

212 Auto Sales, Inc. and Alexander Kubilis. Case 7-  
CA-12063

May 12, 1976

## DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND WALTHER

On March 18, 1976, Administrative Law Judge Benjamin K. Blackburn 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,<sup>1</sup> 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 the Respondent, 212 Auto Sales, Inc., New Buffalo, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> 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. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

### DECISION

#### STATEMENT OF THE CASE

BENJAMIN K. BLACKBURN, Administrative Law Judge: The charge was filed on May 30, 1975.<sup>1</sup> The complaint was

issued on July 9. The hearing was held in Benton Harbor, Michigan, on February 2, 1976. The issue litigated was Respondent's motive for terminating the employment of four truckdrivers on May 27. For the reasons set forth below, I find that it discharged them for engaging in union activities, thereby violating Section 8(a)(3) and (1) of the National Labor Relations Act, as amended.

Upon the entire record, including especially my observation of the demeanor of the witnesses, and after due consideration of oral argument, I make the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, an Indiana corporation, is engaged in New Buffalo, Michigan, in the trucking business, specializing in the hauling of used vehicles purchased at auctions by automobile dealerships. During calendar year 1974 it grossed more than \$100,000 by transporting used automobiles and trucks, more than \$50,000 of which was received for transporting some of them across state lines.

##### II. THE UNFAIR LABOR PRACTICES

###### A. Facts

I do not credit the testimony of Bruno Mickus, Respondent's president and owner. Consequently, the following facts are either undisputed or based on the credited testimony of the General Counsel's witnesses, principally Elaine Howell and Alexander Kubilis.

Around the first of April Mickus hired three union truckdrivers who had been laid off by firms specializing in hauling new automobiles because of a slump in the new-car market. The three were Alexander Kubilis, Patrick Pancer, and James Jones. It was not long before they began talking with Respondent's other drivers about the possibility of going union.

Mickus got wind of what was going on. Sometime around May 20 he asked Elaine Howell, his sole office employee, whether she had heard any of the drivers talking about a union. She said she had not. He asked her to check with a mechanic named Bob Deal and a driver named Chuck Johnson. He said he thought there was more than one employee involved and had a feeling there were at least four, naming Kubilis, Pancer, Jones, and Winfred Green. He said he wanted to find out precisely which individuals were involved so that he would not get into trouble by doing something to one who was not guilty.

Mrs. Howell did as Mickus asked. She asked Deal if he had ever been approached about a union. He told her that, one morning when some of the employees had been waiting for the terminal to open, there had been a discussion among them about whether a union was feasible. He said that he could not pinpoint the man who had started the discussion. When Mrs. Howell put the same question to

<sup>1</sup> Dates are 1975 unless otherwise indicated.

Johnson, he told her that he had not been approached and was not interested in a union in any event. Mrs. Howell told Mickus what Deal and Johnson had told her. Mickus said he would check further with his son, Bernard (Bennie). The following Friday, May 23, Bruno told Mrs. Howell he had checked with Bennie and Bennie had told him there was union activity among the employees.

Respondent's workweek runs from Tuesday through Saturday with Sunday and Monday as normal days off. The fact that Memorial Day was celebrated on Monday, May 26, thus dislocating the usual schedule of used-car auctions, caused that week to be an abnormal one in Respondent's operations. Mrs. Howell did not work at all. On May 27 Bruno Mickus instructed Bennie Mickus to contact Kubilis, Pancer, Jones, and Green and tell them they were laid off. Bennie telephoned Green. He told Green he had to let him go because he was not a reliable person. He pointed out he had to work for Green on weekends and he wanted to stay home too. (Bennie Mickus is a student. He drives for Respondent on an emergency basis.) He told Green that plus the fact that Green broke equipment were the reasons he was being let go. Green replied, "We'll see about that." Bennie tried to call Jones but could not reach him.

Kubilis found out what was going on when he bumped into Pancer around noon on May 27. Pancer told Kubilis Bruno Mickus had found out about the union and fired Pancer. (How Pancer got the message is not clear in the record. I credit Bennie Mickus' assertion that he did not talk to Pancer. Although subpoenaed by the General Counsel, Pancer and Green did not appear at the hearing.) Although not scheduled to call in for an assignment until the next day, Kubilis called the terminal immediately, reasoning that, since he and Pancer had come to work for Respondent together and Bruno knew they were buddies, the same fate was in store for him. He reached Bennie Mickus. Bennie told him he was not supposed to call in until Wednesday because there were no auctions until then. When Kubilis hung up he told Pancer he did not think Bruno had found out about himself because Bennie had not told him he was fired. However, about an hour later Bennie called back and gave Kubilis the message. Kubilis said he would have to see somebody about the situation. Bennie said, "Do what you have to do."

