

Walter S. Johnson Building Co., Inc. and Harry R. Palladino. Case 3-CA-4873

FINDINGS OF FACT

I. THE FACTS

March 6, 1974

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND
PENELLO

On November 26, 1973, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in support of the Administrative Law Judge's 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 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, 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 Respondent, Walter S. Johnson Building Co., Inc., Lockport, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Administrative Law Judge: This case involves allegations that the above-named employer violated Section 8(a)(1) of the Act by discharging its employee Harry R. Palladino, the Charging Party herein, because he engaged in protected concerted activities. The proceeding was initiated by a charge filed on April 10, 1972,¹ pursuant to which complaint issued on August 24, 1973. On September 20, 1973, hearing was held in Buffalo, New York.

Upon the entire record, including my observation of the witnesses, and after due consideration of the brief filed by General Counsel, I make the following:

¹ Unless otherwise indicated all dates appearing hereinafter are in 1972

² Commerce is not in issue. The complaint alleges, the answer admits,

Respondent is a New York corporation with its principal office and place of business in Niagara Falls, New York. Respondent is a contractor in the building and construction industry engaged in construction at various jobsites, including a jobsite known as the Harrison Radiator jobsite in Lockport, New York.² At all times material herein, Respondent has been party to a contract with the Laborers' International Union of North America, Local 91 (herein called the Union). Palladino is a member of that Union who was employed by Respondent in September 1971 and who was the Union's steward at the jobsite. Shortly after he started working, Palladino began to voice complaints about working conditions which he deemed to be unsafe and in violation of the safety code of the State of New York and about working conditions which he considered to be in violation of the provisions of the contract between Respondent and the Union.

The first complaint about safety conditions occurred about the middle of October and it related to the absence of shoring in an excavation. According to Palladino, material which had been dug from the trench had been stacked close to the top of the trench and it would roll down into the trench endangering laborers working in it. He complained about this to Respondent's superintendent John Naglehout, but Naglehout refused to do anything. Palladino told him he would call in the State safety inspector to have the condition fixed and Naglehout replied, in effect, that he was free to do so. Palladino called the state inspector and after an inspection Respondent was required to remedy the condition. Despite this experience, the same condition was repeated in other parts of the excavation. Each time Palladino would take the matter up with Naglehout and remind him of the order issued by the State inspector and Naglehout's answer would be that if Palladino wanted it fixed he could call the State inspector.

In either December 1971 or January 1972, Palladino complained to Naglehout about the absence of ladders in an excavation to permit the men to escape from the trench quickly in the event of a wall coming down. On two occasions, he complained about unsafe ladders.

In late November, Respondent received a trailer load of insulating material in granular form which is packaged in bags. Palladino and the labor foreman were assigned to unload the trailer and in the course of doing so Palladino testified he became nauseated and for 3 or 4 days afterwards he and the foreman were sick. He spoke to Naglehout about it and asked him to check on the material in the event of another load so that the men could be supplied with respirators. On December 24, another load of the same material was received and four laborers were assigned to unload it. Upon learning this Palladino went to Naglehout and asked about respirators reminding him of his and the foreman's illness when they unloaded the first trailer load. Naglehout told him he'd have to call the State inspector. Palladino did and as a result Respondent was

and I find, that Respondent meets the Board's direct inflow standard for the assertion of jurisdiction

required to furnish respirators and safety glasses to the laborers.

In either December or January, Palladino complained to Naglehout about a portable generator which was not properly grounded and which caused employees to get electrical shocks. He obtained no satisfaction, called the State inspector, and Respondent was required to ground the generator.

Towards the end of December, Respondent was using a cherry picker to lift buckets of concrete to a point where it was forming concrete walls and in the course of operating the cherry picker the operator made a mistake and almost caught Palladino between the body of the cherry picker and the bucket full of concrete. Palladino got angry at the operator and in the exchange that followed learned that the operator's license had expired. Palladino reported to Naglehout that the operator was not qualified to operate the machine and told him to obtain an operator with a license before someone got hurt. Palladino obtained no satisfaction from Naglehout, so he called the State inspector. Upon the inspector's discovery that the operator did not have a license he stopped him from operating the cherry picker, although according to Naglehout's testimony, which I credit, he was permitted to complete the pour.

