Harold L. Fleenor, Jr., d/b/a 7-Eleven Food Store *and* Saul Arana, Ben Lagueruela, Seare Hagos, Johnny O'Hagan, Dawit Seyoum, Individuals. Case 5-CA-9376

May 9, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

On January 8, 1979, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, the Charging Parties filed exceptions and a supporting brief, and Respondent filed an answering brief to the exceptions.

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,[1] findings,[2] 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 complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Parties contend that the Administrative Law Judge committed reversible error by denying their motion for admission into evidence of certain documentary evidence regarding the inherent coerciveness and unreliability of polygraph tests. These documents were placed in the rejected exhibit file. Since the Charging Parties never actually submitted to the polygraph examination scheduled by Respondent and, therefore, the manner in which the polygraph examination was conducted is not an issue in this case, we find that the Administrative Law Judge committed no error in rejecting this documentary evidence because it was irrelevant.

The Charging Parties also contend that the Administrative Law Judge committed prejudicial error by granting Respondent's motion to quash a *subpoena duces tecum* requiring Respondent to produce documents showing the results of previous polygraph examinations of its employees and showing what actions Respondent took against its employees based upon these previous polygraph examinations. Since the undisputed testimony of the Charging Parties establishes Respondent's past practice of discharging employees who failed previous polygraph examinations and, moreover, the manner in which the previous examinations were conducted is not an issue in this case, we find that the Administrative Law Judge committed no prejudicial error in granting Respondent's motion.

[2] In adopting the Administrative Law Judge's Decision in this case, we do not rely upon his gratuitous observations therein regarding the date on which the charge was filed in this case and regarding the reliability of investigatory affidavits, as these comments have no bearing on our decision.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held in Washington, D.C., on November 16, 1978, on a complaint of the General Counsel against Harold L. Fleenor, Jr., d/b/a 7-Eleven Food Store, here called Respondent, or the Company. The complaint issued on June 2, 1978, upon a charge filed on April 7, 1978, by individuals previously employed by Respondent. The complaint alleges that by discharging five men Respondent violated Section 8(a)(1) of the statute. Briefs were filed after the close of the hearing on behalf of all three parties.[1]

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Respondent, a sole proprietorship, is engaged in Washington, D.C., in the retail sale of food and related items. During the preceding 12 months, a representative period, its gross revenues at this location were in excess of $500,000. During the same period it purchased and received at this location goods valued in excess of $10,000 sent to it directly from out-of-city sources. I find that Respondent is engaged in commerce within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *What Is the Question Presented?*

With respect to what happened—i.e., what are the pertinent facts on which a contention of legality is made—the record evidence in this case presents no serious problem. With respect to what legal arguments are advanced, or what theories of law are articulated to sustain the conclusionary elements of the complaint, there is ambivalence and double-talk by both the General Counsel and the counsel for the Charging Parties. In such situations the only way to write a coherent decision is to state what the facts are and then answer the question whether they prove a violation of the particular proscription of the statute set out in the complaint, in this instance Section 8(a)(1). As I see it, the question is simple and plain. May an employer, without violating the Taft-Hartley Act, discharge five employees, all standing before him and together refusing to take a polygraph test which the employer says will help him decide whether any of them are responsible for substantial thefts in the retail store? In my considered judgment, he may.

B. *What Happened?*

In its local food store Respondent has more than once found significant shortages, both in the till and on the shelves, when inventories were taken. For several years he had the clerk-employees take polygraph tests to be more

[1] A motion by the counsel for the Charging Parties to correct certain typographical errors in the transcript of testimony is hereby granted.

certain as to their statements of innocence. Several times he discharged employees in part relying upon the results of these tests.

In October 1977 an inventory brought to light once again a shortage of $5,000 or $6,000. On October 18, Fleenor, the owner, passed the word to the employees that on the 20th all of them would have to take the test. The employees did not like the idea; some had taken it once or twice, one even five times. Now they felt such a test invaded their "human rights." They also knew there had been discharges on earlier occasions when the shortages were followed by the test. On the 19th several of the men discussed the imminent test. On October 20—this was the day they all were scheduled to take the test—the men, five of them—met in the home of Saul Arana at 9 a.m. to talk about it. They hit on the idea that they would ask for a *quid-pro-quo* in return for submitting to the test. In fact, they thought of a number of things they could demand in return for submission including such matters as vacations, holiday pay, sick leave, health insurance, etc. From Arana's house they went to the store and in the basement met with Fleenor, the owner, and Robert Walsh, the store manager. By the time that meeting was over all five of the employees had been discharged.

Three of the employees then present, and no one else, testified at this hearing about what was said there. The talking was about both the Company's insistence that the employees submit to the polygraph test and the suggestion by the employees that their conditions of employment be bettered. It was a heated discussion and nobody was calm. The three men who testified were store clerks, and not experienced witnesses giving sworn testimony; understandably, therefore, there was a vagueness in their stories. But the substance of their overall recitations does reveal a direct and understandable picture. And two facts emerge with absolute clarity. The first is that the men were told they could not continue to work unless they took the polygraph test. The second is that they answered they would not, unless Respondent raised their hourly rate then and there to $6 per hour; they were then receiving $3.50 or $3.75.

