

In the Matter of PENNSYLVANIA ELECTRIC COMPANY and HUSTON
NEPTUNE (AN INDIVIDUAL)

Case No. 6-C-667.—Decided May 27, 1944

Mr. Thomas H. Ramsey, for the Board.

Mr. George M. Spence and *Mr. Tillman K. Saylor, Jr.*, of Johnstown,
Pa., for the respondent.

Mr. Gilbert V. Rosenberg, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon a charge duly filed on December 31, 1941, by Huston Neptune, the National Labor Relations Board, herein called the Board, by the Regional Director for the Sixth Region (Pittsburgh, Pennsylvania), issued its complaint on September 17, 1943, against Pennsylvania Electric Company, Johnstown, Pennsylvania, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and of hearing thereon were duly served upon the respondent and Huston Neptune, the individual who filed the charge herein.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that, from on or about June 1, 1939, the respondent (a) made disparaging statements about the International Brotherhood of Electrical Workers, herein called the Union; (b) urged, warned, and threatened its employees against joining, remaining members of, or assisting the Union; (c) stated that it would not permit members of the Union to work in the gas department of the plant; and (d) warned one employee that he would not be promoted to a higher position if he continued his association with a member of the Union; (2) that the respondent discriminatorily withheld overtime work from Neptune, discriminatorily laid him off on or about March 7, 1941, and, thereafter, on or about May 27, 1941, discriminatorily discharged him and refused

to reinstate him because of his membership in and activities on behalf of the Union; and (3) that the respondent, by the foregoing and by other specific acts, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. Thereafter, the respondent filed its answer denying the alleged unfair labor practices and averring that Neptune had been laid off and discharged because of careless and inefficient work.

Pursuant to notice, a hearing was held at Williamsburg, Virginia, on October 8, 1943, and at Johnstown, Pennsylvania, on October 12, 13, 14, 15, and 16, 1943, before Howard Myers, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the conclusion of the hearing, counsel for the Board moved to conform the pleadings to the proof with respect to dates, names, and other minor particulars. The motion was granted without objection. During the course of the hearing, the Trial Examiner made rulings on other motions and on objections to the admissibility of evidence. The Board has reviewed all the rulings and finds that no prejudicial error was committed. The Trial Examiner's rulings, except those inconsistent with our findings and order below, are hereby affirmed.

On November 4, 1943, the Trial Examiner filed his Intermediate Report, copies of which were duly served upon the parties. He found that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the Act. He recommended that the respondent cease and desist from its unfair labor practices and take certain affirmative action, including an offer of reinstatement with back pay to Huston Neptune.¹ Thereafter, the respondent filed exceptions to the Intermediate Report and a brief in support of its exceptions.

Pursuant to notice and at the request of the respondent, a hearing was held before the Board in Washington, D. C., on January 20, 1944, for the purpose of oral argument. The respondent appeared by counsel and participated in the argument. Neptune did not appear at the hearing.

The Board has considered the exceptions and brief filed by the respondent and hereby sustains the exceptions insofar as they are con-

¹ The Trial Examiner also found, contrary to the allegation in the complaint, that the respondent did not discriminatorily deny Neptune overtime work. No exception was filed thereto. The Board has examined the record and agrees with the Trial Examiner's finding. In accordance with our usual practice, we shall not discuss the evidence relating to the alleged unlawful denial of overtime work, and shall dismiss the allegation of the complaint that the respondent withheld overtime work from Neptune because of his union activities.

sistent with the findings of fact, conclusions of law, and order set forth below.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Pennsylvania Electric Company, a Pennsylvania corporation having its principal place of business and offices in Johnstown, Pennsylvania, is engaged in the production, sale, and distribution of electricity, gas, and steam. The respondent is a part of an integrated system whose activities extend into the State of Maryland where, at Deep Creek, Maryland, it operates a power plant. The respondent annually purchases materials, machinery, and equipment valued in excess of \$3,000,000, of which approximately 25 percent is shipped to its Johnstown plant from points outside Pennsylvania. During 1941, the respondent produced electricity valued at \$9,695,904, approximately 50 percent of which was sold to 29 customers whose businesses are engaged in commerce, within the meaning of the Act. During the same year, approximately 17 percent of the electricity produced by the respondent was sold and transmitted to points outside Pennsylvania.