A little later that afternoon Kubilis managed to reach Bruno Mickus at the terminal by telephone. Bruno told him he was fired for busting up his truck. Kubilis said, "That's not the reason, Bruno, and you know that."

Bruno said, "Yes, it is."

Kubilis said, "I'm going to have to see a lawyer and get the National Labor Board [sic]."

Bruno said, "You don't run my [obscenity] company. You don't get no union in here. You go to whoever you like and nobody going to run my [obscenity] company." After a

few seconds of argument with Kubilis, Bruno repeated that nobody was going to run his Company, either Kubilis or a union or the Labor Board.

Bennie Mickus gave his father's message to Jones when Jones went to the terminal on May 27 to go to work. Jones found the gate padlocked. He eventually managed to attract Bennie's attention. Jones asked Bennie where everybody was. Bennie said everybody had quit on him. Jones laughed and said he knew better than that, nobody is going to up and quit a job. He asked Bennie what had really happened. Bennie said, "We had some trouble and I had to lay off a bunch of men." Jones asked the reason. Bennie said, "Lack of work and other reasons you are aware of." Bennie told Jones he was among those laid off.

Mrs. Howell returned to work on Tuesday June 3. Bruno Mickus asked her why she had failed to come to work on May 27. Mrs. Howell explained that she had stayed home that day because she understood she was supposed to and the rest of the week because Bennie had told her to remain home until further notice. After repeated calls, she had finally reached Bennie at the Mickus home on Sunday and he had told her to report on June 3. Bruno told her he had discharged Kubilis, Pancer, Green, and Jones on the day she failed to show up (i.e., May 27) because of union problems. He said they wanted a union and he did not. He said it was necessary to keep a union from coming into the terminal, that if one did he would burn the place down. He made a long statement as to various reprisals he would resort to if a union did get in, including cutting her pay and ending her car allowance. He asked her if she wanted to quit at that time. She said she wanted to go home and discuss it with her husband first.

The next day Bruno Mickus told Mrs. Howell a Board investigator was coming to the terminal on June 12 to investigate the charge in this case. He told her it would be necessary to give the investigator reasons for the discharge of the four men which had nothing to do with union activities. Mrs. Howell was present in the office when the investigator interviewed Bruno on June 12. At one point Bruno left the room. The investigator asked Mrs. Howell if anyone had ever approached her about a union. She told him about Bruno asking her to check with Deal and Johnson. She did not tell him about Bruno's admission to her that he had discharged Kubilis, Pancer, Green, and Jones for engaging in union activities. When Bruno returned to the room, the investigator asked him to confirm what Mrs. Howell had told him. After the investigator left, Bruno reprimanded her.

Mrs. Howell quit on June 28. The record does not indicate why. (The termination of her employment is not alleged as an unfair labor practice in the complaint.)

Respondent utilized the services of 7 drivers to transport 48 used cars in the week ending Saturday June 1, 1974 (i.e., the week in 1974 in which Memorial Day fell). The figures

for the preceding week are 9 and 216. The figures for the following week are 9 and 266. The figures for the week ending May 31, 1975, are 7 and 67. (The discharge of Kubilis, Pancer, Green, and Jones on May 27 reduced Respondent's complement of drivers from 11 to 7.) The figures for the preceding week are 11 and 131. The figures for the following week are 7 and 187.

In 1974 Respondent transported a total of 7,090 used cars. The comparable figure for 1975 is 6,244.

### B. Analysis and Conclusions

The facts set forth above, especially Bruno Mickus' admission to Mrs. Howell, a witness with no stake in the outcome of this case, on June 3 that he had discharged Kubilis, Pancer, Green, and Jones for talking about organizing his employees, can lead to only one conclusion. That Respondent's motive was a discriminatory one within the meaning of the Act is made more—not less—obvious when a look is taken at its defense.

