Campbell Products Department, Harry T. Campbell Sons Company, Division of Flintkote Company *and* Local Union No. 560, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 22-CA-8001

March 29, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

On September 14, 1981, Administrative Law Judge Julius Cohen issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

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 Decision in light of the exceptions[1] and brief and has decided to affirm the rulings,[2] findings, and conclusions of the Administrative Law Judge.

We shall therefore reaffirm our previous decision[3] that, by refusing to bargain with the Union as representative of the employees in the certified unit, the Respondent violated Section 8(a)(5) and (1) of the Act.

ORDER

It is hereby ordered that the Order issued by the Board in Campbell Products Department, Harry T. Campbell Sons Company, Division of Flintkote Company, 235 NLRB 265 (1978), be, and it hereby is, reaffirmed.

[1] Contrary to the Respondent's contentions, there is no record evidence that either the General Counsel or counsel for the Union encouraged or condoned employee Wyder's misleading of the Respondent's counsel during his investigation.

[2] The Board does not, in cases such as this, reopen and remand the underlying representation case. Whether the Respondent's refusal to bargain violated the Act turns on the validity of the Union's certification. Since the Respondent attacks the Union's certification by attacking the validity of the underlying election, the Administrative Law Judge properly imposed upon the Respondent, as an objecting party, the burden of proving its objections to that election, as is the procedure in representation cases. See *Gulf Coast Automotive Warehouse Company, Inc.*, 248 NLRB 380 (1980).

[3] Contrary to the Administrative Law Judge's recommendation, it is not necessary to issue a new Order.

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This proceeding was heard in Newark, New Jersey, on January 5 and March 12 and 20, 1981. In Case 22-RC-7078 pursuant to a petition filed by Local Union No. 560, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, an election by secret ballot was conducted on May 20, 1977, in an appropriate unit of employees employed by Campbell Products Department, Harry T. Campbell Sons Company, Division of Flintkote Company, herein called Respondent. The Union having won that election, Respondent filed a timely objection to the election, alleging electioneering activities by a union adherent in the vicinity of the polling place. On July 5, 1977, the Acting Regional Director for Region 22 issued a Report on Objections recommending that Respondent's objection be overruled in its entirety. During the course of the investigation, Respondent filed an additional objection alleging the union agents warned employees that if the Union lost the election the Employer would discharge employees who had supported the Union. Concededly this objection was untimely as it was received 12 days past the deadline for the filing of objections. The Acting Regional Director recommended that this objection not be considered as untimely, but noted that assuming it had been timely filed the investigation disclosed no probative evidence that such statements had been made. The Board, on September 23, 1977, overruled exceptions filed by Respondent and adopted the Acting Regional Director's recommendation and thereby certified the Union as representative of the employees in the unit found appropriate.

Subsequently, Respondent refused to recognize or bargain with the Union and in the instant case, a complaint was issued and upon a Motion for Summary Judgment by the General Counsel, the Board issued a Decision and Order granting the motion, finding that Respondent violated Section 8(a)(5) and (1) of the Act and ordering, on March 20, 1978, Respondent to recognize and bargain with the Union.[1]

Thereafter, the Board petitioned the United States Court of Appeals for the Third Circuit for enforcement of its Order directing Respondent to bargain with the Union. The court held that the Board properly rejected Respondent's objection relating to electioneering but further found that the Board should consider and investigate Respondent's concededly late-filed objection. The court therefore denied enforcement of the Board's Order and remanded the case to the Board for further proceedings.[2] The Board then issued its Order on September 26, 1980, remanding the proceeding to the Regional Director for further proceedings relating to Respondent's objection that union agents told employees Respondent would fire union supporters if the Union lost the election. The Board also ordered that a hearing be held before an administrative law judge for the purposes stated in the court's opinion.

A hearing was held pursuant to notice on the dates indicated above,[3] during which all parties were given full

[1] 235 NLRB 265.

[2] 623 F.2d 876 (3d Cir. 1980).

[3] The hearing was held and closed on January 5, 1981, but thereafter upon motion of the General Counsel, the hearing was reopened by order

Continued

opportunity to participate, to introduce relevant evidence bearing on Respondent's objection, to argue orally, and to file briefs. Respondent submitted a brief which has been carefully considered.

