A.B.C. Liquors, Inc. *and* Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737, AFL–CIO. Case 12–CA–7056

January 27, 1977

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND WALTHER

On September 13, 1976, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting 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[1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified.[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 as modified below and hereby orders that the Respondent, A.B.C. Liquors, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 1(a) and (b) and insert the following:

"1. Cease and desist from:

"(a) Coercively interrogating its employees concerning their union activities and their execution of authorization cards for the Union.

"(b) Representing to its employees that it is acting at the request of the National Labor Relations Board in these interrogations.

"(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights protected by Section 7 of the National Labor Relations Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER WALTHER, concurring in part and dissenting in part:

I agree with my colleagues that Respondent violated Section 8(a)(1) of the Act by representing to its employees that its general questioning of the employees was at the behest of the National Labor Relations Board. In the circumstances of this case, I find this representation tainted Respondent's general questioning. However, unlike my colleagues, I would find that, had Respondent not made this representation, the questions would have been permissible.

The facts demonstrate that Respondent had received information that Edward Savoie, a former supervisor who had recently been employed by Respondent, had been instrumental in soliciting a number of authorization cards used to support a petition for an election at one of Respondent's stores. Respondent brought this information to the attention of a Board agent who instructed Respondent that written evidence supporting its contention must be given to the Regional Office before it would pursue the matter further.

Accordingly, Respondent's area supervisor, William Lindsay, individually distributed to each employee at the affected store two documents. One document, entitled the "acknowledgment," stated that the purpose of the questioning was to determine the nature and the extent of Savoie's solicitation; the request to obtain this information came from the National Labor Relations Board; employees were under no obligation to answer questions and there would be no reprisals or punishment or other adverse effect for not doing so, nor would there be any reward or benefits for doing so; and finally the employees were told that their participation was strictly voluntary and confidential. The second document had 22 questions concerning the former supervisor's alleged union activities. Pursuant to Respondent's indication of the voluntary nature of the documents, 9 of the 15 unit employees filled out the questionnaire, while 2 other employees refused to fill out either the acknowledgment or the questionnaire.

Despite the safeguards Respondent accorded its employees, the Administrative Law Judge concluded that Respondent was not justified at all in querying its employees. As support for this dubious proposi-

[1] Respondent's request for oral argument is hereby denied as the record, the exceptions, and brief adequately present the issues and the positions of the parties

[2] We find merit in Respondent's motion to strike fn. 5 of the Administrative Law Judge's Decision We agree that the information in that footnote is immaterial and irrelevant to the issues presented herein and, accordingly, we find it unnecessary to rely on that portion of the Administrative Law Judge's Decision

While we note, contrary to the Administrative Law Judge's observation at fn 6 of his Decision, that a petition for an election had, in fact, been filed in *F C F Papers, Inc, a Division of the Mead Corporation,* 211 NLRB 657 (1974), we agree with the Administrative Law Judge, for those other reasons he notes, that that case is inapposite to the facts of the instant proceeding.

[3] While the administrative Law Judge found that Respondent had coercively interrogated its employees in violation of Sec. 8(a)(1) of the Act, he failed to enter a specific cease-and-desist order covering only that finding We hereby correct the Administrative Law Judge's recommended Order in that respect

tion, the Administrative Law Judge concluded that Respondent "should have" first asked its own officials who had knowledge of this supervisor's activities rather than seeking the information from the employees "at a critical time at the outset of the exercise of their right to determine whether they desired representation." Further, the Administrative Law Judge found Respondent's conduct was "exacerbated" by Respondent's statement that it was acting on behalf of the Board, and I agree. This deceit obviously means that the employees' responses were involuntary. However, I reject the first part of the Adminstrative Law Judge's conclusion.

