In the Matter of NEW YORK TELEPHONE COMPANY *and* GLORIA TRIESTMAN

Case No. 2–C–7032.—Decided April 13, 1950

DECISION

AND

ORDER

On January 17, 1950, Trial Examiner Allen McCullen issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices, and recommending that it take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the Respondent filed exceptions to the Intermediate Report and a supporting brief, and the General Counsel filed a brief.

The Board [1] has reviewed the rulings of 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 and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner,[2] with the following additions.

We agree with the Trial Examiner that the Respondent, by discharging Gloria Triestman, a supervisor, for participating in a strike of the Respondent's nonsupervisory employees during April and May 1947, violated Section 8 (1) and (3) of the National Labor Relations Act, and did not violate Section 8 (a) (1) and (3) of the Act, as amended. The Respondent contends that Triestman was not discharged because of any concerted activity on her part, on the ground that her refusal to work during the strike was caused not by a desire to act in concert with the strikers, but due to her fear of picket line

[1] Pursuant to Section 3 (b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this proceeding to a three-member panel [Chairman Herzog and Members Houston and Murdock].

[2] The Respondent states in its brief that "should the Board feel that it requires further information before deciding this matter, the respondent would welcome an opportunity to present such further information and respectfully requests another hearing." As the record and exceptions and briefs, in our opinion, adequately present the issues and position of the parties, the Respondent's request for further hearing is denied.

violence. While it is true that Triestman at the hearing initially stated that fear of violence was the reason for her refusal to work during the strike and later added that aversion to acting as a strike-breaker was also a reason, the truth of her later claim is borne out by the Respondent's own witnesses. These witnesses, supervisors of Triestman, testified that Triestman had niformed them that she would not work during the strike because she was firmly opposed, as a matter of principle, to crossing a picket line. Under these circumstances, we find that Triestman's refusal to work during the strike was motivated by her desire not to cross the picket line. She therefore allied herself with the protected activity of the rank-and-file employees. In any event, whatever her motive was, the record shows that the Respondent discharged Triestman because of *its belief* that her failure to report for work during the strike was due to her strong opposition to crossing picket lines. We have always held that when an employee is discharged because his employer believes him to be engaged in concerted activity, the discharge is violative of the Act, whether or not such belief is well founded.[3] Accordingly, we find that the Respondent discharged Triestman for joining in concerted activities of the non-supervisory employees.

The Respondent contends that it was justified in discharging Triestman under the doctrine of the *Carnegie-Illinois Steel* case.[4] In that case, the Board held that an employer did not violate Section 8 (1) and (3) of the National Labor Relations Act by discharging supervisors who had joined in a strike of production employees, where the work of such supervisors was essential to protect the employer's property. Triestman was a supervisor in the Respondent's cafeteria. The record contains no evidence that Triestman's refusal to work in any way endangered the Respondent's property or franchise. At the most, it caused inconvenience to those supervisors who were working during the strike to maintain telephone service.[5] Accordingly, we find that the Respondent, by discharging Triestman, violated Section 8 (1) and (3) of the National Labor Relations Act.[6]

The Respondent objects to the recommended order of the Trial Examiner requiring it to make Triestman whole for any loss of pay she may have suffered by reason of the Respondent's discrimination

[3] *Republic Aviation Corporation*, 61 NLRB 397.

[4] 84 NLRB 851.

[5] Member Murdock, who was a member of the majority in the *Carnegie-Illinois Steel* case, regards that case as unique. There the work requested of the supervisors was essential to prevent almost irreparable damage totaling millions of dollars to steel mill equipment and to insure continuance of a gas supply to the city of Gary. Only extraordinary circumstances can invoke the doctrine of that case. They are clearly not present here.

