

**Winco Petroleum Company and Cooper Oil Company, Inc., Successor Employer and Automotive, Petroleum and Allied Industries Employees Union Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 14-CA-10704 and 14-CA-10937

September 30, 1980

**SUPPLEMENTAL DECISION AND ORDER**

**BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO**

On June 12, 1980, Administrative Law Judge Marion C. Ladwig issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and both filed answering briefs to the various exceptions.

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 Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We also find no merit in Respondent's allegation of bias and prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence.

<sup>2</sup> We agree with the Administrative Law Judge's conclusion that Respondent Cooper Oil Company, Inc., as the successor to Winco Petroleum Company, should be required to bargain with the Union herein. In so doing, we emphasize that Cooper Oil Company's predecessor had a bargaining obligation which was based both on *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), and on Winco's initial voluntary recognition and bargaining with the Union. In this regard, we note that this case is distinguishable from *N.L.R.B. v. Cott Corporation*, 578 F.2d 892 (1st Cir. 1978), relied on by Respondent, since in that case the Board's imposition of a bargaining order on the successor had been based solely on a *Gissel* bargaining order issued against the predecessor. Here, as noted, the predecessor had also voluntarily recognized the Union, establishing an additional ground upon which to premise the obligation to bargain, which is now Cooper Oil's responsibility by virtue of its being a successor employer as described by the Administrative Law Judge.

Order of the Administrative Law Judge and hereby orders that the Respondent, Cooper Oil Company, Inc., successor to Winco Petroleum Company, Farmington, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

**SUPPLEMENTAL DECISION**

**STATEMENT OF THE CASE**

MARION C. LADWIG, Administrative Law Judge: On April 24, 1979,<sup>1</sup> the Board issued its Decision and Order (241 NLRB 1118 (1979)) in which it found that Respondent Winco Petroleum (which operated three APCO self-service retail gasoline stations in Pevely, Festus, and Oakville, Missouri) had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by discriminatorily discharging one employee and reducing the hours of said employee and two other employees; violated Section 8(a)(5) and (1) of the Act by unlawfully repudiating its recognition of and bargaining with the Union; and otherwise violating Section 8(a)(1) of the Act. Meanwhile, Respondent Cooper Oil Company (which owned a chain of Derby gasoline stations in central Missouri and southern Illinois) purchased all of Winco's stock on March 6 and continued operation of the business as a wholly owned subsidiary for about 4 weeks. Then on April 2 it merged Winco into Cooper Oil, continuing to operate the three APCO retail stations—under the same station names and the same APCO brand—in a new division with an office at the former Winco office in Pevely about 50 miles from Cooper Oil's headquarters in Farmington.

A controversy having arisen over the amount of backpay due and over Cooper Oil's obligation to remedy the unfair labor practices, the Regional Director issued a backpay specification on November 7, 1979, alleging that Cooper Oil is a successor of Winco, and that Winco and Cooper Oil are jointly and severally liable for the backpay due the three employees and for remedying the unfair labor practices pursuant to the Board's Order issued against Winco, its officers, agents, successors, and assigns.

At the supplemental hearing held in St. Louis, Missouri, on December 5-6, 1979, the primary issue was whether Cooper Oil had knowledge before March 6 of the unfair labor practice proceeding and was obligated as a successor to remedy the predecessor's unfair labor practices, including the refusal to bargain.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Cooper Oil, I make the following:

<sup>1</sup> All dates are from August 1978 through July 1979 unless otherwise indicated.

## FINDINGS AND CONCLUSIONS

A. *Background*

William Cooper, the president of Cooper Oil, had been acquainted with Wilmer Buechting, Sr., president of Winco Petroleum, for about 12 or 15 years. They knew each other as members of a gasoline marketers association which met several times a year and published a newspaper, and from being in the same business in the same area. Two of their stations, Winco's APCO retail station in Festus and Cooper Oil's Derby retail station in Crystal City, were located only about a mile apart.

All of Cooper Oil's Derby retail and dealer stations and all three of Winco's APCO retail stations were non-union.

In the spring of 1977, before the Union began an organizing drive at Winco's three retail stations, Cooper became interested in purchasing Winco as well as Twin City Oil Co. (a separate company owned by the Buechting family), which held the title to Winco's stations and which also owned three APCO dealer stations. Buechting Sr. offered to sell the capital stock of both companies to Cooper, showed him the most recent 1-year profit and loss statements and balance sheets for the two companies, and reached a tentative sales price. However, Buechting Sr. decided instead to sell the Winco stock to his son, Wilmer Buechting, Jr., who would take over much of the operation of the business, and the sale to Cooper was not consummated at that time.

