

North Electric Company and Robert R. Edelstein.
Case 32-CA-94 (formerly 20-CA-11630)

December 7, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND MURPHY

On August 11, 1977, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

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,¹ 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 the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel 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 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case came to hearing at San Jose, California, on April 21, 1977. The charge was filed on June 24, 1976,¹ by Robert R. Edelstein, an individual. The complaint issued on November 18, 1976, alleging that North Electric Company, herein

¹ On September 8, 1976, the Regional Director for Region 20 dismissed the charge and on November 2, 1976, the Regional Director vacated that dismissal. Counsel for the Respondent argues that the complaint is not based on a valid charge because a timely appeal was not filed by the Charging Party from the Regional Director's dismissal. The appeal was due at the General Counsel's office of appeals on September 21, 1976. By letter dated September 17, 1976, counsel for the Charging Party notified the office of appeals that she had been contacted about an appeal by the Charging Party on September 15, 1976, and that she was requesting an extension of the time to appeal. That letter was not received by the office of appeals until September 23, 1976. Nonetheless, an extension of the time to appeal was

called the Company, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended.

Issues

The sole issue is whether the Company discharged Edelstein either because of his union activity or because he sought wage increases for the Company's employees.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Company.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company has offices and places of business at various locations in the United States, including one in Santa Clara, California, where it is engaged in the operation of a warehouse for the distribution of telephones and telephone parts. During the past calendar year, in the course of its business operations in California, the Company purchased and received goods valued in excess of \$50,000 directly from suppliers located outside California. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Sales Delivery Drivers, Warehousemen, and Helpers Union, Local No. 296, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 296, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Sequence of Events*

The Company operates seven warehouses in various parts of the United States in which it receives and stores telephones and telephone parts which it ships to independent telephone companies and to its own enterprise, United Telephone Company. The warehouses all operate under a standard procedure and all use a central computer. The computer is utilized to develop orders and keep up inventory.

One of the Company's warehouses is located in Santa Clara, California. The Company employed four people at

granted, and an appeal was filed within the extended time period. Sec. 102.19(a) of the Board's Rules and Regulations provides that consideration of an appeal untimely filed is within the discretion of the General Counsel upon good cause shown. There is no basis for finding that the General Counsel abused his discretion in extending the time to appeal. It is noted that on November 2, 1976, when the dismissal of the charge was vacated, 6 months had not yet passed from June 11, 1976, the date of the alleged unfair labor practice, and therefore even if the reinstated charge were considered a new charge as of November 2, 1976, it would have been timely under Sec. 10(b) of the Act.

that warehouse during the times relevant herein. They were Warehouse Manager Julian Gonzalez,² warehouse secretary or clerk Lynn DeLisle, and warehousemen Henry Zender and Robert R. Edelstein. The warehousemen received telephone parts, stocked them in the warehouse, packaged them, and shipped them. They were paid a monthly salary and their work hours were from 8 a.m. to 4:30 p.m., with two 15-minute breaks and a half hour lunch. Under outstanding company policy new employees were subject to a 90-day probationary period.

Edelstein was hired on March 15, 1976. He was discharged on June 11, 1976, which was the end of the last pay period³ before the expiration of his probationary period. The reason for his discharge is in dispute.

About the end of April or beginning of May 1976 Edelstein and Zender had a conversation in which they discussed their dissatisfaction with their wages and hours. In mid-May 1976 Edelstein and Zender went into Supervisor Gonzalez' office and asked to speak to him. Edelstein was the spokesman for both employees. Edelstein said that he was not being compensated fairly for his job and that the Company should either increase his wages or give him time off. As the employees were paid a monthly salary, the time off would be the equivalent of a raise in an hourly rate. Gonzalez said that he would talk to the people in the home office and see what he could do. Shortly thereafter, Gonzalez told Edelstein that they would try a system under which the employees, on a rotating basis, would leave before the ordinary 4:30 quitting time if all the work had been completed. That policy was instituted on a trial basis and Edelstein, Zender, and DeLisle rotated in leaving early. When it was Edelstein's turn he left up to 3-1/2 hours early. The other two employees took less time off.

