American Mirror Company, Inc. *and* United Furniture Workers of America, AFL-CIO. Cases 5-CA-14969 and 5-CA-15355

13 January 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND BABSON

On 11 January 1985 Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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 only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent violated Section 8(a)(1) of the Act by polling its employees 8 December 1982[2] and violated Section 8(a)(5) by withdrawing recognition from the Union 10 December.[3] Contrary to the judge, we conclude that the poll and the subsequent withdrawal of recognition were lawful.

The Union was certified 6 July 1981. The parties held negotiating sessions and reached an interim agreement on a wage issue, but did not agree on a total contract. The last session was 9 November.

In July Respondent's cutting and edging department employees engaged in a 2-day strike.[4] In November some of the Respondent's employees circulated slips of paper reading, "I do not want the Union to represent me any more," and obtained 42 employee signatures. The Respondent received the 42 slips 6 December. In the first week of December four employees told Plant Manager Don Weatherman that if an election were held a majority of employees would reject union representation.[5]

On 8 December the Respondent's president Frank Morris told assembled employees that because of uncertainty as to whether the Union retained majority status the Company wished to conduct a secret-ballot election. Morris assured them no one would know how individual employees voted; the Company's only purpose was to determine whether the employees wanted union representation; there would be no reprisals and no management or union representatives would be present during the poll. He then introduced Town Mayor Glenn Wilson who, after management officials left the polling area, conducted the poll. The results were 57 against union representation, 41 for, and 3 no opinion. By letter dated 10 December the Respondent's attorney notified the Union that the Respondent was withdrawing recognition because the Union had lost majority support.

The judge held that when the Respondent took the poll it lacked sufficient objective evidence that a majority did not want the Union, the poll in these circumstances was unlawful, and consequently the Respondent could not rely on the poll's results to withdraw recognition.

We disagree. The Board has long held that an employer is free to withdraw recognition from an incumbent union if (1) the union has actually lost majority support, or (2) the employer has a reasonably grounded doubt, based on objective considerations, about the union's continued majority status. *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970). We conclude that the Respondent had a reasonably grounded doubt about the Union's continued majority status after receiving signed rejections of the Union from 42 of 108 unit employees, and 4 separate oral reports from employees that the Union no longer enjoyed majority support. Accordingly, we conclude that, after receiving this information,[6] the Re-

[1] The Respondent has implicitly 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

[2] All dates are in 1982 unless otherwise indicated.

[3] We agree with the judge that the Respondent violated Sec 8(a)(1) by threatening employee Ricky Widner with discharge for certain remarks he made when the Respondent's poll was in progress. Although we disagree with the judge's statement that Widner was protesting an unlawful poll, we agree that Widner's remarks constituted protected union activity. We do not, however, rely on *Coronet Casuals*, 207 NLRB 304 (1973), which is inconsistent with *Clear Pine Mouldings*, 268 NLRB 1044 (1984) We shall modify the judge's recommended Order and notice accordingly

[4] Twenty-three or 24 employees participated The total number of employees in the unit was 108 in December, and nothing in the record suggests the unit's size differed appreciably in July

[5] The judge credits this evidence, but quotes testimony only from employee Odell Sumner, who told Weatherman the Respondent would prevail in an election if the Union had no time to make promises. Other employees, however, expressed their opinion without qualification. Based on his assessment of plant talk, employee William Upchurch told Weatherman he thought the employees would vote out the Union. Employee J. D. Thomason told Weatherman he thought, based on his own conversations with fellow employees, 15 employees in addition to the 42 who signed statements rejecting the Union would vote against the Union in an election