That summer, the Union conducted an organizing campaign among the employees of Winco's three retail stations, and Winco voluntarily recognized the Union as the bargaining agent and commenced contract negotiations on August 26, 1977. However, Winco thereafter repudiated the recognition and engaged in conduct which the Union herein charged, on September 14 and November 22, 1977, to be violations of Section 8(a)(1), (3), and (5) of the Act. As testified by Buechting Sr., "I don't think" the NLRB case "was a secret." The hearing was held for 8 days during a 3-week period in January 1978 (plus 1 day in February) in Crystal City where one of Cooper Oil's retail stations is located. (Some indication of the knowledge which competing Winco and Cooper Oil had of each other's operations was given by Winco's Manager and corporate secretary, James Partney, who later became Cooper Oil's division manager over its new northern division. He testified that, when he was retained by Cooper Oil as manager over the Winco stations, he already knew how Cooper Oil had operated because "they have a station there in town," referring to Cooper Oil's Crystal City station about a mile from Winco's Festus station.)

Most of the legal expenses connected with the NLRB litigation was paid by Winco in its 1978 fiscal year (which began on August 1 and ended on July 31, 1978). Winco's general journal (G.C. Exhs. 25 and 26) shows payments of \$15,567.48 on February 27 and \$8,702.75 on May 24, 1978, for "Legal Fees" paid to Winco's attorneys in the NLRB proceeding. These fees, totaling \$24,270.23, were shown as "Legal and Professional" expenses on Winco's fiscal 1978 profit and loss statement,

which Winco's accountant furnished to Winco in August shortly after the end of the 1978 fiscal year.

On October 25, Administrative Law Judge Herzel Plaine issued his Decision herein. He found that Winco had discriminatorily discharged Judy Shepherd Oster and had discriminatorily reduced the work hours of Oster, Betty Meyer, and Gloria Broombaugh. He found that Winco committed various independent 8(a)(1) violations. He also found that, "[b]y repudiating the recognition and bargaining on approximately September 2 [1977], except for the 1 day of bargaining, no time for bargaining had elapsed, and [Winco's] refusal to bargain since September 2 violated Section 8(a)(5) and (1) of the Act." However, he found that the bargaining order should be issued as of August 27, 1977, because a bargaining order was also necessary to remedy the unfair labor practices under *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 613-615 (1969), and August 27 was the date on which Winco "embarked on its course of unlawful conduct."

In November Winco offered reinstatement to employee Oster; in December it filed exceptions to the Administrative Law Judge's Decision; and in January Buechting Sr. again engaged in negotiations to sell Winco and Twin City to Cooper Oil. In connection with these negotiations, Buechting Jr. requested the Winco accountant to prepare supplemental financial statements for the 5-month period since the 1978 fiscal year, falsely telling the accountant that "his bank was after him about a financial statement." The 5-month profit and loss statement and balance sheet (G.C. Exh. 2), for the period from August 1 through December 31, did not of course show the large expenditure for the legal fees (totaling \$24,270.23) paid by Winco in fiscal year 1978 for the NLRB litigation.

B. *Purchase of Winco Stock and Merger*

By late January, Buechting Sr. and Cooper had reached an agreement for Cooper Oil to purchase from Buechting Sr. and from Buechting Jr. and his wife all of the shares of stock in both Winco and Twin City for the total amount of \$850,000, paying in cash and other considerations, including promissory notes totaling \$652,000 (\$500,000 payable to Buechting Sr. and \$152,000 payable to Buechting Jr. and his wife).

The purchase agreement and other documents (including one designating Cooper as the sole director of Winco) were signed on March 6. The Winco business was continued without any hiatus and with the same personnel. Manager Partney (who was on the Twin City payroll and who was responsible for Twin City's three APCO dealer stations as well as supervising Winco's cashiers) continued, upon the prior request of President Cooper, as manager over the three Winco retail stations, and he continued to oversee the three Twin City dealer stations. On March 7 Cooper authorized Partney to put in some raises at the Winco stations and assigned him the additional responsibility of selecting a manager and assistant manager at each of the three Winco stations. (When asked by the Cooper Oil counsel if Cooper specifically told him the assistant managers—as well as the manag-

ers—would have the authority to hire and fire. Partney answered, "I'm not sure." When asked a second time, he claimed, "I'm sure he did," but added that he was "not certain" of that.) On the same day, Partney demoted Night Supervisor Vandiver, making Vandiver manager of Winco's Oakville retail station, and promoted cashiers Gloria Broombaugh and Bill Rose to station managers at Winco's Pevely and Festus stations. (When asked when he selected the assistant managers, Partney answered he did not know, "It was shortly after, it could have been as much as a month" later.) Winco continued in operation through March 31 with the Winco employees remaining on the Winco payroll under the Winco insurance during that time.

