

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CTA ACOUSTICS, INC.

and

Cases 9–CA–39411–1,–2,–3,–4

UNITED STEELWORKERS OF AMERICA,
AFL–CIO–CLC

Kathleen A. Floth and Deborah Jacobson, Esqs.,
for the General Counsel.
William L. Hooth, Esq. (Cox, Hodgman & Giarmarco, P.C),
of Troy, Michigan, and *James Tomaw, Esq.,*
of Corbin, Kentucky, for the Respondent.

DECISION

Statement of the Case

JOHN T. CLARK, Administrative Law Judge. This case was tried in Corbin, Kentucky, on October 30, 2002. The charge in Case 9–CA–39411–1, was filed June 27, 2002.¹ The charges in Cases 9–CA–39411–2,–3,–4 were filed July 11. The complaint was issued September 16. The complaint alleges that CTA Acoustics, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees with job loss, and plant closure, by promulgating a rule prohibiting employees from discussing the United Steelworkers of America (the Union), on company property or during company time, by interfering with employees' union activities by removing union literature from tables in the employee break room/lunchroom, and by enforcing its solicitation and distribution policy selectively and disparately by prohibiting prounion solicitations and distributions while permitting antiunion solicitations and distributions in working areas during working time.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, produces fiberglass insulation at its facility in Corbin, Kentucky, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are in 2002 unless otherwise indicated.

II. Alleged Unfair Labor Practices

5 The allegations discussed below occurred in the summer of 2002 during a union organizing campaign at the Respondent's Corbin, Kentucky faculty. Additionally, at the beginning of the hearing counsel for the General Counsel moved to amend the complaint to include an allegation that the Respondent maintained a section in its employee handbook which further violated Section 8(a)(1) of the Act by threatening employees with the loss of their right to talk to management about work problems if they choose to be represented by a union.

10 The Respondent objected to the amendment contending that it was untimely and not factually related to the complaint allegations. The Respondent does not contest that the conduct alleged in the amendment occurred within 6 months of the original charges. The Respondent renews its objection in its brief. I find the objection without merit, and reaffirm my ruling. *Redd-I, Inc.*, 290 NLRB 1115 (1988).

15 The parties stipulated that the alleged offensive sentence is contained in the employee handbook that is given to all employees. The section is entitled "Union-Free Employee Relations," and states, among other things, "A union will charge you money to speak to the company for you. *You give up your right to talk to management about work problems.* Your dues are often paid to outsiders who do not work here and do not understand you or the company." (GC Exh. 2, emphasis added.) Only the emphasized sentence is alleged to be unlawful.

25 In support of this allegation counsel for the General Counsel cites *Economy Fire & Casualty Co.*, 264 NLRB 16, 19 fn. 7 (1982), which relies on *Sacramento Clinical Laboratory, Inc.*, 242 NLRB 944 (1979), for the proposition that a statement referencing employee loss of access to management is a misstatement of employee rights and an unlawful threat of loss of benefits. In *NLRB v. Sacramento Clinical Laboratory*, 623 F.2d 110, 112 (1980), the Ninth Circuit Court of Appeals denied enforcement in relevant part. Moreover, the court's decision was quoted with favor by the Board in *Tri-Cast, Inc.*, 274 NLRB 377 (1985). In *Tri-Cast*, the employer distributed a letter to employees stating, "We have been able to work on an informal and person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing." *Id.* The Board noted that Section 9(a) of the Act contemplates a change in the manner in which employer and employee deal with each other, as such, it is not a threat for an employer to advise employees of this change. See also *United Artists Theatre Circuit*, 277 NLRB 115 (1985).

30 In *Spring City Knitting Co.*, 285 NLRB 426 (1987), the Board reversed the administrative law judge's finding that the following statements to employees were threats of loss of benefits, in violation of Section 8(a)(1), and found that they were merely realistic accounts of the effects of collective-bargaining representation.

35 [O]nce a union is selected, we can no longer deal directly with you as an individual; our duty will be to deal only with your representative. When they win, you lose your right to deal with us directly. You lose your right to take your personal problems to [management]. . . . If you vote for the union, it does not mean that you get more; it means you have given up your right to speak for yourself and have given that right to the union.

