

Montgomery Ward & Co., Incorporated and United Food and Commercial Workers International Union, Local Union No. 455, AFL-CIO-CC.
Cases 23-CA-7882, 23-CA-7888, 23-CA-8019, 23-CA-8089, 23-CA-8323, 23-CA-8414, and 23-RC-4887

May 29, 1992

SUPPLEMENTAL DECISION, ORDER, AND
DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On February 19, 1992, Administrative Law Judge Gordon J. Myatt issued the attached supplemental decision. The Respondent 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 supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt his recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and modifies the Order entered in this proceeding on March 24, 1988, and reported at 288 NLRB 126 by deleting paragraphs 1(o) and 2(c).

IT IS FURTHER ORDERED that Case 23-RC-4887 is severed from Cases 23-CA-7882, 23-CA-7888, 23-CA-8019, 23-CA-8089, 23-CA-8323, and 23-CA-8414, and that Case 23-RC-4887 is remanded to the Regional Director for Region 23 for the purpose of conducting another election at such time as he deems the circumstances will permit the free choice of a bargaining agent.²

[Direction of Second Election omitted from publication.]

¹ The judge inadvertently noted that Bob Gore is employed at the Respondent's retail store in Bloomington, Illinois. Bob Gore is employed at the Respondent's Bloomingdale, Illinois store.

² The Notice of Second Election to be issued by the Regional Director shall be both in English and Spanish, and shall include language informing employees that the first election was set aside because the Board found that certain conduct by the Respondent interfered with the employees' free choice. *Lufkin Rule Co.*, 147 NLRB 341, 342 (1964).

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On May 1, 1991, the Board issued an Order in the above-captioned

307 NLRB No. 119

proceeding remanding it for further hearing. The Board's remand Order was based on a decision, issued on review in this matter, by the United States Court of Appeals for the Seventh Circuit.¹ The court enforced the Board's unfair practice findings but remanded the proceeding to the Board to consider evidence bearing on the propriety of the bargaining Order. In so doing, the court directed the Board to consider whether the use of traditional remedies would be adequate to ensure a fair second election in light of the passage of time and change in circumstances occurring between the commission of the unfair labor practices and the issuance of the Board's bargaining Order. On advising the parties that it accepted the court's remand and after receiving responses from them to a Notice to Show Cause, the Board issued its remand. The Board directed that the record be reopened for the purpose of receiving evidence regarding the passage of time and change of circumstances (employee turnover and change in supervisory personnel involved in committing the unfair labor practices) and whether traditional remedies are adequate to ensure a fair second election.

Following several telephonic conference calls with the parties, a joint motion to stipulate facts and a request for a briefing schedule was submitted on July 16, 1991. An Order was issued on July 30, 1991, granting the motion and briefs were submitted by all parties on August 30. Based on the Board's remand, the joint stipulation, and the briefs submitted by the parties, I make the following

FINDINGS OF FACT

In terms of background, 13 supervisors were found to have been involved in the unlawful conduct which occurred during the Union's attempt to organize and represent the employees at Respondent's Pharr, Texas facility. The bargaining unit at the time of these events consisted of approximately 270 employees. By the joint stipulation, the parties have agreed that April 28, 1991, is the relevant date to assess the composition of both the supervisory staff and the bargaining unit in establishing the turnover of management and unit employees at the Pharr facility; and thereby determine the impact such turnover, along with the passage of time, has on the question of whether traditional remedies would be adequate to ensure a second fair election.

The joint stipulation reveals that of the 13 supervisors found to have committed unfair labor practices at the time of the initial hearing, only 1 (Chris Rocha) was employed as a supervisor on the relevant date in 1991.² The stipulation further reveals that on April 28, 1991, there were 17 supervisors at the Pharr facility. Of this number, three were supervisors at the time of the unlawful conduct. These three were David Chapa, Rudolpho Renteria Jr., and Chris Rocha. Of the 17 supervisors, 4 were bargaining unit employees during the time of the organizing campaign and the commission of the unfair labor practices. The latter four were Leonor

¹ *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990).

² On the relevant date considered here, one of the involved supervisors, Bob Gore, was employed at Respondent's retail store in Bloomington, Illinois, and had no responsibility relating to the Pharr facility. Another of the involved supervisors, Temo Gonzalez, became a nonsupervisory sales associate at the Pharr facility on January 8, 1986, and has been on disability leave since April 13, 1987.

Acevedo, Clifford Lamping, Maria Casarez, and Braulio Ortega.

