

**Whitehead Oil Production Company and Willie B. Thompson, Jr. and Charlie Leon Whitehead and Alfred Tarver and Dewayne Tarver. Cases 23-CA-9148, 23-CA-9166, 23-CA-9166-2, and 23-CA-9212**

30 March 1984

### DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND DENNIS

On 22 September 1983 Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Whitehead Oil Production Company, Buna, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way."

2. Substitute the attached notice for that of the administrative law judge.

<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*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall modify the Order to provide for an affirmative expunction remedy. See *Sterling Sugars*, 261 NLRB 472 (1982).

### 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 has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any employee for concerted presenting grievances.

WE WILL NOT discharge any employee for refusing to cross a union's picket line.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Willie B. Thompson Jr., Charlie Leon Whitehead, Alfred Tarver, and Dewayne Tarver 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 any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WHITEHEAD OIL PRODUCTION COMPANY

### DECISION

#### STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter came to hearing before me on June 9, 1983. The complaint is based on charges filed by individuals Willie B. Thompson Jr., Charlie Leon Whitehead, Alfred Tarver, and Dewayne Tarver against Whitehead Oil Production Company (the Respondent). The allegations of the complaint, as amended, are that, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), the four charging individuals were discharged for failing or refusing to cross picket lines established by two labor organizations. The General Counsel further contends that Dewayne Tarver and Thompson were discharged for the additional reason that they orally presented a grievance about working conditions to Marvin Whitehead (the Respondent's president and no relation to Charlie Whitehead), which actions would constitute independent violations of Section 8(a)(1) of the Act. The Respondent admits jurisdiction but denies commission of any unfair labor practices. The General Coun-

sel and the Respondent have submitted briefs which have been carefully considered.

On the record as a whole, including my observation of the witnesses and upon consideration of the briefs submitted, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent is a Texas corporation which drills for and refines oil. It maintains an oil refinery and other related facilities in or near Buna, Texas. (During 1982 the Respondent also built some apartments in Buna, the construction site.) In the course and conduct of its oil operations in Buna, the Respondent annually purchases and receives products, goods, and materials valued in excess of \$50,000 directly from suppliers located outside Texas. Therefore the Respondent is an employer in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATIONS INVOLVED

According to the credible testimony of agents thereof, Local 2007, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Carpenters Union), and Local 450, International Union of Operating Engineers, AFL-CIO (the Engineers Union), are labor organizations in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Therefore, although denied by the Respondent, both Unions are labor organizations within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

As owner and president of the Respondent, Marvin Whitehead employs several classifications of employees. At the Buna refinery, his production superintendent is Jimmy G. Daniels and Mike Barley is a supervisor. At the apartment construction site the Respondent employed Bill Anderson as supervisor and one Buddy Eaves, whom Anderson described as his "foreman." Marvin Whitehead, Daniels, Barley, and Anderson are supervisors within the meaning of Section 2(11) of the Act. There is insufficient record evidence to conclude that Eaves (who did not testify) is a "supervisor" within the meaning of the Act. However, it is undisputed that Eaves was responsible for relaying orders by Anderson (and, of course, Marvin Whitehead) to the construction site employees.

Alfred (Cowboy) Tarver is 74 years old. He is related to the other Charging Parties in that he is the grandfather of Dewayne Tarver and Thompson, and he is the grandfather of Charlie Whitehead's wife. For several years the Respondent has employed Alfred Tarver to cut grass around the refinery, paint valves at the refinery and on oil leases in the area, and to perform other types of odd jobs. For this Alfred Tarver was paid \$175 per week, whether he worked a few hours or the full week. In fact, according to Marvin Whitehead, he continued to

pay Alfred Tarver the \$175 even when Tarver, for a few weeks in 1982, worked on a "union scale" job for another employer in nearby Beaumont, Texas, and, consequently, did no work at all for the Respondent. The other Charging Parties were also employed as laborers at or around the refinery, but got paid only when they worked.

From November 8, 1982,<sup>1</sup> to some time during the morning of November 22, the Carpenters Union maintained an area standards picket line on the Respondent's apartment construction site. Early in the morning of November 22, at the refinery, Supervisor Barley approached Thompson and Dewayne Tarver and told the employees to go to the apartment construction site to help put up plywood decking.<sup>2</sup> Tarver said nothing, but Thompson asked Barley if the Carpenters' picket was still on the site. Barley replied that he did not know. Thompson told Barley that if there was a picket on the site he would not cross it. Barley told Thompson to let his conscience be his guide. Barley then left. Thompson and Dewayne Tarver discussed the matter between themselves. Thompson decided to consult with Alfred Tarver; Dewayne Tarver decided to talk to Anderson at the construction office which is near, but not on, the apartment construction site. According to Dewayne Tarver, he asked Anderson what he and Thompson were supposed to be doing on the construction site. Anderson replied "pulling up plywood." Further according to Tarver he stated to Anderson:

I don't know about crossing that picket line down there, Bill. And he said . . . I got Union men down there on it and . . . I ain't had no trouble yet . . . . Either you cross it or go home.