During the time the early time-off system was in effect, Gonzalez found that he could not tell from hour to hour what the workload would be, because truckloads and rush orders could come in that required the services of two men. He also found that he was spending most of his time in the warehouse making sure that the company procedures were being followed. On or about June 1, 1976, Gonzalez told the employees that the early time-off system would no longer be followed, that they would have to work the regularly scheduled work hours from 8 to 4:30 and that they could not leave without his permission. When Gonzalez told Edelstein that the early time-off system was ending, Edelstein replied that he did not want to cause any trouble, but he had taken some labor courses in college and he knew he could bring in a union. Gonzalez said that that was his prerogative.⁴

Edelstein testified that some time prior to the institution of the free time-off policy he had a conversation with Gonzalez in which Gonzalez said that one of the regional

warehouses was unionized, that it had the poorest performance of any of the warehouses, and that the executives would have liked to close down the warehouse for a year to get rid of the union, but that it was not economically feasible because that warehouse was located close to a telephone manufacturing plant. Edelstein testified that he did not recall who brought up the subject of the Union and that he had no idea of the context in which the conversation came about. He was also unsure of when the conversation took place. Gonzalez testified that he had two conversations with Edelstein in which the Union was mentioned. One, as discussed above, was on June 1 when the early time-off period ended. Gonzalez averred that the only other conversation was before the time-off period began. According to Gonzalez, he had received a warehouse appraisal form which he showed to Edelstein; Edelstein saw that the Mansfield warehouse was at the bottom of the list; and Gonzalez said that they were having some problems and that it was a union warehouse. Gonzalez specifically denied that he said anything about closing the Mansfield warehouse for a year to get rid of the union. I credit Gonzalez and do not credit Edelstein.⁵

On June 10, 1976, Edelstein was sick and did not report for work. In the late afternoon of that day he called Hank De Diago, a representative of Local 296, about the possibility of obtaining union representation at the warehouse. De Diago told him the process for gaining representation. That evening Edelstein called Zender on the telephone and told him about his conversation with the union representative. Zender said that he would be willing to sign a card to have an election. The same evening Edelstein called DeLisle on the telephone and repeated what he had told Zender. DeLisle said that she did not think she was willing to sign a union card. There is no evidence in the record to establish or to base an inference that the Company obtained knowledge of Edelstein's telephone conversations with De Diago, Zender, or DeLisle.⁶ Gonzalez credibly testified that he had no knowledge of those conversations.

At the end of the workday on June 11, 1976, Gonzalez discharged Edelstein. Gonzalez told Edelstein that he was fired for insubordination. As this was happening, Zender walked into the office and Edelstein told him that he (Edelstein) had been fired. When Zender asked the reason, Edelstein said that Gonzalez had told him that he was fired for trying to run the place by himself, trying to do things his own way, and being insubordinate. Edelstein asked Gonzalez whether Zender was also being fired. Gonzalez

² The complaint alleges, the answer admits, and I find that Gonzalez is a supervisor within the meaning of the Act.

³ Paydays were every other Friday.

⁴ These findings are based on the testimony of Gonzalez. Much of it was corroborated by the testimony of Edelstein. However, Edelstein denied that Gonzalez made any response when he (Edelstein) mentioned a union. Gonzalez impressed me as a guileless, candid witness who was fully credible. Edelstein was extremely vague concerning the circumstances surrounding some of the conversations to which he testified. His demeanor on the witness stand did not inspire confidence. As between Gonzalez and Edelstein I credit Gonzalez.

⁵ Edelstein also testified that at the end of April or beginning of May he told Gonzalez that a lot of the warehouses in the area were unionized and that they as employees had that alternative. At another point in his testimony he averred that he never had a conversation with Gonzalez on the subject of unions prior to the mid-May conversation in which he expressed his dissatisfaction with wages. As indicated above, Gonzalez averred that there were only two conversations in which a union was mentioned. I do not credit Edelstein with regard to the alleged third conversation.

⁶ It is noted that counsel for the General Counsel does not contend in her brief that the Company obtained such knowledge.

replied that Zender was not going to be fired but that he was going to be on probation for a couple of weeks.⁷

The complaint does not allege that Zender's suspension violated the Act. Gonzalez credibly testified that Zender had been an outstanding employee before Edelstein was hired and that he (Gonzalez) thought Edelstein had been a negative influence on Zender. He credibly averred that on or about June 1, 1976, he told Zender that he thought Zender was not performing as well as he had in the past, and that on June 11 he put Zender on probation to let Zender know that he was not working up to his potential.

