

GABINO MARTINEZ, d/b/a RESTAURANT EL ALCAZAR
and UNION DE EMPLEADOS DE HOTELES, CAFES Y
RESTAURANTES DE PUERTO RICO.¹ Case No. 24-CA-412.
November 27, 1953

DECISION AND ORDER

On September 11, 1953, Trial Examiner Thomas N. Kessel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that he cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Gabino Martinez, d/b/a Restaurant El Alcazar, Rio Piedras, Puerto Rico, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Union de Empleados de Hoteles, Cafes y Restaurantes de Puerto Rico, or in any other labor organization of his employees, by discharging any of his employees or in any other manner discriminating against them with respect to their hire or tenure of employment, or any term or condition of employment, except to the extent permitted by Section 8 (a) (3) of the Act.

(b) In any other manner interfering with, restraining, or coercing his employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8 (a) (3) of the Act.

¹The Board has been administratively advised that the charging Union is now affiliated with the American Federation of Labor as Local 34918.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Benito Cotto Torres immediate and full reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered by reason of the Respondent's discrimination against him, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(b) Upon request, make available to the Board or its agents for examination and copying, all payroll, social-security, time, and personnel records necessary to determine the amount of back pay due and the right of reinstatement under the terms of this Order.

(c) Post at his place of business in Rio Piedras, Puerto Rico, copies of the notice attached to the Intermediate Report and marked "Appendix."² Copies of said notice, to be furnished by the Regional Director for the Twenty-fourth Region, shall, after being duly signed by Respondent, be posted by him immediately upon receipt thereof and maintained by him for a period of sixty (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.

(d) Notify the Regional Director for the Twenty-fourth Region in writing within ten (10) days from the date of this Order, of the steps he has taken to comply herewith.

² This notice is hereby amended by substituting the words "A Decision and Order" for the words "The Recommendations of a Trial Examiner." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

Upon a charge filed by Union de Empleados de Hoteles, Cafes y Restaurantes de Puerto Rico, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-fourth Region (Santurce, Puerto Rico), issued his complaint dated June 3, 1953, against Gabino Martinez, d/b/a Restaurant El Alcazar, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (3) and (1) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. Copies of the complaint, the charge, and a notice of hearing were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged that on or about January 29, 1953, the Respondent unlawfully discharged its employee, Benito Cotto Torres, because of his activities in behalf of the Union and has since refused to reinstate him, thereby violating Section 8 (a) (3) and (1) of the Act. The Respondent failed to file an answer to the complaint

in accordance with the provisions of Section 102.20, *et seq.*, of the Board's Rules and Regulations. At the hearing held in this proceeding, counsel appearing for the Respondent orally admitted all allegations of the complaint except those relating to commission of conduct violative of the Act.

Pursuant to notice, a hearing was held at Santurce, Puerto Rico, on June 24, 1953, before Thomas N. Kessel, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded all parties. After the hearing the General Counsel filed a brief with the undersigned which has been carefully considered.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an individual proprietorship, owns and operates at a single location in Rio Piedras, Puerto Rico, a restaurant, bar, bakery, fruit stand, soda fountain, and candy shop. In the operation of his business the Respondent purchases substantial amounts of materials, equipment, supplies, and ingredients which are transported and delivered from and through States and Territories of the United States to his place of business in Puerto Rico, and sells a substantial amount of food and food products in Puerto Rico. The parties stipulated that in the 12-month period preceding the hearing the Respondent purchased beer, liquors, food products, and supplies valued at approximately \$10,000, and during the same period gross receipts from operation of the restaurant and grill amounted to approximately \$10,000. The Respondent concedes, and it is hereby found, that he is engaged in commerce within the meaning of Section 2 (6) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Union de Empleados de Hoteles, Cafes y Restaurantes de Puerto Rico is a labor organization admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

A. The pertinent facts

Benito Cotto Torres was employed by the Respondent as a bartender in July 1952 and worked in that capacity until January 28, 1953. As noted, the General Counsel avers that Torres was discharged on January 29, 1953, because of his activities in behalf of the Union. The Respondent denies that he discharged Torres, and asserts that the latter had voluntarily quit in the face of a request that he change from the day to the night shift. To prove the allegations of the complaint, the General Counsel produced the following witnesses who testified thus:

Torres testified that he joined the Union in January 1953 and then proceeded to organize his fellow employees. On January 27 and 28 he solicited the signatures of these employees to a petition designating the Union as their collective-bargaining representative. On January 27 he procured 8 signatures to the petition, and on January 28 he obtained 5 signatures. Torres conducted these activities on the Respondent's premises upon the termination of his shift at 4 p. m. on each of the foregoing days by contacting employees leaving the day shift and those reporting for the night shift. On January 28 Torres submitted the petition with the 13 signatures to the Union. That evening, according to Torres, Roberto Martinez, the Respondent's brother and assistant in the business, remarked to employees working in the Respondent's kitchen, "Somewhere around here there is a union list. Anyone that signs that union list will have to go." Torres further testified that when he reported for work on the morning of January 29 he was apprised by fellow employees that Roberto had left word that he was not to start work before his (Roberto's) arrival. Torres then spoke to the Respondent about his brother's instruction, and the Respondent, speaking "with a strong inflection," replied "it was better if [Torres] left." Considering himself discharged, Torres complied with the Respondent's advice and left.

Mariano Santos Melendez, employed by the Respondent as a cook, testified that he had signed the petition at Torres' request. He was not certain as to the date on which he signed, but from the fact that his name is second on the list it would appear that he signed on January 27, the first day that Torres solicited signatures. Melendez further testified that the day after he signed the petition Roberto Martinez said "there was a list going around to gather signatures, and that that would be a list of those that were leaving."

Jose Luis Morales testified that he had formerly worked for the Respondent at his fruit counter, and that he also had signed the petition at Torres' request. During the evening of the day before Torres was discharged, Morales overheard a conversation at the Respondent's bar between Roberto Martinez and Angel Rosado, the Respondent's second-shift bartender. Rosado informed Roberto about the petition Torres was circulating. Roberto remarked "that anyone that signed that paper would have to leave."

Rafael Calo Hernandez, who works for the Respondent as a counter clerk, testified that he also had signed the petition at Torres' request. On the morning when Torres was allegedly discharged he arrived at the Respondent's premises and saw Torres sitting near the bar. As the Respondent approached, Hernandez heard him ask Torres what he was doing there. Torres replied that he was waiting for Roberto to tell him when to start working, whereupon the Respondent "told him that he could leave, and not to wait for Roberto, that he was telling him he could leave." Torres then left.

Regino Santos Melendez, who works for the Respondent as a cook, testified that he, too, had signed the petition at Torres' request.

The Respondent appeared as the sole witness to support the defense in this case. He testified that about 3 months after Torres was hired, and while Torres was working as a day-shift bartender, he requested him to take the night shift so that other employees who were pressing for day work could be accommodated. Torres refused because he was attending school at night. The Respondent's request that he cooperate by working the night shift on Saturday and Sunday was also turned down although this arrangement would not have conflicted with Torres' attendance at school. These requests were made several times but were always rejected. The Respondent testified that he renewed these requests on the morning of January 29, whereupon Torres advised him that he was leaving and departed from the premises. The Respondent did not see him again until the hearing. He further testified that he had not discharged Torres, that he regretted his leaving as he was his best employee, and in fact unsuccessfully sought to have him "come back."¹ The Respondent further testified that despite his repeated requests and Torres' refusals, he had never threatened him with discharge for his failure to cooperate.