The Administrative Law Judge ultimately offered no explanation for such a finding save for his *ipse dixit* statement that such conduct "necessarily" infringed on protected rights, and his summary citation to *William Walters Inc., a/k/a Computronics, Inc.*,[4] an inapposite case. *William Walters* did not deal with the question of an employer's concern over the possibility of a supervisor's participation in organizing a union. On the contrary, the Board has held in *F.C.F. Papers, Inc., a Division of the Mead Corporation*,[5] on facts similar to those here, that an employer has a legitimate concern about supervisory participation in organizing a union. As in *F.C.F. Papers, Inc.*, the employees here were given proper assurances that their participation in the questioning was voluntary and confidential, and that no reprisals or benefits would result. The election petition previously filed with the Board made the employees' union activity a matter of public record, and the employees were clearly and fully aware of Respondent's purpose in the questioning. Hence, Respondent's questioning the employees about a subject which the Board has categorized in *F.C.F. Papers, Inc.*, as a legitimate concern would not have been unlawful absent Respondent's further statement that it was done at the behest of the Board.[6]

[4] 179 NLRB 709 (1969).

[5] 211 NLRB 657 (1974).

[6] I agree that Lindsay's individual interrogation of employee Rodolowicz, as detailed by the Administrative Law Judge, is a separate violation of Sec 8(a)(1) of the Act.

APPENDIX

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

The law states that employees shall have the right:

To form, join, or assist labor organizations

To bargain collectively through representatives of their own choosing

To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

To refrain from any or all such activities, except as may be required by a legal agreement between an employer and the representative of the employees.

WE WILL NOT coercively interrogate our employees concerning their union activities and their execution of authorization cards for the Union.

WE WILL NOT represent to our employees that the National Labor Relations Board has asked us to question our employees concerning their union activities or whether they have signed a card for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights protected by Section 7 of the National Labor Relations Act.

A.B.C. LIQUORS, INC.

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Tampa, Florida, upon certain issues in the consolidated complaint,[1] based upon a charge filed by the above-named Charging Party (herein the Union).[2] The complaint alleges that the above-named Respondent, by interrogating employees, by means of a questionnaire and otherwise, concerning employee union activities and the execution of authorization cards on behalf of the Union, and by advising such employees that Respondent was requested by the National Labor Relations Board to obtain such information from those employees, violated Section 8(a)(1) of the Act.

Respondent's answer denies the commission of the alleged unfair labor practices, but admits allegations of the complaint sufficient to justify the assertion of jurisdiction under current standards of the Board (Respondent, engaged in the retail sale of beer, wines, and liquors in the State of Florida, in a recent annual period, received gross revenues from its operations in excess of $500,000 during which period Respondent received products valued in excess of $50,000, from suppliers who obtained those products outside the State of Florida), and to support a finding that the Union is a labor organization within the meaning of the Act.

Upon the entire record in this case,[3] from observation of the witnesses, and after due consideration of the briefs filed

[1] The complaint in Case 12–CA–7056 was consolidated with a complaint in Case 12–CA–7133 on March 26, 1976. After the hearing opened, the parties entered into a settlement of the latter case, which was therefore severed from Case 12–CA–7056

[2] The charge in Case 12–CA–7056 was filed on January 5, 1976, and the original complaint in that case was issued on February 19, 1976. The charge in Case 12–CA–7133 was filed on February 25, 1976

[3] At the hearing, Respondent requested that notice be taken of secs

(Continued)

by General Counsel and the Respondent, I make the following:

FINDINGS AND CONCLUSIONS

I. THE ISSUES

The General Counsel, as has been noted, asserts that the Respondent violated Section 8(a)(1) of the Act by questioning its employees about their union activities and execution of union cards, and advising the employees that it was doing so on the request of the Board. Respondent asserts that it was justified in its actions because it was seeking to show that cards submitted by the Union in support of a representation petition had been secured by a supervisor and because it had been told by an agent of the Board that the Board would not investigate the Respondent's claim of supervisory taint unless Respondent first submitted sufficient evidence in support of its claim.

