

**Airporter Inn Hotel and Service & Hospital Employees Union Local 399, affiliated with Service Employees International Union, AFL-CIO.** Case 21-CA-12418

December 16, 1974

## DECISION AND ORDER

Upon charges duly filed, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint and notice of hearing, dated March 11, 1974, against Airporter Inn Hotel (herein Respondent). The complaint alleged that Respondent has engaged in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and complaint and notice of hearing were duly served on the parties. Respondent filed an answer to the complaint, denying commission of unfair labor practices and requesting that the complaint be dismissed. On April 17, 1974, the Regional Director issued an amended complaint which, in effect, eliminated many of the Respondent's actions underlying the alleged 8(a)(1) violation.

Thereafter, the parties entered into a stipulation of facts and jointly petitioned the Board to transfer this proceeding directly to itself for findings of fact, conclusions of law, and order. The parties stipulated that they waived a hearing before, and the making of findings of fact and conclusions of law by, an Administrative Law Judge, and the issuance of an Administrative Law Judge's Decision, and that no oral testimony was necessary or desired by any of the parties. The parties also agreed that the original and amended charge, complaint and notice of hearing, amendment to complaint, the answer, and the stipulation of facts, including the exhibits attached thereto, constitute the entire record in this case.

On May 16, 1974, the Board issued its Order granting motion, approving stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel and Respondent filed briefs in support of their position.

The Board has considered the stipulation, including exhibits, the briefs, and the entire record in this proceeding, and hereby makes the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE EMPLOYER

Respondent is engaged in the business of operating a nonresidential hotel in Newport Beach, California. During the calendar year 1973, a representative year,

Respondent, in the normal course and conduct of its operations, derived gross revenue in excess of \$500,000 and purchased and received goods, materials, and supplies valued in excess of \$50,000 directly from firms located outside the State of California.

The parties have stipulated, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The parties have stipulated, and we find, that Service and Hospital Employees Union Local 399, affiliated with Service Employees International Union, AFL-CIO (herein the Union), is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE UNFAIR LABOR PRACTICES

##### A. Facts

On or about December 3, 1973, the Union filed an RC petition, seeking to represent certain housekeeping and maintenance employees of Respondent. During the ensuing organizational campaign, Respondent, on or about January 18, 1974, distributed a letter to its employees over the signature of Richard Duffy, owner of Respondent. The letter read as follows:

January 18, 1974

TO: ALL RESTAURANT, KITCHEN, BANQUET, HOUSEKEEPING, MAINTENANCE, BAR, AND FRONT DESK EMPLOYEES

I want to inform you of the attempts which will be made by a labor union to organize all the employees at the Airporter Inn. I also want to make our position clear at this time so you will be fully informed regarding all the issues involved in any decision by you regarding joining or not joining a union. The simple fact is that I am opposed to any union at the Airporter Inn.

Several weeks ago the Service and Hospital Employees Union, Local 399 from Los Angeles filed a petition with the National Labor Relations Board seeking to represent about thirty-two (32) maids, housemen, and maintenance employees. Our position is that no union should be allowed to organize our employees one department at a time and that all employees should decide.

The hearing before the National Labor Relations Board has been postponed to January 28th. I fully

expect that the union will make an intensive effort to sign as many of you as possible during the next couple of weeks. I strongly urge you not to sign any union authorization cards for the following reasons:

1. I have no respect for the Service and Hospital Employees Union, Local 399. I dealt with this union at the Jolly Roger and 399 was forced by our employees there to walk away empty handed.

2. This union, in the main, knows nothing about restaurant operations and is at the Airporter Inn at the request of the Hotel and Restaurant Employees Union which struck out with you recently.

3. This union, to my knowledge, never signs a contract without a union shop provision which requires that all employees be members of the union and pay their monthly dues in order to be able to work. This would force us to fire anyone who refuses to become a member of the union and pay dues. *I am opposed to this and do not believe I have any moral right to force any of our people to join any union to keep their jobs.*

Would our employees want me to force them into the union and pay dues against their wishes? I think most of you are opposed because you've told me so.

4. The only contract that this Service and Hospital Employees Union can or will agree to, regardless what it tells you, is the industry-wide Long Beach and Orange County agreement for hotels and restaurants. This includes the union shop and many other objectionable provisions to which I am opposed. This contract is not acceptable to me. Your benefits now are and will continue to be better without having this union force you to pay dues, initiation fees, assessments and fines over which you will have no say.

