

Western Electric Company, Hawthorne Works and International Brotherhood of Electrical Workers, AFL-CIO, Local Union 1859. Cases 13-CA-8497 and 13-CA-9566

August 1, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
KENNEDY AND PENELLO

Upon a charge filed on June 20, 1968, in Case 13-CA-8497, and upon a charge and an amended charge filed on January 15 and February 6, 1970, respectively, in Case 13-CA-9566, by International Brotherhood of Electrical Workers, AFL-CIO, Local Union 1859, hereinafter called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued an order consolidating cases, complaint, and notice of hearing on March 13, 1971, against Western Electric Company, Hawthorne Works, hereinafter 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(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that, commencing on or about June 3, 1968, and at various times thereafter, the Respondent has interrogated employees regarding instances of their alleged misconduct, that both the Union and a substantial number of the aforementioned employees requested a union representative to be present during these interviews, that their requests were denied by the Respondent at a time when the probability existed that disciplinary action would be taken against these employees, that disciplinary action was in fact taken, and that, by the aforesaid conduct, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7, thereby violating Section 8(a)(1) of the Act, and has failed and refused to recognize and bargain with the Union in violation of Section 8(a)(5) of the Act. On April 28, 1971, the Respondent filed an answer admitting in part, and denying in part, the allegations in the consolidated complaint, submitting an affirmative defense, and requesting that the complaint be dismissed.

Thereafter, on May 3, 1971, the Respondent filed a Motion for Summary Judgment and for Transfer of the Case to the National Labor Relations Board,

with affidavits in support thereof, moving that the Board grant summary judgment in favor of the Respondent and dismiss the consolidated complaint on the basis of the affirmative defense set forth in its answer. Subsequently, on May 6, 1971, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the Respondent's Motion for Summary Judgment should not be granted. The Respondent thereafter filed a brief in support of its Motion and the General Counsel filed a response to the Notice To Show Cause.

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 proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

As its affirmative defense, the Respondent asserts that even if it denied the requests of the Union and of bargaining unit employees to have a union representative present during investigatory interviews, as alleged in the complaint, these facts do not, in the circumstances of this case, give rise to a violation of the Act, notwithstanding that disciplinary action was later taken against a substantial number of the employees interviewed. Specifically, in its supporting affidavits, the Respondent avers: That the question pertaining to the right of union representation during investigatory interviews had been submitted to final and binding arbitration by the parties on prior occasions; that the awards rendered under these submissions denied employees any right to representation during such interviews; and that the collective-bargaining agreements negotiated by the parties subsequent to those awards did not change the procedure governing investigatory interviews. The Respondent contends that the Board should accord binding weight to this method of dispute settlement, freely arrived at by the parties, and dismiss the instant complaint.

The General Counsel in his statement in opposition to the Respondent's motion does not directly contest the accuracy of the Respondent's affidavits but instead argues that their submission demonstrates the need for an evidentiary hearing. Further, the General Counsel asserts that the affidavits relate to a key issue and that reliance on them would "introduce into the Board's proceeding a concept alien to Anglo-American jurisprudence—trial by affidavit."

Federal Rule of Civil Procedure 56(b) provides that the defending party may move for summary judg-

ment, in whole or in part, at any time with or without supporting affidavits. Moreover, FRCP 56(e) provides in pertinent part that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Respondent, by its motion, admits the essential factual allegations of the complaint. In its supporting affidavits and accompanying exhibits, the Respondent set forth additional facts which form the basis of its affirmative defense. The General Counsel, having failed to controvert these additional facts, has not met the burden imposed upon an adverse party by the aforementioned rule.¹ In these circumstances, we are satisfied that there are no material facts in dispute which require a hearing before a Trial Examiner. We shall, accordingly, rule upon the merits of the Respondent's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is now, and has been at all times material herein, a New York corporation with its principal office in New York City and various other plants or facilities at other locations in other States, including a facility located at Cicero Avenue and Cermak Road in Chicago and Cicero, Illinois, herein called the Hawthorne Works, where it is, and has been at all material times, engaged in the manufacture of telephone equipment and related products.

