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**Public Service Company of New Mexico and Paul W. Stein.** *Case No. 28-CA-1097. July 15, 1965*

DECISION AND ORDER

On March 16, 1965, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the Charging Party filed exceptions to the Trial Examiner's Decision and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Brown and Zagoria].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Charging Party's exceptions and brief, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner,<sup>1</sup> but only to the extent consistent herewith.

The Trial Examiner found, and we agree, that Stein, the Charging Party, was a supervisor within the meaning of the Act. We further agree that the Respondent did not violate the Act by discharging Stein in the circumstances of this case. In reaching this conclusion, we rely solely on the fact that Stein was a supervisor and that he was discharged because of insubordination and bad relations with Garrison, his own superior.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its

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<sup>1</sup> The Charging Party has excepted to the credibility findings made by the Trial Examiner. It is the Board's established policy, however, not to overrule a Trial Examiner's resolutions with respect to credibility unless, as is not the case here, the preponderance of all the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (CA 3).

The Charging Party also contends that the Trial Examiner's Decision was based upon bias and prejudice and moved that the case be remanded for rehearing. Upon our review of the entire record, however, we find that these contentions are without merit, and, accordingly, deny the motion for rehearing.

Order the Order recommended by the Trial Examiner, and orders that the complaint herein be, and it hereby is, dismissed in its entirety.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

Upon a charge filed June 1, 1964, by Paul W. Stein, an individual, herein called Stein, the General Counsel of the National Labor Relations Board, herein called the Board, issued a complaint dated July 24, 1964, alleging that Public Service Company of New Mexico, herein called Respondent, violated Section 8(a)(1) and (3) of the Act, by discharging Stein.

Pursuant to due notice, a hearing in this matter was held before Trial Examiner E. Don Wilson at Albuquerque, New Mexico, on September 22 and 23, 1964. General Counsel and Respondent fully participated. Briefs have been received and considered.

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

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

At all material times Respondent has been a corporation and public utility existing under the laws of New Mexico. It maintains places of business in Albuquerque, and in other towns and cities in New Mexico. It transmits, distributes, and sells electric power throughout New Mexico. During the 12-month period preceding issuance of the complaint, it received from customers in New Mexico revenue in excess of \$250,000 and purchased and received from outside the State, materials valued in excess of \$50,000.

Respondent at material times has been an employer engaged in commerce within the meaning of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES <sup>1</sup>

##### A. *The issues*

The issues include (1) was Stein a supervisor within the meaning of the Act; (2) was he discharged because of protected concerted activities; and (3) was he discharged because of union activities?

<sup>1</sup> In finding facts in this section I generally have not credited Stein's testimony where it has not been corroborated by otherwise corroborated testimony. His demeanor impressed me unfavorably. During his testimony he revealed that hope of reward dictated, at least on occasion, whether he was willing to tell a deliberate untruth. At this hearing he testified he was not discharged because he had had differences with Supervisor Boyce Garrison. He denied that he was disgruntled at not getting Garrison's job. Yet, within a few days after his discharge by Respondent, he told the unemployment commission in New Mexico, in his own handwriting, that Garrison got the supervisor's job which had been promised to him and that Garrison had to ask Stein "all about the job." He added that he "resented the fact [he] hadn't been promoted and that resulted in a personality clash between [him] and new boss. Because of the clash [he] was released." Stein testified that these *ante litam motam* statements against his present interest were not true. He said he made them to gain sympathy from Respondent and not have his application for unemployment compensation opposed. He testified there, in fact, was no personality clash, but he stated there was and made the other false statements because he was out of a job and needed \$36 per week compensation. I reject as another of his fabrications that he would not have made such statements to the unemployment commission if he had been placed under oath. I find that Stein, in his testimony, was motivated not by a desire to tell the truth but solely by what he considered his best interest in this case.

I have found Charles A. Ruiz to be an honest but not always reliable witness. The record makes clear he has considerable difficulty with expressing his thoughts or communicating, and indicates that his memory for other than broad generalities is not dependable.

Dave Wheelock was a candid witness and I credit his testimony.

Garrison's demeanor impressed me favorably. He appeared to me to be a completely frank and honest witness who was interested only in telling the truth as he remembered it. I credit his testimony in full, although I find that on occasion he sometimes used the plural when he intended the singular.

Ben Fields appeared to be an honest and reliable witness, although I find Garrison had a more complete recollection of what happened on April 1.

