99¢ Stores, Inc. *and* Teamsters Union, Local 115

Glenn Distributors Corporation *and* Teamsters Union, Local 115

United Food and Commercial Workers Union, Local 1776 *and* Teamsters Union Local No. 115. Cases 4–CA–22708, 4–CA–22709, 4–CB–7207, and 4–CB–7208

February 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On July 12, 1995, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel and the Charging Party (Teamsters Union, Local 115) filed exceptions and supporting briefs. Respondent Employer and Respondent Union both filed briefs in opposition to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Carmen P. Cialino, Jr., Esq., for the General Counsel.
Jeffrey E. Myers, Esq., and *Rosalia J. Costa-Clarke, Esq.*, of Philadelphia, Pennsylvania, for 99¢ Stores, Inc. & Glenn Distributors Corporation.
Robert P. Curley, Esq., of Norristown, Pennsylvania, for UFCW Local 1776.
Norton H. Brainard, II, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On May 2 and June 30, 1994, Teamsters Local 115 filed a charge and first amended charge, respectively, against 99¢ Stores, Inc. (Respondent 99¢ Stores). On May 2 and June 30, 1994, Teamsters Local 115 filed a charge and first amended charge, respectively, against Glenn Distributors Corporation (Respondent Glenn Distributors). On May 2 and June 30, 1994, Teamsters Local 115 filed a charge and first amended charge, respectively, against UFCW Local 1776 (Respondent UFCW Local 1776).

On December 7, 1994, the National Labor Relations Board, by the Regional Director for Region 4, issued an amended consolidated complaint (complaint), which alleges that Respondent 99¢ Stores and Respondent Glenn Distributors violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act), and that Respondent UFCW Local 1776 violated Section 8(b)(1)(A) and (2) of the Act.

Respondents 99¢ Stores, Glenn Distributors, and UFCW Local 1776 filed answers in which they denied that the Act was violated in any way.

A hearing was held before me in Philadelphia, Pennsylvania, on April 3 and 4, 1995.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and counsel for Respondents 99¢ Stores, Glenn Distributors, and UFCW Local 1776, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondents 99¢ Stores and Glenn Distributors admit, and I find, that they meet the jurisdictional standards of the Act and are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Furthermore, they admit, for purposes of this litigation, and I find, that Respondents 99¢ Stores and Glenn Distributors constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondents 99¢ Stores, Glenn Distributors, and UFCW Local 1776 admit, and I find, that at all material times both

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel excepts to the judge's finding that the appropriate unit is comprised of 23 employees and asserts that drivers and other employees should be included in the unit thereby raising the number of unit employees to as high as 30. However, as the General Counsel concedes, Respondent UFCW obtained 16 signed membership/representation authorization forms and therefore presented a majority showing even if all 30 employees are included in the unit.

[2] The General Counsel and the Charging Party rely on *Vernitron Electrical Components*, 221 NLRB 464 (1975), enfd. 548 F.2d 24 (1st Cir. 1977), to support their contention that Respondent Employer's supervisors had the duty to evict Respondent UFCW's organizers when they entered the warehouse. However, in finding a violation of the Act in *Vernitron*, the Board relied on the combination of a number of factors not present in this case. Thus, in *Vernitron*, unlike here, the employer directed employees to attend union meetings during worktime, employees were approached while supervisors, including the general foreman, were openly in a position to watch them execute or refuse to execute union cards, and the employer extended recognition within a few hours and without any attempt to obtain verification by a neutral party of the union's alleged majority status. Accordingly, we find *Vernitron* clearly distinguishable from the present case. See *New England Motor Freight*, 297 NLRB 848, 851–852 (1990).

Respondent UFCW Local 1776 and Teamsters Local 115 have been labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Introduction*

Respondents 99¢ Stores and Glenn Distributors share a 170,000-square-foot warehouse located at 5601 Tulip Street in Philadelphia.

Respondent 99¢ Stores, in addition, operates 14 retail stores where products costing less than $1 are sold. It operates this warehouse for products sold in its stores. Respondent Glenn Distributors operates this warehouse and distributes products both to 99¢ Stores retail outlets and to other customers.

It is stipulated for purposes of this litigation that Respondents 99¢ Stores and Glenn Distributors are a single employer.