[6] In support of the judge's decision, the General Counsel (citing exceptions in Case 5-CA-13895) argues alternatively that the Respondent conducted the poll in an atmosphere of unremedied unfair labor practices. The Board, however, adopted the judge's dismissal of the complaint in Case 5-CA-13895 *American Mirror Co*, 269 NLRB 1091 (1984) Member Dennis, who would have found the Respondent violated Sec 8(a)(1), would not find under all the circumstances that the 8(a)(1) conduct tainted the atmosphere surrounding the Respondent's poll She particularly relies on the fact that the 8(a)(1) conduct occurred a year and a half before the poll

spondent lawfully polled employees as to their union sentiments and then lawfully withdrew recognition from the Union based on the results of the balloting. We therefore shall dismiss these allegations.[7]

ORDER

The National Labor Relations Board orders that the Respondent, American Mirror Company, Inc., Galax, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge for engaging in activities on behalf of United Furniture Workers of America, AFL–CIO.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Post at its plant in Galax, Virginia, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint is dismissed in all other respects.

[7] The judge found that the Respondent unlawfully granted wage increases after it withdrew recognition. Because we find the withdrawal of recognition lawful, we find also that the Respondent lawfully instituted the wage increases.

[8] If this 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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with discharge for engaging in activities on behalf of United Furniture Workers of America, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

AMERICAN MIRROR COMPANY, INC.

Carol A. Baumerich, Esq., for the General Counsel.
Richard F. Kane, Esq. (Blakeney, Alexander and Machen), of Charlotte, North Carolina, for the Respondent.
Robert S. Sarason, Esq., of Riverdale, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Galax, Virginia, on September 19, 1983, upon the General Counsel's complaint which alleged generally that the Respondent withdrew recognition of the Charging Party on December 9, 1982,[1] and subsequently refused to bargain with it in violation of Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. § 151 et seq.) The Respondent is also alleged to have threatened an employee in violation of Section 8(a)(1) of the Act and to have violated Section 8(a)(5) by granting an across-the-board wage increase on April 6, and selected merit and/or wage adjustments in April or May.[2]

The Respondent generally denied that it has committed any unfair labor practices and affirmatively contends that it withdrew recognition because it had objective evidence that the Charging Party no longer represented a majority of its bargaining unit employees. The Respondent had conducted a secret ballot election on December 8, wherein the employees voted 57 to 41 against continued representation by the Charging Party. The Respondent argues that it no longer had an obligation to bargain with the Union, thus the wage increases it granted in 1983 were not unlawful.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I issue the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is engaged in the business of manufacturing mirrors at a facility in Galax, Virginia. During the course of its business, the Respondent annually sells and ships directly to points located outside the State of Vir-

[1] All dates are between July 1982 and May 1983 unless otherwise indicated.

[2] The original charge in Case 5–CA–14969 was filed on December 13, 1982, and amended on January 27, 1983 The complaint issued on March 2, 1983. The charge in Case 5–CA–15355 was filed on April 26, 1983, and the complaint issued July 7, 1983

ginia products valued in excess of $50,000 and annually receives materials and supplies directly from points outside the State of Virginia valued in excess of $50,000. It is admitted, and I find, that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The parties stipulated to most of the material facts in this matter and the others are largely undisputed. In brief, the Union was certified as the bargaining representative for a unit of Respondent's production and maintenance employees[3] on July 6, 1981. Following certification of the Union, representatives of the Union and the Company engaged in collective-bargaining negotiations but were unable to reach agreement on a total contract. There was an interim agreement for a wage increase on March 9, 1982.

Early July 1982 the Respondent's employees engaged in a 2-day strike. The first day, according to the testimony of Frank Morris, the Respondent's president, only employees in the cutting department went on strike and they numbered about 14. On the second day 9 or 10 employees from the edging department also went on strike. But as Charles Thomas, the Union's business agent, testified there was no intent to have the whole bargaining unit strike. Thus, as was reported in the Gazette on July 16,

> [R]ather than have the whole plant on strike this week, only the glass cutting department would be on the picket line. He [Thomas] said 13 of the company's 14 glass cutters are on strike now. "We may or may not have other departments out today, tomorrow or next week, and this department may or may not return to work today, tomorrow or next week," Thomas said.

