

**Western Electric Company, Inc. and Local 6396, Communications Workers of America, AFL-CIO. Case 14-CA-6892**

August 1, 1973

**DECISION AND ORDER**

BY CHAIRMAN MILLER AND MEMBERS FANNING  
AND PENELLO

On March 23, 1973, Administrative Law Judge Eugene George Goslee issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering 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 authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions<sup>1</sup> of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

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

<sup>1</sup> Chairman Miller and Member Fanning find the conclusions of the Administrative Law Judge fully supported by the fact that the Respondent terminated the interviews without further ado when the employees involved refused to answer any questions without a union representative present. They therefore find it unnecessary to pass upon so much of the decision of the Administrative Law Judge as theorizes that the employees had no reasonable grounds to fear that the interviews would adversely affect their employment status.

Member Penello concurs with his colleagues in dismissing the 8(a)(1) allegations because it is clear from the record that Respondent was merely conducting investigative rather than disciplinary interviews. See *Western Electric Company, Hawthorne Works*, 198 NLRB No. 82, *National Can Corporation*, 200 NLRB No. 156, fn. 3, and *J Weingarten, Inc.*, 202 NLRB No. 69, fn. 2.

**DECISION**

**STATEMENT OF THE CASE**

EUGENE GEORGE GOSLEE, Administrative Law Judge: This case came on to be heard before me on November 9, 1972, upon a complaint<sup>1</sup> issued by the Western Electric Compa-

ny, Inc., hereinafter called the Respondent. The issues raised by the pleadings in this case relate to whether or not the Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by conduct hereinafter specified. At the conclusion of the hearing all parties waived oral argument, but briefs have been received from all parties, and the briefs have been duly considered.

Upon the entire record in this proceeding, and from my observation of the testimony and demeanor of the witness, I hereby make the following:

**FINDINGS OF FACT**

**I THE BUSINESS OF THE RESPONDENT**

The Respondent is engaged in the manufacture, sale, and distribution of electric parts and maintains a principal office and place of business at Ballwin, Missouri, as well as a warehouse facility at St. Louis, Missouri. During the 12-month period ending June 30, 1972, the Respondent purchased goods and materials valued in an amount in excess of \$50,000, which were delivered to its Ballwin, Missouri, plant directly from sources situated outside the State of Missouri. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

**II THE LABOR ORGANIZATION INVOLVED**

Local 6396, Communication Workers of America, AFL-CIO, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

**III THE UNFAIR LABOR PRACTICES ALLEGED**

The complaint alleges and the answer denies that on four separate occasions between December 9, 1971, and January 19, 1972, the Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights by refusing requests made by four employees for union representation during the course of interviews conducted by the Respondent's management officials. The complaint further alleges, and the answer similarly denies, that the employees interviewed by the Respondent had reasonable grounds to believe that the subject matter of the interviews could adversely affect their employment status.

In December 1971, the Respondent commenced the relocation of its St. Louis Service Center from Duncan Street to 1111 Woods Mill Road. As a part of the move certain goods and materials were moved from storage at 5206 38th Street, identified in the record as the SECO facility, to the new Service Center. On December 8, 1971, seven employees, under the supervision of Robert Frey, were engaged in preparing materials for transfer from the SECO facility to the new Center. As a part of the preparatory work the employees were instructed by Frey to lower materials from storage bins to the floor, but late in the afternoon it was discovered

ed on September 25, 1972, and is based on a charge filed on June 6, 1972, and amended on July 12, 1972. Copies of the charge and amended charge were served on the Respondent on July 6 and 12, 1972, respectively.

that some of the materials had apparently been purposefully thrown on the floor and damaged. On the following day, December 9, all seven employees who had worked under Frey's supervision on the previous day were interviewed by the Respondent's management, in an attempt to discover who was responsible for the damage. Included in the seven employees was James Reavis and David Anderson, whom the General Counsel contends were deprived of their Section 7 rights by the Respondent's refusal to honor their requests for union representation at the interviews.

James Reavis, a warehouseman and a union steward, testified that after his lunch break on December 9, he returned to his work station in the company of another union steward, Raymond Ketcherside. The employees were approached by Supervisor Frey, who informed Reavis that he was wanted in the office of Peter D. Fenner, the Respondent's production manager. Reavis asked if Ketcherside could accompany him, and Frey replied "Fine."

