In the Matter of NEWARK TELEPHONE COMPANY *and* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL

Case No. 8–C–1610.—Decided January 3, 1945

DECISION

AND

ORDER

On September 8, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had not engaged in and was not engaging in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed, as set forth in the copy of the Intermediate Report annexed hereto. Thereafter counsel for the Board filed Exceptions to the Intermediate Report and the respondent filed a brief in reply thereto. None of the parties requested oral argument before the Board at Washington, D. C. The Board has considered the rulings made by the Trial Examiner at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Exceptions of counsel for the Board, the respondent's brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the additions noted below:

We agree with the Trial Examiner's findings that it was necessary for the respondent to lay off one member of its maintenance and construction crew on December 31, 1943, for economic reasons. The only question arises as to whether the respondent took advantage of this prevailing circumstance to discriminate against Floyd H. Lentz. The Trial Examiner found that the respondent did not follow its customary seniority policy in laying off Lentz. However, the record shows that the practice of following seniority in lay-offs was not an inflexible one. Moreover, uncontradicted testimony of the respondent's auditor shows that length of service was merely one of the many factors considered in laying off an employee, and that, in fact, other lay-offs had occurred where seniority was not followed. Although the matter is not entirely free from doubt and the circumstances surrounding Lentz's lay off give rise to a suspicion of discrimination, we agree with the Trial Examiner that the evidence is insufficient to warrant such a finding.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the complaint issued herein against the respondent, Newark Telephone Company, Newark, Ohio, be, and it hereby is dismissed.

CHAIRMAN MILLIS took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

William O. Murdock, for the Board.

Charles L. Flory and *Robert H. Flory*, of Newark, Ohio, for the respondent.

Ira Braswell, of Winchester, Ky., and *Homer E. Petty*, of Lancaster, Ohio, for the Union.

STATEMENT OF THE CASE

Upon an amended charge filed on June 29, 1944, by International Brotherhood of Electrical Workers, AFL, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Eighth Region (Cleveland, Ohio), issued its complaint dated June 29, 1944, against Newark Telephone Company, 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, accompanied by notice of hearing thereon, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent from about September 1, 1943, to the date of the complaint, advised, urged, and coerced its employees to refrain from becoming or remaining members of the Union; vilified, disparaged, and expressed disapproval of the Union; questioned and interrogated its employees regarding their activities in behalf of the Union; and on about January 1, 1944, discharged Floyd H. Lentz and thereafter failed and refused to reemploy him, because he joined and assisted the Union and engaged in concerted activities for the purposes of collective bargaining and other mutual aid and protection. The respondent's answer, dated July 12, 1944, denied the commission of the unfair labor practices

Pursuant to notice, a hearing was held at Newark, Ohio, on July 13, 14, and 15, 1944, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by representatives. 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 close of the Board's case, the respondent moved to dismiss the complaint for want of jurisdiction of the subject matter and for failure of proof. The latter motion was renewed at the close of the case. The motion to dismiss for want of jurisdiction was denied, and ruling on the motion to dismiss for want of proof was reserved. It is disposed of as indicated hereinafter. Board's counsel moved at the close of the hearing to conform the pleadings to the proof with respect to minor details, names, and dates. This motion was granted. At the close of the respondent's case the parties argued orally. No briefs have been filed.

Upon the entire record in the case and from his observation of witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is an Ohio corporation with its principal place of business at Newark, Ohio. It has five exchanges, more than 10,000 subscribers, and serves an area with a population of 40,000. Its lines connect with those of The Ohio Bell Telephone Company and The Ohio Central Telephone Company. In addition to local calls which pass over its wires, long distance interstate calls originate with the respondent to be transmitted over lines of the connecting companies and calls originating outside of the State of Ohio are received by the respondent in the same manner. Its gross receipts for the year 1943 exceeded $400,000, of which amount $7,400 was from interstate toll calls.[1] In the past three calendar years it has purchased materials of a total value in excess of $246,000, of which materials, 34.17 percent by value were purchased outside of the State of Ohio. The undersigned finds that the respondent is engaged in commerce within the meaning of the Act.[2]

II THE ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, AFL, is a labor organization admitting to membership employees of the respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Alleged interference, restraint, and coercion; alleged discharge of Floyd H. Lentz*

1. The chronology of events from organization of the Union to the termination of Lentz's employment

About September 20, 1943, nine employees of the respondent's maintenance and construction departments, including Floyd H. Lentz, attended a meeting arranged by the Union. At that meeting they agreed to join the Union. A week later, 14 employees, including Lentz, attended another meeting and paid their initiation fee and monthly dues At this meeting Lentz was elected chairman of the group and of its negotiating committee.