[6] In making this finding, we do not rely upon the Trial Examiner's dictum that Triestman's discharge would have been justified if she had been "a supervisor in charge of any part of the work incident to the maintenance of telephone service."

against her since May 6, 1947.[7] The Respondent contends that any liability it might have toward Triestman must terminate on August 22, 1947, the date of enactment of the Labor Management Relations Act. For the reasons set forth in *Republic Steel Corporation (Upson Division)*[8] we find no merit in this contention.

As none of the parties objected to the Trial Examiner's dismissal of the complaint insofar as it alleged that the occurrences involved herein constituted a violation of Section 8 (a) (1) and (3) of the amended Act, we shall dismiss this allegation of the complaint.

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, New York Telephone Company, New York, New York, its officers, agents, successors, and assigns shall:

Take the following affirmative action which the Board finds will effectuate the policies of the Act and the amended Act:

(a) Offer Gloria Triestman immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to her seniority or other rights and privileges;

(b) Make Gloria Triestman whole for any loss of pay she has suffered because of the Respondent's discrimination against her, by payment to her of a sum of money equal to the amount she would normally have earned as wages during the period from May 6, 1947, to the date of the Respondent's offer of reinstatement, less her net earnings during said period;

(c) Notify the Regional Director for the Second Region in writing within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

It is further ordered that the complaint, insofar as it alleges a violation of Section 8 (a) (1) and (3) of the Act, as amended, be, and it hereby is, dismissed.

---

[7] The complaint alleges that the Respondent discharged Triestman on or about April 18, 1947. The Trial Examiner makes no specific finding as to the date of Triestman's discharge, but orders the Respondent to pay her back pay from May 6, 1947. On that date, the strike having ended, Triestman reported back to work and was told that she was discharged for participating in the strike. This discharge confirmed a conversation between Triestman and her supervisor, which had taken place on the telephone about 2 weeks prior to the end of the strike, in which the supervisor informed Triestman that she was discharged. Under these circumstances, we find that the Respondent did not become liable for any pay lost by Triestman until May 6, 1947, the time at which she ceased voluntarily to withhold her services from the Respondent. *Kallaher and Mee, Inc.*, 87 NLRB 410.

[8] 77 NLRB 1107. See also *Universal Camera Corporation*, 79 NLRB 379, enforced 179 F. 2d 749 (C. A. 2, 1950).

INTERMEDIATE REPORT

Mr. Vincent M. Rotolo, for the General Counsel.
Mr. John G. Ross, 140 West Street, New York, N. Y., for the Respondent.

STATEMENT OF THE CASE

Upon a charge duly filed by Gloria Triestman, an individual, the General Counsel of the National Labor Relations Board, called herein respectively the General Counsel and the Board, by the Regional Director of the Second Region (New York, New York), issued a complaint dated November 28, 1949, against New York Telephone Company, New York, New York, herein called the Respondent, alleging that 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, and Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Labor Management Relations Act, 1947 (61 Stat. 136), herein called the amended Act. Copies of the charge and the complaint, together with notice of hearing, were duly served upon the Respondent.

With respect to unfair labor practices, the complaint in substance alleged that Respondent, on about April 18, 1947, discharged Gloria Triestman and has since refused to reinstate her to her former or substantially equivalent position for the reason that she refused to work during a strike and other concerted activities of Respondent's employees sponsored by the Traffic Employees Association, herein called the Association, in violation of Section 8 (1) and (3) of the Act, and Section 8 (a) (1) and (3) of the amended Act.

In its duly filed answer, Respondent denies the commission of the alleged unfair labor practices.

Pursuant to notice a hearing was held in New York, New York, on December 13, 1949, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and 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 on the issues was afforded all parties. After the taking of evidence, the undersigned granted the General Counsel's motion to conform the pleadings to the proof in formal matters, and reserved decision on Respondent's motion made at the conclusion of the hearing to dismiss the complaint on the grounds that General Counsel had not made out a case. This motion is disposed of in accordance with the findings of fact and conclusions of law made below. Arguments were made by both parties at the close of the hearing. Both parties waived the right to file briefs.

