

Montgomery Ward & Co., Incorporated and Amalgamated Food Employees Union Local 590, affiliated with United Food and Commercial Workers International Union, AFL-CIO. Case 6-CA-12565

26 August 1983

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 31 August 1982 Administrative Law Judge Walter H. Maloney, Jr., issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and a motion to strike.¹

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 Supplemental Decision² in light of the exceptions and briefs and has decided to affirm the

¹ Respondent attached to its brief to the Administrative Law Judge the affidavit of Customer Service Manager Bryan V. King, which outlined certain changes in personnel since the Union first demanded recognition in the summer of 1979. The Administrative Law Judge rejected the affidavit on procedural grounds as outside the scope of the remand, and on substantive grounds, because he found that changes in personnel over the years would have no bearing on the propriety of a bargaining order in this case. Respondent attached this same affidavit to its brief in support of its exceptions herein, and the General Counsel filed a motion to have it stricken. We agree with the Administrative Law Judge's reasons for refusing to consider King's affidavit. See *Martin City Ready Mix*, 264 NLRB 450, fn. 21 (1981). Accordingly, we grant the General Counsel's motion.

² In fn. 3 of his Supplemental Decision, the Administrative Law Judge commented on the Board's previous holding in this proceeding that "the failure to object to the admission of a [union authorization] card into evidence waives only the right to question its authenticity at a later time." 253 NLRB 196 (1980). According to the Administrative Law Judge, "[t]he net effect of the current holding is to permit a respondent to lull the General Counsel and the Charging Party into believing, at the evidentiary stage of the proceeding, that there is no issue concerning the validity of a given card and then permit it to raise the matter after the record has been closed and the General Counsel and the Charging Party have no further opportunity to adduce evidence on the question."

It is apparent that the Administrative Law Judge misread the Board's previous Decision in this case, for nowhere did the Board state or even imply, as the Administrative Law Judge suggests, that the issue of card validity may be raised after the record has been closed. On the contrary, the Board stated only that, insofar as authorization cards are concerned, the evidentiary and validity questions constitute two separate and distinct issues, and that the validity question "is timely raised by, *inter alia*, cross-examination of the authenticating witness or the production of the signer's direct testimony." 253 NLRB at 196. Accordingly, we disavow fn. 3 of the Administrative Law Judge's Supplemental Decision.

rulings, findings,³ and conclusions⁴ of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

³ Respondent has excepted to all of the credibility findings made by the Administrative Law Judge. Respondent contends that the Administrative Law Judge's rationale for crediting the testimony of employees Fran Temple and Pam Kent over that of employees Pamela Corn and Joann Houck as to the circumstances surrounding the solicitation of the latter two employees' authorization cards is based on both misstatement and mischaracterization of the record evidence. We find that the Administrative Law Judge, in certain respects, inaccurately described portions of Pamela Corn's testimony and, as Respondent points out, failed to note a discrepancy in Fran Temple's testimony concerning whether or not she gave an authorization card to Joann Houck. It is the Board's established policy, however, not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions 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 that even considering the errors made by the Administrative Law Judge in describing certain testimony, described and corrected below, there is no basis for reversing his findings.

In his discussion of Pamela Corn's testimony in pars. 9 and 10 of his Supplemental Decision, the Administrative Law Judge indicated, *inter alia*, that one of Corn's responses was to a leading question; that Corn testified that she had "no" conversation with Fran Temple when Temple originally gave her an authorization card; that Corn admitted on cross-examination that she understood the language on the card; and that Corn acknowledged that she did not really recall a conversation with Pam Kent which she previously had described. The record shows, however, that Corn's response was not to a leading question; that Corn testified that she had a conversation with Temple at the time, but that it was "not much"; that Corn did not necessarily admit to having understood what she read on the card, inasmuch as her response was to a confusing, compound question; and that the conversation Corn could not recall was not one she had with Kent, but rather one she had with Temple. We further note that the Administrative Law Judge substituted Corn's name for Hanson's in par. 12 of his Decision.

Member Hunter adopts the Administrative Law Judge's finding that employee Hanson's authorization card was executed on 10 July 1979, thereby establishing that on that date 37 of 72 employees had executed valid authorization cards and therefore constituting majority employee preference for representation by the Union. Accordingly, Member Hunter finds it unnecessary to pass on, and does not adopt, the Administrative Law Judge's finding with respect to the authorization cards of employees Houck and Corn.

