

Wm. S. Carroll, Inc. and Lawrence Rosenberg. Case
1-CA-12416

October 13, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND MURPHY

On July 8, 1977, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

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 briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, except that the remedy is modified so that interest is to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).²

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, Wm. S. Carroll, Inc., Brookline, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ We do not adopt the Administrative Law Judge's dicta that Respondent may have had a valid reason for discharging Rosenberg. As found by the Administrative Law Judge, Rosenberg's refusal to cross the picket line at Preterm was protected by Sec. 7 of the Act, *Redwing Carriers, Inc., and Rockana Carriers, Inc.*, 137 NLRB 1545 (1962), *enfd.* 325 F.2d 1011 (C.A.D.C., 1963), *cert. denied* 377 U.S. 905 (1964), and the fact that Respondent may have lost some Preterm business as a result thereof does not justify the discharge. *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F.2d 503, 506 (C.A. 2, 1942). Inasmuch as the record reveals that Rosenberg did not, in fact, engage in any misconduct in the course of his protected activity, President Carroll's alleged good-faith belief that such misconduct occurred is not a defense. *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). All of the remaining justifications advanced by Respondent, such as Rosenberg's irresponsibility and his "foul[ing] everything up," stem solely from his refusal to cross the picket line.

Respondent cannot transform a protected activity into cause for discharge merely by characterizing the conduct in this fashion.

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

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: This proceeding was heard at Boston, Massachusetts, on April 14, 1977, pursuant to a charge filed on November 8, 1976,¹ and amended on December 20, and a complaint issued on December 23. The question is whether Respondent, Wm. S. Carroll, Inc. (herein Respondent), violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein the Act), by discharging, and by failing and refusing to reinstate, Lawrence Rosenberg for refusing to drive a busload of nonstriking employees across a picket line at the premises of another employer whose employees were on strike.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Massachusetts corporation, with its principal office and place of business in Brookline, Massachusetts, where it is engaged in the operation of a schoolbus service, and a charter bus service. It annually receives revenues in excess of \$50,000, directly from interstate business, and annually receives revenues in excess of \$250,000, directly from private charter services rendered. Respondent admits, and I find, that Respondent is engaged in commerce within the meaning of the Act, and that to assert jurisdiction over its operations will effectuate the policies of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Discharge of, and Failure and Refusal to Reinstate, Lawrence Rosenberg

1. Rosenberg's refusal to drive a busload of nonstriking employees across a picket line at the premises of another employer whose employees were on strike

At the time of the events in this case, Respondent had in operation two terminals, the Brookline Terminal, or the main terminal, and the Watertown Terminal. The Watertown Terminal was used for both charter and schoolbus runs, but mainly for schoolbus operations.

¹ All dates herein are in 1976 unless otherwise stated.

Lawrence Rosenberg was first employed by Respondent in the middle of October, at which time he started a 2-week training period, without pay. On November 1, about 7 a.m., he reported to the Watertown Terminal for his first assignment and, upon arriving, he saw several other employees being dispatched on various bus runs. After the departure of the other drivers, Anthony Andre, the dispatcher, gave Rosenberg a slip of paper which said, "Star Market, 1717 Beacon Street to 1842 Beacon," and "drop." As Andre handed Rosenberg the note, Andre said, "Take them [the passengers] to 1842 Beacon Street." Rosenberg responded, "1842 Beacon, that's Preterm, isn't it? Aren't they on strike?" Andre said he did not know and that the charter until that day had been run from the Brookline office. Rosenberg knew that there were other business offices, or medical offices in that building, and did not know for sure that the charter actually involved taking the people to Preterm, but he thought there was a good chance that it did. Andre then called up Joe Quaterone, the dispatcher at the Brookline office, and asked him what was going on at the Beacon Street address. Quaterone told Andre to tell Rosenberg to go there and to follow instructions. Quaterone confirmed to Andre that there was a strike there, and told him also that Rosenberg was supposed to pick up some people at Star Market's parking lot and transport them to Preterm at 1842 Beacon Street. Observing Rosenberg's reluctance, Andre told him that if he did not go, he, Andre, would go; that he had nobody else to send. At that point Rosenberg decided to go, and left.

