General Electric Corporation, Installation & Service Engineering Division *and* John E. Evans

J. P. Shirley Company *and* John E. Evans

General Electric Corporation, Installation & Service Engineering Division and J. P. Shirley Company *and* International Brotherhood of Electrical Workers, Local 124. Cases 17-CA-9630, 17-CA-9672, and 17-CA-9648

June 19, 1981

DECISION AND ORDER

On March 2, 1981, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions 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 be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: These consolidated cases were heard before me on November 4 and 5, 1980,[1] at Kansas City, Kansas. In Cases 17-CA-9630 and 17-CA-9672, it is alleged that Respondents, acting as joint employers, discharged John E. Evans on February 5 in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

In Case 17-CA-9648, it is alleged that, on May 2, Respondents, acting as joint employers, terminated nine members of the International Brotherhood of Electrical Workers, Local No. 124, in violation of Section 8(a)(3) of the Act.

While denying that they are joint employers, Respondents admit that General Electric determined to lay off the electricians on May 2 which decision was implemented by J. P. Shirley Company. J. P. Shirley Company admits full responsibility for the termination of Evans on February 5.

Both Respondents contend that the layoff of the electricians and the termination of Evans were for cause and were in no way related to any employees' protected or union activities.

Upon the record as a whole, including briefs and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

General Electric Corporation, Installation & Service Engineering Division (herein called General Electric), is a New York corporation engaged, *inter alia*, in the manufacture and installation of hydroelectric generators throughout the United States, including the Truman Dam project at Warsaw, Missouri. In the course and conduct of its business, General Electric annually purchases goods and services valued in excess of $50,000 directly from sources located outside the State of Missouri. General Electric admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

J. P. Shirley Company is a California corporation engaged, *inter alia*, in furnishing labor for construction of hydroelectric power plants and on August 22, 1977, entered into a "labor/services contract" with General Electric to "provide craft labor as requested to perform installation of 6 (six) hydro-generators" at the Truman Dam project in Warsaw, Missouri. J. P. Shirley Company annually sells more than $50,000 worth of services directly to customers located outside the State of California. J. P. Shirley Company admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated that J. P. Shirley Company has a collective-bargaining agreement with the Central Missouri District Council, United Brotherhood of Carpenters and Joiners of America, Local 1792, covering the millwrights hired for the Truman Dam project.

It appears that the principal function of J. P. Shirley Company under its contract with General Electric is to furnish labor for the performance of the work outlined in the agreement, including the furnishing of onsite supervision and the providing of administrative services. In fact, however, the evidence before me reveals that J. P. Shirley Company did not provide onsite supervision. Rather, Stan Kolodi was the site manager on the Truman Dam project and was, according to his testimony, the General Electric site representative. The evidence reveals that with regard to personnel matters, such as the discharge of Evans and the layoff of the electricians, Kolodi either made the decision or the decision was made by higher General Electric supervision transmitted to Kolodi, and through him to the J. P. Shirley Company.

Since Kolodi made the decision to discharge Evans, the responsibility for which was assumed by the J. P. Shirley Company and since Kolodi by his testimony was the General Electric representative on the project, it appears that the responsible direction of labor matters at the Truman Dam project for both General Electric and J. P. Shirley Company was common. I therefore conclude that for purposes of this matter the J. P. Shirley Company and General Electric were joint employers of

[1] All dates are in 1980 unless otherwise indicated.

Evans and the electricians. E.g., *Sinclair & Valentine Co., Inc., a Division of Wheelabrator-Frye, Inc.*, 238 NLRB 754 (1978).

II. THE LABOR ORGANIZATIONS INVOLVED

It is admitted, and I find, that International Brotherhood of Electrical Workers, Local 124 (herein called IBEW), is a labor organization within the meaning of Section 2(5) of the Act.

It is further admitted, and I find, that United Brotherhood of Carpenters and Joiners of America, Local Union No. 1792 (herein called the Carpenters), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

General Electric had a contract with the United States Army Corps of Engineers to install six hydroelectric generators for the Truman Dam project. In connection with this work, as indicated above, General Electric contracted with J. P. Shirley Company for labor. Principally the work of General Electric required the services of electricians (all of whom were members of IBEW), millwrights (all of whom were members of Carpenters), pipefitters, and laborers. According to the agreement between General Electric and J. P. Shirley Company, the work was to be completed on "approximately September 30, 1979." However, the generator installation was not finally finished until August 14 or 15, 1980.

B. *Analysis and Concluding Findings*

1. The John E. Evans cases

John Evans was hired by Kolodi in the summer of 1978 to work as a millwright. Evans, as a member of a sister local of the Carpenters, was a "permit man."