On April 2, Winco Petroleum, Inc., and Twin City Oil, Inc. (then wholly owned subsidiaries) were merged into Cooper Oil Company, Inc. (the parent company), under a provision in paragraph 1(C) of the articles of Merger (G.C. Exh. 19) that Cooper Oil, "as the surviving corporation, shall be responsible and liable for all of the liabilities and obligations [emphasis supplied] of Twin City and Winco. The cashiers at the three Winco retail stations were then placed on the Cooper Oil payroll under the Cooper Oil insurance program (and later its pension plan). Partney was made division manager over a new northern division, which includes the three former Winco retail stations in Pevely, Festus, and Oakville, the three former Twin City dealer stations (all six of which are still operated under their same names as APCO stations), and one Derby station (Cooper Oil's retail station in Crystal City). The office for the northern division is the former Winco office in the building where the Pevely retail station is located.

At the supplemental hearing, the parties stipulated that the total net backpay due Judy Shepherd Oster is \$7,606.30 for the period from August 25, 1977, through December 12, 1978; the amount due Betty Meyer is \$510.68 for the period from August 25, 1977, to March 16, 1979; and the amount due Gloria Broombaugh is \$551.50 for the period from August 25, 1977, through March 16, 1979.

### C. Prior Notice of NLRB Proceeding

#### 1. Contentions of the parties

The General Counsel contends that Cooper Oil purchased Winco with prior knowledge of Winco's unfair labor practices and that, as a successor employer to Winco, it is obligated to remedy these unfair labor practices.

Cooper Oil admits in its brief that it is a successor of Winco. It argues:

In the landmark case of *Perma-Vinyl Corp.*, 164 NLRB 968 (1967), the Board concluded that achievement of the national labor policy under NLRB demanded successor responsibility for a predecessor's unfair labor practices under certain limited circumstances. Thus, two principle prerequisites for successor liability emerged in *Perma-Vinyl*: (1) there must be a substantial continuation of the predecessor's employee complement and methods, and

(2) the successor must have had actual or constructive notice at the time of the acquisition of the outstanding unfair labor practice charges. Respondent Cooper Oil Company, Inc., concedes the existence of the first prerequisite, but strongly denies the existence of the second.

Cooper Oil also contends that the testimony of Buechting Sr., Partney, and Cooper "clearly established that Mr. Cooper did not have actual knowledge of the unfair labor practice charges (or of the bargaining order) until his receipt of the Board's Decision on or about April 31, 1979." It further contends that the only evidence tending to contradict this "reliable" testimony is the testimony of Von Vandiver, "who should not be considered a reliable or credible witness."

#### 2. The evidence

According to William Cooper, president of Cooper Oil, he knew nothing about the Union's organizing the Winco employees in the summer of 1977, nothing about the NLRB hearing in Crystal City (where one of his retail stations is located) in January and February 1978, and nothing about the Union or the unfair labor practice charges prior to April 30, 1979, when he received a copy of the Board's April 24 Decision and Order.

President Cooper admitted that Buechting Sr. had given him both Winco's and Twin City's financial reports for the last full fiscal year during his 1977 negotiations to purchase those two companies. In the January 1979 negotiations, as Cooper admitted, Buechting Sr. again gave him Twin City's financial reports for the last full fiscal year. However, Cooper claims that Buechting Sr. did not give him Winco's financial reports for the last full fiscal year (reports which Buechting Sr. received in August 1978, covering the fiscal year which ended on July 31, 1978). Cooper claims that Buechting Sr. instead furnished him with Winco's balance sheet and profit and loss statement covering a 5-month period (from August 1 through December 31) "to help me make my determination as to whether or not I wanted to buy the company." He also claims that he did not ask Buechting Sr. why a 5-month period was picked, and did not see any other Winco financial records. Thus, by claiming that he did not see the fiscal 1978 profit and loss statement, which showed Winco's expenditure of \$24,270.23 in legal fees for the NLRB litigation (and also claiming that he did not inquire about the \$906.22 "Legal and Professional" expenses on the 5-month profit-and-loss statement), Cooper was able to deny that he had ever heard of the pending NLRB case. (I discuss his credibility later.)