On June 14, 1976, Edelstein called Company Executive John Hartling in Kansas City and asked about the discharge. Hartling told him that Gonzalez had reported that Edelstein had been discharged for insubordination. The Company's records also show that the discharge was for insubordination.

On June 21, 1976, Gonzalez signed a statement relating to Edelstein's unemployment compensation claim. In the part of the form that said, "If this person quit or was fired, explain in detail," Gonzalez wrote, "Insubordination and unwilling to submit to company policy. The claimant believed he should be able to leave the job when he thought he had done 8 hours work even if the workday had not finished. He also believed he was under-paid. Wanted compensation beyond my control." Gonzalez credibly testified that his remark, to the effect that Edelstein wanted compensation beyond Gonzalez' control and that Edelstein believed he was underpaid, had nothing to do with the reason for the termination. He also credibly averred that he thought those remarks might explain some of the insubordination.

B. *The Reasons Advanced by the Company for the Discharge*

Edelstein was aware of the fact that the Company had a number of warehouses and that it was essential that everyone follow prescribed procedures because the work had to be coordinated with the procedures at the other warehouses.

Gonzalez credibly testified that Edelstein was a good worker for the first month of his employment but that after that he continually questioned company procedures and failed to properly follow them. When Gonzalez corrected Edelstein, Edelstein did the work properly for several days and then went back doing it his own way. Gonzalez had to constantly supervise Edelstein to make sure that Edelstein was doing things correctly. The problem arose in a number

of different contexts. Company procedure requires that top priority be given to receiving merchandise. Employees were supposed to stop whatever they were doing when merchandise came in so that the new merchandise could be entered in the computer. Edelstein questioned that procedure, saying that he did not feel he should stop what he was doing to follow a procedure that had been set down by the Company in Kansas. The company procedure calls for the rotation of stock so that items in the warehouse longest were the first shipped out. The newly received stock had to be physically placed in back of the older stock. Edelstein told Gonzalez that the rotation took too much time. Gonzalez often observed Edelstein failing to rotate the stock and repeatedly told him to correct the situation. Company procedures require that orders be segregated to avoid shipping errors. Separate orders were to be separately stacked rather than being placed on top of each other. On several occasions Edelstein stacked different orders on top of each other and argued with Gonzalez when Gonzalez corrected him. Edelstein often worked through his breaks and then asked to go home early because his part of the work for the day had been completed. On a number of occasions Gonzalez told Edelstein that he was supposed to take his breaks like all the other employees and be there from 8 to 4:30.⁸

The above findings are based on the credited testimony of Gonzalez. Zender, who had been assigned to train Edelstein, testified to a number of incidents involving Edelstein which indicated the same type of attitude and conduct by Edelstein as had been described by Gonzalez. Those incidents were not reported to Gonzalez, so they may not be considered in evaluating the Company's motivation for the discharge. However, Zender's testimony does support the conclusion that Gonzalez accurately evaluated the work and attitude of Edelstein.

The early time-off period ended on June 1, 1976. On June 4, Gonzalez observed Edelstein leaving 10 or 15 minutes before the 4:30 quitting time. He asked where Edelstein was going and Edelstein replied that he was going home. Edelstein also said that he had worked through his break and that he should be able to go home. Gonzalez replied that Edelstein was supposed to take his breaks and go home at 4:30 just like the other employees. They continued to discuss the matter until 4:30 when Edelstein left.⁹

Gonzalez credibly testified that on June 4, 1976, after Edelstein tried to leave early, he decided that he would terminate Edelstein. He also decided to make the termination effective on Friday, June 11, which was the end of that

⁷ These findings are based on the credited testimony of Gonzalez and Zender. Edelstein testified that when he was discharged Gonzalez told him that he (Gonzalez) did not like the atmosphere that existed with Edelstein there. I do not credit Edelstein.

⁸ Edelstein testified that on several occasions Gonzalez told him that he (Edelstein) was doing too much of the workload and that he should slow down and let Zender do more. Gonzalez, in his testimony, acknowledged that he told Edelstein he was working too fast. However, Gonzalez also averred that it occurred during the early time-off period and that Edelstein was working fast and recklessly so that he could leave early.

