Potter Electric Signal Company *and* International Brotherhood of Electrical Workers, Local No. 1, AFL–CIO. Case 14–CA–11200

August 25, 1978

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On June 7, 1978, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

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, as modified below, and hereby orders that the Respondent, Potter Electric Signal Company, county of St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following as paragraph 2(b), reletter paragraph 2(b) of the recommended Order as 2(c) and reletter the remaining paragraphs accordingly:

"(b) Expunge and physically remove from its records and files any discharge notices and any references thereto relating to the discharges of Sarah Pegues and Peggy Koelling on February 20 and 21, 1978, respectively."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has in effect 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 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Charging Party excepts to the Administrative Law Judge's failure to order Respondent to expunge from its records any discharge notices and any references thereto relating to the discharges of Sarah Pegues and Peggy Koelling on or about February 20, 1978. As we have found in agreement with the Administrative Law Judge that those discharges were unlawful, we find merit in the Charging Party's exception and shall modify the recommended Order accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT require any employee to take part in an interview or meeting where the employee has reasonable grounds to believe that the matters to be discussed may result in his or her being the subject of disciplinary action and where we have refused to permit him or her to be represented at such meeting by a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights of the National Labor Relations Act, as amended.

WE WILL offer Peggy Koelling and Sarah Pegues immediate and full reinstatement to their former jobs or to substantially equivalent employment if such jobs no longer exist, without prejudice to their seniority or other rights or privileges enjoyed by them, and make them whole for any loss of pay they may have suffered by reason of our discharge of Sarah Pegues and our suspension and discharge of Peggy Koelling.

WE WILL expunge and physically remove from our records and files any discharge notices and any references thereto relating to the discharges of Sarah Pegues and Peggy Koelling on February 20 and 21, 1978, respectively.

POTTER ELECTRIC SIGNAL COMPANY

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, ADMINISTRATIVE LAW JUDGE: This case was heard before me at St. Louis, Missouri, on April 25, 1978, pursuant to charges timely filed and a complaint duly issued on April 6, 1978, wherein it is alleged that the Respondent-Employer violated Section 8(a)(1) of the Act by refusing to allow employees Peggy Koelling and Sarah Pegues to have a union representative present during investigatory interviews, and by discharging Peggy Koelling and Sarah Pegues as a result of said interviews. The Respondent duly denied the commission of any unfair labor practices.

On the basis of the entire record, the demeanor of the witnesses as they testified before me, and the post-trial briefs filed by the parties, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent, Potter Electric Signal Company, is a Missouri corporation with its principal office and place of business located in the county of St. Louis, Missouri, where it is engaged in the manufacturer, sale, insulation, and servicing of electric fire, burglary and other electric signal devices, and related products. During the year ending March 31, 1978,[1] a representative period, the Respondent purchased, and caused to be directly transported and delivered to its St. Louis County facility, goods and materials valued in excess of $50,000 from points located outside the State of Missouri. The Respondent is now and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

International Brotherhood of Electrical Workers, Local No. 1, AFL–CIO, herein referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[2]

On the morning of February 20, employees Sarah Pegues and Peggy Koelling were working on a tableveyor line when they got involved in an argument over their work. The argument only continued for a few minutes, but it became rather loud. Pegues told Koelling that anything she had to say to her she could say to her face, and Koelling replied that Pegues could kiss her ass. Pegues then struck or shoved Koelling with her hand.[3] At this point, Manufacturing Supervisor Joseph Ronzio came on the scene and shut down the line, told the two employees to punch out, restarted the line with two replacement employees in the place of Pegues and Koelling, and told Pegues to go to the cafeteria and Koelling to stand by his desk. He then left and went to Plant Manager Robert Vancil's office. I credit Pegues' testimony that she asked Ronzio, immediately after she was first told to go to the cafeteria, to have Shop Steward Schilly accompany her to the cafeteria, and that his only reply was that she was to go to the cafeteria. I also credit Pegues' claim that she later asked Ronzio where Schilly was as she entered the cafeteria with Ronzio and Vancil, and was again told by Ronzio to go into the cafeteria and sit down.[4]

As Ronzio left to get Vancil, Ms. Koelling shouted for Shop Steward Mark Schilly, who worked nearby. Schilly went to Koelling, and found her crying. He got no explanation as to what had happened from her, nor did he talk to Pegues about what had happened. Ronzio and Vancil came to the scene after Schilly arrived, at a time when Pegues, Schilly, and Koelling were walking towards the cafeteria. Schilly asked Vancil what was going on, and Vancil told him to "go back to work, Mark, go back to work." Schilly returned to his work station.[5]

Vancil and Ronzio met with Pegues in the cafeteria. Vancil asked her what had happened. She related the altercation she had had with Koelling, and Vancil told her that she was fired and she should punch out. She did and left. Koelling was then called into the cafeteria and Vancil questioned her as to what had happened. After receiving her explanation, he told her that she was suspended pending investigation. She was in fact informed by the Company's personnel manager the following day that she was discharged as a result of investigation.

