

**Unaflex Rubber Corporation and Transportation Employees Association affiliated with District 2, Marine Engineers Beneficial Association—Associated Maritime Officers, AFL-CIO. Case 29-CA-3875**

February 14, 1975

**DECISION AND ORDER**

BY MEMBERS JENKINS, KENNEDY, AND  
PENELLO

On October 31, 1974, Administrative Law Judge Irving M. Herman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions.

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 has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**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 Respondent, Unaflex Rubber Corporation, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> We agree with the Administrative Law Judge's conclusion that the cases cited by the Respondent in opposition to a remedial bargaining order are inapposite but not necessarily for the reasons he sets forth in his fn. 11. Thus, we have not required that a demand for recognition be made except in an 8(a)(5) context (which was neither alleged nor litigated here); we have found that bargaining orders may be granted to remedy violations of sections other than Sec. 8(a)(3) of the Act; and it has not been Board procedure to require that any party specifically request such a remedial bargaining order.

Nor do we rely on the cases cited by the Administrative Law Judge in the last paragraph of his analysis regarding the issuance of a bargaining order. We find those cases inapposite inasmuch as they involve 8(a)(5) allegations and findings, which are not present here. Contrary to the Administrative Law Judge, we find that the bargaining order is appropriate solely because the Respondent has engaged in unfair labor practices likely to destroy the Union's majority and seriously impede an election, the effects of which cannot be eliminated by the customary remedy. *N.L.R.B. v. Gissel Packing Company, Inc.*, 395 U.S. 575, 600 (1969).

**DECISION**

**STATEMENT OF THE CASE**

IRVING M. HERMAN, Administrative Law Judge: This case was heard before me on September 23 and 24, 1974,<sup>1</sup> at Brooklyn, New York. The charge was filed on May 29 by Transportation Employees Association affiliated with District 2, Marine Engineers Beneficial Association—Associated Maritime Officers, AFL-CIO<sup>2</sup> (herein called the Union), and duly served on Respondent the same day. Complaint issued August 30. The primary issues are whether Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151 *et seq.*), herein called the Act, by interrogating, polling, and threatening its employees concerning the Union, and by laying off employees for choosing the Union; and whether a bargaining order is warranted in the circumstances.

Upon the entire record, including my observation of the witnesses, and after due consideration of the brief filed on behalf of Respondent, and a letter filed for General Counsel in lieu of a brief,<sup>3</sup> I make the following:

**FINDINGS AND CONCLUSIONS**

**I. RESPONDENT'S BUSINESS**

The complaint alleges, the answer admits, and I find that Respondent is a New York corporation engaged at Brooklyn, New York, in the manufacture, sale, and distribution of expansion joints and related products; that during the year preceding the complaint, Respondent shipped over \$50,000 worth of its products directly to States other than New York; and that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE UNFAIR LABOR PRACTICES**

**A. The Facts**

**1. Union organization and Respondent's reaction**

There is no substantial disagreement as to the essential facts, synthesized below from the testimony of all the witnesses. On May 22 Respondent announced to its

<sup>1</sup> All dates are in 1974.

<sup>2</sup> The complaint was amended at the hearing to reflect this name.

<sup>3</sup> No other briefs have been filed.

employees that it had become economically advisable to get 8 hours' work for 8 hours' pay, and hence cease paying for the employees' 30-minute lunch period, and that such change would be effectuated June 3. Later that day seven employees visited the Union's offices where they executed cards authorizing the Union to represent them for collective-bargaining purposes. The 8-hour change was at least one factor motivating the visit. Three additional signatures were obtained at the plant by some of these employees later that day and the following day.

