

**Public Service Electric and Gas Company and
Joseph Bartholomew. Case 22-CA-9805**

14 December 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 12 May 1981 Administrative Law Judge Richard S. Schully issued the attached decision. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The Respondent, in addition, filed an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by disciplining Joseph Bartholomew, John Tonachio, and Robert DePaul for record falsification which it learned of through their testimony at an arbitration hearing. For the reasons set forth below, we disagree.

The relevant facts are undisputed. Bartholomew, Tonachio, and DePaul testified at an arbitration proceeding concerning the discharge of employees Thomas Leckie that they had falsified records, a practice which they maintained was condoned by supervisors. They offered this testimony in an effort to establish a defense of supervisory condonation on behalf of Leckie, who had been discharged for record falsification. Though other employees gave similar testimony, the arbitration panel rejected the defense on Leckie's behalf and ultimately found that he had been discharged for cause.

The Respondent had an established policy against record falsification and regularly disciplined employees for violating it. All three employees were aware of that policy. Upon review of the arbitration transcript, the Respondent followed its established practice when faced with evidence of record falsification and disciplined the employees. The discipline took the form of issuing verbal warnings to Bartholomew, Tonachio, and DePaul, and placing a memorandum of that warning in each employee's file.

The judge, in finding a violation of Section 8(a)(1) in the Respondent's act of disciplining the employee, states that the act of testifying and the

subject of the testimony cannot be separated. Because the disciplinary action came as it did after the employees testified at the Leckie arbitration, and because the discipline was based on no evidence other than the employees' testimony, the judge infers a "nexus" between the employees' participation in arbitration and the discipline the Respondent imposed. That nexus is sufficient, he concludes, to intimidate and coerce other employees who would use the grievance process. He reasons that, since the defense on Leckie's behalf was offered in good faith, the protections extended to an employee's participation in arbitration should extend to the employees in this case.

The judge assumes that participation in an arbitration proceeding is an independent right protected under Section 7 of the Act. Thus he would find a violation here not because the Employer lacked sufficient cause for its discipline or because it retaliated against the three employees for participating in the arbitration hearing, but because such discipline might discourage other employees from future participation in arbitration proceedings. We disagree and find this extension of the Act's protection to be unwarranted.

Arbitration is a private mechanism for dispute resolution established through collective bargaining. Such protection as the arbitration process enjoys under the Act derives from the collective-bargaining agreement. The Act protects an individual employee's right to have access to the arbitration machinery but it does not control the operation of that machinery. Accordingly, when an employer disciplines an employee based on his participation in or conduct at an arbitration proceeding, the Board properly finds a violation of the Act. *Crown Central Petroleum*, 177 NLRB 322 (1969), *enfd.* 430 F.2d 724 (5th Cir. 1970). On the other hand, when an employer disciplines employees based on past misconduct that comes to light at an arbitration, as in the instant case, no violation will be found.

The judge's reasoning would give automatic immunity from discipline to all employees who testify at arbitration proceedings. The Act's protection of the arbitration process does not go that far. Section 7 does not extend protection to wrongdoing, freely confessed, simply because the employer discovers the wrongdoing in the course of protected activities engaged in by the employee. The Respondent was thus free to discipline employees for their misconduct even though the misconduct was discovered as a result of their testimony at an arbitration hearing.

In light of the foregoing, we find that the Respondent did not violate Section 8(a)(1) when it

disciplined Bartholomew, Tonachio, and DePaul for record falsification. We shall dismiss the charge.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge: This case was heard on February 5, 1981, in Newark, New Jersey, pursuant to a complaint issued by the Regional Director for Region 22 of the National Labor Relations Board, on May 30, 1980, based upon a charge filed by the Charging Party, Joseph Bartholomew, on February 29, 1980. The complaint alleges that Public Service Electric and Gas Co. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act), by issuing warnings to the Charging Party and two other employees. The Respondent's timely answer denied that it had committed any violation of the Act.

All parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present oral argument. Briefs submitted on behalf of the General Counsel and the Respondent have been carefully considered.

Upon the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material herein, the Respondent was a New Jersey corporation engaged in the sale and distribution of electricity and natural gas and related services with its principal place of business at Newark, New Jersey, and a facility at East Orange, New Jersey, the only facility involved in this proceeding. It had annual gross revenue in excess of \$250,000, a substantial amount of which was received from the sale of electricity and natural gas to other enterprises which are engaged in business whose operations affect commerce. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material herein, Local 855, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO (the Union) is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent and the Union were parties to a collective-bargaining agreement, effective May 1, 1977,

through April 30, 1980, which contained a grievance-arbitration provision providing for the final resolution of disputes through arbitration by a three-member panel consisting of one member selected by the Respondent, one member selected by the Union, and one neutral member. This matter arises out of testimony given by the Charging Party and others during the course of an arbitration proceeding involving employee Thomas Leckie, who was discharged by the Respondent for allegedly falsifying his work records.

Leckie had been a service specialist in the Respondent's Gas Transmission and Distribution Department, assigned to the Orange District, where he and other service specialists traveled about responding to customer-originated requests or company-originated orders and performed tasks such as inspecting and repairing leaking or malfunctioning gas appliances, cleaning gas furnaces, and installing and replacing gas meters. In connection with this work, the Company required that service specialists fill out daily reports of work performed. As the result of supervisor surveillance, the Respondent determined that Leckie had falsified certain of his work reports and discharged him. Leckie had previously been suspended on at least two occasions for similar violations.

