

**Alco Electric Co., Inc. and Gilbert Rivera, Case 2-
CA-16819**

September 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On September 29, 1980, Administrative Law Judge Howard Edelman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Alco Electric Co., Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

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

WE WILL NOT discharge or otherwise discriminate against our employees in order to discourage membership in, or activities on behalf of, Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer to Gilbert Rivera immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings or benefits he may have suffered by reason of our discrimination against him, with interest.

ALCO ELECTRIC CO., INC.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge: This case was heard by me in New York, New York, on May 8, 1980. This case originated pursuant to a charge filed by Gilbert Rivera, an individual, on October 12, 1979. On December 6, 1979, a complaint issued alleging that Alco Electric Co., Inc., Respondent herein, had discharged Rivera because he had joined, supported, or assisted Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, in violation of Section 8(a)(1) and (3) of the Act.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New York corporation with an office and place of business in Bronx, New York, where it has been engaged as an electrical subcontractor in the building and construction industry installing electrical wiring and fixtures in residential and commercial buildings. Respondent, since at least 1976 and continuing up to the present time, has been and is now an employer-member of United Construction Contractors Association, herein called the Association, which is an organization composed of employers engaged in the construction industry and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations including the Union herein.

The Association had a collective-bargaining agreement with the Union since June 30, 1976, this agreement expired on June 30, 1979. The collective-bargaining agreement covered a unit of electrical apprentices, mechanics, and journeymen. Respondent, a member of the Association, is bound by the terms of the collective-bargaining agreement between the Association and Local 363. Henry Moses, president director of Respondent, testified that as yet no new bargaining agreement has been negotiated. However, at the date of this hearing the parties were currently in negotiations for a new agreement.

The employer-members of the Association in the course and conduct of their business operations collectively, annually derive and during the past year derived gross revenues in excess of \$500,000. The employer-members of the Association in the course and conduct of their business operations annually and collectively purchase and receive and during the past year did purchase and receive at New York State locations, goods and materials valued in excess of \$50,000 directly from points outside the State of New York.¹

I find the Association, and Respondent as a member of the Association, are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. *Town House Restaurant*, 203 NLRB 864 (1973); *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (Atlas Reid, Inc.)*, 170 NLRB 584 (1968).²

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that the Union herein is a labor organization within the meaning of Section 2(5) of the Act.

III. RESPONDENT'S RELATIONSHIP WITH THE UNION

Henry Moses, Respondent's president, testified that on or about October 1979, he employed a total of 13 unit employees (apprentices, mechanics, and journeymen) of which 11 were members of the Union. Foreman Obdulio Rivera, an admitted supervisor within the meaning of Section 2(11) of the Act, testified that during the same period, Respondent employed approximately 11 unit employees of which 7 or 8 were union employees. The collective-bargaining agreement contained a union-security clause which required membership in the Union after 7 days from the beginning of employment or the effective date of the agreement, whichever is later.

According to Moses, although the 1976 bargaining agreement has expired, he had continued to apply the terms of the expired collective-bargaining agreement to those employees who are members of the Union. He does not apply terms of this agreement to nonunion employees. In this connection, Moses admits that he continues to deduct and remit union dues pursuant to the contract's union-security clause to the Union on behalf of those employees who are members of the Union. Although the expired collective-bargaining agreement provides that each employer shall hire employees through the Union and that an employer may hire from outside sources only if the Union is unable to supply employees. Moses testified that he routinely hires employees off the street based on their prior experience in the electrical industry or through recommendations of other employers or employees rather than through the Union's hiring hall.

¹ Respondent's answer denied knowledge or information as to par. 2(d) and (e) of the complaint which alleged the gross revenues and purchases of the Association. During the course of the hearing herein, Respondent amended its answer to admit par. 2(d) and (e) of the complaint.

² Respondent's answer denied knowledge or information concerning par. 3 of the complaint which alleges that the Association and Respondent are now and have been at all times material herein, employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

In addition, the Association's agreement also provides that the employer make specified monetary contributions for each employee employed by the employer, to a pension fund, annuity fund, or joint industry fund. Moses presumably makes such contributions for union members.

IV. THE DISCHARGE OF GILBERT RIVERA

Gilbert Rivera, the Charging Party herein, began work for Respondent on July 16, 1979.³ His classification was that of mechanic. He received a rate of \$5.50 per hour. Gilbert Rivera testified that he was initially interviewed for employment by Foreman Obdulio Rivera. He filled out no application form but was instructed by Foreman Rivera orally to commence work on July 16. According to Gilbert Rivera during his employment interview with Foreman Rivera, he informed Foreman Rivera that he was a member of Local 815, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that he had obtained this membership as a condition of employment in connection with his prior job. According to Gilbert Rivera, Foreman Rivera replied that Respondent was a teamster shop represented by a different local, but that there should be no trouble transferring from one Teamsters local to another.