On October 5, the respondent received notice that the War Labor Board had approved its application for a 15 percent wage increase, retroactive to January 1, 1943, for all of its employees. This notice was the result of correspondence beginning June 16, 1943. Upon receipt of this notice, the respondent had copies made and posted on the bulletin boards. On the following day Lewis W. Easton, president and general manager of the respondent, called the employees of the construction and maintenance departments together, announced the increase

[1] The foregoing facts were stipulated to be correct.

[2] The respondent's counsel reasoned that the respondent is not engaged in interstate commerce because it is located entirely within the State of Ohio, and because the respondent alone cannot place calls outside the State; but respondent's counsel conceded that interstate calls through other telephone companies could not be made out of the territory serviced by the respondent without use of the respondent's equipment The respondent's contentions are answered by the decisions in *Consolidated-Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, and *N. L. R. B* v *Central Missouri Telephone Co.*, 115 F. (2d) 563. Furthermore, respondent's importation of materials into the State of Ohio furnishes a basis for jurisdiction of the Board.

and then told them that because of wartime restrictions affecting construction and installations and because of the resultant lack of work he would be obliged to lay off four men, two on October 31,[3] and two at the end of the year.

A proposed contract was delivered in person by Homer Petty, representative of the Union, to Easton, on about October 21, 1943. Petty at that time told Easton he had all the men signed up. Easton asked for no proof but understood that he was expected to make counter-proposals. Easton told Petty he would not be able to give the contract much consideration until after the respondent had finished computing the amount of back pay due to the employees as a result of the War Labor Board's approval of the wage increase. The contract was laid aside, and Easton took no action on it. The Union wrote to the respondent thereafter but received no reply.[4] On November 24, 1943, it petitioned the Board for investigation and certification under Section 9 (c) of the Act, and the respondent was so notified. On November 26 the Board wrote the respondent setting 2 p. m. on November 30 as time for a joint conference between the respondent, the Union, and Board representatives.

At about 11:30 a. m. on November 30, Easton called Lentz to the office and told him that Petty had 'phoned and asked that Lentz be permitted to attend the meeting that afternoon.[5] Both Lentz and Easton testified that Easton said he could attend if he wanted to and he would be paid for the time he spent there. Lentz testified, however, that Easton first showed him the letters from the Board and then asked what they meant, and that when Lentz said they were going to have an election, Easton reminded Lentz that he had been "mighty good" to Lentz when the latter was in the hospital with a broken arm in December 1942. According to Lentz, Easton said that he would have been obliged to pay Lentz only $13 75 a week, but that he paid him straight time and that he put him in a private room when he might have put him in a ward. Lentz testified that Easton also said that he (Lentz) was not as good a man as he was 20 years before. Harry Redman, plant superintendent, and Reta Clemans, auditor, were present at the time. Redman flatly denied that Easton had said anything to Lentz about having been good to him when he had broken his arm. Clemans denied that there was any conversation beyond that of Lentz's attendance at the conference that afternoon and testified specifically that she did not hear anything said about the respondent's good treatment of Lentz. Easton testified that he made no statement about the respondent's treatment of Lentz to his recollection. Redman's testimony was inconsistent and the undersigned regards his testimony as unreliable. It was not shown that Clemans, though present, gave her undivided attention to the entire conversation. The conversation occurred near her desk, and that fact plus her testimony that she did not hear anything said about the respondent's good treatment of Lentz suggests that she may have been pursuing her own duties and missed some of the conversation. Because of the fact that Easton testified merely that he did not recall having made such statement and that Lentz was quite emphatic that the statement was made, and because the

[3] The two men laid off on October 31 were apprentices who had been employed only a short time

[4] The only date of such correspondence revealed by the evidence was "before the company was notified by the Labor Board that a petition had been filed" Easton testified that early in November he telephoned the Northern Ohio Telephone Company and the Mansfield Telephone Company for copies of their union contracts, but that he received nothing but promises, and when he was notified by the Board of the Union's petition for investigation and certification, he decided to let the Board proceed and made no further effort to get such copies.