Although he was led to state that he had told Dewayne Tarver to help police the area in preparation for putting the decking in place before it rained, Anderson did not otherwise dispute this testimony of Tarver.

Dewayne Tarver then went to the construction site. Tarver went into the work area<sup>3</sup> where he was told by Eaves to start picking up paper on the ground. Tarver refused, stating that he had been sent there by Marvin Whitehead to pull up plywood. Tarver also told Eaves that he and Thompson were going to talk to Marvin Whitehead about this assignment to the construction site.<sup>4</sup> Tarver then went outside the work area to wait for Thompson.

When Thompson arrived, he and Dewayne Tarver did in fact drive to the Respondent's office where they met and spoke with Marvin Whitehead.<sup>5</sup> The employees

<sup>1</sup> All dates are in 1982 unless otherwise specified.

<sup>2</sup> This "decking" was the plywood which supports construction felt and shingles on the apartment roof.

<sup>3</sup> Tarver was not asked if there was a picket on the job when he went into the work area.

<sup>4</sup> Since Dewayne Tarver had not then been to see Marvin Whitehead, his statement to Eaves, that Whitehead had instructed him only to pull up plywood, was necessarily false.

<sup>5</sup> Marvin Whitehead testified that he only spoke to Thompson that morning, and that conversation was by telephone. Whitehead's pretrial affidavit states that Dewayne Tarver and Thompson "came by" his

*Continued*

asked Whitehead if they were being assigned to the construction site as discipline for something they had done at the refinery. Whitehead replied that they were not being disciplined and the only reason for the assignment was that they were needed at the construction site. Nothing was said about picketing. The employees left the office and proceeded to the construction site.

When Dewayne Tarver and Thompson got to the construction site they observed a Carpenters Union picket line. Thompson went home rather than cross it; Dewayne Tarver went onto the site to work.

After 15 or 20 minutes, Dewayne Tarver was approached by Anderson. Anderson testified that at the time Tarver was just standing around; Tarver testified that at that moment he was holding a board while another employee nailed it into place. I credit Anderson. But what was said is more important than what Tarver was doing at that moment. According to Tarver:

Well, he called me down off the building and he asked me why wasn't I policing the area and picking up this paper, and I told him, I said, "well, Marvin sent us up here to pull plywood up." He said, "I done told you what you had to do. You didn't have to go up there and bother Marvin." And he said, "Why did you?" I said, "well, I wanted to see if we was being punished for something and sent off our regular job up here to pull plywood."

He said, "no, you [weren't] . . . I just needed you up here." He said, "you are fired for bothering Marvin and also Bubba [Thompson] and . . . Bubba is also fired for not showing up for work."

On cross-examination Tarver acknowledged that he told Anderson, as well as Eaves, that he was not going to pick up any paper. Further, it is to be noted that neither Dewayne Tarver nor Thompson testified that Marvin Whitehead told them that they were sent to the construction site only to handle plywood.

Anderson, an extremely evasive and forgetful witness, denied firing Dewayne Tarver at all. He testified that when he saw Tarver loafing, he told Tarver to "go home or back on the job where he was" if he would not do his assigned work. On direct examination Anderson specifically denied that he had told Tarver that he was fired for complaining to Whitehead. On cross-examination he did acknowledge that Eaves had told him that "Dewayne was not going to do what I had told him to do and went back to tell Marvin [Whitehead]." On cross-examination Anderson was further asked and testified:

Q. When you were talking to Mr. Tarver, did you ask him why he went to talk to Mr. Whitehead?

office. Whitehead attempted to explain the discrepancy by stating that "come by" is a southern vernacular expression for telephoning. The Respondent's counsel has not asked me to take official notice of such vernacular, and I do not. I credit Tarver and Thompson and find that the meeting was face to face in Whitehead's office.

A. I asked him why he didn't do the job that I gave him to do.

JUDGE EVANS: Answer the question. Did you ask him why he went to see Mr. Whitehead?

THE WITNESS: That was my answer. Wouldn't that be . . .