On another occasion Palladino complained about debris in the working area, but Naglehout refused to do anything about it. Palladino called the State inspector again and Respondent was ordered to make the working area reasonably safe.

According to the contract, Article VI, Section 4(b), the steward is required to be on the job whenever laborers are working. It appears that this means if any work covered by the contract is to be performed, and only one laborer is required, the laborer to whom it shall be assigned is the steward. On one occasion Palladino observed that materials had been delivered to the job by someone over the weekend. He learned this had been done by the general superintendent and he claimed 2 hours show-up pay on the ground it was laborers' work and he should have been called to bring the materials to the job. His claim was upheld. On another occasion, a laborer had brought material to the job at 7:30 a.m. (starting time was 8 a.m.). Palladino learned this laborer had not been paid for this work and he claimed pay for the laborer in question, and for himself, as he should have been given the work. His claim was upheld.

On one occasion, Palladino became involved in trying to obtain boots for a laborer, and on another occasion he was involved in a dispute over the condition of rain gear. The contract required Respondent to provide boots and rain gear.

Another matter in which Palladino became involved concerned the covering of fresh concrete with blankets to protect it from the cold. According to Naglehout, blanket covers are laid in two ways. One way is merely to lay the blanket over the concrete and to keep it in place by placing heavy objects upon the blanket. The second way involves tacking the ends of the blanket into the sides of the form,

not so much to secure the blanket as to protect the sides of the blanket from resting in mud or water and becoming damaged. This latter method requires the nailing of strips of wood to the blanket and the sides of the form, and for this reason was considered by Naglehout to be carpenter's work. The former method was regarded as laborers' work.

According to Naglehout, there were many instances when blankets were laid by the laborers with no dispute where no tacking was involved. Sometime in November, however, at a time when Palladino had already left work, Naglehout assigned the laying of a blanket or blankets to the carpenters because tacking was involved. The following morning when Palladino learned about the assignment he protested to Naglehout who told him he knew the procedures to follow if he thought the assignment was wrong.

About the second week in December, Naglehout again assigned the laying of blankets to the carpenters because tacking was involved and Palladino instructed four laborers to cease work until the carpenters had finished. Naglehout estimated the laborers stood by for about one-half hour.³

On February 10, Naglehout again assigned the job of covering the concrete to the carpenters and Palladino again protested, but to no avail. According to Palladino's own testimony, despite Naglehout's assignment, when the laborers brought out the blankets, instead of giving them to the carpenters Palladino started to cover the concrete himself. The carpenters started to take the blankets away from him and he told them that it was his work and he was going to do it. The carpenters told him no, that they had been told to do it by Naglehout and they were going to do it. When Palladino insisted upon doing the work, the carpenters walked up the road and stood there while Palladino, aided by two other laborers, covered the concrete with the blanket and tacked the ends into the sides of the form with strips of wood.

On February 14, Palladino was terminated. Although he was then told it was because a reduction in force, Respondent later admitted that he was in fact discharged, assertedly for cause.

II. ANALYSIS AND CONCLUSIONS

According to General Counsel, Palladino was terminated because he engaged in protected concerted activities, namely, protesting violations of safety rules and breaches of contract. According to Respondent, Palladino was terminated because he engaged in unprotected activities, namely, that he caused the work stoppage of the carpenters on February 10.

At the outset, there can be no question that Palladino's complaints respecting violations of safety rules and breaches of contract constituted concerted activities. Although some of Palladino's complaints affected him alone (e.g. delivery of materials to the job without calling him), they were based on the provisions of the contract and may thereby be deemed concerted activity.⁴ But even if

³ Palladino denied this. He claimed the laborers in fact laid the blankets and not the carpenters. Palladino did not impress me as a credible witness and I do not credit his testimony where it conflicts with Naglehout's

Foreman Al Safran gave sketchy testimony tending to corroborate Palladino, but I do not credit him either.