If the union were to get enough of you to sign union authorization cards and then win the election, it won't even negotiate with us but tell us to sign or else. The law gives me the absolute right to refuse to sign any labor contract not acceptable to me.

The "or else" means that if we cannot agree with the union, should it win the election, the only way it can enforce its demands is by calling the employees out on a strike.

I want you to know that, in the event of any strike or picketing, the Airporter is going to operate full blast. I would expect our people to continue working and I would hire other employees permanently

to replace the present employees who would refuse to cross any union picket line. The law gives us the right to do this and we would do it. We don't tell you this as any threat, but to make sure you are well informed. What is more, picketing in front of the Airporter would increase our business since the entire area is non-union.

What this boils down to is this: Refuse to sign any union authorization cards and avoid a lot of unnecessary turmoil. You will always do better with us without a union which can't and won't do anything for you except jeopardize your jobs. If you want job security and a good place to work under the best terms and conditions, reject the union.

Cordially yours,

Richard E. Duffy

Ten days later, the Union withdrew its petition and soon thereafter, on February 4, 1974, filed charges alleging that certain statements contained in the letter violated Section 8(a)(1) of the Act. A complaint was issued on April 17, 1974, in which only the statements contained in the last paragraph of the letter are alleged as violative of Section 8(a)(1).

#### B. Contentions of the Parties

General Counsel argues that the last paragraph of the Duffy letter violated Section 8(a)(1) in that it admonished Respondent's employees not to sign union authorization cards lest they place their jobs in jeopardy. In support of its position, General Counsel cites *Trojan Battery Company*<sup>1</sup> and *Robert Meyer Hotel Company, Inc., d/b/a Robert Meyer Hotel*<sup>2</sup> in which the Board found such statements to employees to be admonitions and thus violative of Section 8(a)(1). General Counsel points to specific phrases in the last paragraph—"Refuse to sign any union authorization cards" and "reject the union" as "imperative verb phrases couched in the nature of a command or directive, rather than declaratory phrases designed to express Respondent's views, advice, or opinion."

Respondent asserts in its brief that the statements contained in the last paragraph of the Duffy letter, far from being an order or admonition, amounted to no more than a mere suggestion or recommendation to the employees that it was in their best interest not to sign any union authorization cards. Such language is legitimate campaign rhetoric protected by Section 8(c) of the Act. Respondent distinguishes the *Trojan Battery* and

<sup>1</sup> 207 NLRB 425 (1973)

<sup>2</sup> 154 NLRB 521 (1965)

*Robert Meyer Hotel* cases on the basis that the remarks considered there occurred against a backdrop of independent and flagrant 8(a)(1) misconduct. Finally, Respondent argues in the alternative that should the Board deem the statements composing the last paragraph of the letter to be an order or admonition, such admonition would be *de minimis*, not warranting an 8(a)(1) finding.

### C. Conclusion

As the parties correctly point out, the Board's interpretation of Section 8(c) lies at the heart of this case. That section provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of the Act, if such expression contains no threat of reprisal or force or promise of benefit.

The precise scope of Section 8(c) is clearly established in its legislative history:

[T]his subsection is limited to "views, arguments, or opinions" and does not cover instruction, directions, or other statements which might be deemed admissions under ordinary rules of evidence."<sup>3</sup>

Our analysis of the instant case is, therefore, twofold: (1) are Respondent's statements "views, argument, or opinions" or are they instructions or directions and (2) if they are the former, do they contain any threat of reprisal or force or promise of benefit. For the reasons given below, we conclude that the statements in question are not instructions or directions, nor do they contain any unlawful threats or promises. Accordingly, we shall dismiss the complaint in its entirety.

In its letter of January 18, 1974, Respondent expressed opposition to the Union's organizing efforts and offered several reasons for its adoption of that position. One of the primary reasons advanced was the adverse impact which unionization might have upon the employees' job security, both in terms of union-security clauses and in terms of possible replacement during an economic strike. Such statements have long been held to be permissible campaign propaganda.<sup>4</sup> Indeed, the General Counsel makes no contention that they are improper.

In the final paragraph—the only portion of the letter

which is in dispute<sup>5</sup>—Respondent summarizes his argument as follows:

What this boils down to is this: Refuse to sign any union authorization cards and avoid a lot of unnecessary turmoil. You will always do better with us without a union which can't and won't do anything for you except jeopardize your jobs. If you want job security and a good place to work under the best terms and conditions, reject the union.