During the past calendar or fiscal year, the Respondent received a gross annual revenue from its business operations in excess of \$1,000,000, of which in excess of \$500,000 was derived from the shipment of its goods from its Hawthorne Works directly to points outside the State of Illinois.

We find, on the basis of the foregoing, that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, AFL-CIO, Local Union 1859, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The complaint alleges in substance that the Respondent violated the statutory rights of its employees and unlawfully refused to bargain with the Union as their designated representative by denying employees the opportunity to have a union representative present when they were interviewed by the Respondent in the course of an investigation into employee misconduct at a time when they could reasonably anticipate that such interviews might lead to action adverse to their employment relationship.

The Respondent admits that it refused to allow a union representative to be present at these interviews. The Respondent contends, however, that its refusal was not unlawful as the question concerning the existence of these rights had been resolved in its favor, on more than one occasion, by arbitration, a means mutually agreed upon by the parties. The Respondent also contends that the decisions of the arbitrators are not repugnant to the purposes of the Act, and that the parties' failure to modify these rights during the two rounds of contract negotiations which followed arbitration of the controversy is further justification for giving binding weight to the arbitral process and dismissing the complaint herein.

B. Background

The Respondent's affidavits and accompanying exhibits establish, *inter alia*, that in August 1964, grievances were submitted to arbitration on behalf of two employees who were disciplined by the Respondent following an investigation into their alleged misconduct. In both cases the employees were required to submit to investigatory interviews without a union representative being present. In both cases the Union grieved over the Respondent's refusal to permit a union representative to be present when these employees were being interviewed, contending, *inter alia*, that by its refusal the Respondent violated the terms of their collective-bargaining agreement.

An arbitration board handed down its decision and award pertaining to the first grievance on June 7, 1965. In its decision, the board distinguished between conferences or interviews where disciplinary penalties are to be announced and investigatory inter-

¹ *Williams v. Baltimore & Ohio Railroad Company*, 303 F.2d 323 (C.A. 6)

views. The board held that employees did have a right under the agreement to the presence of a union representative at disciplinary conferences. With respect to investigatory interviews, however, the arbitrators held that no such right obtained under the contract. Finding no reasonable distinction between discussions concerning job performance and violations of company rules, they concluded that the Respondent "clearly does have a right under the Contract to conduct interviews or interrogations without according the employee a right to have a Union Representative present."

The second grievance was decided on February 8, 1966. In that case, an arbitration board held that, in view of the earlier decision, the right to union representation during investigatory interviews which might result in disciplinary action "can only be accomplished by negotiating a provision therefor into the contract."

Thereafter, on January 20, 1967, while the parties were engaged in bargaining over the terms of a new agreement, the Union proposed incorporating such a provision. However, agreement was reached on the new contract without amendment of the language previously construed by the arbitrators.²

Approximately 1 year into the term of the 1967 agreement, the Respondent initiated an investigation into gambling activities at its Hawthorne Works. Following investigatory interviews, which union representatives were not allowed to attend, the Respondent took disciplinary action against a substantial number of employees. Another investigation into employee misconduct occurred in 1969, under similar circumstances and with similar results. The refusal of the Respondent to permit union representatives to be present at the interviews conducted in the course of these investigations gave rise to the filing of charges in the instant proceeding and to the issuance of the consolidated complaint.

C. Concluding Findings

The question posed by the 8(a)(5) allegations of the complaint herein, namely whether the Respondent violated its obligation to bargain with an employee representative by denying requests that a union representative be present during investigatory interviews, has been considered and rejected by this Board in a number of instances³ since our earlier decision in the *Texaco* case.⁴ Accordingly, we find that the Respondent did not violate Section 8(a)(5) of the Act on the facts alleged in the complaint.