40 *Id.* at 440.

Counsel for the General Counsel also relies on the statements contained in *Colony Printing & Labeling*, 249 NLRB 223, 224 (1980). Although that case was not specifically overruled in *Brunswick Food & Drug*, 284 NLRB 663 (1987), the Board adopted the administrative law judge's statement, after he cited *Colony Printing & Labeling*, above, that the "current Board, however, has held that such statements do not violate Section 8(a)(1) of the Act." *Brunswick*, above at 673; *Koons Ford of Annapolis*, 282 NLRB 506 (1986). It would also appear that this is the view of at least one current Board Member. *Mediplex of Stamford*, 334 NLRB No. 111, slip op. at 5 (2001)(Member Liebman participating). Accordingly, I find that the sentence contained in the Respondent's employee handbook, and set forth above, does not violate Section 8(a)(1) of the Act, and I recommend that paragraph 5(e) of the amended complaint be dismissed.

A. Allegations Concerning Shipping and Traffic Manager Ron Partin

Paragraph 5(a) of the complaint alleges that about June 26, Supervisor Partin threatened an employee that the Respondent would close its facility if the employees selected the Union as their collective-bargaining representative.

In support of this allegation, employee Leland Farris testified that sometime in June he was told by a coworker to report to Partin's office. Partin, an admitted supervisor, is the shipping and traffic manager and the immediate supervisor of Farris. After Farris entered the office, Partin closed the door and told him that he had heard rumors about a union. He said that the Company president had invested \$10 million in the Company but that currently all plans for expansion and growth were on hold because of the Union. Partin stated that if the Union came in the president would withdraw his money and jobs would be lost. Leland Farris creditably testified that he had attended a union meeting the previous evening and that he had signed an attendance sheet. He also testified that it was his belief that Partin summoned him to the office because he knew about his attendance at that union meeting. Because he believed that Partin would also talk to other employees who attended the union meeting, Farris told some of those employees what occurred in Partin's office. One of those employees was Carlene Farris, his former wife, who corroborated his testimony. Partin denies that he met with Leland Farris and that he ever made the statements attributed to him.

Leland Farris appeared to have the demeanor of a credible witness. In addition to his testimonial demeanor, he is an employee with 10 years seniority who appeared to harbor no animosity towards Partin or the Respondent. His testimony was corroborated, in part, by his former wife. I credit his testimony over Partin's denial and find that the Respondent violated Section 8(a)(1) of the Act when Shipping and Traffic Manager Partin threatened employee Leland Farris with loss of employee jobs and plant closure should the employees select the Union as their bargaining representative.

Carlene Farris testified that on the same day that Partin spoke to her former husband he asked her to come to his office. When Carlene arrived at Partin's office he was discussing vacation requests with Ira Gabbard, Carlene's crew leader, whom the parties stipulated was not a supervisor as defined in Section 2(11) of the Act. After they approved her vacation request, Gabbard started to leave the office. Carlene asked him not to leave her with Partin. She testified that she made this request because she knew, based on the information from her former husband, that Partin was going to discuss the Union. Her request notwithstanding, Gabbard left and closed the door. Partin told her that the Respondent could not operate with a union and that the Respondent would have to shut the door and leave. Carlene stated that she wanted a union and left the office. That evening Carlene attended a union meeting and reported the incident to the union representatives.

Partin is Carlene's immediate supervisor. He stated that earlier in the day, and on a previous day, Carlene had expressed concerns about the ongoing union activity. He also stated that she wanted to know if her vacation request had been approved. Partin claims that Carlene came to his office to ask about her vacation request. After she was told that it was approved, and as Gabbard was about to leave, Partin alleges that Carlene stated in a loud, laughing voice, "don't leave me alone here with this guy, I don't trust him." He asked what she was trying to say and she said, "you might try and attack me." He assured her that was not the case. He stated that he believed that that she was joking. Partin claims that after he gave her assurances that employees would not lose their jobs, nor would the Company relocate because of the Union, Carlene, still in a jocular manner, left his office. Later that evening employee Ruby Pawula called Partin at home and related to him that Carlene, at a union meeting, had charged him with harassment. Partin claims that the next day he drafted a memo to the Respondent's president setting forth his version of the meeting the previous day with Carlene (R. Exh. 2)².

