

**Tanner Motor Livery, Ltd. and Martin Abramson.**  
Case 31-CA-5 (formerly Case 21-CA-5500)

June 30, 1967

**SUPPLEMENTAL DECISION AND ORDER**

On September 29, 1964, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,<sup>1</sup> finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging its employees Abramson and Dorbin because they had engaged in concerted activities to protest the Respondent's alleged racially discriminatory hiring practices and policies, and by threatening to discharge Dorbin if he continued to engage in such conduct. Accordingly, the Board ordered the Respondent to cease and desist from engaging in the unfair labor practices found and to take certain affirmative action designed to remedy these unfair labor practices. Specifically, it ordered the Respondent to reinstate Abramson<sup>2</sup> and reimburse him for any loss of pay suffered by him as a result of the discrimination.

Subsequently, on June 29, 1965, the United States Court of Appeals for the Ninth Circuit<sup>3</sup> affirmed the Board's finding that the concerted activities of the employees, in attempting to persuade the Respondent to employ Negroes, was protected by Section 7 of the Act. The court also agreed with the Board's finding that Abramson and Dorbin were discharged because they had engaged in such protected concerted activities. However, the court was of the further opinion ". . . that the existence of a collective-bargaining agreement between the Employer and the Union raises further questions which are of such importance that the Board ought to give consideration to them before requiring reinstatement of employees under such circumstances." The court accordingly remanded the case for the Board to consider whether an employer may lawfully discharge employees who engage in otherwise protected concerted activities, or who picket in support of such activities, when there is an established col-

lective-bargaining representative having a contract with the employer and the employees do not act or seek to act through that representative. Stated another way, the court asked ". . . to what extent does Section 9(a) limit or remove the protection afforded by Section 7?"

Pursuant to the remand, the Board, on August 30, 1965, invited the parties to file briefs or comments discussing the legal issues raised by the court. Thereafter, briefs were filed by the General Counsel and by the Respondent.<sup>4</sup> In addition, the AFL-CIO submitted its comments in an *amicus* brief.

The Board has considered its original Decision and Order, the opinion of the court and the issues raised by its remand order, the briefs, and the entire record in this case, and hereby reaffirms its conclusion that the Respondent violated Section 8(a)(1) of the Act.

The record does not establish whether Abramson and Dorbin had attempted to act through their established bargaining representative<sup>5</sup> before addressing their concerted protest directly to their Employer. In our opinion, however, such a finding is not essential herein. Nor do we find it necessary, as suggested by the court, to determine whether the employees were filing a grievance under the proviso to Section 9(a), or whether they were attempting to bargain individually with their Employer. For, in either event, the employees were not acting in derogation of their established bargaining agent by seeking to eliminate what they deemed to be a morally unconscionable,<sup>6</sup> if not an unlawful, condition of employment. In these circumstances, we are unable to find that the Union's status as the employees' exclusive bargaining agent was infringed, imperiled, or otherwise undermined when the employees engaged in a concerted effort to secure racially integrated working conditions. Nor is it contended that Abramson and Dorbin were discharged because they were undermining, or seeking to undermine, the Union.

In addition, the Board cannot presume or conclude that, contrary to the course being urged by Abramson and Dorbin, the Union knowingly would have taken the unlawful position that it would

<sup>1</sup> 148 NLRB 1402.

<sup>2</sup> Dorbin was offered immediate reinstatement before incurring loss of pay, as set forth in the Board's Decision and Order, *ibid*

<sup>3</sup> *N.L.R.B. v Tanner Motor Livery, Ltd.*, 349 F.2d 1 (C.A. 9).

<sup>4</sup> In its brief following the remand, the Respondent conceded that "Dorbin was fired for picketing . . . [and] Abramson was fired because of his persistent efforts to persuade Tanner to hire a negro [sic] that Tanner did not think was qualified." The record, however, does not sustain the contention that the employees' efforts were limited to securing the employment of a particular job applicant. Rather, we have found that the employees' concerted activities were in protest against the general hiring practices and policies of their Employer. Moreover, the Respondent did not cite improper harassment as a reason for its conduct.

<sup>5</sup> At the time of the events herein, the Respondent had a collective-bargaining agreement with Chauffeurs Union Local 640, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union)

<sup>6</sup> It is undisputed that there were no Negroes among the 50 to 60 drivers employed by Respondent at its Santa Monica operation. We have found it unnecessary to decide, however, whether the lack of Negro drivers at that location was, in fact, motivated by racial discrimination. It is sufficient for the purposes of this decision that the employees had a reasonable basis for so believing and that their concerted protest, therefore, was not grounded on contrived or flimsy evidence, which otherwise might have reflected an intent more to harass their employer than to vindicate a noxious working condition.

refuse to represent Negro drivers fairly if hired.<sup>7</sup> Rather, we must assume that these employees were acting in accord with, and in furtherance of, the lawful position of their collective-bargaining agent.<sup>8</sup> For the Board to find, therefore, that the employees' otherwise protected concerted activities herein were rendered unprotected by virtue of an existing collective-bargaining agreement between the Union and the Respondent would be offensive to public policy.

In view of the foregoing, we reaffirm our previous conclusion that the Respondent, by discharging Abramson and Dorbin, and by threatening to discharge Dorbin, interfered with the exercise of

the employees' rights under Section 7 of the Act and thereby violated Section 8(a)(1) of the Act. Accordingly, the Board hereby reaffirms its Order of September 29, 1964, in this proceeding.

Member Brown, dissenting:

Upon consideration of the Section 9(a) issue remanded by the Court of Appeals for the Board's resolution in this matter, I would dismiss the complaint. *Black-Clawson Co., Inc. v. International Association of Machinists* 313 F.2d 179, 184-186 (C.A. 2). Cf. *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175.

<sup>7</sup> See *Independent Metal Workers Union Local No. 1 (Hughes Tool Company)*, 147 NLRB 1573; *Local 1367, International Longshoremen's Association, AFL-CIO, (Galveston Maritime Association, Inc.)*, 148 NLRB 897, enfd. 368 F.2d 1010 (C.A. 5). Chairman McCulloch and Member Fanning, who dissented in those cases, although agreeing that it would be unlawful for the Union to take a position contrary to that urged

by Abramson and Dorbin (see *Pioneer Bus Co., Inc.*, 140 NLRB 54), do not consider that such a position would also be an unfair labor practice.

<sup>8</sup> Cf. *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N.L.R.B. (Los Angeles-Seattle Motor Express)*, 365 U.S. 667