Reavis, accompanied by Ketcherside, was taken by Frey to Fenner's office where David Youngberg, the Respondent's warehouse department chief, was also present. According to Reavis, Fenner stated that management was investigating an incident that had taken place at the SECO facility on the previous day, and wanted to ask Reavis some questions. Youngberg showed Ketcherside some pictures of the damaged materials, and stated that management wanted to find out who was responsible. At this juncture Fenner asked Ketcherside to leave the office, and in response to Ketcherside's protest, Fenner also stated that it was just part of an investigation and management felt that they could ask questions better if the Union were not involved.

After Ketcherside's departure, Reavis told Fenner that he preferred not to answer any questions unless the Union was present. As Reavis testified, Fenner stated that if he didn't cooperate it might result in disciplinary action. Some questions were asked by Fenner, however, about the SECO incident, as well as about a prior incident involving a forklift at which Reavis was present. As Reavis testified on cross-examination, the only questions asked after he voiced his preference not to answer questions without union representation, was an inquiry as to where he was on the afternoon of December 8, and whether he had heard any noises. Reavis replied that he was marking cartons and instructing a new representative, and heard no noises. Fenner stated, "I can see we are getting nowhere with you," and instructed Reavis to return to work. Fenner turned to Supervisor Frey and told him to summon employee Phil Schneider. Reavis asked if he could remain to represent Schneider, and Fenner said, "No," that it would not be necessary. The record contains no evidence that Reavis was disciplined, or that his employment tenure and status was in any way affected by the interview of December 9, or by the SECO incident.

Ketcherside confirmed Reavis' testimony that Supervisor Frey approved the request that he accompany Reavis to Fenner's office. Ketcherside also confirmed that Fenner asked him to leave the office, with the explanation that management was only conducting an investigation, and it was believed that employees would be more cooperative in answering questions if a union representative was not present.

After he left Fenner's office, Ketcherside called John DeClue, the vice president of the Union, and informed him of what had happened. DeClue directed Ketcherside to pass the word to employees that they were entitled to representation in interviews by management. Ketcherside complied and talked to several employees, including David Anderson whom he found sitting outside Fenner's office.

Anderson, a warehouseman, was also working at the SECO facility on December 8, when alleged damage was caused. On the afternoon of December 9, Supervisor Frey instructed him to come to the office, and Anderson countered with the statement that he wanted a union representative. Anderson did not testify as to what, if anything, Frey replied, and for the following additional reason I do not credit Anderson's testimony that he demanded union representation from his supervisor. Anderson testified that he made the demand of Frey because Ketcherside had informed him that he was entitled to a union representative if he was called to the office for an interview. Ketcherside's testimony, as corroborated by Anderson, was that he informed Anderson of his alleged right when he found Anderson waiting outside Fenner's office.

Anderson, was called into the office by Fenner and Youngberg, who, according to his testimony, started to ask him questions about the SECO incident. Anderson asked for a union representative, and was told that it would not be allowed because management believed that the employees would more fully cooperate without a union representative present. Youngberg asked Anderson to look at some pictures, but Anderson replied that he didn't want to look at the photographs. Anderson was asked some questions about what had happened at SECO on December 8, but he refused to answer unless he was permitted union representation. According to his testimony, Anderson was asked if he knew what insubordination was, and he replied that he did, but did not intend to answer any questions. When the management representatives returned to questions about the SECO affair, Anderson again refused to answer and was sent back to work.

On the following Monday Anderson was terminated on grounds that he had engaged in an act of sabotage against the Company. Anderson's discharge, for whatever cause, is not alleged as a violation of the Act in this proceeding, but is pending an arbitration proceeding arising under the terms of the collective-bargaining agreement in effect between the Union and the Respondent.

Warehouse Chief Youngberg testified as the Respondent's witness concerning the interviews of Reavis and Anderson. Fenner conducted the interview of Reavis, with Youngberg present, and Youngberg conducted the interview of Anderson with Supervisor Frey present. As to the content of the interviews, Youngberg's version conforms generally to the versions proffered by Reavis and Anderson. Youngberg did relate that at the time of the interviews management had no reason to suspect or believe that Reavis or Anderson were implicated in the damage caused at the SECO facility on December 8. Contrary to Reavis, moreover, Youngberg denied that any mention was made of discipline if Reavis failed to cooperate, and he similarly denied that there was any mention in the interview of a prior incident involving a forklift. As to Anderson, Youngberg

also denied that the subject of insubordination was raised during the course of Anderson's interview by management. Anderson was discharged for misconduct several days following the interview, but, according to Youngberg, the termination was effected on the basis of information supplied by an eyewitness to the SECO incident, which came to light after Anderson's interview. I credit Youngberg's testimony of the interviews.

