JD(SF)-59-02
North Las Vegas, NV

UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

AMERIGAS PROPANE, INC.

and Case 28-CA-17670

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, LOCAL 631,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
AFL-CIO

Joel C. Schochet, Esq., of Las Vegas, Nevada
on behalf of the General Counsel

Norman I. White, Esq. and Erika B. Fisher, Esq.,
McNees, Wallace and Nurick, of Harrisburg,
Pennsylvania, on behalf of Respondent

DECISION

John J. McCarrick, Administrative Law Judge. This case was tried in Las Vegas, Nevada on May 2, 2002[1], upon the General Counsel's Complaint issued February 27, 2002 alleging that Respondent committed certain violations of Sections 8(a)(1)[2] and (3) of the National Labor Relations Act, 29 U.S.C. 151 et seq.(Act) by threatening its employees that work rules would be more strictly enforced, by more stringently enforcing its work rules, and by warning and suspending its employee Marlon Larrie because its employees engaged in union activities. Respondent timely denied any wrongdoing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and Counsel for Respondent, I make the following:

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[1] All dates are in 2001 unless otherwise stated.

[2] In his brief, Counsel for the General Counsel moved to withdraw paragraph 5 of the Complaint. Inasmuchas no evidence was adduced to support that allegation, I will grant Counsel for the General Counsel's motion.

I. Findings of Fact

A. Jurisdiction

The Respondent, a Delaware corporation, with an office and place of business in North Las Vegas, Nevada, is engaged in the retail sale of propane gas and propane related supplies to residential, commercial, agricultural, motor fuel and wholesale customers. In the past 12 months Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 shipped directly to its North Las Vegas, Nevada facility from outside the State of Nevada. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Teamsters, Chauffeurs, and Helpers of America, affiliated with the International Brotherhood of Teamsters, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

B. Alleged Unfair Labor Practices

1. Facts

Respondent operates a regional sales office in North Las Vegas, Nevada, herein called the North Las Vegas facility, where its five drivers distribute propane gas to 1400 residential and commercial customers within a 100 mile radius of its North Las Vegas facility. David Vance (Vance) has been Respondent's sales service manager at the North Las Vegas facility since about 1997. Joyce Weber (Weber) was Respondent's clerk at the North Las Vegas facility. Respondent delivers 20 pound gas cylinders, commonly used for barbeque grills, 33 pound gas cylinders to power forklifts and 100 pound commercial gas cylinders. In addition Respondent fills large residential and commercial propane tanks from a bobtail truck.

In October, the Union filed a petition with Region 28 of the National Labor Relations Board to represent Respondent's five drivers located at its North Las Vegas facility. On November 30, Region 28 conducted an election among Respondent's drivers at the North Las Vegas facility. The Union was selected by a majority of Respondent's drivers as their collective bargaining representative.

Respondent employed Marlon Larrie (Larrie) as a route sales driver since about October 2000. Larrie primarily delivered cylinders of gas to commercial customers. His hours of work were 2:30 a.m. to 10:30 a.m. There is no evidence that Larrie engaged in any union activity.[3]

On December 4, Larrie made a delivery of 100 pound gas cylinders to the Islands, one of Respondent's commercial customers. After Larrie delivered the gas to the Islands, an Island's representative called Respondent because the cylinder Larrie delivered was leaking gas. Because Vance was closest to the Islands, he responded to the customer's call on December 1 and resolved the problem. Later on December 5, Vance gave Larrie a written warning for delivering an overfilled gas cylinder to the Islands. The warning provided:

[3] General Counsel's contention in its brief that Respondent considered Larrie to have a prime role in the Union campaign is unsupported by any evidence. Respondent's position statement was neither offered nor received into the record.

> On 12-04-01 Marlon Larrie over filled 100# cylinders at two locations. Thus causing the tanks (sic) relief valve to leak propane. One location the Islands had a heater on the 100# and lucky for Amerigas the customer shut the system down and called us.