The workweek for all Respondent's electrical employees is from Monday through Saturday, 48 hours per week with 8 hours' overtime. All employees are expected to work Saturday.

Gilbert Rivera commenced working on July 16 at 359-99 Bainbridge Avenue, Bronx, New York, where Respondent was engaged in renovation work. He worked continuously at this location from July 16 through July 25.

As of the payroll period ending August 1, Gilbert Rivera received a pay increase from \$5.50 to \$6 per hour. According to Moses, Rivera received this raise because of the excellent quality of his work at this time.⁴

Gilbert Rivera was next assigned to work at a renovation project located at 325 West 45th Street, New York, New York, where he worked from July 26 through September 8. From September 10-24, Rivera was assigned to work at a job called the Arden Street job. This project is a Federal project and Rivera received a rate of \$9.50 per hour.⁵ From September 26 until his discharge on October 10, Gilbert Rivera returned to work at the West 45th Street job. The electrical work performed by Rivera at all of the above jobs consisted of rewiring electric circuits, adding additional circuits, properly distributing existing circuits and adding light switches and wall sockets.

Gilbert Rivera testified that at various times during his employ he questioned Foreman Rivera as to his joining the Union. Each time Foreman Rivera responded that

³ All dates herein are 1979, unless otherwise specifically indicated.

⁴ According to the testimony of Moses, mechanics are paid an approximate rate of \$6 per hour except on jobs involving Federal contracts where their pay rate required by Federal law is \$9.50 per hour. The collective-bargaining agreement between the Association and the Union does not set forth the pay scale for covered employees for the years 1978 and 1979. The pay rate set forth in the year 1977 was \$5.95 per hour.

⁵ The exact address of the Arden Street job is not set forth in the hearing record.

the Union would send for him at which time they would require that he fill out certain papers, presumably a membership application and dues-checkoff card. Foreman Rivera admitted that Gilbert Rivera asked him on several occasions when he could join the Union, and he replied, "When we know we can keep you." According to Foreman Rivera, employees were permitted to join the Union only after Respondent made a decision that the employee was a qualified employee and they intended to retain him as a permanent employee. Moses testified that he determines the length of this trial period. It could be 3 months or a year and a half. There is no specified trial period set forth in the Association agreement. However, article 6 of that agreement, relating to the discharge of employees provides that "after an employee shall have been employed for 28 days, no employer shall have any right to an immediate discharge except for dishonesty, drunkenness or assault."

Moses testified that when Gilbert Rivera commenced working on the 45th Street job (July 26 through September 8) he began receiving complaints from the job that Rivera was slow and required help to perform his work. In his regard, Foreman Rivera testified that he visits each jobsite several times per week that he frequently observed Rivera at work and that his work was unacceptably slow. He testified that he spoke to Rivera about his slow work frequently. Gilbert Rivera concedes that Foreman Rivera criticized his work as being too slow on numerous occasions.

Additionally, Moses testified that on several occasions Gilbert Rivera left the jobsite without permission during working hours. In this connection, Moses testified that on one occasion he went to the Arden Street job where Rivera was assigned looking for him and he was nowhere to be found. On another occasion, at another jobsite Moses testified he received a call from the construction foreman at that jobsite who was unable to find Rivera. The construction foreman informed Moses that he was unable to put up sheet rock because Rivera had not yet performed his assigned electrical work.

Additionally, Moses testified that Gilbert Rivera's absence record was intolerable. In this connection, payroll records establish that during the 13 weeks that Rivera worked for Respondent, he was absent a total of 19 out of 78 working days. In addition, during this period Rivera worked only a full workweek during 3 of those 13 weeks. Further, although Saturday work was required, Rivera worked only 3 out of 13 Saturdays. According to the undisputed testimony of Moses, work was available 6 days a week, throughout the course of Rivera's employ.

Moses testified that as a result of Gilbert Rivera's work record described above, sometime in late September, he told Foreman Rivera to fire Gilbert Rivera. Foreman Rivera testified that Moses repeatedly told him to get rid of Rivera but that he persuaded Moses each time to give Rivera another chance in the hope that the quality of his work and his absence record would improve.

