Armcor Industries, Inc. *and* Michael A. Rossi *and* United Electrical, Radio and Machine Workers of America (UE). Cases 6–CA–7532 and 6–CA–7539

January 26, 1977

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND JENKINS

On April 11, 1975, the National Labor Relations Board issued its Decision and Order[1] in this proceeding. The Board, in agreement with the findings of the Administrative Law Judge, found that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union activities; by creating the impression of surveillance of union activities; by threatening plant closure and loss of benefits if employees supported the Union; by promising benefits if employees withheld their support of the Union; and by encouraging employee support for a rival union. The Board also agreed with the Administrative Law Judge that the Company violated Section 8(a)(3) and (1) of the Act by discharging the leading union advocate, Michael Rossi, because of Rossi's efforts on behalf of the Union.

Contrary to the Administrative Law Judge, the Board found a further violation of Section 8(a)(3) and (1) of the Act predicated on the Company's termination of employee Wayne Burns. The Board concluded that the Company discharged Burns, who was Rossi's work partner and fellow union supporter, to give an aura of legitimacy to its discharge of Rossi.

The Board concluded that the circumstances of the case warranted an order directing the Company to recognize and bargain with the Union.

Thereafter, on May 3, 1976, the United States Court of Appeals for the Third Circuit issued a decision[2] in which it granted enforcement of the Board's findings of violations of Section 8(a)(1) and (3) of the Act, but denied enforcement of that part of the Board's Order requiring the Company to bargain with the Union. In so doing, the court noted that in *N.L.R.B.* v. *Gissel Packing Co., Inc.,* 395 U.S. 575 (1969), the Supreme Court indicated that a bargaining order without requiring an election would be appropriate in either of two situations: first, in those "exceptional cases" in which the unlawful conduct is so "outrageous" and "pervasive" that traditional remedies cannot eliminate their coercive effects; and second, in those "less extraordinary cases" in which there are less pervasive practices, but where there is a showing that the union at some point had a card majority, and where the Board concludes that the extensiveness of the unlawful conduct has a "tendency to undermine majority strength and impede the election processes." 395 U.S. at 613–614.

In seeking to apply the Supreme Court's *Gissel* teachings to the facts of this case and to the Board's decision thereon, the court pointed out that the Board had characterized the Company's unlawful conduct as "extensive and egregious," terms which appear relevant to the first, or "exceptional cases" category. However, the Board in its decision had also remarked on the presence of a card majority, a factor relevant to the second, or "less extraordinary cases," category. In these circumstances, the court concluded that the Board had failed to explicate sufficiently the precise basis on which it had decided that a bargaining order was warranted.[3] Accordingly, the court remanded the matter to the Board "for further analysis and findings on the necessity for a bargaining order." 535 F.2d at 246.

The Board, having accepted the remand, respectfully recognizes the above-mentioned court opinion as binding upon us for the purpose of deciding this case.

On June 3, 1976, the Board notified the parties that it had decided to accept the remand and invited each party to file a statement of position. Pursuant to this notice, counsel for the General Counsel, the Union, and the Company filed statements.

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 as a whole, the decision of the United States Court of Appeals for the Third Circuit remanding the proceedings, and the statement of position filed by each party and, for the reasons set forth below, has decided to reaffirm its initial Decision and Order in this matter, including that part of its Order which requires the Company to bargain with the Union upon request.

The record evidence as found by the Board and the reviewing court establishes that the Union's campaign had its genesis on or about May 23, 1974, when employee Michael Rossi contacted a union representative and arranged for a meeting between interested company employees and the Union. The meeting was set for the evening of May 28. On the afternoon of May 28, Company Vice President Jack Fabean coercively interrogated employee Richard Powell concerning where the union meeting was to be held. Later that same afternoon Fabean, still seeking information about the meeting, coercively interrogated employee Dennis Wilson.

[1] 217 NLRB 358

[2] 535 F.2d 239

[3] Circuit Judge Gibbon, in his concurring and dissenting opinion, 535 F.2d at 246, would have enforced the Board's Order in its entirety.

At the union meeting on May 28, and thereafter on May 29, employee Rossi solicited valid authorization cards in favor of the Union from 19 of the 23 production and maintenance employees then employed at the plant. On the morning of May 30, Fabean unlawfully questioned Rossi about the number of cards he had received, sought to create the impression of company surveillance over union activities, and impliedly promised Rossi that company benefits would increase if employees repudiated the Union. That same morning Fabean approached a group of employees which included Rossi, Wilson, Powell, and several others and by his pointed remarks sought to reinforce the impression of company surveillance over the employees' protected activities.