On May 28, the Union sent Respondent a telegram requesting recognition as representative of "the majority of your employees." The only statutory employees then working for Respondent were 15 production and maintenance employees.<sup>4</sup> The telegram was received by Respondent early that afternoon. Horace White, Respondent's president, called the foremen in and asked if they knew anything about it, and one of them said he had told White there would be trouble over the 8-hour day. White, admittedly "very angry," ordered the employees to be called down to his office. That was about 1:30 or 1:45 p.m. When the employees had congregated there, White said he had received the telegram and asked who had "started this."<sup>5</sup> Upon being told that it was not the work of any particular individual but rather the group as a whole, he stated that his insistence on 8 hours of work had become economically necessary, and to employee Ahearn's protest that he was depriving the men of something they were entitled to by "precedent," White responded, "don't give me any of that Philadelphia lawyer bull shit." He also asserted that "no union"<sup>6</sup> was going to tell him how to run his business, that "if he wanted to, he could close the company down,"<sup>7</sup> and he proceeded to poll the employees by name on whether they were "going to work the eight hour day or are you going to go with the union?" Up to that point, no employee had said he was refusing to work 8 hours. Respondent, as admitted by its vice president, inferred such a refusal merely "from the fact that they had gone to the Union." After White had called on about five of the employees, either he or Ahearn suggested that the men vote outside the room.<sup>8</sup> In any event, 10 of the men did step outside as Plant Superintendent Bonk said, "If you want the Union, out the door." Following a brief discussion, they voted to stay with the Union.<sup>9</sup> Ahearn thereupon stuck his head inside the office and so reported to the Whites. Horace White said, "Okay, gentlemen, goodbye." Ahearn then inquired whether the nine men were fired, laid off, "or what," and Howard White replied they were laid off for lack of work, Howard testifying he meant that no work was available if the men were unwilling to work 8 hours a day. The nine who had voted for the Union then left. Rudy Gil returned to work. Respondent never replied to the demand for recognition.

<sup>4</sup> The admittedly appropriate unit alleged in the complaint consists of "All production and maintenance employees of Respondent, including painters, builders, cutters and wrappers, exclusive of all other employees, guards and supervisors as defined in Section 2(11) of the Act."

<sup>5</sup> The quote is from the testimony of Respondent's witness, Rudy Gil.

<sup>6</sup> According to his son, Vice President Howard White, Horace may have added "or anyone else."

<sup>7</sup> Thus testified Respondent's witness, Devine. According to the testimony of General Counsel's witnesses, White said it had taken him only

## 2. Events after May 28

Several of the laid-off employees returned to the plant after May 28 to collect their pay and talked with Howard White, who told them that they were welcome back if they agreed to work an 8-hour day and that Respondent did not care how they felt about the Union. Horace White joined in the conversation with some and said that the men could vote on whether they wanted a union. Employee Devine offered to transmit the message to other employees and did so. Some of the men did go back to work. The four employees who had returned by June 7 were paid on that day for the period they had missed work,<sup>10</sup> Horace White stating "it was all a misunderstanding." No similar compensation was given any of the other employees.

On July 2, Respondent sent the following letter to those who had not yet returned:

We are writing because there may have been some misunderstanding about our working conditions at Unaflex, as brought forth on May 28, 1974.

As stated then, the company's economic situation absolutely requires that we receive 8 hours of work for the hours pay given our employees. We will be happy to re-employ any of you who were then working and who would work in conformity with the schedule that the company requires; 8 hours work for 8 hours pay.

A number of our employees refused at that time to accept this arrangement but many of them have subsequently changed their minds and have returned to work on that basis. Please realize that if you want to come back to work here, your old job is waiting for you at the same wages and working conditions that you then had (except that, as was announced early in May, after June 3rd our schedule calls for 8 hours pay for 8 hours of work). You have the right not to work here if you don't want to, but as stated you have your old job here if you wish it.

Finally, we remind you that we do not care how you or any of our employees feel about the union who has petitioned to represent you and we will respect your decision about any other union but let us again emphasize that is your business. Whether you want a union or not is completely unrelated to the problem about working an 8 hour day for 8 hours pay, which caused a number of you to leave. If you and our other employees select a union to represent you, we will respect your choice and will deal with the union as your representative.

The offer to return will be held open for you until July 12th, 1974 after which time we will assume you no longer desire to work at Unaflex and we shall feel free to fill your position with someone else.

We look forward to your returning to work here.

5 minutes to open the place and he could shut it down in the same time.

<sup>8</sup> Respondent's witness, Rudy Gil, testified that Ahearn advanced the suggestion "because he saw the way everybody, you know, was scared and didn't want to say anything."

<sup>9</sup> The 10 consisted of 9 of the card-signers (the 10th, Commarato, having been absent that day) and Rudy Gil. The latter was the only one to vote against the Union.

