

**Young and Hay Transportation Co. and General Drivers and Helpers Union Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 17-CA-5426**

August 20, 1973

## DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING  
AND JENKINS

On April 26, 1973, Administrative Law Judge George Turitz issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief.

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, 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 Respondent, Young and Hay Transportation Co., Schuyler, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

## DECISION

### STATEMENT OF THE CASE

GEORGE TURITZ, Administrative Law Judge: Upon a charge filed by General Drivers and Helpers Union Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), on November 28, 1972, and served November 29, 1972, on Young and Hay Transportation Co. (Respondent and, at times, the Company), the General Counsel of the National Labor Relations Board (the Board), through the Regional Director for Region 17, on January 10, 1973, issued a complaint and notice of hearing which was duly served on the Respondent. Respondent filed its answer in which it denied all allegations of unfair labor practices. A hearing on the complaint was held before me on March 15, 1973, at Schuyler, Nebraska, at which the General Counsel, Respondent, and the Union were represented by their re-

spective counsel. Respondent has submitted a brief.

Upon the entire record and from my observation of the witnesses I make the following:

## FINDINGS OF FACT

### I THE BUSINESS OF RESPONDENT

Respondent, Young and Hay Transportation Co., is a Minnesota corporation having its principal office and place of business at Worthington, Minnesota, and terminals at Schuyler, Nebraska, and Council Bluffs, Iowa. It is a regular-route motor common carrier transporting general commodities in a multistate area. In the course and conduct of its business at the Schuyler terminal Respondent annually derives in excess of \$50,000 gross revenues for its services in the transportation of commodities directly to locations outside the State of Nebraska. I find that Respondent is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act, as amended (the Act).

### II THE LABOR ORGANIZATION INVOLVED

The Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

### III THE UNFAIR LABOR PRACTICES

#### A. Introduction

Starting about the middle of May 1972 the Union conducted an organizational campaign among Respondent's employees at the Schuyler terminal. On June 28 the Union filed a petition for certification of representatives in Case 17-RC-6949. The parties entered into a stipulation for certification upon consent election pursuant to which an election was conducted on August 17, 1972. The tally of ballots showed that 10 votes were cast for the Union, 1 against, and 2 were challenged. The Company filed objections to the election which were overruled, and on January 26, 1973, the Union was certified.

Respondent operated principally at three locations; namely, Worthington, Schuyler, and Council Bluffs. Al Young, secretary-treasurer of the corporation, was usually at the main office in Worthington and visited the Schuyler terminal a few times a year. At Schuyler Respondent had about 11 drivers, 10 of whom, working under the supervision of Terminal Manager Dolliver, were engaged principally in hauling meats from a packing plant in Schuyler to railroad ramps in Council Bluffs and Fremont, Nebraska. The 11th driver, Michael Kment, carried general freight, mostly from Omaha to Schuyler and delivered it there. He was supervised by Tomek, the freight manager, who had hired him. Kment usually completed his runs between 6 and 7 p.m., after Tomek had left the office. He therefore made his reports to Tomek at the latter's residence.

The principal issue litigated at the hearing was whether Respondent discharged Kment because it considered him a careless driver or because it wished to retaliate against the employees for voting for the Union. The parties also litigat-

ed incidents of alleged threats and coercive interrogation.

### B. *Alleged Interrogation and Threats*

#### 1. By Freight Manager Tomek

Kment was first approached concerning the Union in the middle of May 1972. Some 4 days later he attended a union meeting and signed a card; he was among the last few employees to sign. About June 1, when Kment reported in the evening, Tomek told him that he had heard that someone was trying to organize the employees, and he asked what Kment knew about it. Kment replied that he knew nothing. About 2 weeks later, again when Kment reported, Tomek asked him who the instigator of the Union was, and who had approached him about it. Kment replied that he knew of no instigator and had himself been approached by "the whole group," all of whom asked him to help by joining. Tomek told him that Young was 100 percent against the Union and that "there just wouldn't be any union; it was out of the question."

About a week after the election, when Kment reported to Tomek, the latter told him: "Well, I have bad news for you. You are going to have to start looking for a different job." He explained that Young had come to Schuyler and held a meeting at which he told the employees that most of the Schuyler operation would be closed down, the washrack building razed, and no employees would be retained to haul meat or freight; that the only ones left would be himself, Dolliver, the terminal manager, and one other individual. Tomek then said, "The person you have to thank for this is whoever brought the Union in." Kment said, "I suppose I better start looking, then."

Respondent contends that Tomek's interrogation of Kment did not tend to restrain him in the exercise of Section 7 rights because it occurred at Tomek's residence and was casual and because the two men got along well. Kment was not lingering at Tomek's residence for social intercourse; he was making his daily reports. It was between 6:30 and 7 o'clock in the evening; presumably he would have liked to get home. The fact that Tomek kept him there with his questions at such a time indicated that the matter was important, not casual. The two did get along well, but they were not personal friends. Tomek impressed one as a gentle person, but his gentleness did not prevent him, as described later in this Decision, from hoping that those who brought the Union in would starve.