As to the status of Roberto Martinez in his brother's business, various of the General Counsel's witnesses testified that he ordered them about, assigned them their duties, and that he was regarded by Respondent's employees as their boss. Thus, Torres testified that "when Gabino was not there [Roberto] acted and ordered as if he was Gabino. . . . he ordered me to go wherever I was needed, whether in the kitchen or in the soda fountain, and he told me so." Morales testified that while working at the fruit counter he took his orders from Roberto. Hernandez testified that Roberto was "our boss," and "he was the one who gave us orders, besides the owner, Gabino Martinez. He ordered us around. . . . he was the one who told us what our free days were, our days off, and things like that." The Respondent testified that he alone managed his multifarious business, spending almost 16 hours daily between the hours of 7 a. m. to midnight at his establishment. He specifically denied any grant of authority to Roberto over the 40 to 50 employees on the payroll, or that he had authorized him to discuss union matters with them. The Respondent further testified that only he hired and discharged employees, and that Roberto merely consulted him about these matters. He conceded that Roberto was in charge when he was not present, and saw that the employees "observed order," "did their work properly," "worked within the meaning of the law," and kept "an eye on the employees." In addition to these functions, Roberto purchased supplies, and generally, in the words of the Respondent, acted in the capacity of his assistant, "tend[ing] to the business, mov[ing] around and look[ing] after things," albeit "nobody took orders from him because [Respondent] was there sixteen hours and more every day." Roberto did not testify. He had left his brother's employ 3 weeks before the hearing and had gone to New York.

¹In the context in which this testimony was given, it is construed to mean that the Respondent had urged Torres not to quit, but to stay in his employ.

The Respondent refused to stipulate at the hearing that Roberto was a supervisor, and ostensibly opposes a conclusion to such effect presumably to prevent the attribution to the Respondent of Roberto's knowledge pertaining to Torres' union activities or his conduct pertaining thereto. It is not necessary, however, to decide whether Roberto was a supervisor in order to charge the Respondent with his knowledge or conduct. It is enough for this purpose that Roberto is the Respondent's brother and was known as such by the employees, that he performed functions which closely identified him with management, and that he was consequently regarded by employees as their boss.² As the record convincingly demonstrates Roberto's close affinity to management in this case, both as a relative of the Respondent and as an assistant in the operation of the business, it is here found that Roberto's knowledge of Torres' union activities and his conduct pertaining thereto are attributable to the Respondent.

B. Discrimination

In short, the question as to whether Torres was unlawfully discharged required only resolution of the conflicting testimony of the Respondent and the General Counsel's witnesses as to what actually occurred on the morning of January 29, 1953, between the Respondent and Torres. Torres' union activities prior to this date are conclusively established by uncontradicted and unrefuted testimony Roberto Martinez' knowledge of these activities and his threatening remark are likewise conclusively established. Because of Roberto's relationship to the Respondent, as indicated above, the latter's knowledge of these activities is also established.

Turning to the Respondent's version of the events of January 29, he would have it appear that upon his mere request for the change in work hours, Torres, although not ordered to make the change or threatened with discharge or other disciplinary action for failing to comply with the Respondent's request, turned it down and quit his job. And this, according to the Respondent, occurred although Torres had with impunity rejected such requests in the past and there was no apparent reason for belief that he would this time, any more than before, be compelled to change his hours in order to retain his job. What is more, Torres supposedly quit despite the Respondent's entreaty that he remain. The undersigned does not credit this account, not alone because it fails to ring true, particularly in the face of the more plausible version presented by the mutually corroborative testimony of the General Counsel's witnesses, but also because important aspects of the Respondent's testimony are so vague and uncertain as to stamp it generally unreliable. Thus, the Respondent on direct examination first indicated that during Torres' employment with him he had one other bartender, Ulises Ramos, who worked the night shift, and that he had "various" conversations with Torres relative to changing his shift because "the other one (Ramos) was continually requesting the change" to the day shift. On cross-examination, however, the Respondent admitted that he had 4 bartenders, 2 on each shift, and that during Torres' employment Ramos had been given day work when 1 of the bartenders was called to military service. The Respondent at this point implied that he was pressured by his other bartenders for day work, but could not recall the name of any of these employees. His faulty memory is further exemplified by his failure even to remember which bartender was transferred to Torres' day shift after he left.

The Respondent's unconvincing testimony fails to refute the simple account of the January 29 discussion between him and Torres testified to by the latter and corroborated by employee Hernandez. The testimony of these witnesses as to this event stands unimpeached by cross-examination or by any other evidence presented by the defense. Their testimony is credited for these reasons, and because Torres and Hernandez impressed the undersigned with their sincerity and forthrightness. Moreover, their version is more plausible under all the circumstances of this case than the Respondent's account of his interchange with Torres. The undersigned is satisfied from all the evidence that on the morning of January 29, 1953, the Respondent, having been informed by Torres that he was not to start work as directed by Roberto Martinez until the latter's arrival, knew that this instruction had been provoked by Torres' organizing activities for the Union in the preceding 2 days, and that when he told Torres not to wait for Roberto but to leave immediately he in fact discharged him for engaging in these activities. In arriving at this conclusion the undersigned has considered

