

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in or activities on behalf of Local 1529, Retail Clerks International Association, AFL-CIO, or any other labor organization, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating against our employees in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT coercively or unlawfully interrogate our employees regarding their union membership, activities, or desires.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 1529, Retail Clerks International Association, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities.

WE WILL offer to Fred Larry Andrews and Thomas M. Cooper, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them.

All our employees are free to become or remain or to refrain from becoming or remaining members of Local 1529, Retail Clerks International Association, AFL-CIO, or any other labor organization.

DUNN BROS., INC.; DUNN & DUNN, INC.;  
PIC-PAC FOOD STORES, SOUTHGATE, INC.,  
D/B/A PIC-PAC FOOD STORES,

Employer.

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 22 North Front Street, Memphis, Tennessee, Telephone Number, Jackson 7-5451, if they have any questions concerning this notice or compliance with its provisions.

**Redwing Carriers, Inc. and Rockana Carriers, Inc. and Teamsters, Chauffeurs and Helpers Local Union No. 79, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases Nos. 12-CA-1021, 12-CA-1022, 12-CA-1023, 12-CA-1025, 12-CA-1026, 12-CA-1027, 12-CA-1028, and 12-CA-1060. July 20, 1962**

SUPPLEMENTAL DECISION AND ORDER

On March 6, 1961, the Board issued a Decision and Order in this case,<sup>1</sup> finding that Respondents had not engaged in unfair labor practices and dismissing the complaint in its entirety. Thereafter, Teamsters, Chauffeurs and Helpers Local Union No. 79, International

<sup>1</sup> 130 NLRB 1208.

137 NLRB No. 162.

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, one of the Charging Parties, filed a petition with the United States Court of Appeals for the District of Columbia, requesting review of the Board's Order. A joint designation of record was filed with the court, as well as a brief by Petitioner Local Union No. 79.

On February 5, 1962, the Board filed a motion with the aforesaid court, seeking to have the case remanded to the Board for further consideration. No objection was raised by Respondents, and, on February 21, 1962, the Board's motion was granted *per curiam* and the case remanded.

The Board has reconsidered its original decision, and hereby reaffirms that decision, except as modified herein.

The Board, in its original decision, found, *inter alia*, that certain employees of Respondents engaged in unprotected conduct when they chose in the course of their employment to honor a picket line at the premises of another employer. As set forth more fully in the original decision, these employees were permanently assigned to make deliveries to Virginia-Carolina Chemical Corporation. When they decided on June 2 not to cross the picket line established by Chemical Workers at Virginia-Carolina, their services were terminated by Respondents, who within a day or two replaced them with other drivers, including several new employees.<sup>2</sup>

In the earlier decision, the Board cited the *Auto Parts Co.*<sup>3</sup> case for the proposition that the activity of these employees, as described above, was unprotected. A reexamination of that case indicates, however, that the Board there carefully avoided characterizing such activity as either protected or unprotected, but merely found that the employer did not violate Section 8(a) (3) by discharging its driver, Shuman, in the circumstances of that case.<sup>4</sup> Moreover, other Board cases on the same point have indicated to the contrary, namely, that employees engage in protected concerted activity when they respect a picket line established by other employees.<sup>5</sup> Such activity is literally for "mutual

<sup>2</sup> One driver, though deciding with the group on June 2 not to cross the picket line, was not given a V-C assignment until July 21, at which point he refused and was told by Respondents they had "nothing else for him"

<sup>3</sup> *Robert H. Snow, d/b/a Auto Parts Co.*, 107 NLRB 242.

<sup>4</sup> The Board in *Auto Parts* specifically found it "unnecessary to adopt the various rationales set out in the Intermediate Report." *Ibid* The Trial Examiner had held expressly that employee Shuman had not engaged in a concerted activity for mutual aid or protection when he chose not to cross a picket line established by his union at another location

<sup>5</sup> *Eustace de Cordova, et al, Co-partners doing business as Cyril de Cordova & Bro.*, 91 NLRB 1121; *Cone Brothers Contracting Company*, 135 NLRB 108. And see *Illinois Bell Telephone Company*, 88 NLRB 1171, enfd, denied 189 F 2d 124 (CA 7), cert. denied 342 U.S. 885. See also *NLRB v. Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F. 2d 503, 505-506 (C.A. 2). A similar question was presented in *Rockaway News Supply Company, Inc.*, 95 NLRB 336, where the Board expressly held such activity a

aid or protection," as well as to assist a labor organization, within the meaning of Section 7. Contrary to the language of the Board's former decision, therefore, we find that the employees of Redwing engaged in protected concerted activity when they refused to cross the Virginia-Carolina picket line.