⁴ We agree with the Administrative Law Judge that the Union's majority increased to 39 out of 72 unit employees on 10 July 1979, with the addition of the cards signed by Joann Houck and Helen Hanson on that date. Respondent's contention that the General Counsel failed to establish the composition of the bargaining unit at any time following 9 July 1979 and therefore failed to show that the Union possessed majority status on 10 July is without merit. ALJ Exh. 1, which Respondent prepared, lists the names of all of the unit employees and the wage increase each of them received on 11 July 1979, retroactive to 5 July 1979. There are 74 names on the list, including Donita Pierce and Linda Ohr, whom the court of appeals, in its decision, excluded from the unit. Thus, excluding Pierce and Ohr, the record shows that the bargaining unit was comprised of the same 72 employees at all relevant times herein, including 10 July 1979.

Member Hunter did not participate in the Board's Decision and Order herein, reported at 253 NLRB 196 (1980). Since the Court of Appeals for the Seventh Circuit remanded the Decision and Order only for reconsideration of the issues pertaining to the authorization cards of three employees, for institutional reasons Member Hunter adopts the Administrative Law Judge's recommendation that the Board impose a remedial bargaining order on Respondent as of 10 July 1979, under the authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

lations Board reaffirms its Order (reported at 253 NLRB 196) and hereby orders that the Respondent, Montgomery Ward & Co., Incorporated, Greensburg, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

SUPPLEMENTAL DECISION

WALTER H. MALONEY, JR., Administrative Law Judge: This case originally came on for hearing before me at Pittsburgh, Pennsylvania, on March 4, 5, and 6 and May 1, 1980, on an amended complaint issued by the Regional Director for the Board's Region 6, which alleges that Respondent Montgomery Ward & Company, Incorporated, violated Section 8(a)(1) and (5) of the Act. Shortly thereafter, on July 22, 1980, I issued a Decision finding that Respondent committed 29 independent violations of Section 8(a)(1) of the Act and that it unlawfully refused to bargain with the Amalgamated Food Employees' Union Local No. 590 (herein called the Union) as the exclusive representative of the clerical employees employed by Respondent at its Greensburg, Pennsylvania, credit service center. Among other things I recommended to the Board that it issue a so-called *Gissel*¹ remedy requiring Respondent to bargain collectively with the Union. The recommendation was premised on a finding of union majority based on authorization cards collected by the Union during an organizing drive which took place between July 2 and 10, 1979. It was prompted by further findings of serious, repeated, and pervasive unfair labor practices committed by Respondent following receipt of the Union's demand for recognition.

Shortly after the issuance of this Decision, the Board, on November 4, 1980, issued a Decision and Order affirming that Decision with some minor modifications. 253 NLRB 196. On November 30, 1981, 14 months thereafter, the United States Court of Appeals for the Seventh Circuit entered a decision affirming the Board's findings of violations of Section 8(a)(1) of the Act,² reversing certain findings with respect to the eligibility of card signers, and remanding the case to the Board for further findings with respect to the validity of authorization cards executed by Respondent's employees Pam Corn, Helen Hanson, and Joann Houck. The court also left open the question of the appropriateness of a *Gissel* remedy. On July 23, 1982, 6-1/2 months thereafter, the Board remanded the case to me for additional findings, conclusions, and recommendations respecting the validity of the cards signed by these three employees and for a determination of whether and when the Union obtained majority status. On that date, I issued an order giving the parties until August 16, 1982, to brief these limited issues if they chose to do so.

In passing on the remanded questions, I hereby reaffirm the original findings, conclusions, and recommendations which I made in the July 22, 1980, Decision, except

¹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

² Throughout these proceedings Respondent did not contest most of the allegations that it violated Sec. 8(a)(1) of the Act following the Union's demand for recognition. Those it did contest were resolved adversely to Respondent.

insofar as they have been modified by the Board or the Seventh Circuit, and I reiterate them herein as fully and completely as if they were again set out *in haec verba*. According to the revised tally of cards announced by the Seventh Circuit, the Union collected 36 valid designation cards out of a total of 72 bargaining unit employees. The cards of Corn, Hanson, and Houck remain in doubt. If any one of those cards is found to be valid, then the Union must be deemed to be the majority representative of Respondent's Greensburg credit service center employees.

