National Telephone Directory Corp. *and* Communications Workers of America, AFL–CIO *and* Dawn Casserly. Cases 22–CA–19067, 22–CA–19683, 22–CA–19169, and 22–CA–19848

October 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On March 31, 1994,[1] the Regional Director for Region 22 issued an order consolidating cases, first amended consolidated complaint and notice of hearing in the above proceeding. The amended complaint alleges, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging employee Dawn Casserly because of her union activities.

Prior to the opening of the hearing, the Respondent served a subpoena duces tecum on Union Organizer Loida Ortiz for the production of authorization cards signed by the Respondent's employees, and for other documents relating to union activity among the Respondent's employees. Neither the Union nor Ortiz produced the requested documents.

The hearing opened on May 23. Ortiz, the General Counsel's first witness, testified on direct examination that Casserly engaged in union activities. Specifically, Ortiz testified that Casserly assisted Ortiz in organizing employee support for the Union, including arranging meetings between Ortiz and the Respondent's employees. Ortiz testified that at one such meeting in February, the employees in attendance signed union authorization cards.

On cross-examination, counsel for the Respondent asked Ortiz for the names of employees who attended the meeting at which authorization cards were signed. Ortiz could not remember the names of the employees, but testified that the names were recorded on her notes of the meeting and on the authorization cards signed at the meeting. The Respondent thereafter moved for production of the notes and cards. The Union, in response, moved to quash the Respondent's prehearing subpoena and opposed the motion to produce to the extent that the motion, if granted, would require disclosing the identities of employees at the meeting who were still employed by the Respondent. The General Counsel joined in opposition to the Respondent's motion.

On June 13, Administrative Law Judge James F. Morton issued an order deferring ruling on the motion to quash and motion to produce until after completion of the General Counsel's case-in-chief. The judge held that the identities of employees who attended union meetings and signed authorization cards were somewhat privileged, but that Ortiz' testimony on direct examination served to waive the privilege, and thus the information was within the scope of direct examination and could be proper grounds for cross-examination if Ortiz' testimony constituted a material aspect of the General Counsel's prima facie case.

Thereafter, the General Counsel continued to present his case. On June 29, after the General Counsel completed his presentation of evidence concerning the Casserly allegation, the judge denied the motion to quash and granted the motion to produce both the authorization cards and the names of employees who signed authorization cards and attended the relevant union meetings.

The General Counsel and the Union each filed a request for special permission to appeal the judge's ruling. The General Counsel and the Union argued, in essence, that the employees' interest in keeping confidential their authorization card signing and their attendance at union meetings is greater than the Respondent's interest in obtaining their names for cross-examination purposes. The Respondent filed a response to the request for special permission to appeal, contending that the information it seeks is essential to the Respondent's ability to impeach Ortiz' credibility and rebut the allegations that organizing activities occurred among the Respondent's employees, that Casserly was involved in those activities, and that the Respondent was aware of those activities.

Thus, we must decide whether a respondent employer may obtain, through cross-examination about events testified to on direct examination, information the Act ordinarily prohibits an employer from obtaining, i.e., the identities of employees who have signed authorization cards and have attended union meetings. As the judge noted, prior cases have not fully addressed the legitimate concerns raised by the parties in this case.[2]

Having considered the matter, we have decided to grant the requests for special permission to appeal and to reverse the judge.[3] We find, for the reasons set forth

[1] All dates are in 1994 unless otherwise stated.

[2] Although this issue has been raised in a previous case, the Board resolved the issue without completely addressing the concerns raised by the parties. See *U.S. Divers Co.*, 133 NLRB 968 fn. 2 (1961), modified in part 308 F.2d 899 (9th Cir. 1962) (Board affirmed trial examiner's ruling sustaining, as beyond the scope of cross-examination, the General Counsel's objection to respondent's attempt to ascertain the names of employees who attended a union meeting and signed authorization cards).

[3] By an unpublished Board Order dated October 7, the Board granted the General Counsel's and the Union's requests for special permission to appeal, reversed the judge's ruling, and stated that a fully articulated decision would follow.