Cooper also positively denied that the word "union" came up during his 1979 negotiations with Buechting Sr. To the contrary, Buechting Sr. finally admitted on the stand that his "union problems" were mentioned in his negotiations with Cooper. (When called as a witness, Buechting Sr. appeared to be endeavoring to support Cooper's testimony. As found above, he was holding Cooper's promissory note for \$500,000.) Buechting Sr. at first positively denied that he recalled telling Cooper that he was "getting out of business because of Union prob-

lems." He claimed that the only reasons he gave for wanting to get out of the business were the gasoline supply problem and the fear of going bankrupt. At that point, however, the General Counsel showed him paragraph 11 of his affidavit (G.C. Exh. 30, taken in the office of the Cooper Oil counsel on July 26), in which Buechting Sr. swore that he told Cooper in January 1979 that he was having "employee problems, problems with the Department of Energy, and union problems. Cooper did not question me about any of the problem areas . . . I just mentioned these problem areas as reasons why I wanted to sell and Cooper did not explore them [emphasis supplied]." (In par. 12 of the affidavit, he added, "I never mentioned anything about the union again as I didn't want to blow the sale.") Buechting Sr. then testified:

Q. Having read your affidavit, do you now recall telling Bill Cooper that you were having employee problems, problems with the Department of Energy, and union problems? Do you recall saying that to Bill Cooper?

A. Yes, in the conversational way. This was *not* one of my reasons for selling. [Emphasis supplied.]

Buechting Sr. later claimed that, when he mentioned the union subject in the January negotiations, "I mentioned that as a problem in our area with businesses." However, if he had been referring to the problem of unions organizing businesses generally in the area, he undoubtedly would not have added in his affidavit that he "never mentioned anything about the union again as I didn't want to blow the sale."

Thus, contrary to President Cooper's positive denial that the subject came up during the January negotiations, Buechting Sr. admitted in his affidavit, and finally on the stand (although he attempted later to retract it), that he did mention to Cooper about his "union problems," and that Cooper made no response. (The General Counsel contends that Cooper's silence indicates that Cooper was already familiar with the Union's organizing and Winco's NLRB litigation.)

Buechting Sr. also denied showing President Cooper the fiscal 1978 profit and loss statement (which he had received from the Winco accountant in August, revealing the payment of \$24,270.33 in legal fees for the NLRB litigation), claiming that the 5-month profit-and-loss statement and balance sheet (covering August through December) would give Cooper an "accurate figure" on Winco's financial condition. When asked if Cooper would have been aware of the "very expensive" (NLRB) litigation if Cooper had seen the 1978 financial statement, he claimed, "I didn't give that a thought." He also claimed that he himself had asked Winco Accountant Lloyd Moore to prepare the 5-month statement "for the purpose of showing it to Bill Cooper," and that Buechting Jr. took no part in the negotiations with Cooper. Other credited testimony, however, indicates not only that Buechting Jr. was involved in the negotiations, but also that he and his father were considering the problem of Cooper's buying the Winco stock from Buechting Jr.

and his wife without the NLRB Order being enforceable against the new owner.

As credibly testified by Winco Accountant Moore, it was not Buechting Sr. who requested him to prepare the 5-month financial reports (specifically to show to Cooper), it was the son, Buechting Jr. (then president of Winco) who made the request, telling Moore that "his bank was after him about a financial statement." (Thus, at the time the Buechting father and son were concealing from the Winco accountant the reason they wanted a supplemental profit and loss statement.) Also, in January Buechting Jr. revealed to Winco Night Supervisor Von Vandiver (with whom Buechting Jr. often discussed the NLRB litigation) that Buechting Jr. was involved in the matter. In one conversation, as Vandiver credibly testified, he asked Buechting Jr. what was going on in the "union deal" (referring to the NLRB litigation), and Buechting Jr. "told me that he had told his attorney to drop the matter, that he wasn't going to pursue it anymore." Then early one morning Buechting Jr. telephoned Vandiver, and advised him that "they were going to sell the company to Cooper Oil Company" and that "he had told Mr. Cooper that I was a good employee" and that Cooper "should keep me on," although Cooper Oil had only station managers and not a "roving manager" (Vandiver's role as a night supervisor over the Winco stations). Still later, in February Vandiver saw Buechting Jr. in the office reviewing one of the documents in the pending NLRB case and asked him "how it would affect Mr. Cooper." Buechting Jr. responded that "he didn't believe the Judge's [October 25] decision would be enforceable on a new owner." Vandiver then asked "if Bill Cooper knew about Winco being involved in this, in the NLRB case," and Buechting Jr. answered, "Yes, he's aware of it." Buechting Jr. did not indicate how he knew that Cooper was aware of the NLRB litigation. However, I consider his belief that Cooper was aware of the unfair labor practices is relevant to a determination of why the Buechtings concealed from the Winco accountant the fact that they wanted a supplemental financial report to give to Cooper (a report which would not put Cooper on formal notice of the NLRB litigation through the large legal fees on the fiscal 1978 profit-and-loss statement), and why Buechting Jr. made statements to Vandiver that he was directing the Winco attorney to drop the appeal in the NLRB case, that the NLRB case "would not affect Mr. Cooper," and that he did not believe "the Judge's decision would be enforceable on a new owner," (In its brief, Cooper Oil vigorously attacks Vandiver's credibility, and argues in support of the credibility of the Buechtings—despite the earlier finding by Administrative Law Judge Plaine that some of their testimony was "incredible." While testifying on the stand, Vandiver impressed me most favorably as an honest, forthright witness, who had a good recall of what had happened, whereas both the Buechting father and son appeared less than candid.)