I credit Schilly's testimony that after he saw Pegues and Koelling leave, he stopped Vancil and asked him what was going on, and received the reply that it did not concern Schilly. Schilly asked what it was that did not concern him, and said that he had just seen two people leave. Vancil rejoined, "It doesn't concern you."

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[1] All dates herein occurred in 1978.

[2] The facts set forth herein are based on a synthesis of the credited aspects of the testimony of all witnesses, the exhibits, stipulations of the parties, and careful consideration of the logical consistency and inherent probability of the facts found. Although I may not, in the course of this decision, advert to all the record testimony it has been carefully weighed and considered, and to the extent that testimony not mentioned herein might appear to contradict the findings of fact that evidence has not been disregarded but has been rejected as incredible, lacking in probative worth, surplusage, or irrelevant.

[3] Whether a blow or a shove was involved is of no consequence to the resolution of this case.

[4] Although Ronzio first testified that neither employee asked him to get the steward, he then gave evasive answers on cross-examination as follows:

> Q. (By Mr. Hunter) Mr. Ronzio, when counsel asked you if at any point Peggy or Sarah ever talked to you, do you remember saying you don't recall?
>
> A. Right.
>
> Q. Well, if you don't recall, then how do you know that neither one asked you for a union steward?
>
> A. Because I have never refused anyone from seeing one.
>
> Q. I did not ask you that. I said if you don't recall, how do you know they did not ask you for a union steward?
>
> A. O.K., I do not recall anyone saying anything to me as far as what I am saying is no, not to my recollection.
>
> Q. But they could have asked you for a union steward?
>
> A. If they had asked me, I would have known it.
>
> JUDGE WOLFE. What was that? I did not hear that, sir.
>
> THE WITNESS. If they had asked me, I would have known it, if they had asked for a union steward.

Vancil's testimony that to his knowledge neither Koelling nor Pegues asked for a steward is only relevant in assessing whether or not Pegues made the second request because he was not present at the time of the first request, and only establishes at most that he did not hear any such request and none was made to him. That Pegues did not make her second request to Vancil, rather than Ronzio, gives me no reason to vary my credibility findings because it is obvious that her second request was a followup to her first request made to Ronzio and was therefore quite naturally addressed to Ronzio. It is pure speculation to assume that Vancil was in such close proximity to Ronzio and Pegues that he would have heard the second request had it occurred. I decline to engage in such speculation.

[5] I credit Schilly's account because Ronzio does not recall seeing him there and concedes that he does not know if Schilly was there, and Vancil's testimony with respect to whether or not he talked to Schilly was extremely evasive, and incredible. I believe Schilly to be a much superior witness than Vancil on the topic of what was said to Schilly by Vancil. Schilly's version is corroborated by Pegues' testimony that she heard Vancil tell Schilly to go back to his work station because it was not a union matter and Vancil would take care of it. I am of the opinion that Schilly is probably more accurate in his testimony as to what Vancil actually said, but Pegues' testimony as to what Vancil said is not inconsistent with the tenor of Vancil's instructions to Schilly to go back to work, as recited by Schilly.

It is clear from the evidence that the cafeteria was customarily used as the place to investigate and administer discipline, and that the employees were aware of this.

It is well established that when an employee is called by his or her employer into an interview which the employee reasonably expects might result in discipline, the employee is entitled to have a union representative present upon request, and the Employer's refusal to grant such a request is violative of the National Labor Relations Act.[6]

Koelling did call for Schilly, and he responded to her call. As set forth above, Pegues specifically asked Ronzio to get Schilly. Schilly was enroute to the cafeteria with the employees when he was told by Vancil to go back to work. Vancil's testimony that he did not think it necessary to have a shop steward present during the interviews, because there was nothing involved concerning the collective-bargaining agreement or concerning union-company relationships, inferentially corroborates Schilly's testimony that after the two employees had been interviewed and left their jobs, he was told by Vancil that the fact that two people had left their work did not concern him. I shall make no effort to analyze Vancil's opinion in this regard to see how he arrived at it, but there can be no reasonable question regarding the simple proposition that a shop steward who has been speaking to employees engaged in a controversy, and then sees them taken into a room where discipline is administered, from which he is barred, has a very definite concern in assuring that employees' rights are protected. Similarly, it was certainly a valid concern of the employees that they be represented by a steward who may have been able to effectively intercede on their behalf and secure more lenient treatment from the Respondent. By barring Schilly from the interviews, Vancil effectively precluded the employees from exercising their right to be represented by a steward, which he later compounded by refusing to discuss the matter with Schilly on the ground that the employees leaving did not concern Schilly. In this connection, I note that even though Pegues had already been discharged, Koelling had not. Her status was still somewhat in limbo and the possibility yet existed that effective union representation may have prevented Koelling's discharge the following day.

I am convinced that the employees had reasonable fear of discipline when Ronzio took them off their jobs, caused them to punch out, and went to get Vancil. Koelling's call for Schilly clearly indicates her belief that the situation called for his presence, as do Pegues' specific requests for Schilly's presence with her in the cafeteria. That they were individually directed to proceed to the cafeteria, where they knew discipline had often been administered, and talk with Vancil and Rozio could only operate to intensify this fear.