The record is clear, and the Respondent does not deny, that both Reavis and Anderson requested union representation during the course of their interviews. The Respondent refused the requests, however, on grounds of its established policy that employees are entitled to union representation at management interviews only when the interviews are for disciplinary reasons, and not, as in the cases of Reavis and Anderson, where the interviews are solely for investigatory reasons.

Under current Board law, an employee's right to be represented by his union at an interview conducted in the presence of management officials no longer turns on the test of whether the interview is conducted for investigatory reasons, or for the purpose of meting out discipline.<sup>2</sup> As decided by a majority of the Board in *Quality Manufacturing*,<sup>3</sup> an employee called into an interview by management is entitled to the safeguard of his collective-bargaining representative's presence, or, alternatively, may choose to forego the interview, if he has reasonable ground to fear that the interview will adversely affect his continued employment. As established in the *Quality* case, the "reasonable ground" test is to be measured by objective standards under all the circumstances present in each separate case.

In reply to the General Counsel's question as to his purpose in asking for union representation at the December 9 interview, Reavis testified:

It was felt that being called into the office and asking me a bunch of questions I could damage my job in some way or just felt that I should have one there. They may say something to me I may not like. I may wind up and end up getting fired over the whole thing.

The above excerpt from Reavis' testimony is the only evidence in the record adduced by the General Counsel in support of the reasons, reasonable or otherwise, which prompted Reavis to request union representation at his interview by Fenner and Youngberg on December 9, 1971. The statement, on its face, is purely subjective, and totally unsupported by any objective evidence to support Reavis' contention that he believed the interview would damage his job or lead to his termination. Aside from the evidence that Reavis worked at the SECO facility on December 8, there is no evidence that he was aware of the damage caused to the merchandise, or knew of anyone who was involved, or was himself implicated in the alleged misconduct in any way. On cross-examination, moreover, Reavis admitted that he was never accused of implication in the SECO incident, and was never informed that the Respondent had any evidence of his participation in the misconduct.

Anderson gave no testimony as to the reason which prompted him to request union representation at his inter-

view by Youngberg on December 9. The most the record evidence shows is that Anderson was employed at the SECO facility on December 8, that he requested union representation at his interview because Ketcherside told him to do so, and that he was subsequently discharged for misconduct.

The General Counsel argues that Anderson's subsequent termination is corroborative evidence that he had a reasonable ground, based on objective considerations, to fear that the interview would affect his job tenure. Evidence that does not exist in the record cannot be corroborated. The most the record shows is that Anderson was told by Ketcherside and employee Schneider that the interview would concern the damage done at the SECO facility on December 8. In my view mere knowledge of the subject matter of the interview, even when coupled with the evidence of his presence at the SECO building on December 8, is not objective proof that Anderson believed at the time of his interview that his participation in a confrontation with management would adversely affect his employment. Anderson was discharged, but the post interview discharge cannot, in the absence of some other affirmative evidence, be treated as objective proof of the reasonableness of his belief at a time before the termination was affected. Notwithstanding his discharge, the record contains no evidence that Anderson was in fact implicated in the damage done at the SECO facility, and in view of the pendency of an arbitration proceeding on the merits of the discharge, the lack of evidence is understandable.

In summary, I find and conclude that the General Counsel has not proved that Reavis and Anderson had reasonable grounds, based on objective considerations, to fear that their interviews by the Respondent would adversely affect their continued employment. Even if, contrary to this finding, I could find that their alleged fears were based on objective considerations, I would, nevertheless, recommend dismissal of the complaint insofar as it involves these two employees. The rule set forth in *Quality Manufacturing, supra*, affords an employee who is called into an interview with management the option to forego the interview unless his request for union representation is allowed. When Reavis and Anderson were informed that union representation would not be allowed, both refused to answer questions concerning events at the SECO facility on the previous day. There is no allegation, and no evidence that Reavis was disciplined in any way because of his refusal to participate in the interview. As to Anderson, he was discharged, but again there is no allegation and no proof that his termination was caused by his exercise of the option not to answer questions at the December 9 interview.