Upon the entire record in the case, and from my observation of the witnesses, I, the undersigned Trial Examiner, make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is a New York corporation, and at all times herein mentioned, maintained its principal office and place of business at 149 West Street, New York, New York, where it is now and has been continuously engaged in the business of furnishing local and long distance telephone communication service to its subscribers throughout the State of New York and in Greenwich, Connecticut. In the operation of its business, Respondent, using the facilities, equipment, and services of associate companies and of its parent organization,

American Telephone & Telegraph Company, which are located throughout the various States of the United States, and as a member of a nationally organized communications network popularity known as the Bell System, furnished and is furnishing its subscribers with long distance telephone service to all parts of the United States and to many foreign countries. The Respondent admits, and I find, that it is engaged in commerce within the meaning of the Act and the amended Act.

II. THE LABOR ORGANIZATION INVOLVED

The Traffic Employees Association is and has been at all times material hereto a labor organization within the meaning of Section 2 (5) of the Act and of the amended Act.

III. THE UNFAIR LABOR PRACTICES

Discharge of Gloria Triestman

General Counsel offered one witness, Gloria Triestman, and Respondent offered two witnesses, Clare Dunn, division dining room supervisor, who was directly in charge of Triestman's work, and Dunn's immediate supervisor, Vernette Murphy, dining room manager for the Long Island central office employees. As there is no material variation in the testimony of these three witnesses, and it is all credited, the facts adduced by such testimony are summarized as follows without reference to the testimony of each individual witness.

On April 7, 1947, all of the operating employees of Respondent went on a strike, which lasted until May 5, 1947. Picket lines were established at some of Respondent's exchange buildings for approximately 2 weeks after the strike started, and were then discontinued. For approximately a year prior to the strike, Triestman was employed by Respondent as supervisor in charge of a cafeteria maintained at the Rockaway Avenue Branch in Brooklyn. Her duties consisted in supervising from 6 to 10 employees in the cafeteria, ordering the food, taking care of the cash, making up daily receipts at the end of the day, and general supervision of the preparation of the food and cleaning up. During the period of the strike limited service was provided in the cafeteria for meals for supervisory employees who continued to work to furnish limited emergency telephone service. Some of these supervisory employees remained in the exchange buildings for 24 hours a day.

The week before the strike started, Clare Dunn, the immediate supervisor of Triestman, in a conversation with the latter stated that if the employees did go on strike that "we as members of the management would be required to come to work," and Triestman replied that she would not, that "she would not cross the picket line, that she did not believe in crossing the picket line, and that her family would not let her cross the picket line." Dunn replied that she thought she should work that it was her duty to the company. Triestman was not a member of the Union. After this conversation, Dunn reported to Murphy that Triestman would not report for work in the event of a strike, and Murphy telephoned Triestman and confirmed this fact.

Triestman did not report for work on Monday, April 7, 1947, nor did she go to the exchange building at any time during the strike to determine if picket lines were being maintained. Dunn was assigned by Murphy to take care of the cafeteria service at the Rockaway Avenue Branch in place of Triestman, which work she did during the time of the strike.

About 2 weeks after the strike started, Murphy called Triestman on the telephone and informed her that inasmuch as she had failed to report for duty when

she was needed, that the company would no longer require her services. On May 6, 1947, after the strike, Triestman called on Murphy to ask her about her position, and was again told she had been discharged because she refused to come in to work during the strike, and she immediately reported the matter to the Regional Office of the Board in New York, filing a charge that afternoon.

There was some testimony that some of the supervisory employees remained at the exchanges 24 hours a day during the strike, and meals were supplied to them in the cafeterias. It was conceded by counsel that Respondent, as a public utility, was charged with a public duty to maintain at least a minimum of telephone service for emergencies during the strike, and to render such service, it was necessary for supervisors to work during the strike. General Counsel contends that is was not necessary to maintain dining room service during the strike in order to enable the Respondent to fulfill its public duty as a utility company. Respondent, on the other hand, contends that the operation of dining room service was essential to maintain this limited service. I do not agree.

