A.P.F. Electronics, Inc. ***and*** **Corso Palenzuela.** Case 29-CA-8068

July 31, 1981

DECISION AND ORDER

On April 8, 1981, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] 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, A.P.F. Electronics, Inc., Queens, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

FINDINGS OF FACT

STATEMENT OF THE CASE

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me at Brooklyn, New York, upon an unfair labor practice complaint[1] issued by the Regional Director for Region 29, which alleges that Respondent A.P.F. Electronics, Inc.,[2] violated Section 8(a)(1) and (3) of the Act. More particularly, the complaint alleges that Respondent directed employees to cease engaging in activities on behalf of Local 327, Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC (herein called the Union or Local 327), placed the concerted protected activities of its employees under company surveillance, threatened to discharge employees and to place them under additional supervision in reprisal for their union and concerted protected activities, and denied bathroom privileges to the Charging Party in reprisal for his concerted protected or union activities. Respondent points out that it has long been an organized firm with good relations with the Union representing its employees, denies the specific conduct attributed to it, and asserts that Patrick Callendar, to whom the unlawful activity set forth in the complaint is attributed, was not a supervisor within the meaning of the Act until June 6, 1980, before which date much though not all of the unlawful activity set forth in the complaint took place. Upon these contentions, the issues herein were joined.[3]

[1] The principal docket entries in this case are as follows:

Charge filed herein by Corso Palenzuela, an individual, against Respondent on June 9, 1980; complaint issued by the Regional Director on July 17, 1980; answer filed by Respondent on August 5, 1980; hearing held in Brooklyn, New York, on March 2, 1981; briefs filed with me by the General Counsel and Respondent on or before March 30, 1981.

[2] Respondent admits, and I find, that it was a New York corporation which maintains a place of business in Queens, New York, where it is engaged in the service and repair of calculators and other related electronic devices which it manufactures. During the preceding year, it shipped from its Queens, New York, place of business directly to points and places outside the State of New York goods valued in excess of $50,000. Accordingly, Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Local 327, Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, is a labor organization within the meaning of Sec. 2(5) of the Act.

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent operates a shop in Queens where it services electronic calculators and other devices which it manufactures and has received back from customers for repair. At the time of the events in this case it employed about 35 people at this location, all of whom were represented by Local 327. Until June 6, 1980, Ronald Sartini was the manager of this shop. Patrick Callendar, whose status until that date is in issue, was second in command. On June 6, Sartini left the employ of Respondent and Callendar took his place as manager.

On or about March 14, 1980, Local 327 concluded a new collective-bargaining agreement with Respondent, replacing a previous agreement which had expired. The Charging Party, employee Jesus Ibarra, incumbent Shop Steward Bob Simmons, and Union Business Agent Lionel Otero were on the negotiating committee which concluded this agreement. Several months before the negotiations on this contract began, Sartini had occasion to speak with Palenzuela and Ibarra while they were in the men's room. Sartini had just discovered that one of the toilets had been broken. He asked these employees if they were holding a union meeting and accused them of being agitators who were trying to incite the other employees in the shop. Sartini denounced Ibarra as a troublemaker and called Palenzuela a politician. He complained to Ibarra that whatever Palenzuela contrived to do, Ibarra would go along with, and referred to Ibarra as Palenzuela's "henchman." He also told Ibarra not to use the bathroom or else he would be fired and would receive an unfavorable reference.

A short while before the commencement of negotiations, Palenzuela and Ibarra drew up a typewritten list of union proposals. They posted copies on the wall and circulated them throughout the shop, obtaining the signatures of about 20 employees in support of their demands. During negotiations, Respondent Secretary-Treasurer Martin Lipper inquired of the union negotiating committee who had circulated the list of union proposals in the

[3] Errors in the transcript have been noted and corrected.

shop and commented that he was going to start "cracking the whip." He was informed that all of the workers in the shop were involved in formulating these proposals and that no single individual was responsible.

About 6 weeks after the new contract was approved, Ibarra and Palenzuela circulated in the shop a petition directed to the Union which requested an election for shop steward. After receiving the petition in the middle of May, Otero asked Respondent for permission to conduct such an election on company premises. Permission was granted and an election was held on or about May 15. The incumbent steward, Simmons, was reelected; Palenzuela was also a candidate and received about 10 votes.