About the same time that the SECO incident occurred, the Respondent was conducting another investigation among its employees concerning the use of narcotics, theft of company property, and sabotage. The investigation was conducted by Leonard J. Majesky, department chief-security, from the Respondent's New York security office. Majesky testified that on January 19, 1972, he interviewed employees William M. Libbert and Larry G. Morris in connection with the investigation. Majesky also testified that it is the Respondent's standard policy not to allow employees to have union representation during the course of interviews arising on a security investigation, but if the employee

<sup>2</sup> See *Southwest Ornamental Iron Co.*, 201 NLRB No. 153, at fn. 1

<sup>3</sup> *Quality Manufacturing Company*, 195 NLRB 197

makes a request the security agent terminates the interview, and it is resumed by local management personnel with the right to union representation. Majesky related that he confirmed this policy with his superior, Frank J. Maddox, before undertaking the interviews of Libbert and Morris. Youngberg testified that on January 18, he informed the Respondent's section chiefs that employee interviews were to be conducted, and if employees summoned to interviews asked for union representation, Youngberg was to be notified and the union representative was to be brought to the place of the interview.

Libbert, a warehouseman, testified that on January 19, 1972, he was told by his supervisor, Robert McFarland, that he was wanted in Mr. Thrall's office. According to Libbert, as they were proceeding to the office he asked McFarland if he could have a union representative, and McFarland replied, "No, you won't need him."

When Libbert arrived at Thrall's office Majesky introduced himself and said that he wanted to talk to Libbert about the "dope" situation in the warehouse. Libbert replied that he knew nothing about it, and Majesky stated that he believed him. Majesky then turned the questions of theft and sabotage, and according to Libbert's direct testimony he asked for a union representative. Majesky replied that Libbert wouldn't need a union representative, and continued with the questioning. As Libbert related, Majesky said that he had a statement accusing Libbert of theft and sabotage, but couldn't disclose the name of the person who gave the information. Libbert denied the accusation, and Majesky left the room. Within a few minutes Youngberg and McFarland appeared and informed Libbert that he was under investigation and was temporarily suspended. A few days later Libbert was notified that he was fired for grave misconduct.

Larry Morris was also summoned for an interview on January 19, by his supervisor, Dan Frise. According to Morris, he asked Frise if the Union was going to be present, but admitted that Frise may not have heard him, and Frise made no response.

When Morris arrived at the office, Youngberg and Majesky were present, and the latter introduced himself as a security agent. Youngberg and Frise left and Majesky stated that he was making an investigation of sabotage and theft and was going to question a lot of people. According to Morris, Majesky threatened that if Morris didn't tell the truth, Majesky would find out. As Morris testified on direct examination, at this juncture he asked, "Well, where is the Union?" Majesky replied, "Just answer my questions." Majesky then asked if Morris had ever stolen any screw drivers or cold chisels, or if he had a coin collector key in his pocket. Morris replied in the negative, and Majesky asked if he had ever seen anyone take drugs, or had himself taken drugs. Morris again replied that he had not. Majesky may have asked other questions, but Morris was unable to recall what the questions were. At the end of the interview Morris was taken to another room, and within a few minutes he was told by Youngberg and McFarland that he was under suspension. A few days later he was called by Frise, who gave him the opportunity to resign in lieu of discharge. Morris agreed to resign, and as of the date of the hearing in this proceeding his termination was pending on an arbi-

tration proceeding.

Robert McFarland testified that he took Libbert to Thrall's office on January 19, on the instruction of Youngberg. McFarland also testified that on January 18, he was instructed by Youngberg that a security man would be conducting some interviews, and if any employee requested union representation the employee was to be taken to Youngberg's office and the union representative brought along. McFarland denied that when he informed Libbert that Youngberg wanted to see him, Libbert made any request for a union representative.

According to Majesky, he informed Libbert of the nature of the investigation, and stated that three employees had been arrested for drug transactions on Company premises. Majesky told Libbert that the door was open and he was free to terminate the interview at any time he chose. No accusations were made against Libbert, but Majesky did ask him specific questions about narcotics and damage to an intercom speaker. Majesky denied that he told Libbert that he was in possession of any evidence or signed statement implicating Libbert in acts of theft, sabotage, or other misconduct. Majesky also denied that Libbert made any request or demand for union representation during the course of the interview.

As to Morris, Majesky testified that he repeated about the same format in the interview as he had used with Libbert, but also asked Morris about the removal of property from the Company's premises. After some questions on the subject Morris admitted that he may have removed some small tools, particularly a cold chisel and a knife. According to Majesky, Morris did not ask where the Union was, nor did he request union representation.

Upon all of the relevant portions of the record, I credit the testimony of McFarland and Majesky insofar as their versions of events conflict with the testimony of Libbert and Morris. Both employees were less than candid in their testimony, particularly with respect to the issue of if, and when they requested union representation at the interviews.