² The Eclipse Lumber Company, Inc., 95 NLRB 464; Swan Fastener Corporation, 95 NLRB 503.

the fact that Torres was the ringleader in the union movement, the threat by Roberto Martinez the night before the discharge to get rid of employees signing the union petition circulated by Torres, the timing of the discharge which occurred directly after the Respondent's discovery of Torres' activities and Roberto Martinez's threat, and the implausible, unconvincing explanation by the Respondent for Torres' severance of his employment.

By the foregoing conduct the Respondent discriminated in regard to the hire and tenure of employment of its employee, Torres, in violation of the provisions of Section 8 (a) (3) of the Act, thereby interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8 (a) (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that he cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has discriminated with respect to the hire and tenure of employment of Benito Cotto Torres, it will be recommended that Respondent offer him immediate and full reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges. See The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch, 65 NLRB 827. It will further be recommended that Respondent make Torres whole for any loss of pay suffered by reason of the discrimination against him. Said loss of pay, based upon earnings which he would normally have earned from January 29, 1953, the date of the discrimination against him, to the date of the offer of reinstatement, less net earnings, shall be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289; N. L. R. B. v. Seven-Up Bottling Co, 344 U. S. 344.

Because of Respondent's demonstration of his willingness to resort to unlawful methods to counteract an attempt by employees to achieve self-organization through a labor organization of their own choosing, the commission of other unfair labor practices may be anticipated. It will therefore be recommended that Respondent cease and desist from in any manner infringing upon the rights guaranteed his employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1 Union de Empleados de Hoteles, Cafes y Restaurantes de Puerto Rico is a labor organization within the meaning of Section 2 (5) of the Act.

2 By discriminating with respect to the hire and tenure of employment of Benito Cotto Torres, thereby discouraging membership in a labor organization, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing his employees in the exercise of the rights guaranteed by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

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

[Recommendations omitted from publication.]

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Act, I hereby notify my employees that:

I WILL NOT discourage membership in Union de Empleados de Hoteles, Cafes y Restaurantes de Puerto Rico, or in any other labor organization of my employees, by discriminating in any manner in regard to hire, tenure, or any other term or condition of employment, except to the extent permitted by Section 8 (a) (3) of the Act.

I WILL offer to Benito Cotto Torres immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of the discrimination against him.

I WILL NOT in any other manner interfere with, restrain, or coerce my employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8 (a) (3) of the Act.

All my employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent above stated.

Dated.....

GABINO MARTINEZ,
Proprietor, Restaurant El Alcazar.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

POINSETT LUMBER AND MANUFACTURING COMPANY,
and INTERNATIONAL UNION OF ELECTRICAL, RADIO,
AND MACHINE WORKERS, CIO, Petitioner. Case No.
11-RC-534. November 27, 1953

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVES

Pursuant to a Decision and Direction of Election issued by the Board herein on July 17, 1953,¹ an election by secret ballot was conducted on August 7, 1953, under the direction and supervision of the Regional Director for the Eleventh Region among the production and maintenance employees at the Employer's Anderson, South Carolina, plant. Following the election a tally of ballots was furnished the parties. The tally shows that, of approximately 301 eligible voters, 275 cast ballots, of which 139 were for the Petitioner, and 135 were against the Petitioner. There was 1 challenged ballot and 2 void ballots.

On August 13, 1953, the Employer timely filed objections to conduct of the election and conduct allegedly affecting the results of the election.² In accordance with the Rules and

¹Not reported in printed volumes of Board Decisions.

²Other objections of the Employer concerned the challenged ballot and one of the void ballots. The Regional Director resolved both objections against the Employer and the Employer duly excepted to his findings. We agree with the Employer to the extent that it argues that the Regional Director committed an apparent oversight in not resolving the alleged supervisory status of voter Dunn in the instance of the challenged ballot. We find it unnecessary to decide that issue nor the issue of the propriety of the Regional Director's ruling with