The authorization card of Helen Hanson (G.C. Exh. 38) bears what purports to be her signature and the date of July 10, 1979. It was admitted into evidence over the objection of Respondent's counsel. The card was identified by employee Jean Armes, who testified that she gave it to Hanson at the latter's desk and that Hanson returned it to her a day later with all of the items thereon filled out. Armes could not pinpoint within a day or two the actual date on which Hanson returned the completed card but thought it was between July 10 and 12. The card was submitted by the Union to the Board on July 13 in support of a representation petition and bears the time and date stamp of Region 6 on its reverse side. At the time of the hearing in this case, Hanson continued to be an employee of Respondent, but Respondent did not elect to summon her as a witness or to present any other evidence which would contradict either Armes' testimony or the matters which appear on the face of the document in evidence. I affirm my original ruling admitting the card to evidence and conclude as a matter of fact that it was executed on July 10 by Helen Hanson.

The authorization card of Joann Houck (G.C. Exh. 62) bears her signature and the date of July 10, 1979. Like Hanson's card, it has the time and date stamp of Region 6 for July 13. Prior to the testimony of Houck, the card had been admitted into evidence without objection by Respondent³ on the testimony of employee Frances Temple, who stated that Houck handed her the card, which had been completely filled out, in the ladies' room at Respondent's office and that she then turned the card over to her fellow employee Joanne Miller. Respondent summoned Houck as a witness, who admitted signing and dating the card and handing it to Temple in the ladies' room.

The discrepancies in their testimony are as follows: Temple testified that Houck already had the card in her possession when they spoke in the ladies' room and she was not the solicitor who originally gave it to her. All that she did was collect the card and turn it in. With respect to representations made concerning the card,

³ In this case, the Board overruled a previous holding in *Pilgrim Life Insurance Co.*, 249 NLRB 1228 (1980), in which it had held that a respondent employer was not free to challenge the validity of union authorization cards if it had permitted them to be introduced into evidence at the hearing without objection. The net effect of the current holding is to permit a respondent to lull the General Counsel and the charging party into believing, at the evidentiary stage of the proceeding, that there is no issue concerning the validity of a given card and then permit it to raise the matter after the record has been closed and the General Counsel and the charging party have no further opportunity to adduce evidence on the question.

Houck testified that Temple told her that the card "was just to try to get the election." She then testified that Temple said that "we needed the majority of the signatures to turn it in, to try to be represented," and she reiterated this latter statement on cross-examination. On redirect examination, she was asked the leading question as to whether Temple had said that the sole and exclusive purpose of the card was to get an election. Houck replied that Temple did not say so in those words, "but that's what I understood it to be for, just an election." In subsequent examination, she said she did not remember Temple's exact words and vacillated between saying that Temple told her that the cards were "for an election" and "to get a majority to be represented." Temple testified during her interrupted cross-examination she said nothing to any employees concerning an election and nothing to connect the card with an election.

Temple's testimony was unqualified and convincing while Houck vacillated as to what was assertedly said to her. Based on these factors and the demeanor of the witnesses, I credit Temple's version, discredit Houck, and find and conclude that Houck executed a valid union designation card on July 10, 1979, which is untainted by any misrepresentations falling within the ambit of the *Cumberland Shoe* rule.⁴

The authorization card of Pam Corn (G.C. Exh. 61) bears her signature and the date of July 6, 1979. Corn was given the card by Temple and held on to it for 3 or 4 days. Frances Temple testified that Corn originally returned the card to her without filling it in and that she gave it back to Corn for this purpose. There is no dispute that Corn in fact signed and dated the card and then gave it to Frances Temple. It was admitted into evidence without objection.

