

A.B.C. Coach Lines, Inc., and Amalgamated Transit Union Div. 1492, AFL-CIO, Case 25-CA-9502

December 6, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND TRUESDALE

On September 7, 1978, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a response to Respondent's 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 Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions 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 Order of the Administrative Law Judge and hereby orders that the Respondent, A.B.C. Coach Lines, Inc., Muncie, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ 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.

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard in Muncie, Indiana, on June 5, 1978, on the basis of a complaint issued January 23, 1978, alleging that Respondent interrogated and threatened employees with discharge if they supported or became members of the Union and that on December 12, 1977, Respondent discharged employee William L. Jolliffe because of his union activities.

Upon the entire record in this case, including my obser-

vation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a bus company, has maintained its principal office and place of business at Muncie, Indiana, and has at all times material been engaged in the business of furnishing intrastate and interstate passenger transportation services. In the past year, Respondent derived gross revenues in excess of \$50,000 for the transportation of passengers in interstate commerce. Respondent admits the above factual allegations, and I therefore find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union, Amalgamated Transit Union Div. 1492, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Issues

(1) Whether Respondent, through its vice president and general manager, Thomas Kvalo, interrogated employees about the Union and threatened them with discharge if the Union came in, in violation of Section 8(a)(1) of the Act.

(2) Whether employee William L. Jolliffe was discharged on December 12, 1977, because of two accidents or because of his activities on behalf of the Union.

As to (1), employee Bryan Cassidy credibly testified that about October 19, 1977, General Manager Thomas Kvalo asked him whether anyone had contacted him about the Union. When Cassidy answered no, Kvalo stated that "if the Union ever goes in here, there'll be some people out of jobs" and "I'll [Kvalo] be down at the unemployment office." I cannot credit Kvalo's denial that he made such comments. Kvalo conceded that he may have said the latter statement about his being at the unemployment office if the Union came in. His denial was unimpressive, and his concession is in part corroborative of Cassidy's testimony. Accordingly, I find that Kvalo's interrogation of Cassidy as to whether anyone had contacted him about the Union, and his implicit threat that employees would be out of jobs if the Union came in, constitutes unlawful interrogation and a threat in violation of Section 8(a)(1) of the Act.

As to issue (2), Respondent claims it discharged Jolliffe because he had two accidents while driving his bus, whereas Counsel for the General Counsel contends that he was in fact discharged for his union activities.

In resolving this issue it is necessary to review: the driving record of employee Jolliffe and the two accidents in which he was involved, which Respondent contends prompted his discharge; and the union activities of employee Jolliffe and whether Respondent was aware of them.

Thomas Kvalo testified that since January 1, 1975, Mr. Jolliffe was the only driver discharged for his accident record. He further testified that the Company had no written

rules requiring discharges after so many accidents but that the nature of the accidents and their frequency were considered in his evaluation of drivers and that he discharged Jolliffe on December 12, 1977, because he considered him an unsafe driver. Specifically, he was discharged because of his last two accidents. One accident occurred on October 7, 1977, when Jolliffe concededly ran into the back of another bus of the Company as they were entering a highway from an exit ramp. The rear of the rammed bus received a small dent, and the mirror of Mr. Jolliffe's bus was twisted. There were no personal injuries involved. Jolliffe filed an accident report with the Company and was advised by Kvalo to be more careful. Respondent's Exhibit 12 is a bill for repair of the damaged buses, which amounted to \$106.31.

Another bill, Respondent's Exhibit 11, for \$566.23, also allegedly for repair of damages caused in the same accident, involved, *inter alia*, the repair of a cracked rear window. In rebuttal, Jolliffe credibly testified that the cracked rear window did not result from his accident and that therefore its repair was not properly included as damages caused by him in that rear-end accident. Kvalo conceded that he did not know whether the window was damaged in this accident. I credit Jolliffe's testimony in this regard.

The second accident occurred on November 25, 1977, and resulted when Jolliffe's bus caught the bumper of a taxicab parked in the bus zone. There were no personal injuries involved in this accident, and the Company invoiced the repair of damage to the bus as \$165.75. The damage to the bumper of the taxi was not listed but was handled by its insurer.

Kvalo testified that although he saw Jolliffe's accident report on November 26, 1977, he decided to terminate him on November 28, 1977. He did not implement the termination, however, until December 12, 1977. Kvalo testified that he delayed terminating Jolliffe because the bad winter weather had made them short-handed for part of that time and some 12 inches of snow were handicapping the company's operations for a part of that period.

