

**American Truck Stop, Inc. and Patricia A. Heinz, Margaret Dryer, Nellie Herron, Ella Moore, and Phyllis Norman.** Case 6-CA-7826

June 30, 1975

## DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND  
PENELLO

On March 28, 1975, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the Respondent 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.<sup>1</sup>

### 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, American Truck Stop, Inc., Bentleyville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

<sup>1</sup> The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and positions of the parties.

The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F 2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

### APPENDIX

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

After a hearing in which all parties had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to

post this notice and to keep the promises that we make in this notice:

WE WILL NOT threaten employees that they will be discharged if they refuse to give up their right to engage in a work stoppage in support of their demand for an immediate meeting with management officials.

WE WILL NOT discharge, refuse to reinstate, or otherwise discriminate against our employees because they have indicated that they would not work until after management officials met with them to discuss their grievances.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL reinstate Patricia Heinz, Margaret Dryer, Nellie Herron, Ella Moore, and Phyllis Norman to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, with full backpay covering the earnings they lost because we unlawfully terminated them.

AMERICAN TRUCK STOP,  
INC.

### DECISION

#### STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard on January 24, 1975, in Pittsburgh, Pennsylvania, upon a charge filed on October 11, 1974, and a complaint issued on December 13, 1974, alleging that Respondent violated Section 8(a)(1) of the Act by threatening to discharge, and thereafter discharging and refusing to reinstate upon their unconditional offer to return to work, employees Patricia A. Heinz, Phyllis Norman, Margaret Dryer, Nellie Herron, and Ella Moore because they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection. In its duly filed answer, the Respondent denied commission of any unfair labor practices. After close of the hearing, briefs were filed by the General Counsel and the Respondent.

Upon the entire record in this proceeding, including my observation of the witnesses while testifying and consideration of the posthearing briefs, I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENT

The Respondent is a Pennsylvania corporation engaged in the retail and nonretail sale of fuel and in the retail sale of food from its facility located in Bentleyville, Pennsylvania. During the 12-month period preceding the issuance of the complaint, a representative period, Respondent sold and distributed products, the gross value of which exceeded \$500,000, and received goods and materials

valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Issues*

This case involves no union nor effort on the part of employees to engage in collective bargaining or organizational activity. The sole issue involved relates to the right of unrepresented employees to engage in concerted activity pursuant to Section 7 of the Act. There is no dispute as to the underlying cause of the threatened discharge, ultimate termination, and refusal to reinstate the Charging Parties. Thus, all were admittedly prompted by the Charging Parties' declared intention that they would refuse to work their regularly scheduled shift unless Respondent agreed to an immediate meeting, so that they could air their complaints to certain of Respondent's officials. Therefore, since motivation is not in dispute, the allegations of the instant complaint turn on the limited question of whether the threatened refusal to work constituted concerted activity of the type protected by the Act, as the General Counsel contends, or as Respondent contends conduct so unreasonable and indefensible as to furnish Respondent good cause for dismissal of the five employees involved.

### B. *The Facts*

Respondent operates two truckstops in Washington County, Pennsylvania, with that involved here located in Bentleyville. Thomas Cooper is the Respondent's president, and his wife, Ruth, its vice president. Stock ownership in the Respondent is held by the Coopers and Coen Oil Company. The secretary of Respondent is William Brooks; Brooks is also a vice president of Coen Oil.

Thomas Cooper is engaged in immediate overall management of both truckstops, with the exception of restaurant facilities, which are managed by Mrs. Cooper. Brooks, apparently, does not exercise day-to-day supervisory responsibilities with respect to the truckstops, but visits the Bentleyville location irregularly, about 4 times weekly, signs payroll checks, along with Thomas Cooper, and has attended meetings with employees to explain tax

and wage-hour changes of interest to them. The evidence does not identify any individuals other than Thomas Cooper, Ruth Cooper, and William Brooks who would be identified as having managerial responsibility at the truckstop.

The restaurant at Bentleyville is a round-the-clock, 7-day operation, manned by three shifts. Prior to their discharge, the Charging Parties were kitchen employees assigned to the 11 p.m. to 7 a.m., or third, shift. As such, they, like kitchen employees on other shifts, performed grill work, dishwashing, food preparation, and cleaning. However, the bulk of the cleaning is expected to be completed during the third shift.

The kitchen employees on the third shift were subject to the direction of Phyllis Norman, a nonsupervisory employee, apparently clothed with lead authority, who is one of the Charging Parties. Ruth Cooper, who, prior to the instant hearing, had not been at the restaurant during the third shift for some 4-5 months, generally relayed instructions to the kitchen employees assigned to that shift through the restaurant cashier.