As to the 8(a)(1) allegations of the instant com-

plaint, a majority of the Board is of the view that, under the circumstances of this case, they should also be dismissed. Members Penello and Kennedy base their decision to dismiss upon reasons paralleling those expressed in Member Kennedy's dissents in *Quality Manufacturing Company*, 195 NLRB No. 42, and *Mobil Oil Corporation*, 196 NLRB No. 144.

Chairman Miller joins them in dismissing here, but for different reasons, as set forth below.

While we have held that an employee has a Section 7 right to engage in concerted activity, and thus to request that he be accompanied by a union representative in an interview which he reasonably believes may lead to action adverse to him in his employment relationship, that right is not an unqualified one. Collective agreements may, and frequently do, establish orderly channels for the exercise of employee rights, including the specification of the procedures for the manner in which employees and the designees of their exclusive representative shall act in concert for the duration of the governing agreement. This Board has traditionally refrained from attempting to regulate or interfere with such arrangements, so long as they are consistent with the statutory scheme, viewed as a whole.

Thus, we have refrained from finding any violation of our Act when collective agreements excluded union representatives at a particular step of the grievance procedure, and substituted instead an all-employer committee. *Shell Oil Company*, 93 NLRB 161. And we have for many years honored agreements in which unions pledged, on behalf of all the employees in the unit, not to strike. In such cases the employees are bound not to exercise a significant right to engage in a traditional kind of concerted activity—the strike—but rather to channel their concerted action into the orderly grievance and arbitration machinery provided by the contract.

In the present case, it seems clear that the Union and the Respondent have jointly considered, on many occasions, the issue of whether union representatives should be present in investigatory interviews of the type here under review. They failed to agree on the question of whether their contractual procedures and their *modus vivendi* provided for representation at this juncture. Twice they submitted the issue to arbitration, and twice the answer from the arbitrators came back in the negative. Although the Union, faced with an adverse determination as to the matter, attempted in negotiations to persuade the Respondent to adopt new procedures which would have included new contract provisions providing for representation in such interviews, no agreement to

NLRB No. 84, *Texaco, Inc., Los Angeles Sales Terminal*, 179 NLRB 976.

⁴ *Texaco, Inc., Houston Producing Division*, 168 NLRB 361, enforcement denied 408 F.2d 142 (C.A. 5, 1969).

² The Union offered no proposal with respect to the matter during the 1969 round of negotiations

³ *Chevron Oil Company*, 168 NLRB 574, *Jacobe-Pearson Ford, Inc.*, 172

include such provisions emerged from the negotiations.

Under these circumstances, it seems that the parties must have understood that the former procedures, as they had been interpreted by binding arbitration, were intended to continue. And those procedures, while they provided for union representation at other points, such as in the processing of contractual grievances, did *not* include such representation at this kind of investigatory interview.

There remains only the question of whether an agreement which expressly, or through interpretation, operates to exclude union representation in investigatory interviews, is repugnant to the statute. Since, as indicated by the discussion, *supra*, we have regularly permitted parties, by agreement, to determine how representation rights shall be channeled during the life of a collective agreement, there would seem to be no basis for reaching a contrary result here. If the parties desire to change these channels in future negotiations, they are free to do so. Thus, if the employees should become convinced that representation in the course of these interviews is necessary as a part of their total protection from what they may view as a harsh or unfair application of the employer's disciplinary policies, they are free to seek this additional safeguard, and to refuse to authorize their agent to make an agreement which does not include such safeguards.

The situation appears not to be significantly different than that in *Shell Oil Company, supra*. In that case, too, although there in express terms, the contract excluded union representatives at a point

where, absent such agreement, we would doubtless have held that the employees had a Section 7 right to engage in concerted activity and demand that they be represented by their chosen agent. But different channels were, we held, controlling for the life of the contract.

For these reasons, Chairman Miller joins his two colleagues in dismissing the complaint herein in its entirety.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Respondent, Western Electric Company, Hawthorne Works, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, AFL-CIO, Local Union 1859, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, Western Electric Company, Hawthorne Works, has not engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.