JUDGE EVANS: No, sir. That calls for a yes or no. Did you ask him why he went to see Mr. Whitehead?

THE WITNESS: Yes

BY MR. MASLANKA:

Q. You did.

A. Yes.

Q. You asked him the question, Why did you go see Marvin Whitehead?

A. Yes—instead of working, what he is supposed to be doing.

Anderson persistently denied telling Dewayne Tarver that he or Thompson was fired.

Dewayne Tarver left the construction site and met Thompson at Thompson's house. There he told Thompson that both of them had been fired. The two employees went to the Respondent's office in Buna that afternoon and collected the checks that were waiting for them. The checks had been marked "full" and "final."

Alfred Tarver testified that during the afternoon of November 22 he spoke to Marvin Whitehead at the Respondent's office:

A. Well, I said, Mr. Whitehead, I said, You may not know it, Marvin, but Bubba Thompson has got a union card in his pocket and he can't go through that picket line. He said, I don't care about that picket line. I got work up there for them to do and they didn't go across the picket line and do it.

And he said, Willie Thompson won't never work on none of my premises no more.

Q. Did he say anything else?

A. He says, he should have went through the picket line if he wanted to work for me, but he can't never work for me no more if he can't go through a picket line. He can't draw my money.

Q. Did he give a reason for why he allegedly discharged Mr. Thompson?

A. Nothing, only he wouldn't go through the picket line and work. All he said, he said they should have went over to the site where—they ought to have went, but they come to talk to him in place of going on over there . . .

Alfred Tarver presumably was referring to both Thompson and Dewayne Tarver when he testified that Whitehead said that "they didn't go across the picket line. . . ." Yet Dewayne Tarver never refused to cross the picket line. I believe that Alfred Tarver was thereby expanding on what Marvin Whitehead actually had said. However, even taking into account this exaggeration, Alfred Tarver was still more credible than Marvin Whitehead. When asked on direct examination if Alfred Tarver questioned the discharge of his grandsons, White-

head first attempted evasion by saying "not that I know of." When he advanced this testimonial subterfuge a second time on direct examination, I asked him what he meant. Whitehead then flatly denied any such discussion with Tarver. However, his pretrial affidavit plainly states that on November 22 Alfred Tarver did approach him and asked about the discharge of Thompson. The credible evidence is that Marvin Whitehead told Alfred Tarver that Thompson, but not Dewayne Tarver, was discharged for refusing to cross a picket line, but that both employees were discharged for approaching Whitehead at his office when they had been told to be at work at the construction site.

I further believe and find that Anderson, back at the construction site, had told Tarver that "Bubba [Thompson] was fired for not showing up for work." This was obviously a reference to Thompson's refusal to cross the picket line. I further believe and find, as Dewayne Tarver testified, that Anderson stated that he (Tarver), as well as Thompson, was fired for "bothering" Marvin Whitehead. As well as having a less credible demeanor than that of Tarver, Anderson's reluctance to admit mentioning to Dewayne the visit to Marvin Whitehead is telling. It demonstrates that the General Counsel had struck the nerve protecting the real reason for the discharge of Tarver. Anderson attempted to dilute the significance of his reluctant acknowledgement by adding that he asked Tarver why he had gone to see Mr. Whitehead "instead of working, what he is supposed to be doing." But in this attempt Anderson disclosed that he really objected to Dewayne Tarver's and Thompson's approach to Whitehead when, in his opinion, they should have been working.

In summary, Marvin Whitehead's attempt to deny that the office visit occurred, coupled with Anderson's attempt to evade admitting that he had mentioned the office visit to Dewayne Tarver, has led me to conclude that the discharges were precipitated by that office visit. It is undisputed that the employees' complaint to Whitehead concerned their assignment to the construction site, a term and condition of employment. Therefore, while Dewayne Tarver was decidedly insubordinate, he was not fired for that reason.<sup>8</sup> Therefore, I find and conclude that Dewayne Tarver and Thompson were fired for the presentation of a grievance to Marvin Whitehead, a plain violation of Section 8(a)(1) of the Act. Additionally, Thompson was fired for refusing to cross the Carpenters Union picket line, a violation of Section 8(a)(3) and (1) of the Act.

On December 1, the Engineers Union established a picket line at the Buna refinery. That day Alfred (Cowboy) Tarver and Charlie Whitehead were working, painting valves, on one of Respondent's oil leases about 3 miles from the refinery. According to Tarver, during the day he and Charlie Whitehead were approached by Jimmy Daniels and:

<sup>8</sup> Indeed, Anderson insisted at the hearing that he had not fired Dewayne Tarver at all. However, assuming, arguendo, that Tarver's insubordination played some part in the discharge, the Respondent has failed to show that he would have been discharged regardless of his protected concerted activity. *NLRB v. Transportation Management*, 103 S.Ct. 2469 (1983).

