

Washington-Baltimore Local, American Federation of Television and Radio Artists (WMAR, Inc.) and Irwin Alan Field. Case 5-CB-4217-1

30 March 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

On 24 August 1983 Administrative Law Judge Leonard M. Wagman issued the attached decision. The Charging Party filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.³

ORDER

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

¹The Charging Party has 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.

²In the penultimate paragraph of his Analysis and Conclusion section, the judge states that Charging Party Field's filing of a decertification petition was of "minimal, if any, consequence" in Respondent Union's decision on the fine it imposed on Field. We find it unnecessary to rely on this suggestion that the decertification petition may have been of even minimal consequence in Respondent Union's deliberations, for the judge found elsewhere, and we agree, that the General Counsel failed to establish that Respondent Union was motivated by the decertification petition in fining Field.

In light of this finding, Chairman Dotson finds it unnecessary to pass on the line of cases cited by the judge holding that expulsion of a member for filing a decertification petition is not an unfair labor practice.

³The Charging Party's request for oral argument is denied, as the record, the exceptions, and the brief adequately present the issues and positions of the parties.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This matter was heard by me on April 6, 1983, at Baltimore, Maryland. Upon an unfair labor practice charge filed by Irwin Alan Field on November 8, 1982, against the Union, Washington-Baltimore Local, American Fed-

eration of Television and Radio Artists,¹ the Regional Director for Region 5 of the National Labor Relations Board, referred to herein as the Board, issued a complaint and notice of hearing on December 23, 1982, alleging that the Union violated Section 8(b)(1)(A) of the National Labor Relations Act by imposing a court collectible fine on Field because he filed a decertification petition with the Board in Case 5-RD-776.

On the entire record in this case, my observation of the witnesses, and on consideration of the briefs, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

The Employer, WMAR, Inc., a Maryland corporation with an office and place of business at Baltimore, Maryland, operates a radio broadcasting station known as WRLX-FM and a television broadcasting station known as WMAR-TV, Channel 2. During the past 12 months, a representative period, the Employer, in the course and conduct of its business operations, received gross revenues exceeding \$100,000. During the same period, the Employer purchased and received at its facility materials and supplies valued in excess of \$50,000 directly from points located outside the State of Maryland. From the foregoing commerce data, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is undisputed and I find that the Union, Washington-Baltimore Local, American Federation of Television and Radio Artists, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Issue Presented

The issue presented is whether the Union violated Section 8(b)(1)(A) of the Act by fining Field \$2,500 because he filed a decertification petition with the Board.

For the reasons stated below, I find that a preponderance of the evidence does not sustain the allegation, and have recommended dismissal of the complaint.

B. The Facts

Irwin Alan Field had been a member of the Union since 1960. During the over 20 years that he was a member of the Union, Field was shop steward with station WCAO for 11 of the 12 years he worked there. As shop steward, Field also was a member of the executive board for about 6 years. In 1966, Field was also elected second vice president of the local union for a year.

Before coming to WRLX, Field did free lance work and worked at WAYE and WCAO in Baltimore. Field

¹ The caption of this case appears as amended at the hearing. The corrections to the official record are in the attached Appendix. [Omitted from publication.]

worked as a full-time staff announcer for radio station WRLX-FM in Baltimore, Maryland, since August 31, 1981.

The Union represented employees of television station WMAR, Channel 2 and employees of radio station WRLX-FM. Both stations, located in the same building in Baltimore, Maryland, are operated by WMAR, Inc. The employees of the television station and radio station were separate bargaining units and covered by separate collective-bargaining agreements, both of which expired on February 28, 1982,² with no agreement on new contracts. On March 1, the Union called a strike against both the radio and television stations.

As of March 1, when the Union began its strike, the radio station bargaining unit consisted of the following employees: Irwin Alan Field, a full-time staff announcer; Lewis "Ed" Graham, a full-time staff announcer; Leonard Roberts, a full-time announcer; John Smoot, a/k/a John Mason, a part-time announcer; Larry Hall, a full-time announcer and the program director of the station; David Prosser, a/k/a Dave Ross, a part-time announcer; and Rodney Jackson, also a part-time announcer. When the strike began, Prosser and Jackson were "in the process" of becoming members of the Union. All other radio unit employees were members of the Union when the strike began.

