

**Thomas Spring and Mfg. Corp. and Production,  
Maintenance and Service Employees Union, Local  
3. Case 29-CA-1129**

June 27, 1968

### DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS BROWN  
AND JENKINS

On March 28, 1968, Trial Examiner Arthur M. Goldberg issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in the attached Trial Examiner's Decision. Thereafter, the Charging Party filed exceptions to the Decision.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.<sup>1</sup> The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

### 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 Trial Examiner and hereby orders that the complaint herein be, and hereby is, dismissed in its entirety.

<sup>1</sup> The Union excepts to the decision on the grounds that the Trial Examiner, in a settlement conference which was not made part of the record, indicated bias against the position of the Union, and therefore prejudged the case. We find no merit in the Union's contention. Our review of the record reveals that the hearing was conducted fairly.

### TRIAL EXAMINER'S DECISION

ARTHUR M. GOLDBERG, Trial Examiner: Upon a charge filed on October 19, 1967,<sup>1</sup> by Production, Maintenance and Service Employees Union, Local 3 (herein called Local 3 or the Union), the complaint herein issued on November 30. The complaint alleged that Thomas Spring and Mfg. Corp.<sup>2</sup> (herein called Thomas Spring or the Respondent), had refused to recognize and bargain collectively

with the Union in violation of Section 8(a)(5) of the National Labor Relations Act, as amended (herein called the Act). Respondent was alleged to have violated Section 8(a)(3) of the Act by the discharge of four employees and by interrogation of employees concerning union activity to have violated Section 8(a)(1) of the Act. Respondent denied all the material allegations of the complaint.

All parties participated in the hearing in Brooklyn, New York, on January 30 and 31, and February 1, 1968, and were afforded full opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. General Counsel argued orally at the close of the hearing and in addition filed a brief. Respondent's motion to dismiss the complaint, on which I reserved ruling, is disposed of according to my findings below.

Upon the entire record in the case, from my reading of General Counsel's brief, and from my observation of the witnesses and their demeanor, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

The complaint alleged, the answer admitted, and I find that Thomas Spring and Mfg. Corp., a New York corporation, is engaged in the manufacture, sale, and distribution of precision springs and related products with its principal office and place of business in Farmingdale, New York. During a representative 12-month period Respondent, in the course and conduct of its business, had a direct inflow of goods and materials in interstate commerce valued in excess of \$50,000 which were shipped to its Farmingdale plant from points outside the State of New York. In addition, during the same 12-month period Respondent shipped manufactured products valued in excess of \$50,000 from its plant to points in the United States outside the State of New York.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and meets the Board's standards for asserting jurisdiction.

#### II. THE LABOR ORGANIZATION INVOLVED

Production, Maintenance and Service Employees Union, Local 3, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> Unless otherwise noted all dates herein were in 1967.

<sup>2</sup> The Respondent's name appears pursuant to amendment at the hearing.

## III. THE ALLEGED UNFAIR LABOR PRACTICE

## A. Background

At the time of the events herein Respondent had 13 employees in the production and maintenance unit, plus Carlos Rodriguez whose status is discussed below. Additionally, Respondent had three other employees outside that unit who were represented under the terms of a collective-bargaining agreement by the Tool, Die and Mold Makers Guild, Independent.

In April or May 1966, Local 3 petitioned for a Board-conducted election in the production and maintenance unit but failed to receive a majority of the votes cast.

For some period of time prior to the events herein Respondent had been working on an order for springs to be used by the contractor, Spartan Electronics, in the manufacture of sonar buoys, which are employed in antisubmarine detection.

## B. Carlos Rodriguez

Most of Respondent's production employees were Puerto Ricans. The majority of these employees spoke no English and lived in the same neighborhood in Brooklyn. Carlos Rodriguez was Respondent's sole means of communicating orders and directions to these workers.

Rodriguez had been employed by Thomas Spring for about 4 years. James Tessitore, Respondent's plant foreman and a part owner of the Company, speaks no Spanish although he is in direct overall charge of the factory. Tessitore described Rodriguez as the bench foreman who sets up jobs for manufacture, makes tools, and inspects jobs and work in process. Tessitore gives instructions to Rodriguez in English, and Rodriguez passes these orders on to the employees in Spanish.