Bruno was asked by his counsel, "Why did you dismiss four employees?" He replied, "Because they had the best records [i.e., for termination], they were like a temporary employee and they were living far away and I never believed they would stay with me." Counsel then undertook to ask Bruno about the four men individually, starting with Pancer. To the question "Why did you lay Mr. Pancer off?" Bruno replied, "Pancer was drinking, but I could never touch him. He was a very violent [man] and he told me, he repeated, [obscenity] you. What am I to do, take a hammer and hit him in the head or something? I walk off."

A digression at this point developed the information about Kubilis, Pancer, and Jones having been taken on around the first of April at a time when they were laid off elsewhere. They still lived some distance from the terminal in New Buffalo. They were unlike Green in that Green had started working for Respondent on January 1. (Apparently Green was also different in that he was not a laid-off new-car hauler.)

Mention of Green caused counsel to return to his effort to elicit from Bruno his reasons for terminating each man with the question "Why did you lay Mr. Green off?" Bruno replied, "Because he refused to go to work. He stated on Fridays he can't work and Saturdays he can't work and Friday is our Thursday and Saturday [is our Friday], and I kept on asking the guy and asking the guy and I lose my nerves and let him go, and had to because he won't listen to me."

Counsel then returned to Pancer to elicit details about his drinking and information about alleged damage to Respondent's equipment. This led in turn to statements that Kubilis and Jones were also guilty of mistreating equipment, thus:

Q. All right. Now, did you have any problems with Mr. Kubilis?

A. Mr. Kubilis first I warned Kubilis twice because he was running my truck with low oil, one time six quarts and one time a gallon. So, one time a cylinder pump went out and this was strictly negligence and I did warn Kubilis and then I called two weeks before he was laid off and he came into work and I didn't see him at that time, I don't recall, but he had a fight with somebody somewhere and I can't recall exactly, I think it was his ex-employer and he went to work and worked for a half a day and he said he couldn't work anymore because his leg was getting infected and then he went to the doctor and didn't show up for a week, if I recall.

Q. Now, what about Jones, did you have a problem with Jones?

A. Jones, the first week he worked, he came back with a mud flap missing. I said, what happened to my mud flap and he said [obscenity] you Bruno, and wouldn't even talk to me. And I knew right away I feel a real bad thing, and if a boss can't ask what a man is doing with the trucks, we can't work together.

Q. Did you have any other problems with him?

A. Yes, I think two weeks later he came back with two loading ramps with the legs missing and nobody was in the premises and he took another two ramps and the man came to me and said, Bruno, somebody stole my two ramps, and I remember my legs and ramps and they're on Jones' truck. But I was so scared to tell him because of his fighting, he will kill me, and the guy was so violent and I waited for business to slow down and let him go and I take a lie detector test on it.

In summary, Respondent contends it decided to lay off four drivers the Memorial Day week for economic reasons and selected Kubilis, Pancer, Green, and Jones without regard to seniority for the plethora of reasons stated by Bruno Mickus. Neither the economic nor the individual aspect of its defense stands up under close inspection. As to the latter, Respondent does not contend that the distance any of the men had to drive to get to work interfered in any way with his attendance. Nothing occurred just prior to May 27 to make Bruno think that Kubilis', Pancer's, and Jones' quitting to go back to their jobs with unionized new-car haulers was imminent. All of the drinking, attitude, and damage to equipment incidents related by Bruno predated May 27 by significant intervals of time. His complaints about each of the men started soon after the moment he hired him, yet he did nothing to get rid of any of them until he learned of the threat of unionization. In Pancer's case, in fact, he fired the man some 2 weeks before May 27 and rehired him immediately.

As to the economics of the situation, Respondent introduced records for 1974 and 1975 from which I have abstracted the figures set forth in the last two paragraphs in the section above entitled "Facts." It also introduced a comparison of 1974 and 1975 as to cars it had hauled for one customer, a Chicago dealership named Car Credit Center. The latter was intended to support the contention that the loss of this important account contributed to the decision to lay off for economic reasons. It does show that, in the April-August period in 1974, Respondent transported 413 cars for Car Credit Center while, in the same period in 1975, it hauled only 117. However, the exhibit does more for the prosecution than the defense, for it shows that Respondent was still hauling for Car Credit Center as late as the week ending June 21. (I attach no significance to the figure 9 after the date 8-23-75, the only numeral in a long string of ciphers beginning with the week ending 6-28-75, and running through the week ending 8-30-75. Car Credit Center's calling on Respondent to haul some cars for it once in that period would not make it a customer again in any sense relevant to this issue.)