Regarding the composition of the bargaining unit itself, the stipulation indicates there were approximately 270 bargaining unit employees eligible to vote in the election at the time of the violations found in this case. As of April 28, 1991, there were 154 employees in the bargaining unit. The stipulation further provides that 41 of the unit employees on April 28 were also members of the bargaining unit at the time of the unlawful conduct. In addition, the joint stipulation discloses that when employees leave Respondent's employment, they generally are eligible for rehire, although there are times when this is not the case. Also, that there are occasions when employees will quit their jobs with Respondent one or more times and be rehired thereafter, or not be subject to rehire.

Contentions of the Parties

The parties have drawn differing conclusions based on the facts agreed on in the joint stipulation. The General Counsel and the Union contend that the effects of the unfair lawful conduct, which occurred more than 8 years ago, have not been dissipated by the passage of time nor by the turnover of the managerial and bargaining unit employees. In support of this contention the General Counsel argues that 41 of the current employees in the bargaining unit, now consisting of 154 employees, were members of the larger bargaining unit at the time of the unlawful conduct and, therefore, were most likely to recall Respondent's prior egregious conduct during the first organizing effort of the Union. The General Counsel postulates that "industrial experience" dictates that the 41 employees would not only recall Respondent's unlawful response to the Union's first organizing campaign, but would also make this conduct known to the other employees in the unit during a second effort to secure union representation. Thus, according to the General Counsel, the effects of the numerous prior unfair labor practices are not and would not be dispelled by either the passage of time or the turnover in the employee complement. Accordingly, the General Counsel asserts that traditional remedies would not be adequate to ensure a fair second election.

The Union's argument is essentially the same as that of the General Counsel except that the Union relies more on its analysis of the statistical breakout of the turnover in the employee complement than on a theory of what would occur if traditional remedies were now applied. The Union argues that of the 154 employees in the present bargaining unit, 27 percent (41) were employed at the time of unlawful conduct. The Union contends that this percentage is a "significant number" and when considered in the context of the further fact that it is not unusual for employees to come back to work for Respondent on "multiple occasions," the lingering effects the numerous unfair labor practices still remain. Thus, according to the Union, traditional remedies are not adequate to erase the impact of these lingering effects on the unit employees and the extraordinary remedy of a bargaining Order is still warranted.

The Union further asserts that even if a bargaining is no longer considered to be the appropriate remedy here, the pervasive nature of the unfair labor practices committed by the Respondent in its effort to thwart the rights of the employees in seeking union representation still requires that some type of extraordinary remedy be imposed on the Respondent. To

this end, the Union urges that if a second election is deemed appropriate, the Respondent be ordered to provide the following additional relief: (1) pay the Union's legal and organizing costs associated with the second election; (2) allow the Union access to bulletin boards at Respondent's facility; and (3) allow the Union to be present at and respond to all speeches made by Respondent during the election campaign.

The Respondent, on the other hand, approaches the employee turnover question from a different perspective. Respondent's statistical analysis of the turnover rate is based on the bargaining unit complement as it was at the time of the unfair labor practices. Thus, Respondent contends that the rate of turnover of the original bargaining unit is 85 percent. But even if the current unit size is viewed as the basis for analysis, Respondent asserts the employee turnover is nonetheless substantial since the turnover rate is 74 percent. This prong of Respondent's argument tends to indicate that the turnover rate alone is sufficient to warrant the holding of a second election in this matter. Respondent now contends this is the only fair means to protect the employees' Section 7 right to freely choose whether they wish to be represented by a union.

Respondent further asserts the passage of time that has elapsed in this matter (since the unlawful conduct and the issuance of the Board's bargaining Order) more than warrants a determination that the impact of the unfair labor practices have been mitigated "to the extent that their effects can likely be erased" by application of traditional Board remedies. Respondent contends its position in this regard is further buttressed by the fact that only 1 of the 13 supervisors involved in the unlawful conduct is currently employed as a supervisor at Respondent's facility.

On the basis of all the above factors, Respondent argues that traditional remedies are sufficient to ensure the holding of a fair second election in this matter.

Concluding Findings

The Board's instructions on remand direct that the impact of the passage of time between the commission of the unfair labor practices and the issuance of the Board's Order, and the change in circumstances resulting from the turnover in the employee and management complement be considered in determining whether traditional remedies are adequate so as to ensure the holding of a fair second election. Based on the joint stipulation and considering the language contained in the court's remand, I am constrained to conclude that the time lapse and the change in circumstances warrant a finding that the effects of Respondent's prior unlawful conduct, albeit extensive and pervasive, have been dispelled and dissipated. Therefore, a second election is now the more appropriate means by which the current employees should determine whether they wish union representation.