The Charging Parties were terminated on October 5, 1974.<sup>1</sup> Prior thereto, they had expressed dissatisfaction to Mrs. Cooper concerning working conditions. Thus, in May, at the request of these employees, Mrs. Cooper met with them concerning certain of their grievances, including supply problems,<sup>2</sup> harassment by kitchen employees on other shifts,<sup>3</sup> equalizing the work crew on Monday nights,<sup>4</sup> and exhaust fumes, emanating from the garage, which were reaching the kitchen area. In consequence of this meeting Mrs. Cooper assured the employees that they would be given ample supplies, that nobody would give them orders other than herself, and that the fumes would be checked. The kitchen employees were satisfied with this disposition. However, according to the credited testimony of Phyllis Norman, conditions affecting the third shift began to deteriorate again several weeks prior to October 5. In this connection, a few days before October 4, Norman called Mrs. Cooper in a further effort to straighten the other shifts out. Because Norman felt this could be accomplished through the phone call, no meeting was requested at that time.<sup>5</sup>

On October 4, Mrs. Cooper left the Bentleyville area on a trip to New York. Before leaving, she wrote a note which was to be given Norman by the cashier. The note contained the following:

employee named Peggy Bailey, who was not favored by third-shift kitchen employees, to a job during daylight hours. In any event, while Cooper's testimony in this respect may imply a denial of the conversation described by Norman, which is set forth in the above text, Cooper does not directly contradict Norman in this respect. Nonetheless, Mrs. Cooper's penchant for nonresponsive and evasive answers left me unimpressed with the reliability of her testimony generally and she is discredited to the extent that her testimony relates to matters in controversy. The testimony of Peggy Bailey, in response to leading questions, to the effect that during her assignment on the third shift she was aware of no "serious" problems with respect to the Employer is regarded as of no consequence. Bailey was transferred from the third shift 2-3 weeks before October 4, and hence she would have no knowledge of the reoccurrence of the complaints related by Norman. Further, in view of the animosity which existed between Bailey and the Charging Parties, and her unimpressive demeanor, I would discredit her testimony even if viewed material.

<sup>1</sup> Unless otherwise indicated, all dates refer to 1974.

<sup>2</sup> Each shift was responsible for preparation of certain food items for ensuing shifts. As I understood the credited testimony of Phyllis Norman, the issue concerning supply problems related to the second shift's failure to provide ample supplies for the third shift.

<sup>3</sup> This related to the complaint by third-shift employees that rank-and-file employees on other shifts were giving them orders.

<sup>4</sup> In this respect the employees were complaining about the fact that only four employees, rather than the customary five, were assigned to the kitchen on Monday nights. Respondent had previously made this arrangement to facilitate a six-man crew on weekends.

<sup>5</sup> Although Mrs. Cooper was questioned as to communications between herself and Norman in this time period, she related that the "last time" she (Cooper) called Norman, the latter stated that everything is fine and that "since you (Cooper) took that red-head from me we don't have any problems." This was an obvious reference to Mrs. Cooper's transfer of an

Phyllis

Please get your girls on the ball *with the cleaning*. Be sure you prepare enough potatoes and onions for 1st shift.

Thank you  
Ruth

That evening when Norman read the note to the others on the shift, all were angered at its content. In their view, the third shift was doing all the work they could, there was too much being pushed on them as it was, and they would oppose what they construed as an attempt to put more work on them. All were of the mood to engage in a spontaneous walkout. However, Norman persuaded them to stay on and to meet the next day, Saturday, October 5, at Norman's home.

On Saturday, October 5, that meeting was held and it was then decided that Norman would call the restaurant that evening before their scheduled work shift and demand a meeting with Thomas Cooper and William Brooks. Pursuant thereto, at about 9:45 p.m., that evening, Norman called the restaurant and advised the cashier on duty, Mary Patton, of their demand.<sup>6</sup> Patton called Thomas Cooper, who told Patton to tell the girls to come to work tonight and we will try to iron this out next week. According to Patton, she called Norman back, asking her to reconsider, mentioning the difficulties involved in obtaining replacements at that late hour. She advised Norman that next week "we would talk it over."<sup>7</sup> Patton goes on to relate that Norman responded stating "no meeting, no work because she was sticking by her girls." Patton then called Cooper back. He told her to advise the girls that if they didn't work they wouldn't have a job. She then called Norman back, again urging her to reconsider, stating that if the girls don't come in "you know what this means." Norman again indicated that the girls would not be in. Patton then made her third call to Cooper, in which Patton reported the final position of the girls. Cooper told her to urge them to reconsider once more, and if they refused to do so, to discharge them. Patton apparently called Norman again, and effected the discharge.