Gilbert Rivera testified that not having been contacted by the Union since his employ sometime on or about October 5, he telephoned the union office and spoke with a

clerk. He informed the clerk that he was employed by Respondent and had been a member of Local 815 of the Teamsters and wished to transfer to the Union. The clerk informed him that Pat Bellontoni, a union delegate, would contact him. Rivera left a private phone number where he could be reached. On October 10, in the morning, not having been contacted by the Union, Rivera again contacted the Union by phone and requested to speak with Bellontoni. Rivera testified that he made this phone call from a nearby pay phone. According to Rivera, at 1 p.m. on October 10, Bellontoni telephoned him.⁶

According to Rivera, Bellontoni informed him that he had telephoned Respondent's office in response to his telephone calls and asked Rivera whether he had received word of such contact. Rivera stated he had not received any message from the office of such call. Rivera then informed Bellontoni that he wanted to join the Union. Rivera then told Bellontoni that he had to return to the job but would get back to him later.

Henry Moses testified that sometime on October 10, during the workday, he had tried to locate Gilbert Rivera. When he was unable to do so he contacted Foreman Rivera and asked, "Where the hell did he [Gilbert] go this time." Foreman Rivera responded, "Oh he went to the Union." Moses then stated, "Get rid of him, once and for all, period."

Gilbert Rivera testified that sometime on October 10, following his conversation with Bellontoni he received a telephone call from Foreman Rivera at the jobsite. Foreman Rivera told him that he was fired. Rivera asked why he was fired and Foreman Rivera responded that he had been informed by Moses that the union delegate had called and stated that Rivera must be discharged because he did not belong to the Union. Foreman Rivera did not indicate who the union delegate had spoken with. Rivera told Foreman Rivera that he did not believe this. Foreman Rivera then stated, "Moses did not like you calling the Union."

Foreman Rivera testified that he recalled this telephone conversation with Gilbert Rivera but did not recall what transpired during this conversation except that he did recall informing Rivera that he was terminated because of his poor work. He denied that he told Rivera that the Union demanded his discharge because of his nonmembership or that Moses did not like him calling the Union. He asserted that Rivera told him that he wanted to join the Union and that he said that it was too late now. I credit Gilbert Rivera's version as to this telephone conversation.⁷

⁶ The record does not establish where Rivera received this telephone call.

⁷ I found Gilbert Rivera to be honest and forthright in response to the questions put to him on both direct and cross-examination. In this connection he readily admitted the criticisms concerning his work alleged by Moses and Foreman Rivera. In addition, I do not believe that Gilbert Rivera had either the inventiveness nor imagination to make up the testimony concerning his conversation with Foreman Rivera. Further, in view of the admission made by Moses to discharge Rivera upon hearing that he had contacted the Union, I conclude that Gilbert Rivera's testimony is credible.

On October 11, in the morning, Gilbert Rivera visited the Union's office in Mineola, Long Island, and spoke with Pat Bellontoni. He informed Bellontoni of his discharge and of his conversation with Foreman Rivera. Bellontoni denied that he had told Moses or any Respondent representative that he should be discharged for his nonmembership in the Union. According to Rivera, Bellontoni stated, "There's no reason for me to say that—my purpose is to have members and right now we need members."

Later that same day, about 5:30 p.m., Gilbert Rivera went to Respondent's office to pick up his paycheck. At this time he met Foreman Rivera. He told Foreman Rivera that someone was lying when they told him that the Union wanted him fired because of his nonmembership. He told Foreman Rivera that he had gone to Mineola that morning and spoken with Bellontoni who had denied ordering his discharge. According to Rivera, Foreman Rivera stated, "Well that's what Moses told me." Foreman Rivera then told Rivera that "he shouldn't have called the Union in the first place. Moses did not like it and in any event, Moses wasn't too happy with his work."

Gilbert Rivera testified that, on October 12, he telephoned Moses and told him that he wanted an explanation as to why he had been terminated. He told Moses that Foreman Rivera had told him that he was terminated because he was not a member of the Union. Moses told him that it was also because of his poor job performance. Rivera repeated to Moses that Foreman Rivera had told him that it was because of the Union. At this point, Moses stated that his going to the Union had little to do with it and that he should not have gone to the Union.

Moses testified that he had a telephone conversation with Rivera following his discharge. According to Moses, Rivera told him that Foreman Rivera had said that he was fired because he wanted to join the Union. Moses told him he was fired because his work was unsatisfactory. I credit Rivera's version of this telephone conversation.⁸

Analysis and Conclusion

The evidence in this case establishes conclusively that Gilbert Rivera was discharged by Respondent because he attempted to join the Union.