Thereafter, the judge advised the parties that he would not schedule the resumption of the hearing prior to the issuance of the Board's fully articulated Order. The General Counsel filed a request for special permission to appeal the judge's refusal to reschedule the hear-

below and in agreement with the General Counsel and the Union, that the confidentiality interests of employees who have signed authorization cards and attended union meetings are paramount to the Respondent's need to obtain the identities of such employees for cross-examination and credibility impeachment purposes.[4]

The confidentiality interests of employees have long been an overriding concern to the Board. Generally, an employer who seeks to obtain the identities of employees who sign authorization cards and attend union meetings violates the Act. Indeed, an employer may not surveil its employees to obtain such information, and may not give its employees the impression that it has surveilled—or will surveil—them to obtain such information. *Eddyleon Chocolate Co*., 301 NLRB 887 (1991); *Beretta U.S.A. Corp*., 298 NLRB 232 (1991), enfd. mem. 943 F.2d 49 (4th Cir. 1991); *Adco Metals*, 281 NLRB 1300 (1986). Further, an employer violates the Act if it questions its employees about this information. *Hanover Concrete Co*., 241 NLRB 936 (1979); *Dependable Lists, Inc*., 239 NLRB 1304, 1305 (1979); *Campbell Soup Co*., 225 NLRB 222 (1976).

Additionally, the Board has always held authorization cards in confidence during representation cases. *Midvale Co*., 114 NLRB 372, 374 (1955). Consistent with this rule, the courts have held that an employer is not entitled to obtain the disclosure of union authorization cards under the Freedom of Information Act, 5 U.S.C. § 552. See *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977); *Madeira Nursing Center v. NLRB*, 615 F.2d 728 (6th Cir. 1980); Pacific Molasses v. NLRB, 577 F.2d 1172 (5th Cir. 1978); *NLRB v. Biophysics Systems, Inc*., 91 LRRM 3079 (S.D.N.Y. 1976). These cases recognize the importance of an employee's ability to sign an authorization card with confidence that the card will not be presented to the employer, because ''it is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed.'' *Committee on Masonic Homes*, supra, 556 F.2d at 221.

In addition to the employees' confidentiality interests, the other concern raised here is the Respondent's right to cross-examine the General Counsel's witnesses about events testified to on direct examination. Generally, all parties are afforded an opportunity for full cross-examination of witnesses in unfair labor practice proceedings. See the Board's Statements of Procedure Section 101.10(b)(2) (''Every party has the right . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts.''). A full cross-examination includes the right to test the credibility of the General Counsel's witnesses by asking legitimate questions about subjects brought out on direct examination.

In balancing these two legitimate interests, we are guided by the policies set forth in *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214 (1978). There, the Supreme Court balanced the confidentiality interests of employee affiants who had not testified in a hearing, with an employer's interest in obtaining their affidavits for the purpose of preparing its defense of unfair labor practice allegations. The Court, in holding that the investigatory affidavits are protected from disclosure under the Freedom of Information Act, recognized that such disclosure would create a risk that recipients of the affidavits would intimidate employees ''to make them change their testimony or not testify at all.'' Id. at 239. The Court further suggested that potential witnesses might ''be reluctant to give statements to NLRB investigators at all'' without assurances of confidentiality because of the ''all too familiar unwillingness [of employees] to 'get too involved' [in formal proceedings] unless absolutely necessary.'' Id. at 240–241.[5]

As our discussion above concerning employee confidentiality interests shows, we take very seriously the possibility of intimidation of employees by employers seeking to learn the identity of employees engaged in organizing. We conclude that the danger of employee intimidation would be severely heightened if an employer could obtain the names of employees who signed cards or attended meetings.