Employee Pawula is the shipping clerk and Partin is her immediate supervisor. Her office adjoins Partin's with a door between them. Pawula claims that she was at her desk when Carlene entered Partin's office and that she heard Carlene ask Partin and Gabbard to approve her vacation. After this was done, and Gabbard was about to leave, Pawula heard Carlene, in a loud, laughing voice, say, "don't leave me in here with him, I don't trust him." With that Gabbard closed the door behind him and, after about a minute, Pawula saw Carlene leave Partin's office "laughing and going on." That evening Pawula attended a union meeting where she heard Carlene tell a union representative about the incident, up to the point that the door was closed. Pawula claims that Carlene was acting "very irritated and aggravated" when she was telling the union representative about the incident. Pawula contends that because Carlene was "laughing and cutting up" both before the door was closed, and when she was leaving the office, Carlene was not upset about Gabbard leaving the office (Tr. 163). She admits that she did not hear what was said between Carlene and Partin after the door was closed. After leaving the union meeting Pawula called Partin at his home and told him what she heard Carlene tell the union representative.

Carlene Farris appeared to have the demeanor of a sincere and candid witness. I credit her testimony over Partin's. Pawula admitted that she circulated an antiunion petition and provided Partin with names of employees who attended union meetings. Although I credit her testimony, especially where it corroborates Carlene's version of the incident, I sense that Pawula exaggerated Carlene's jocularity. Partin certainly was aware that Carlene was "concerned" about something when she asked Gabbard to remain in the office (Tr. 181,195). Regardless, it is well established that the test of whether an employer's conduct violates the Act's prohibition against interference, restraint, or coercion is not whether the conduct succeeds or fails, but, rather, the objective standard of whether it may reasonably be said that the conduct tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959).

In addition to his demeanor, I also find Partin's testimony somewhat inconsistent. His avowed reason for speaking with Carlene was to alleviate her concerns, and yet when she

² Counsel for the General Counsel objected to the receipt of the memo, contending it is hearsay. I overruled her objection, which she renewed in her brief. Assuming, for the sake of argument, that the memo is hearsay "administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies." *Midland Hilton*, 324 NLRB 1141 fn. 1 (1997), *McCormick on Evidence* § 352 (4th ed. 1992). I reaffirm my ruling.

asked that Gabbard remain in the office, he did no more than assure her that he would not attack her. It would have been a small matter to ask Gabbard to remain in the office for the short period of time that he spoke with Carlene. I also assess no greater probative value to Partin's self-serving memo than I do to his testimony. Although he admitted writing the memo only after he knew about the charge, this fact, along with how he learned about the charge, i.e., his motive for writing the memo, is glaringly absent. Additionally, the memo contains phraseology that certainly anticipates additional confirmation. Thus, Partin writes that Carlene spoke in a voice "loud enough for anyone to hear in the next room." The "anyone" of course, being Pawual, who, only the previous evening had told him that she had heard Carlene's statement.

I credit the testimony of Carlene Farris, and I find that Partin's statement was a threat of plant closure which violates Section 8(a)(1) of the Act. *DMI Distribution of Delaware*, 334 NLRB No. 59, slip op. at 10 (2001).

B. Allegations Concerning Shift Supervisor Brenda Taylor

Paragraph 5(b) of the complaint alleges that about June 28, Shift Supervisor Brenda Taylor, in an employee restroom, orally promulgated a rule prohibiting employees from discussing the Union on company property or during company time.