Rodriguez clocks in and out on the timeclock, is paid for any overtime he works, and is not compensated for any hours he misses. Whereas the pay range for production employees is from \$1.50 to \$1.80 per hour, a high of \$72 for a 40-hour week, Rodriguez receives \$124 per week, or \$3 an hour. There are no fringe benefits in effect. Rodriguez does not have authority to discharge, but may make recommendations on terminations to Tessitore. He does not decide independently which workers to use on production jobs, this is determined by Tessitore, and cannot change employees' shifts or hours

<sup>1</sup> This account of the hiring process is based on the credited testimony of James Tessitore. Carmen Vazquez, one of the alleged discriminatees, corroborated this testimony when she described the manner in which she was hired. She testified that Rodriguez brought her to the plant, showed her the work she was to do, and put her to work. No one other than Rodriguez spoke to her. Carmen Vazquez' timecard was filled out by Rodriguez who obtained from her and recorded the necessary information for company records.

<sup>4</sup> In addition to Carmen Vazquez, Rodriguez hired Hipolita Vazquez, Dolores Evertsz, Isaac Davila Castaing, and 3 other employees, a total of 7 of the 13 employees in the unit at the time of the events herein.

without consulting with the plant foreman.

When Respondent determines that more production employees are needed, help is sought in one of two ways, either by newspaper advertising or through recruiting by Rodriguez among his friends and relatives in Brooklyn. In the latter event, Tessitore would ask Rodriguez to bring in additional help. On other occasions Rodriguez, knowing of an available unemployed worker in his neighborhood would ask Tessitore if he needed additional workers. In either case Rodriguez brings the worker he has recruited to the Farmingdale plant from Brooklyn in his station wagon and puts the new employee to work without an intervening interview or decision by Tessitore or any of the other partners in Thomas Spring.<sup>3</sup> There is no inquiry as to their prior work experience, education, or like matters before Rodriguez puts the new employees to work. Tessitore testified that "when Mr. Carlos Rodriguez brings people in, I rely on his discretion to bring in people who will be able to do the work for us." The plant foreman explained that his daily routine keeps him in the plant office going over the schedule for the day until about 8:20 a.m. The plant starts work at 8 a.m. Thus, if a new employee has started that day, Rodriguez does not inform Tessitore that the new worker has joined the work force until almost one-half hour after that worker has been on the job.

I find that Rodriguez is possessed of and exercises the authority to hire employees for Respondent's work force.<sup>4</sup> This is clear evidence of supervisory status.<sup>5</sup> Accordingly, I find that Rodriguez is a supervisor within the meaning of Section 2(11) of the Act.<sup>6</sup>

## C. The Union's Campaign and Majority

Late in September the employees expressed an interest in union representation and Rodriguez telephoned Antonio Patino, secretary-treasurer of Local 3 to arrange a meeting with him. Rodriguez knew Patino from the Union's unsuccessful 1966 organizing effort. Two or three days later Rodriguez and Patino, together with Isaac Castaing, met on a Brooklyn street. Following this, Patino called Rodriguez on Saturday, September 30, and arranged for a meeting with the employees to be held on October 4, at 4:30 p.m., after work on the parking lot of a bar near Respondent's plant. Rodriguez in turn told the employees about the arrangements for the meeting with the Union.

Patino, together with Alfred Cavallaro, president

<sup>5</sup> Sec 2(11) of the Act provides in pertinent part that "The term 'Supervisor' means any individual having authority, in the interest of the employer, to hire or effectively to recommend such action, in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

<sup>6</sup> "[T]he possession of any one of the authorities listed in Section 2(11) [of the Act] places the employee invested with this authority in the supervisory class" for that "section is to be interpreted in the disjunctive." *Ohio Power Company v NLRB*, 176 F.2d 385, 387 (C.A. 6), cert. denied 338 U.S. 899.

of Local 3, met with the employees on October 4. Cavallaro spoke to the employees in English and his remarks were translated into Spanish by Patino. Thereafter, Cavallaro spoke to employee John Maio, the one English-speaking employee present.

Patino then addressed the employees in Spanish. In his own words Patino "told them that in order to represent them, they must authorize Local 3 by signing the card, which will be needed to file a petition with the National Labor Relations Board." Patino explained that the cards were necessary to get an election and translated the card to the employees.<sup>7</sup>

Castaing testified that after Patino explained the benefits under a union contract he signed an authorization card. There were no employee benefits at Thomas Spring. Castaing explained, "and we liked those benefits." Hipolita Vazquez testified that she signed a card to authorize the Union to represent her.