Therefore, we believe the policies of the Act are best effectuated by prohibiting the Respondent from obtaining on cross-examination the names of the employees who attended union meetings and signed authorization cards. That the Respondent has sought this information through cross-examination, rather than through surveillance or interrogation of employees, does not reduce the potential chilling effect on union activity that could result from employer knowledge of the information.[6]

We disagree with the judge's statement that Ortiz' testimony on direct examination served to waive any

ing. The General Counsel moved the Board to direct the judge to resume the hearing without waiting for the Board's decision. On November 18, the Board granted the General Counsel's request for special permission to appeal and directed the judge to reschedule the hearing.

[4] The Respondent has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties.

[5] The Board has also held that employee affidavits may be protected from disclosure even if copies of the affidavits were given by the affiant to the Union. *H. B. Zachry Co*., 310 NLRB 1037 (1993).

[6] The primary chilling factor is the fear that the employee's identity will be disclosed to the employer. Thus, we find unpersuasive our dissenting colleague's contention that any danger of protected activity being chilled could be mitigated through assurances given by the judge. Moreover, any assurances given by the judge would give little comfort to the employees, as they likely would not be present at the hearing.

privilege that existed as to the identities of the employees. The right to confidentiality exists for the protection of the employees, and thus cannot be waived by the Union, but only by the employees themselves.[7] See generally *H. B. Zachry Co*., supra, 310 NLRB at 1038 fn. 5 (employee does not waive right to confidentiality by giving copy of affidavit to the union).

Although our ruling somewhat limits the scope of the cross-examination of a potentially important witness, we do not believe at this time that the Respondent will be prejudiced as a result. Indeed, we note that the Respondent has had ample opportunity to cross-examine Ortiz on all but one aspect of her testimony, and has also cross-examined former employee Simeon Bogiages, who corroborated Ortiz by testifying that he attended the meeting—arranged by Casserly—where authorization cards were signed. Additionally, we note that the Respondent is free to present evidence to rebut Ortiz' testimony. Thus, our ruling has not left the Respondent without the means to test the witness' credibility and otherwise present a vigorous defense.

We recognize, however, that our ruling leaves open the remote possibility that the General Counsel's evidence could consist primarily of testimony immune from cross-examination. In such rare circumstances, it could be appropriate—in resolving issues of credibility—to forego the traditional credibility analysis and afford less weight to the immune testimony in determining whether a preponderance of evidence supports the General Counsel's allegations. Such an analysis would decrease the likelihood that the immune testimony would constitute the sole basis for finding that a preponderance of evidence supports the General Counsel's allegations.

We note that the Board has, on occasion, resolved conflicting testimony in a similar manner. In *Blue Flash Express*, 109 NLRB 591 (1954), the Board adopted a trial examiner's findings that were based on a simple preponderance of evidence standard rather than on customary credibility resolutions. In that case, two witnesses gave conflicting testimony concerning crucial events. The trial examiner found nothing in the demeanor of either witness or their testimony that would enable him to determine the credibility issue, and therefore attached equal weight to both witnesses and found that the preponderance of evidence did not support the alleged violation. The Board adopted a similar finding of an administrative law judge in *Central National Gottesman*, 303 NLRB 143, 145 (1991).[8]

As mentioned above, however, we see nothing in the record before us indicating that such an analysis would be appropriate in the instant case.

In sum, we find that the policies of the Act are effectuated by prohibiting the disclosure, on cross-examination, of the names of the Respondent's employees who signed authorization cards and attended union meetings. Such a rule protects employee confidentiality interests and does not prejudice the Respondent's ability to present its defense. Accordingly, we shall order that the Respondent's subpoena duces tecum be quashed and that the Respondent's motion to produce be denied to the extent they seek the production of authorization cards and the names of current employees who signed authorization cards or attended union meetings.

ORDER

It is ordered that the Charging Party's and the General Counsel's requests for special permission to appeal the judge's ruling are granted and the administrative law judge's rulings are reversed and vacated.

IT IS FURTHER ORDERED that the above proceeding is remanded to Administrative Law Judge James F. Morton, with instructions to quash the Respondent's subpoena duces tecum and deny the motion to produce to the extent they seek the production of authorization cards and the names of current employees who signed authorization cards or attended union meetings.

MEMBER COHEN, dissenting.