It is undisputed that in his October 31, 1977, paycheck Jolliffe received an award of \$125 from the company for 100,000 miles of safe driving. The award covered a driving period ending in May or June 1977.

Jolliffe testified that he had a brief conversation with Mr. Kvalo on or about November 21, 1977, shortly after passing his ICC driver's physical and prior to his November 25, 1977, accident. In that conversation Jolliffe, referring to his driver's license and the trouble involved in getting a clear picture, stated that he was good [for driving] for another 2 years. According to Jolliffe, whom I credit, Kvalo responded, "[D]on't be too sure." Cassidy confirmed that Kvalo made such a statement. Kvalo on rebuttal conceded that he made a comment to Jolliffe but that it was said in jest and that according to his version, he merely commented, "[W]ell, nobody is sure of anything."

Kvalo testified credibly that other drivers had been discharged or forced to resign because of bad driving records prior to January 1, 1975, but that he was not involved in those decisions and that they occurred before he became general manager.

Jolliffe credibly testified that he passed out union au-

thorization cards among the drivers and that, although he had initially passed out union cards in the period from October 1976 on, renewed interest in bringing in a union occurred in October 1977, and he passed out more cards and secured three more signed union cards at that time. After securing a number of signed union authorization cards, he mailed them to the Union. The day after his discharge, the Union submitted the cards to the Regional Office of the National Labor Relations Board, and an election was held on or about January 31, 1978, in which the Union was rejected by a 20-to-9 vote. Two other drivers, Cassidy and Fluhr, corroborated Jolliffe's testimony about his union activities, stating that they had secured union cards from Jolliffe and had signed them and returned them to him. There is no explicit evidence that Kvalo was aware of Jolliffe's union activities, although he conceded that it was common knowledge that there was union activity going on among the drivers. Kvalo specifically denied any knowledge of Jolliffe's union activities and reiterated that Jolliffe was discharged solely because of his bad driving record and that his last two accidents in October and November 1977, discussed previously herein, were the precipitating cause of Jolliffe's discharge.

Thus, the crux of the allegedly discriminatory discharge is simply whether the company was in fact motivated solely by Jolliffe's accidents or whether the accidents were merely a pretext for discharging Jolliffe for his union activities.

B. Contentions of Respondent

Respondent contends that Jolliffe was discharged because he was an unsafe driver, as established by two accidents in which he was at fault, which occurred in October 1977 and on November 25, 1977. The record indicates that since his employment in February 1976 Jolliffe was involved in five accidents, of which three was deemed to be his fault. Kvalo indicated that in evaluating a driver's performance Respondent considered only those accidents in which its driver was at fault. Since his first "at-fault" accident on March 8, 1976, Jolliffe drove 100,000 accident-free miles and received an award therefor.

Respondent also points to a decision of the Indiana Employment Security Division and a decision of an appeals referee, dated January 31, 1978, upholding an earlier determination that Jolliffe was discharged for just cause because of his driving record. Further, Respondent points to Jolliffe's application for unemployment (Resp. Exh. 6), in which he stated as the reason for his unemployment "safety record unsatisfactory." In his testimony Jolliffe stated that he merely entered the reason the company gave him for discharge. Respondent's Exhibit 7 indicates that Jolliffe did claim that his discharge stemmed from his union activities.

While the determination of the Indiana Employment Security Division is a factor to be considered, it is not dispositive of the issue before me. Moreover, the record in this proceeding contains evidence not adduced before the deputy or the Appeals Referee.

C. Conclusions on the Cause of Discharge

For the reasons detailed hereinafter, I am persuaded that Jolliffe's union activities were the motivating cause for his discharge and therefore find that his discharge is in violation of Section 8(a)(3) and (1) of the Act.

The accidents Jolliffe was involved in October and November 1977 were minor and resulted in no personal injuries. The damages were nominal,¹ and there was no contention or evidence offered that the insurance carrier requested the discharge of Jolliffe. Bumping into another bus of the company and catching the bumper of a parked taxi are no reasons for commendation, but neither do they appear to warrant immediate discharge, in view of his prior award for "accident-free driving" and particularly since Kvalo gave no warning to Jolliffe that his job was in jeopardy because of his accidents. Moreover, Kvalo delayed from November 28, 1977, when he stated he made the decision to terminate Jolliffe, until December 12, 1977, when the actual termination was made. If, in fact, Jolliffe were an unsafe or accident-prone driver, letting him continue to drive in hazardous winter weather seems somewhat illogical even if they were shorthanded.