It is true that on June 1 Respondent's retaliatory attitude about the employees' desire to bargain collectively had not been expressed openly. That does not mean that Kment, when interrogated about union activities, would not recognize or perceive Respondent's retaliatory aim before its open manifestation. In assessing the impact of interrogation upon employees, account must be taken of their economic dependence upon their employer. Cf. *The Sinclair Company v. N.L.R.B.*, (*N.L.R.B. v. Gissel Packing Co.*), 395 U.S. 575, 617 (1969). There was no legitimate purpose in Tomek's interrogation and, as already found, this was not friendly chitchat. The reasonable inference was that Respondent was seeking information to utilize for the purpose of crushing the nascent union organization. Indeed, if Kment had

felt confident that Tomek was not seeking information for the purpose of enabling Respondent to punish him or fellow employees with whom he was engaged in concerted activities for mutual aid and protection, he would not have felt compelled to demean himself by answering Tomek's questions with an outright lie. I find that Tomek's interrogation of Kment on June 1 tended to coerce employees in their exercise of Section 7 rights and that Respondent thereby violated Section 8(a)(1) of the Act.

Tomek's interrogation of Kment on June 15, 1972, as to who was the "instigator" of the Union, and who had approached him, was plainly coercive. It must have been difficult for Kment to conceive any possible legitimate reason for Tomek to ask him those questions. On the contrary, it is obvious that if an employer wishes to discriminate specifically against union adherents or "instigators," he must first ascertain who they are. For this reason alone Tomek's interrogation on June 15 was plainly coercive. See *Cannon Electric Company*, 151 NLRB 1465, 1468. Moreover, Tomek coupled the interrogation with the statement that there just would be no union, since Young was 100 percent against it. By telling Kment, in effect, that unionization would in any event lead to nothing and was futile, Tomek made the interrogation doubly coercive. I find that by Tomek's interrogation of Kment on June 15, 1972, Respondent violated Section 8(a)(1) of the Act.

By Tomek's telling Kment that Respondent was discontinuing the freight-carrying function of the Schuyler terminal and discharging drivers because the Union had been brought in, Respondent further violated Section 8(a)(1) of the Act.

Shortly after Young made the speech, described elsewhere in this Decision, in which he let the employees know that he was going to close down the terminal, Tomek remarked to Hodyc, an employee who worked in the office and did some dispatching, that on account of the Union everyone was to be fired, and he hoped that the men would starve to death. The conversation took place in the office, and another employee, Rech, was also present. Although Hodyc and Rech had heard Young's speech directly, I find that the repetition of his coercive message by a supervisor, especially with the coercive thrust strengthened by the supervisor's hope that the men would starve, was an additional violation of Section 8(a)(1) of the Act.

#### 2. By Terminal Manager Dolliver

On August 5, 1972, which was 12 days before the election, Dolliver, the manager of Respondent's Schuyler terminal, asked Kment, "Mike, how are you going to vote on the Union? Are you for it or against it?" Kment replied that he had not yet decided, and that he would not consider it "if things were more like they should be. . . ." Asked by Dolliver what he meant, he explained that his wage of \$2.25 per hour was low when compared to that of people in Omaha doing similar work, who received over \$5 per hour, and that he thought he should be receiving about \$3.50 an hour. Dolliver agreed that Kment was entitled to more than he was getting, but not \$3.50. He suggested that \$2.50 or \$2.75 "would be more like it." Dolliver testified that he did not "believe" he had asked Kment how he would vote, but I

found Kment's testimony more convincing and have credited him. On cross-examination Kment testified as follows:

Q. Had you made up your mind at that time?

A. To a certain extent, I was fairly sure.

Q. But was your mind totally and completely made up at that time?

A. Not really.

Q. So what you told him was really true?

A. Yes.

Notwithstanding the last answer of Kment's which I have quoted, I find that he was fairly sure of how he would vote and that his answer to Dolliver was not truthful.

The purpose of a Board election is to permit the casting of a secret ballot, without the necessity of any open declaration of preference. There is a big difference between discussion of voting intentions among employees and questioning as to such an intention by an employer. If Kment had simply refused to answer Dolliver's question, he would have been displaying criticism and open defiance of his employer. He knew from Tomek that, so far as Respondent was concerned, "there just wouldn't be any union; it was out of the question." Rather than defy Dolliver by telling him that if he, Kment, had his way, there *would* be a union, or by refusing altogether to answer, he demeaned himself by lying as to his intentions. Dolliver had no legitimate need to know how Kment would vote. He wanted the information in order to put pressure on him. Thus, he indicated immediately that he would seriously consider a 25-cent or 50-cent wage increase for Kment. I find that Dolliver's questioning of Kment was coercive and violative of Section 8(a)(1) of the Act. See *Overnite Transportation Company*, 161 NLRB 461, 467; *Merritt Packing and Crating Service, Inc.*, and *Western Moving and Storage, Inc.*, 172 NLRB 1731; *Mississippi Extended Care Center, d/b/a Care Inn, Collierville*, 202 NLRB No. 139.