It is with these two facts in mind that the conflicting contentions of the parties will best be appreciated. Respondent takes one position and one position only, and it is that the men were fired for refusing to take the test and for no other reason—period. The counsel for the Charging Parties starts by saying it was because they insisted, in concert, upon discussing their wages and other emoluments in employment. Other conclusionary theories follows this one. But the major portion of this brief, is devoted to an argument that an employer's demand that clerks—mere blue collar workmen as distinguished from corporate big shots—take such test is a *per se* unfair labor practice in violation of Section 8(a)(1) of this statute. This position is, of course, strictly at odds with the first—that the men were discharged because they wanted more money.

The General Counsel, speaking first via his complaint, alleges the men were fired because of their "protected concerted activities . . . by presenting to Respondent . . . a list of demands concerning their wages," but "in connection with Respondent's request that they submit to a polygraph examination." There is an ambiguity here. Does it mean that absent this employer's insistence upon these tests, whatever happened would have fallen short of an unfair labor practice? The confusion is compounded, in the case as a whole, when the General Counsel, as the first step in his post-hearing brief, expressly disavows the Charging Party's contention that a test of this kind *per se* constitutes an unfair labor practice. I read this as admission that when an employer discharges a single employee for refusing to take a polygraph test he does not violate this statute. In the interest of clarity, I asked the General Counsel, in the course of the hearing, whether it was his contention that when an employer discharges a group of employees who together refuse to take such a test—i.e., when they do so in concert—he commits an unfair labor practice. He refused to answer the question. This brief, therefore, in total essentially reiterates the first contention of the Charging Parties, that the men in fact were discharged because they spoke in concert in demanding raises.

Analysis and Conclusion

I find it a fact, on the total record, that Respondent discharged these men only because they refused to take the polygraph test. The week following the discharges the men walked the sidewalk in front of the store distributing leaflets to the public, asking them not to patronize the place. The leaflets disparaged the store because of its inflated prices, its excessive profits, its unhealthy and dangerous conditions, the poor quality of its products, and the unsatisfactory and inadequate compensation paid employees. The last paragraph, and the most revealing of all insofar as this case is concerned, reads:

> AND TO TOP IT ALL OFF—we the employees are forced to submit to a polygraph test every time there is a monetary or inventory discrepancy, regardless of how many times we've taken it before; as a matter of fact one of us has had to take it *five different times!* The way the store accounts for its merchandise has always been questionable, so when an inventory shortage was reported in mid-October and another polygraph test was suggested, we the employees rallied together and refused to go, citing not only that most of us have gone through it before, but also that it is a cruel thing to be put through. In addition, if you pass it all you receive for your trouble is a pat on the back and an apology 'for doubting you.' *For refusing to take the test and for putting up a united front, we were fired.* [Emphasis supplied.]

This was late in October 1977, a few days after the events in question. The charge, saying the dismissal constituted a violation of Section 8(a)(3), was not filed until April 7, 1978, almost 6 months later, and was therefore clearly an afterthought. Who could know better than the employees themselves what happened in the basement that day? They were there, and their written statement at the time of the events is even more reliable than any investigatory affidavit ever produced. Their own concurrent statement decides the factual issue underlying the whole case.

When Manager Walsh, on October 20, came to the basement of the store to meet with the employees as they had requested by telephone, the first thing he did was point to each one in turn and ask was he or was he not going to take

the test, and each man answered "no."[2] Walsh's immediate response was there was nothing else to talk about. Fleenor, the owner, said the same thing.

The men started talking about their economic demands, but the managers would have none of it. They refused to consider such matters, or even to talk about them, until such time as the men gave an unconditioned yes to the test requirements. The men kept trying to turn the conversation into the subject that they preferred, while Walsh and Fleenor persisted in keeping the discussion focused upon the question of the test. Unable to change the subject to their liking—and knowing, of course, that the matter of the test was what had brought them there just before the testing was scheduled to take place—the men caucused in the corner. The managers gave them time to do this, hoping they would agree to take the test. Now the employees, seeing they were failing in their multiple *quid pro quo* demands, decided a single one might be achieved. They decided to settle for a straight hourly raise only—to $6 per hour. Again the managers responded only by demanding to know would they take the test. Again, from O'Hagan's testimony: "Basically, the same pattern continued. The whole issue was whether or not we will go to take it, why aren't you going to take it—so on and so forth."

It was a distortion of the story for the employee witnesses to try to say that the managers changed the course of the discussion. It was they, instead, who attempted to avoid the very point of the meeting, and it was no more than just another way of repeating their negative position on the heart question of whether or not they were going to yield to the directions of management that they take the test. And in the end, as all five of the men went up the stairs and out to their cars to leave, the manager followed, still pleading that they not leave, but stay and take the test. From the testimony of the employees: "We got up and walked up the stairs. Sonny [Fleenor] and Bob followed. We got out to the car and Bob followed us out. Bob said—where are you guys going? We need you." "We all got up and Sonny told us he wouldn't be needing us anymore. We walked upstairs out to the car. Bob followed us out and asked us why—What are you guys doing? You are crazy. Why are you doing this? Why don't you take the polygraph. We didn't say nothing, got in the car and took off."