### B. Background

Respondent's Albuquerque service center, storehouse, or warehouse, herein called warehouse, is the situs of the events involved herein. At the warehouse, J. A. Crawley had for years been the storekeeper or supervisor. Boyce Garrison, after serving an apprenticeship under Crawley, succeeded him as supervisor in October 1963. Under Garrison were Stein, whose title was store clerk, and four warehousemen who performed the manual work required in the warehouse.

Late in 1963 or early in 1964<sup>2</sup> the Teamsters and the IBEW<sup>3</sup> were competing for representative status among the warehouse employees. Stein was a Teamsters supporter and strong and open opponent of the IBEW. Early in 1964 the IBEW was certified as bargaining representative, after a Board election. Relations between Stein and some of the warehousemen became strained during and after the unions' competition, because of their respective beliefs in the merits of the unions, and some of their discussions became heated. Earlier and around or about the same time, Stein had more than heated arguments with others in the warehouse; e.g., one warehouseman, Blair, had two serious encounters with Stein in February. According to Stein, warehousemen other than Ruiz would not talk to him and shunned him. Garrison was not antiunion and attempted at various times to establish harmony among the employees; indeed, he warned them that if "they" could not get along with each other he would get "someone" who could.

It seemed to Garrison that Stein, with 7 years' experience in the warehouse, resented Garrison's getting the job of supervisor. It appeared to him that Stein did his work grudgingly. Toward April 1, Stein, who shared Garrison's office, hardly talked to Garrison and Garrison hardly talked to Stein. According to Garrison's credited testimony, "It got to the place where you could feel the tension in the room."

### C. April 1 and Stein's discharge

#### 1. Stein's status on April 1

Already noted has been Stein's strained relations with the warehousemen before April 1. It is clear that his principal occupation was that of clerk. He occasionally assisted warehousemen in performance of their manual duties. It is plain that at material times and particularly since October 1963, Garrison was absent from the warehouse on an average of 8 hours of a 40-hour week.<sup>4</sup> In his absence, Stein was in charge of the warehouse. Stein described himself as "in charge of the supervision of the men" and the "general flow of the work." He said he was "responsible for the operation of the warehouse during Mr. Garrison's absence" and Garrison told all the other employees they were to do what Stein asked them to do. Stein testified that when Garrison was absent, about 1 day a week, it was Stein's responsibility to run the warehouse "in an orderly manner, asking the men to do certain things that had to be done to control the regular flow of work," and sometimes things were not routine. Stein's testimony as to his responsibility in Garrison's absence is corroborated by the testimony of Garrison. Stein was paid \$40 per month more than the warehousemen, which was due in part to Stein's responsibilities as store clerk and in part to the fact that he was responsible for the warehouse in Garrison's absence. Shortly after Garrison became the supervisor he called the warehousemen and Stein together and told them that Stein was in charge in Garrison's absence; "that they should cooperate with him just like they would with me if I were there." The warehousemen were told that Stein was "responsible for the operation" of the warehouse in Garrison's absence. In Garrison's absence, Stein had authority to tell any available warehouseman to do whatever work had to be done. Stein did direct the operations of the warehousemen in Garrison's absence.

I find that Stein, on an average of about 8 hours of a 40-hour week, had authority responsibly to direct the four warehousemen and that he was a supervisor within the meaning of Section 2(11) of the Act. The exercise of his authority was not merely routine nor of a clerical nature and it required Stein to exercise his independent judgment. It is not reasonable to assume that during 20 percent of the working week when Stein was in sole charge of the warehouse, matters of a nonroutine nature did not arise, and it is clear that Stein's authority and responsibility extended to all directions of the warehousemen in Garrison's absence.<sup>5</sup> The warehousemen were to

<sup>2</sup> Hereinafter all dates refer to 1964, unless otherwise stated.

<sup>3</sup> International Brotherhood of Electrical Workers, Local Union No. 611.

<sup>4</sup> Giving talks, etc.

<sup>5</sup> He must also have dealt responsibly with those seeking to do business with the warehouse

cooperate with Stein's direction just as they would with that of Garrison. The authority given to Stein clearly called for him to exercise independent judgment. There was no one else present upon whom he could depend. It is not reasonable to find that in Garrison's absence, Respondent expected anarchy.