[5] Lentz testified that Petty had phoned him the night before and asked him to attend the conference, and that he (Lentz) requested Petty to call Easton and ask him to permit him (Lentz) to attend

undersigned regards Lentz as an honest witness, it is found that Easton did make the statements attributed to him by Lentz.[6]

At the meeting that afternoon arrangements were made for an election to be held on December 16 The Union lost the election, held that day, by a vote of 7 to 12.

On December 31 at 3:45 p. m., the employees of the construction and maintenance departments were called to the office There, Easton, reading from a prepared statement, announced that, as predicted in October, it was necessary to reduce the force at this time and that because of complaints regarding Lentz's conduct, it had been decided to release Lentz rather than the youngest employee.[7] Redman took Lentz to the garage and relieved him of his keys. At that time Lentz told Redman that he thought he was being discharged because of his union activities and also said that he intended to go to the Industrial Commission regarding the injury he had suffered in 1942.

2. Respondent's explanation of Lentz's layoff

Lentz first worked for the respondent in 1917, but he left voluntarily in February 1922. Returning to the respondent in April 1923, Lentz worked continuously in the maintenance and construction departments until his lay off on December 31, 1943. For most of those 20 years he worked as a lineman and as an installer. As a lineman he assisted an installer, who had charge of the truck they used. In April 1942 he was raised to the position of installer and took charge of a truck with one man, a lineman, under his direction.[8] His lineman for a year prior to October 11, 1943, was Seward Settle.

It was the custom of the installer to get his assignment of orders in the morning and to return to the respondent's building at noon and at the end of the day.

During the summer of 1943, Easton received the criticism from subscribers that two of the respondent's men had been seen loafing in the truck, smoking and reading newspapers. The first such critic identified Settle as one of the two men. This necessarily identified Lentz as the other. Another such complaint came through an anonymous telephone call. The caller gave Easton the license number of the truck, and Easton, on checking, discovered that it was Lentz's truck. That noon Easton spoke to Lentz about the incident. Lentz admitted having parked at the location reported and gave the explanation that there was not sufficient time to start a new job before lunch. He denied that he had been reading a newspaper or that there was any newspaper in the truck. Easton told Lentz that in the future, if he had any time to waste, he should return to the respondent's building, explaining to Lentz the objection, from the public relations angle, to his being seen loafing. T. J. Evans, secretary and treasurer of the respondent, during the latter part of 1943 told Easton he had seen Lentz and his lineman, smoking and wasting time in the truck.

[6] While Easton's statements are regarded as a mild attempt to persuade Lentz to forego his interest in organization of the employees for the purpose of collective bargaining, the undersigned, because of the absence of other evidence of interference or coercion does not find this to be a violation of the Act. However, it is not meant to suggest that the respondent may in the future interfere with, restrain, or coerce its employees in their right to select their own bargaining agent without violating the Act.

[7] There were five or six employees in the construction and maintenance departments who had been with the respondent for a shorter period of time than Lentz

[8] The men in charge of trucks were called gang foremen but had little supervisory power. They had the work orders, took the initiative in executing the work, and controlled the manner of execution. but they had no authority to hire and fire nor affect the status of the other men The position of installer carried more pay than that of lineman.

About October 11, 1943, Lentz asked Easton to change his lineman, saying that Settle had high blood pressure and that he did not want Settle to fall from a pole[9] As a result, Settle was taken off Lentz's truck and was advised to have a medical examination. Lentz was then given a lineman named McInturf. Toward the end of October, Settle asked Easton if he was going to be put back on Lentz's truck Easton told Settle that Lentz wanted him off the truck because Lentz had said that he had had to watch Settle to see that he did not kill himself falling off a pole and that this had interfered with his own work. Settle thereupon became angry and told Easton that Lentz had been killing time, and he related instances when Lentz had parked or driven around to kill time, or had stopped during working hours, between jobs, to drink beer or whiskey, spending from 10 minutes to an hour and a half.[10] In his testimony, Lentz admitted having parked on more than one occasion and idled when there was no time to start a new job. He also confessed to having stopped on numerous occasions between calls for a drink of beer or whiskey. He claimed that this had been his practice and that of other employees for 20 years[11]

On December 8, 1943, at about 3 p. m. Lentz was driving past the State liquor store. He noticed that there was no line in front and he decided to stop and get his Christmas ration. He parked the truck double in front of the liquor store, leaving McInturf in the truck. Easton happened by at this time, saw the truck double parked, and saw Lentz in the liquor store. He testified that this was one of the few times in his life when he was really angry and that he was not so much concerned with the fact that Lentz stopped to purchase liquor as with the fact that Lentz had left the truck "in plain view of all the public" in front of the store, double parked, with his helper idling. Easton walked into the store, tapped Lentz on the shoulder, said "Hello, Bob,"[12] and walked out. He walked down the street, returned in a few minutes and told McInturf to move the truck, then waited nearby to see how long Lentz took. In about 20 minutes Lentz came out, drove home with his liquor ration, and then went on to his next job. Easton said nothing to Lentz about this incident thereafter.

