

**Pickett Industries, Inc. and United Paperworkers International Union, AFL-CIO.** Cases 15-CA-13903 and 15-CA-13048

November 23, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN  
AND BRAME

On July 10, 1998, Administrative Law Judge Keltner W. Locke issued the attached bench decision.\* The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and has decided to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

\* On July 23, 1998, the judge issued an Erratum to his decision. We will attach the transcript pages 290-303 referred to in item 2 of the Erratum. Items 1 and 3 are incorporated herein.

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Liebman would not rely on that portion of the judge's analysis of Keith Mason's testimony which discusses its supposed implausibility based on the assumption that a person who contrives a false reason for an unlawful discharge "knows enough not to blurt out evidence of his true intent." In her view, the credibility resolutions are amply supported by the record even without this speculation about the implausibility of certain testimony. In this regard, she observes that the judge specifically relied on demeanor and other factors in making credibility findings.

<sup>2</sup> Because a finding of an unfair labor practice would be cumulative and would not affect the remedy, we find it unnecessary to pass on the General Counsel's exception to the judge's dismissal of the allegation that the Respondent threatened employee Clyde Fuller with loss of his job on April 4, 1996. Member Brame would find no merit to the General Counsel's exception.

Member Liebman would find merit in the General Counsel's exception to the judge's dismissal of the complaint allegation that Supervisor Clyde Patterson unlawfully interrogated employee Clyde Fuller. In this connection, Member Liebman observes that the Board has found employer interrogations to be coercive when they are accompanied by unlawful threats. E.g., *Christie Electric Corp.*, 284 NLRB 740, 741 (1987). Here, the judge specifically found that during the same conversation in which Patterson questioned Fuller about a union meeting, Patterson unlawfully threatened Fuller with termination by stating that the Union "would end up costing all of them their jobs." In the context of this threat, Member Liebman would find that Patterson's questioning of Fuller would reasonably tend to interfere with, restrain, and coerce him in the exercise of his Sec. 7 rights, and, therefore, constituted an unlawful interrogation.

<sup>3</sup> We modify the recommended Order to comply with the Board's decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container*, 325 NLRB 17 (1997).

ORDER

The National Labor Relations Board orders that the Respondent, Pickett Industries, Inc., Vidalia, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with termination if they engage in activities on behalf of the Union.

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

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

(a) Within 14 days after service by the Region, post at its facility in Natchez, Mississippi, copies of the attached notice marked "Appendix B."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 1996.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX B

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.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection

<sup>4</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."

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with termination of employment because you engage in activities on behalf of the Union.

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.

PICKETT INDUSTRIES, INC.

*Charles Rogers, Esq.*, for the General Counsel.  
*Price Barker, Esq.*, for the Respondent.

#### BENCH DECISION AND CERTIFICATION

**[Corrections have been made according to an erratum issued on July 23, 1998.]**

#### STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on June 3 and 4, 1998, in Vidalia, Louisiana. After the parties rested, I heard oral argument, and on June 4, 1998, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision. The conclusions of law, remedy, and Order provisions, and notice to employees are set forth below.

#### CONCLUSIONS OF LAW

1. Respondent, Pickett Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

2. The Union, United Paperworkers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act, some time during the latter part of February 1996, by threatening its employees with termination because they aided or assisted the Union, as alleged in paragraph 7(a)(ii) of the complaint.

4. Respondent did not violate the Act in any other manner alleged in the complaint.

#### REMEDY

Having found that the Respondent has engaged in an unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B [omitted from publication].

In view of my findings that the Respondent did not discriminate against any employee, as alleged in the complaint, the remedy does not include any reinstatement or make whole provisions.

[Recommended Order omitted from publication.]

#### APPENDIX A

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#### AFTERNOON SESSION

(Time Noted: 1:55 p.m.)

JUDGE LOCKE: **On the record.**

The hearing will be in order.

First of all, I want to thank the parties for their patience; it took me slightly longer to put this bench decision together than I had expected it to.

And, also, I was advised by Concordia Parish—an official of the parish that we will need to vacate the hearing room that they have loaned us at 2:00 this afternoon. So I wanted to go ahead and read you the decision.

#### BENCH DECISION

This is the bench decision in the Case of Pickett Industries, Incorporated, which I will call the Respondent, and United Paper Workers International Union, AFL-CIO, which I will call the Union. It is issued pursuant to Section 102.35, subparagraph 10, and Section 102.45 of the Board's rules and regulations.

Respondent has admitted in its answer the allegations raised in certain paragraphs of the General Counsel's complaint. Based upon those admissions and the record as a whole, I make the following findings of fact.