Nor was the Company's unlawful antiunion campaign confined to the activities of Vice President Fabean. As found by the Board, Company President Pat DeLaquil helped set in motion the organizational activities of a rival labor organization whose representative, a personal friend of DeLaquil for many years, appeared on the Company's premises on May 30. Moreover, on the afternoon of May 31, DeLaquil interrogated employee Elaine Seiler concerning her reasons for wanting the Union, intimated that Seiler's coworker, Elaine Hohman, would be fired if the Union came in, and threatened plant closure. In a second conversation that same afternoon DeLaquil unlawfully questioned employee Mitch Persin and advised Persin that employees should have gone to management first to resolve their grievances. Finally, at a company party for all employees held that evening, DeLaquil announced his adamant opposition to the Union and stated his preference for the rival labor organization. In the course of his speech to employees, DeLaquil also remarked that he had been considering a profit-sharing plan for employees but if the Union came in the plan would not be put into effect.

The Company's unlawful effort to counter the Union's organizational drive was capped by the May 30 termination of Michael Rossi, well known both to management and to his fellow workers as the prime mover behind the Union's campaign and as the leading union proponent at the plant. The Company's unlawful conduct was compounded by its decision to terminate the employment of Rossi's coworker, Wayne Burns. As indicated previously, the Board concluded that the decision to terminate Burns was motivated by the Company's desire to give an aura of legitimacy to the Rossi discharge.

In view of the presence here of a card majority in favor of the Union, we do not have to resolve the issue of whether or not the Company's unlawful practices standing alone are sufficient to place this case in the category of "exceptional cases" described by the *Gissel* Court. Even assuming, *arguendo,* that the Company's violations of the Act cannot be fairly characterized as "outrageous," they are nonetheless sufficiently serious and extensive, and their effects so lingering, that in all the circumstances of this case it is plain that "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Gissel,* 395 U.S. at 614–615.

With respect to the seriousness of the Company's unfair labor practices and the impact one might reasonably expect them to have had on employees, we note at the outset the relatively small complement of 23 employees at the plant and the fact that experience indicates that an employer's unlawful conduct is magnified when directed at such a small number. Moreover, in the case at hand, at least 5 of the 23 employees were involved in separate face-to-face confrontations with management. During these incidents each employee was coercively interrogated and/or threatened, not by a low-level supervisor but rather by Fabean or DeLaquil, individuals who clearly possessed power to make good their threats.[4] As a group, employees were also coercively addressed by President DeLaquil on the evening of May 31. During his speech, DeLaquil not only disparaged the Union and boosted a rival labor organization but utilized the "carrot and stick" approach by intimating to employees that benefits would be granted on condition that the Union did not come in. As the Supreme Court has long recognized, even an unsophisticated employee is quick to perceive "the fist in the velvet glove" implicit in such tactics. *N.L.R.B.* v. *Exchange Parts Company,* 375 U.S. 405, 409 (1964). This is especially true where, as here, the promise of benefit if the union is abandoned is coupled with the threat of retaliation, including plant closure, if the union is voted in.[5]

We must also take into account the likelihood that the impact of the Company's antiunion campaign was measurably heightened by the fact that the Company's unlawful activities commenced immediately on the first stirring of employee interest in the Union and were concentrated in such a brief timespan. Thus, within 1 week of the first meeting between its employees and the Union, the Company had engaged in all the acts of interference, restraint, and

[4] See, in this regard, *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 223 NLRB 1409 (1976)

[5] The Board and the courts have long recognized that threats to close down a facility because of union activity are among the most serious and flagrant forms of interference with the free exercise of employee rights. *Irving N. Rothkin d/b/a Irv's Market,* 179 NLRB 832 (1969), enfd. 434 F.2d 1051 (C.A. 6, 1970) *Textile Workers Union* v. *Darlington Mfg. Company,* 380 U.S. 263 (1965). Moreover, as the Supreme Court has indicated, such threats are among the less remediable unfair labor practices See *Gissel,* 395 U.S. at 611, fn. 31

coercion described earlier herein and, in addition, had violated Section 8(a)(3) of the Act by discharging the instigator of the union drive, as well as a second union adherent. This Board is well aware that no employer conduct is more serious or has consequences more crippling to the free exercise of Section 7 rights than the discharge of an employee because of the employee's union affiliation. Indeed, both the Board and the courts have frequently pointed out that such conduct "goes to the very heart of the Act." *N.L.R.B.* v. *Entwistle Mfg. Co.,* 120 F.2d 532, 536 (C.A. 4, 1941). The effect of such a discharge is particularly pronounced when, as is true of the instant case, one of the victims is well known as the instigator of the Union's drive. In such circumstances, only the most remarkably obtuse employee would fail to perceive and to heed the employer's message that any employee who advocates the union is embarking on a perilous venture.[6]