Later, Corn was summoned as a Respondent witness. She testified in response to leading questions that fellow employee Pam Kent, whose desk was near her own desk, told her that "all we needed was a majority of signatures to get the election in." She testified that she had no conversation with Fran Temple when Temple originally gave the card to her and originally testified that she had no conversation with Temple after talking with Kent. She later testified that Temple told her to sign and date the card because it was close to the last day for the cards to be in for an election. Corn admitted on cross-examination that she read the dual purpose card and that she understood what she read.⁵ She later said, in answer to a question posed by me, that Frances Temple told her that the sole and exclusive purpose of that card was to get an election. She assertedly made this statement during the period of time she was holding on to the card. Later, on cross-examination, she stated inferentially that she had told counsel for the General Counsel something different during a pretrial interview; namely, that she had had not

⁴ *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enf. 351 F.2d 917 (6th Cir. 1965).

⁵ Her card states on its face:

I hereby request membership in and also authorize the Amalgamated Food Employees Union, Local 590 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, to represent me and bargain collectively with my employer in my behalf to negotiate and conclude all agreements concerning wages, hours, fringe benefits, and other terms and conditions of employment.

been informed that the sole purpose of the card was to get an election. She then accused counsel for the General Counsel of attempting to mislead her. When pressed, she then testified that she had told counsel for the General Counsel that the purpose of the card "was for a union," and then counsel for the General Counsel stated that she was wrong. She then stated that counsel for the General Counsel did not ask her what another employee had said to her on this point.

Corn then went on to repeat her original testimony; namely, that Pam Kent had told her that "we needed a majority of signatures so we could get an election in, and to do that, we had to have the majority so we could bring the union representative in to management to present the majority." She then acknowledged that she did not really recall what the conversation was at all, adding that she was led to believe that the card would be used to get an election. She could not remember whether she was told that this was the sole and exclusive purpose of the card.

Temple flatly denies that she ever spoke of an election in soliciting cards from employee. Kent flatly denies that she ever told Corn that the exclusive purpose of the card was to get an election or that she even had any conversation with Corn concerning the designation card. I credit their testimony over the garbled, confused, and contradictory testimony offered by Corn. In so doing, I conclude that Pam Corn executed a valid union designation card on July 6, 1979, which is untainted by any misrepresentations falling within the ambit of the *Cumberland Shoe* rule or any other case involving misrepresentations in this collection of union designation cards.

Having found that all three employees in question executed valid cards—one of July 6 and two on July 10—I conclude that, as of July 9, 1979, the date on which Union Representative George Nestler made a demand for recognition, the Union had a majority of 37 cards out of 72 employees. On July 10, 1979, the Union's majority increased to 39 out of 72 employees. Accordingly, I reaffirm all findings and conclusions of law set forth in the original Decision of July 22, 1980.

With respect to recommendations requested by the Board in its remand, I recommend that it enter the same order which I recommended on July 22, 1980. Respondent persists in contending that the cards of Corn and Houck should be discounted because they were procured the day following the mailing of Nestler's letter to Respondent in which the Union demanded recognition. The contention is without merit for at least two reasons. With respect to the violation of Section 8(a)(5) which has been alleged, it is clear that the demand for recognition which Nestler sent is a continuing one. Indeed, there is little doubt that it continues to this day, some 3 years later, and has never been withdrawn. Accordingly, it is immaterial that the Union may have perfected its majority status after the letter was mailed, although such is not the case here.

More to the point, a *Gissel*-type bargaining order is essentially a remedy for an 8(a)(1) violation, not necessarily a remedy for an 8(a)(5) violation. For a *Gissel* order to be valid there is no necessity that there be a demand for

recognition at all, since a demand is not an element of an 8(a)(1) case. What is essential for a *Gissel* order is that a respondent be found guilty of committing unfair labor practices which are serious enough that the Board cannot conduct a fair and free election under the "laboratory conditions" which it has long deemed to be essential⁶ and which the Supreme Court acknowledged when it issued the *Gissel* decision.⁷ In this case Respondent was found guilty of committing 29 separate violations of Section 8(a)(1) of the Act. These violations include the granting of a wage increase for the purpose of persuading employees to reject the Union, coercive interrogation of employees concerning their union sympathies and the union sympathies and activities of other employees, creating in the minds of employees the impression that their union activities and those of other employees were the subject of company surveillance, threatened to close the consumer credit service office if the Union came in, soliciting grievances during the course of the organizing campaign with the implied promise that the grievances would be redressed, threatening an employee with loss of a promotion because of his union activities, and directing employees to cease from engaging in union activity during working hours while permitting antiunion activities to continue. These findings are now beyond challenge. The question remaining is whether they add up to a *Gissel* order.