The charge in Case 15-CA-13903 was filed by the Union on June 3, 1996, and served on the Respondent on or about June 4, 1996. On July 25, 1996, the Acting Regional Director of Region

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15 of the Board issued a complaint and notice of hearing in this case. Thereafter, on August 5, 1996, the Union filed an amended charge in this case and served a copy of it on the Respondent on August 6.

The Union filed a charge in Case 15-CA-13948 on June 20, 1996, and served a copy on Respondent on June 24, 1996. Cases 15-CA-13948 and 15-CA-13903 are the only unfair labor practice matters to be decided in this proceeding.

On September 25, 1996, the Acting Regional Director of Region 15 of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing which supercedes the earlier complaint in Case 15-CA-13903. I will refer to this later pleading as the consolidated complaint or, simply, as the complaint.

Respondent has admitted and I find that it is a Louisiana corporation with an office and place of business in Natchez, Mississippi; that during the 12 months ending June 30, 1996, its business operations performed services valued in excess of \$50,000 in states other than the state of Mississippi, and that at all times material to this proceeding, it has been an Employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

Respondent also has admitted that its General Manager, Justin Patterson, and its Chief Financial Officer, Sandra Morehart, who is now a Vice President of Respondent, are its

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supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. I so find.

Respondent has denied the allegation in Paragraph 5 of the complaint, that: "At all times material, the Union has been a labor organization within the meaning of section 2(5) of the Act," stating in its answer that it lacks sufficient information. The testimony of hearing establishes that the Board conducted

an election among the Respondent's employees, that the Union won the election and that the Respondent has engaged in collective bargaining with the Union. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Paragraph 9 of the complaint alleges that, "On or about June 5, 1996, the Respondent issued a written warning to employee Clyde Fuller." Respondent admits issuing such a warning to Fuller, but states it did so on June 9, 1996, not June 5. I find that Respondent issued this warning on June 9, 1996.

Now I will address the disputed allegations raised by the complaint. Paragraph 7(a) alleges that, "On or about the latter part of February 1996, Respondent, by Justin Patterson at its facility interrogated its employees about their Union membership, activities and sympathies and the Union membership, activities and sympathies of other employees."

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Clyde Fuller testified that sometime in February of 1996—that is, a few weeks after the Union won the election—he had a conversation with general manager Patterson. Fuller believed that another employee, Burlyn McLemore, was present. But McLemore did not corroborate Fuller's testimony. According to Fuller, the conversation began when Patterson asked him if he had had a good meeting. Fuller understood the question to refer to a Union meeting and told Patterson that it was very informative. I credit Fuller's testimony.

Fuller testified that, before the election, he had talked with people about the Union. Later, he became a member of the Union's negotiating committee. However, the record strongly indicates that the Respondent and the Union had not yet had a bargaining session when that conversation between Fuller and Patterson took place. The evidence falls short of establishing that Respondent definitely knew about Fuller's support for the Union at this time.

In deciding whether interrogation is unlawful, I am governed by the Board's decision in *Rossmore House*, 269 NLRB 1176, 1984, enforced under the name of *Hotel Employees and Restaurant Employees Union versus NLRB*, 760 Fed. 2d 1006, (9th Cir. 1985). In *Rossmore House*, the Board held, "The lawfulness of questioning by Employer agents about Union sympathies and activities turns on the question of whether under all circumstances the interrogation reasonably tends to restrain or

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interfere with the employees in the exercise of rights guaranteed by the Act."

In making such a determination, the circumstances may be evaluated under the frame work described in *Bourne Company versus NLRB*, 332 Fed 2d 47, (2d Cir. 1964). The following factors are relevant:

1. The background; that is, is there a history of Employer hostility and discrimination.
2. The nature of the information sought; that is, whether the interrogator appeared to be seeking information on which to base taking action against individual employees.
3. The identity of the questioner.
4. The place and method of the interrogation; for instance, was the employee called from work to the boss' office, and was there an atmosphere of unnatural formality?
5. The truthfulness of the reply.

In this case, the record does not show a history of Employer hostility or discrimination. The evidence also falls short of establishing that the interrogator was seeking information to use in targeting employees for retaliation. Although Patterson bears the title of General Manager of the Natchez facility, the record suggests that his position is one of middle management, although, at times, he also acts as a first-line supervisor.

Although the conversation took place at the Respondent's

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facility, it occurred casually. Patterson did not call Fuller into a locus of management and authority. And I presume Fuller answered truthfully. In all of these circumstances, I find that the question by Patterson was an off-hand comment and was not unlawfully coercive.