Palenzuela and Ibarra testified that both before the negotiations and before the shop steward election, they would talk from time to time with other employees concerning the proposals which were being circulated or about the forthcoming steward election. On several occasions, they were told by Callendar to stop politicking. On one occasion, Callendar told Ibarra that the Company was fed up with the trouble that was occurring and that it was going to "clean house." These instructions from Callendar were frequently made on occasions when Palenzuela was talking with Ibarra. Ibarra complained to Callendar that Simmons was campaigning for reelection as shop steward on company time and said that if there was a rule against talking among employees, it should be applied equally to all employees and not directed particularly to him and to Palenzuela.

Palenzuela credibly testified that Callendar frequently followed him to the bathroom, accused him of holding meetings in the bathroom, and threatened to fire him if he continued to do so. On June 6, 1980, Callendar's first day as shop manager, he suspended Palenzuela from work for a week. On June 9, Palenzuela filed an unfair labor practice charge, alleging harassment and an unlawful suspension. While the Regional Director did not find cause to issue complaint concerning the suspension, the complaint which he issued in this proceeding emerged from the other portions of the charge filed on that date.

On July 9, Palenzuela complained to his business agent that he was not allowed to make or receive any phone calls at the shop including emergency calls. Otero spoke to Callendar about this complaint and ironed out the problem. Late in the day, Callendar came to Palenzuela at his work station and criticized him for bringing a seemingly trivial matter to the attention of his business agent instead of taking it up directly with Callendar. He told Palenzuela that complaining to the Union would profit him nothing, that Callendar would decide how things would be run in the shop, and then told Palenzuela that, from that point forward, he would count Palenzuela's work[4] and would fire him if his work did not measure up to standard. He also told Palenzuela not to use the bathroom facilities thereafter.

Eventually, both Palenzuela and Ibarra quit their employment with Respondent. However, no suggestion has been made that these terminations in any way violated the Act.

[4] Palenzuela worked in the shipping department packing calculators which had been repaired and were being returned to customers.

II. ANALYSIS AND DISCUSSION

A. *The Supervisory Status of Patrick Callendar*

There is no dispute that, after June 6, 1980, Patrick Callendar, as shop manager, was a supervisor within the meaning of the Act. Accordingly, any acts and statements by him occurring after that date are legally attributable to Respondent. However, Respondent denies vicarious responsibility for any of Callendar's words and deeds before June 6, when he was employed as assistant shop manager. Before January 1980, Callendar was a bargaining unit employee and a union member. In December 1979, he wrote a letter to the Union in which he resigned as a member because he was going to become a supervisor. Until June 6, 1980, Callendar was paid a weekly salary of $280 in a plant where unit employees were hourly rated and were receiving wages ranging from $3.10 to $4.70 per hour. Upon his promotion to shop manager, his salary was raised to $336 per week. Callendar was second in command at the shop, received no additional compensation for overtime, and did not punch in and out on the timeclock. I credit testimony in the record that, during this period of time, Callendar hired some employees and suspended at least one. He could and did authorize employees to take time off and could adjust grievances, such as disputes concerning errors on timecards. He regularly assigned work to employees and was empowered to maintain discipline and order in the shop. Were Callendar not a supervisor within the meaning of the Act during the period in question, there would have been approximately 30–35 employees. This ratio is extreme and argues strongly that additional personnel were also supervisors. As Callendar was second in command, he could hire and fire, enforce discipline, grant time off, and adjust grievances, and as he was making an income which far exceeded the highest wages paid to bargaining unit personnel and bore the title of assistant manager, I conclude that he was at all times material herein a supervisor within the meaning of Section 2(11) of the Act.