Thereafter, Norman and the four other discharges on Sunday, October 6, and Monday, October 7, picketed the Bentleyville truckstop. Subsequently, on November 2, all

<sup>6</sup> According to Patton, Norman at this time stated that "she was reporting all the kitchen girls off on the 11 p.m. shift until they could have a meeting with Mr. Cooper and Mr. Brooks." Patton's version of what was said is not regarded as creating a material conflict and, accordingly, it is accepted.

<sup>7</sup> Norman contradicts Patton by denying that Patton ever indicated that a meeting would be set up at any time. Furthermore, according to Norman, when Patton initially called her, Patton advised that Cooper had said "he would have a meeting in no way, that if we didn't report to work we were fired." Although I regard these conflicts as immaterial, and shall rely upon Respondent's version of the telephone conversation for purposes of my analysis, were it necessary, however, I would credit Norman's account over that of Respondent's witnesses. I regarded Norman as a more persuasive witness than those offered by Respondent. From my observation of Thomas Cooper, he did not impress me as the type who, after working all day at the restaurant, and returning home at 9:30 p.m. on a Saturday, would respond to the employees' demand for an immediate meeting before 11 p.m. that evening, with the conciliatory expression that he and Respondent's witnesses would have me believe he attempted to relay through Patton. I believe it more likely that he regarded the demand for a meeting as "unreasonable and indefensible" and reacted to it with the retort reflected in Norman's testimony; namely, "that he would have a meeting in no way."

five unconditionally offered to return to work, but their written requests were not acknowledged by Respondent.

In the interim, Respondent terminated the third shift at the Bentleyville restaurant on October 13. According to Thomas Cooper, the sole reason for the elimination of the shift was his inability to obtain replacements willing to cross the picket line.<sup>8</sup>

### C. Concluding Findings

As heretofore indicated, all of the unlawful conduct attributed to Respondent in this case was concededly motivated by the Charging Parties' expressed intention to decline to work, unless first granted a meeting with Respondent's president and secretary.

The legitimate interest of employees in seeking such a meeting, and the statutory protection against reprisals or intimidation where that right is asserted is firmly imbedded in decisional precedent. Thus, as stated in *N.L.R.B. v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983, 988 (C.A. 7, 1948), ". . . even though no union activity be involved, or collective bargaining contemplated . . . [employees have] . . . a legitimate interest in acting concertedly in making known their views to management without being discharged for that interest." Respondent lays no challenge to this principle. Instead, the defense focuses upon the overall conduct of the Charging Parties in furtherance of their demand for a meeting, with Respondent contending that the means employed were "unreasonable, indefensible and not protected."

In considering Respondent's position it is necessary initially to point out that this is not a case where the pressures invoked by the employees either assumed, or threatened to assume, that form of employee action inherently beyond statutory protection, and which accordingly would be a proper subject for discipline irrespective of the worthiness of the underlying cause. Thus, all that was involved here was a threatened refusal to work, which did not contemplate a takeover of the plant<sup>9</sup> or an interference with the Employer's right to hire replacements, or violence,<sup>10</sup> or an effort to continue working in disobedience of an employer's instructions.<sup>11</sup>

Indeed Cooper's use of Patton as a go-between rather than to communicate directly with Norman suggests that his mood was not one of conciliation. I was also unimpressed with Patton, whose testimony in significant respects was shifting and contradictory. My suspicion as to her veracity was enhanced by my disbelief of Louisa Kubala, called to corroborate Patton's testimony that Patton told Norman that the girls could talk over their problems with Cooper next week. Kubala's testimony as to how she happened to be in the cashier's area cannot be reconciled with Patton's testimony as to this same subject matter. Thus, Patton relates that in recognition of her problem she "called one of the girls (Kubala) in the kitchen" to witness the conversation. Patton relates that Kubala stood beside her, while she called Norman back. According to Kubala, she was not called at all but, out of coincidence, happened to go over to the cashier station to obtain some keys while Patton's phone conversation with Norman was in progress. In view of this conflict between a principal and corroborating witness, as to so fundamental a fact, I regard the testimony of both as totally unreliable.

<sup>8</sup> As indicated, the picket lines were up for a brief 2 days and had been removed several days prior to termination of the 11 p.m. to 7 a.m. shift.

<sup>9</sup> *N.L.R.B. v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1938).

<sup>10</sup> *Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31 (1942).

<sup>11</sup> *Elk Lumber Co.*, 91 NLRB 333 (1950).

However, Respondent nonetheless claims that this case should be resolved in accordance with the formulation set forth in *Dobbs Houses, Inc. v. N.L.R.B.*, 325 F.2d 531, 538 (1963), where the Fifth Circuit reversed the Board and held that a peaceful strike in protest of the employer's discharge of a favored supervisor was unprotected. In doing so, the court stated that: "The cause of the employees' grievance must be considered in determining the reasonableness of their course of conduct undertaken in protest . . ." <sup>12</sup> and employee conduct in quest of a matter of legitimate concern to them will only be protected where "the means be reasonably related to the ends sought to be achieved." <sup>13</sup> Upon application of this test the court concluded that a mass quitting of work during a busy period in the employer's restaurant operation was "not a reasonable method of protest against the firing of a supervisor who enjoys . . . [employee] . . . esteem."