Paragraph 7(a)(ii) of the complaint alleges that, "On or about the latter part of February 1996, the Respondent, by Justin Patterson in its facility, threatened its employees with termination because they aided or assisted the Union." Fuller testified that during this same conversation, Patterson said that Respondent's owner, Mr. Pickett, told him that he would spend more money to keep the Union out, presumably meaning that the Company would spend more opposing the Union than the Union could afford to spend opposing the Company.

According to Fuller, Patterson said that there were only 16 [sic] employees in the Union, implying that they could not afford to pay sufficient dues for the Union to oppose the Company successfully. Fuller testified Patterson said that it would end up costing all of them their jobs and that he felt sorry for the employees. I credit Fuller's testimony.

And, additionally, I find that this statement is coercive and in violation of Section 8(a)(1) of the Act. It conveys both the meaning that collective bargaining would be futile and, also, that alliance with the Union could result in the termination of employment. I find that this statement

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interferes with, restrains and coerces employees in the exercise of rights conferred by Section 7 of the National Labor Relations Act.

Complaint Paragraph 7(b) alleges that, "On or about April 4, 1996, the Respondent, by Justin Patterson at its facility, threatened employees with termination because they aided or assisted the Union." On or about that date, Fuller had another conversation with General Manager Patterson.

This conversation took place in the Respondent's shop, where Fuller had brought in a forklift he had been operating, because of a problem with the brakes. Patterson came into the shop and asked Fuller if he were taking a lunch break. Fuller explained to Patterson that the brakes were bad. Fuller testified that Patterson replied that if Fuller were not willing to do his job, he had a number of non-Union people who would do it.

Fuller said in reply that he would drive the forklift, but that he would also complain to the safety director. According to Fuller, whose testimony I credit, Patterson did not require him to drive the forklift with the faulty brakes.

In analyzing whether a statement violates Section 8(a)(1) of the Act, the Board applies an objective standard. The fact that Fuller did not act as if he were coerced by Patterson's statement does not affect whether or not the statement constitutes an unfair labor practice. In applying an objective

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standard, however, I believe it is important to consider the total context of the statement.

This is not a situation in which employees contemplating an economic strike were told that if they ceased work, they could be permanently replaced. Rather, in a discussion of another matter, the supervisor interjected the comment about the Union, which seemed both gratuitous and a non-sequitur.

The comment certainly is oblique and, coming at the start of the Union's relationship with the Respondent as the employees' collective bargaining representative, it does sound of a somewhat ominous tone, which causes me concern. At the same time, I do not find that a fair reading of the words articulates a threat which violates Section 8(a)(1) of the Act, and, therefore, I recommend that this allegation be dismissed.

Paragraph 7(c)(i) alleges that, "On or about May 28, 1996, the Respondent, by Justin Patterson at its facility, threatened employees with termination because they aided or assisted the Union." Paragraph 7(c)(ii) alleges that, "On or about May 28, 1996, the Respondent, by Justin Patterson at its facility, threatened employees with unspecified reprisals because they aided or assisted the Union."

These allegations concern comments asserted to be made by Patterson at the time he discharged Keith Mason. I will discuss them in connection with Paragraph 8 of the complaint, which alleges that, "On May 28, 1998 [sic], Respondent discharged

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Keith Mason." Respondent admits discharging him on this date, but denies it acted unlawfully.

Mason was clearly the most obvious and active Union supporter. He was the only witness at the representation hearing before the National Labor Relations Board, and he was the Union's observer during the election. He also campaigned for the Union. I find that General Counsel has established both that Mason engaged in protected activities and that Respondent knew about those activities.

Patterson and Mason gave widely different accounts of the circumstances leading to the discharge. Patterson stated that he discovered Mason was asleep while on duty in his truck and discharged him for that reason. Mason testified that he was not asleep, but reading a newsletter. Thus, I must decide which testimony represents the truth.

Mason further testified that, when Patterson later came to the shop where Mason was working on his truck and terminated him, Patterson made the comments which are the subject of Complaint Paragraph 7(c). Mason testified that Patterson said, quote, "I'm going to have to fire you for sleeping on the job," and Mason said, "I wasn't sleeping on the job."

According to Mason, Patterson also said-and I quote—"You Union mother-fuckers think you have some power; I'm going to show you who has the power; You tried to get me fired, and I'm going to get you fired." Mason also quoted Patterson as

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saying that if Mason hadn't organized the Union, maybe things would have been different. Another witness, Robert Dobson, heard parts of this conversation, but not all of it. Dobson did not corroborate any of the statements alleged to be violative.

Those statements, if credited, certainly would violate the Act. Patterson denies making all of the statements alleged, and, thus, the case turns on credibility.

I've observed the demeanors of the witnesses carefully and also have considered all the circumstances and have decided not to credit Mason. Some of Mason's testimony sounded implausible. For example, he said that the Respondent used the two-way radio system to notify the driver when he had to make a pick-up and, since he hadn't been notified of an order, he was free to park his truck under a shade tree for awhile.