### 3. Cooper's credibility

A key issue in this proceeding is the credibility of President Cooper, who denied that he saw Winco's fiscal

1978 profit-and-loss statement (showing the large expenditure of legal fees in the NLRB litigation) and who denied that he knew anything about the union organizing and the unfair labor practice charges until April 30 when he received a copy of the Board's April 24 Decision and Order. In weighing his credibility, I take into consideration some of the positions he took prior to the supplemental hearing herein.

On June 22, the Cooper Oil counsel wrote a letter to the NLRB Region 14 Compliance Officer, disclaiming any responsibility on the part of Cooper Oil to remedy the Winco unfair labor practices. President Cooper admittedly provided the counsel with the "facts" contained in this statement on behalf of Cooper Oil. I find that many of these so-called "facts" reflect unfavorably on Cooper's credibility.

Contrary to the undisputed evidence at the supplemental hearing, the position letter (G.C. Exh. 5) stated that Cooper Oil purchased Winco on March 1; that Cooper Oil "offered employment to Winco employees at the time of the sale and they accepted employment with Cooper"; that "six former rank-and-file employees of Winco were named supervisors for Cooper Oil at the time of the sale"; that Managers Vandiver, Broombaugh, and Rose, and Assistant Managers Meyer, Behr, and Roberts, all former Winco rank-and-file employees, were the supervisors "operating the three facilities at issue on March 1, 1979"; and that "[f]rom the date of closing of the sale, March 6, 1979, Cooper Oil Company operated the three facilities at issue, along with all of its other facilities, as Cooper Oil Company, and not "through Winco Petroleum." (It is undisputed that Cooper Oil purchased the Winco stock on March 6; on that date all of the employees remained on Winco's payroll; none of the station managers or assistant managers was appointed either on March 1 or March 6; and Winco employees remained on the Winco payroll through March 31.) At the supplemental hearing, Cooper admitted having been told by Buechting Sr. that one of the new station managers, Vandiver, had been a night supervisor, but claimed that he did not know the meaning of "rank-and-file" employee. He admitted that the station managers and assistant managers were not appointed on the date of the sale, and claimed that he did not know when they were appointed.) I find it obvious that Cooper fabricated much of the information in the position letter in order to mislead the NLRB regional staff during the Region's investigation of Cooper Oil's status as a successor of Winco. (I also find to be fabricated Cooper's testimony that, when he went to lunch with Buechting Sr. and Buechting Jr. immediately before he held the second negotiating meeting with Buechting Sr. in January 1979, "Not to the best of my knowledge" did Buechting Jr. know that the sale of the business "was the purpose of the meeting.")

Concerning Cooper's claim that he purchased the Winco stock on March 6 without knowledge of Winco's unfair labor practices, and that he first became aware of the union organizing and the NLRB litigation when he received the Board's Decision and Order (on April 30, as he claimed at the supplemental hearing, or "on or about May 8" as he claimed in his counsel's June 22 letter to

the Region 14 Compliance Officer), there is direct evidence to the contrary.

Cooper's earlier knowledge was revealed by James Partney, former Winco manager and corporate secretary, who was retained by Cooper to manage the Winco stations in March and who was made division manager over Cooper Oil's Northern Division when Winco was merged into Cooper Oil on April 2. (Partney had testified on Winco's behalf concerning employee Oster's discriminatory discharge in the hearing before Administrative Law Judge Plaine, who found that Partney was a statutory supervisor—before he became the corporate secretary for Winco. Although Partney claimed at the supplemental hearing that he had not used his authority to hire and fire Winco employees, he stated in his July 30 affidavit that he did "hire and fire employees" for Winco.)