The following day, October 5, Castaing obtained signed cards from Carmen Vazquez<sup>8</sup> and Venancio Martinez when they were all in Rodriguez' station wagon going home to Brooklyn. Castaing gave these cards to Patino on October 6.

On October 4 the Union obtained authorization cards from 6 of the 12 employees in the bargaining unit on that day.<sup>9</sup> By October 6, the unit had increased to 13 with the addition of Carmen Vazquez, and the Union now had a total of 8 cards, a majority.<sup>10</sup>

However, the record reveals that Rodriguez was the moving force in the Union's successful campaign to solicit authorization cards. Thus, it was Rodriguez who first contacted the Union and, with Castaing, met with Patino, the Union's representative. It was Rodriguez whom Patino contacted to arrange for the October 4 meeting with the employees and it was Rodriguez who informed the employees that the meeting had been scheduled. At this meeting arranged by Rodriguez and with him present, six employees signed union cards. Rodriguez testified that he observed them sign the authorization cards. Finally, the last two union cards were solicited in Rodriguez' station wagon, one of the cards being signed by Carmen Vazquez who that very day had been hired by Rodriguez.

<sup>7</sup> The cards bear the following language under the name and address of the Union

Authorization for Representation

I, the undersigned, employed by (Name of Firm) (Address of Firm) do hereby authorize Local 3 to represent me and, in my behalf, to negotiate all agreements as to hours, wages and other employment conditions

The full power to act for the undersigned as herein described supersedes any power or authority heretofore given to any person or organization to represent me in such capacity and shall remain in full force and effect for one year from date and thereafter, subject to thirty (30) days written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein

Hereafter blanks are provided to be filled in by the employee with his name, address, and other pertinent information

Having found that Rodriguez was a supervisor and having found that he was the moving force in getting the Union's authorization cards signed, I cannot hold that these cards may be used in this proceeding to prove that the Union represented an uncoerced majority of Respondent's employees. Accordingly, I shall recommend dismissal of the allegation that Respondent violated Section 8(a)(5) of the Act. *A.T.I. Warehouse, Inc.*, 169 NLRB 580; *M.C. Inc., d/b/a Poca Super Market*, 164 NLRB 1080; *J. C. Penney Co., Inc.*, 160 NLRB 279.

D. The Discharges

1. Respondent's knowledge of the Union's campaign

On October 4 the Union obtained seven signed authorization cards. The following day Patino filed a petition with the Board's Regional Office seeking a representation election.<sup>11</sup>

Cavallaro, the Union's president, testified that about 9 a.m. on October 5, he called Respondent's plant and spoke to a person who identified himself as "Aldo." Respondent's president is Aldo Lavalle and Cavallaro claimed to have recognized his voice. Cavallaro testified that he told Aldo the Union represented a majority of his employees and demanded recognition. The union president stated that Aldo replied he was keeping his fingers crossed and that the Union should prove its majority to the N.L.R.B. Patino corroborated Cavallaro's claim to have called Respondent but did not claim to know to whom Cavallaro spoke. Lavalle testified and denied receiving a telephone call from Cavallaro on October 5. I credit Lavalle. Lavalle impressed me as an honest witness who was truthfully relating the events as he recalled them. Cavallaro evoked an opposite reaction. Based on his demeanor while testifying and his behavior after he entered an appearance for the charging party and participated in these proceedings, I would not credit Cavallaro unless corroborated by credible independent witness. Patino, while credible in the main, is not an independent witness. I find that there was no call by the Union to Thomas Spring on October 5.

As earlier noted the Union filed its petition for

While the card purports to bind the employee to the Union as his representative for a fixed period of time, something it clearly cannot do, it is nonetheless an unambiguous designation of the Union as the signer's bargaining representative, and I so find

<sup>8</sup> October 5 was Carmen Vazquez' first day of work.