On the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

A. *Facts*

During the course of the investigation by the Regional Director of the objection filed by Respondent, an affidavit was obtained from George A. Braun, fleet maintenance supervisor for Respondent. In addition, Braun testified at the hearing during which he stated that an employee, Tom Perillo, with whom he frequently had coffee during breaks, spoke to him about a union meeting he had attended the previous evening. The conversation with Perillo occurred during the week prior to the election. Perillo informed Braun that he did not believe the Union could win because too few people were attending the meetings. Braun stated that he asked Perillo why they do not postpone the election, to which Perillo replied that the Union had told them at the meeting if they postponed the election the Company would find reasons to get rid of them or weed out the supporters of the Union. Braun's affidavit submitted to the Board in 1977 is more or less to the same effect as he stated therein that Perillo told him the Union said not to worry about withdrawing the petition because if they did withdraw, "the Company would weed us out before the next election."

Robert DeMattio, plant manager, testified on behalf of Respondent that Tom Perillo continued in employment until March 1978, approximately 10 months after the election when he left Respondent's employ to go to Florida. Presumably Respondent made no effort to communicate with Perillo or obtain any statement from him until 1 week before the hearing herein in January 1981 when it was unable to locate him.

Daniel Rubino, business agent of the Union, testified that he was the only union agent involved in the organization of Respondent's employees. He stated that prior to the election he conducted three meetings but at none of them did he state that if the Union did not win the election the Company would weed out the union supporters.

No other testimony or evidence was adduced at the hearing, which was then closed. However, as noted, the hearing was reopened when the General Counsel moved for such action based on his having received the affidavits of Perillo and Rubino, which were in existence at the time of the hearing, but through an inadvertence, not available. In addition there were affidavits from six other employees. In order to afford the parties further opportunity, the hearing was therefore reopened. Three individuals testified at the reopened hearing that they did not attend a meeting within the last week preceding the election and since Respondent's objection is confined to an alleged statement made at that time, their testimony could be of no service to any party.

Pursuant to subpena served by the General Counsel, Perillo testified at the reopened hearing, but his direct testimony exhibited an almost complete lack of recall or recollection concerning the event in question. However, during the course of the investigation Perillo had given an affidavit to the Board agent on June 15, 1977, when, presumably, his recollection would have been better. In this statement, Perillo said that he attended a union meeting at the Dover Y.M.C.A. 3 days before the election; that John Sweeney, Jeff Lee, Dave Sperry, Carl Jenson, Frank Wydner, and Bill Stevens also attended the meeting. In his affidavit Perillo said "there was no discussion on the withdrawal petitions or on what the Company had said or done or what their intentions were in connection with the organization drive." As to his conversation with Braun, Perillo deposed that he had no conversations with Braun concerning statements made by union officers, that his only conversations with Braun about the Union were initiated by Perillo himself, and Braun only said to him that the Union would do him more harm than good, and that he did tell Braun the day before the election that he thought the Union was going to lose because the guys were changing their minds. Finally, Perillo testified at the hearing that while he no longer had any recollection as to what had occurred, his affidavit submitted to the Board investigator was true when he gave it.

John Sweeney and David Sperry, employees at the time of the election and still employed, both testified that they attended the meeting during the week prior to the election, but did not recall anything that transpired. They were not contacted or interviewed by the Board during the investigation.

The final witness, Frank Wydner, an employee of Respondent, was called as a witness by the Union. Wydner attended the meeting in question and stated that Rubino had not said anything concerning what would happen to employees if the Union withdrew the petition or lost the election. However, Wydner said that at various meetings employees brought up the subject of what would happen if an employee were terminated after an election, and, at this last meeting, Wydner brought it up himself. Rubino responded that the Company could not do anything because the employees had signed cards which were turned over to the Labor Board who would help them if there were justified reasons. Wydner confirmed that Perillo, Sweeney, and Sperry were at the meeting, and believed that Jeff Lee also attended. In this connection, the General Counsel turned over to Respondent an affidavit given to the Board during the investigation by Lee. The parties stipulated that Lee, Stevens, and Jacobs named in Perillo's affidavit, are no longer employed by Respondent.