My colleagues have deprived the Respondent of the fundamental right to cross-examine a witness for the General Counsel. In agreement with the judge, I would accord the Respondent that right. I therefore dissent.

The General Counsel alleged that the Respondent discharged employee Casserly because of her union activities. The General Counsel's first witness was Union Organizer Ortiz. She testified, inter alia, that Casserly arranged a meeting between Ortiz and employees. She further testified that all employees who attended that meeting signed union authorization cards.

The testimony of Ortiz was critical. It was designed to show that Casserly was a leading union adherent. Respondent counsel therefore sought to cross-examine Ortiz. He asked for the names of those employees who attended the meeting. Ortiz said that she could not recall, but that the names were recorded on her notes of the meeting and on the signed authorization cards. The

[7] We do not agree with our dissenting colleague that the result would be different if the issue were characterized as whether the General Counsel's witness ''opened the door'' to cross-examination, rather than whether the witness ''waived'' the employees' right to confidentiality. Whether or not the ''door'' is ''opened'' by the General Counsel, we conclude that we nevertheless have a responsibility to protect the employees' legitimate and statutorily protected right to keep their union activities confidential.

[8] We also note that when an administrative law judge has died after the close of the hearing but before the issuance of a decision, the Board has made findings of fact based on the record evidence as a whole and without resolving the conflicts in testimony. See *Capitol Theatre*, 231 NLRB 1370, 1377 fns. 14 and 15 (1977).

Respondent moved for production of the notes and cards. The Union opposed. The judge ultimately granted the motion. My colleagues reverse that ruling.

It is clear that the Respondent had a legitimate and substantial interest in cross-examining the witness so as to challenge the credibility of her important testimony. The right to cross-examine is guaranteed by due-process requirements and is recognized in the Board's Statements of Procedure Section 101.10(b)(2). My colleagues, however, seek to balance that right against the interest of protecting confidentiality in the exercise of Section 7 rights. They tip the balance against the right of cross-examination.

I disagree. In resolving the balance, it is important to keep in mind that the General Counsel and his witness are the ones who created the problem. Although the General Counsel properly alleged that Casserly was a discriminatee, he and his witness went further and introduced testimony that all employees attending the meeting signed union cards. Having done so, they cannot now say that the testimony is immune from attack. In sum, having opened the testimonial door, the General Counsel cannot close it to cut off cross-examination.[1]

The fact that the cross-examination will permit access to sensitive documents does not require a contrary result. For example, it is clear that an employee affidavit given to the National Labor Relations Board (NLRB) is itself a highly sensitive document. Indeed, it is privileged from disclosure under the Freedom of Information Act (FOIA).[2] That document, however, must nonetheless be produced for purposes of cross-examination, to the extent that it relates to testimony adduced in direct examination.[3] Similarly, although the documents involved here may be privileged under the FOIA, they must be produced, because they relate to testimony on direct examination.

My colleagues err when they seek to analogize this case to those cases involving nonjudicial interrogation of an employee. The questioning in this case will take place in a judicial setting, under the aegis and protection of an NLRB judge. The judge can give assurances to employees and, in their presence, can caution the Respondent that reprisals are unlawful. In essence, the entire matter is under judicial control. Thus, the cases cited by my colleagues are inapposite.

My colleagues appear to recognize the danger inherent in relying on evidence that is immune from cross-examination. They suggest that it might be appropriate ''to afford less weight to the immune testimony.'' Thus, my colleagues would apparently give *some* weight to the testimony in resolving issues of credibility. In my view, this is a pale substitute for cross-examination. The time-honored way of resolving issues and credibility is to subject the witness to cross-examination and to have the presiding judge resolve such issues. I would follow that approach here.

[1] Contrary to the view of my colleagues, the issue is not one of waiver. Rather, the issue is the traditional evidentiary one of whether a witness has opened the door so as to allow cross-examination on a given point.

[2] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

[3] See the Board's Rule Sec. 102.118(b)(2); *Jencks v. U.S.*, 353 U.S. 657 (1957).