<sup>9</sup> The number and identity of the employees in the unit were stipulated at the hearing. The complaint alleged and the answer admitted that "all production and maintenance employees of Respondent, employed at its Farmingdale plant, exclusive of tool and die employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purpose of collective bargaining"

<sup>10</sup> In these calculations I have excluded Carlos Rodriguez from the unit and have subtracted his card from the total held by the Union on either October 4 or 6

<sup>11</sup> The petition states that recognition was demanded and refused on October 4. Patino testified that this date was stated in error and I credit his explanation

election on October 5. At the instant hearing it developed that on that same day the Regional Office sent a letter to Respondent requesting the Company's position on the petition, enclosing a commerce questionnaire to be completed and returned by Thomas Spring to determine jurisdiction and notices for posting in the plant. This letter was sent by ordinary mail. The commerce questionnaire was not returned. Lavallo testified that this letter was never received and that he so informed the Board agent who called him on October 11 to advise that an informal conference would be held on October 19 to discuss the Union's petition.<sup>12</sup> The Board agent was not called to testify. Lavallo testified without contradiction that the Company had been experiencing difficulties with mail delivery. As a result, Lavallo claimed, Respondent did not receive until October 12 or 13 a copy of a telegram sent by the Union on October 9 demanding recognition which was forwarded by Western Union through the mails. Lavallo stated that Western Union had not telephoned the message to Respondent before putting a copy in the mail. Although I alerted General Counsel to the need for proof no evidence was offered which would controvert Lavallo's testimony. Western Union's records were neither offered nor subpoenaed to show that the telegram was transmitted in a manner other than that testified to by Lavallo. As noted, Lavallo was a credible witness. Based on his uncontroverted testimony, I find that Respondent did not receive notice of the Union's activity among its employees until October 11.<sup>13</sup>

## 2. The events of October 10

On October 10 Respondent discharged four employees. It is alleged that these employees were fired because of their union activity. Respondent denied that its action was motivated by antiunion considerations, justifying the discharge of Juan Baez on the basis of his absenteeism and the separation of three other employees, Hipolita

Vazquez, Carmen Vazquez, and Dolores Evertsz because of the unacceptable work they were performing.

On Saturday, October 7, Lavallo was advised by Respondent's representative in Michigan that Spartan Electronics was returning 5,000 rings because of defects in manufacture. Lavallo observed that 10,000 more were on the way and was told that if the additional rings were in the same condition as the previous shipment they would be returned as well.

On Tuesday, October 10, Lavallo told Tessitore that the rings were coming back from Spartan and asked him to check the rings in process in the factory.<sup>14</sup> Tessitore and Rodriguez inspected the rings then being manufactured and discovered some with rough edges, improperly countersunk drill holes, and others which were misshapen.<sup>15</sup>

Tessitore reported his findings to Lavallo who told the plant foreman to discharge the people who were doing the bad work. Later Tessitore told Lavallo that three girls were involved. In this same conversation Tessitore brought up Juan Baez' continued absences. Baez had been out on Monday and was away from work again on Tuesday. From the time he was hired Baez had been absent 17 of the 70 working days. Lavallo said to include Baez in the layoff.<sup>16</sup>

Rodriguez testified that Tessitore told him at the end of the workday to tell the three women, Carmen and Hipolita Vazquez and Evertsz, that they were discharged. Rodriguez informed the women and left the plant to get the station wagon for the trip back to Brooklyn.

Carmen Vazquez and Hipolita Vazquez<sup>17</sup> testified that after being told of their discharges by Rodriguez they had gone to the office independently of each other and asked Lavallo why the action had been taken. Each claimed that Lavallo asked if she had signed anything for the Union or knew anything of its activities. Upon their denial of such activity or knowledge Lavallo confirmed the fact of their discharge.<sup>18</sup>

<sup>12</sup> That conference was held and the Tool, Die and Mold Makers Guild intervened in the representation proceeding

<sup>13</sup> In view of the relatively small size of the work force involved, General Counsel urges that a finding be made of company knowledge of union activity under the presumption postulated in *Wiese Plow Welding Co., Inc.*, 123 NLRB 616. In the circumstances of this case I do not deem such a presumption justified. Alone among Respondent's officers or supervisors (other than Rodriguez) only Lavallo spoke or understood Spanish and his time was spent in the office. The few occasions when he was out on the factory floor were of short duration and his infrequent conversations with the employees were limited to an exchange of pleasantries. I do not impute to Respondent Rodriguez' knowledge of the union activity because he was clearly not acting within the scope of his authority when he was responsible for the Union's organizing efforts. Thus, the generally valid assumption that from the very nature of the intimate relationship between management and the employees in a small plant situation the employer would gain knowledge of any union activity can not be applied in the special circumstances of this case.

