Nuodex Division of Tenneco Chemicals, Inc. *and* **Dolores Easton.** Case 22-CA-3619

June 12, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND ZAGORIA

On February 26, 1969, Trial Examiner Sydney S. Asher, Jr., issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as herein modified.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Nuodex Division of Tenneco Chemicals, Inc., Piscataway, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

[1]The Respondent also requested oral argument. The request is hereby denied, as the record, the exceptions and the briefs adequately present the issues and positions of the parties.

[2]The General Counsel excepted to the Trial Examiner's failure to find that Dolores Easton, the Charging Party herein, did in fact apply for reinstatement to her former position. However, such a finding is unnecessary in view of the fact that as a discriminatorily discharged sympathy striker, Easton was under no obligation to request reinstatement. See *Union Carbide Corporation*, 174 NLRB No. 147; *Difco Laboratories Inc.*, 172 NLRB No. 235; and *Southern Greyhound Lines*, 169 NLRB No. 148. *Ford Radio & Mica Corporation* 115 NLRB 1046, 1048-9, enfd. denied, and remanded 258 F.2d 457 (C.A. 2), Supplemental Decision 122 NLRB 34, and the other cases he cites and *Southern Greyhound Lines, supra*. It appears that the Trial Examiner failed to take into account that *Southern Greyhound Lines* unlike the cases he cites, involved a discharged sympathy striker.

TRIAL EXAMINER'S DECISION

SYDNEY S. ASHER, JR., Trial Examiner: On November 1, 1968, Dolores Easton, of South Plainfield, New Jersey, filed charges against Nuodex Division of Tenneco Chemicals, Inc., Piscataway, New Jersey, herein called the Respondent. On December 4, 1968, the General Counsel of the National Labor Relations Board issued a complaint, alleging that on or about October 3, 1968, the Respondent warned Easton that she would be discharged if she continued to refuse to cross a picket line around the Respondent's plant and that on or about October 9, 1968, the Respondent discharged her, and since then has failed and refused to reinstate her, because she refused to cross the picket line mentioned above. It is alleged that this conduct violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act. Thereafter the Respondent filed an answer admitting that on or about October 3, 1968, the Respondent sent Easton a telegram requesting her to return to work and stating that if she did not do so she would be presumed to have abandoned her position; and further admitting that on October 7 and 8, 1968, Easton informed the Respondent that she would not cross the picket line and that as of October 8, 1968, Easton was presumed by the Respondent to have abandoned her employment whereupon she was terminated pursuant to earlier notice. The answer sets up certain defenses, namely, that Easton's actions were independent and not concerted, and that they did not constitute activities for mutual aid or protection.

Upon due notice, a hearing was held before me on January 6, 1969, at Newark, New Jersey. All parties were represented and participated fully in the hearing. After the close of the hearing the General Counsel and the Respondent filed briefs. These have been duly considered.

Upon the entire record in this case, and from by observation of the witnesses, I make the following:

FINDINGS OF FACT

1. The Respondent is, and at all material times has been, a Delaware corporation with its principal office in New York, New York. It maintains various other facilities, including a plant and office at Piscataway, New Jersey, where it is engaged in the manufacture, sale and distribution of liquid and powder chemicals and related products.

2. During the 12 months preceding December 4, 1968, the Respondent shipped products valued at more than $50,000 directly from its Piscataway plant to destinations outside the State of New Jersey. The Respondent admits, and it is found, that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of the Act.

3. Local 8-575 Oil, Chemical and Atomic Workers, AFL-CIO, herein called the Union, is, and at all material times has been, a labor organization within the meaning of the Act.

4. J. F. Robertson, personnel manager; Frank Grubic, supervisor accounting department; and Alice Hall Heims, supervisor order sales department; are, and at all material times have been, supervisors within the meaning of the Act and agents of the Respondent acting on its behalf.

5. All production, maintenence, shipping, receiving, and boiler room employees employed at the Respondent's Piscataway plant, including leadmen, but excluding office

and plant clerical employees, laboratory employees, cafeteria employees, professional employees, guards and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act.

6. Since 1962, the Union has represented the employees in the above-described unit for purposes of collective bargaining with the Respondent.

7. From on or about October 1, 1968, to on or about November 12, 1968, certain employees of the Respondent employed in the above-described unit ceased work concertedly, went out on strike, and maintained picket lines around the Respondent's Piscataway plant, with the authorization and sanction of the Union.

8. At all material times, Dolores Easton was employed by the Respondent as an office clerical employee in the office of its Piscataway plant. She was not a member of the above-described unit.

9. On October 1,[1] the first day of the strike, Easton went to the vicinity of the plant, but remained standing across the street and did not cross the picket line. As Heims, Easton's immediate superior, was entering the plant, Easton called to Heims, stating that Easton's husband would not permit Easton to come to work. Later that day, Easton telephoned to Heims and repeated that Easton's husband would not permit Easton to cross the picket line.