As Rosenberg drove the bus toward his destination, he passed Preterm and saw 10 or 15 pickets in front of the building. He stopped the bus, went across the street, and asked the pickets if the bus that he was driving was intended to take people to Preterm. The pickets replied in the affirmative, and told him that Carroll buses had come there before, and that, in fact, he was not only to bring the people to 1842 Beacon, but was to cross the picket line with the bus. That upset Rosenberg, so he went to two phone booths nearby and tried to call dispatcher Andre, but both phones were out of order. He then went to a pharmacy nearby, but there was no phone in it. He went back to Preterm and talked to the pickets again, and told them that he did not think he could refuse to bring the people over to 1842 Beacon, because it was his first day on the job; that they were going to get there anyway; and that he was just going to bring them to 1842 Beacon Street, without crossing the picket line.

He then went back to his bus, drove it to the Star Market parking lot, and saw about 10 women waiting there for the bus. The first woman who got on the bus asked, "Where are you taking us?" Rosenberg said, "1842 Beacon Street. That's what I was told to do." The woman responded, "Good," and they all got on the bus. He then asked one of the women, "Why are you going in there when there is a strike going on?" They said, "Well, we're not breaking the strike, we're just going to work." He waited until more people arrived, and at one point a police officer came on

the bus and told Rosenberg that Rosenberg was to follow him.

About 8:30 a.m., the bus pulled out of the parking lot with a police car in front and a police car behind the bus. Rosenberg followed the police car, and they proceeded about one-half mile to 1842 Beacon.

Preterm is located in a building on the northwest corner of the intersection of Beacon and Englewood Streets, with the main entrance to Preterm on Beacon Street. Rosenberg turned into Englewood Street and stopped the bus, even though the police escort in front continued moving toward the rear of the building where there is an entrance to the parking lot, which is approximately 225 feet from the intersection of Beacon and Englewood Streets. There were at least 20 pickets,² mostly women, and some of them were carrying picket signs.

As the bus turned into Englewood Street, a number of pickets came out into the street. One of the pickets shouted to Rosenberg, "Are you going to take those people across the picket line?" Rosenberg responded, "If you have a picket line there, I won't cross it." Upon hearing Rosenberg's response to the picket, one of the women on the bus shouted to the police officer that the driver was not about to cross the picket line. The police officer told Rosenberg, "Do what you are told. What do you think this is, a game?" Rosenberg replied, "No, but I am just not going to cross the picket line." At this point, the pickets were surrounding the bus and shouting obscenities to the passengers. The passengers, in turn, were shouting at Rosenberg. The police officer then told Rosenberg to drive up the street, and turn into the driveway of the parking lot. Rosenberg then drove the bus further up the street, about a bus length or two, but not as far as the opening to the driveway, and again said he was not going across the picket line. The passengers, at this point, insisted that he cross the picket line, and Rosenberg persisted in not crossing the picket line. The police officers conferred among themselves and then told Rosenberg to back the bus onto Beacon Street. The police then told Rosenberg to drive across Englewood on Beacon Street to the front door of Preterm. Rosenberg did this, and the police formed a cordon between the bus and the front door of the building. The passengers then got off the bus and filed through the police cordon into the building without further incident.

Police Officer Thomas R. Fay, who was called by Respondent, testified that he was in the lead car, and that when the bus stopped on Englewood Street he asked the driver why he stopped, and the driver told him he was not going across the picket line. The police officer then said, "Well, why the hell didn't you tell me that back at the Star Market?" He testified further that there were five police officers assigned to the front of the building and five assigned to the back of the building, and that he intended to direct the bus to the second driveway entrance which would have brought the bus within 10 to 15 feet of the back entrance of Preterm. Officer Fay further testified that he did not observe any pickets at the second entrance, but that there were pickets at the first entrance (into the garage). He said he did not indicate to the busdriver which entrance he

² Respondent's witness, Feinbloom, estimated 50 to 75 pickets.

intended to use. Fay testified further that he did not observe any other conduct on the part of Rosenberg to aggravate the already tense situation.

After Rosenberg discharged the passengers on the bus, two policemen asked him for his license, which he produced, and the bus registration. Rosenberg looked around for the registration but could not find it, and told them he did not know where it was. One officer then said to the other, "Well, we're going to look into whether or not this guy has the authority to be driving this bus. I don't think he does." An officer then said, "Do you think we like doing this? You know you have caused us a lot of trouble." Rosenberg then went back to the Watertown Terminal and reported what had happened to dispatcher Andre. Andre told him that he was unhappy about the matter, and also told Rosenberg that what he should have done was to take the bus across the picket line and then complain to management for having had to do something that he did not think was right. Rosenberg responded that that would have missed the point because then the damage would have been done. Andre dispatched Rosenberg to two other charters later that day.