Smoot participated in the strike during its entire course. Roberts participated in the strike for the first 2 weeks but then returned to work and worked during the remainder of the strike. Hall, the program director, performed his management duties but less on-air work than before the strike. All other radio unit employees continued to perform their regular work duties during the strike.

On March 3, 2 days after the strike began, Donald Gaynor, the Union's assistant executive secretary, sent mailgrams to Field, Prosser, Jackson, and Graham which stated:

AFTRA IS ON STRIKE AGAINST WMAR-TV AND WRLX-FM. AS A MEMBER OF AFTRA YOU ARE ORDERED TO CEASE IMMEDIATELY WORKING IN AFTRA'S JURISDICTION ON THESE STRUCK STATIONS. FAILURE TO DO SO WILL SUBJECT YOU TO CHARGES AND APPROPRIATE ACTION UNDER AFTRA'S CONSTITUTION AND BYLAWS.

DON GAYNOR AFTRA

The Union sent a followup letter to Field identical to the mailgram. The Union did not send a letter or mailgram to Roberts or Smoot, who were honoring the strike, or to Hall who was considered a supervisor.

Among the television bargaining unit employees, announcer Tobie Marsh refused to honor the strike and was very vocal about her refusal to participate in the strike. Two other television unit members, John Deuber (a/k/a Jack Dawson) and Brad Ganson, who had not been appearing on the air prior to the strike, went on the

air and performed work of striking members throughout the strike. Wayne Lynch, a management employee of WMAR was required to perform on-air work, despite his request not to, and reluctantly complied.

During the first week of the strike, Arnie Kleiner, the head of WMAR television, Channel 2, and Stu Frankel, an executive of Abel Radio, which owned WRLX-FM radio, approached Field, Hall, and Graham and offered them extra money for performing work in the television booth during the strike. Field and Hall declined the invitation, while Graham made no reply. Shortly thereafter, Graham began making station identification announcements and other so-called voice-over work, and did so for the remainder of the strike. Graham was the only member of the radio unit to perform struck television unit work during the strike.

On March 1, the first day of the strike, Graham filed a charge with the NLRB alleging that the Union had restrained and coerced employees of WRLX-FM in violation of Section 8(b)(1)(A) of the Act. The Regional Director for Region 5 informed Graham of his decision not to issue a complaint by letter dated April 2. The Regional Director also informed Graham of his right to appeal this decision which Graham exercised on April 13. In a letter dated May 12, the General Counsel's Office of Appeals denied Graham's appeal.

On April 14, while the strike was still in progress, Field filed with the Board a petition in Case 5-RD-776 to decertify the Union as the exclusive bargaining representative of WRLX-FM employees. After holding hearings at the Board's office on May 11 and 21, the Regional Director issued a Decision and Direction of Election on May 28. Union representatives did not participate in the hearings nor did they attend or oppose the election. In the ensuing election, conducted on June 24, WRLX-FM employees voted 5-1 against the Union. The Regional Director certified the results of the election on July 27, decertifying the Union as the bargaining representative at WRLX-FM.

On April 17, the strike was settled. Thereafter, Union President Gordon Peterson sent letters dated May 24 to Field, Graham, Roberts, and Hall, of WRLX-FM and Marsh, Dawson, Ganson, and Lynch of WMAR-TV, notifying each that he or she had been charged by the Union with "failure to observe AFTRA rules and the requirement to refrain from broadcasting over struck facilities" and crossing the Union's picket line at WMAR TV/WRLX-FM while the Union was engaged in an authorized strike. The Union's Board-scheduled hearings for June 12. The letter informed the employees of their right to counsel, statements in their behalf, and examination of the witnesses at the hearing, and the provisions under the Union's constitution and bylaws by which the hearings would be conducted. Sometime after the commencement of the strike, the Union discovered that Prosser and Jackson had not tendered union dues as of February 28. No charges were brought against either of them.

Roberts and Lynch requested postponements of their hearings. Field advised the Union that he would not attend the hearing of June 12, but would send a letter,

² Unless otherwise noted, all dates referred to are in 1982.

responding to the charge against him, which would be read to the Union's Board. Field sent a letter to Union President Peterson dated June 2, also stating that he, Field, would not attend the June 12 hearing but would like to have his letter read into the record by Larry Hall.