In remanding this matter to us, the court of appeals also directed that we "should consider whether present conditions at the plant are still so contaminated as to warrant a bargaining order." 535 F.2d at 246. Although in our view the validity of a bargaining order in this case and in similar cases should properly rest upon our analysis of the seriousness and pervasiveness of the unlawful conduct at the time that conduct was first presented for our scrutiny,[7] in conformity with the court's instructions we have carefully considered the statement of position filed by the Company and the arguments concerning changed circumstances contained therein.

The basic thrust of the Company's statement of position is that no bargaining order is warranted now because (1) the Union has lost its card majority, and (2) there has been a significant turnover of employees since the commission of the unfair practices.[8] We find no merit in these arguments.

The error in contending that the current lack of a card majority demonstrates that no bargaining order is warranted is that such a state of affairs might as easily be taken as proof of the lingering effects of the Company's unlawful conduct. Indeed, as we have taken pains to point out herein, given both the massiveness of the Company's antiunion campaign and the nature of the unfair labor practices committed during it, one would expect that employee support for the Union once dissipated would long remain dormant.[9]

As for the Company's assertion that the turnover among its employees obviates the need for a bargaining order, it is sufficient to note that the Company concedes that at least 8 of the 23 employees employed during the critical period of the Company's unlawful conduct are still at the plant.[10] Included among those currently employed is Michael Rossi, the union activist who was discriminatorily discharged in 1974.

We find it reasonable to infer that the enthusiasm for union activity formerly displayed by Rossi and the other individuals whose employment dates back to 1974 has been, and will continue to be, dampened by the recollection of the Company's unswerving and unlawful opposition to their previous efforts on behalf of the Union. We think it also reasonable to infer that Rossi and other employees who personally witnessed the lengths to which the Company went to thwart the free exercise of employee rights in 1974 have already related to new employees or, if the occasion should arise in the future, will relate to new employees their experiences.[11]

Accordingly, and in light of our consideration of the record as a whole, we are persuaded that the specter of company retaliation and reprisal cannot be exorcised by posting a notice, by company assurances to "play fair" in the future, or by any other traditional remedy. Hence, we shall reaffirm our initial Order in its entirety.

ORDER

Based on the foregoing, and the entire record in this proceeding, the National Labor Relations Board hereby reaffirms its Order issued in this proceeding on April 11, 1975, as contained in 217 NLRB 358.

[6] See, in this regard, *Superior Micro Film Systems, Inc and/or Wilfred W Burgart and Jesse Guido, Partners d/b/a B. G Management Company,* 201 NLRB 555 (1973), enfd. 485 F.2d 681 (C.A. 3, 1973).

[7] To conclude otherwise is "to put a premium upon continued litigation by the employer" *N L R B* v *L.B Foster Company.* 418 F 2d 1, 4–5 (C.A 9, 1969) See also *Gibson Products Company of Washington Parish, La, Inc,* 185 NLRB 362 (1970)

[8] The Company also contends that a bargaining order is inappropriate now because it allegedly plans at some time in the future to close its Murrysville plant and move some 35 miles to a new facility at Butler, Pennsylvania Not only does the Company fail to substantiate its planned move by presenting any leases or other relevant agreements, but it is also apparent from the Company's brief that the facility which it contemplates using has not yet been completed, that the date of the move or any definite timetable has not yet been fixed, and that there is no evidence that the present employee complement or some part of it will not retain their jobs at any such new facility

[9] See *Howard Creations, Inc,* 212 NLRB 179 (1974), *Vernon Devices, Inc,* 215 NLRB 475 (1974); *Westminster Community Hospital, Inc,* 221 NLRB 185 (1975); *Schwab Foods, Inc, d/b/a Scotts IGA Foodliner,* 223 NLRB 394 (1976); *Red Barn System, Inc,* 224 NLRB 1586 (1976)

[10] The Company's statement alleges that eight cardsigners are still employed It is not clear whether other employees whose employment dates back to the critical period, even if they did not sign cards, also retain their employment

[11] *E S. Merriman & Sons; Merriman Management Services, Inc,* 219 NLRB 972 (1975), and cases cited therein at 973