In our opinion, the phrases "Refuse to sign any union authorization cards . . . ." and "reject the union" when taken in the context of the entire letter do not constitute "instructions or directions" within the meaning of Section 8(c). If they stood alone as separate declarative statements they might well be deemed to be instructions or directions.<sup>6</sup> But they do not stand alone—they constitute clauses in two sentences whose overall impact is argumentative in nature. Unless the language in dispute is to be read entirely out of context, it seems to us that the only reasonable interpretation is the following:

What this boils down to is this: Refuse to sign any union authorization cards and [you will thereby] avoid a lot of unnecessary turmoil. . . . If you want job security and a good place to work under the best terms and conditions, [then] reject the union.

Such statements in our view constitute permissible campaign propaganda—not instructions or directions to employees to refrain from executing authorization cards.

While we agree with the General Counsel that Respondent's statements may well be characterized as "admonitions," we do not agree with his conclusion that all admonitions are unprotected by Section 8(c).<sup>7</sup> An admonition is a friendly warning or advice against fault or oversight.<sup>8</sup> As such it is more akin to a view, argument, or opinion specifically protected by Section 8(c) than it is to an instruction or direction.

In our judgment, Section 8(c) represents in part an attempt by Congress to permit employers to noncoercively persuade—but not to order—their employees to refrain from union activities. In the context of the in-

<sup>5</sup> Unlike our dissenting colleagues, we find it unnecessary to speculate whether the "litany of successive events predicted by Respondent" in pars. 3 through 6 of the Duffy letter constitutes an unlawful threat. Only the final paragraph of the letter was encompassed by the stipulation of the Board.  
<sup>6</sup> Cf. *Robert Meyer Hotel Company, Inc., d/b/a Robert Meyer Hotel*, 154 NLRB 521 (1965).

<sup>7</sup> To the extent that *Trojan Battery Company*, 207 NLRB 425 (1973), is inconsistent with the views expressed herein, it is hereby specifically overruled.

<sup>8</sup> Webster's Third New International Dictionary (1966) defines an admonition as "a gentle or friendly reproof, warning or reminder, . . . counsel against a fault, error, or oversight."

<sup>3</sup> H Leg His 1541 (1948)

<sup>4</sup> E.g., *Adco Advertising, Inc., d/b/a Pennysaver and Ampress, Inc.*, 206 NLRB 497 (1973), *O'Neil Moving and Storage, Inc.*, 209 NLRB 713 (1974)

stant case, this means that Respondent was free to noncoercively convince his employees that it was against their interests to execute authorization cards, but could not order them to refrain from doing so. For the reasons stated above, we do not think that the final paragraph in Respondent's letter constitutes such an unlawful order.

Having determined that the statements in question fall within the ambit of Section 8(c), it remains to be decided whether they are nevertheless unlawful because they contain threats of reprisal or force or promise of benefit. We conclude that they do not.

As with the entire letter, the thrust of the final paragraph is purely informational in nature. It contains no promises of improved working conditions should the Union be defeated, nor does it threaten any repercussions should the Union be victorious. It merely expresses Respondent's position that the employees will be better served in terms of benefits and job security by rejecting the Union. Such is precisely the type of campaign propaganda which has become commonplace in our elections and which Section 8(c) was designed to protect.<sup>9</sup> Accordingly, we shall dismiss the complaint.

#### MEMBERS FANNING and JENKINS, dissenting:

Our colleagues have found a communication from Respondent to its employees telling them to refuse to sign union authorization cards or else face possible job insecurity "akin to a view, argument, or opinion" rather than an instruction or direction. They further conclude that the thrust of this "opinion" is "purely informational in nature" without any overtones of threats of reprisal. We disagree on both points.

At the outset, we find fault with our colleagues' two-step method of analysis. The first question, i.e., whether or not a statement by an employer is an unlawful direction or a lawful expression of views is not resolved in a vacuum. The protracted semantic analysis undertaken by our colleagues to determine whether the last paragraph of the Duffy letter constitutes a "direction," "admonition," or "expression of views" is not dispositive of the ultimate issue. The resolution of this question turns on the resolution of the second question; i.e., whether or not the statement contains the threat of reprisal.