The main thrust of Respondent's economic defense is that Memorial Day week was a slow one for it in 1975 and that its records prove it managed to accomplish its work with seven drivers just as it had in 1974. However, the parallel between 1975 and 1974 does not go far enough to help Respondent. In 1975 it terminated the employment of drivers. There is no basis in the record for a finding that it did the same thing in 1974. Bruno Mickus was asked to consult his records and state whether he had laid off drivers in the comparable 1974 week when business dipped as it did in 1975 or had simply not used as many drivers at that time without terminating anyone's employment. He could not recall.

Respondent's asserted reason for terminating employees on May 27 is as much of an afterthought as its reasons for selecting Kubilis, Pancer, Green, or Jones rather than someone else. They all smack of Bruno Mickus' statement to Mrs. Howell on June 4 that they had to think of some nondiscriminatory reasons to give to the Board's investigator. Before he received the charge in this case, Bruno had never heard of the National Labor Relations Board or the National Labor Relations Act. I find, therefore, Respondent violated Section 8(a)(3) and (1) of the Act on May 27, 1975, by discharging Alexander Kubilis, Patrick Pancer, Winfred Green, and James Jones for engaging in union activities.

The complaint also contains two allegations of independent violations of Section 8(a)(1). The first is predicated on Mrs. Howell's conversations with Bob Deal and Chuck Johnson during Memorial Day week. Since Mrs. Howell acted on Bruno's express instructions, thus becoming Respondent's agent, and since, in the absence of the sort of safeguards set up by the Board in *Struksnes Construction*

*Co., Inc.*, 165 NLRB 1062 (1967), the questions she put to them about their and other employees' union activities were inherently coercive, I find Respondent illegally interrogated employees about "participation in, activities on behalf of, and sympathies for" a union.

The other 8(a)(1) allegation is that, "[o]n or about May 27, 1975, Respondent, by its agent Bruno Mickus, threatened its employees that it would sell all of its trucks if said employees selected a labor organization to represent them for the purposes of collective bargaining." The General Counsel conceded there is nothing in the record to support it.

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

#### CONCLUSIONS OF LAW

1. Respondent, 212 Auto Sales, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By discharging Alexander Kubilis, Patrick Pancer, Winfred Green, and James Jones on May 27, 1975, for engaging in union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.
3. By interrogating employees about their and other employees' participation in, activities on behalf of, and sympathies for a union, Respondent has violated Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. The allegation of the complaint that Respondent violated Section 8(a)(1) of the Act by threatening employees has not been sustained.

#### THE REMEDY

A cease-and-desist order, reinstatement and backpay for all four discriminatees, and the usual notice are required to remedy the unfair labor practices found. Backpay will be 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). James Jones was offered a job by Respondent and declined, and Winfred Green was rehired sometime after May 27. However, the record reveals nei-

ther the dates nor the precise terms of Respondent's offers. Whether they constituted offers of reinstatement sufficient to render new offers unnecessary to effectuate the purposes of the Act and their effect, if any, on the backpay due Green and Jones can be determined during the compliance stage of this case.

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

## ORDER <sup>2</sup>

Respondent, 212 Auto Sales, Inc., New Buffalo, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for engaging in union activities.

(b) Interrogating employees about their participation in, activities on behalf of, or sympathies for unions.

(c) In any 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 necessary to effectuate the policies of the Act:

(a) Offer Alexander Kubilis, Patrick Pancer, Winfred Green, and James Jones immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any earnings they lost, plus interest, as a result of their discharge on May 27, 1975.

(b) 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 backpay due under the terms of this recommended Order.

(c) Post at its terminal in New Buffalo, Michigan, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall 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 insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges Respondent violated Section 8(a)(1) of the Act by threatening employees.

<sup>2</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.

<sup>3</sup> In the event that this Order is enforced by a Judgment of a 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."

## APPENDIX

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

The National Labor Relations Board having found, after a hearing, that we violated Federal law by discharging employees for engaging in union activities, we hereby notify you that:

The National Labor Relations Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection

To refrain from any or all of these things.

WE WILL NOT discharge you for engaging in union activities.

WE WILL NOT interrogate you about your participation in, activities on behalf of, or sympathies for unions.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL offer Alexander Kubilis, Patrick Pancer, Winfred Green, and James Jones immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and we will make them whole for any earnings they lost, plus interest at 6 percent per annum, as a result of their discharge on May 27, 1975.

212 AUTO SALES, INC.