According to Thomas the purpose of the strike was to protest the Company's unfair labor practices allegations which were awaiting trial. Those matters were heard by Administrative Law Judge Russell M. King Jr. on July 29. Judge King issued his decision on September 22 concluding that the Respondent had not committed the unfair labor practices alleged and recommending the complaint be dismissed in its entirety.[4] The General Counsel filed exceptions but to date no decision has been reached by the Board.

The parties did continue to bargain for a time, but held their last negotiating session on November 9.

About this time certain of the Respondent's employees began circulating slips of paper reading:

> I *DO NOT* WANT THE UNION TO REPRESENT ME ANY MORE.
>
> Print Name Signature

Without agreeing to the authenticity of any signatures, the General Counsel and Charging Party did stipulate that 42 such slips were received by the Company.[5]

In addition to receiving these slips from employees, Don Weatherman, the Respondent's plant manager, was told by four different employees something to the effect that in their opinion if there were another election, a majority of the employees would vote against the Union. Thus Odell Sumner, one such employee, testified he told Weatherman:

> I said, "if there's someway you can get the Labor Board up here and have a secret ballot without giving the union time to promise anything or stir up something, then the union would be voted out." I said it would be close by my opinion but it would go out.

Then, officials of the Respondent apparently determined to poll the employees in a secret-ballot election to be conducted on its premises by Glenn Wilson, the mayor of Galax. No advance notice was given to the Union or the employees. The employees were notified by Morris approximately 15 minutes prior to the election which was conducted at 3 p.m. on December 8. Fifty-seven employees voted against continued representation by the Union, 41 in favor, and 3 expressed no opinion. There were also three employees who were absent that day and did not vote.

On December 9 Morris posted a notice to employees stating that "the majority of those voting on December 8, 1982, decided they did not want to be represented by" the Union and that "[b]ased upon the results of your vote, we have withdrawn recognition of the Union." He concluded the notice, "My personal thanks to all of you for your vote of confidence in the Company."

Then on December 10 the Respondent's counsel wrote to the Union stating that recognition had been withdrawn based on "objective evidence" that "the Union has lost the support of a majority of the employees."

On learning of the election, employee Ricky Widner left the plant to inform the Union's agent, John Kissack. He then returned to vote and at this time made some comment to Mayor Wilson, the essence of which was that Widner objected to Wilson participating in antiunion activity, given that he was the mayor of the town. Though precisely what Widner said is a matter of some dispute, that he confronted Wilson is acknowledged. The Respondent contends that Widner had threatened Wilson in some fashion. The next day Weatherman called Widner into his office and told Widner that such threats

[3] The appropriate unit within the meaning of Sec. 9(b) of the Act is: All production and maintenance employees, including assistant foremen and local truckdrivers, employed by Respondent at its Galax, Virginia, facility, excluding all office clerical employees, over-the-road drivers, sales employees, guards and supervisors as defined in the Act

[4] Case 5-CA-13895, JD-425-82

[5] One slip was signed by Jimmy R. Ramey and another by a James R. Ramey. While these may be different individuals, the printing and signatures on each slip are so similar as to suggest the same person did both However, whether the Company had slips from 41 or 42 employees is not critical to the outcome of this matter

would not be tolerated, and should he threaten Wilson or anyone else again, he would be terminated.

As above noted, in April and May 1983 the Respondent granted certain wage increases without notification to or bargaining with the Union.

The Respondent's withdrawal of recognition was alleged to have been a violation of Section 8(a)(5) of the Act and therefore its subsequent unilateral grant of pay increases was also violative of Section 8(a)(5). It is alleged that conducting the poll on December 8 and Weatherman's threat of discharge to Widner on December 9 were violative of Section 8(a)(1).