⁴ *N.L.R.B. v. Interboro Contractors Inc.*, 388 F.2d 495 (C.A. 2, 1967)

there were some question about the concerted aspects of those complaints affecting Palladino only,⁵ there could be no question that his many complaints about safety conditions were concerted activities as they were for the safety of all the laborers and it was Palladino's responsibility as job steward to assure the maintenance of safe working conditions for the laborers. Moreover, there can be no dispute about the protected nature of the complaints made by Palladino as described above. While they were numerous and may have seemed picayune, there is no basis for holding that they were made in bad faith or with an intent to harass Respondent. The very fact that merit was found in nearly every instance is an indication that the complaints were made for legitimate Union purposes.

On the other hand, there can be no question that Palladino engaged in unprotected activity on two occasions in connection with the jurisdictional dispute with the carpenters. On one occasion, as I have found, he caused the laborers to cease work, and on another, he caused the carpenters to cease work. There is testimony about conversations between representatives of the Union and Palladino with Jack Johnson, president of Respondent, and Naglehout concerning the work assignment of the laying of blankets which I have not set forth because it is immaterial to a decision. The thrust of the testimony, insofar as Palladino is concerned, is that Johnson agreed that the disputed work belonged to the laborers and that Naglehout acknowledged that fact. Be that as it may, on at least the three occasions described above, Naglehout assigned the work to the carpenters and on two of these occasions Palladino caused a work stoppage. His conduct in that regard was unprotected.⁶

It appears that Palladino engaged in unprotected activity in addition to that involving the jurisdictional dispute. Thus, on one occasion, he had a dispute with Naglehout over the adequacy of planking on which the laborers would have to walk in making a concrete pour and he delayed the concrete pour while he and the labor foreman installed additional planking.⁷ While he had a legitimate interest in protesting the adequacy of the planks, he had no right to resort to self-help. On other occasions, he usurped management functions by instructing laborers to work in pairs in carrying planks or plywood. According to Respondent, he also instructed laborers to refuse to use a Cushman vehicle and this slowed down the work. Palladino denied issuing any such instructions but I do not credit him. Rather, I credit Naglehout's uncontradicted testimony that he spoke to Palladino about the Cushman vehicle and Palladino told him it was the Teamsters jurisdiction.

In addition to this conduct which was cause for discharge, Palladino was accused of several other acts of misconduct by Johnson at a grievance meeting sometime after Palladino's discharge.⁸ No useful purpose would be served by enumerating all the charges against Palladino and resolving his culpability or innocence. The short of the

matter is that Respondent had cause to discharge Palladino. However, such a finding is only incidental to the issue in the case, namely, Respondent's motive for discharging him. "The issue before us is not, of course, whether or not there existed grounds for discharge of these employees apart from their union activities. The fact that the employer had ample reason for discharging them is of no moment. It was free to discharge them for any reason good or bad, so long as it did not discharge them for their union activity. And even though the discharges may have been based upon other reasons as well, if the employer was partly motivated by union activity, the discharges were violative of the Act." *N.L.R.B. v. Great Eastern Color Lithographic Corp.*, 309 F.2d 352, 355 (C.A. 2, 1962).

At the hearing, Johnson testified that the decision to discharge Palladino was made on the Saturday morning following the work stoppage caused by Palladino on Thursday. The thrust of his testimony was that he discharged Palladino because of that work stoppage and not because of any protected activities Palladino may have engaged in. Thus, when asked if it was not true that he based his decision on more than one incident Johnson replied, "My final decision was based on the fact that he wasted time of all the employees with jurisdictional disputes which he had no reason to do." As can be seen, this reply suggests that the discharge was based only on Palladino's unprotected activities, although it does not contain such an express avowal. Understandably so, because on two other occasions, Johnson expressed his reasons for discharging Palladino and on both occasions he did not restrict himself to the February 10 work stoppage.

