American Directional Boring, Inc., d/b/a ADB Utility Contractors, Inc. *and* Local 2, International Brotherhood of Electrical Workers, AFL–CIO. Cases 14–CA–27386, 14–CA–27570, and 14–CA–27677

August 27, 2010

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND BECKER

On September 30, 2008, the two sitting members of the Board issued a Supplemental Decision and Order in this proceeding, which is reported at 353 NLRB 166.[1] Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Eighth Circuit. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals issued an order denying enforcement.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[3]

The Board has considered the judge's 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 to the extent and for the reasons stated in the decision reported at 353 NLRB 166, which is incorporated herein by reference. We also further address the appropriateness of a bargaining order remedy.

On July 22, 2010, the Board sent a letter to the parties inviting them to file supplemental pleadings bringing to the Board's attention any changed circumstances relevant to the bargaining order issued by the judge or any alternative remedies the parties believed to be appropriate. The Acting General Counsel, the Charging Party, and the Respondent all filed submissions. The Acting General Counsel and the Charging Party both argued that a bargaining order remains appropriate. In the alternative, they advocated that the Board consider other special remedies in the event it decides not to adopt a bargaining order. The Respondent argued that a bargaining order is no longer an appropriate remedy based on the passage of

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

[2] The sole basis of the Court's decision denying enforcement was that in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Supreme Court had determined that "a two-member group may not exercise delegated authority when the total Board membership falls below three because 'the delegation clause [in section 3(b)] requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board.'" *NLRB v. Whitesell Corp.* 2010 WL 2542904 at *1 (quoting *New Process Steel, L.P. v. NLRB*, 130 S.Ct. at 2644). The Court neither discussed nor decided the merits of the two Board Members' unfair labor practice findings, some of which the Company had not contested before the Court.

Although the Board sought clarification of the Court's order, the Court denied that motion without explanation. Accordingly, we are required to construe the Court's decision and mandate in light of the principle that a "mandate is 'to be interpreted reasonably and not in a manner to do injustice.'" *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962) (quoting *Wilkinson v. Massachusetts Bonding & Ins. Co.*, 16 F.2d 66, 67 (5th Cir. 1926)). Accord: *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 225–228 (1947). Because the Eighth Circuit predicated its denial of enforcement solely on *New Process Steel's* determination that the two members lacked authority to issue an order, we have concluded that the Court's decision and mandate are not a final resolution of the pending unfair labor practice issues litigated before the administrative law judge and are not reasonably interpreted as terminating further proceedings before the Board. Further, we do not find the Eighth Circuit's denial of the Board's motion for remand or clarification to be a significant factor in construing the Court's decision and mandate. As courts have explained, no inferential weight should be ascribed to summary denials of post-judgment motions for rehearing or clarification, given the myriad reasons that the denials could represent. See, e.g., *Exxon Chemical Patents v. Lubrizol Corp.*, 137 F.3d 1475, 1479–1480 (Fed. Cir. 1998) (motion for clarification); *U.S. v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (petition for rehearing or modification); *Luckey v. Miller*, 929 F.2d 618, 621–622 (11th Cir. 1991) (petition for rehearing en banc).

Finally, the Court's jurisdiction under Sec. 10(e) and (f) of the Act extends to review only of a "final order" of the Board. See *Augusta Bakery Corp. v. NLRB*, 846 F.2d 445 (7th Cir. 1988) (dismissing petition for review for want of jurisdiction where Board had not issued a "final" order). Absent such an order, there is nothing for a court to enforce or set aside. See *In re Labor Board*, 304 U.S. 486, 494 (1938) (in finding that the Third Circuit exceeded its jurisdiction in attempting to halt further proceedings before the Board, Supreme Court held that a court without statutory power to decide the controversy in the particular circumstances, "lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith"). The Court here made no finding that the order issued by two Board Members who lacked authority to issue that order constituted a "final order" under the Act, and, in light of *New Process*, there is a serious question whether the Court had jurisdiction either to decide any dispute on the merits or to terminate further proceedings before the Board in this case.

[3] Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the members who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board Members not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

time since the Board's earlier decision, additional managerial and employee turnover since then, and the impact of the global financial crisis.

We agree with the Acting General Counsel and the Charging Party that a category 1 bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) remains appropriate. In granting the bargaining order as part of the remedy, we recognize that almost 7 years have passed since the commission of the last of the Respondent's unfair labor practices. Nonetheless, for the reasons set forth in the incorporated decision, the passage of time will not dissipate the coercive effects of the Respondent's outrageous and pervasive misconduct, including its repeated threats of plant closure and job loss, repeated statements that unionization would be futile, threats of discipline, fabrication of evidence against union supporters, and discharge of 13 union supporters (approximately 22 percent of the bargaining unit), many of whom were leaders of the organizing campaign. See 353 NLRB 166, 167–169.[4] "When the unfair labor practices rise to that prominence [as required for a category 1 *Gissel* order], the only additional element needed to rationally support a bargaining order is a finding that the detrimental effects of the unfair practices will persist over time, so as to continue the need for the bargaining order even after months or years have elapsed." *Power, Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1994). Such a finding is clearly appropriate here.

