

Windsor Industries, Inc. and National Organization of Industrial Trade Unions. Cases 29-CA-7943 and 29-CA-8108

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 15 December 1982 the National Labor Relations Board issued a Decision and Order in this proceeding,¹ adopting an administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by soliciting grievances from its employees and promising to remedy them in order to induce employees to refrain from supporting the National Organization of Industrial Trade Unions (the Union) and violated Section 8(a)(1) and (3) by laying off employees Joseph Benzola and Jack Roberts in order to discourage membership in the Union. The Board also adopted the judge's findings that the Respondent's unfair labor practices were sufficiently widespread and serious to warrant issuance of a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and that the Respondent's refusal to recognize and bargain with the Union violated Section 8(a)(1) and (5).² The Board ordered the Respondent to cease and desist from the conduct found unlawful and to take certain affirmative action, including bargaining with the Union on request as the exclusive bargaining representative of its employees. Thereafter, the Board filed an application for enforcement with the United States Court of Appeals for the Second Circuit.

On 13 March 1984 a panel of the court of appeals enforced the Board's Order to the extent that the Board found the Respondent had violated Section 8(a)(1) and (3). The court declined, however, to enforce that portion of the Order requiring the Respondent to bargain with the Union and remanded this proceeding to the Board for additional findings concerning the propriety of a bargaining order. The court found that events occurring after the unfair labor practices were committed were relevant to the issuance of a bargaining order. Thus, the court directed the Board to consider lapse of time, employee turnover, and other factors and to apply the law of the circuit that the existence of

"hallmark" violations alone does not necessarily warrant issuance of a bargaining order.

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

Applying the principles in the court's remand as the law of this case, we find for the following reasons that a bargaining order is not warranted.

As found in our original decision the Union commenced organizational activities among the Respondent's 15 unit employees on 7 April 1980.³ On 10 April the Union demanded recognition. At the employees' request the Respondent held a meeting on company premises the following day where employees' benefits and grievances were discussed. At this meeting the Respondent agreed to "look into" employees' stated concerns and thereafter at the request of an employee posted a list of holidays already enjoyed by employees.⁴ On 15 April the Respondent laid off employees Benzola and Roberts because of their activities on behalf of the Union. On 29 May the Respondent offered Benzola reinstatement and on 4 June the Respondent offered Roberts reinstatement. Roberts accepted the reinstatement offer. Benzola did not respond.

At the time of the unfair labor practices in April 1980 the Respondent employed 15 bargaining unit employees. When our original decision issued in the proceeding in December 1982 the Respondent employed 13 unit employees. Only 5 of those 13 employees had been employed at the time of the unfair labor practices in April 1980. Of those five employees only two had signed union authorization cards. Two more years have now elapsed since our original decision in this proceeding.

Substantially similar circumstances were present in *NLRB v. Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984), in which the Second Circuit denied enforcement of a bargaining order. There, 60 percent of the current unit employees were not employed at the time the violations were committed. Here, approximately 60 percent of the unit as it existed when our original decision issued were not employed at the time the violations were committed. There almost two-thirds of the old employees had not signed cards. Here, precisely 60 percent of the employees employed in April 1980 who were still employed in December 1982 had not signed cards. There, the court noted a substantial lapse of time cast doubt on whether employee preference once expressed through authorization cards still reflected

¹ 265 NLRB 1009

² Former Chairman Van de Water and Member Hunter declined to join that portion of the Board's Order directing the Respondent to bargain with the Union

Chairman Dotson did not participate in the original decision and expresses no view regarding the Board's findings therein

³ All dates are in 1980 unless noted otherwise

⁴ The list included no additional holidays that were not already enjoyed

majority support for the union. Here, a similar substantial lapse of time occurred.

In addition to such substantial employee turnover and passage of time in the instant proceeding, we also find that certain other factors now militate against issuance of a bargaining order. Thus, although the discriminatory layoff of employees Benzola and Roberts were hallmark violations of the Act, the Respondent offered reinstatement to both these employees several weeks later and, indeed, Roberts accepted the Respondent's offer. Further, notwithstanding its solicitation of grievances and implied promise to remedy grievances, the Respondent did not implement any actual changes in response to the grievances solicited.⁵ Nor did the Respondent otherwise engage in acts of reprisal or coercion independently violative of Section 8(a)(1).

Taken together with the substantial employee turnover and passage of time, we find that the Respondent's unfair labor practices in April 1980 did

⁵ As noted, the Respondent merely posted a list of holidays already enjoyed by employees

not have the tendency to undermine majority strength and impede the election processes as to make a fair election unlikely years later. *NLRB v. Gissel Packing Co.*, supra.⁶ We shall therefore deny the request for a bargaining order and shall dismiss the complaint insofar as it alleges that the Respondent violated Section 8(a)(5) and (1) of the Act.

ORDER

The complaint is dismissed insofar as it alleges that the Respondent, Windsor Industries, Inc., Melville, New York, refused to bargain with National Organization of Industrial Trade Unions in violation of Section 8(a)(5) and (1) of the Act.

IT IS FURTHER ORDERED that the request for a bargaining order is denied.

⁶ As directed by the court of appeals, in reaching our decision we have carefully considered the court's opinions in *NLRB v. General Stencils*, 438 F.2d 894 (2d Cir. 1971), *J. J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981), *NLRB v. Pace Oldsmobile*, 681 F.2d 99 (2d Cir. 1982), and *NLRB v. Marion Rohr Corp.*, 714 F.2d 228 (2d Cir. 1983). We conclude that a bargaining order is not warranted in this proceeding under the holdings of those cases. See also *NLRB v. Knogo Corp.*, supra.