## 2. The April 1 events

On the morning of April 1, Garrison reprimanded Charles A. Ruiz, a warehouseman, for poor work. Ruiz believed that a part of the basis for the reprimand was his failure properly to discharge his duties with respect to highline material. About 10 a. m., Ruiz asked Stein why he had to know highline material when the other three warehousemen, who received the same pay, allegedly did not have to have such knowledge. Stein went into the office he shared with Garrison and borrowed a book from Garrison's desk<sup>6</sup> and went to coffee with Ruiz. At coffee, Stein and Ruiz unsuccessfully examined the book so as to obtain an answer for Ruiz.<sup>7</sup>

After lunch, around 1 p. m., Stein and Ruiz observed Garrison and Ben Fields enter Garrison's office. Fields was office manager of Respondent's Albuquerque division and Garrison's immediate supervisor. Ruiz said to Stein he'd like Stein to help him "get his point across" to Garrison and Fields.<sup>8</sup> Stein agreed to help him. Stein entered the office alone and sat at his desk. Garrison was seated at his desk talking to Fields, who was standing. Ruiz then entered alone, holding a clamp in his hand. Ruiz addressed a question to Garrison, or Garrison and Fields, about the clamp. He probably received an answer. Ruiz, at no time, said anything about working on highline material. Stein spoke up and said he thought Garrison was treating Ruiz unfairly and Ruiz was being imposed upon by Garrison because he had to know highline material and the other warehousemen didn't. The credited testimony of Garrison and Fields makes clear that Stein was addressing his remarks primarily to Fields and not Garrison. This took Garrison by surprise that Stein "went right straight to Mr. Fields over [Garrison's] head" and Garrison said nothing. Fields said it wouldn't be too difficult for Ruiz to deal with highline materials if he'd use a catalogue. Ruiz left the room having said nothing other than his initial remark about the clamp. Stein said nothing further. There is no evidence that Fields or Garrison had any thought or suspicion that Stein charged Garrison with unfair treatment at the request of Ruiz or in Ruiz' behalf. Indeed, Ruiz never had asked Stein to make such a charge.<sup>9</sup> As Ruiz testified, "Evidentially Mr. Fields and Mr. Garrison were not aware that I had asked Mr. Stein to speak for me in case I couldn't get my point across." I specifically find that neither Garrison nor Fields had such knowledge. I find no substantial evidence that Garrison or Fields had reasonable cause to believe Stein made his remarks in the office in behalf of any one other than himself.

Very shortly after Ruiz left the office, Garrison and Fields left. While they were gone, David Wheelock, a journeyman meterman employed by Respondent, entered the warehouse and proceeded to a scrap pile to get a used aluminum reflector. On the way he spoke to two warehousemen who were aware of the purpose of his visit, and who made no effort to stop him. Respondent had a rule that no one was to enter the warehouse area unless accompanied or escorted by warehouse personnel. Wheelock went to the scrap pile without an escort, though one of the warehousemen had suggested that he look at the scrap pile. Stein observed Wheelock in the warehouse without an escort and approached Wheelock, asking him what he was doing without an escort. There ensued a very heated argument between Stein and Wheelock, the details of which need not be related. It may be noted that Stein reprimanded Wheelock for being without an escort, adding Garrison "isn't here and I'm in charge when [Garrison] is not here." Further, the argument got so heated that, according to Stein, after Wheelock got personal, "I asked him if he wanted to go outside and he said no and I said fine."<sup>10</sup>

During the latter part of this argument, Garrison approached within about 50 feet and heard the loud talking, although he could not distinguish the words. Then, or a short time later, he inquired of warehousemen Meagher and Ruiz what had happened and received reports. He went to the office and asked Stein what had happened. Stein gave his story. He then told Stein he shouldn't have jumped on Wheelock but should have used a little more tact. Garrison then spoke to Wheelock

<sup>6</sup> In Garrison's presence

<sup>7</sup> I find it significant that Stein did not ask Garrison if he were interested in Ruiz' problem

<sup>8</sup> Referring to his highline material problem

<sup>9</sup> Ruiz only wanted the answer to his question about highline materials.