10. Easton did not report for work on October 1, 2 or 3 and was not paid for these days. On October 3 Easton again called Heims on the telephone and repeated that it was Easton's husband's wish that Easton not cross the picket line. On the same day, Grubic informed Robertson of this conversation (which presumably Heims had related to him). Robertson then sent Easton the following telegram:

> IT IS HEREBY REQUESTED THAT YOU RETURN TO WORK NO LATER THAN MONDAY OCTOBER 7TH AT 9AM IF YOU DO NOT APPEAR FOR WORK YOU WILL BE PRESUMED TO HAVE ABANDONED YOUR POSITION IN [SIC] THEREFORE TERMINATED AS OF THAT DATE
>
> J F ROBERTSON TENNECO CHEMICAL

11. In response to the above-described telegram, Easton reported to the Respondent's personnel manager at 8:30 a.m. on October 7, then went to her desk. She told Heims that she (Easton) hadn't been able to come to work because her (Easton's) husband still objected to her (Easton) crossing the picket line, adding that "she (Easton) had to live with him and that was her problem." Later that day Easton told Grubic that her refusal to cross the picket line had been due primarily to her husband's wishes that she honor the picket line. She asked Grubic "if there was any chance of getting a leave of absence"; Grubic replied that he would speak to Robertson about the matter. Still later that day, Grubic informed Easton that he had spoken to Robertson and that Easton could not have a leave of absence. He added that if Easton "couldn't cross the picket line, that was it." Easton replied that she would go home and speak to her husband "and try to convince him [she] could cross the picket line" and report the result the next morning in person. Grubic responded "that she would be terminated if they did not do so." Easton worked a full workday, and was paid for it.

12. On October 8, at 8:30 a.m. Easton appeared at the Respondent's plant and informed Grubic that she could not convince her husband "that [she] should cross the picket line." Grubic then "informed her of her termination." She left the plant at about 11 a.m. and was paid for a full day.

13. Although it was Grubic who told Easton of her termination, the decision that she be terminated was made by Robertson. At the hearing, Robertson testified as follows:

> Q. (By the Trial Examiner): Why did you arrive at that decision?
>
> A. I separated Mrs. Easton as I would separate any of the employees or recommend they be separated who would not report for work, certainly as the result of outside influence at home.

14. To fill Easton's position, the Respondent recalled a former employee on a temporary basis.

15. On November 14, following the end of the strike and after the charges herein had been filed, Easton telephoned to Grubic and inquired as to her job status. Grubic replied that "she was officially terminated." She has not been offered reinstatement since then.

Contentions of the Parties

The General Counsel contends that the refusal of Easton, a non-unit employee, to cross the picket line maintained by her fellow employees at her place of employment constitutes concerted activity protected by Section 7 of the Act. He maintains that her motive for engaging in such protected activity is immaterial. Therefore, he argues, Easton was illegally coerced on October 3 by the telegram threatening discharge, and again on October 8 by the discharge itself.

The Respondent, conversely, maintains that Easton's conduct does not constitute activity protected by Section 7, because it was individual rather than group action, therefore not "concerted"; and also because it was not "for mutual aid or protection." On this point, the Respondent states in its brief

> Her refusal to cross the picket line was not based on her desire to assist her fellow workers, nor on sympathy for their cause . . . [it] "could only have been for the benefit and aid" of those represented by a union, which, as bargaining representative, did not represent her and, consequently, could have obtained nothing from respondent for her benefit.

Conclusions

It is by now too well settled to require extensive discussion that an employee who refrains from crossing a picket line established by his fellow employees at their mutual place of employment thereby makes common cause with them and joins them in their concerted activities. And this is true even when the picket line consists of workers in a bargaining unit in which the employee in question is not included.[2] Therefore the Respondent's view that Easton's honoring the picket line constituted individual, as opposed to concerted, activity is

[1] All dates hereafter relate to the year 1968 unless otherwise noted.

[2] *Montag Bros., Inc.*, 51 NLRB 366, 372, enfd. 140 F.2d 730 (C.A. 5); *West Coast Casket Company, Inc.*, 97 NLRB 820, enfd. 205 F.2d 902, 908 (C.A. 9); *Texas Foundries, . c.*, 101 NLRB 1642, 1643, 1681, enforcement denied on other grounds 21 F.2d 791 (C.A. 5); *A O. Smith Corporation,*

without merit and must be rejected.[3]

The Respondent's remaining contention, that Easton's motives are important, is also unconvincing. In a similar situation, the Board stated:

> the focal point of inquiry in determining whether Kraucalis' refusal to cross the picket line to perform production work was a protected activity must of course be the nature of the activity itself rather than the employee's motives in engaging in the activity.[4]

So also, here, Easton's motives in honoring the picket line are not a legitimate subject matter for inquiry. Accordingly I need not, and shall not, determine what her motives were.