### 3. Young's speech

On the morning of August 23 Young called a meeting of the employees of the Schuyler terminal, the first in its history. Referring to the Union's one-sided victory in the Board election the previous week, he said that the employees evidently felt that they had been abused, for which he was sorry. "However," he went on, "I can assure you of one thing, I will not go union." He asked the men not to create any problems for the packing plant the Company served, and promised that Respondent would do its utmost to get out of their hair in 60 days. Young testified that he implied that he would close down the operation. I find that by Young's speech Respondent threatened to close the terminal operation and discharge the employees because they had chosen to bargain collectively through the Union. I further find that Respondent thereby violated Section 8(a)(1) of the Act.

#### C. Kment's Discharge

Kment worked for Respondent from June 1, 1971, to November 24, 1972, when he was discharged on the stated ground that he was a careless driver. Kment was not outstanding in union activities; on the contrary, he was among

the last few employees who joined.

Kment had five accidents while working for Respondent. They occurred, respectively, in the fall of 1971, the spring of 1972, and September, October, and November, 1972. The first three accidents occurred when Kment was maneuvering his tractor-trailer, about 50 feet in length overall, in tight places, and they resulted in relatively minor damage, i.e., \$44, \$90, and about nothing,<sup>1</sup> respectively. The October accident was a rear-end collision which resulted from the fact that Kment followed a car too closely, for which offense he was cited by the police. His explanation was that the pavement was wet and that the car he was following unexpectedly stopped to make a left turn at a corner where left turns were prohibited. Young testified, without contradiction, that reports showed that the struck car had its left turn signal flashing. Kment reported that the damage amounted to approximately \$25.

Kment's last accident occurred at Respondent's terminal on the night of November 21. Kment was backing his van truck past a line of parked trailers. In the darkness he failed to see that one of them, belonging to an outside company, still had its tractor attached and therefore stuck out beyond the line. He ran into the tractor, causing damage of about \$550. He informed Tomek of the incident that evening and the next morning, after giving the driver of the damaged tractor the necessary information, Kment went on his regular run to Omaha. Tomek reported the matter to Young, who said, "That was no accident; it was plain carelessness." He ordered Tomek to get an estimate of the damage. The estimate Tomek got was for \$998, and he so informed Young. Young said he was not happy with that type of accident and instructed Tomek to get Kment to resign. Tomek urged Young to give Kment another chance, but Young refused.

That evening Tomek told Kment that Young wanted his resignation. He said he had tried to save Kment's job, but Young would not hear of it. Kment said, "I can't blame him because of the accident." Tomek pointed out that if they had to discharge Kment, they could not give him a reference; and he commented that the matter would probably not have been so bad, but because of "this union thing" Young had a sour taste for the men, and Kment's discharge would serve as an example for the others. Kment said that he would think the matter over. On November 24—November 23 was a holiday—Kment gave his answer; namely, that he refused to resign. He went out on his run to Omaha, and when he returned that evening Tomek told him that by Young's order he was as of then relieved of duty.

The record shows that Respondent had never discharged any employee other than Kment solely because of a poor driving history. Accidents in the course of hitching trailers to tractors and maneuvering trailers in and into confined areas were common—Dolliver, himself, had his share—but Respondent apparently accepted these to some extent as inevitable. Charles Brown had two accidents on the highway resulting in damage to other vehicles. On July 25, 1972, making a right turn while he was coming out of a parking area, a Volkswagen attempted to overtake and pass him on

<sup>1</sup> Neither the victim nor his insurer presented a bill for the third accident

the right. Brown's trailer, its course shifting to the right of his tractor's course, finally squeezed the Volkswagen against a utility pole. On August 30, 1972, Charles Brown's air hose broke while he was driving on a highway, locking his brakes and causing his trailer to swerve. The driver of a gas transport passing in the other direction turned out of the way too quickly and turned over. Damage was estimated at \$20,000 and the driver was injured. Young admitted that Respondent's rules required Brown to check his air hoses before going out, but he testified that it was not practicable for a driver to inspect everything. Charles Brown was not disciplined. Another driver, Tom Brown, was retained notwithstanding that on a number of occasions he was negligent in maintenance of his tractor. Also, at some time not clearly stated—probably early in 1972—he failed to use proper braking and clutch procedure and ran into the back of a pickup truck. He was discharged not long thereafter, but the triggering of a pickup truck. He was discharged not long thereafter, but the triggering incidents were misconduct and what Dolliver regarded as insubordination. Moreover, Young rehired him at Worthington after a brief interval.<sup>2</sup>