During December[13] Easton discussed with Redman who should be laid off at the end of the year. Easton decided on Lentz, although he was a man of longer service than several of the others He testified, ". . . I decided that perhaps the best thing for the Company insofar as our public relations was con-

[9] The undersigned infers from scattered bits of testimony that the real reason for this request was that Lentz regarded Settle as an unsatisfactory assistant.

[10] Lentz estimated the longest time they stopped for beer as 20 minutes. Settle so obviously bore a grudge against Lentz and was so obviously vindictive that the undersigned regarded most of his testimony of Lentz's delinquencies as gross exaggerations. Easton testified that he took Settle's statements "with a grain of salt" but had received substantiation for them through other reports

[11] Trouble-shooter Delbert Hoskinson, a man of 19 years of unbroken service, testified he stopped once a day for a drink. Wayne Mathews, another trouble shooter, with 8 years of service, testified he would stop at a restaurant or someplace for a drink between assignments on occasions. Usually, however, a trouble man would call in to notify the respondent of his location so he could be given the next trouble call when it came in. J. W. Hitchcock, foreman of the construction truck, testified that on returning at the end of the day in the warm weather he was accustomed to stop to get a glass of beer. The construction gang, the undersigned infers, had less contact with subscribers than the installation men, and the evidence indicated less tendency for the former to drink between assignments. Other installers did not have Lentz's habit of pausing for alcoholic refreshment during the work day.

[12] Lentz was nicknamed "Bob." Easton explained that he went in to get Lentz's attention and that he said nothing more because he does not like to talk when he is angry.

[13] The date could not be established Redman testified it was sometime between December 8 and 30.

cerned and insofar as the efficiency of operations that the best thing would be to release Mr. Lentz in preference to any other one man."

Easton testified that Settle had told him that Lentz had said he was not afraid of being laid off because the company had not settled with him for the injury he had sustained in December 1942. Because of this, Easton testified, in the latter part of December, he consulted the respondent's attorneys about his intention to lay Lentz off.[14] They advised him to prepare affidavits concerning the facts which were responsible for Lentz's lay off. Easton caused to be prepared affidavits executed by himself, Settle, and T J. Evans, secretary-treasurer of the respondent.[15]

3 Evidence bearing on the cause of Lentz's lay off and conclusions in respect thereto

The undersigned is satisfied that the respondent did not need all the men it had in its employ in the fall of 1943 and that the plan to lay off four men by the end of the year was not directed against the Union. The sole issue, then, is whether the respondent made opportunistic use of that plan to get rid of Lentz, the Union protagonist.

Lentz's conviction that he had been discharged for union activity arose from the fact, according to his testimony, that when he talked to Easton on November 30 about the election conference, Easton had told him how good the company had been to him when he had broken his arm. From this he deduced that Easton was angry. Subsequently, he inferred a coolness on Easton's part from the fact, as he testified, that Easton did not speak to him from November 30 to December 31, except for the one time in the liquor store on December 8. Such facts, if true, are suggestive, but, the undersigned believes, insufficient basis for the conclusion that Lentz was laid off or discharged for his union activity. The record did not disclose that Easton came into contact with Lentz between November 30 and December 8 under circumstances where he saw Lentz and would normally have spoken. If he was cool toward Lentz after that date, there was some cause for him to be in view of the liquor store incident

The record is not devoid of evidence creating some suspicion as to Easton's motives in laying Lentz off. Employee Wayne Mathews testified that in October or November, in the garage, Easton talked to some of the men and said that "he would run it to the best of all of us, if other people did not interfere" No further evidence was given as to how Easton came to say this, as to what he meant by "other people," or as to how it was understood by the men. Easton was not questioned about the statement. While the statement might be assumed to have related to the Union, the undersigned feels that, because of the scantiness of the evidence as to how the statement came to be made or as to how it was understood by the employees, the evidence lacks probative value.