Jolliffe had been a driver since February 1976, had completed a probationary period, and had, in October 1977, received an award for 100,000 miles of accident-free driving. The record establishes that Jolliffe was the only employee engaged in distributing and collecting union authorization cards. Cassidy so testified and acknowledged that he had received a card from Jolliffe and signed a union card in October 1977. Fluhr, another driver, testified that he received a union card from Jolliffe in the fall of 1977, probably in September. As to Kvalo's knowledge of union activities, he conceded that it was common knowledge, hearsay, as he termed it, that union activities were going on at the terminal.

Critical to resolution of the motivation of Jolliffe's discharge is whether Kvalo knew of Jolliffe's union advocacy and activities. In such a situation, it would be unusual to have an admission by Kvalo that he knew of Jolliffe's union activities. Accordingly, a critical point is whether on the facts presented it can be inferred that Kvalo knew of Jolliffe's union activities. A number of factors persuade me that Kvalo did know. First, I have credited testimony that Kvalo did interrogate employee Cassidy about whether the Union had contacted him; second, the testimony of Cassidy and Fluhr indicates that Jolliffe was the *only* individual who was circulating authorization cards for the Union; third, Kvalo himself conceded that he told Jolliffe *before* the second accident that he wouldn't be too sure whether Jolliffe would be driving for another 2 years; and fourth, in a union election held on or about January 31, 1978, the vote was 20 votes against union representation and 9 for the Union. Because employee sentiment appears opposed or hostile to representation, it is highly likely that Kvalo did learn from other employees of Jolliffe's activities in circulating and getting union cards signed, since he was the only employee so involved. Lastly, Kvalo admitted know-

¹ The Respondent repairs its own buses because the cost of collision insurance would be prohibitive.

ing of the union activity going on in the terminal. The small number of employees involved (approximately 30 employees) increases the likelihood that employees and Kvalo knew and were aware of Jolliffe's union activities. Based on the above, I conclude that Kvalo was aware of Jolliffe's activities on behalf of the Union.

In so finding, I do not intend to usurp management's right to discipline or discharge its bus drivers if their driving records or accident records warrant. In the context presented here, I am simply persuaded that Jolliffe was not discharged because of the accidents but was in fact discharged because of his active role in organizing on behalf of the Union.

CONCLUSIONS OF LAW

1. By interrogating employee Cassidy about the Union and stating that employees would lose their jobs if the Union came in, Respondent, through General Manager Kvalo, engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
2. By discharging employee William L. Jolliffe on or about December 12, 1977, because of his activities on behalf of the Union, the Respondent, through General Manager Kvalo, engaged in an unfair labor practice violative of Section 8(a)(3) and (1) of the Act.
3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
4. The Respondent has not otherwise violated the Act.

THE REMEDY

The recommended Order will require Respondent to cease and desist from the unfair labor practices found, to offer reinstatement with backpay and interest thereon to William L. Jolliffe, and to post a notice to that effect. Jolliffe shall be made whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he would normally have earned from the date of his discharge until the date he is offered reinstatement by Respondent, less net earnings during such period, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).²

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³

The Respondent, A.B.C. Coach Lines, Inc., Muncie, Indiana, its officers, agents, successors, and assigns, shall:

² See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

³ 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.

1. Cease and desist from:

(a) Interrogating employees about the Union, or threatening that employees would lose their jobs if the Union came in.

(b) Discharging employees because of their activities on behalf of the Union.

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

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

(a) Offer William L. Jolliffe immediate and full reinstatement to his former job or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for such loss of pay as he may have suffered as a result of Respondent's discrimination, with interest in the manner set forth in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its premises in Muncie, Indiana, copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's 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 the Respondent to insure

that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

⁴ In the event that this Order is enforced by a judgment of a 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

WE WILL NOT interrogate employees about the Union or threaten employees with the loss of their jobs if the Union comes in.

WE WILL NOT discharge employees for circulating or securing union authorization cards or engaging in any other activities on behalf of the Union.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of their Section 7 rights.

WE WILL offer reinstatement to employee William L. Jolliffe and make him whole for any loss of earnings he may have suffered as a result of such discrimination, with interest.

ABC COACH LINES, INC.