#### Concluding findings with respect to Kment

While no driver other than Kment had ever been discharged solely because of poor driving, the record does not show with any degree of clarity what Respondent's standard was with respect to tolerating drivers' faults. Except for Young's rehiring Tom Brown in early 1972 in the face of a record showing him to be a poor driver, especially negligent with respect to maintenance, the General Counsel failed to show that Respondent's practice was to retain drivers who manifested more than a minor degree of negligence. Charles Brown's collision with the Volkswagen was primarily the fault of the other driver; and while his failure to inspect his air hose may have involved some negligence, it did not involve the degree of culpability that Kment's last two accidents.<sup>3</sup>

Young's appraisal of Kment's last accident as the result of carelessness was not unreasonable or even suspicious. Kment would have had not difficulty avoiding the collision if he had simply been aware that the tractor was standing there; and his first reaction was to say he did not blame Young for wanting him terminated. As to his rear-end collision on July 25, even assuming, *arguendo*, that he would have been justified in taking for granted that the car ahead of him would not make an illegal left turn, his disregard of the wet pavement and of the other driver's left turn signal were plainly negligence. Even Tomek, who thought he should have been given another chance, thought he was too close.

I found Tomek a credible witness and have credited his testimony that Young did not tell him that he was discharg-

ing Kment because the men had voted the Union in. His opinion that that was Young's motivation is not sufficient to establish that to have been fact.

As the General Counsel has failed to prove that Respondent in the past had tolerated driving errors as serious as Kment's in his last two accidents, and as Kment was not outstanding in union activity, I find that the General Counsel has failed to prove by a preponderance of the evidence that Respondent discharged Kment in retaliation for the employees' voting for the Union or in order to discourage membership in the Union.

#### IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

I find that the activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V THE REMEDY

As I have found that Respondent has engaged in certain unfair labor practices, I recommend that the Board issue the Order set forth below requiring Respondent to cease and desist from said unfair labor practices and to take certain affirmative action which will effectuate the policies of the Act.

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

#### CONCLUSIONS OF LAW

1. Respondent, Young and Hay Transportation Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. General Drivers and Helpers Union Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. By discharging Michael Kment, Respondent did not engage in unfair labor practices within the meaning of the Act.

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:

<sup>2</sup> About 1 month after being rehired Tom Brown lost the oil plug of an engine that had just had a major overhaul and the engine was completely ruined. He quit of his own accord.

<sup>3</sup> The incident with Charles Brown's air hose occurred after Young had become "sour on the men" for voting the Union in. The record contains no basis for inferring that Young assumed that Brown opposed the Union.

ORDER <sup>4</sup>

## APPENDIX

Respondent, Young and Hay Transportation Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees with respect to any employee's activity, membership, or interest in, or on behalf of, any labor organization in a manner, or under circumstances, constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act.

(b) Interrogating employees as to their voting intentions in a Board election.

(c) Informing employees that their attempts to organize in a union would be futile because Respondent would not tolerate a union and would make no contract with any union.

(d) Threatening to close down its terminal operation or to discharge employees because the employees vote for the Union in a Board election or otherwise indicate their desire to bargain collectively.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which, I find, will effectuate the policies of the Act.

(a) Post at its place of business in Schuyler, Nebraska, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of said notice, to be furnished by the Regional Director of Region 17, shall, after being signed by a representative of Respondent, 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 Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify said Regional Director of Region 17, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.

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

<sup>4</sup> In the event that no exceptions are filed as provided in 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, automatically become the findings, conclusions, decision, and Order of the Board and all objections thereto shall be deemed waived for all purposes.

<sup>5</sup> In the event that 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."

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT question you as to your voting intentions in any NLRB election.

WE WILL NOT question you as to any employee's union activity or membership, or as to his interest in any labor organization, under such circumstances, or in such a way, as to constitute coercion.

WE WILL NOT tell you that your attempts to organize in a union would be futile, or that we will not tolerate a union, or that we will make no contract with any union.

WE WILL NOT threaten to close down our terminal or any part thereof or to discharge employees because they vote for the Union in an NLRB election, or because they indicate in any other way that they wish to bargain collectively.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to self-organization, to bargain collectively through representatives of your own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain any or all such activities.

YOUNG AND HAY TRANSPORTATION Co  
(Employer)

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

This is an official notice and must not be defaced by anyone.

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. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office 616 Two Gateway Center, Fourth At State, Kansas City, Kansas 64101, Telephone 816-374-4518.