It is concluded that Easton's refusal on and after October 1 to cross the picket line maintained by the Union at her place of employment constituted concerted activity for mutual aid and assistance protected by Section 7 of the Act. It follows, and it is found, that the Respondent's threat to Easton on October 3, its discharge of her on October 8, and its failure thereafter to reinstate her to her former position constitute interference, restraint and coercion of employees in the exercise of rights guaranteed them in Section 7 of the Act, and therefore violated Section 8(a)(1) of the Act.

Upon the basis of the above findings of fact, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Nuodex Division of Tenneco Chemicals, Inc., is, and at all material times has been, an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By threatening to discharge and discharging its employee, Dolores Easton, and by thereafter failing and refusing to reinstate her to her former position, because she honored a picket line established by her fellow employees at their mutual place of employment thereby interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The above-described unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It will be recommended that the Respondent cease and desist from the unfair labor practices found, and from in any like or related manner infringing upon the protected rights of its employees. However, I am not convinced that the unfair labor practices were motivated by opposition to the Union or to unionism in general. Rather, I view them as the result of the Respondent's pique against Easton because it believed (correctly or mistakenly) that she placed obedience to her husband's wishes above loyalty to her employer. Accordingly, I shall recommend the use of a narrow, rather than a broad, cease and desist order.

Let us turn now to the question of appropriate affirmative relief. In *Ford Radio & Mica Corporation*[5] employees were discharged while on strike. The Board said:

> . . .The Trial Examiner found that three of the strikers, Durkin, Babino, and Renna, did not formally request unconditional reinstatement. . .He therefore recommended that these employees not be given any reimbursement for loss of earnings unless "the Respondent should fail to offer them reinstatement. . . . In that event, back pay shall begin to run from 5 days after the employee unconditionally requests reinstatement."
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> The General Counsel and the Union took exception to these findings and recommendations. The General Counsel maintains that, as practically all the strikers applied for reinstatement on May 5, 1954, the number of applications served as notice to the Respondent that the strike was terminated, and constituted a request for the reinstatement of all the strikers. He contends, therefore, that all the strikers should get back pay from May 5, 1954. We do not agree with this contention as these were individual requests and not a collective request.
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> On the other hand, we do not agree with the Trial Examiner that the individuals in question, *as discriminatorily discharged strikers,* were required to make "formal unconditional requests for reinstatement addressed to the Respondent," but find, rather, that they were required only to indicate that they were ready to abandon the strike and return to work. The Board generally requires reinstatement and back pay for discriminatorily discharged employees from the date of their discharge. It does not, however, award back pay to employees discriminatorily discharged while on strike during the period when they remain on strike on the theory that, until it appears that the employees who desire employment have given up the strike, it cannot be established that the loss of pay was conclusively attributable to the Employer's conduct. [Footnote omitted.]
>
> It follows therefrom that the duty which devolved upon the discriminatorily discharged strikers in the present case was merely to indicate that they had given up the strike.

Subsequent cases followed this principle, requiring as a condition precedent to reinstatement some sort of action by the discharged striker, either an unconditional request for reinstatement transmitted to the employer, or at least some indication of desire to return to work. Moreover, backpay did not begin to run until the dischargee had

Granite City Plant, 132 NLRB 339, 340, 400-401; *Canada Dry Corporation,* 154 NLRB 1763, 1764, fn. 2; and *Southern Greyhound Lines, Division of Greyhound Lines, Inc.,* 169 NLRB No. 148. See also *Truck Drivers Union Local No. 413, etc.* v. *N.L.R.B.,* 334 F.2d 539, 542-543 (C.A.D.C.)

[3] The Respondent cites *N.L.R.B.* v. *Illinois Bell Telephone Company,* 189 F.2d 124, 129 (C.A. 7), in which the Court of Appeals refused to enforce the Board's Decision, 88 NLRB 1171, 1176. With due respect for the Court of Appeals, I, as a Trial Examiner, am bound "to apply established Board precedent which the Board or the Supreme Court has not reversed." *Insurance Agents' International Union, AFL-CIO (The Prudential Insurance Company of America),* 119 NLRB 768, 772-773; *Novak Logging Company,* 119 NLRB 1573, 1575-76; and *Scherrer and Davisson Logging Company,* 119 NLRB 1587-89. Accordingly I am required to follow the Board's decision in *Illinois Bell Telephone* rather than that of the court of appeals.