The warning was given to Larrie during the December 5 meeting between Larrie, Mark Gradin (Gradin)[4], Respondent's market manager, and Vance. Larrie asked if he was being written up because of the Union. Vance replied, "I have to document everything to present to the Union."[5] Vance also said it was a safety issue. Gradin added, "It's no big deal. We just have to make a written record because it's a safety issue." There had been other overfilled and leaking cylinders delivered in the past but Vance conceded that no one had been disciplined for delivering leaking cylinders. Vance explained that the employees who delivered those overfilled cylinders were in their training periods. There is no dispute that Larrie was well out of his training period when he delivered the overfilled cylinder to the Islands.

On December 12 Vance met with Larrie and warned him to turn his radio on when he clocked into work and to leave the radio on until he clocked out. This was not the first time Vance had spoken to Larrie about keeping his radio on during work because both Vance and Weber had problems contacting Larrie. On three or four occasions before November 30, Vance was unable to contact Larrie because Larrie's radio was turned off. In Larrie's annual review in October, Vance counseled Larrie to keep his radio turned on.

On December 12, Larrie worked six and a half hours overtime in order to take December 13 off. It is undisputed that Larrie did not secure Vance's permission to work the overtime. After having worked the overtime on December 12, Larrie called Vance by radio and asked for December 13 off. Vance responded that Larrie had not gotten permission to work the overtime. Larrie did not work on December 13. On December 14, Larrie received a written warning from Vance that stated:

> On 12-2-01 Marlon Larrie took it upon himself to work 14.5 hours in one day without authorization from his supervisor. Also Mr. Larrie took a day off without authorization from his supervisor on 12-13-01.

Respondent's drivers often worked overtime in order to get the following day off. According to Vance, overtime must be approved in advance. Vance reminded employees that they had to get his permission to work overtime because in the past they had worked overtime without his approval. However, Vance said it was not necessary to get permission to work overtime to service a customer who was out of gas. Larrie said that he worked overtime in the past with Vance's permission. Larrie admitted he had only worked overtime and taken the next day off once without Vance's permission before December 12-13. Vance testified, without contradiction, that he had disciplined employee William Garcia for working extra hours and taking the following day off without permission.

On the afternoon of January 3, Weber took a call from Daws, Respondent's customer who was out of gas. Later on the afternoon of January 3, Weber put a delivery slip into Larrie's mailbox at the North Las Vegas facility for him to make an out of gas delivery to Daws on

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[4] Gradin was present by speaker phone.

[5] Vance denied making this statement. Since there was a new collective bargaining relationship, it is likely that Vance would have stated it was important to document discipline for future discussion with the Union. I credit Larrie's testimony.

January 4.[6] On January 4 at about 10:00 a.m., Weber received another out of gas call from Olympic Tracks, another of Respondent's customers. Weber tried to call Larrie on his radio to set up the delivery to Olympic Tracks but Larrie's radio was off. When Larrie returned to the North Las Vegas facility at the end of his shift at about 10:30 a.m., Weber told Larrie he needed to make a delivery of gas to Olympic Tracks. Weber had a delivery slip in her hand and said another customer, Daws, was also out of gas. Larrie told Weber he had not delivered to Daws[7]. Larrie said he did not have time to service Daws because he had personal business. Larrie made the delivery to Olympic Tracks and returned to the North Las Vegas facility about 15 minutes later. Vance was waiting for Larrie and said, "I have an account you need to do." Larrie said, "I can't. I have something personal I have to do." Vance asked Larrie why Larrie's radio was turned off. Larrie replied he had just turned the radio off when he came into the facility. Vance said the paper work for the Daws delivery had been in Larrie's mailbox since January 3, 2002.

On January 7, 2002, at the end of Larrie's shift, Vance called Larrie into his office and told Larrie that he should have made the Daws delivery. Vance said there was a delivery slip in Larrie's mailbox on January 3 and he was writing Larrie up for not making the delivery and for having his radio off during work time. The discipline provided both a written warning and a three day suspension. It provided in pertinent part:

> On 1-3-02 Marlon was given an out of gas customer to deliver to, on 1-4-02 he had still not delivered to this customer. When Manager instructed Marlon to make this delivery on 1-4-02 he refused. This is unacceptable. Marlon has been previously written up about having his radio on during work hours, on 1-4-02 Marlon did not have his radio on during work hours.
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> Effective immediately Marlon will not refuse to deliver to any of our customers and furthermore if given a task to complete he will complete the task, if he has any concerns or questions he will contact his supervisor. Marlon will turn his radio on when he clocks in for work and will not turn it off until he has clocked out. Marlon will be suspended for three days without pay starting 1-8-02 and not returning to work until 1-11-02.[8]

Larrie admitted Respondent issued its route drivers a radio to maintain contact with the North Las Vegas facility for deliveries and for safety. It is undisputed that while working, the drivers are supposed to have the radio turned on, however, prior to the election on November 30, no employee received a written warning for having the radio turned off. It is also undisputed that before the petition for election was filed, Vance had directed Larrie to keep his radio turned on while working. During the first week in December, Vance again told Larrie to keep his radio turned on since Weber had not been able to contact Larrie by radio.

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[6] Larrie denied receiving a delivery slip on Friday morning for an out of gas delivery to Daws. General Counsel's exhibit 8 was a contemporaneous written statement made by Weber on January 11, recounting the events surrounding the Daws delivery. I credit Weber's version of the events over Larrie's since her statement was made when her memory was current and more likely to be accurate.

[7] To service Daws would have required a one and a half hour round trip from the North Las Vegas facility.

[8] While the written discipline is dated January 3, 2002, there is no dispute that Larrie received it on January 7.

2. Analysis

Counsel for the General Counsel argues that Respondent violated Section 8(a)(1) and (3) of the Act by more strictly enforcing its work rules, resulting in the warnings and suspension of Larrie in retaliation for its employees' support of the Union.

In order to establish a violation of Section 8(a)(3) of the Act the burden is on General Counsel to establish the presence of union activity, Respondent's knowledge of the union activity and a connection between the discrimination and respondent's anti union animus. Once General Counsel has established a *prima facie* case, the burden shifts to Respondent to show it would have taken the action even in the absence of the discriminatee's protected activity. *Wright Line*, 251 NLRB 1083 (1980); *enfd*., 662 F.2d 899 (1st Cir. 1981); *cert. denied*, 455 U.S. 989 (1982).

The record is devoid of any evidence that Larrie participated in union activities or that Respondent suspected him of engaging in union activity. Likewise no evidence was adduced of anti union animus directed toward Larrie or any other driver at the North Las Vegas facility. General Counsel's contention that Vance's statement that he was shocked that the Union won the election is an expression of his surprise rather than evidence of anti union animus. Vance's subjective surprise was never translated into anti union statements directed to Respondent's employees. Likewise his subjective state of mind that he did not want his employees to choose the Union and that he thought Respondent's employees would be better off without the Union, was never expressed to his employees. There is no evidence of disparate treatment of Larrie or any other employee by Respondent in the enforcement of its work rules. Larrie was repeatedly warned both before and after the November 30 election to keep his radio turned on, yet he admittedly failed to do so. Larrie was told before the November 30 election that he had to obtain permission to work overtime, and in the past requested permission before working overtime. Yet he worked overtime on December 12 without permission. Vance had disciplined employee William Garcia for similar conduct. Larrie was told to make the out of gas delivery to Daws on January 3. By the end of his shift on January 4 he had not made the delivery and refused to do so when ordered by Vance. This was not a case of refusing to work overtime as contended by Counsel for the General Counsel but rather a refusal to perform a scheduled delivery during normal work hours. The absence of written warnings or suspensions to Larrie before the election, in the absence of anti union animus or disparate treatment, does not by itself establish that in enforcing its work rules Respondent was motivated by its employees' union activity. I find that General Counsel has failed to establish a *prima facie* case that Respondent violated Section 8(a)(1) or (3) of the Act by more stringently enforcing its work rules and by warning and suspending Larrie because its employees engaged in union activity. I will dismiss the Complaint in its entirety.

II. Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. I find that General Counsel has failed to establish Respondent violated Section 8(a)(1) or (3) of the Act as alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

IT IS HEREBY ORDERED that the Complaint be, and it is, dismissed in its entirety.

San Francisco, California
Dated: August 8, 2002

John J. McCarrick
Administrative Law Judge

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.