The respondent concedes that it is engaged in commerce, within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The lay-off and discharge of Huston Neptune

Huston Neptune was first employed by the respondent in March 1927 and worked for the respondent continuously, except for two short lay-offs, one of which is alleged to have been discriminatory, until May 27, 1941, the date of his discharge, which is also alleged to have been discriminatory. During that period, Neptune worked in the respondent's gas division which, until March 1940, was under the supervision of his father. Prior to March 1940, Neptune received four promotions accompanied by wage increases, but none thereafter.²

² Notwithstanding the fact that Neptune received promotions and wage increases during his father's tenure as head of the gas division, the record indicates that during a substantial portion of that period, Neptune was not a satisfactory employee. But since, as we herein-after find, the respondent laid off and discharged Neptune for acts of misconduct which occurred in 1941, we shall not set forth in detail his service record prior thereto.

The Union first organized among the respondent's employees in 1933. During the following 10 years the respondent and the Union have bargained collectively and have reached agreement in successive contracts, covering both gas and electric division employees. However, Neptune did not become interested in the Union until the early fall of 1939. At that time he aroused interest in the Union among a few co-workers in the gas division, where the Union had only two members, and urged the Union to reduce its initiation fee to induce gas division employees to become members. The Union indicated that it was anxious to obtain more members in the gas division, but refused to lower its initiation fee. Nevertheless, Neptune joined the Union in March 1940, and thereafter solicited a number of gas division employees to join; but he did not obtain any new members.

The circumstances leading to Neptune's lay-off and discharge, alleged herein to have been discriminatory, are briefly as follows:

On March 5, 1941, while Neptune, who was then classified as a pipe fitter, and several unskilled employees were installing a gas service line, gas escaped from a pipe on which Neptune was working, and the gas was ignited by a nearby lighted lantern, which had been left the night before to guard an excavation. The lantern was supposed to have been extinguished before resumption of work on the gas line. A fire resulted, and Neptune was burned. The respondent held Neptune responsible for the accident and disciplined him by lay-off. About a week later, Neptune was reinstated and warned that any future carelessness on his part would result in his discharge.

In May 1941, Neptune installed a gas service line at the residence of a customer of the respondent; the customer subsequently complained to the respondent about a gas leak. The respondent examined Neptune's work on the gas service line, found that a coupling was loose, permitting the escape of gas, and discharged Neptune.

The respondent sought to justify Neptune's lay-off and discharge on the ground that he had been careless in his work on the two occasions mentioned above. However, the Trial Examiner found that Neptune was laid off and discharged because of his union activity. In reaching this conclusion the Trial Examiner relied principally on the testimony of Ernest Zilk, a Board witness, that in the latter part of March 1941, when Neptune and several other of the respondent's employees were engaged in repair work at the residence of Zilk, the latter remarked to Edward Rager, the respondent's foreman in charge of the repair crew that Neptune was doing most of the work on the job, and that Rager replied, "We aim to put pressure on that bird. . . He is a union man . . . We aim to get rid of him." The Trial Examiner found Zilk to be a credible witness and discredited Rager's denial at the hearing that he made the remarks attributed to him by Zilk. We do

not agree with these findings of the Trial Examiner. In our opinion Zilk was not a reliable witness, and neither his testimony nor the record as a whole convinces us that the respondent laid off or discharged Neptune because of his union activity.

Although Zilk was never in the respondent's employ and did not know Neptune at the time the alleged conversation with Rager occurred, the record shows that, after Neptune's discharge by the respondent, he and Zilk worked at the same plant elsewhere, where they became acquainted and developed a friendly relationship. Notwithstanding this relationship, Zilk testified at the hearing that he had never mentioned the alleged conversation set forth above to Neptune or to anyone else until he was interviewed by a Board representative with respect to the instant case; after so testifying Zilk was unable to explain how the Board's representative obtained knowledge, prior to the pre-hearing interview, of the alleged conversation, which, according to Zilk, did not occur within the hearing of other persons. Aside from Rager's denial that he had never had a conversation with Zilk, there is evidence in the record which indicates that Rager and his crew had left the vicinity of the Zilk residence before the alleged conversation, according to Zilk's testimony, occurred. Moreover, the anti-union remarks which Zilk attributed to Rager and the Trial Examiner's finding of discrimination are inconsistent with the labor relations background of the respondent and with the record as a whole. While Neptune joined the Union in March 1940, and solicited employees in the gas division, where the Union had but few members, his organizing efforts met with no success, and, so far as appears, the respondent had no knowledge of his abortive attempts to secure members in the gas division.³ Besides, there is no showing that the respondent opposed the union activity of any employee or in any way sought to impede the Union's organizational activities among the employees. To the contrary, the record shows, through the testimony of the officials of the respondent and the Union, that the long standing contractual relationship between the respondent and the Union, which is presently in effect, has been mutually satisfactory and beneficial.