The events leading to Evans' discharge began on the morning of February 4.[2] While there is some disagreement concerning certain material facts, *infra*, the parties basically agree that on the morning of February 4 Evans saw an employee identified as Frank Smith who had previously worked as an electrician and was now on the job as a millwright (or vice versa, the record being unclear on this point). Believing that Smith was a member of both the Carpenters and IBEW, Evans went to Donald Merk, his job steward (and vice president of the Carpenters), protesting that there was a man working who had two union cards.

According to Merk's generally credible testimony, Evans came to him that morning and "asked me if I was going to do anything about Frank Smith, who was a millwright working on permit as an electrician. I told him at that time that there was nothing I could do about Frank Smith." After this conversation, according to Evans, he went to Kolodi to ask why Smith was back. Kolodi said he did not have time to explain the situation and for Evans to go back to work. Kolodi denied that he had any conversation with Evans on February 4.

In any event, around 9 a.m. Evans approached Millwright Foreman Michael Montgomery (who was also president of the Carpenters Union) and said "he had a bur[r] in his saddle and he was going to leave the job." Montgomery asked him if there were a problem and Evans replied that there were some things bothering him and he felt that he should get away. Montgomery told Evans that, if he did not want to work, Montgomery could not stop him.

Montgomery then sought out Kolodi and told him of his conversation with Evans. He told Kolodi that Evans had left and Kolodi asked why. Montgomery repeated the conversation between him and Evans. Kolodi, according to Montgomery, "seemed worried about the manhours, the men, who to replace him [Evans] with." They attempted to find Evans but could not.

That morning Evans was part of a four-man crew which had been assigned to install a thrust bearing as soon as a crane was free, which occurred around 10 a.m. Because Evans had left, another man had to be assigned to the crew.

Evans testified that he did not talk to Montgomery until around noon. He testified:

> I came back upstairs and I told him [Montgomery] Kolodi had never come back down to the union yet—I do not know if he is trying to avoid me over the situation or not but I have been upset all morning and I have a cold, I am sick and if it is okay by you I would like the rest of the day off. He said yes.

There is a substantial conflict between the testimony of Evans and Montgomery concerning precisely what Evans said prior to leaving the job. I credit Montgomery. First, Montgomery's demeanor was more positive than Evans'. Secondly, even though Montgomery was a working foreman (a job in the construction industry not normally associated with management), it does not appear that he had any stake in the outcome of this proceeding whereas Evans clearly did. Further, Montgomery's version of this conversation is more consistent with Evans' admission that he was upset and sought out Kolodi with regard to what he conceived to be a violation of trade union principles (dual unionism).

John Maggart, the electrician foreman, testified in rebuttal that he saw Evans at the project shortly before lunch. Evans asked him to tell their carpool driver that he would be gone the rest of the day. This is apparently offered to corroborate Evans' testimony that he did not leave the job until noon. It does not, however, for Evans certainly could have walked off the job as testified to by Montgomery, around 9:30 a.m., and still have been in the area at noon.

On the afternoon of February 4, Kolodi told Montgomery and Merk that he intended to discharge Evans for walking off the job. Montgomery agreed and Merk, representing the Carpenters as the job steward, told Kolodi there was nothing he could do to protect Evans.

[2] Evans testified that sometime in the fall of 1979 he asked Kolodi why new people were hired in favor of union members on temporary layoff. There is no indication that this conversation had anything to do with Evans' discharge.

Evans came to work the next morning, and according to his testimony sought out Kolodi "to see if he was available to finish our conversation about the electrician or millwright coming back—the guy carries two cards." He met Kolodi and they had a conversation about Frank Smith. Kolodi said he was not going to do anything about the matter and, according to Evans, "I said, according to my rules, you are not supposed to be carrying two union cards." Evans went on to state that he also talked to Kolodi about the number of apprentices on the job:

> . . . but I said that I did not approve of the guy carrying two cards and asked him when he was going to get something done about the apprentice program. Anyway, we had that conversation and he said that he had to do a job a certain way and said he was going to do it like he had to do it and to expedite it anyway he could. He then said for me to go up and wait in the coffee shack and that he would talk to me later.

During this conversation, according to Evans, Kolodi said something to the effect that "if you are going to make waves you know what I'm going to have to do," a comment which Kolodi denied he made.

Sometime after this conversation with Kolodi, Evans talked to Montgomery, who came in to work late, having had a dental appointment that morning, and according to Montgomery stated that he had made a mistake by leaving the job the day before. Evans denied he made any such comment to Montgomery. Again, I credit Montgomery's assertion over Evans' denial.