The fact that the Union lost the election although it had 14 paid members at the time might arouse the suspicion that there was some interference, but it is entirely possible that the wage increase influenced the vote.

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[14] Easton explained that he had heard of cases of unscrupulous claims and he feared that someone might get Lentz to claim large damages

[15] Easton's affidavits related the two instances when he received criticism from subscribers about Lentz's and Settle's parking, and the December 8 incident Settle's affidavit related an alleged instance of Lentz's semi-intoxication on an installation job, Lentz's habit of stopping to drink beer and whiskey, and his habit of parking to waste time which, Settle's affidavit said, was changed to aimless driving after Easton had told him not to park for loafing purposes. Evans' affidavit related four instances of Lentz's loafing which he had witnessed, two in the latter part of 1943

Evidence adduced by the Board indicated that the respondent had always followed a practice of laying off men with the least seniority [16] Since this practice was not followed in Lentz's case a question is raised as to the reason for the deviation. A desire to get rid of a leading union member is only one possible reason. Another equally possible reason is Lentz's lax habits. While Lentz's helpers may also have wasted time, Lentz, being in charge, would be held responsible.

Easton testified that he had no objection to the men's practice of stopping to do personal errands or to get a drink so long as they did not have liquor on their breath when they called on the next customer, that the reports of Lentz's loafing rather than his drinking was the principal reason for his lay off,[17] and that the liquor store incident of December 8 entered into consideration only indirectly. He further testified that, if he had a position open, he would reemploy Lentz but would not give him a job in charge of an installation truck because he felt that Lentz had failed in his responsibilities to that job—that he had proved incapable of being a gang foreman or of working by himself, although he was capable of doing the work "if he could control himself."

Since Lentz's lay off, the installation work has been handled alternately by Earl Deyo and Charles Evans, assisted by Settle. Deyo had previously been in charge of the installation truck and Evans had been on the construction truck. Because of lack of outside work, these two men had been transferred to the office payroll doing engineering work in connection with a continuing property record requested by the Federal Communications Commission. Their work on that job was finished by December 1, and that meant that there were two men more than were needed. One man, a trouble shooter, resigned on December 20. For this reason Easton decided to lay off only one man instead of two, Deyo and Evans were, therefore, justifiably assigned to the installation truck, and the only serious question is why, if Lentz was capable of working under someone though not alone, Easton did not leave Lentz on as assistant to Deyo and Evans and lay off some man with less service. If Lentz's record had been unimpeachable, that solution would have been the natural one. From the testimony as well as his observation of Lentz, Deyo, Evans, and other witnesses, however, the undersigned is satisfied that Lentz not only drank liquor with greater regularity than the others, but was also of an easier going disposition which might fall easily into lax habits. Of the employees who testified, Settle struck the undersigned as the one whom the respondent might best have done without, judging from his conduct and appearance on the stand and from statements which inferentially made Settle out as one whom the foremen found unsatisfactory. But such considerations are speculative. It cannot be said that, from a public relations standpoint, as Easton testified, he may not have been justified in selecting Lentz Since the Union had lost the election two weeks prior to Lentz's lay off, nothing was to be accomplished by laying Lentz off for union activity, and no cogent explanation of a cause related to union activity appears unless it can be inferred that Easton felt that Lentz had crossed him and that Easton was a vindictive sort of person, an impression the undersigned did not receive from Easton's testimony or conduct. On the entire record the undersigned is not satisfied that the evidence establishes that Lentz was discharged or laid off because of his union membership or activity.

[16] This was contradicted by the respondent's evidence However, the prepared statement which Easton read from on December 31 would indicate that the respondent usually followed seniority in laying men off, and the undersigned so finds

[17] The undersigned understands that this includes the time which Lentz spent in drinking places. In other words, while Easton had no prejudice against a man's drinking, he felt he should not waste so much time during the working day

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

CONCLUSIONS OF LAW

1. The operations of the respondent, Newark Telephone Company, constitute a continuous flow of trade, traffic, and commerce among the several States, within the meaning of Section 2 (6) of the Act.
2. International Brotherhood of Electrical Workers, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.
3. The respondent has not violated Section 8 (1) and (3) of the Act as alleged in the complaint.

RECOMMENDATION

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in the case, the undersigned recommends that the complaint against the respondent, Newark Telephone Company, be dismissed.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective November 26, 1943, any party or counsel for the Board may, within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with an original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

JAMES R. HEMINGWAY,
Trial Examiner

Dated September 8, 1944.