Wydner, on cross-examination, stated that prior to the hearing he had spoken to Respondent's counsel and told him that he did not remember anything about the meeting. On the other hand, on the morning of the hearing, he told the General Counsel and counsel for the Union the substance of what he actually testified to at the hear-

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of the Administrative Law Judge dated Febraury 17, 1981, to afford opportunity to all the parties to consider certain affidavits not available at the time of the hearing in January, and call witnesses, if necessary.

ing. He conceded that he had not told the truth to Respondent's counsel.

No further testimony or evidence was adduced by any of the parties at the hearing.

B. *Analysis*

A summary of the evidence and testimony at the hearing leads me to conclude that there is no probative evidence to support the allegation that a union agent told employees they would be weeded out or terminated by Respondent in the event the Union lost the election. Thus, Braun's affidavit merely contains a hearsay statement that employee Perillo told him this is what occurred at a meeting during the last week preceding the election. Perillo himself testified he no longer had any recollection as to what occurred at this meeting but averred that his affidavit, received in evidence as past recollection recorded, was true at the time he made it. That statement does not reflect such threat having been uttered at the meeting. Rubino, the union agent present at the meeting, testified credibly and without contradiction that he made no such statement. Three other witnesses did not attend the meeting, and two others attended the meeting but had no recollection of what occurred. That leaves the testimony of Wydner, who stated that Rubino made no threat as alleged. Respondent urges that Wydner be discredited since he admitted not telling the truth to Respondent's counsel who had discussed the matter with him. Disregarding Wydner's testimony because of his obvious bias and his admitted failure to tell the truth to counsel leaves the record still bare of any affirmative probative evidence that the union agent made the threat as alleged in Respondent's objection.

It is well settled that the burden is on the party who seeks to overturn the election to establish that objectionable conduct existed which requires such a result.[4] Respondent recognizes this but nevertheless relies, in its brief, on allegations that the Regional Director did not conduct a thorough enough investigation, and, moreover, the lapse of time caused failure of recollection on the part of witnesses who testified. In view of Respondent's burden which a circuit court of appeals has described as "heavy,"[5] the ultimate responsibility must fall upon Respondent itself. In this connection it is noted that Respondent presented no witness other than Braun at this hearing in support of its contention. The witnesses such as they were and affidavits were made available by the General Counsel. When additional affidavits were discovered, the hearing was adjourned to afford Respondent time to seek out these affiants. Respondent had Perillo's affidavit and was aware of those employees who attended the meeting. The fact that several of the employees were no longer employed is not sufficient to establish that they would not have been available as witnesses. Actually, Respondent did not produce even Perillo at the hearing despite the fact that his alleged conversation with Respondent's fleet maintenance supervisor, Braun, was the basis for its objection. Respondent apparently made no effort to obtain any statement from Perillo although he continued in Respondent's employ for almost 10 months subsequent to the election and long after its objection had been filed. As to Respondent's complaint concerning the lapse of time involved in this litigation causing failure of memory, its own responsibility is noted by the testimony of its own witness that no effort during the 3-year span was made to communicate with Perillo until the week preceding the opening of the hearing herein. In any case, it is well settled that there is no duty upon "the Board staff to seek out evidence that would warrant setting aside an election." *N.L.R.B.* v. *Singleton Packing Corp.*, 418 F.2d 275, 280 (5th Cir. 1969), cert. denied 400 U.S. 824.

I therefore conclude on the basis of all of the foregoing that Respondent has failed in its burden to establish that the Union had engaged in objectionable conduct to warrant setting aside the election.[6]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent failed to establish that an agent of the Union told employees they would be terminated or "weeded out" should the Union lose the election.

RECOMMENDATION

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, it is recommended[7] that the Board enter an Order against Respondent containing the same cease-and-desist provisions and affirmative remedial action as are contained in the Order of the Board herein reported at 235 NLRB 265, 267 (1978), in accordance with that portion of the Board's Decision and Order designated "The Remedy."

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[4] *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961).

[5] *Gulf Coast Automotive Warehouse Company, Inc.* v. *N.L.R.B.*, 588 F.2d 1096, 1100 (5th Cir. 1979).

[6] I find no merit in Respondent's contention that, alternatively, a bargaining order should be denied and a new election directed because of the passage of time. Unlike a bargaining order based on authorization cards, the Union's majority status herein was based on an election, and the time interval was caused by Respondent's litigating an objection determined to be groundless. See *N.L.R.B.* v. *Patent Trader, Inc.*, 426 F.2d 791, 792 (2d Cir. 1970).

[7] 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.