As indicated earlier, Palladino filed a grievance over his discharge. Part of the procedure in processing the grievance involved a meeting between Union representatives, Respondent, and representatives of other contractors. According to the uncontradicted testimony of Palladino, at this meeting Johnson undertook to give his reasons for discharging Palladino and he enumerated about 25 reasons. Palladino recited 23 of those reasons at the hearing. For example, Johnson accused Palladino of tardiness and absenteeism, wasting time in making telephone calls, taking too much time to perform work assigned, delaying a concrete pour to add planks to scaffolding, and instructing the men not to use the Cushman vehicle and to work in pairs carrying 16 foot planks and 4 by 8 pieces of plywood.

In addition, however, Johnson recited other incidents among his reasons for discharging Palladino. For example he referred to the fact that Palladino had "brought a lot of heat on the job by calling the State inspector" . . . ; that Palladino had insisted on being paid 2 hours show-up time when he had not in fact shown up on the job; that he had insisted on double payment for a delivery of material to the job (that is, 1/2 hour in wages to the laborer who made the delivery and 1/2 hour to Palladino who should have been

⁵ *N.L.R.B. v. Northern Metals*, 440 F.2d 881 (C.A. 3, 1971)

⁶ *A. Brochman & Sons Co.*, 174 NLRB 203; *Stop & Shop Inc.*, 161 NLRB 75.

⁷ Palladino denied delaying the concrete pour, but I do not credit him. Foreman Al Safran appeared to corroborate Palladino, but his testimony was somewhat vague. If he intended to deny there was a delay, I do not credit him.

⁸ Palladino filed a grievance over his discharge which was eventually processed through arbitration. No party contends that the Board should defer to the arbitration pursuant to the principle of *Spielberg Mfg. Co.*, 112 NLRB 1080, inasmuch as the parties stipulated that the arbitrator did not decide the issue of the reason for Palladino's discharge, but rather decided only whether procedural requirements of the contract had been met.

called to make the delivery); and that he had instructed the laborers not to wear rain gear.

As pointed out earlier, Palladino's activities which resulted in calling the State inspector were protected concerted activities. His insistence on 2 hours show-up pay and payment for 1/2 hour for work he did not perform were also protected concerted activities as they were based on provisions of the contract. His disputes over rain gear and boots were also based on provisions of the contract and in protesting Respondent's compliance with those provisions it does not appear that Palladino protested in such a manner as to render his conduct unprotected.

In short, when Johnson explained to the grievance committee his reasons for discharging Palladino, he included among his reasons both protected and unprotected activities. On his own statement, therefore, a finding is warranted that in discharging Palladino Respondent was motivated in part by Palladino's protected activities, and, as indicated above, a discharge so motivated is violative of the Act.

The detailed manner in which Johnson enumerated the activities of Palladino on which he based his decision to discharge him indicates that the protected activities played a substantial part in that decision. Further proof of that fact was given by Johnson on another occasion when, in the investigation of the charge in the instant case, he gave a sworn statement to the Board agent in which he stated "the following are several instances which led to the decision to discharge Mr. Palladino" and then elaborated the incidents. The statement was not offered into evidence so that the record does not include all the incidents relied upon by Johnson, but Johnson admitted at the hearing that he had listed Palladino's complaints about rain gear and that he had stated "It was reported to me that Mr. Palladino personally called the State inspector on the job at least ten times . . ." His admission about these items alone as incidents "which led to the decision to discharge Mr. Palladino" give additional support to the finding that Johnson was motivated in substantial part by Palladino's protected activities in deciding to discharge him.