<sup>10</sup> These were Frank Devine, Salvatore Curto, Steven Umbria, and Nick Prinzi.

## B. Analysis

As found above, a "very angry" Respondent, reacting to the Union's bargaining demand, interrogated its employees concerning the origin of the union activity and polled them openly as to their union desires in a coercive atmosphere that included not only a threat to close the plant but also the layoff of all the employees who chose the Union when Respondent forced upon them the alternatives of opting for the Union or accepting the loss of their paid lunch period. This conduct clearly violated Section 8(a)(1) and (3) of the Act, a conclusion which Respondent did not appear seriously to contest at the hearing where it urged post-May 28 "ameliorating" or "mitigating" circumstances to defeat a bargaining order. In its brief, however, Respondent strangely argues that "the fact that some may have viewed the choice given by White as either (a) electing to work the eight hour shift or (b) going for the union, should not be allowed to confuse the issue" because "the crucial point was of their willingness to work the eight hour day . . . and the signifying by an employee of the 'eight hour day' did not necessarily preclude his support of the union." As shown above, the May 28 meeting was precipitated by White's receipt of the Union's bargaining demand; and it was in the context of his "very angry" response, embracing the statement that "no union" was going to tell him how to run his business and the threat that he could shut down the operation, that he commenced the poll with the words (as testified by Howard White), "what's it going to be? Are we going to work the eight hour day or are you going to go with the Union?" Moreover, the issue thus posed was of Horace White's own creation because, as Howard White admitted, any thought on Respondent's part that its employees might refuse to work the 8 hours was inferred solely "from the fact that they had gone to the union." In the face of that, any "confus[ion] of the issue" must stem from Respondent's brief which goes on to overtax credulity completely by the suggestion that "the Whites could have thought of the employee walkout as a form of 'concerted action' in protest against the company's changing the work week."

Nor can there be any doubt that but for the allegedly "ameliorating" or "mitigating" circumstances after May 28, *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), would require a remedial bargaining order because of the impossibility or unlikelihood of holding a fair and free election in the face of the coercion practiced by Respondent.<sup>11</sup>

In my opinion, it is doubtful whether even an invitation to return to work, accompanied by a clear retraction of prior unlawful statements and other conduct, undoes the coercive atmosphere initially created by such conduct so as

to render likely a fair and free election. I am not satisfied that the coercive effects of the original spontaneous conduct reflecting the natural feelings of an employer are necessarily dissipated by subsequent statements made and action taken after consulting counsel. Especially is this so where, as here, there is neither a concomitant offer to compensate the employees for the time lost from work by reason of the unfair labor practices<sup>12</sup> nor even an acknowledgment to the Union that the bargaining demand has been received. Moreover, there is no clear retraction here in any event. The letter of July 2 purports to "remind" the employees that Respondent does not care how they feel about a union and to "again emphasize" that that is the employees' business; and it continues, "whether you want a union or not is completely unrelated to the problem about working an 8 hour day for 8 hours pay, which caused a number of you to leave." To employees who had been told by their employer that he very much cared how they felt about a union and that it was sufficiently his business to condition their continued employment on their giving up the Union, this disingenuous document could hardly have served to dispel the fears generated by Respondent's conduct of May 28.

Respondent urges that White's action here was only similar to the discharge action he took against the employees the previous year before any union had entered the picture. The short answer to this is that an unfair labor practice is no less such simply because the employer is the type who brooks no interference from any source. His right to run his business entirely as he sees fit stops where the employees' Section 7 rights begin. And it is small comfort for the employees to know that their employer might have reacted just as violently to a nonunion challenge.

Independently of *Gissel*, I find, in agreement with the General Counsel, that a bargaining order is warranted on the basis of the circumstances surrounding the May 28 poll of the employees which demonstrated to Respondent that the Union commanded the support of at least 9 of the 15 employees involved. Cf. *Nation-Wide Plastics Co., Inc.*, 197 NLRB 996 (1972); *Sullivan Electric Co.*, 199 NLRB 809 (1972).<sup>13</sup>

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1) of the Act by interrogating, polling, and threatening its employees concerning the Union.