99¢ Stores used to be called Amazing Stores and in 1985 Respondent UFCW Local 1776's predecessor union UFCW Local 1357 began an organizing campaign among the stores employees. After lengthy litigation involving unfair labor practices UFCW Local 1776 was certified as the collective-bargaining representative of the employees who worked in what are now called the 99¢ Stores of which there are, as noted above, 14. The litigation established that the Union had secured a card majority but lost the election. Because of pervasive unfair labor practices committed by 99¢ Stores the Board ordered and the court of appeals agreed that a *Gissel* bargaining order was appropriate.[1] Collective-bargaining agreements were entered into between 99¢ Stores and the Union. The first collective-bargaining agreement ran from October 1990 to October 1993 and a second collective-bargaining agreement is effective from October 1993 to October 1996.

Richard Godwin credibly testified that he is a vice president of Respondent UFCW Local 1776 and directs the local's audit team. In March 1994 Godwin received an audit report which reflected, as he had suspected, that Respondent 99¢ Stores was not reporting some employees as eligible union members or making health and welfare contributions for them. It was reported to Godwin that employees were being switched between the retail stores and the warehouse on Tulip Street.

Godwin met with Respondent UFCW 1776 President Lou Bucci and suggested to Bucci that the Union attempt to organize the warehouse in an effort to harass Respondent 99¢ Stores.

I found Godwin to be a credible witness. His demeanor was that of an honest man.

Lou Bucci did not testify. No one called him as a witness. Lou Ferrante, a union business agent, did testify however. Ferrante, like Godwin, impressed me by his demeanor as an honest man and a credible witness. He testified that Bucci told him to ''blitz organize'' the warehouse because, according to what Bucci told Ferrante, ''they're ripe.''

[1] See *Amazing Stores*, 289 NLRB 163 (1988), enfd. 887 F.2d 329 (D.C. Cir. 1989), and *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

B. *The ''Blitz Organizing'' on April 12, 1994*

On April 12, 1994, UFCW Local 1776 Business Agent Ferrante gathered up Union Agents Matt McFarlane and Leonard Purnell and told them to go with him to the Tulip Street warehouse for some ''blitz organizing.''

''Blitz organizing'' is a tactic where union agents appear unannounced and unexpected at an employer's place of business and go in and try to sign up for the union as many employees as possible as quickly as possible and then leave.

Ferrante, McFarlane, and Purnell entered the warehouse and walked through it telling employees that they were from the Union that represented the employees in the 99¢ Stores and wanted to represent them as well. All three union agents credibly testified that they did not tell employees that the Employer wanted them to sign up with the Union or that the Employer sent them into the warehouse to sign employees up for the Union. Both the 99¢ Stores area of the warehouse and the Glenn Distributors area of the warehouse were covered by the union agents. A majority of the employees of 99¢ Stores and Glenn Distributors working in the warehouse signed the forms presented to them by either Ferrante or McFarlane or Purnell, i.e., 16 out of 23. (Some 9 of 15 Respondent 99¢ Stores employees and 7 of 8 Respondent Glenn Distributors employees.) The form presented was one piece of paper with three parts to it. The top part was a membership application and authorization to the Union to represent them, the middle portion was an authorization form for PAC membership and contribution, and the bottom portion of the form was for dues-deduction authorization. Respondent UFCW Local 1776 was clearly identified by name on several parts of the form. The employees were asked to sign the top and bottom portions of the form only and not the middle portion.

The three union agents entered the warehouse without giving prior notice to either Respondent 99¢ Stores or Respondent Glenn Distributors. And there is no evidence that either Respondent 99¢ Stores or Respondent Glenn Distributors gave permission to the Union to enter the warehouse. The three union agents were in the warehouse for approximately 40 or 45 minutes.

A visual inspection of the forms signed by the employees reflects that it was obvious that the Union was the UFCW Local 1776 and the employees could not be reasonably mistaken about the identity of the Union.

I credit the testimony of Ferrante that he never told the employees that either ''Joe,'' a possible reference to Joe Lieberman, or that ''they'' had sent the union agents to the warehouse to sign up the employees.

Present at the warehouse, in addition to the employees, were Respondents 99¢ Stores' warehouse manager, Mansour Ally, and Respondent Glenn Distributors' warehouse manager, Eugene DeShazor. Ally and DeShazor both testified before me. It is clear that neither Ally nor DeShazor attempted to stop the three union agents from signing up employees but they did not help them either.

In the warehouse are signs which state that parts of the warehouse are off limits to nonemployees, e.g., ''Employees Only.'' Neither Ally nor DeShazor enforced these signs against the three union agents but the testimony was mixed about just how strictly these signs were normally enforced. The bottom line is sometimes they were enforced against nonemployees and sometimes they were not so enforced.