About the third week in April, a week or more before Cooper claimed he first learned about the NLRB litigation, the northern division manager, Partney, went to the APCO station in Oakville (where Partney, as the Winco manager, on March 7 reassigned Von Vandiver from his position as night supervisor to station manager) and talked to Vandiver about making one of his cashiers an assistant manager. As Vandiver credibly testified, Partney said he would talk to Betty Meyer (one of the discriminatees in the NLRB proceeding) about working on Sunday nights to give Vandiver a day off. Vandiver protested that he did not like the idea: "I didn't really want to even keep Betty Meyer employed there." However, Partney said "he and Mr. Cooper talked it over, and if anything ever happened with the union case [referring to Winco's NLRB proceeding] that they could claim that Betty Meyer was my assistant manager" and "avoid problems with the Union by claiming Meyer was managerial if the union came back in." However, Partney "assured me that she wouldn't have any managerial functions." Vandiver asked if there was still something going on with the Union, and Partney answered, "Not a whole lot but Cooper had a "hotshot" or "big time lawyer who didn't think there was much of a case." (I discredit the denials by Partney and Cooper, both of whom from their demeanor on the stand appeared to be more concerned with supporting Cooper Oil's cause than giving an accurate account of what actually happened.)

Thus, a week or more before President Cooper received a copy of the Board's Decision and Order herein, he already knew that cashier Meyer was involved in Winco's pending NLRB case. This evidence also belies Cooper's position, taken in the June 22 letter to the Regional Office, that three Winco employees were promoted to supervisory assistant managers at the three Winco retail stations on March 1.

#### 4. Findings of actual knowledge

After weighing all the evidence, and considering all the arguments in the parties' briefs, I find that President Cooper did have actual knowledge of Winco's unfair labor practices before March 6 when Cooper Oil purchased all outstanding shares of Winco's stock from Buechting Jr. and his wife.

I discredit the claims that Cooper was shown only Winco's financial reports covering a 5-month period and not the profit-and-loss statement for the last fiscal year reflecting the large legal fees incurred by Winco in the NLRB litigation. From all the evidence I infer, contrary to Buechting Sr.'s claim that he did not give it a thought that Cooper would be aware of the very expensive NLRB litigation if he saw the 1978 financial statement, that, when Buechting Jr. requested the Winco accountant to prepare the 5-month financial reports (falsely advising the accountant that the "bank" was "after him about a financial statement"), the Buechting father and son were engaged in a maneuver to assist Cooper in building a defense that he was purchasing the Winco stock without knowledge of the unfair labor practices. I also find that Cooper was also attempting to build such a defense, after receiving a copy of the Board's Decision and Order, when he disclaimed prior knowledge in a letter to Winco's labor counsel in early May and in letters to the NLRB Regional Office in early May and on June 22.

#### D. Obligations of a Successor

##### 1. Continuation of business

Employees at three self-service APCO gasoline stations are involved in this proceeding. As found, Winco, on August 26, 1977, voluntarily recognized and bargained with the Union in a bargaining unit of these employees. Thereafter, as Administrative Law Judge Plaine found in his October 1978 Decision, Winco unlawfully repudiated the recognition and bargaining and committed a number of unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act. On March 6, 1979, before the Board issued its April 24, 1979, Decision and Order affirming Administrative Law Judge Plaine's findings and conclusions, Cooper Oil purchased all of the Winco stock with actual knowledge of Winco's unfair labor practices, as found herein. On March 6 it continued operating the business with the same employees, without any hiatus, at the three APCO stations, and thereafter operated Winco as a wholly owned subsidiary through March 31. On April 2 Cooper Oil merged Winco into Cooper Oil, thereby assuming "responsibility and liability for all of the liabilities and obligations" of Winco.

During the week ending April 4, after the merger, Cooper Oil employed 19 persons at the three APCO self-service stations. A total of 13 of these 19 persons had been employed by Winco on February 28, before Cooper Oil purchased the Winco capital stock, and 15 of the 19 were employed on March 31, before the merger. (G.C. Exh. 9.) A total of 3 of the 19 employees were supervisors on April 4 (Oakville Station Manager Vandiver, formerly Winco's night supervisor, and Station Managers Broombaugh and Rose at the Pevely and Festus stations, formerly Winco employees), leaving 16 bargaining unit employees at the 3 APCO stations. A total of 12 of these 16 employees were Winco employees before March 6. On July 30, at the time Division Manager Partney gave his affidavit (G.C. Exh. 21, par. 22), there were about 15 employees working at the 3 APCO retail stations, about 13 of whom formerly worked for Winco. As estimated

by Partney, Cooper then employed a total of about 60 employees at all of its retail stations—about 15 at 3 high volume APCO retail stations and about 45 at the remaining 17 lower volume Derby retail stations. (I note that Cooper claimed at the supplemental hearing that there were about 20 Winco employees, not including part-time help, who were retained on March 6, and that today he has 20 retail stations, 6 dealer stations, a work force of "around 100," only approximately 9 of whom are former Winco employees and about 3 or 4 of whom are now cashiers. However, Cooper has given so much misleading "information" in this proceeding that I cannot rely on the accuracy of this unsupported testimony.)