In *Carnegie-Illinois Steel Corporation*, 84 NLRB 851, the Board said that

> The supervisors were instructed by Respondent to work during the steel workers strike at nonsupervisory jobs, but, in their case, however, the purpose of the work assignment was solely to prevent serious damage to plant equipment during the steel workers strike and *to maintain essential service to the City of Gary.* Apart from this, the Respondent made no effort during the rank and file strike to continue its normal production operations. Assuming, without deciding, that in all cases the supervisors, in refusing to work, engaged, as the examiner found, in concerted activities, we do not agree that on the facts in this case such activities are protected by the Act. . . . We find that, whatever the reason for their action, under the special circumstances of this case, the supervisors failure to report for, or remain at, work was such a serious breach of their duty to the Respondent as to remove them from the protection of the Act. (Emphasis supplied.)

It is clear in the present case that Respondent was not attempting to maintain its normal telephone service, but only an emergency service as was required of it as a public utility. If Triestman was a supervisor in charge of any part of the work incident to the maintenance of telephone service, Respondent's action in discharging her would be justified under the doctrine established in the *Carnegie-Illinois* case. However, it is difficult for me to see that the operation of the dining room service was an essential part of maintenance of the limited telephone service which Respondent was required to render during the strike. Respondent offered no testimony disclosing the number of supervisors who remained at the exchanges for the full period of 24 hours a day, nor was it shown that it was necessary to supply meals at the exchanges. Dunn and Murphy testified that they crossed the picket lines during the short time they were maintained and they experienced no difficulty. If this was true in their case, there is no reason to assume that other employees working at the exchanges would have had any difficulty in leaving the exchanges to get meals. While this may have been an added burden, it seems clear that the maintenance of the dining rooms was but an accommodation to these employees, and certainly not an essential element of the telephone service Respondent was obliged to render. I find, therefore, that Respondent's request to the supervisors in the dining service to work during the strike was not reasonable.

Respondent urges that Triestman was a disloyal employee, that she was the only one out of a large number of supervisors who did not report for duty during

the strike, and that she was just AWOL, and points to her testimony that she did not want to cross the picket lines because she feared bodily harm; that she did not have any particular sympathy with the Union as such and its strike action or demands, but that she had made up her mind that if a strike was to take place, she had decided not to come in. At the time of the discharge, the only reason for Triestman's failure to report for work known to Respondent, as testified by both of Respondent's witnesses was that "she would not cross the picket line, that she did not believe in crossing the picket line, and that her family would not let her cross the picket line." Respondent made no further investigation, nor did it make any inquiry as to why she did not wish to cross the picket line, but acted on these facts alone, and discharged her about 2 weeks after the strike started and made it rather clear to her that the reason for her discharge was because she refused to cross the picket line and report for work. Respondent relies upon the decision of the Circuit Court in *Hazel Atlas Glass Company* v. *N. L. R. B.*, 127 F. (2d) 109, where the Court said:

> The undisputable fact is that there was a good reason for discriminating between Carder and the strikers that had no relation to union organization or collective bargaining. Carder's disloyalty in refusing to help his employer in an emergency, in contrast with the willing assistance of his brother foremen of equal standing, was an all-sufficient reason for his discharge. To cast this established fact aside and to hazard the conjecture that the employer was actuated by an unlawful motive is merely to indulge in a speculation that furnishes no legal basis for the Board's order.