DeShazor testified that he has eight people under him on the Glenn Distributors' side of the warehouse. A union agent approached him to sign a union authorization card and he refused saying he was part of management and the agent moved on. At one point an employee named Robert McGoldrich asked DeShazor if he should sign an authorization card and DeShazor admits he said words to the effect that if the employee was looking for more money it was up to him to sign or not. I do not credit Robert McGoldrich's testimony that DeShazor told him to get the other employees and see if they'll sign up for the Union.

Ally manages on the 99¢ Stores' side of the warehouse. He didn't try to stop the union agents but didn't help them either. He did nothing. He was never given training on what to do as a part of management if a union tries to organize the employees. Indeed, DeShazor likewise never received any training either. At one point Ally, a native of Guyana, was asked to help a union agent sign up one of the employees, i.e., Azween Houssein, because of a language problem and Ally refused to help in any way. I do not credit James Lugo that Ally told him that the union agents wanted to talk to him (Lugo).

Ally and DeShazor did not stay with the union agents as the agents asked the employees to sign up with the Union but they did not flee the warehouse either. Both Ally and DeShazor were asked to sign up for the Union and refused. The evidence reflects that the union agents did not know that Ally and DeShazor were part of management.

I find that Respondent's 99¢ Stores and Glenn Distributors did not unlawfully assist Respondent UFCW Local 1776 in organizing its employees. I found Union Agents Ferrante, McFarlane, and Purnell to be credible and I found Warehouse Managers DeShazor and Ally also to be credible. Based on their credited testimony and after examining the leading cases cited by all counsel, I conclude that the Act was not violated.[2] The only assistance Ally and DeShazor gave to the union agents is that they did not move to evict the union agents from the warehouse. This is simply not enough to even suggest a violation of the Act.

Also present in the warehouse at the time of the ''blitz organizing'' was Sid Berezin. Berezin is a 67–68-year-old man who is like a father to Glenn Segal and Joe Lieberman, the principals behind Respondents Glenn Distributors and 99¢ Stores, respectively, and while Sid Berezin, the father of one of Respondent Glenn Distributor's salesman, has the run of the warehouse and can come and go as he pleases he has, based on the record in this case, no title in either business and has no managerial role in either business. During the ''blitz organizing'' he remained in an office he is allowed to use and was not on the floor. He did nothing to help or hinder the union agents and there is no evidence he even knew what was going on. Lastly, there were no threats or promises made by anyone to the employees to get them to sign up for the Union.

C. *The April 14, 1994 Card Check*

On April 14, 1994, 2 days after the ''blitz organizing,'' Attorney and Arbitrator Margaret Brogan, a former employee of the National Labor Relations Board, conducted a card check and confirmed that a clear majority of the employees had authorized Respondent UFCW Local 1776 to represent them and a recognition agreement was executed.

D. *Efforts by Teamsters Local 115 to Organize the Warehouse Employees*

David Leininger was not present at the warehouse on April 12, 1994, the day of the ''blitz organizing.'' When he returned to work on April 13, 1994, he was very upset that agents of Respondent UFCW Local 1776 had been at the warehouse and signed up employees. Leininger wanted the employees to be represented by the Teamsters and not by the UFCW. Leininger, however, had not gotten any employees to sign authorization cards for the Teamsters nor had he or anyone else ever distributed any Teamsters literature at the warehouse. Indeed Anthony Robb, a witness for the General Counsel, testified he knew nothing of any union organizing prior to the ''blitz organizing'' on April 12, 1994. Suffice to say Leininger attempted to get employees to sign authorization cards for Teamsters Local 115 but he did not try to get or get any cards signed prior to April 15, 1994, and, as noted above, on April 14, 1994, the day before, a recognition agreement had been signed in which agreement Respondents 99¢ Stores and Glenn Distributors recognized Respondent UFCW Local 1776 as the collective-bargaining agent for the warehouse employees.

Leininger claims that in December 1993 Respondent Glenn Distributors Warehouse Manager DeShazor overheard Leininger talking about bringing in the Teamsters to represent the warehouse employees and DeShazor said to Leininger ''I didn't hear that'' or words to that effect. DeShazor credibly denied that ever occurred.

Leininger was later fired by Respondent Glenn Distributors and is currently employed in a job where he is paid more than he made when he was with Respondent Glenn Distributors and is in a unit represented by Teamsters Local 115 and Teamsters Local 115 helped him get the job. Leininger's discharge had nothing to do with his activity on behalf of Teamsters Local 115. He was never disciplined for his activity on behalf of Teamsters 115.