When Vancil directed Schilly to return to his work station, this action effectively precluded the employees from having any representation in their subsequent interviews with Vancil, and rendered any further request from them for union representation in those interviews unnecessary by virtue of the fact that Vancil's act in sending Schilly away made it quite evident that union representation would not be permitted in the ensuing meetings.

The interviews were clearly investigatory and disciplinary in nature, including a discharge and a suspension. That Vancil may have later engaged in additional independent investigation of the conduct of Koelling which resulted in her discharge, does not lessen the impact of his actions on the employees' rights on February 20.

I do not credit Vancil's self-serving testimony that he had already decided to fire Pegues and Koelling before he talked to them because he understood that there was some company provision for automatic dismissal of employees engaged in a fight. There was no evidence of any such policy adduced, other than Vancil's rather tentative testimony about it, and it is reasonably inferrable that he had not made up his mind to discharge the two because he did not discharge Pegues until after he had asked her for the circumstances of the affair, and only suspended Koelling pending further investigation.

The Board has held that the collective-bargaining representative of employees has the right of a preinterview consultation with the employees in order to advise them of their rights to representation, and that a denial of this right to prior consultation is a denial of representation violative of the Act.[7]

I conclude that the barring of Schilly from the interviews with Pegues and Koelling is an even more serious intrusion upon the Union's right to represent its employees than that found unlawful in *Climax Molybdenum, supra.* Additionally, by barring Schilly from the meetings, the Respondent engaged in conduct specifically condemned by the Board in *Certified Grocers of California, Ltd.*, 227 NLRB at 1213, in the following words:

> Requiring a lone employee to attend a investigatory interview which he reasonably believes may result in a imposition of discipline perpetuates the inequality the Act was designed to eliminate and bars recourse to the safeguards provided by the Act.

In conclusion, I find that Vancil was not engaged in a mere ministerial or mechanical act as his testimony would seem to claim, but was conducting investigatory and disciplinary interviews as envisaged by both the Board and the Supreme Court, and that the Respondent violated Section 8(a)(1) of the Act by denying union representation to Pegues and Koelling during their interviews when they reasonably and correctly believed that those interviews might result in discipline.

The Respondent suggests that because grievances have been filed and are being submitted to arbitration, as the parties before me stipulated, that the Board may wish to defer to issue of the cause for the discharges to arbitration. Contrary to the Respondent's suggestion, deferral to arbitration in the instant case is not appropriate. *General American Transportation Corporation*, 228 NLRB 808 (1977).

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be

[6] *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977).

[7] *Climax Molybdenum Company, a Division of Amax, Inc.*, 227 NLRB 1189 (1977).

ordered to cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

Having found that the Respondent unlawfully required that employees participate in investigatory and disciplinary interviews without union representation, and pursuant thereto discharged both Pegues and Koelling [8] I shall recommend that the Respondent be ordered to offer reinstatement to their former position to, or substantially equivalent jobs if those positions no longer exist, to Sarah Pegues and Peggy Koelling, and make them whole for any loss of pay suffered by them as a result of the discrimination against them,[9] with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Florida Steel Corporation,* 231 NLRB 651 (1977).[10]

Conclusions of Law

1. The Respondent, Potter Electric Signal Company, is, and at all times material has been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local No. 1, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring that employees participate in employee interviews without union representation, where such union representation has been denied to them by the Respondent, where employees have reasonable grounds to believe that the matters to be discussed may result in their being the subject of disciplinary action, and such disciplinary action was actually imposed by the Respondent, the Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

I hereby issue the following recommended:

ORDER [11]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Respondent, Potter Electric Signal Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Requiring that employees participate in employer interviews or meetings without union representation, when such representation has been refused by the Respondent, when the employees have reasonable grounds to believe that the matters to be discussed may result in their being the subject of disciplinary action, and actually imposing such disciplinary action on employees.

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

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

(a) Offer immediate and full reinstatement to their former positions or, if such positions no longer exist to substantially equivalent positions, to Peggy Koelling and Sarah Pegues, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, in the manner set forth in the section herein entitled "The Remedy."

(b) Preserve and, upon 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 recommended Order.

(c) Post at the Respondent's place of business in the county of St. Louis, Missouri, copies of the attached notice marked "Appendix." [12] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by the Respondent's authorized representative, shall be posted by the 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 the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply with this Order.

[8] Although Vancil did not in fact discharge Koelling until the following day, but suspended her on February 20, I am persuaded that the Respondent's refusal of union representation of Koelling at the interview tainted not only the conduct of the interview but any investigation subsequently conducted by Vancil based thereon. Therefore, Koelling is entitled to reinstatement and the discrimination against her began on February 20, and continues until such date as she is offered reinstatement.

[9] Reinstatement and backpay is clearly an appropriate remedy in the instant case. *Certified Grocers of California, supra.*

[10] See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

[11] 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.

[12] In the event that this Order is enforced by a judgment of the 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."