[4] *The Cooper Thermometer Company,* 154 NLRB 502, 504. See also *Montag Bros., Inc., supra.*

[5] 115 NLRB 1046, 1048-49, enforcement denied and remanded 258 F.2d 457 (C.A. 2), Supplemental Decision 122 NLRB 34

taken such action.[6] However, in speaking of a discharged striker in *Southern Greyhound Lines, Division of Greyhound Lines, Inc.*, 169 NLRB No. 148, cited in both briefs herein, the Board stated:

> Respondent has never at any time offered Anderson reinstatement. To be sure, as Respondent's counsel says in its brief, *Anderson did not apply for reinstatement,* but having been discharged . . . she had every reason to believe that an application for reinstatement would have been futile . . . . If an employee is unlawfully discharged, *the employer must remedy the wrong by seeking out the employee and offering reinstatement.* [Emphasis supplied.]

The Board then ordered an immediate offer of reinstatement, but regarding back pay stated:

> Since it is a fair inference from Anderson's testimony and conduct that she would not have returned to work prior to the termination of the strike on April 10, 1967 even if she had not been discharged, Respondent will be required to . . . [pay] to her...the sum which she would normally have earned on and after April 10 to the date Respondent offers her reinstatement. . . .

It seems to me there is an irreconcilable conflict between *Ford Radio* and the cases which followed it, which require some action by the dischargee, and *Greyhound,* which puts the burden on the employer to seek out the dischargee and offer reinstatement, and entitles the dischargee to back pay from the end of the strike, regardless of whether the employee sought reinstatement. As *Greyhound* is the more recent case, I assume that the Board thereby *sub silentio* reversed *Ford Radio* and the cases which followed it.

Applying here the principle enunciated in *Greyhound,* it is concluded that Easton would not have returned to work prior to the end of the strike on November 12, 1968. Accordingly, it will be recommended that the Respondent offer her immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to the rights and privileges she previously enjoyed. It will further be recommended that the Respondent make her whole for any loss of pay she may have suffered by reason of the discrimination against her, by paying to her a sum of money equal to the amount she would normally have earned from November 12, 1968, the date when the strike ended, to the date of the offer of reinstatement, less her net earnings during this period, computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company,* 90 NLRB 289, including 6 percent interest as set forth by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Finally, it will be recommended that the Respondent preserve and make available to the Board, upon request, all records necessary to compute the amount of backpay due hereunder and post appropriate notices.

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this case, I make the following:

RECOMMENDED ORDER

It is recommended that Nuodex Division of Tenneco Chemicals, Inc., Piscataway, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to discharge or discharging employees or otherwise discriminating against them in regard to their hire, tenure of employment, or any term or condition of employment, because they honor picket lines established by their fellow employees at their mutual place of employment.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Dolores Easton immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to her seniority and other rights and privileges previously enjoyed, and make her whole for any loss of pay she may have suffered by reason of the Respondent's failure to reinstate her after the end of the strike on November 12, 1968.

(b) Notify Dolores Easton, if she should currently be serving in the Armed Forces of the United States, of her right to full reinstatement after discharge from the Armed Forces, upon application in accordance with the Selective Service Act and Universal Military Training and Service Act, as amended.

(c) 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 back pay due under this Recommended Order.

(d) Post at its plant in Piscataway, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of the said notice, on forms to be provided by the Regional Director for Region 22, after being duly signed by the Respondent's 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 insure that these notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 20 days of the receipt of this Decision, what steps have been taken to comply herewith.[8]

[6] *Morris Fishman & Sons, Inc.*, 122 NLRB 1436, 1438-39; *Central Oklahoma Milk Producers Association,* 125 NLRB 419, 422; *Elm Tree Baking Company,* 139 NLRB 4, 6-7; *Sea-Way Distributing, Inc.*, 143 NLRB 460; and *Artim Transporation System, Inc.*, 166 NLRB No. 87, fn 3.

[7] Should this Recommended Order be adopted by the Board, the words "the Recommended Order of a Trial Examiner" shall be stricken from the notice, and the words "a Decision and Order" shall be substituted therefor. Should the Board's Order be enforced by a decree of the United States Court of Appeals the words "a Decision and" shall be stricken from the notice and the words "a Decree of the United States Court of Appeals Enforcing an" shall be substituted therefor.

[8] Should this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT threaten to discharge or discharge employees, or otherwise discriminate against them with regard to their wages, hours, or other working conditions, because they honor picket lines established by their fellow employees at their mutual place of employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any union, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from such activities, except to the extent that such right may be affected by an agreement requiring union membership as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL offer Dolores Easton immediate and full reinstatement to her former or a substantially equivalent job, with the same rights and privileges she previously enjoyed, and reimburse her for any loss of pay she suffered because of the discrimination against her, with 6 percent interest. If she should currently be serving in the Armed Forces of the United States, WE WILL notify her of her right to full reinstatement after discharge from the Armed Forces, upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended.

NUODEX DIVISION OF TENNECO CHEMICALS, INC.
(Employer)

Dated By
(Representative) (Title)

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Building, 16th Floor, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-2100.