The General Counsel contends that, because other carpenters had left the job in the past and had not been discharged, and because Evans had permission from Montgomery, Kolodi must have been motivated by Evans' having protested about the dual card employee, the use of apprentices, and the pay scale of millwrights. While Kolodi did testify that during the exit interview with Evans he agreed to "listen him out":

> . . . he says that he felt that we were not doing the right thing, that there was a man, a millwright, that had two cards. The apprentices had, that we had the apprentices work in which they should not be working. They were doing millwrights work and about the pay scale.

Evans did contact the Union subsequent to his discharge and did protest matters relating to wages and other conditions of employment of employees, and such was investigated by an International representative. However, it is clear, even from Evans' testimony, that the object of his protest on February 4 was his belief that an individual was working as a millwright who also was a member of IBEW. And it was this fact that caused Evans to have a "bur[r] under his saddle." And it was this I find that caused Evans to determine to walk off the job in protest on February 4. I do not believe that he was sick nor do I believe that he had the permission of his foreman to leave the job. It is clear that Evans left the job to protest the employment of Frank Smith and it is equally clear that Kolodi was determined to discharge Evans for doing so.

Thus, the question becomes whether Evans' act was protected concerted activity. I conclude that it was not. First, there was no evidence that he acted in concert with any other employee. He did seek out his union steward about this matter, but the steward declined to participate. Thus it can hardly be said that he was acting on behalf of fellow union members. Nor was any other employee involved with Evans. When Evans walked off the job on February 4 he walked off by himself and was acting on his own behalf and not on behalf of any other employee. Second, it is clear that the object of his protest was not the enforcement of the collective-bargaining agreement, an act which can be concerted even though engaged in by an individual. E.g., *Farmers Union Cooperative Marketing Ass'n.*, 145 NLRB 1 (1963).

Evans was concerned about the employment status of an individual because of his membership in two unions. The only reasonable interpretation of Evans' protest was that he sought the termination of Frank Smith, because Smith was a member of the IBEW even though he was then working on the job as a millwright. Such clearly was an attempt to cause discrimination against an employee because of his membership in a labor organization. Had Kolodi, on behalf of either of Respondents, acquiesced in Evans' implicit demand, he would have violated Section 8(a)(3) of the Act. The object of Evans' protest was clearly not protected by Section 7. Cf. *Brady-Hamilton Stevedore Company*, 198 NLRB 147 (1972).

While there may have been some discussion, both in the fall of 1979, even on February 5 concerning the matter of apprentices, the object of Evans' protest was that of the millwright who was also a member of the IBEW. I do not believe that Evans walked off the job to protest the other matters which he brought up in testimony or which he complained of to the Union following his discharge.

I therefore conclude that, in discharging Evans for walking off the job, Kolodi did not interfere with his or other employees' rights guaranteed them by Section 7 of the Act, nor did he discriminate against Evans because he was a member of the Carpenters. Accordingly, I conclude that the General Counsel has failed to establish by a preponderance of the credible evidence that Evans was discharged in violation of Section 8(a)(1) or (3) of the Act. I will recommend that the complaint in Cases 17-CA-9630 and 17-CA-9672 be dismissed in its entirety.

II. THE IBEW CASE

In October 1979 there were five electricians on the project. The number then increased to six in late October, to seven in February 1980, and then by late April there were nine electricians with the inclusion of two who were hired specifically to work only 80 hours.[3] On

[3] Apparently under the IBEW hiring hall, an employee does not lose his place on the out-of-work list where he accepts a job which lasts for 80 or fewer hours.

May 2 all of the electricians were laid off. On May 8 three were recalled to report to work on May 12 and another two were hired in June. The complement of electricians was from four to six until the installation of the generators was completed in August.

During the times material, John Maggart was an electrician foreman and Beasmore Lamm, who began working in January, was the IBEW job steward.

On April 30, Kolodi called together all of the employees on the project. During the course of his talk, he praised the pipefitters and millwrights but mentioned that they had gone through several electrician foremen. He then discussed the problem they were having with parts and parts identification (an inventory had just been completed). While on this subject, in effect, Kolodi accused Lamm of pilfering.

According to Lamm, this accusation by Kolodi was both untrue and embarrassing. Thus, he contacted his business agent, Chester Combs, who came to the project the next day (May 1). Combs and Lamm met with Kolodi about this. Combs demanded that Kolodi hold another meeting among employees at which time he should make a public apology to Lamm. Kolodi agreed to do so.

Following this meeting with Combs and Lamm, Kolodi called Denver Aleshire, his superior in Atlanta. Aleshire testified he asked Kolodi if he had in fact accused Lamm of stealing. Kolodi said no but he did use Lamm as an example and Aleshire told him that such was "bad." Aleshire then advised Kolodi that he ought to go back to the site, call a meeting of all the employees, and state what he had in mind—that he had not in fact accused Lamm of stealing.