207 NLRB 1005 (1973), which also involved no 8(a)(3) conduct, there was no bargaining demand. In *Smutty's Foods, Inc.*, 201 NLRB 283, 298-299 (1973), the Union did not have a card majority. Nor was there a valid majority in *J. J. Newberry Company*, 202 NLRB 420, 431-432 (1973). And apart from any other considerations, no 8(a)(3) conduct was involved in any of the remaining cases cited.

<sup>12</sup> Apart from the first four to return.

<sup>13</sup> Indeed, the reference in Respondent's brief to the absence of any comments to Commarato regarding unionization "even though he was one of the employees who had signed up with the Union" suggests Respondent's awareness of a 10th union supporter.

<sup>11</sup> The cases cited by Respondent are either inapposite or distinguishable. Respondent relies principally on *Fuqua Homes Missouri, Inc.*, 201 NLRB 13 (1973), and *Hennessy Service Corp.*, 204 NLRB 266 (1973). In *Fuqua*, not only was the record "devoid of any evidence establishing majority status on the part of the Union" but it "d[id] not establish any demand by the Union for recognition." 201 NLRB at 130-131. In *Hennessy*, the unlawful conduct "primarily consist[ed] of individual acts of interrogation, involving five [of the 15] employees in the unit." In *Georgetown Dress Corporation*, 201 NLRB 102, 118, fn. 60 (1973) (which, unlike the instant case, involved no 8(a)(3) conduct), no bargaining order was sought. In *Gold Circle Department Stores, a Division of Federated Department Stores, Inc.*,

4. Respondent has violated Section 8(a)(3) of the Act by laying off nine of its employees because of their preference for representation by the Union.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

In order to remedy the unfair labor practices found herein, my recommended Order will require Respondent to cease and desist therefrom and, in view of the nature of the violations, to cease and desist from any like or related conduct. In order to effectuate the policies of the Act, my recommended Order will also require Respondent to make whole all of the laid-off employees who have not yet been compensated for any loss of earnings they may have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to that which he would have earned from May 28 to the date of receipt of a valid offer of reinstatement, less net earnings during such period, with interest, in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). As indicated above, I shall also recommend a bargaining order.

Upon the foregoing findings of fact and conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby recommend the following:

#### ORDER<sup>14</sup>

Respondent, Unaflex Rubber Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
  - (a) Coercively interrogating or polling its employees concerning their union preferences or activities.
  - (b) Threatening to close its plant to avoid union organization of its employees.
  - (c) Laying off or otherwise discriminating against its employees because of their union activities.
  - (d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
  - (a) Make whole Thomas Ahearn, Leonard Geraghty, Henry Gil, Louis Rivera, and Frank Toscano for any loss of pay suffered by reason of their layoff in the manner set forth in the section of this Decision entitled "Remedy."
  - (b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, as well as all other records necessary to analyze and compute the amount of backpay due hereunder.
  - (c) Upon request, bargain collectively and in good faith with Transportation Employees Association, affiliated with District 2, Marine Engineers Beneficial Association—Associated Maritime Officers, AFL—CIO, as the exclusive representative of all the employees in the following appropriate unit, and embody in a signed agreement any understanding reached:

All production and maintenance employees of Respondent, including painters, builders, cutters and wrappers, exclusive of all other employees, guards and supervisors as defined in Section 2(11) of the Act.

(d) Post at its place of business in Brooklyn, New York, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent, immediately upon receipt thereof, and be maintained by it for a period of 60 days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>14</sup> 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, 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.

<sup>15</sup> In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

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

WE WILL NOT coercively question any of our employees about their union activities, views, or sympathies.

WE WILL NOT threaten to close our plant to avoid the unionization of our employees.

WE WILL NOT lay off or otherwise discriminate against any employee because of union activity.

WE WILL NOT interfere with our employees' exercise of their rights under the National Labor Relations Act in any like or related manner.

WE WILL make whole Thomas Ahearn, Leonard Geraghty, Henry Gil, Louis Rivera, and Frank Toscano for any loss of pay they may have suffered by reason of their layoffs.

WE WILL bargain collectively and in good faith with Transportation Employees Association, affiliated with District 2 of the Marine Engineers Beneficial Association—Associated Maritime Officers, AFL—CIO, as the exclusive representative of our employees, in respect to rates of pay, wages, hours, and other terms and conditions of employment.

UNAFLEX RUBBER  
CORPORATION