Q. What if anything did he tell you and what if anything did you say to him?

A. He said, Cowboy, I come to deliver a message. . . . Marvin called out to the office and told me to come over here and tell you to take your boy and go over there at the refinery and help Cecil back there in the back of the refinery.

I said, Jim, I can't do that. He says, I know it, Cowboy, . . . I had to give you the message. I said, now, Marvin knows that I have got a union card and I retired through the union, drawing a pension, and I can't go through that line, even if I didn't have.

He says, I know it and you know it too. [He] says, Let the boy go ahead cleaning on them valves, get in your truck and you go to the office and talk to Marvin.

Charlie Whitehead supported Alfred Tarver's testimony; Daniels was called by the Respondent but advanced nothing as a denial of the testimony of Tarver, whom I credit.

Alfred Tarver left the lease and went to the Respondent's office. There he met with Marvin Whitehead. Tarver testified that he told Whitehead that he could not cross the Engineers' picket line because he was collecting a union pension. According to Tarver:

THE WITNESS: Mr. Whitehead said, Cowboy, I don't care about that pension. I have got work out there. I says, I know it, Marvin. I says, I can't do that. Well, he said, if you can't go through that picket line, . . . will that other boy go through the picket line, Charlie Whitehead? I said, no, sir. Go get him.

JUDGE EVANS: Mr. Whitehead said go get him?

THE WITNESS: Mr. Marvin Whitehead says, go get Charlie and bring him over here to the office; meet me over there in 30 minutes and get you all's money. If you all can't cross the picket line, I don't need you. I said, well, okay. I will sure go get [him].

Tarver did seek out Charlie Whitehead and repeated that they both had been fired. The employees returned to the office where they picked up their checks from a payroll clerk.

Marvin Whitehead denied telling Alfred Tarver that either he or Charlie Whitehead was fired. Marvin Whitehead testified that, rather, Tarver approached him and stated that he would rather quit than cross the picket line. According to Whitehead, he responded, "that's your prerogative."

If one would credit Marvin Whitehead, the obvious question which arises is: Why would Tarver quit a job which paid \$175 a week where he worked 40 hours, 2 hours, or not at all? Respondent recognizes the problem and in its brief argues that, since Charlie Whitehead's father was the picket captain at the Engineers Union line, Alfred quit to keep peace with his son-in-law. I have no idea of the nature of the relationship between Tarver and his son-in-law. But, without more than such

empty speculation, I would not assume that any man would surrender such a sinecure in the interest of assuring familial fealty. That is to say, I discredit Marvin Whitehead.

As for Charlie Whitehead, the Respondent advances no reason, chimerical or otherwise, why he would quit rather than exercise his statutory right to join the Engineers' strike.

I find that joining the strike is what Charlie Whitehead and Alfred Tarver did and that this union activity got them fired by Marvin Whitehead. Accordingly, I conclude that by Whitehead's discharge of Alfred Tarver and Charlie Whitehead, the Respondent violated Section 8(a)(3) and (1) of the Act.

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

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent 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

Having found that the Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be required to reinstate Willie B. Thompson Jr., Charlie Leon Whitehead, Alfred Tarver, and Dewayne Tarver and make them whole for any loss of earnings which they may have suffered by virtue of the Respondent's unlawful discharges of them. Backpay shall be calculated in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 2007, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Local 450, International Union of Operating Engineers, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by discharging employees Willie B. Thompson Jr. and Dewayne Tarver because they concertedly presented grievances to Marvin Whitehead.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Willie B. Thompson Jr., Charlie Leon Whitehead, and Alfred Tarver because they engaged in the union activity of refusing to cross picket lines established by the above-named Unions.

On the basis of the foregoing findings of fact and conclusions of law and on the entire record in this proceeding, I issue the following recommended<sup>7</sup>

#### ORDER

The Respondent, Whitehead Oil Production Company, Buna, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for concertedly presenting grievances.

(b) Discharging any employee for refusing to cross a picket line established by a labor organization.

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

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

(a) Offer employees Willie B. Thompson Jr., Charlie Leon Whitehead, Alfred Tarver, and Dewayne Tarver immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of their unlawful discharges, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, on 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 order.

(c) Post at its place of business in Buna, Texas, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of said notice on forms provided by the Regional Director for Region 23, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

<sup>7</sup> If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>8</sup> If 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."