Employees Tanya Grubb and Teresa Swafford testified about this incident. Grubb is a mold operator who has been employed by the Respondent since December 2001. Swafford is a line runner with over 18 years seniority. Swafford testified that around the alleged date, as she was going to the restroom, she passed Supervisor Taylor, who was going in the opposite direction, and she also saw Grubb enter the restroom. When Swafford entered the restroom she noticed that only the first stall, the one nearest the door, was occupied. The other two stalls were vacant. Swafford entered the middle stall and began discussing union matters with Grubb. The stall doors were closed. Both women testified that their conversation continued after exiting the stalls and while washing their hands. It was then that Taylor exited the third stall and, according to Swafford, looked directly at Grubb and said, "[I]t wasn't anything to her, but she couldn't have that kind of talk on Company time and Company property." Grubb's recollection is that Taylor said to her that Grubb "wasn't supposed to talk about the Union on Company time, and I wasn't supposed to talk about it in there at all." Grubb also testified that shortly thereafter Taylor approached her at her work station and said that she did not want to embarrass her in the bathroom, that she respected everyone's opinion, and that everyone had a right to their own opinion, but that Taylor would have stopped her even if she had been talking "bad" about the Union.

Taylor has a different version of the incident. She claims that the restroom was empty when she entered the stall furthest from the entrance. As she was preparing to leave the stall she heard talk about the Union. Upon exiting the stall, she saw Grubb and Swafford leaning against the wall. They looked at her "real funny" and she told them "they don't need to be talking about [the Union], they need to be back on their jobs," and Grubb and Swafford left.

The parties seem to agree that it is permissible for employees to discuss union activities concurrent with the legitimate use of the restroom. The Respondent, however, contends that Swafford and Grubb did not use the restroom for its intended purpose but were in there "wasting time," and Taylor did nothing more than order them back to work. The counsel for the General Counsel submits that regardless of whether the testimony of Swafford or Grubb, is more accurate, under either version, Taylor promulgated an overly broad rule restricting employees' union activities during their nonworktime. This issue, as did the last, turns on credibility. I find

that Swafford and Grubb appear to have the testimonial demeanor of forthright and candid individuals. The fact that their recollection of Taylor's statement is not identical does not detract from their credibility, nor does it hamper the finding of a violation. Additionally, both women are, as are all the General Counsel's witnesses in this proceeding, current employees, a factor that further enhances their credibility. *DMI Distribution of Delaware*, above at slip op. 9-10. I also find, in addition to Taylor's demeanor, that her memory of exactly what she said was less certain when questioned by counsel for the General Counsel (Tr. 151). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when it promulgated an overly broad rule restricting employees' union activities during their nonworktime. *Industrial Wire Products*, 317 NLRB 190 (1995).

C. Allegations Concerning Production Supervisor Don Chaffin

Paragraph 5(c) of the complaint alleges that about June 28, Production Supervisor Don Chaffin interfered with employees' union activities by removing union literature from the tables in the employee break room/lunchroom.

The Respondent stipulated that the lunchroom/break room is a nonworking area, which it maintains for use by its employees. The room consists of 24 tables, each with 4 seats. In addition to eating and drinking in the area, the Respondent allows employees to leave sale catalogs and books, as well as craft items, on the tables. The craft items are the object of raffles. A raffle is where employees, for a fee, write their names on a chance. The chances are pooled and the winning chance is selected in a random drawing. The chances are also allowed to remain on the tables. An outside cleaning service is responsible for cleaning the area (Tr. 108, 150).

Employee Polly Sue Kelly testified that during the morning of a day in late June, she and another employee, placed one union flyer on each of five or six lunchroom tables. Shortly thereafter, Supervisor Chaffin entered the room, read the flyers, and removed them from all the tables. She testified that she had never seen Chaffin remove anything from the tables before, and that he only removed the union literature. Chaffin removed the flyers at least an additional two or three times on that day and continued to remove the union literature for several weeks thereafter, until Kelly stopped putting it on the tables. Employee Grubb testified to having a similar experience. Grubb, however, on observing Chaffin collect the flyers asked him what they were. She testified that he said, "[S]omeone's trying to solicitate [sic] in the lunchroom." Chaffin denies making that statement and claims that he replied that he was "cleaning up." The Respondent argues that the union literature was part of the trash left on the tables, along with coffee cups and old newspapers, and was lawfully removed and disposed of by Supervisor Chaffin.