Contrary to the Respondent, the court's decision in *Dobbs Houses* is of no avail here. Well-established Board policy collides with the court's view that otherwise legitimate strike action, though invoked in quest of legitimate employee demands, may nevertheless expose the strikers to lawful reprisals if, in the circumstances, such pressures disproportionately inconvenience the employer, while lesser, more reasonable, means of employee expression are available. In *Plastilite Corporation* <sup>14</sup> the Board, with court approval, <sup>15</sup> specifically declined to adopt the "reasonableness" test set forth by the Fifth Circuit in *Dobbs Houses* <sup>16</sup> reiterating its adherence to the view that employees do not forfeit statutory protection by backing their otherwise legitimate demands with pressures which might reflect "ill judgment or lack of consideration." <sup>17</sup> See also *N.L.R.B. v. Solo Cup Company*, 237 F.2d 521, 526 (C.A. 8, 1956). Consistent with that position, the Board, in two recent decisions, has held that employers violated the Act by discharging employees for engaging in work stoppages to obtain a meeting with management officials. <sup>18</sup> Accordingly, I regard Respondent's defense as legally insubstantial under established Board policy.

Based upon the foregoing, I find that the action of the employees in declaring their intention to refuse to report for work until afforded an opportunity to voice their grievances in the presence of Thomas Cooper and William Brooks constituted concerted activity, protected by Section 7 of the Act. It follows therefrom that Respondent's threat to terminate the Charging Parties if they declined to report for work, as well as the discharge and refusal to reinstate the Charging Parties, constituted unfair labor practices violative of Section 8(a)(1) of the Act.

<sup>12</sup> 325 F.2d at 539.

<sup>13</sup> 325 F.2d at 538.

<sup>14</sup> 153 NLRB 180 (1965).

<sup>15</sup> *N.L.R.B. v. Plastilite Corporation*, 375 F.2d 243, 249-250.

<sup>16</sup> 153 NLRB at 183, 185.

<sup>17</sup> This is the most that could be said of the factors relied on by Respondent in support of its factual claim that the Charging Parties declared intention to strike was "unreasonable and indefensible." In this regard the fact that the underlying complaints herein did not involve the urgency called for by the employees, the fact that other informal means for complaint resolution were available to them which were effective in the past and which Respondent, through Mrs. Cooper, had always honored, and the fact that the demand came only an hour before the threatened strike was to

## CONCLUSIONS OF LAW

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

2. By threatening employees with discharge in the event they engaged in protected concerted activity, by discharging and refusing to reinstate Patricia A. Heinz, Margaret Dryer, Nellie Herron, Ella Moore, and Phyllis Norman, in reprisal for their declared intention to engage in protected concerted activity, Respondent has violated Section 8(a)(1) of the Act.

3. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

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

It having been found that the Respondent unlawfully discharged the above-named employees, I shall recommend that it be ordered to offer them full reinstatement, with backpay computed on a quarterly basis, plus interest at 6 percent per annum, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), from the date of the discharge to the date reinstatement is offered.

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

## ORDER <sup>19</sup>

The Respondent, American Truck Stop, Inc., Bentleyville, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from interfering with, restraining, and coercing employees by threatening discharge if they engage in protected concerted activity, or by discharging, refusing to reinstate, or otherwise discriminating against employees because they have engaged in, or have declared an intention to engage in, activity protected by Section 7 of the Act.

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

(a) Offer to Patricia Heinz, Margaret Dryer, Nellie Herron, Ella Moore, and Phyllis Norman immediate and

take place, do no more than reflect what the Act, as construed by the Board, in a fashion consistent with the weight of court authority, condones as an excusable offshoot of the emotion-filled atmosphere under which employees who feel aggrieved, select the means for effective redress.

<sup>18</sup> *Magna Visual*, 213 NLRB No. 29 (1974); *Crenlo Division of GF Business Equipment, Inc.*, 215 NLRB No. 151 (1974).

<sup>19</sup> 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, 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.

full reinstatement to their former jobs or, if their jobs have been eliminated by reason of legitimate economic considerations unrelated to the instant labor dispute, to substantially equivalent positions, without loss of seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain the backpay due under the terms of this order.

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<sup>20</sup> 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

(c) Post at its truckstop in Bentleyville, Pennsylvania, copies of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, immediately upon receipt thereof, shall be signed by Respondent's authorized representative and posted by the Respondent and maintained 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 said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."