2. Rosenberg's discharge

Upon arrival at the Watertown Terminal the following morning at about 7:30 a.m., Rosenberg asked Andre what was happening, because, on the day before, Andre told Rosenberg that the owner, Carroll, had told Andre that he wanted to fire Rosenberg. Andre replied, "Well, Mr. Carroll says that you are suspended." Rosenberg said, "Oh, Why?" Andre replied that Carroll was told by the police that Rosenberg tried to run over one of them, and that he had caused trouble and, therefore, should be suspended. Andre again told Rosenberg that he was suspended and that he had to clear himself with the Brookline police before Carroll would take him back. Rosenberg went home and, later that day, he called Respondent's office in Brookline and told the person who answered the phone that he wanted to find out what his status was since Andre had told him he was suspended. The woman on the line said that he was dismissed. When he asked her why, she said for refusing to finish the charter. Rosenberg then asked to speak to Carroll and was told that Carroll was not there.

On the following day, Rosenberg called Carroll and told him he would like to have his job back. Carroll said he would not give him his job back and that he was fired for refusing to finish the charter. When asked whether being fired had anything to do with the complaint by the police, Carroll responded negatively, stating that it was for refusing to finish the charter.³ However, Carroll testified that a police officer telephoned him and told him, "My God, he liked to get us all killed." That was when I finally fired him." Carroll testified further that he received a couple of telephone calls from Preterm informing him that they were "terribly upset," and that things were so "fouled up," and that was the last day except for three Saturday charters that Preterm used his bus service. He said Preterm

representatives had told him enough to cause him to decide that "this man was not level-headed enough to drive people's kids or people." He said he did not send a bus out there until the next Saturday. Carroll also testified that he did not believe Rosenberg was given a reason for being fired at the time that he was fired. Carroll said that he himself drove the charter to Preterm on one occasion. He said pickets were there but the police kept them aside, and he drove the bus right into the building and let the passengers off while the pickets were calling him "a few pet names."

Carroll was asked on cross-examination whether he discharged Rosenberg so that he could replace him with someone who would do Preterm work. Carroll replied, "Definitely not, no."

III. DISCUSSION AND CONCLUSIONS

I find that contrary to Respondent's stated reasons for the discharge, Rosenberg did, in fact, complete the charter notwithstanding he did not follow the police escort a few hundred feet more across the picket line. The passengers were discharged in front of the building at the main entrance. The refusal of Rosenberg to cross the picket line did result in making more tense an already tense situation, but the evidence is that he did nothing, beyond exercising his protected right under Section 7 of the Act, that could be construed as making the situation worse. Officer Fay, who escorted the bus to the scene, testified that Rosenberg did not engage in any conduct other than refusal to follow the police escort across the picket line that was criticizable.

The fact that Respondent Carroll lost some Preterm business as a result of the incident did not justify discharging Rosenberg. Rosenberg did what was reasonably expected of him in the circumstances. It was his first assignment in a new job. He was the only driver available besides the dispatcher when he suspected that the assignment might possibly have been to a place that was on strike and being picketed. Because of that suspicion, he expressed reluctance to dispatcher Andre about accepting the assignment; but, when confronted with the possibility of losing his job had he refused the assignment outright, he decided to play it by ear. Rosenberg did consider the possibility that the charter may have been for a neutral tenant at the same address, but, upon inquiring, he found out that the charter was intended for the struck Preterm. During this whole episode Rosenberg was determined, as a matter of principle, that he would not cross a picket line. Thus, he took the passengers to Preterm and stopped short of crossing the picket line, which was his protected right. Even if Carroll had a justifiable ground for firing Rosenberg, and I do not believe he had, the mere existence of a justifiable ground for dismissal is no defense if it is a pretext and not the moving cause. *Don Lucas International, Inc., d/b/a San Jose Bavarian Motors*, 229 NLRB 127 (1977); *N.L.R.B. v. Solo Cup Company*, 237 F.2d 521, 525 (C.A. 8, 1956). Assuming *arguendo* that Respondent Carroll had a valid nondiscriminatory reason for the discharge of Rosenberg, the discharge still violated the Act. The Board

³ Carroll showed irritation and annoyance with counsel for the General Counsel's cross-examination.

has held that a discharge motivated in part by an employee's exercise of Section 7 rights is a violation of the Act, even though a valid cause may also be present. *Broyhill Company*, 210 NLRB 288 (1974).