That the discharge of Rivera was discriminatory is established by Moses' testimony wherein he concedes that upon becoming aware on October 10, through Foreman Rivera, that Gilbert Rivera had contacted the Union earlier that day, he told Foreman Rivera on the spot to "get rid of him once and for all."⁹ It is further established by

⁸ As set forth above, I found Rivera to be a credible witness. Moreover, in view of Moses' admissions concerning his decision on October 10 to fire Rivera upon learning about Rivera's contact with the Union, I find Rivera's version of his telephone conversation with Moses to be consistent with the admissions of Moses. Moses, throughout his testimony, both on direct and on cross-examination was frequently vague and unresponsive in his answers.

⁹ The record does not establish how Foreman Rivera became aware that Rivera had contacted the Union on the morning of October 10, the day of his discharge. However, Gilbert Rivera testified that Bellontoni told him he (Bellontoni) had called Respondent's office in response to Ri-

the credited testimony of Gilbert Rivera that upon being informed of his discharge by Foreman Rivera, Gilbert Rivera questioned the stated reason for the discharge, namely, that the Union had requested that Respondent discharge him because of his nonmembership in the Union, and Foreman Rivera replied that Moses did not like his calling the Union. Similarly, on October 11, the day following Rivera's discharge, Rivera again confronted Foreman Rivera and told him that Union Representative Bellontoni had denied requesting his discharge. Foreman Rivera responded that he should not have gone to the Union in the first place; Moses did not like it, and in any event, Moses was not happy with his work. It is conclusively established by the credited testimony of Gilbert Rivera that during a telephone conversation with Moses on October 12, he pressed Moses as to the real reason for his discharge and Moses admitted that "The Union had a little to do with it." Adding that "he shouldn't have gone to the Union anyway."

It could be argued that Respondent had no motive to terminate Rivera in that Respondent had a collective-bargaining agreement with the Union. However, the evidence establishes that not all Respondent's unit employees covered by this agreement were members of the Union. Moreover, Moses admitted that he did not enforce the provisions of the agreement with respect to nonunion members and that the agreement only applies to union members. This being the case, it can be fairly presumed that Respondent was opposed to Rivera's joining the Union as it would require substantial contributions by Respondent to the union funds. Additionally, the Association's agreement discharge clause provides that an employee employed for 28 days shall be exempt from immediate discharge except for dishonesty, drunkenness, or assault. Application of this provision to Rivera whose work Respondent was not satisfied with, would make it difficult for Respondent to terminate his employment.

Respondent contends that Rivera was discharged because his work was not satisfactory. The evidence does establish that Rivera was a slow worker and was warned about his slow work on numerous occasions by Foreman Rivera and Moses, a fact which Rivera generally concedes. In addition, the evidence establishes that Rivera was at various times unreliable in that he was away from his job station during working hours without permission. Further, the evidence establishes that Rivera's attendance record was unsatisfactory. However, Moses condoned Rivera's unsatisfactory work record. Although he repeatedly instructed Foreman Rivera to discharge Gilbert Rivera, he was persuaded each time by Foreman Rivera to give him another chance in the hope that his work would improve. It was only when Moses became aware that Rivera had contacted the Union that he insisted that Rivera be discharged.

vera's telephone call on October 10, just hours prior to notification of his discharge.

CONCLUSIONS OF LAW

1. The Association and Respondent are employers engaged in commerce within the meaning of Section 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. By discharging its employee Gilbert Rivera, Respondent engaged in discrimination in regard to hire or tenure of employment or other terms or other conditions of employment discouraging membership in or activities on behalf of a labor organization in violation of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged and is engaging in unfair labor practices, in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

It is recommended that Respondent offer Gilbert Rivera full reinstatement to his former job or, that if such a job no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and benefits, and to make Rivera whole for any loss of pay or benefits he may have suffered as a result of the discrimination against him, as found herein, by payment to him of a sum of money equal to that he would have earned as wages or other benefits from the date of his discharge to the date of an appropriate offer of reinstatement by Respondent, less net earnings during that period with interest thereon to be computed in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁰

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

ORDER¹¹

The Respondent, Alco Electric Co., Bronx, New York, Inc., its officers, agents, successors, and assigns, shall:

¹⁰ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the

1. Cease and desist from:

(a) Discharging or otherwise discriminating against its employees in order to discourage membership in, or activities on behalf of Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Offer to Gilbert Rivera immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings, or benefits he may have suffered by reason of Respondent's discrimination against him, as set forth in The Remedy section of this Decision.

(b) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social security records, time cards, personnel records and reports, and all other records necessary to facilitate effectuation of the order herein.

(c) Post at its offices and place of business in Bronx, New York, copies of the attached notice marked "Appendix."¹² Copies of said notices on forms provided by the Regional Director for Region 2, after being duly signed by an authorized representative of Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 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 material.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹² In the event that this 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."