In arriving at the conclusion that Respondent was motivated in substantial part by Palladino's protected concerted activities in discharging him, I have considered the evidence that on each occasion when Palladino threatened to call the State inspector, Naglehout did nothing to dissuade him. To the contrary, he indicated to Palladino that was his prerogative. Such evidence militates against a finding that Palladino's complaints to the State inspector partly motivated his discharge. However, Naglehout was not as unconcerned about those complaints as his behavior toward Palladino suggests. Thus, sometime between Christmas and New Year, when Johnson was preparing to take up with a union assistant business agent the problems created by Palladino, he consulted with Naglehout who included in his complaints about Palladino that Palladino was making calls to the State inspector. It would appear from this that Naglehout was not indifferent to Palladino's calls. According to Palladino, Naglehout was so opposed to Palladino's calls to the State inspector that in

mid-January he offered Palladino a steady job if he would stop calling him. However, Naglehout denied this and I credit him.

In the final analysis, it is not Naglehout's attitude which matters. It is Johnson's, because it is he who made the decision to discharge Palladino. As set forth above, based on Johnson's statements at the grievance meeting and in his prehearing affidavit, a finding is warranted that among the reasons for discharging Palladino were Palladino's protected concerted activities. Accordingly, I find that the discharge was violative of Section 8(a)(1) of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section I above, occurring in connection with its operations described therein, 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.

IV. THE REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As it appears that the Harrison Radiator job on which Harry Palladino was employed was completed several months after his discharge,⁹ an order requiring Respondent to offer him reinstatement would be inappropriate. Instead, I shall recommend that Respondent make him whole for any loss of pay he may have suffered as a result of his unlawful discharge by payment to him of a sum of money equal to that which he would have earned as wages from the date of his unlawful discharge to the date the job was completed or the date he would have been terminated for reasons unrelated to his protected concerted activities, less net earnings, to which shall be added interest at the rate of 6 percent per annum in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 716. In addition, I shall recommend that Respondent notify Palladino, in writing, that notwithstanding his discharge, he would be considered eligible for employment in the future at any of Respondent's projects if he should choose to apply for employment at any of them or be referred to them by the Union. Respondent shall include in the letter to Palladino copies of the notice which would have been posted if the project had not been completed. Also, Respondent shall mail copies of the notice to all its employees employed at the Harrison Radiator jobsite on February 14, 1973.¹⁰

CONCLUSIONS OF LAW

1. Walter S. Johnson Building Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

⁹ Naglehout testified the job ran for several months after the discharge

¹⁰ Cf. *Interboro Contractors Inc.*, *supra* at 1302

2. The evidence adduced herein establishes that Harry B. Palladino was discharged on February 14, 1973 in substantial part because he engaged in protected concerted activities and Respondent thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommendation:

ORDER¹¹

Respondent, Walter S. Johnson Building Co., Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging employees or otherwise interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act because they have engaged in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their right to engage in, or to refrain from engaging in, any or all of the activities specified in Section 7 of the Act.

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

(a) Make Harry R. Palladino whole for any loss of pay he may have suffered by reason of his discharge and assure him of his future eligibility for employment by Respondent in the manner and to the extent set forth in the Section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other records necessary or useful to determine the amount of backpay due under the terms of this Order.

(c) Sign and mail copies of the attached notice marked "Appendix,"¹² to Harry Palladino and to the employees specified in the Section entitled "The Remedy."

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

¹¹ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 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 the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law when we discharged Harry Palladino and the Board has ordered us to mail this notice to you:

WE WILL NOT discharge employees because they have engaged in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their right to engage in, or to refrain from engaging in, any or all of the activities specified in Section 7 of the Act.

In as much as the Harrison Radiator jobsite on which Harry Palladino was employed has been completed we cannot offer him reinstatement to his former job. WE WILL, however, assure Harry Palladino that he is eligible for future employment by us and we will make him whole for any loss of pay he may have suffered by reason of his unlawful discharge.

WALTER S. JOHNSON
BUILDING CO., INC.
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

This is an official notice and must not be defaced by anyone.

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

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Ninth Floor—Federal Building—111 W. Huron Street, Buffalo, New York 10007, Telephone 716-842-3100.