B. *Analysis and Concluding Findings*

1. The withdrawal of recognition

The parties are in general agreement that an employer may not withdraw recognition from a certified bargaining representative of its employees absent objective evidence that it no longer represents the majority of those employees. Thus the question is whether the Respondent in fact had such objective evidence to support its withdrawal of recognition from the Union. The Respondent contends that it did based on the results of the poll it conducted on December 8. Further, it was permitted to take the poll because (a) only 23 or 24 of approximately 108 employees went on strike in early July; (b) 42 employees had signed a statement to the effect that they did not want the Union to continue to represent them, and (c) four employees had notified their supervisor that in their opinion a majority of employees would vote against the Union in an election.

In *Forbidden City Restaurant*, 265 NLRB 409 (1982), the Board held that Respondent violated Section 8(a)(1) and (5) of the Act "by polling its employees at a time when it did not possess sufficient objective evidence to support a reasonable doubt of the incumbent Union's majority status." The Board further held that factors such as those relied on by the Respondent here were insufficient to justify taking the poll in the first instance. A doubt is not enough to justify the polling of employees. Before permitting an employer to do so, there must be "sufficient objective evidence" that a majority no longer wants representation.

I conclude that at the time the Respondent took the poll it did not have sufficient objective evidence that a majority of the employees no longer wished representation. At the time material, there were about 108 employees in the bargaining unit. Thus 42 employees who signed the slips indicating they did not wish continued representation were far short of a majority.

Statements by employees to their supervisor giving opinions concerning how other employees might vote is scarcely reliable evidence that a majority of employees did not want to be represented. In this respect, it might be noted that Sumners' opinion to Weatherman was predicated on there being a quick election such that the Union would not be allowed to campaign. Even then, he told Weatherman the outcome would be close.

Finally, the fact that only 23 or 24 employees went on strike in July is hardly sufficient to justify Respondent concluding the majority of employees no longer wanted the Union to represent them. As reported by the Gazette, the Union was engaged in a partial strike. It is immaterial that such activity might not be protected. Company officials read the Gazette and thus knew of the tactic and knew that the number of strikers did not correspond to the number of union supporters. Under such circumstances the Respondent could not reasonably conclude that a majority employees evidenced a disinterest in continued representation.

Having received designations from 42 employees and having been advised that others might vote against the Union the Respondent conducted an election without prior notice to the employees or the Union. When the poll was held, the Respondent did not have sufficient objective evidence that the majority of employees did not want the Union. Thus conducting the poll in such circumstances was unlawful and it follows that the results of such an unlawful act cannot be offered as evidence to support withdrawing recognition. *Thomas Industries*, 255 NLRB 646 (1981).

The policy reasons for this are obvious. The long-approved forum to test employees' desire for collective bargaining is a Board-conducted election. An election staged by a company, no matter how apparently fair the procedure may be, does not carry imprimatur of the Federal Government and the congressionally mandated safeguards. Even though the Respondent had the mayor of Galax run the election, he was clearly an agent of the Respondent and not of the Federal Government.

Further, had the Respondent truly believed that a majority of its employees would vote against continued representation in a free election environment, it could file petition with the Board. There is in fact a process by which to determine employee sentiment which has been fashioned by Congress and more than 40 years of experience. Private elections are no substitute. Thus the kind of self-help employed by the Respondent is not permitted except as a device to verify a fact already established by other objective evidence—that the majority of the employees do not wish continued representation. To conduct a poll as did the Respondent on December 8 absent such independent objective evidence was unlawful and was not validated by the result.

The Respondent argues that "the test to be applied should be that contained within the Board's own regulations prescribing the circumstances under which it will entertain a petition from employees." In short, the Respondent contends that objective evidence that 30 percent of its unit employees do not want representation is sufficient to permit a poll. However, the cases cited by the Respondent are inapposite. Nor is the basis for the Board's administrative standard applicable to a privately conducted poll.

Section 101.18 of the Board's Rules and Rules and Regulations is based on efficient administration of the Act and allocation of agency funds: "[I]n the absence of special factors the conduct of an election serves no purpose unless the petitioner has been designated by at lest 30 percent of the employees." (The 30-percent rule does not apply to petitions filed by an employer.) Such has nothing to do with employers polling employees about

their union sentiments where they are represented by a certified union.