Moreover, the additional 2-year lapse since the 2008 decision was beyond the control of the Charging Party and the General Counsel and was not caused by any procedural or administrative delay on our part. The 2008 decision and order was issued in the good-faith belief that the Board's two sitting members had the statutory authority to act. The Board did not acquire a third member until April 2010. At that time, the case was not before the Board. The General Counsel had petitioned for enforcement of the order on January 23, 2009, the Supreme Court issued *New Process Steel* on June 17, 2010, and the Eighth Circuit denied enforcement of the order on June 24, 2010.

In its supplemental brief to the Board, the Respondent asserts that, since the issuance of the 2008 decision, the size of its operation has contracted significantly and that, excluding the discriminatees, not a single employee who signed a union authorization card remains in its employ. It also contends that only two of the eight managers who participated in the unfair labor practices remain. As explained in the incorporated decision, the Board's established practice is to evaluate the appropriateness of a *Gissel* bargaining order as of the time that the unfair labor practices occurred; changed circumstances following the commission of the violations generally are not considered. See *Garvey Marine*, supra, 328 NLRB at 995–996. Nevertheless, we have considered the arguments urged by the Respondent and conclude that a bargaining order is still warranted.

We reject the Respondent's argument that employee turnover since the 2008 decision militates against a bargaining order. In light of its invidious, unlawful campaign to thwart the Union, the Respondent's narrow focus on the number of remaining employees who signed authorization cards is misguided. A substantial percentage of the turnover is attributable to the Respondent's unlawful discharge of 13 union supporters, 11 of whom are still entitled to reinstatement pursuant to the terms of our Order.[5] Further, the Respondent's brief makes no reference to the number of remaining employees who were *employed* at the time of its unfair labor practices and would have been exposed to the Respondent's campaign. Thus, the Respondent's representation that none of the 33 (of 59) employees who signed cards authorizing the Union to represent them remain employed does not preclude the possibility that 26 of the remaining 29 employees in the unit were employed at the time the unfair labor practices were committed. Finally, for all current employees, the Respondent's unfair labor practices are the type that will "live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed." *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978). The "lore of the shop" will be given vivid embodiment when some or all of the unlawfully fired employees accept reinstatement and explain to their coworkers that they have only regained their jobs after 7 years of litigation.

The Respondent's argument regarding management turnover is equally unavailing. In its brief preceding the 2008 decision, the Respondent asserted that three of the managers who were involved in the unfair labor practices remained in its employ. The loss of one additional manager since then is not a significant change. As explained in the incorporated decision, the Respondent's entire

[4] See *Garvey Marine, Inc.*, 328 NLRB 991 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001) (adopting *Gissel* bargaining order over 4 years after unlawful conduct); *Churchill's Supermarkets*, 285 NLRB 138 (1987), enfd. 857 F.2d 1474 (6th Cir. 1988)(7 years after unlawful conduct); *Lou De Young's Market Basket, Inc.*, 181 NLRB 35 (1970), enfd. 430 F.2d 912 (6th Cir. 1970)(over 5 years after unlawful conduct).

[5] If the unlawfully discharged union supporters accept reinstatement and no other employees are displaced, they will constitute a quarter of the bargaining unit even accepting Respondent's representations about its current size.

antiunion campaign was in accordance with the virulent antiunion sentiment of Rusty Keeley, who is still the owner of the Company. The judge found that the unlawful campaign was "entirely consistent" with Keeley's desires and attitudes and that "the buck stop[ped] with him." 353 NLRB 166, 218–219. The Respondent vowed to "fight all attempts to bring a union into our company even if its takes years," and stated that it would "never recognize a union." Id. at 174–175. It continued to fire union supporters during the unfair labor practice trial (John Shipp and Wayne Schaffer). Id. at 168. And, the judge found that it engaged in "blatant and unconscionable" fabrication of evidence against union supporters and that its general manager at the time of the unfair labor practices, Chris Eirvin, had "no regard for the truth." Id. at 196–197. The Respondent has presented no evidence that by word or deed Keeley or any other management official of the Respondent has ever repudiated any of the unlawful activities detailed in the incorporated decision by reinstating all the unlawfully fired union supporters or in any other manner.[6]

Finally, we reject the Respondent's entirely speculative and legally unsupported argument that its employees would no longer be inclined to support the Union in light of the ongoing global economic crisis.

For all of these reasons, we do not believe a free and fair rerun election can be held among the Respondent's employees at this time, even if it were preceded by full compliance with all the "special remedies" described by our colleague. Under the circumstances present here and even with the passage of time, no such remedies can "assure employees that Respondent will respect [their Section 7] rights." *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1029 (1979). The special remedies proposed by our colleague, even augmented by others we have granted in prior cases, remain a second-best alternative to enforcing the previously expressed sentiment of the majority of employees. The employees will then have an opportunity, through the filing of a timely petition for decertification,[7] to demonstrate whether they have changed their minds. We would, of course, grant such special remedies if the Respondent chooses not to comply with the bargaining order and enforcement cannot be obtained. See, e.g., *United States Service Industries, Inc.*, 319 NLRB 231, 231–232 (1995) (and cases cited therein).