In his letter which was read to the Union's executive board in his absence, Field attacked the Union and its handling of negotiations. He wrote that he had not attended any negotiations because the Union was asking only for more money and "[S]ince I had come to WRLX for over scale, scale did not interest me." Field went on to detail what he believed were the important issues for the radio unit and to contrast that with the television unit's interests. He went on to accuse the Union of nonrepresentation and of sacrificing the radio unit "on the TV altar" to present a unified front, despite the radio unit's contentment with its contract. Field concluded by saying:

I have been a member of this local for over twenty two years. I was a shop steward for eleven years and spent most of that time on the Executive Board as well. I was also Second Vice President of this local for a year. Never before, in all that time, have I seen such a flagrant disregard on the part of the union for the wishes of its members.

In the letter, Field also mentioned that Graham filed a grievance with the NLRB for nonrepresentation and Field had filed a decertification petition.

The Union held hearings on June 12 for Marsh, Dawson, Ganson, Field, Hall, and Graham. The Union fined Marsh \$5,000. Dawson, Ganson, and Field were each fined \$2,500. The Union also expelled those four members. The Union suspended Graham indefinitely but did not fine him. The Union found Hall not guilty of misconduct because of his supervisory status.

On September 15, at the postponed hearing, Lynch was found not guilty of any misconduct because of his management position when his case was considered. Roberts failed to appear at his rescheduled hearing on September 15. He was suspended indefinitely and fined \$500. Upon learning that the letter informing Roberts of his hearing date had been misaddressed, the Union scheduled another hearing for him on November 9. Roberts attended this hearing and spoke on his own behalf. The Union's executive board then decided to revoke the suspension and reduced his fine to \$200, based on his appearance and explanation of his conduct at the hearing.

Field appealed his fine and expulsion in a letter dated June 27. A July 15 letter from his attorneys supplemented his earlier letter. The membership of the Union denied this appeal on October 21. At the time of the hearing, Field's fine was on appeal before the National Board of AFTRA.

The executive board of the Union was informed of the decertification of the WRLX-FM bargaining unit at its September 15 meeting. This was the first time that executive board members who did not attend the Field hearing were officially informed of the decertification.

Analysis and Conclusion

Section 8(b)(1)(A) of the National Labor Relations Act (herein the Act) provides:

It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.* [Emphasis added.]

Under the proviso, it has long been held by the Board and Courts that unions may discipline members who violate rules and regulations governing membership. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). The Supreme Court in an in-depth review of the legislative history and purpose of this proviso, concluded that the power to discipline members "is particularly vital when the members engage in a strike," because "the power to fine or expel strikebreakers is essential if the Union is to be an effective bargaining agent." *Id.* at 181. Numerous cases before the Board and courts have upheld a labor organization's right to fine and/or expel members who crossed picket lines during an authorized strike. E.g., *NLRB v. Machinists Local 1327*, 608 F.2d 1219 (9th Cir. 1979); *NLRB v. Operating Engineers Local 18*, 503 F.2d 780 (6th Cir. 1974); *NLRB v. Typographical Union No. 21*, 486 F.2d 1347 (9th Cir. 1973); *Operating Engineers Local 18 (Davis-McKee, Inc.)*, 238 NLRB 652 (1978); *Insurance Workers Local 60 (John Hancock Co.)*, 236 NLRB 440 (1978); *Typographical Union No. 6 (Typemen, Inc.)*, 229 NLRB 886 (1977).

The Board has recognized the right of a union to defend itself when a member files a decertification petition, holding that expulsion of such a member is not an unfair labor practice. *Tawas Tube Products*, 151 NLRB 46 (1965). On the other hand, fines against members for filing decertification petitions have been held to violate Section 8(b)(1)(A) of the Act. *Molders Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208 (1969), *enfd.* 442 F.2d 92 (9th Cir. 1971); *Machinists (Smith-Lee Co.)*, 182 NLRB 849 (1970). Here, the evidence presented did not sustain the contention that the Union's treatment of Irwin Alan Field ran afoul of that section of the Act.

In the instant case, the Union was engaged in an authorized strike. Those of its members who crossed the picket lines on the first day of the strike were told of the strike, ordered to cease working, and warned that failure to cease working would subject the member to charges and appropriate action under the Union's constitution and bylaws. Field admitted receiving this notification. He also admitted crossing the picket line daily for the duration of an approximately 7-week strike and collecting his "overscale" salary.