The Board and the Seventh Circuit have issued *Gissel* orders for conduct equivalent to or less than what has been found in this case and I have no hesitation in recommending such a remedy here.⁸ Two recent cases enforcing *Gissel* orders are *Justak Bros. v. NLRB*, 664 F.2d 1074 (7th Cir. 1981), and *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982). One way to determine whether a *Gissel* order is appropriate herein is to compare the facts of this case with the facts which the Supreme Court in *Gissel* thought were sufficient to warrant the issuance of a bargaining order. Except for two discriminatory discharges, the facts here portray a more pervasive and energetic course of illegal conduct than did the evidence in the case whose name gives rise to the remedy here at issue. In *Gissel*, a 47-member bargaining unit of packinghouse employees was treated to two illegal discharges, an announcement by the company vice president that union meeting would be placed under surveillance, several instances of coercive interrogation, a statement to one employee by the vice president that "I

can give you more than the [the union] can," and another statement by a supervisor and "I don't want to hear more of this 'union stuff.'" As noted above, the 72-member bargaining unit of office clerical employees was treated to a more numerous and more pervasive variety of unfair labor practices, save for the discriminatory discharges. The employees in the instant case were threatened with closing of their operation and were also given a wage increase. The latter, as pointed out in my previous Decision, has the unique quality among unfair labor practices of reappearing in each month's paycheck of every employee. Ward's also violated the law in 27 other particulars. In *Justak* and again in *Berger Transfer*, the Seventh Circuit pointed out that "common sense" dictated that representation elections could not be properly run under the circumstances found therein, and I suggest that the same "common sense" dictates a similar conclusion in this case.

Respondent attached to its brief in this case an affidavit of the present customer credit service manager indicating that certain changes have occurred in personnel since the Union first demanded recognition in the summer of 1979. The remand in this case did not include a reopening of the record to take additional testimony so I reject the affidavit on procedural grounds. I also reject it as an irrelevancy.⁹ There is little doubt that the composition of any bargaining unit changes as the years wear on. If the delays occasioned by litigation are permitted to continue, the day will eventually arrive when every member of the bargaining unit who was employed in July 1979, when the organizing campaign took shape, will have quit, retired, or died. Giving any weight to the argument suggested by Respondent in this regard would be to permit it to profit from its own wrongdoing and give administrative and judicial sanction to the venerable technique of chewing up bargaining rights by chewing up time. This ought not to be permitted and Respondent ought not to be allowed to dally any longer in according to the Union the recognition it should have granted over 3 years ago. Hence I recommend that the Board enter the same order which I recommended on July 22, 1980.¹⁰

⁹ I also reaffirm my rejection of a petition proffered at the hearing asking the Board to conduct an election rather than issue a bargaining order. Assuming, without all at finding, that the signatures thereon are genuine, it is apparent that the petition, circulated on company time and company premises and in the wake of severe and pervasive unfair labor practices, is a tainted expression of employee sentiment, as well as an expression of frustration at the slowness of the law in providing a remedy for a wrong.

¹⁰ 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.

⁶ *General Shoe Corp.*, 77 NLRB 124 (1948).

⁷ *Gissel Packing Co.*, supra, 395 U.S. at 597, fn. 8.

⁸ *NLRB v. Henry Colder Co.*, 447 F.2d 629 (7th Cir. 1971); *NLRB v. Copps Corp.*, 458 F.2d 1227 (7th Cir. 1972); *NLRB v. Big Ben Shoe Store*, 440 F.2d 347 (7th Cir. 1971); *NLRB v. Brown Specialty Co.*, 436 F.2d 372 (7th Cir. 1971); *Texaco v. NLRB*, 436 F.2d 520 (7th Cir. 1971), cert. denied 409 U.S. 1008 (1972); *Certified Foods v. NLRB*, 461 F.2d 33 (7th Cir. 1972); *Townhouse TV v. NLRB*, 531 F.2d 826 (7th Cir. 1976); *Walgreen Co. v. NLRB*, 509 F.2d 1014 (7th Cir. 1975).