Leininger claims that after the ''blitz organizing'' he spoke with Respondent Glenn Distributors Warehouse Manager DeShazor and DeShazor told him that he (DeShazor) had spoken with Glenn Segal and Segal told DeShazor that Segal would close the warehouse if the Teamsters were selected as the collective-bargaining representative of the warehouse employees. DeShazor credibly denied that Segal ever said this to him or that he said it to Leininger.

DeShazor and Ally knew nothing of union organizing at the warehouse prior to the ''blitz organizing'' on April 12, 1994. The bottom line is no other union was trying to organize the warehouse employees prior to the ''blitz organizing'' of April 12, 1994, but Leininger was thinking about bringing in the Teamsters at some point in time.

E. *Negotiations and Agreement on a Collective-Bargaining Agreement*

Following the signing of the recognition agreement on April 14, 1994, between Respondents 99¢ Stores and Glenn Distributors on the employer side and Respondent UFCW Local 1776 on the union side the parties engaged in negotia-

[2] See *New England Motor Freight*, 297 NLRB 848 (1990), and *Longchamps, Inc.*, 205 NLRB 1025 (1973).

tions for a collective-bargaining agreement. After five or six negotiating sessions, the parties entered into a collective-bargaining agreement which was later ratified by the warehouse employees themselves.

The collective-bargaining agreement covering the warehouse employees is effective from June 19, 1994, to June 21, 1997. The unit is as follows:

> All truck drivers and warehouse employees employed by Respondent Employees at the Philadelphia facility, excluding guards and supervisors as defined in the Act.

The agreement contains a union-security clause and an automatic initiation fee and dues-deduction clause. The initiation fees and dues deducted pursuant to the agreement have been held in escrow pending the disposition of this unfair labor practice case.

Since I find that the Act was not violated in any way by Respondents 99¢ Stores, Glenn Distributors, and UFCW Local 1776, it was lawful for the parties, based on a card check by a neutral, to sign a recognition agreement and enter into a collective-bargaining agreement (later ratified by the members of the unit), and it was lawful for that collective-bargaining agreement to contain a union-security clause requiring the members of the unit to join the Union and for that collective bargaining to contain a provision for automatic initiation fee and dues deduction by the Employer. Not one employee claimed to be coerced into signing an authorization card for Respondent UFCW Local 1776. The Union represents an uncoerced majority of the warehouse employees.

Respondent 99¢ Stores may have been privately elated that its warehouse employees chose UFCW Local 1776 as their collective-bargaining representative and not some Teamsters Local, such as 115, but that is not unlawful. Respondent 99¢ Stores vigorously opposed the organization of its employees at its retail stores by the same union. See *Amazing Stores*, 289 NLRB 163 (1988), enfd. 887 F.2d 329 (D.C. Cir. 1989). And, it is incongruous indeed that Respondent 99¢ Stores was the subject 10 years ago of Board litigation because it did not recognize the union as collective-bargaining representative for some of its employees and it is now the subject of Board litigation because it did recognize that same union as collective-bargaining representative for others of its employees.

There is nothing wrong with an employer preferring to deal with one union rather than another but an employer cannot and must not interfere with the rights of its employees to select the collective-bargaining representative the employees want rather than selecting the collective-bargaining representative the employer wants.

I credit the testimony of Louis Ferrante, Matt McFarlane, Leonard Purnell, Richard Godwin, Joseph Lieberman, Eugene DeShazor, and Mansour Alley and conclude that the rights of the warehouse employees to chose their collective-bargaining representative was not compromised by anything done unlawfully by either the single employer or its agents (Respondents 99¢ Stores and Glenn Distributors) or the union or its agents (Respondent UFCW Local 1776).

Neither the Employer Respondents nor the Union did anything wrong on April 12, 1994, the day of ''blitz organizing.'' There is no duty on the part of management to evict union organizers from its property. Accordingly, based on the card majority, verified by a neutral, the parties were free to execute a recognition agreement and negotiate for a contract because Respondent UFCW Local 1776 did, in fact, represent an uncoerced majority of employees in the appropriate unit. The parties reached agreement on a contract 2 months after recognition and the unit employees ratified that agreement.

The Act was not violated in any way.

Conclusions of Law

1. Respondents 99¢ Stores and Glenn Distributors are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and are a single employer for purpose of this litigation.

2. Respondent UFCW Local 1776 and Charging Party Teamsters Local 115 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Act was not violated in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed in its entirety.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.