The General Counsel and Field contended, however, that he was not fined for crossing the picket line, but for filing a decertification petition with the Board 3 days before the strike's cessation. According to the General Counsel and Field, the size of Field's fine when compared to those which the Union imposed upon the other

FM radio unit employees showed that the Union punished him for filing the decertification petition. This contention fails.

Granted that Field was the only WRLX-FM unit employee to suffer a fine of \$2,500 and expulsion from the Union, the General Counsel's case fails on two grounds. First, the General Counsel failed to show that the Union imposed the punishment on Field because he had filed a decertification petition. Further, the General Counsel has not shown that the Union applied one standard to WRLX-FM employees and another to WMAR-TV employees in determining punishment. Thus, in analyzing the facts before me, I have considered Field's treatment in relation to both the WRLX-FM unit employees and the WMAR-TV employees. In this context, the General Counsel has failed to show that Field's punishment was extraordinary.

It is established Board and Supreme Court law that the validity of union fines under the Act does not depend on their being reasonable in amount. *Machinists No. 405 (Boeing Co.)*, 185 NLRB 380, 383 fn. 16 (1970); *NLRB v. Boeing*, 412 U.S. 67 (1973). The excessiveness or severity of a fine may nevertheless be considered in ascertaining the motive, reason, and purpose for the fine. *Operating Engineers Local 965 (Elcon Pipliners)*, 247 NLRB 203, 210 (1980). Accordingly, I have looked to all the circumstances surrounding Field's punishment.

The General Counsel failed to establish that the Union was motivated by the decertification petition rather than crossing the picket line in fining Field. The Union's board never mentioned the petition at the Union's hearings. Indeed, only Field brought it to the attention of the Union's executive board. There was no showing that the Union paid any special attention to the decertification petition. No union board members expressed hostility to Field in the intervening 8 weeks between the filing and the hearing. The Union never went to the hearings nor did it fight or even attend the election. As Assistant Executive Secretary Gaynor credibly testified, the Union's attitude was "if they didn't want us, we didn't want them." There is also no showing that Field suffered more than others who crossed the picket line.

The Charging Party and the General Counsel asserted that the difference in discipline shows that Field was punished more severely because of the petition. Union President Peterson credibly explained the differences in punishment. In the case of Roberts, who was fined \$200, he honored the picket line for the first 2 weeks of the strike, he attended negotiation sessions, he made a contribution to the strikers, and he attended his hearing. Graham, who was not fined, but suspended indefinitely, received lenient treatment because of his extenuating circumstances. These included his wife's ill health which required expensive medical care, his previous participation

in lengthy union strikes, the fact that he had been at WRLX less than 1 month when the strike started, and immediately prior to that he had been unemployed for 11 months. Notwithstanding these extenuating circumstances, Graham escaped a fine only by a tie-breaking vote of the Union's president, Gordon Peterson.

Union President Peterson credibly testified that the factors which the Union's board considered in imposing punishment on Field were his crossing the picket line every day for the duration of the strike, his failure to attend negotiating sessions, his expression of disinterest in negotiations because he was overscale, his failure to attend the union board's hearing, and his status as a union officer. In light of all these factors which the union board knew about for weeks before Field's hearing, his filing of a decertification petition was of minimal, if any, consequence in deciding on the fine. Moreover, Field's fine equaled that of two WMAR-TV unit employees, who both crossed the picket line every day, one of whom had also held union office, and one of whom had been vocal about defying the strike. Finally, neither of these latter employees had filed a decertification petition against the Union.

For reasons stated herein, I find that the General Counsel has failed to establish the violation of Section 8(b)(1)(A) alleged in the complaint.³ Accordingly, I shall recommend dismissal of this complaint in its entirety.

CONCLUSIONS OF LAW

1. WMAR, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Washington-Baltimore Local, American Federation of Television and Radio Artists is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not, as alleged in the complaint, engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The complaint herein is dismissed in its entirety.

³ While the General Counsel did not protest the expulsion of Field, his counsel sought rescission of his expulsion. The Board has held that the proviso in 8(b)(1)(A) allows a union to expel a member who files or circulates decertification petitions. *Tawas Tube Products*, 151 NLRB 46, 48 (1965).

⁴ 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.