Former Winco employees in the bargaining unit still work at the same three retail stations under one of the same managers (Partney). Although they are now Cooper Oil employees with similar benefits, they are paid somewhat higher wages than the employees working in Cooper Oil's two other divisions "due to the high cost of living in the St. Louis metro area." (G.C. Exh. 10, par. 27.) Although these three stations are included in Cooper Oil's northern division with one nearby Derby station (and with the three former Twin City dealer stations whose employees are not involved in this proceeding), the three former Winco stations are not operated under the name "Cooper Oil Company," nor under the Derby brand, but they are stations with a "lot higher" volume and are operated separately to the extent that they are still operated under the former station names as APCO stations. (G.C. Exh. 10, par. 16.)

##### 2. Contentions and concluding findings

The General Counsel contends that Cooper Oil is a successor to Winco, that it purchased Winco with prior knowledge of Winco's unfair labor practices, and that it is obligated to remedy these unfair labor practices, including Winco's unlawful repudiation of its recognition of and bargaining with the Union. He argues, "The Supreme Court and Board rule is well established that a successor employer which purchases a predecessor employer with knowledge of its unfair labor practices will be obligated to remedy the unfair labor practices." *Golden State Bottling Company, Inc. formerly Pepsi-Cola Bottling Co. of Sacramento, et al. v. N.L.R.B.*, 414 U.S. 168 (1973); *Perma Vinyl Corporation, Dade Plastics Co. and United States Pipe and Foundry Company*, 164 NLRB 968 (1967). The General Counsel also argues that, if the evidence does not establish that President Cooper had actual knowledge of the Winco unfair labor practices, such knowledge should be imputed to Cooper Oil because of the carry over of managerial people. Alternatively, the General Counsel contends that there was a mere change of ownership of stock on March 6; that Winco had a continuing obligation to remedy its own unfair labor practices; and that on April 2, when Winco (then a wholly owned subsidiary of Cooper Oil) was merged into Cooper Oil with identical ownership, supervision, and control of labor relations, Cooper Oil was Winco's *alter ego*, it stood in Winco's shoes, and it had to remedy the unfair labor practices. The General Counsel contends that, as held in *Topinka's Country House, Inc.*,

235 NLRB 72, 74 (1978), the "Board has consistently held that mere change of stock ownership does not absolve a continuing corporation of responsibility under the Act."

As indicated above, Cooper Oil conceded in its brief that it is Winco's successor, there being "a substantial continuation of the predecessor's employee complement and methods," but it "strongly denies that it had actual or constructive notice at the time of the acquisition of the outstanding unfair labor practice charges." It denies that the purchase of stock imputes the predecessor's knowledge of his unfair labor practices to the successor, contending that as far as labor law is concerned, there is absolutely no difference between a stock purchase and a sale of assets, merger, or bankruptcy sale. It denies that it was Winco's *alter ego* between March 6 and April 2. Alas, ignoring the fact that the bargaining order was based primarily upon Winco's unlawful repudiation of its recognition of and bargaining with the Union, Cooper Oil argues that a "*Gissel Packing* bargaining order" should not be imposed on the successor.

Having found that President Cooper did have actual knowledge of Winco's unfair labor practices before March 6 when Cooper Oil purchased all the outstanding shares of Winco's stock, I agree with the General Counsel that *Golden State* and *Perma Vinyl* are applicable, and that Cooper Oil is required to remedy Winco's unfair labor practices. In view of this ruling, I find it unnecessary to rule on the General Counsel's other theories.

Accordingly, I find that Cooper Oil must pay the stipulated amount of backpay due Oster, Meyer, and Broombaugh, plus interest, and remedy Winco's unfair labor practices pursuant to the Board's Order. I also find that the employees at Winco's former Pevely, Festus, and Oakville retail stations (which continue to be operated under their former station names as APCO brand stations) remain an appropriate bargaining unit. I further find that, by acquiring the Winco business and retaining all of the employees on March 6 at the three APCO retail stations, with knowledge of the predecessor's unfair labor practices, Cooper Oil as the successor assumed the predecessor's obligation to bargain, and that bargaining is now necessary to remedy the predecessor's unlawful repudiation of its bargaining with the Union as the recognized exclusive bargaining representative of employees in the appropriate bargaining unit.

Upon the foregoing findings and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>2</sup>

The Respondent, Cooper Oil Company, Inc., successor to Winco Petroleum Company, Farmington, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

<sup>2</sup> 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.

(a) Coercively interrogating its employees concerning their signing of union authorization cards, signing by other employees, who among them was responsible for starting the signing, why they needed the Union, or whether they would support the Union if there were picketing.

(b) Creating the impression of surveillance of employee union activities.