I find, based on their demeanor, that the witnesses presented by counsel for the General Counsel appeared to be more truthful and I credit their testimony. In addition to his demeanor, Chaffin's attempts, on cross-examination, to explain how he distinguished between "trash" which he removed from the tables, and sale catalogs, books, and raffle chances which he did not, was extremely tortured and convoluted (Tr. 120-125). His clearest, and most telling answer, was given on direct examination when he explained, "[W]e just felt like that [the raffles and books] was a good thing for them and we didn't want to bother it. You know, if they keep it in a neat and orderly fashion—if they just bring a bunch of junk in there, then we're going to tell the employee, you can't do this" (Tr. 116). I find, based on the credited testimony, that the Respondent, acting through its supervisor, believed that the union literature was akin to junk and that it was not a good thing to allow it to remain in the employee lunchroom/break room. "When the employee break area is filled with literature of all sorts, an employer's selective

removal of pro-union pamphlets conveys the unmistakable message of hostility toward unionization.” *Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075, 1077 (D.C. Cir. 2001), *enfg. per curiam* 332 NLRB No. 19 (2000). Accordingly, I find that the Respondent’s removal of union literature from the employee lunchroom/break room violates Section 8(a)(1) of the Act.

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D. Allegations Concerning Shift Supervisor Terry Roberts

Paragraph 5(d) of the complaint alleges that about June 28 the Respondent, by Shift Supervisor Terry Roberts, enforced its solicitation and distribution policy selectively and disparately by prohibiting prounion solicitations and distributions while permitting antiunion solicitations and distributions in working areas during working time.

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The facts are essentially not disputed. During a morning in late June, employee Tim Bradley went to the tool crib to draw gloves for members of his work crew. Shift Supervisor Terry Roberts and crib clerk Alberta Adams were at the window of the crib. Typically, Adams retrieves the requested items and Roberts completes the paper work. On this day, before passing the gloves to Bradley, Adams slid a clipboard containing an antiunion petition to him and said, “[Y]ou need to sign this.” Bradley read the petition and returned it, unsigned, to Adams. Shift Supervisor Terry Roberts testified that he thought the clipboard contained an antiunion petition but that he also thought that it was all right for Adams to ask Bradley to sign the petition.

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During this time period, the Respondent’s employee handbook prohibited solicitation or distribution of literature by employees during the working time of the solicitor or the employee being solicited. According, when Shift Supervisor Roberts allowed employee Adams to distribute the antiunion petition and to solicit Bradley’s signature, the Respondent was enforcing its solicitation and distribution policy selectively and disparately by prohibiting prounion solicitations and distributions while allowing antiunion solicitations and distributions in working areas during working time, and violated Section 8(a)(1) of the Act. *Reno Hilton*, 320 NLRB 197, 208 (1995).

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Conclusions of Law

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

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by threatening employees with job loss and plant closure, by promulgating an overly broad rule restricting employees’ union activities during their nonworktime, by removing union literature in nonwork areas, and by disparately enforcing its solicitation and distribution policy by prohibiting prounion solicitations and distributions in working areas during working time while permitting antiunion solicitations and distributions in working areas during working time.

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4. The unfair labor practices described above affect commerce within the meaning of Section 2(6), and (7) of the Act.

Remedy

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Having found that the Respondent has engaged in certain 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

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ORDER

The Respondent, CTA Acoustics, Inc., Corbin, Kentucky, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

(a) Threatening employees with job loss and plant closure should they select the Union as their bargaining representative.

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(b) Promulgating overly broad rules restricting employees' union activities during their nonworktime.

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(c) Disparately enforcing our solicitation and distribution policy by prohibiting prounion solicitations and distributions in working areas during working time while permitting antiunion solicitations and distributions in working areas during working time.

(d) 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.

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

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(a) Within 14 days after service by the Region, post at its facility in Corbin, Kentucky, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the 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 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 June 26, 2002.

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(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.

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³ If no exceptions are filed as provided by 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.

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⁴ 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."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

5 Dated, Washington, D.C. March 21, 2003

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John T. Clark
Administrative Law Judge

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