The basic contention that this record proves the men were discharged because they advanced demands for more money, is only one of the factual props in the Charging Parties' brief that has no support whatever in the evidence received. It is not true that the Company dreamed up the notion of having the tests made only as a retaliatory device to counteract and squelch a revealed concerted activity aimed at getting raises. Not only did the witnesses admit they were told of the October shortage as the reason for the programmed investigation, but they also said this was pure continuation of past practice. There is not the least indication of the men having made common cause, let alone alerting management to such conduct, toward demanding economic improvements before they were faced with the immediate order to take the test. It will not do for the brief to stress colorfully the Company's financial successes now and then, to belittle the last raise given the men, to hint—with no proof whatever—that management well knew these tests would not help locate a culprit or prevent future shortages. Some employees were not satisfied with the raises given 2 months earlier, but this is hardly proof of concerted, or union, activity. Absent proof that the test technique was in fact used as a union-busting device, the cases cited in the brief are inapposite.

There are too many fancied ideas set out in the brief to justify discussion of them all. One would find Respondent guilty in part because it came forward with no affirmative explanation of why, having learned of the meeting of the five employees, it decided to administer the test "at that particular time." But Arana, the main witness in support of the complaint, said the date was set on the 18th, and that the employees first gathered in his house thereafter as a result of setting the date!

Back to the beginning. I find nothing in the Charging Parties' brief supportive of the flat statement that a polygraph test, demanded by an employer, is a *per se* unfair labor practice. Whether or nor such a requirement is a nice thing for a company to do, I do not intend to debate. Is it constitutional? Is it true there are moves afoot here and there to outlaw such tests? These considerations are irrelevant to the legal question raised by this complaint. I suppose one could advance the contention that while a single man could be discharged with impunity in these circumstances, a group, together insisting on having things their way in the shop, would be "protected" because of their togetherness. This argument is not made in this case. By his refusal to answer the examiner's question at the hearing the General Counsel in effect disavowed that idea altogether. As to the counsel for the Charging Parties, he does not distinguish, in his extended brief, between one or more men on the question of the legality of the test. The so-called concerted refusal in the case at bar therefore really need not be considered here. Were this argument made, I would find it without merit.

A polygraph test is a condition of employment, and this is what Fleenor was reminding the employees about when he scheduled the October 20 tests. Cf. *Medicenter, Mid-South Hospital,* 221 NLRB 670, 678 (1975). It was not an innovation; not only had it been a practice over the years, but the employees well knew this to be so. It was also a reasonable thing to do in the light of the recently discovered shortage, and the history of shortages in this store. *American Oil,* 189 NLRB 3 (1971). There is absolutely no evi-

[2] From the prehearing affidavit of Benjamin Lagueruela, who also testified at the hearing:

> Next, Walsh asked each of us if we would take the test. He pointed at each of us individually and asked us if we had any objection to taking the test. I said that I would not take the test and that if he knew who it was, why should we take the test. All of us indicated essentially that we objected to taking the test. At that point, Walsh made some statement that indicated to me that if we did not take the test that we would be discharged.

From the testimony of John O'Hagan, also a witness:

> We met downstairs. Saul [Arana] had his outline of what he would discuss with Sonny and Bob [Walsh]. Bob did most of the talking and Sonny sat in the corner. As soon as Saul started to bring out some of these things we had outlined, Bob stopped him and asked us if we were going to take the polygraph. We said no, and then he started to point to everybody—Are you going to take the polygraph, are you going to take the polygraph, are you going to take the polygraph? All around the circle. We said no. He kept saying—why aren't? You have to go. We have to find out who is stealing. And so on and so forth.

dence of illegal motive in Fleenor's decision to have these particular tests taken at that time. In contrast, see: *National Food Service, Inc.*, 196 NLRB 295 (1972). There was no established exclusive majority bargaining agent, so the question of bypassing a union, or making unilateral changes in conditions of employment, could not possibly arise. Of all the cases mentioned in the three briefs filed, the most pertinent one is *John S. Swift Co.*, 124 NLRB 394 (1959), cited by Respondent, which holds that employees—whether one or more than one—may not dictate the terms under which they will work. There they insisted on disregarding the established overtime work practice, and persisted in working only those hours which suited them. They were fired for their insubordination. The Board said: "The employees' refusal to work overtime on March 11 constituted an attempt to work on terms prescribed solely by themselves. The Board and the Courts have squarely held that such a refusal to work provides the employer with valid ground for discharge."

I make the same finding here. In sum, I find that the evidence does not prove the complaint allegation that the discharge of these five men constituted a violation of Section 8(a)(1) of the Act. I shall therefore recommend dismissal of the complaint.

Upon the foregoing findings and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[1]

I hereby recommend that the complaint be, and it hereby is, dismissed.

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[1] 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.