B. *The Violations Alleged*

There is little doubt that both Palenzuela and Ibarra had long been regarded by Respondent as activists who posed a threat to the placid and tranquil relationship which existed in the shop between Respondent and the Union. Palenzuela, Ibarra, and the employees who followed their lead objected to what they felt was an excessively cozy relationship between Respondent and the Union. Without delving into the merits of their objection, it should be noted that they were unhappy about asserted failures on the part of the incumbent shop steward to press grievances in an aggressive manner. The record also reflects that, after 1-1/2 years of employment, Ibarra was receiving a wage rate under the union contract which was no higher than the statutory minimum wage. Whatever the reason for their discontent, it was clear that some employees were disenchanted with both the Company and the Union and that Palenzuela and Ibarra were regarded by Respondent as the spokesmen for this faction. For their efforts they were tagged by the former

plant manager with such epithets as "agitator," "troublemaker," "henchman," and "politician." By July 9, when several of the unfair labor practices alleged in this case took place, Palenzuela had confirmed Respondent's assessment of him as a troublemaker by filing charges with the Board. Ibarra was threatened with discharge on one occasion for his activities. Upon learning of the petition which he and Palenzuela circulated among employees in support of new collective bargaining demands, Lipper candidly stated at the negotiations that he would have to start cracking the whip. This evidence clearly establishes that Palenzuela and Ibarra were unfavorably regarded by Respondent and that their poor standing was the result of their in-house activities on behalf of dissident employees.

Callendar admits watching both employees when they went to use the men's room. I credit testimony that he repeatedly followed them to check up on their activities. He and his predecessor candidly stated that they suspected that they were holding union meetings at that spot. While management has the unquestioned right to insist that employees devote working time to work, it cannot indulge certain nonwork related activities of its employees, such as discussing sports during worktime, and single out other private on-the-job conversations for censure or prohibition. Nor can it insist that one candidate for union office confine his campaign activities on company premises to personal time while permitting free reign to his opponent to campaign at will throughout the shop. I credit the testimony of Palenzuela and Ibarra that such an uneven application of company-imposed restrictions was directed at them. Accordingly, this interference with their concerted protected and union activities violated Section 8(a)(1) of the Act.[5]

On July 9, Callendar confronted Palenzuela with the fact that the latter had contacted his union representative to voice a grievance about the making and receiving phone calls on the job.[6] Palenzuela had a right under the Act to lodge such a complaint with his business agent. When, as a result of this action, Callendar became piqued, threatened him with increased supervision and discharge, and then denied him bathroom privileges, he violated Section 8(a)(1) and (3) of the Act.

Upon consideration of the foregoing findings of fact and the entire record herein considered as a whole, I make the following:

[5] While there is testimony in the record that, during the winter of 1979-80, the Respondent was experiencing vandalism in its men's room, there was no basis for any suspicion that Palenzuela and Ibarra were responsible for this damage. Its surveillance of their use of the toilet facilities was long after the vandalism came to an end and was tied to their expressed fear that they were using this location as the site of "agitation" for improvements in the shop over and above what their Union was willing to fight for.

[6] Respondent attempted to establish that the Company in fact permitted Palenzuela to make and receive phone calls and hence that his complaint to Otero on this score was without merit. The fact that a grievance may be groundless does not in any way affect the protected right of an employee to bring it to the attention of his union representative, for the merits of a grievance in no way affect its character as union activity.

Conclusions of Law

1. Respondent A.P.F. Electronics, Inc., is now, and at all times material herein has been, an employer engaged in commerce and within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 327, Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying employees bathroom privileges in reprisal for their union activities, Respondent violated Section 8(a)(3) of the Act.

4. By the acts and conduct set forth in Conclusion of Law 3; by directing employees to cease engaging in the union activity of campaigning for shop steward; by keeping the union activities and the concerted protected activities of employees under company surveillance; and by threatening to discharge employees because of their union activities and their concerted protected activities, Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has committed unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. I will recommend that Respondent be required to post a notice advising its employees of their rights and of the results in this case.

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

ORDER[7]

The Respondent, A.P.F. Electronics, Inc., Queens, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Directing employees to cease engaging in the union activity of campaigning for shop steward.

(b) Keeping the union activities and the concerted protected activities of employees under company surveillance.

(c) Threatening to discharge employees and denying employees bathroom privileges because they have engaged in union activities or concerted protected activities.

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

[7] 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.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Post at its Queens, New York, shops copies in English and in Spanish of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by a representative of Respondent, 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.

(b) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[8] 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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT direct employees to cease engaging in the union activity of campaigning for shop steward.

WE WILL NOT keep the union activities or the concerted protected activities of our employees under company surveillance.

WE WILL NOT threaten to discharge employees and WE WILL NOT deny bathroom privileges to employees because they have engaged in union activities or in concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection.

A.P.F. ELECTRONICS, INC.