Finally, there is credible evidence supporting the respondent's contention that Neptune was laid off for failing to extinguish the lighted lantern which caused the fire described above and that he was discharged for this faulty work on the pipe coupling which developed a leak, also described above. Neptune testified that it was not his duty to extinguish the lantern in question, but rather the duty of his helper.

³ Although the respondent knew of Neptune's union membership through a grievance filed on his behalf in October 1940, at the same time the respondent obtained knowledge of the union membership of another grieving gas division employee; the latter was not subsequently disciplined; on the contrary, he has since been given a wage increase.

However, the record clearly shows that Neptune was the only pipe fitter on the job, that as such he was responsible for work there being done, and that it was part of his responsibility to see that all lighted lanterns on the job were extinguished before resumption of work on the gas line. Neptune further testified that he had tightened the coupling in question, that he had tested it for leaks, and that it did not leak. Neptune's helper also testified that he had helped tighten the coupling, but that he had not observed the results of the test made by Neptune. On the other hand, the subsequent physical examination of the coupling made by the respondent indicated that it had not been properly tightened. Thus, without regard to whether Neptune had in fact been negligent, the respondent had reason to believe that Neptune had been careless in his work. Under the circumstances, we find that the respondent did not lay off or discharge Neptune because of his union membership or activities.⁴

We find that the respondent has not discriminated against Huston Neptune, within the meaning of Section 8 (3) of the Act, and that the respondent has not interfered with, restrained, or coerced its employees, within the meaning of Section 8 (1) of the Act. We shall accordingly dismiss the complaint in its entirety.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. The operations of the respondent, Pennsylvania Electric Company, constitute commerce and affect commerce, within the meaning of Section 2 (6) and (7) of the Act.
2. International Brotherhood of Electrical Workers, affiliated with the American Federation of Labor, is a labor organization, within the meaning of Section 2 (5) of the Act.
3. The respondent has not engaged in unfair labor practices as alleged in the complaint, within the meaning of Section 8 (1) and (3) of the Act.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the complaint against Pennsylvania Electric Company, Johnstown, Pennsylvania, be, and it hereby is, dismissed.

⁴ It also appears significant that, prior to the filing of the charge herein, Neptune filed a grievance with the Union concerning his lay-off and discharge but that he did not then attribute such action by the respondent to his union activity or membership.

MR. GERARD D. REILLY, dissenting:

The summary of the record in the majority opinion makes it clear that this is a case which turns entirely upon the resolution of conflicting testimony. It has been our almost invariable rule under these circumstances to accept the Trial Examiner's findings on credibility since he has seen the witnesses and observed their demeanor. To be sure, we have not felt ourselves bound by his findings when they were contrary to the preponderance of the evidence or when they depended upon factual inferences which seemed far-fetched or improbable. This case, however, does not fall within any of these categories and I am of the view that the reasons recited in the majority opinion for reversing the Trial Examiner are unconvincing. The report of the Trial Examiner shows that he fully considered all the points raised by the bill of exceptions and to my mind he reached the right result on every issue.

I am aware of the difficulty of ascertaining on which side truth lies in any controversy where the testimony of the principal witnesses is diametrically opposed to one another. Virtually every witness offered by one side or the other in this case was connected with one of the opposing parties either by ties of kinship or legal relationship. One exception to this general rule was Zilk, whose testimony corroborated that of the complainant. The majority, disagreeing with the Trial Examiner in his appraisal of Zilk, regard him as an unreliable witness largely because of the fact that he denied on the witness stand talking to anyone except the Board representative with respect to the subject matter of his testimony. I hardly think this a sufficient reason for discrediting his entire testimony. A phenomenon of trial practice sadly familiar to all judges and lawyers is that many laymen seem to be obsessed with the idea that there is something improper about conferring with one of the parties in advance of being placed upon the witness stand, with the result that many unsophisticated witnesses try to conceal the fact. Consequently, the experienced trier of fact rarely gives weight to such incidents.

Moreover, although it is possible in the instant case—as the majority seem to assume—that Zilk had told Neptune of his proposed testimony, and that it was through Neptune that the Field Examiner learned of Zilk, this is not established by the record, and the respondent which had the burden of overcoming Zilk's testimony apparently made no effort to call the examiner and clear up this point.

I am, therefore, of the opinion that the weight of the evidence supports the Trial Examiner's findings.