II. THE FACTS

On December 8, 1975 (all dates hereinafter are in 1975, unless otherwise noted), the Union filed a petition for certification among the employees of Respondent's store 15 (docketed as Case 12–RC–4970). Shortly thereafter Respondent's management advised their counsel, Paul Saad, that they had been informed by managers of other Respondent stores that the manager of store 15, Savoie, had requested their assistance in obtaining authorization cards for the Union from employees in their stores, and that Savoie, himself, when discharged on December 13, asserted that he was being terminated because of his union activities. Saad testified that, upon contacting the Regional Office, he was informed that Mary Lee Meder was "in charge."[4] He thereupon drafted the following letter, dated December 17, addressed to "Ms. Mary Lee Meder, Field Examiner," which he hand-delivered to Meder:

> Re: ABC Liquors, Inc. Case No. 12–RC–4970
>
> Dear Ms. Meder:
>
> This is to advise you that I have evidence that Mr. Savoie, Manager of the store which has been the subject of the above designated petition, did actively engage in the solicitation of employees working within that store and at other stores for the purpose of signing cards on behalf of the labor organization that filed the petition in this proceeding.
>
> I am in the process of gaining evidence to support this charge and hereby request that the Regional Director initiate an investigation to determine the extent of supervisory participation on the part of Mr. Savoie and to invalidate those cards obtained by him.
>
> I am hopeful that we shall be able to file our evidence with your office at the beginning of the next week.

According to Saad, he told Meder the details of his information from Respondent's management concerning Savoie's activities, and requested that the Regional Office initiate an investigation. Meder told Saad that he should first "submit your evidence in support of your request" in writing.

Saad testified that based on his experience with the Regional Office, beginning with a case handled some 10 years previous, he was convinced that the Regional Office would not initiate an investigation into the question of possible supervisory taint of the petitioning Union's cards unless direct firsthand evidence was produced, that hearsay evidence would not suffice. However, he did not discuss this with Ms. Meder. He states that he has since been informed by the Regional Director that the Region will conduct such an investigation based upon a *prima facie* presentation, presumably in writing.[5]

Because of his belief that the Region would require firsthand evidence, Saad did not seek written statements from the store managers who had been contacted by Savoie, or from the management official to whom Savoie complained of being discharged for his union activities, all of whom were presumably available to Saad. Saad decided, rather, that the employees in store 15 should be questioned directly. In pursuance of this, Saad prepared two documents which might be submitted to the employees by a member of management. The first of these documents, headed "ACKNOWLEDGMENT," reads as follows:

> This is to advise you that the company is conducting an investigation for the purpose of obtaining evidence pertaining to the extent of the union activity of Mr. Savoie. As Mr. Savoie is no longer with our organization, it is necessary to discuss with you your own personal knowledge of any such activity on his part. Therefore, I want to advise you of the following:
>
> 1. The sole purpose of this questioning is to determine the nature and extent of Mr. Savoie's solicitation of your support on behalf of the union. We have been requested to obtain this information by the National Labor Relations Board which is the Federal agency responsible for the final decision as to whether or not union cards obtained by Mr. Savoie were valid. As stated, you should be aware that there is no other way for us to obtain this information except by questioning our employees.
>
> 2. After you are through reading this notice, you should be aware that you are under absolutely no obligation to answer any questions we ask. You

11020 through 11039, and sec 11392.5 of the Board's Field Manual So far I can determine, there are no sections presently numbered between 11030 and 11042 I have otherwise taken notice of the sections requested I have also taken notice of the settlement agreement in Cases 12—CA–1403, –1403–2, attached to General Counsel's brief.

[4] Saad asserted that in the absence of the Regional Director, the Assistant Regional Director and the Regional Attorney, he considered Meder the acting Assistant Regional Director. This is disputed by General Counsel The title is not important On this record, Saad was entitled to assume that Meder was acting for the Region in respect to the pending representation matter.

[5] General Counsel points out that Saad has on three occasions been personally cited in complaints issued by the Region for interrogating employees concerning their union activities In two cases, this conduct was found violative of the Act. *Lindsay Newspapers, Inc*, 130 NLRB 680 (1961), *Guild Industries Mfg. Corp*, 133 NLRB 1719 (1961), supplemented at 135 NLRB 971 (1962). In a third case, *L.D Plante, et al*, Cases 12–CA–1403, –2, a settlement agreement was entered into. The settlement agreement, of course, does not constitute proof that conduct violative of the Act occurred

> may get up and leave at this point if you wish, and there will be no reprisals or punishment or other adverse effect on your job if you choose not to answer any questions. On the other hand, if you choose to answer our questions, there will be no reward or benefit to you in any way. Your providing this information to us will be strictly voluntary and strictly confidential.
>
> 3. You are requested to sign the signature line below which will signify that you have read the foregoing information, that you understand its comments, and that you realize that if you choose to answer questions you are doing so voluntarily, without any threat of reprisal or any promise of any reward or benefit.

