

**Raley's and United Food and Commercial Workers Union, Local 588, United Food and Commercial Workers International Union, AFL-CIO.** Cases 20-CA-24837 and 20-CA-25166

June 28, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On March 6, 2002, Administrative Law Judge Jay R. Pollack issued the attached supplemental decision. The Union filed exceptions and a supporting brief. The General Counsel and the Respondent filed answering briefs, and the Union filed reply briefs.

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, and conclusions and to adopt the recommended Order.

In its exceptions to the Board, the Union contends that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to submit to a card check by a third party neutral. The complaint alleges that the Respondent unlawfully refused to recognize and bargain with the Union as the majority representative at the two stores in dispute. The complaint does not allege that the Respondent unlawfully failed to submit to a neutral card check. However, whether or not the Union's theory of the violation was within the scope of the complaint, the General Counsel has from the outset disclaimed that the case was litigated on any such theory. It is well established that the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change that theory. *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999). Consequently, we must reject the Union's position. See *Paul Mueller Co.*, 332 NLRB 1350 (2000) (reversing the judge on due process grounds where the judge found a violation on a theory effectively disclaimed by counsel for the General Counsel).

In any event, we find that the Union has presented no persuasive evidence establishing the existence of an agreement or past practice of submitting the issue of majority status to a third party neutral. Indeed, the evidence indicates that 10 out of 14 past card checks involving the Union and the Respondent were conducted by individuals who worked in the Respondent's corporate offices.<sup>1</sup>

<sup>1</sup> Two card checks were conducted by the county deputy sheriff. The record does not indicate the status of the individual who conducted the remaining two card checks.

Thus, we affirm the judge's denial of the Union's motion to compel a neutral party card check.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the complaint is dismissed.

*Boren Chertkov*, for the General Counsel.

*Patrick W. Jordan* and *Stephen N. Yang* (*Jeffer Mangels, Butler & Marmaro*), of San Francisco, California, for the Respondent.

*Barry Jellison* (*Davis, Cowell & Bowe*), of San Francisco, California, for Local 588.

SUPPLEMENTAL DECISION

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on February 19, 2002. On September 28, 2001, the Board issued its decision in this matter [336 NLRB 374] finding that: (1) section 1.1 of the parties' bargaining agreement waives the Respondent's right to insist on a Board-conducted election; (2) the two disputed stores (Grass Valley and Yuba City) are within the scope of section 1.1, and (3) the Respondent was therefore obligated to recognize Local 588 on its demonstration of majority support at those stores. The Board then remanded the proceeding to the undersigned to "allow the parties to litigate the Union's claim of an authorization card majority at these two stores and any other remaining issues relevant to Respondent's obligation to recognize Local 588."

After consultation with the parties on November 9, 2001, I set the hearing to commence on February 19, 2002. On February 8, 2002, Local 588 filed a motion for an order, requiring Respondent to submit the issue of majority status at the two stores to a neutral party. Further, Local 588 filed a motion to continue the hearing indefinitely pending resolution of the motion seeking to compel a neutral party card check. On February 15, 2002, both the General Counsel and Respondent opposed the motions. On February 19, 2002, I denied Local 588's motions. Instead, I ordered that the hearing proceed and that the General Counsel establish Local 588's majority status in accordance with the Board's remand order.

Based upon my failure to order the Respondent to submit to a neutral party card check, Local 588 refused to produce the union authorization cards necessary to establish majority status. Therefore, the General Counsel unable to prove majority status, moved to withdraw the complaint. The Union opposed withdrawal of the complaint and again requested that I order the Respondent to submit to a third-party card check. Respondent

<sup>2</sup> Chairman Hurtgen dissented from the prior decision of the Board, 336 NLRB 374, 378. In his view, the Respondent did not waive its right to a Board-conducted election. Thus, in his view, a card check of any kind was inappropriate. However, accepting the majority view as the law of the case, he agrees with his colleagues that the complaint herein should be dismissed.

Member Cowen did not participate in the prior decision of the Board and expresses no view as to that decision.

opposed withdrawal of the complaint and requested that the General Counsel proceed with the case. Respondent argued that absent prosecution of the case, I should dismiss the complaint with prejudice.

For the following reasons, I find that I must recommend dismissal of the complaint. After finding that Respondent waived its right to demand a Board-conducted election, the Board found that Respondent was required to extend recognition at these stores upon a demonstration of majority support. Regarding majority status the Board confirmed that:

Local 588 maintains it had obtained authorization cards from a majority of the grocery employees at both stores at the time it made its demands for recognition. The Respondent, however, contests the validity of the cards and argues that the Union did not have majority support when it made its recognition demands. Because the judge found that the Respondent had not waived its right to an election for those stores, he did not allow the parties to litigate the issue of whether the Local 588

had majority support. In the absence of factual findings on this issue, we are unable to determine whether the Respondent has engaged in unlawful conduct alleged in the complaint. We therefore remand the case to the judge for further proceedings necessary to rule on the underlying complaint allegations.

Based on the Board's remand, it is clear that General Counsel and/or Local 588 must establish that Local 588 had obtained authorization cards from a majority of the employees at each store. As the General Counsel and Local 588 have failed to produce any evidence on this issue, I cannot find a prima facie case. I, therefore, must dismiss the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:<sup>1</sup>

#### ORDER

The complaint is dismissed in its entirety.

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<sup>1</sup> All motions inconsistent with this recommended Order are hereby denied. In the event 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.