The Board has, in the past, found orders, instructions, or directions by an employer to its employees not to sign cards to be coercive and thus violative of Section 8(a)(1) of the Act.<sup>10</sup> The obvious reason for this view-

point is the very nature of such an order, instruction, or direction. As noted above, the essence of a direction from an employer to an employee lies in the impression created in the mind of the employee that if he does not follow this direction, the employer will see to it that the employee will somehow suffer economically. The message need not be explicit; i.e., an employer need not couch his order or direction in terms of "Refuse to sign the union cards or else I will . . ." On the contrary, the threat may be implicit. Thus, in *Robert Meyer Hotel*, the communication found by the Board to be coercive consisted merely of an instruction not to sign anything coupled with statements to the effect that the employer had a "no-union policy," the union could not benefit the employees, and the employer, not the union, paid the wages.<sup>11</sup> Even though the employer never specified in that case what kind of retaliation it would take if the employees signed the cards, the Board perceived an implied threat violative of Section 8(a)(1).

Turning to the case at bar, while the last paragraph of the Duffy letter may, arguably, appear as harmless campaign rhetoric when read in isolation, it is highly coercive when read in the context of the entire letter and, by any objective analysis, takes on the appearance of a threat. Again we are presented with the same familiar litany of successive events predicted by Respondent if the union is certified: (1) the Respondent will be faced with excessive and unrealistic demands by the union (i.e., a union-security clause) (2) to which it is morally opposed and therefore cannot agree; (3) the union, to enforce its demands, will inevitably strike, (4) which in turn will lead to the strikers losing their jobs to permanent replacements. The Board has time and time again condemned such unwarranted predictions, almost identical to those contained in the Duffy letter, as veiled threats which tend to coerce employees in the exercise of their Section 7 rights.<sup>12</sup>

As the complaint in this case is specifically limited to the last paragraph of the Duffy letter, we cannot, and indeed do not, assert that our colleagues should have made conclusions as to the legality of any of the language in the preceding paragraphs of the letter. Suffice it to say that given the coercive nature of these earlier

<sup>10</sup> See *Robert Meyer Hotel*, 154 NLRB 521 (1965), *Trojan Battery Company*, 207 NLRB 425 (1973)

<sup>11</sup> *Robert Meyer Hotel*, *supra* at 523

<sup>12</sup> *Four Winds Industries Inc.*, 211 NLRB 542 (1974), *Glacier Packing Co., Inc.*, 204 NLRB 597 (1973), *Tommy's Spanish Foods*, 187 NLRB 235 (1970) Our colleagues cite *Adco Advertising, Inc.*, 206 NLRB 497 (1973), and *O'Neil Moving and Storage, Inc.*, 209 NLRB 713 (1974), as examples of the Board's approval of language similar to that contained in the Duffy letter. However, in those cases, the Board specifically noted an absence of an adamant refusal by Respondent to consider a union-security clause. In the instant case, however, Respondent reiterates three times that it is "morally" opposed to the union-security clause and finds it unacceptable. Such a clear expression of anticipatory refusal to bargain over a union-security clause has been recognized by the Board to run afoul of the Act. *Four Winds Industries, supra*.

<sup>9</sup> We see nothing in any portion of the Duffy letter—including Respondent's claim that it has a moral objection to union-security clauses—which would support our colleagues' claim that the letter constitutes "a clear expression of anticipatory refusal to bargain over a union-security clause . . ." Most people have a moral objection to violence. This does not mean, however, that they would refuse to defend themselves when their personal security was placed in jeopardy.

paragraphs, the last paragraph, with its special emphasis on "avoiding unnecessary turmoil" and "job security" can be evaluated in its true perspective: Employees are left with the clear message that if they sign the union cards, they will set in motion a chain of deleterious economic events, triggered by Respondent's own adamant refusal to bargain with the union over a key subject of bargaining, which will inevitably result in employees losing their jobs.<sup>13</sup>

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<sup>13</sup>This sense of inevitability is heightened by Respondent's exaggeration of the scope of the union-security clause sought by the Union Respondent, in its letter, claims that the clause, if agreed to, would force employees to pay assessments and fines. Such an interpretation of a union-security clause, clearly a misstatement of law as the Board noted in *O'Neil Moving and Storage, supra*, lends an unwarranted aura of unreasonableness to the Union's demands, and thus reinforces the impression held by the employees that a vote for the Union will result in loss of work.

In *Tommy's Spanish Foods, supra* at 235, we regarded such a message by management as "calculated to make employees look upon collective bargaining as a one-way street leading to unemployment." These words are singularly appropriate here. The threat contained in the last paragraph of the Duffy letter clearly renders that paragraph an unlawful direction to employees not to sign the union cards; we would therefore find the 8(a)(1) violation.