Respondent, however, has overlooked the fact that on consideration of a petition for rehearing, the Court modified the quoted statement for the reason that it "is too broad and may, on that account, be subject to misinterpretation." The Court said:

> A petition for rehearing complaints of the action of the court with respect to that portion of the order relating to the reinstatement of Carder. It is said that, since Carder's refusal to work was because of the existence of a strike, that refusal cannot furnish the basis of a lawful discharge, even though the company may have felt that Carder was guilty of disloyal conduct in refusing to work and may have discharged him for that reason. . . . It was not our intention to make such a holding. We think, however, that certain language in the last paragraph of the opinion discussing the discharge of Carder is too broad and may, on that account, be subject to misinterpretation, and that therefore the basis upon which the discharge of Carder was justified should be restated. *The strike of the six operators was illegal and would have constituted sufficient justification for their discharge. National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 344, 59 S. Ct. 508, 83 L. Ed. 682. Carder's discharge was justified on this ground, for certainly if the discharge of operators who have struck illegally, is justified, the discharge of one who refuses to work because the strike is on is also justified. (Emphasis supplied.)

In the present case, there was no unlawful strike. Triestman was participating in the concerted activities of other employees who were engaged in a lawful strike. The fact that she was not a member of the Union is immaterial. Respondent places some emphasis upon the mental reasoning of Triestman as to why she did not want to cross the picket lines. I can find no merit in this. It was not considered by Respondent at the time of the discharge for the reason that it did not develop until the hearing. Triestman also testified that she

did not want to be a strikebreaker, and her conduct rather clearly shows that that was one of the principal reasons why she did not report for work. She testified that she did not go to any of the exchanges to ascertain if picket lines were being maintained, and even after Murphy called her 2 weeks after the strike and informed her she was discharged, she made no attempt to go to the exchange until after the strike terminated. Based upon all of the testimony, I find that she was participating in the concerted activities of the striking employees, and was entitled to the protection of the Act, and that Respondent by discharging her contravened Section 8 (1) and (3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

It has been found that Respondent has engaged in certain unfair labor practices in violation of Section 8 (1) and (3) of the Act. Such practices, however, are not violative of the amended Act, and it is not necessary to recommend that Respondent cease and desist from engaging in a course of future conduct which is no longer unlawful.

Having found that Respondent discriminated against Gloria Triestman because she participated in concerted activities, the undersigned will recommend that Respondent offer Triestman immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make whole to her any loss of pay she has suffered by reason of Respondent's discrimination against her, for the period from May 6, 1947, to the date of her reinstatement.

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

CONCLUSIONS OF LAW

1. The Traffic Employees Association is a labor organization within the meaning of Section 2 (5) of the Act and amended Act.

2. By discriminating in regard to the hire and tenure of employment of Gloria Triestman, thereby discouraging the formation of, and membership in, a labor organization, the Respondent has engaged in unfair labor practices within the meaning of Section 8 (3) of the Act.

3. By such discriminatory discharge the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8 (1) of the Act.

4. By the discharge of Triestman Respondent did not violate Section 8 (a) (1) and (3) of the amended Act as charged in the complaint.[1]

[1] It was conceded that Triestman was a supervisor. Under the circumstances of the present case, I do not find that her discharge affected any employee, as that term is defined in the amended Act. As a supervisor, she had no rights under Section 7 of that Act. Hence my finding that there was no violation of Section 8 (a) (1) and (3) of the amended Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that the Respondent, New York Telephone Company, New York, New York, its officers, agents, successors, and assigns, shall:

1. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act and the amended Act:

(a) Offer Gloria Triestman immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to her seniority or other rights and privileges;

(b) Make Gloria Triestman whole for any loss of pay she has suffered because of Respondent's discrimination against her, by payment to her of a sum of money equal to the amount she would normally have earned as wages during the period from May 6, 1947, to the date of the Respondent's offer of reinstatement, less her net earnings during said period;

(c) Notify the Regional Director for the Second Region in writing, within twenty (20) days from the date of the receipt of this Intermediate Report, what steps the Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report the Respondent notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record of proceedings (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations and recommended order herein contained shall, as provided in Section 203.48 of said 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.

Dated at Washington, D. C., this 17th day of January 1950.

ALLEN MACCULLEN,
Trial Examiner.