The second document, in the form of a questionnaire, with 22 questions and spaces for answers, and a place for signature, asked, *inter alia,* whether Savoie talked with the employee about a union, what union, and whether this occurred during working time, after working time, or at the Respondent's place of business; did Savoie speak in favor of the union, say it would get better wages or working conditions, talk to the employees about signing a union card, or offer such a card; did the employee sign a card offered by Savoie or return the card to Savoie; did Savoie invite the employee to a union meeting, encourage support for the union, ask the employee to talk to other employees about joining the union, say why he was interested in a union at Respondent, say that employees who joined would get better benefits than others, suggest that if the employee did not join his job might be in jeopardy, say that all had joined but the employee and that he should therefore join, or make any promise of benefit if the employee signed a union card and joined the union now.

Respondent's area supervisor, William Lindsay, was assigned the task of contacting the individual employees at store 15. Apparently this was done individually, in some private place. Lindsay took one employee, James Rodolowicz, into a back room at the store and read him the material from the "Acknowledgment," but did not show him the paper. Rodolowicz said that he would be willing to sign the papers if Lindsay could show him Respondent's authority from the National Labor Relations Board requesting Respondent to ask these questions. Lindsay then put the papers away, but orally asked Rodolowicz if Savoie had given Rodolowicz a union card to sign, and when Rodolowicz replied in the negative, asked Rodolowicz if he had signed a union card. Rodolowicz answered that he had and that all of the employees had signed cards. Lindsay said he could not believe that Rodolowicz was participating in the union activities. Lindsay recited the benefits Respondent offered which he said were as good or better than Respondent's competitors, to which Rodolowicz replied that the employees were mostly concerned with job security.

The record shows that, of the approximately 15 employees in the unit at store 15, 9 filled out the questionnaires. It was stipulated that one employee other than Rodolowicz refused to sign the acknowledgment and questionnaire. The completed questionnaires in evidence indicate that Savoie solicited execution of several union cards.

The record shows that the petition in Case 12–RC–4970 was withdrawn by the Union and another petition for the same unit was thereafter filed; an election was conducted on this petition and the results of the election were certified by the Board. A charge on behalf of Savoie alleging his discharge to be a violation of the Act was also subsequently withdrawn.

III. ANALYSIS AND CONCLUSIONS

This case illustrates a growing misconception of the nature and purpose of the Board's longstanding requirement that a petition for representation must be supported by a showing of substantial interest on the part of the employees before the Board will process such petition. Respondent seems to contend that it may attack the validity of such showing of interest as a matter of right, comparing this procedure to the procedure followed in filing objections to an election, in which the parties do act as a matter of right. See, e.g., the Board's Rules and Regulations, Series 8, as amended, Section 102.69. No such rule appears permitting an attack upon a showing of interest. Cf. Statements of Procedure, Series 8, as amended, Part 101, subpart C, Sections 101.17 and 101.18. Rather, the requirement that a showing of interest be made serves an administrative purpose of the Board only, to prevent the parties from abusing the Board's processes and wasting Board time and money. This purpose is succinctly summarized in section 11020 of the Board's Field Manual as follows:

> The requirement as to adequacy of interest on the part of labor organizations initiating or seeking participation in an R case helps to avoid unnecessary expenditure of time and funds where there is no reasonable assurance that a genuine representation question exists, and prevents persons with little or no stake in a bargaining unit from abusing the Agency's machinery and interfering with the normal administration of the Act.
>
> The determination of the extent of interest is a purely administrative matter, wholly within the discretion of the Board. While any information offered by any party bearing on the validity of the evidence offered in support of an asserted interest should be received, weighed, and, if appropriate, acted upon, there is no *right* in any such party to litigate the subject, either directly or collaterally. [Emphasis in the original.]