<sup>14</sup> Lavallo did not explain why he had not on Monday taken up with Tessitore the problem of bad work. General Counsel did not examine Lavallo on this point. The first of Spartan's debit memos to Thomas Spring was

dated Monday, October 9, and it could well be that Lavallo was waiting confirmation from the customer before cracking down.

<sup>15</sup> Tessitore testified credibly that Rodriguez had accompanied him during this inspection. Rodriguez both agreed and disagreed with Tessitore's account of their joint inspection.

<sup>16</sup> This account of the events leading up to the discharges on October 10 is based on a synthesis of the credited testimony of Lavallo and Tessitore.

<sup>17</sup> The two are not related.

<sup>18</sup> Evertsz' version of the events surrounding her discharge is totally incredible. Alone among all the witnesses Evertsz denied that Rodriguez had told her of her discharge. Instead she claimed that she was taken to the office by Tessitore where, after he had interrogated her about her contacts with the Union, Lavallo had fired her. Evertsz also insisted that the union authorization card which she had signed had been written in Spanish. When shown her card at the hearing Evertsz pled inability to determine whether it was in English or Spanish because she had left her glasses at home. Under examination by Patino, and much to his surprise, she denied that she had spoken to the Union's secretary-treasurer after her discharge or had given him a statement. I discredit Evertsz' account of the alleged exit interview.

Lavalle flatly denied that he had had any conversation with any of the three discharges on October 10.

Rodriguez and Evertsz testified that there was no discussion of the discharges in the car that evening on the trip back to Brooklyn. Instead, Evertsz stated, they talked about "different things, nothing concrete."

The denial that the discharges had been discussed is the incredible cap to an incredible structure of events. Three of the passengers had lost their jobs and, if they are to be believed, had just had their first conversation of substance with the boss in which he had questioned them about the Union. Certainly the loss of employment must have warranted some comment by those whose income had come to an end.<sup>19</sup> I credit Lavalle and find that there were no conversations in his office on October 10, there was no interrogation of the employees concerning union activity, and there was no violation of Section 8(a)(1) of the Act.

Moreover, I do not believe that General Counsel has met the burden of proving that the four employees were discharged in violation of the Act. There is no evidence that, at the time of the discharges, Respondent was aware of union activity among the employees, let alone that the alleged discriminatees were among those so involved. Respondent's explanation for the discharges stands un rebutted. Baez' employment record establishes his poor attendance. Debit memos from Spartan Elec-

<sup>19</sup> It is hard to believe that Rodriguez would have been silent on the discharges. These were people he had brought to the Company. If the Union had been a factor in their discharge this would have been a matter of concern for him for it was he who had introduced the Union to the scene. Indeed, if only because he had just lost three riders who paid him \$4 a week each for their transportation Rodriguez must have expressed some concern.

tronics covering return shipments of defective rings provide independent corroboration of credible testimony by Lavalle and Tessitore that the three female employees were discharged because an inspection of work in process disclosed that they were not doing a satisfactory job. Such an inspection would reasonably follow upon notice from an important customer that a substantial quantity of unacceptable merchandise had been shipped. It is equally reasonable that upon discovering that probationary employees<sup>20</sup> were turning out additional unacceptable rings their employment would be terminated. I shall recommend dismissal of the allegation of unlawful discharge.<sup>21</sup>

#### CONCLUSIONS OF LAW

1. Thomas Spring and Mfg. Corp. is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Production, Maintenance and Service Employees Union, Local 3, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices as alleged in the complaint.

#### RECOMMENDED ORDER

It is recommended that the complaint herein be dismissed.

<sup>20</sup> Hipolita Vazquez and Evertsz had been hired on September 18 and Carmen Vazquez had commenced work on October 5.

<sup>21</sup> Thus, even if the authorization cards had been untainted by supervisory involvement a finding that Respondent's refusal to extend recognition to the Union was an unlawful denial of its bargaining obligation would not have been warranted by the facts. *Aaron Bros. Co.*, 158 NLRB 1077.