Finally, to adopt the Respondent's argument would allow companies to conduct their own polls on relatively flimsy evidence and would tend to unsettle bargaining relationships. And, as the Board noted in *Montgomery Ward & Co.*, 210 NLRB 717 (1974), where a company initiates a poll of employee sentiment such tends, unlawfully, to undercut the continuing majority status of the union.

Accordingly, I conclude that by conducting the poll the Respondent violated Section 8(a)(1) and by subsequently withdrawing recognition, the Respondent violated Section 8(a)(5) of the Act.[6]

2. Threat to Ricky Widner

Ricky Widner came to vote in the election having discussed the matter with one of the Union's representatives. He told Mayor Wilson, in effect, that Wilson was making a big mistake by inserting himself in an effort on behalf of the Company to get rid of the Union. According to Company witness Carolyn Worrell, Widner ended his statement by saying, "I talked to Kissack and he says you're in a lot of trouble." And, "you'll be hearing from us." She reported this to Weatherman who the next day called Widner to his office and told him that Wilson was a guest of the Company, and should Widner threaten Wilson again, or anybody else, Widner would be discharged.

The General Counsel argues that the Respondent thereby threatened an employee in violation of Section 8(a)(1) of the Act. The Respondent contends that Widner's statement to Wilson was not protected, concerted activity.

No doubt Widner's statement was prompted by Wilson helping the Respondent do an unlawful act. Though Wilson may have been acting in good faith, he was nevertheless the Respondent's agent for purposes of conducting an unlawful poll. Widner's remarks thus occurred in the context of the Respondent's unlawful antiunion activity with which Wilson was associated. The Widner-Wilson confrontation arose out of union activity—the Respondent's attempt to dethrone the employees' certified bargaining representative. Thus Weatherman's threat to discipline Widner was necessarily unlawful unless Widner's statement could be found so egregious, on balance, as to be unprotected—a standard long applied by the Board when employees are engaged in a strike. See, e.g., Coronet Casuals, 207 NLRB 304 (1973).

The statement to Wilson, "You'll be hearing from us," or the other things Widner is alleged to have said hardly qualify as unprotected, egregious acts.

Widner, I conclude, had the protected right to protest the Respondent's poll especially since the poll was unlawful. And he had a right to do so to the one the Respondent had put in charge of conducting it. To discipline, or threaten to discipline, him for doing so was unlawful and a violation of Section 8(a)(1).

3. The grant of wage increases

As stipulated to by the parties, in April the Respondent granted an across-the-board wage increase and in April and May gave selective merit and/or wage adjustments. The Respondent admittedly gave these wage increases unilaterally, contending that it no longer was required to negotiate with the Union concerning such matters.

Having concluded that the Respondent unlawfully withdrew recognition from the Union and that the Union continued to be the duly certified representative of the Respondent's bargaining unit employees, the unilateral grant of wage increases in April and May 1983 was violative of Section 8(a)(5) of the Act. However, consistent with the Board's policy concerning the unlawful grant benefits, the Respondent will not be ordered to withdraw such increases.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above, occurring in connection with the Respondent's business have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to resume bargaining with the Union, on request, as the duly certified representative of its employees in the appropriate bargaining unit described above. A new certification year shall commence when Respondent begins to bargain in good faith. *Mar-Jac Poultry*, 136 NLRB 785 (1962).

[Recommended Order omitted from publication.]

[6] In view of my conclusion that the Respondent did not have sufficient objective evidence to conduct the poll, I need not rule on the General Counsel's further argument that the poll was conducted in an atmosphere of unremedied unfair labor practices, and thus unlawful. *Struksnes Construction Co*, 165 NLRB 1062 (1967) This argument is based on the General Counsel's contention that the Board will reverse Judge King's dismissal of the earlier complaint