

Decible Products, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW. Case 16-CA-8836

26 August 1983

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 22 April 1980 the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,¹ in which it found that by refusing to bargain with the Union, certified by the Board in Case 16-RC-7936 on 28 September 1979,² Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. The Board ordered Respondent to cease and desist from its unlawful conduct, and to recognize and bargain with the Union. Subsequently, the General Counsel filed with the United States Court of Appeals for the Fifth Circuit a petition for enforcement of the Board's Order.

In an opinion dated 30 September 1981³ the court denied enforcement of the Board's Order and remanded the case to the Board with the instruction that the Board consider the entire record compiled in connection with the Regional Director's Report on Objections. On 1 April 1982 pursuant to the Board's petition for rehearing *en banc*, the court vacated its opinion of 30 September 1981 and remanded the case to the Board for reconsideration in the light of the decision of the U.S. Court of Appeals for the Sixth Circuit in *NLRB v. North Electric Co.*, 644 F.2d 580 (1981).⁴ Thereafter, Respondent filed a statement of position with the Board.

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.

We have carefully reviewed the entire record in the underlying representation proceeding, as well as Respondent's statement of position, and for the reasons discussed below, we have decided to reaffirm our Certification of Representative issued in Case 16-RC-7936 and our previous Order in this proceeding.

Respondent refuses to bargain with the Union on the ground that certification of the Union was im-

proper because the election was conducted in an atmosphere which destroyed the laboratory conditions prescribed by the Board and which made a fair election impossible. Specifically, Respondent contends that: (1) the integrity of the balloting process was breached when, during the counting of ballots, the Board agent removed marked ballots from the presence of the election observers for about 10 minutes while she conferred by telephone with her supervisor on how to handle Respondent's challenges to certain ballots; (2) several employees wearing prounion T-shirts created a "carnival" atmosphere of confusion and engaged in improper electioneering near the polling place when they "paraded" in view of voters; and (3) a union observer's clenched-fist gesture created an atmosphere of fear and coercion among the voters.

In the underlying representation proceeding, the Regional Director found no merit in any of Respondent's aforementioned contentions. The Regional Director found that the Board agent's failure to invite the election observers to accompany her when she removed the marked ballots from the counting area did not cast doubt on the fairness of the election or the validity of the results, since the unused blank ballots remained with the observers, there was no evidence that ballots may have been altered while in the agent's possession, and all ballots were accounted for after the tallying. He also decided that the presence in the voting area of some employees wearing prounion T-shirts was not sufficient justification for setting aside the election. Further, the Regional Director concluded that the union observer's raising of a clenched fist did not create a general atmosphere of confusion or fear of reprisal. Accordingly, he recommended that Respondent's objections to the election be overruled and that the Union be certified.

On 28 September 1979 the Board adopted the Regional Director's findings and recommendations. The Board found that Respondent's exceptions to the Regional Director's report raised no substantive or material issues of fact or law which would warrant either reversal of his recommendations or a hearing. The Board subsequently denied Respondent's motion for reconsideration on the ground that it presented no matters not previously considered. As mentioned above, the Board thereafter found that Respondent's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act.

In refusing to enforce the Board's bargaining order, the Court of Appeals has directed the Board to reconsider the case in the light of the Sixth Circuit's opinion in *North Electric Co.*, supra, which held that it is an abuse of discretion for the Board

¹ 248 NLRB 1337.

² Not reported in volumes of Board Decisions.

³ 657 F.2d 727.

⁴ 671 F.2d 908.

to adopt a regional director's report without reviewing the documentary evidence relied on by the regional director. About 3 months later, however, in *Revco D.S., Inc. v. NLRB*, 653 F.2d 264 (1981), the Sixth Circuit clarified the ruling in *North Electric* by holding that the Board need not review the entire regional investigatory file when a party's objections do not raise sufficient substantial and material issues.

Respondent argues that the court's remand requires the Board to order the Regional Director to transmit to it all materials relied upon by the Regional Director, including company and Board affidavits. Respondent contends that after reviewing said materials the Board should either set aside the election or direct a hearing. We disagree. Even viewing as true the evidence referenced by Respondent, we find that as a matter of law there is nothing raised in Respondent's objections warranting either a hearing or an examination of the investigatory materials compiled by the Regional Director.