There is no question whatsoever regarding the high rate of employee turnover during the course of the past 8 years. If viewed in terms of the original bargaining unit, the turnover rate is 85 percent. If considered in the context of the current unit composition, the turnover rate is approximately 74 percent. Regardless of which unit basis is considered, the rate of employee turnover here is at a significant level, and becomes a relevant factor in considering whether a bargaining Order should be imposed on the current work force or whether the employees should have a free choice in a second

election to determine if they wish union representation. *Impact Industries v. NLRB*, 847 F.2d 379 (7th Cir. 1988) (87-percent turnover rate); *Impact Industries*, 293 NLRB 794 (1989) (Board on remand deleted bargaining order); *Camvac International*, 302 NLRB 652 (1991) (turnover rate 92 percent; Board on remand deleted bargaining order).

Of equal importance is the turnover of the management employees involved in the unlawful conduct at the time of the organizing campaign. As noted, of the 13 supervisors found to have been involved, only 2 are currently employed at Respondent's facility; 1 in a supervisory position and 1 in a nonsupervisory capacity, but on disability leave since 1987. Thus, making even more remote the possibility that the lingering effects of the prior unlawful conduct are still present. Therefore, the turnover of the managerial staff is likewise a relevant factor in determining whether traditional remedies are sufficiently adequate to permit the current employees to exercise a free choice in a second election. *Impact Industries*, supra; *Camvac International*, supra.

Concerning the effect of the passage of time between the unlawful conduct and the issuance of the bargaining Order, I find that the time lapse also weighs heavily in favor of the application of traditional remedies rather than the imposition of a bargaining order. The main contention of both the General Counsel and the Union regarding this issue is that the denial of a bargaining order here would permit the Respondent to now benefit from its own unlawful conduct. As a general proposition, this argument carries considerable weight. But it cannot be so mechanically applied that it precludes taking into account all the circumstances in a given case. In the instant matter, the Respondent did not engage in any delaying tactics which impeded the issuance of the bargaining Order. Nor is there any evidence here which attributes the employee turnover to Respondent's prior unlawful conduct. Rather, the delay was solely one occasioned by the administrative process. Therefore, any benefit the Respondent may gain from its unlawful conduct must be weighed against the consequences of imposing a remedy that now infringes on the self-determination rights of the vast majority of the current work force; the composition of which has dramatically changed during the course of the passage of time. In my judgement, preserving the Section 7 rights of the current unit employees outweighs any benefit the Respondent may be perceived to gain as a result of the time delay. *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398 (5th Cir. 1991); *Peoples Gas System v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980). Cf. *NLRB v. Laverdiere's Enterprises*, 933 F.2d 1045 (1st Cir. 1991); *Emhart Industries v. NLRB*, 907 F.2d 372 (2d Cir. 1990).

In sum, I find the record here establishes that due to the passage of time and the change in the composition of the bargaining unit employees and managerial staff, the effects of the unlawful conduct committed by the Respondent have been dispelled. Accordingly, I further find that traditional remedies are now adequate to ensure the holding of a fair second election.

One final matter remains to be addressed. As noted, the Union urges that if a second election is held, certain extraordinary remedies be imposed on the Respondent: i.e., payment of the Union's legal and organizational costs associated with the second election; access to the employee bulletin boards in Respondent's facility; and to be present at and respond to all speeches made by Respondent to employees during the election campaign. As to the payment of the Union's legal and organizational costs, there is serious question as to whether imposition of such a remedy would be deemed remedial or punitive in these circumstances. In any event, such an order would only further delay an already long delayed resolution of this matter. The last two aspects of the Union's request for some type of extraordinary relief relate to the holding of a fair second election. Since I have found that the effects of Respondent's unlawful conduct have now been dissipated by the passage of time and the change in circumstances, there is no justification for imposing this relief to ensure a fair second election. See *Impact Industries*, 293 NLRB 794, 795 fn. 6 (1989) (Board on remand in similar circumstances rejects a union's request for extraordinary remedies to ensure a fair second election).

I recognized, however, that the holding of a second election at this time with a virtually new work force subjects the purpose of the election to numerous interpretations by the parties. Therefore, in order to prevent any possibility of a wrongful interpretation as to the reason for the second election, I shall recommend that the Notice of Second Election, in both English and Spanish, include language informing the employees that the first election was set aside because the Board found that certain conduct by the Respondent interfered with the employees' free choice. *Lufkin Rule Co.*, 147 NLRB 341 (1964); *La Favorita, Inc.*, 302 NLRB 849 fn. 3 (1991).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

That the paragraphs in the Board's Order requiring the Respondent, Montgomery Ward & Co., Incorporated, recognize and bargain with United Food and Commercial Workers International Union, Local Union No. 455, AFL-CIO be deleted.

That Case 23-RC-4887 be reopened and the Regional Director conduct a second election thereunder. Further that the Notice of Second Election, in both English and Spanish, include language informing employees that the first election was set aside because the Board found certain conduct by the Respondent interfered with the employees' free choice.

³ 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.