Respondent contends that driving the bus to the back entrance per police instructions did not entail crossing a picket line since there were no pickets at that driveway at the time Rosenberg stopped the bus. Respondent relies on testimony that Rosenberg told the pickets to go to the rear and he would not cross the picket line as further evidence that there was no picket line to cross at the rear of the building.

I do not consider Respondent's contentions meritorious for the following reasons:

1. Preterm was on strike and was being picketed, not merely part of it.

2. The transporting of the passengers was to Preterm and intended to be taken on private property occupied by Preterm.

3. The fact that pickets may not have been physically present at the precise location of the entrance to the private Preterm driveway at a time when pickets are present and in view does not mean that crossing that entrance is not crossing a picket line. See *Woodward Motors, Inc.*, 314 F.2d 53 (C.A. 2, 1963), where the Board and the court construed picketing to include a situation in which picket signs were stuck in a snowbank with individuals in cars parked on the street adjacent to the signs. Both the Board and the court said that was picketing. Although a delivery onto Woodward Motors' property was not in issue in that case, it may reasonably be argued that if it had been in those circumstances it would have entailed crossing a picket line. I therefore conclude that Rosenberg's refusal to enter the driveway to Preterm in the face of genuine picketing of Preterm constituted a refusal to cross a picket line and, therefore, was protected activity.

4. Inasmuch as Rosenberg was *not* discharged so he could be replaced by someone who would cross the picket line at Preterm, his discharge is in violation of the Act. *Redwing Carriers*, 137 NLRB 1545 (1962), *enfd.* 325 F.2d 1011 (C.A.D.C., 1963), *cert. denied* 377 U.S. 905 (1964).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating against Lawrence Rosenberg in the manner aforesaid, because he refused to cross a picket line during a labor dispute involving another employer, and by failing and refusing, and continuing to refuse, to reinstate Lawrence Rosenberg to his former or substantially equivalent position of employment, because he engaged in concerted activities for purposes of mutual aid or protection, Respondent interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, its employees in the exercise of their rights guaranteed in

⁴ *N.L.R.B. v. Entwistle Manufacturing Company*, 120 F.2d 532, 536 (C.A. 4, 1941).

⁵ 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,

Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent, through its agents and representatives, discharged Lawrence Rosenberg for refusing to cross a picket line, it is recommended that Respondent offer said employee immediate and full reinstatement to his former position, 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 any loss of earnings that he may have suffered as a result of Respondent's interference, restraint, and coercion in the exercise of his rights guaranteed in Section 7 of the Act. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

As the unfair labor practices committed by Respondent strike at the very heart of employee rights safeguarded by the Act, I shall recommend that Respondent be placed under a broad order to cease and desist from in any manner infringing on the rights of employees guaranteed in Section 7 of the Act.⁴

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

ORDER⁵

The Respondent, Wm. S. Carroll, Inc., Brookline, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging any employee for refusing to cross a lawful picket line.

(b) Discharging and refusing and failing to reinstate any employee for the reason that he engaged in concerted activities for the purposes of mutual aid or protection.

(c) Interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the

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.

purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Offer Lawrence Rosenberg immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges, and make him whole for any loss of earnings he may have suffered by reason of Respondent's interference, restraint, and coercion against him in the manner set forth in the section of this Decision 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 records necessary and relevant to analyze and compute the amount of backpay due under the terms of this recommended Order.

(c) Post at its Watertown and Brookline terminals in Brookline, Massachusetts, copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's authorized representative, shall be posted by it 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 ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁶ 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

After a hearing at which all parties had the opportunity to present their evidence, it has been decided that we violated the law and we have been ordered to post this notice. We intend to carry out the order of the Board and abide by the following:

WE WILL NOT discharge any employee for refusing to cross a lawful picket line.

WE WILL NOT discharge any employee for the reason that he engaged in concerted activities for the purposes of mutual aid or protection.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collectively bargaining, or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer Lawrence Rosenberg his former job or, if his former job no longer exists, a substantially equivalent position, and WE WILL restore his seniority and other rights and privileges.

WE WILL pay Lawrence Rosenberg any backpay he may have lost as a result of our discrimination against him, with interest.

WM. S. CARROLL, INC.