In his direct testimony, and initially on cross-examination, Libbert insisted that he made a request of Majesky for a union representative immediately after Majesky's initial questions concerning narcotics, theft, and sabotage. When faced with a prehearing affidavit given to the General Counsel, however, Libbert agreed that he had previously stated that he made the request for union representation at the start of the interview. In response to further questions on the subject, Libbert agreed that Majesky asked him a series of questions, that it was not until near the end of the interview that he asked for union representation, and that his prehearing affidavit as to the timing of his request was not correct. In the face of such inherent conflict on a crucial issue, I have no alternative but to credit McFarland and Majesky, and find that Libbert made no request for a union representative to be present at his interview on January 19, 1972. Even if, however, I were to credit Libbert's testimony that he made the request near the end of the interview, and after Majesky's questions, I would still recommend dismissal of this allegation of the complaint. As I understand the rule propounded in *Quality Manufacturing, supra*, as the employee has the option to forego an interview if his request for union representation is rejected, the employer also has

an option to forego or terminate the interview, without, of course, imposing any discipline on the employee, if the employee's request for union representation is denied. If the request was not made until the end of the interview, and the interview was then terminated, no violation occurred unless Libbert was disciplined because he made the request. Libbert was terminated, but there is no allegation, and no evidence that his termination resulted from his request for union representation.

There is also a conflict in Morris' testimony as to the time of his alleged request for union representation, as there is a further conflict in his version of the events which transpired at the interview. On direct examination Morris testified that he asked where the Union was immediately after Majesky explained the purpose of the interview, and before Morris was asked specific questions. On cross-examination Morris again testified that he asked for union representation before Majesky asked any questions, but Morris admitted that in his prehearing statement he said he made his request after Majesky had asked him if he knew anything about the use of "dope" on company premises.

In addition, neither in his direct testimony, nor in his prehearing affidavit, did Morris acknowledge, as he did on cross-examination, that during the course of the interview he gave Majesky a signed statement in which he admitted that he had "inadvertently" removed small tools from the Respondent's premises. In the face of the conflict in his testimony as to when he requested union representation, and particularly in view of his failure to divulge crucial events which took place during the course of the interview of January 19, I reject Morris' testimony except where it is corroborated by other evidence. Assuming, *arguendo*, moreover, that Morris made a request for union representation at some stage in the interview, the interview was terminated and, as in the case of Libbert, there is no allegation, and no evidence that Morris' subsequent suspension and ultimate termination resulted from the request.

In summary I find and conclude that the Respondent has not violated the Act as alleged in the complaint.<sup>4</sup>

<sup>4</sup> At the hearing, and in its brief, the Respondent argues that these disputes involving employees Reavis, Anderson, Libbert, and Morris should be defer-

## CONCLUSIONS OF LAW

1. The Respondent, Western Electric Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union, Local 6396, Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated the National Labor Relations Act, as amended, as alleged in the complaint.

## ORDER <sup>5</sup>

It is recommended that the complaint herein be dismissed in its entirety.

red to the contractual forum provided in the collective-bargaining agreement between the Company and the Union. The Respondent is a party to the national agreement with the Communications Workers, and the bargaining agreement contains grievance and arbitration procedures. It is clear, however, that the bargaining agreement contains no provision with respect to an employee's right to union representation at an interview by management, and it is equally clear that the parties have never sought to arbitrate this issue, either in these or any other cases. The Respondent argues, nevertheless, that the employee's right to union representation in these circumstances is a bargainable issue which a union may waive by virtue of a collective-bargaining agreement. There is evidence that both before and during the 1971 negotiations the Union sought, but failed to obtain a provision in the contract according employees the right to union representation in circumstances such as present in the instant case. Relying on the concurring opinion of Chairman Edward B. Miller in *Western Electric Company, Hawthorne Works*, 198 NLRB No. 82, and dissenting opinions by Member Ralph E. Kennedy in *Quality Manufacturing, supra*, and *Mobil Oil Corporation*, 196 NLRB 1052, the Respondent contends that these disputes should be deferred as matters involving contract interpretation, even though the existing agreement does not expressly deal with the subject of employee rights to collective representation at management interviews. While I find that the Respondent's argument for deferral is attended with some merit, but I also find no precedential case where a majority of the Board has deferred its jurisdiction to arbitration where the collective-bargaining contract contains no express provision relating to the union's right to represent employees at management interviews, but where the union has sought, but failed to obtain such a provision. Accordingly, I shall recommend dismissal of the complaint on the merits.

<sup>5</sup> [In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the 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.]