Combs testified that he waited around most of the day for Kolodi to reassemble the employees but left around 4 p.m. Shortly thereafter, Kolodi, who apparently had gone to his home to call Aleshire, returned and did in fact call together all the employees and did apologize to Lamm.

On May 2, according to Maggart, about 3:20 p.m. Kolodi gave him paychecks for all of the employees, said that there was no more material, that the payroll was running about $35,000 a week, and they had to cut some place. At this time, all of the electricians were given termination slips which stated "reduction in force."

Maggart further testified that, as of May 2, there were in fact sufficient parts and material available at the project to keep a crew of electricians busy for at least 5 weeks and, while some additional material had come in during the week he was on layoff (Maggart being one of the three recalled effective May 12), there was in fact work available for electricians. Work which was done subsequently could have been done during the period when no electricians were employed.

The General Counsel contends that the reasons given by Respondent for laying off the electricians on May 2, and specifically those testified to by Aleshire (the General Electric official who made the decision to effect the layoff), are pretextual. Thus it can and should be inferred that the true reason for the layoff on May 2 "was the conversation between the IBEW business agent and the electrician's union steward on May 1, and the demand made therein."

While the timing is suspicious, such falls short, in my judgment, of establishing a *prima facie* showing of a causal connection between the concerted activity engaged in by Lamm and the layoff.

Fundamentally, this is a motive case wherein the General Counsel alleges that General Electric was motivated by Lamm's having engaged in protected concerted activity to terminate all the IBEW employees. The General Counsel, however, has failed to show why Kolodi or Aleshire specifically, or either Respondent in general, would be so motivated. There is no showing why General Electric would cease performing an important phase of a multimillion dollar project because the union business agent advised the project superintendent that he should make a public apology to Lamm. (Incidentally, I credit Aleshire's testimony that he also advised Kolodi to make such an apology.)

Two of the most common occurrences in the construction industry are periodic layoffs of craft employees and visits to the jobsite by a craft union's business agent to discuss grievances with the job superintendent. The fact that a layoff follows in time a business agent's visit, even by 1 day, does not prove a causal connection between them.

Lamm testified that there had already been rumors of a layoff. In fact, he took the rumors so seriously that he sought confirmation from his source with the Corps of Engineers. Further, in late April some, but not all, of the employees in the other two crafts were laid off.

Finally, there is the testimony of Aleshire, whom I found to be a credible witness. He testified that following a report from Kolodi concerning the job status and parts inventory he was having difficulty determining how to proceed with the job. He testified that in the week prior to the layoff he could not decide whether he should lay off the entire crew of electricians, keep three, or what. There followed a phone conversation and later a meeting with Combs wherein Aleshire assured him that IBEW members would do the remaining electrical work, and they did. Within a week three electricians were recalled, and then two more.

The fact that the project was completed with fewer than the total complement of the electricians as of May 2 indicates that there was less work available for electricians than the General Counsel contends. In any case, from the totality of the testimony, I cannot conclude that the layoff on May 2 of all electricians was pretextual.

It is possible that the determination to lay off the entire crew rather than part of it was made by Kolodi after Aleshire had instructed him to lay off some electricians and was done so in an attempt to get rid of Lamm. However, a finding of such would be mere speculation on the state of the record here. There is no indication, for instance, why, if Kolodi had wanted to discriminate against Lamm, he would have undertaken to lay off the entire crew. Lamm was the job steward and in some collective-bargaining agreements job stewards enjoy superseniority and are therefore the last to be laid off. But, there is no indication that the electricians on this project

were working under a collective-bargaining agreement or, if they were, that such contract had a superseniority clause.

Had Kolodi determined to retaliate because of Lamm's having engaged in activity protected by the Act, it is just as probable to conclude from the record here that he would have laid off part of the electrician crew and included Lamm rather than laying off the entire crew as occurred.

Finally, there is just simply no demonstrated animus against unions in general or IBEW in particular to support an inference that Kolodi or Aleshire would be motivated to discriminate against employees because they engaged in activity protected by the Act.

The only evidence upon which finding an unfair labor practice can be made is the fact of a total layoff following in time the jobsite visit by the IBEW business agent and the discussion among him, Lamm, and Kolodi. Such I conclude is insufficient to establish *prima facie* discriminatory motive. Further, the totality of the generally credited testimony of Respondents' witnesses is that the layoff was the result of business considerations. Cf. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). I accordingly conclude that the allegations in Case 17-CA-9648 have not been established by the preponderance of the credible evidence.

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

The complaints are dismissed in their entirety.

[4] 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.