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

Contrary to my colleagues in the majority, I would rescind the *Gissel*[1] bargaining order originally issued in the Board's decision reported at 353 NLRB 166 (2008). I would do so as a result of the regrettable but undeniably substantial passage of time between the unfair labor practices engaged in by the Respondent and this Supplemental Decision and Order, as well as the other matters raised by the Respondent in its recent submission responding to the Board's request for briefing on changed circumstances, as referenced by the majority.

I clearly understand my colleagues' reasons for issuing the *Gissel* bargaining order here. I agree with the Board's prior decision, incorporated by reference in this decision, holding that the Respondent engaged in egregious and pervasive unfair labor practices, including numerous violations of Section 8(a)(1) and particularly "hallmark" violations of the Act, and the Section 8(a)(3) discharges of a large number of union supporters constituting a substantial percent of the bargaining unit.

On the other hand, I have repeatedly acknowledged that Federal circuit courts have repeatedly chastised the Board in no uncertain terms for failing to assess the appropriateness of a *Gissel* bargaining order in light of changed circumstances as of the date an order is entered. And thus, contrary to Board policy but consistent with these circuit courts decisions, I assess the appropriateness of a *Gissel* order as of the time of issuance. See, e.g., my dissenting position in *Cogburn Healthcare Center*, 342 NLRB 98 (2004).

Although the most recent delay in the Board's issuance of a legally binding bargaining order has not been of the Board's making, and was certainly a result of circum-

[6] Moreover, the two supervisors that admittedly remain in the Respondent's employ—Ernie Nanney and Kevin Sellers—were active participants in the Respondent's unlawful antiunion campaign. Nanney made various threats in violation of Sec. 8(a)(1) and was involved in the Respondent's pretextual discharge of discriminatee Shipp for low production. Sellers read aloud the Respondent's unlawful letter to his employees and told them that, whatever they did, the Respondent would never go union. He also was a principal in the unlawful termination of discriminatees Sutton, Williams, and Adams by falsely telling them that they were required to relocate to Florida and then discharging them when they refused to do so.

[7] Such a petition would be timely if the parties are unable to reach agreement on a contract after the parties have bargained for a reasonable period of time.

[1] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

stances clearly beyond the Board's control, the undisputable fact remains that 7 years have now passed since the unfair labor practices at issue in this proceeding. The Board itself has recognized that an excessively long delay such as occurred here would likely render a bargaining order unenforceable. Id. at fn.4.

This passage of time and the changed circumstances noted by the Respondent, such as the contraction of the unit, and employee and managerial turnover beyond that considered in the Board's prior decision, raise the important and fundamental issue as to what *current* employees want on the issue of union representation. I believe that their desires can only fairly and accurately be determined through a secret ballot election.

In my view, under the circumstances, a combination of special remedies will address the Respondent's prior unlawful conduct, its likelihood of being repeated and, most importantly, effectuate employee free choice. Thus I would order a new election with the following special remedies: one, notice reading to all employees by a Board agent, with management and union representatives present; two, a notice mailed to all employees attaching the Board notice and further advising them to report any incidents of intimidation or coercion to the Board regional office, with contact information; three, union access to the Respondent's premises for 2 hours twice a week during the campaign in an area where employees may voluntarily gather during nonwork time to discuss unionization; and four, requiring the Respondent to promptly provide the union with copies of all written management communications distributed during the union campaign and before the election that address the issue of unionization or the employees' terms and conditions of employment.[2]

Accordingly I respectfully dissent on this issue.

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[2] My colleagues contend that a *Gissel* order is the most effective remedy here, and that special remedies are "a second-best alternative." I disagree. Ascertaining and effectuating the desires of the Respondent's current workforce are of paramount importance. A fair election is indisputably the best means for doing so. Moreover, the 7 years' time between the violations here and our order, and the accompanying changes to the work force, render a bargaining order a particularly questionable alternative for addressing current employees' desires. In these circumstances, I view special remedies set out above, coupled with a new election, as best accommodating the dual goals of remedying the prior violations here and effectuating employee free choice. A bargaining order, conversely, would saddle the employer with a bargaining obligation with respect to a union that the majority of its employees may not have chosen in an election. And the majority's suggestion that the employees could file a timely decertification petition if they "changed their minds" does not, in my view, address the fundamental question as to whether the current employees would have chosen the union if given the opportunity to do so. Moreover, if the Board issues a bargaining order, the employees would be precluded from filing a decertification petition for a reasonable period of time, and if the parties bargain and reach agreement, the employees would be foreclosed from exercising their right to decertify the union for a substantial period.