However, the Respondent's witnesses credibly testified that the radio system is used for unusual situations, not for routine dispatching. Moreover, the log which Mason had to fill out showed his last pick-up shortly after 12:00 noon, with no more activity that day. Patterson testified that he found Mason sleeping about 3:20 that afternoon.

If I believe Mason, then there is a gap of more than two hours which goes unexplained. However, there is another reason why I am reluctant to credit Mason's testimony: Clearly, the Government's theory involves the most clear-cut kind of pretext, what the mystery novelist would call a frame-up. Under the

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Government's theory, Patterson is claiming he caught Mason in an infraction which Mason did not commit and which Patterson knew that Mason did not commit.

At first glance, the timing of events might be consistent with such a setup theory. Thus, after supposedly discovering Mr. Mason asleep in his truck, Patterson promptly faxed to higher management other records which would show Mason in an unfavorable light.

Additionally, the witness Robert Dobson testified that he overheard the discharge conversation between Patterson and Mason, at least some parts of that conversation, and, during this interview, Patterson told Mason, in effect, that he could not reverse the decision to terminate Patterson cause instructions were coming from higher management. That certainly suggests the possibility that management was out to get rid of Mason perhaps because of his Union activity.

However, this theory leads to an inconsistency: If management was involved in a plan to discharge Mason for an infraction he did not commit, it would also have instructed Patterson to be very careful of what he said during the discharge interview. Similarly, if Patterson were calculating enough to fabricate a totally false story about Mason as a pretext for discharging him, he would also have taken care not to say anything which would link the discharge with an unlawful motive.

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By definition, a pretext is a false reason contrived to conceal a true but unlawful motivation. A person who realizes that he needs to have a pretext to cover up a wrongful act also knows enough not to blurt out evidence of his true intent.

A rational person bent on breaking the law would not concoct an intricate but plausible story about how Mason was lying asleep in his truck and then undo his cunning cover-up by making 8(a)(1) statements attributed to Patterson; it would make no more sense than the mystery novel in which the villain plotted a crime of premeditation and coldness of blood, but then, after the fact, waited for the police while holding a smoking gun in his hands.

Obviously, people do not act rationally at all times, and emotion may overcome judgment. However, if I am to believe Mason's testimony, that means accepting the theory that Patter-

son made up a wholly false story, which is an act of calculating and cunning and not of emotion.

Moreover, the record does not establish any evidence that there was a heated contest between the Union and the Employer, and it similarly does not establish that emotions were running high. And it further does not establish the necessary motivation for the link between the adverse action taken against Mason and Mason's protected activities.

For all these reasons, Mason's story does not have the ring of truth, and I do not credit his testimony. I find that the

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General Counsel has not made a prima facie case. I find that the events alleged in Paragraphs 7(c) and 8 did not occur. And I recommend that these allegations be dismissed.

Paragraph 9 of the complaint alleges that, "On or about June 5, 1996, Respondent issued a warning to its employee Clyde Fuller." The warning has been admitted as being issued on June 9.

Without dispute, the evidence establishes that the forklift Fuller was driving that day suffered tire damage. In particular, I credit the testimony of Robert Dobson, a mechanic with nine years experience, as well as formal training. He impressed me as a reliable and conscientious witness. He examined the damage caused to the forklift and found that it was extensive.

I find that Fuller drove the forklift even though he knew it had a flat tire and that this action caused damage to the rim of the forklift. I find that this damage cost the Company \$800.

Additionally, I note that Fuller did not have very much protected activity and find that the reason for the warning was the exasperation which Respondent's management felt at seeing a forklift abused in that way. It was the same sense of exasperation that I seemed to sense in Mr. Dobson when he testified as a mechanic regarding this equipment. In all of these circumstances, I recommend that the allegations in Paragraph 9 also be dismissed.

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I have been advised that we must leave this hearing room by 2:00 p.m. so that another meeting may be held by Concordia Parish, which has loaned the Board the use of its facilities here. And it is already after 2:00 p.m.

Upon receipt of the transcript, I will issue a certification of bench decision which will include an order, a remedy and a notice and the photocopy of the pages of the transcript that involve this oral decision. When the parties are served with this document, the time for filing an appeal will begin.

I really appreciate your courtesy and professionalism in conducting this hearing, and the hearing is closed.

MR. BARKER: Just on the record, I wanted to show that I returned the affidavit of Keith Mason.

JUDGE LOCKE: Very well.

And the hearing is closed.

**Off the record.**

**(Whereupon, at 2:15 p.m., the hearing was concluded.)**