(c) Threatening employees, if they bring the Union in, with closing the stations or making working conditions more onerous.

(d) Threatening employees, if they bring the Union in, with reduction in working hours or vacation benefits or with delayed payment for scheduled paid vacation time.

(e) Threatening employees, if they bring the Union in, that communication with management on problems will be barred.

(f) Importuning and soliciting employees to obtain return from the Union of signed authorization cards.

(g) Promising or granting employees preferred time off to encourage their assistance to Respondent in opposing the Union and to discourage their support of the Union.

(h) Warning employees not to communicate grievances to a union representative.

(i) Discharging, reprimanding, or otherwise disciplining employees, or reducing the hours of work of employees, because they engage in activities for, or support, the Union.

(j) Altering the vacation policy or practice to reduce vacation benefits, or instituting a reprimand system, because employees engage in activities for, or support of, the Union.

(k) Discouraging employees from support of or membership in the Union, or any other labor organization, by discharge, layoff, a reduction in hours of work or vacation benefits, or other discrimination affecting their tenure or conditions of employment.

(l) Refusing, upon request, to bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

All station employees employed at Respondent's gasoline sales stations in Pevely, Festus, and Oakville, Missouri, comprising regular cashiers, regular relief cashiers, and the night maintenance or utility employee, but excluding office bookkeepers or office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Judy Sheperd Oster, Betty Meyer, and Gloria Broombaugh by paying them \$7,606.30, \$510.68, and \$551.50, respectively, plus interest as computed in *Florida Steel Corporation*, 231 NLRB 651 (1977), less tax withholdings as required by law.

(b) Expunge from Respondent's records any reference to the reprimand, dated September 28, 1977, discriminatorily issued to employee Stephen Henson.

(c) Upon request, bargain collectively with the Automotive, Petroleum and Allied Industries Employees Union Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the above-described unit of station employees, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an agreement is reached, embody the agreement in a written contract.

(d) Post in the stations at Pevely, Festus, and Oakville, Missouri, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>3</sup> In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board having found, after a hearing and supplemental hearing, that our predecessor, Winco Petroleum Company, violated the National Labor Relations Act, as amended, we assure you that:

**WE WILL NOT** coercively interrogate our employees concerning their signing of union authorization cards, signing by other employees, who among them is responsible for starting the signing, why they need the Union, or whether they would support the Union if there were picketing.

**WE WILL NOT** create the impression of surveillance of our employees' union activities.

**WE WILL NOT** threaten our employees that, if they bring the Union in, we will close the stations or will make working conditions more onerous.

**WE WILL NOT** threaten our employees that, if they bring the Union in, we will reduce hours of work or vacation time.

**WE WILL NOT** threaten our employees that, if they bring the Union in, we will cut off their communication with management on problems.

**WE WILL NOT** importune or solicit our employees to obtain return from the Union of signed authorization cards.

**WE WILL NOT** promise or grant employees preferred time off to encourage their assistance in our opposing the Union and to discourage their support of the Union.

**WE WILL NOT** warn employees against communicating grievances to a union representative.

**WE WILL NOT** discharge, reprimand, or otherwise discipline employees, or reduce their hours of work, because they engage in activities for, or support, the Union.

**WE WILL NOT** alter the vacation policy or practice to reduce vacation benefits, or institute a reprimand system, because employees engage in activities for, or support, the Union.

**WE WILL NOT** discourage our employees from support of or membership in the Union, or other labor organization, by discharge, layoff, a reduction in hours of work or vacation benefits, or other discrimination affecting their tenure or conditions of employment.

**WE WILL NOT** in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

**WE WILL**, upon request, bargain with the Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the bargaining unit described below, and, if an agreement is reached, embody it in a written contract. The bargaining unit is:

All station employees employed at our gasoline sales stations in Pevely, Festus, and Oakville, Missouri, comprising regular cashiers, regular relief cashiers, and the night maintenance or utility employee; but excluding office bookkeepers or office clerical employees, professional employees, guards, and supervisors as defined in the Act.

**WE WILL** expunge from our records any reference to the reprimand, dated September 28, 1977, issued to employee Stephen Henson.

Because the Board found that Winco Petroleum Company unlawfully discharged employee Judy Shepherd Oster and unlawfully reduced the scheduled hours of work of employees Judy Shepherd Oster, Betty Meyer, and Gloria Broombaugh, **WE WILL** make them whole by paying Judy Shepherd Oster \$7,606.30, Betty Meyer \$510.68, and Gloria

Broombaugh \$551.50, plus interest, less tax withholdings as required by law.

COOPER OIL COMPANY, SUCCESSOR TO  
WINCO PETROLEUM COMPANY