirmed the Board's findings that the Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act, but remanded to the Board, for its further consideration, the question of the validity of its 8(a)(5) finding and bargaining order.² On August 27, 1974, the parties were advised by the Board that it had decided to accept the remand and granted them an opportunity to submit statements of position with respect to the issues raised by the remand. Such a statement was filed by the Respondent.

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.

We have considered the entire record in this proceeding, including the Respondent's statement of position, in the light of the court's opinion and, for the reasons set forth below, have decided to dismiss the complaint insofar as it alleges that the Respondent violated Section 8(a)(5) of the Act.

The Union was certified by the Board in May 1971 as the representative of the Respondent's employees. Bargaining negotiations followed, but were interrupted by a 2-week economic strike that ended on February 3, 1973. The last bargaining meeting between the parties was held on February 11. On February 15, Respondent reinstated strikers Carver and Stephens as new employees with loss of their seniority, and it refused to reinstate striker Tolbert. Thereafter, on May 30, an employee filed a petition for a decertification election with the Board. On June

6, the Union requested another bargaining session but, on June 14, the Respondent declined to meet with the Union, claiming that it no longer represented a majority of the bargaining unit employees.

As noted above, the court enforced the Board's 8(a)(3) findings in the cases of Carver, Stephens, and Tolbert but declined to enforce the bargaining order. It held, in effect, that, as a general proposition, the type of unfair labor practices involved in this case *could* tend to produce disaffections from a union but that this could not be presumed and that such an impact had to be demonstrated to justify a bargaining order. The court did not find a factual basis in the present record for drawing a conclusion as to the actual impact of the 8(a)(3) violations and remanded this aspect of the case for further proceedings consistent with its opinion.

The present record having been found by the court to be an inadequate basis for making a determination as to the impact of Respondent's 8(a)(3) violations upon the filing of the decertification petition, the only further proceeding open to us would be a remand for further evidence bearing upon this issue. However, more than 2 years have passed since the crucial events of this case. Over such a long period, an employer's work complement undergoes change and the passage of time dims memories and otherwise takes its toll upon such probative evidence as once existed. To now launch an inquiry in this case into the extent to which the unfair labor practices occurring in early 1972 were a factor in the filing of the decertification petition in May 1972, especially when it appears that that would largely require a probing into the subjective factor of the motivation of those who sponsored and supported the petition (assuming their present availability), would, experience teaches, prove to be a fruitless, and yet costly, endeavor.

Even in the best of circumstances, inquiry into an employee's subjective motivation for embarking on a course of action is a risky proposition. Which one, of several possible factors, actually played the decisive role in the individual's decision is a difficult enough task for most people even when all the circumstances and events are fresh in mind. But, in an unfair labor practice proceeding, this probe into the employee's mental processes would not occur until testimony was taken in a Board hearing on the complaint which might be some 9 months³ after the events in question. Can we realistically expect an employee to recall his inner feelings and reactions to things that happened so far distant? We think not. Furthermore, there is also the practical problem encountered when

little over 3 months from the time the unfair labor practice charge was filed, the charge itself may relate to events which occurred 6 months prior to its filing.

¹ 205 NLRB 709, Member Kennedy dissenting in part

² *N.L.R.B. v. Anvil Products, Inc.*, 496 F.2d 94.

³ Although, on the average, a Board hearing will be conducted within a

an employee is asked to testify about something which he believes could adversely affect his interest. While we have every reason to expect that the individual will testify truthfully concerning objective facts, there is always the possibility, when dealing with inner thought processes, that the individual's reassessment of his motivation will unknowingly be colored by his present circumstances. Oftentimes, the employee has no personal stake in the matter and when, as here, the Union has suffered at least a temporary setback and the Employer has engaged in serious unfair labor practices, which as yet are unremedied, it may be expecting too much in hoping that an employee would possess the objectivity to testify in a purely candid manner about his thinking then as opposed to now.

For the foregoing reasons, we believe that it would be extremely unlikely that a remand could produce the factual basis necessary for making an informed judgment on the impact issue remanded by the court for our resolution. Accordingly, we are constrained to dispose of this case on the basis of the present

record as viewed by the court, and find that Respondent had a valid, objective basis for doubting the Union's majority status when it withdrew recognition from the Union. We shall therefore dismiss the complaint insofar as it alleges that Respondent violated Section 8(a)(5) of the Act.

ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed, insofar as it alleges that the Respondent violated Section 8(a)(5) of the Act.

IT IS FURTHER ORDERED that paragraphs 1(a) and 2(a) of the Board's Order issued on August 27, 1973, and the respective notice provisions contained in the appendix thereto, be, and they hereby are, vacated.

MEMBER KENNEDY, concurring:

My colleagues; decision to dismiss the 8(a)(5) allegations accords with my earlier dissent in this matter and I concur in the result herein.