In *Frontier Hotel*, 265 NLRB 343 (1982), the Board recently clarified its definition of the record in objections cases where no hearing is held. The Board stated:

As now clearly set out in our Rules and Regulations, the record in objections cases where no hearing is held consists of the objections which were filed, the regional director's report or decision, all documentary evidence, except statements of witnesses, relied upon by the regional director in his report or decision, any briefs or other legal memorandums submitted by the parties, and any other motions, rulings, or orders of the regional director. Section 102.69(g)(1)(ii).

The Board then pointed out that statements of witnesses are expressly excluded from the record in accord with its policy, upheld by the Supreme Court in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), of protecting investigatory affidavits from disclosure when the witnesses who gave them have not testified at a hearing. Notwithstanding this policy, the Board explained in *Summa* that Section 102.69(g)(3) of its Rules and Regulations provides that

. . . if a party wishes the Board to consider any documentary evidence, including affidavits, which it has timely submitted to the regional director, but which are not attached to the regional director's report or decision, such evidence may be appended to the party's exceptions or opposition. Once appended, those affidavits, or other documentary evidence,

become part of the record and are fully considered by the Board.

In its statement of position Respondent claims that company affidavits submitted to the Regional Director, but not forwarded to the Board with his report, support its exceptions to the report. Nevertheless, Respondent at no time has appended any of those affidavits to its submissions to the Board, as provided in its Rules and Regulations. Accordingly, the Board was acting with proper discretion and within its own Rules by determining the merits of Respondent's exceptions without reviewing the affidavits in dispute.

We need not decide here whether the Fifth and Sixth Circuits would disagree with the foregoing and find that there are circumstances which mandate a regional director's inclusion of investigatory affidavits in the record transmitted to the Board. The clarification of *North Electric* in *Revco* clearly manifests the judicial opinion that the Board is not required to engage in the evidentiary review process in all circumstances where no hearing on objections has been held. As the Board held in *Summa*,

[T]he burden is on the objecting party to demonstrate to the Board that the evidence it submitted to the regional director, if credited, would warrant setting aside the election, and that the regional director in the decision overruling the objections resolved substantial and material issues of fact without conducting a hearing. In the absence of such a demonstration we are entitled to rely on the regional director's report or decision, for the material facts in such circumstances are undisputed.

Here, Respondent has identified no substantial and material factual issues and concedes that the facts are undisputed regarding the conduct that it alleges to be objectionable. Neither has Respondent offered any proof that the Regional Director ignored or misstated certain evidence. Instead, Respondent takes exception to the legal conclusions that the Regional Director and the Board have drawn from the undisputed facts. The question to be decided, then, is one of law, not of fact.

For example, Respondent contends that both the Regional Director and the Board erroneously considered each of the alleged incidents involving prounion employees in isolation without evaluating their cumulative effect, and thereby ignored the "rationale" of its objections. Such a contention raises strictly a question of law, which does not warrant a hearing or an examination of the entire regional investigatory file. Respondent also argues that a hearing should be held in order to permit it "to present witnesses who would testify as to the

atmosphere of fear and confusion which premeated [sic] this election as an outgrowth of the circus atmosphere." This contention similarly does not raise factual issues, since it relates solely to the legal significance that is to be attributed to certain, undisputed conduct during the election.

Like the Regional Director, we have accepted as true the facts most favorable to Respondent. Since none of Respondent's objections raises substantial and material factual issues, no evidentiary hearing is necessary and we need not review the documentary evidence relied upon by the Regional Director.⁵ Further, for the reasons stated in the Regional

⁵ See *Reichart Furniture Co. v. NLRB*, 649 F.2d 397 (6th Cir. 1981); *NLRB v. Belcor, Inc.*, 652 F.2d 856 (9th Cir. 1980); *Revco D.S., Inc. v. NLRB*, 653 F.2d 264 (6th Cir. 1981). But compare *Elison Corp. v. NLRB*, 688 F.2d 22 (6th Cir. 1982).

Director's report, we have concluded that Respondent's objections lack merit. Accordingly, we hereby overrule Respondent's objections, and we reaffirm the Certification of Representative issued in Case 16-RC-7936 and our prior Order in Case 16-CA-8836.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board affirms its Decision and Order issued in this proceeding on 22 April 1980 (reported at 248 NLRB 1337) and hereby orders that the Respondent, Decibel Products, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth therein.