Although the Act accordingly prohibits any reprisal against the eight Redwing drivers for engaging in the protected activity of not crossing the V-C picket line, we also recognize that the Respondents had a corresponding right which must be balanced against the right of the employees. That is, Respondents had a right to attempt to run their business despite the sympathetic activities of the drivers here involved.<sup>6</sup> In this context, the Board has in the past drawn a distinction between replacement and discharge of such employees whose sympathies prevent them from performing assigned work tasks.

In considering the continued validity of the discharge-replacement distinction in this situation, we are convinced that substance, rather than form, should be controlling. That is, where it is clear from the record that the employer acted only to preserve efficient operation of his business,<sup>7</sup> and terminated the services of the employees only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work, we can see no reason for reaching different results solely on the basis of the precise words, i.e., replacement or discharge, used by the employer, or the chronological order in which the employer terminated and replaced the employees in question.

This same point was made by both the Supreme Court and the Court of Appeals for the Second Circuit in *Rockaway News*. The Board had there held that the employer could lawfully have required its employee to elect the status of a striker and replace him, but held in addition that the employer violated the Act by "discharging" him. The Second Circuit commented:

We cannot follow the Board's reasoning. . . . We think that the Board is wholly unrealistic in the distinction which it seeks to make between the discharge of Waugh for refusing to carry his newspapers across the picket line, which it stamps as unlawful, and the suggested replacement of him as a striker . . . , which it thinks would have been perfectly all right.<sup>8</sup>

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protected form of concerted activity The Court of Appeals for the Second Circuit agreed with the Board on this point, but denied enforcement on another theory (197 F 2d 111) The Supreme Court affirmed the Second Circuit's conclusion, in effect on the grounds that the activity in question was itself in breach of an operative no-strike agreement (345 U.S. 71).

<sup>6</sup> See, e.g., *N.L.R.B. v. Mackay Radio & Telegraph Co*, 304 U.S. 333, 345

<sup>7</sup> See, e.g., *Auto Parts Co*, *supra*, footnote 2

<sup>8</sup> *N.L.R.B. v. Rockaway News Supply Company, Inc.*, 197 F. 2d 111, 115.

The Supreme Court in its decision stated even more pointedly:

The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by *N.L.R.B. v. Mackay Co.*, 304 U.S. 333, 347. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by a new employee or by transfer of duties to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.<sup>9</sup>

We have reexamined the record in this case, and find it clear that, insofar as Respondents may actually have "discharged" the eight drivers, they did so entirely for the purpose of continuing their business operations. Redwing's president, Charles Mendez, testified that on June 2, when the drivers refused to cross the V-C picket line, he transferred other men from their normal jobs to make these deliveries, and in addition hired new men to replace them, both on June 2 and 3. Dispatcher Pierola confirmed that he immediately called in other drivers from different runs to handle the V-C assignments, and several of the drivers themselves, including Bennett and Spivey, testified they were told by Mendez that he had no alternative but to replace them with other drivers. In view of the above, and the absence of any evidence of union animus on the part of Respondents, we are convinced that Respondents terminated the services of the eight drivers not in reprisal for honoring the V-C picket line, but solely to continue their business dealings with V-C. Under these circumstances, and on these grounds alone, we reaffirm our original disposition of this case, and dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

**MEMBER LEEDOM, concurring:**

For the reasons stated in the original Decision and Order in this case (130 NLRB 1208), I concur in the result.

**MEMBER RODGERS** took no part in the consideration of the above Supplemental Decision and Order.

<sup>9</sup> *N.L.R.B. v. Rockaway News Supply Company, Inc.*, 345 U.S. 71, 75.