See also *Bakelite Corporation,* 60 NLRB 318 (1945); *O.D. Jennings & Company,* 68 NLRB 516 (1946); *Georgia Kraft Company,* 120 NLRB 806 (1958), and cases cited. As these cases show, parties quite regularly have sought to attack the showing of interest as a means of obtaining dismissal of the representation petition. These attempts have been regularly rejected by the Board on the basis that this requirement is a matter devised by the Board for its own protection and not subject to collateral attack. At one point, as the cited cases show, the Board did experiment with permitting parties to litigate supervisory taint of such showing of interest, but

soon decided that this variation in its procedures only served to obstruct the administration of the Act, and reverted to its original rule that such issue should "be investigated only administratively by the Board." See *Georgia Kraft Company, supra.*

I am well aware that in most cases the Regional Office of the Board will not be aware of such issues as supervisory taint if the parties do not call attention to the probability that such defect in the showing of interest exists. I am also aware, as this case shows, that the Regional Office will not act on a mere claim of supervisory taint without written evidence showing a probability that such exists. A mere claim by counsel is not enough. Obviously if this were not so, the resources of the Board might be abused to the point that the value of the Board's administrative rule would not only be lost, but the use of the rule would itself lead to obstruction and delay of the Board's procedure to determine whether employees desire representation.

In the present case, Respondent did not attempt to secure written statements from those who had firsthand evidence—store managers who had been asked by Savoie to obtain union cards from the employees in their stores, and management officials to whom Savoie had admitted he had engaged in union activities—prior to engaging in interrogation of the employees concerning their union activities. No matter whether Respondent thought that the Regional Office would not act on such evidence, if Respondent desired to pursue the issue, this was a matter for the Board to decide, not Respondent. Respondent should have collected the evidence it had, and should have presented it to the Regional Office first, rather than questioning the employees at a critical time at the outset of the exercise of their right to determine whether they desired representation. As Respondent is now advised, the Regional Director would probably have acted upon such a presentation. If he did not, he might have been subject to reversal by the Board, but his mere refusal to act would not justify Respondent in usurping the Board's administrative function. In the circumstances of this case, Respondent was not justified in interrogating its employees separate and apart, in back rooms, concerning their union activities. Such conduct necessarily tended to interfere with, restrain, and coerce the employees in the exercise of their attempt to secure rights guaranteed under the Act. See *William Walters, Inc., a/k/a Computronics, Inc.,* 179 NLRB 709 (1969); cf. *Sullivan Surplus Sales, Inc.,* 152 NLRB 132 (1965).[6]

The coercive effects of Respondent's questioning of the employees concerning union activities was indeed exacerbated by Respondent's statements to the employees that the interrogation was authorized by the Board, a conscious device obviously intended to overcome anticipated employee reluctance to discuss union matters with Respondent. There is no justification in this record for inferring that Respondent was somehow invited by the Regional Office of the Board to engage in wholesale interrogation of its employees or to claim that it was acting on behalf of the Board in this instance. See *Burns International Security Service, Inc.,* 225 NLRB 271 (1976). It is therefore found that Respondent, by interrogating its employees concerning their union activities, and by asserting that it was engaged in this conduct at the request of the National Labor Relations Board, violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 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, by coercively interrogating its employees concerning their union activities and their execution of authorization cards for the Union, and by representing that it had been requested by the Board to engage in such activities, engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

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

ORDER[7]

The Respondent, A.B.C. Liquors, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Representing to its employees that it is acting at the request of or on behalf of the National Labor Relations Board in interrogating its employees concerning their activities on behalf of or their support for a labor organization.

(b) In any other manner coercively interrogating its employees concerning their union or other activities protected by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

[6] Respondent's reliance upon *F C F Papers, Inc*, 211 NLRB 657 (1974), is misplaced In that case the Board held that the employer "had a legitimate concern about supervisory participation in the union," in questioning employees about a supervisor's activities at a union meeting which led the employer to discharge the supervisor. No petition for an election was involved. We are not here concerned with an employer's right to protect itself against the legal consequences of a supervisor's assistance to a union Savoie had already been discharged when the interrogation involved here took place Respondent, as has been noted, had no similar legitimate concern with the Union's showing of interest which justified interrogation of the employees.

[7] 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

(a) Post at its store 15 copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[8] In the event the Board's Order is enforced by a Judgment of the 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."