<sup>10</sup> I find the suggestion to go outside was for the purpose of fighting, physically.

to get his account. Wheelock gave it and admitted he was partly to blame. In the meanwhile, Stein went out to coffee and Garrison returned to the office. Garrison credibly testified that he decided he could not continue to have such scenes and he had to come to an agreement with Stein. He had not then decided to terminate Stein. When Stein returned to the office, Garrison began the conversation by saying, "So you think I'm treating Charley [Ruiz] unfairly." Stein said Garrison was correct, since Ruiz had to know all the highline material and the other warehousemen didn't. Garrison explained it was necessary to do this and he had to run things as he saw fit and in his way. Garrison further explained that he felt Stein's attitudes were wrong and he should try to look at things differently, and he and Stein had a different outlook. Stein asked Garrison who he was to be talking about psychology, that Stein had had two years of psychology in college and he should be telling Garrison about it. Garrison told Stein it appeared they couldn't get together as a team and he asked Stein for his resignation. Stein asked if he was fired and Garrison told him he was. There was some talk about Stein seeing someone with greater authority. Stein used a vulgar epithet about the Respondent and another one about "some people," obviously referring to Garrison.

#### Concluding Findings

General Counsel contends that Stein was discharged because he and Ruiz engaged in concerted activities on April 1, when Stein charged Garrison with treating Ruiz unfairly. He further contends Stein was discharged because of his union activities in presenting a first-step grievance to Respondent under the terms of a contract between the IBEW and Respondent.<sup>11</sup> The last contention will be considered first.

Section 3a of the contract between IBEW and Respondent reads as follows:

On-the-Job Disputes or Grievances. When a dispute or difference arises, the employee and supervisor concerned shall immediately attempt to settle the dispute or difference. If the employee and supervisor fail to settle the dispute or difference, either party may request the Department Steward and in such case use every reasonable means to call the Department Steward to the scene; or in the absence of the Department Steward, another Steward may be called to obtain all the details and if possible to settle the dispute or difference. If neither the employee nor the supervisor requests the Steward, the dispute or difference shall be considered as settled and no cause for a grievance. No employee shall be discriminated against for invoking this procedure in a reasonable dispute or difference.

Ruiz was the employee concerned and Garrison was the supervisor concerned under section 3a of the contract. Plainly, under the contract, it was up to Ruiz to attempt to settle *his* dispute or difference with Garrison. There is no contract provision which would call for, or permit, Ruiz to attempt to settle his dispute or difference through the intervention of Stein, who was not even a steward. I find no evidence that Ruiz or Stein even thought of the contract at the time Stein told Fields that Garrison was treating Ruiz unfairly.<sup>12</sup> I find that Stein was not presenting Ruiz' grievance under the contract, but rather was going over Garrison's head so as to disparage him to Fields. Further, there is no provision in section 3a of the contract which would permit Ruiz, let alone Stein in his behalf, to address the first step of the grievance to Fields rather than Garrison, as Stein did here. Finally, I have found Stein was a supervisor and I fail to see how a discharge of a supervisor for "presenting a grievance" to the management of which he was a part would illustrate to rank-and-file employees that Respondent would discharge them for filing or presenting a grievance.<sup>13</sup> Certainly management is not to sit on both sides of the table in resolving contract grievances any more than in contract negotiations. Thus, I find no merit to General Counsel's contention that Stein was unlawfully discharged for engaging in "union" activities.

Considering now the question of whether Stein was unlawfully discharged for engaging in protected concerted activities with Ruiz, I find he was not.

Stein was a supervisor. Since only he and employee Ruiz were involved in the so-called grievance, I find there were no concerted activities within the meaning of Section 7 of the Act. Section 7 refers to the rights of "employees" to engage in concerted activities. Here, there was only one "employee" concerned with or active in

<sup>11</sup> The complaint does not allege that IBEW, Local Union No 611, is a labor organization. The contract is in evidence and it is clear that at least when executed, the IBEW was a labor organization. There is no doubt that Stein was not a steward for the IBEW.

<sup>12</sup> The record makes clear that Stein was prejudiced against the IBEW.