⁹ These findings are based on the testimony of Gonzalez. Edelstein in his testimony denied that he ever sought to leave work early after the early time-off period was terminated and also denied that he talked to Gonzalez about such a matter. He averred that during the early time-off period one of the employees sought to leave early and that Gonzalez asked to be notified

when someone was leaving early. He also averred that the employees agreed to notify Gonzalez. Gonzalez, in his testimony, denied that any such conversation took place and averred that it was the established procedure, even during the early time-off period, for employees to check with him before they left. Zender testified that sometime after the early time-off period ended he saw Edelstein trying to leave about 10 minutes before quitting time and he heard Gonzalez tell Edelstein that he could not leave before quitting time. In an affidavit he gave to the General Counsel, Zender averred that he thought the incident occurred during the early time-off period. However, in his testimony at the hearing he averred that the incident had to be after the early time-off period because otherwise there would not have been an argument about Edelstein's leaving 10 minutes early. During the early time-off period Edelstein had been leaving as much as 3-1/2 hours early. I credit Gonzalez and Zender's testimony. I do not credit Edelstein.

payroll period and the end of the last payroll period before the expiration of Edelstein's 90-day probationary period.

Gonzalez credibly testified that he thought Edelstein would take too much supervision and that he was not the type of employee that they needed on that type of a job.¹⁰ He further credibly testified that his conversations concerning unions with Edelstein, and Edelstein's efforts at seeking additional compensation, had nothing to do with the termination.

C. Analysis and Conclusions

In mid-May 1976 Edelstein asked Supervisor Gonzalez for a raise. He did it in the presence of Zender after discussing the matter with Zender. It is reasonable to believe that the request for a raise was on behalf of both and that it was therefore a concerted activity. There is no evidence that the Company was hostile toward employees who asked for raises.

On June 1, when Gonzalez informed Edelstein that a paid time-off policy would no longer be in effect, Edelstein replied that he could bring in a labor union. His right to bring in a labor union was protected by the Act. The credited evidence does not establish that the Company knew of any other protected activity that Edelstein engaged in.¹¹ Sometime before June 1976 Supervisor Gonzalez told Edelstein that the Company was having problems with its Mansfield warehouse and that that warehouse was unionized. The remark was made in the context of a discussion relating to the position of the Mansfield warehouse on a warehouse appraisal form. That remark was not of such a nature as to indicate that Gonzalez harbored the type of animosity against union activity that would make it reasonable to believe that he was motivated to discharge an employee because that employee spoke about bringing in a union. There is no other credited evidence indicating that the Company harbored any union animus.

¹⁰ Gonzalez credibly testified that another employee, Edward Roth, was terminated for failing to follow proper warehouse procedures.

¹¹ Edelstein was discharged the day after he had a telephone conversation with a union representative and two telephone conversations with other employees about the Union. While the timing of the discharge raises suspicions, there is insufficient evidence to establish that the Company knew of those conversations. Those conversations did not take place on company premises, and there were no circumstances present that would make it

Gonzalez credibly testified in substance that he was dissatisfied both with Edelstein's failure to follow company procedures and with Edelstein's attitude towards supervision. He further credibly testified that he decided to discharge Edelstein on June 4 after he saw Edelstein attempting to leave work early. Edelstein was discharged on June 11, which was the last day of the payroll period and shortly before Edelstein's 3-month probationary period ended.

Edelstein's protected activity was limited, the Company was not shown to harbor the type of animosity against such activity that would give it a motive to discharge Edelstein because of that activity, and the Company has established by credible evidence that it had legitimate business reasons for the discharge. I find that the General Counsel has failed to establish by a preponderance of the credible evidence that there was a causal connection between Edelstein's union or other protected activity and his discharge. I shall therefore recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 296 is a labor organization within the meaning of Section 2(5) of the Act.
3. The Company did not violate the Act as alleged in the complaint.

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

ORDER¹²

It is hereby ordered that the complaint is dismissed in its entirety.

reasonable to believe that the Company obtained knowledge of them. Cf. *Samsonite Corp.*, 206 NLRB 343, 349 (1973).

¹² 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 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.