<sup>13</sup> Cf. *Jackson Tile Manufacturing Company*, 122 NLRB 764, 767.

connection with Ruiz' grievance and that was Ruiz. I do not here consider what the situation would be had Stein engaged in activities with two or more employees who were acting in concert for the purpose of collective bargaining or other mutual aid or protection. I do find that in connection with Ruiz' question, "employees" did not act in concert. The very most that could be urged by General Counsel is that a supervisor and an employee acted in concert, and such is not protected by Section 7 of the Act. Further, Ruiz' problem was shared in no way by Stein. It was none of his concern, excepting as a supervisor, whether Ruiz was or was not the only warehouseman required to handle highline material. His testimony that he had a concern similar to Ruiz because he might have to learn about highline material in connection with his clerical work, if Ruiz were required to work on it, is entirely speculative and is not believed. Thus, I find Stein and Ruiz were not acting for "mutual" aid and protection. Ruiz was acting for the purpose of being relieved of the obligation to handle highline material, or at least to have what he considered the burden shared by the other three warehousemen. Stein was acting for the purpose of embarrassing Garrison in the presence of his supervisor, Fields.

Assuming Stein to have been an employee and assuming further that he was acting in concert with Ruiz for their mutual aid or protection, *arguendo*, the fact remains that Garrison had no knowledge they were acting in concert. There was every legitimate reason for Garrison to believe that Stein, who was sitting quietly at his desk when Ruiz entered the office, injected his disparaging opinion of how Garrison dealt with Ruiz, solely out of malice. No one, including Ruiz, had asked Stein, in Garrison's presence, to say anything. His expressed opinion to Fields of Garrison's treatment of Ruiz had not the faintest association with anything that Ruiz had asked about the clamp or anything Ruiz said. I have already found that for some time prior to this, relations between Garrison and Stein had been at least tense, and it would be reasonable for Garrison to believe, in the circumstances of this case, that Stein was merely a volunteer intruder. In light of Stein's very bad relations with the warehousemen, it would not be expected that Stein would assist any one of them. Not knowing of Stein's assumed protected concerted activities, Respondent could not have discharged him because of them.

I find Garrison discharged Stein because Stein became insubordinate when Garrison was speaking to him after the Wheelock incident on April 1. Having observed Garrison, and based upon the entire record, I am convinced he did not intend to discharge Stein when he began his conversation with Stein during which the termination became a fact. I find that while Stein was out to coffee Garrison reviewed in his mind at least some of his experiences with Stein, including the Wheelock incident and Stein's charge to Fields. He determined to talk to Stein in the hope of achieving some meeting of the minds so that they could function harmoniously for the good of Respondent's operations. In his conversation with Stein he took a reasonable approach, even to explaining that things would have to be run his way. It was reasonable for him to suggest to Stein that his attitudes were wrong and that he should try to look at things differently, particularly in light of Stein's past relations with the warehousemen and Garrison and his immediate past encounter with Wheelock. Garrison was entitled, as Stein's superior, to a reasonable response. Instead, Stein's reply was insolent and surly. His braggadocio about having had 2 years of college during which he had studied psychology, and his statement that he should be talking to Garrison about attitudes rather than *vice versa*, as might be expected in the circumstances, prompted Garrison to ask for Stein's resignation and then to discharge Stein. Stein wasn't content with matters as they then stood and made no effort to mend his fences and perhaps continue on, but rather he threatened to see a person in management even higher than Garrison and Fields. When Garrison took him up on this, Stein used a not too uncommon vulgar expression in describing Respondent. He also indicated that he believed Garrison had been placed in charge of the warehouse for the purpose of getting rid of Stein. I find the proximate cause of the discharge of Stein was his insolent and surly attitude to Garrison when Garrison, in a reasonable and calm manner, was attempting to get Stein to conduct himself in a cooperative manner. There is insufficient probative evidence to establish that Stein would have been discharged had he not told Garrison that Stein should be talking to Garrison about attitudes and psychology rather than Garrison talking to Stein.

Finally, I conclude there is insufficient substantial evidence to establish that Stein, at any time, engaged in concerted activities for mutual aid or protection within the meaning of the Act, or that he engaged in IBEW activities<sup>14</sup> or that he was discharged because he engaged in protected concerted activities or in union activities.

<sup>14</sup> Excepting in opposition to the IBEW

Upon the basis of the foregoing findings of fact, and upon the entire record, I make the following:

#### CONCLUSIONS OF LAW

1. Respondent is, and at material times has been, an employer engaged in commerce within the meaning of the Act.
2. The record does not establish that Respondent has engaged in the unfair labor practices, or any of them, alleged in the amended complaint.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record, it is recommended that the Board enter an order dismissing the complaint.

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**Local 378, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO and Waldbaum, Inc. Case No. 29-CP-7. July 16, 1965**

#### DECISION AND ORDER

On April 21, 1965, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent, Local 378, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.