At the arbitration hearing conducted at various times between November 1978 and March 1979, Leckie and the Union defended on the ground that work-record falsification of the type involved was regularly condoned, indeed, was encouraged and/or directed by supervisory personnel concerned about keeping up production or the appearance of production. The Union produced several witnesses from Orange and another district who testified that while employed as service specialists they had falsified work records with tacit and, at times, overt supervisory approval. Among these witnesses were Charging Party Joseph Bartholomew, John Tonachio, and Robert De Paul. On September 19, 1979, the arbitration panel, with the union member dissenting, issued its award holding that Leckie's discharge was for proper cause.

The Respondent's District Manager Willard Carey and two subordinates read over the transcripts of the testimony given during the Leckie arbitration by the Respondent's employees. After reviewing this testimony, Carey determined that, once the Leckie arbitration proceeding was over, he would meet with Bartholomew, Tonachio, and De Paul to warn them that if they were still falsifying work records they should stop doing so immediately and to remind them of the Company's policy requiring accurate reporting and that falsification was a serious offense which would result in disciplinary action up to and including discharge. There is no evidence that this decision by Carey was based on any information about work-record falsification by these three employees other than each individual's testimony at the Leckie arbitration hearing.

On December 5, 1979, Carey, Service Supervisor Raymond Moore, and Senior Engineer Scott Williams met in separate meetings with Bartholomew, Tonachio, and De

Paul.¹ According to the testimony of Bartholomew, at each meeting the employee was given a written warning (what he described as a standard form disciplinary action letter), which stated that the employee had testified that he had falsified timesheets and that, if it continued, further action would be taken up to and including discharge. Although Bartholomew was allowed to read the letter, he was not given a copy of it. Similar letters were read but not given to Tonachio and De Paul although the letter was shown to De Paul. They were told that the letters would be put in their files.

Carey testified that at the meetings on December 5, he did not read from or show a letter to any of the three employees. He told each employee orally that he had read the employee's testimony at the Leckie arbitration, that if the employee was still falsifying records he should stop, and that if the employee continued to falsify his work records, he could expect serious disciplinary action up to and including discharge.

Moore also testified that there were no letters and that Carey was not reading from anything when he issued the warnings. According to Moore, Williams made a written record of what occurred at the meetings (Jt. Exh. 2) while Carey was speaking.

I believe Carey's testimony that the warnings he gave were what the Respondent classifies as "verbal" (oral) and that no "letter" warnings were involved. I found both Carey and Moore, whose testimony corroborated that of Carey concerning the warnings, to be straightforward, credible witnesses. In addition, although the Union normally receives a copy of a written warning to an employee, Union Business Manager Patrick Ryan testified that he was unaware of anything in writing other than Williams' memorandum concerning the meetings on December 5. Bartholomew's version of the meetings was not corroborated by any other evidence. Neither Tonachio nor De Paul was called to testify. I find that the warnings issued to Bartholomew, Tonachio, and De Paul on December 5, 1979, were "verbal" as opposed to "letter" warnings.

Apart from the question of whether the warnings were verbal or letter,² there is no dispute but that the substance of the warnings given to the three employees was as testified to by Carey and as memorialized in the memorandum prepared by Williams and placed in the employees' personnel files.

It is clear that the Respondent has a vital interest in having its service specialists submit accurate work records.³ The Respondent uses the records for such purposes as preparing its payroll, preparing submissions to the Board of Public Utilities in ratemaking proceedings, and in connection with disputes and legal matters arising from work done or actions occurring on customers'

premises. In order to protect that interest, the Respondent has programs for emphasizing the importance of accurate work records to its employees and for verifying the work reported. An employee beginning work as a service specialist is given a written notice to the necessity for accurate recordkeeping and is required to sign a statement to the effect that he has received that notice. A copy of the notice is posted on the company bulletin board. Supervisors conduct meetings for service specialists in which the necessity for accurate recordkeeping and the penalties for failure to do so are discussed, on a periodic basis, usually following the disciplining of an employee for falsification of records or misuse of time. The record reflects that Bartholomew, Tonachio, and De Paul received such notices and attended such meetings. The Respondent also makes spot checks of its service specialists to see that they are on the job and conducts audits and followup visits to customers in order to assure that the work reported was, in fact, done and/or done properly.

The complaint alleges that the Respondent has violated Section 8(a)(1) and (3) of the Act by issuing verbal warnings to Bartholomew, Tonachio, and De Paul based on their testimony concerning the falsification of work records at the Leckie arbitration. The Respondent denies that such testimony was concerted activity protected by the Act and contends that, even if it were, the protection afforded is not absolute. It also denies that there has been any discrimination on its part which would encourage or discourage membership in a labor organization.

B. Analysis

1. Violation of Section 8(a)(1)

The initial question is whether or not the testimony these employees gave at the arbitration hearing is protected by Section 7 of the Act. The importance of promoting industrial peace through use of the grievance-arbitration process in the application and interpretation of collective-bargaining agreements and the need to preserve the integrity of that process has long been recognized by the Supreme Court⁴ and by the Board.⁵ To this end, it has been stated that "it is essential to the existence of the arbitration process that witnesses testify before the arbitrator without fear of reprisal from either the employer or the union," otherwise "the integrity of the arbitration process would be destroyed and the arbitration clause perverted."⁶ Consequently, it has been consistently held that the rights guaranteed employees by Section 7 include the rights to appear as witnesses at arbitration hearings as well as to give statements during preliminary stages of grievance-arbitration proceedings and that unions which discipline or threaten to discipline members for giving such testimony or statements infringe on and restrain those rights in violation of Section 8(b)(1)(A) of

¹ Bartholomew attended all three meetings having served as the union representative for Tonachio and De Paul. De Paul served as the union representative at the meeting with Bartholomew.

² While the nature of the warning may be important in the context of a disciplinary proceeding since a written warning is considered to be more serious than a verbal warning, it is not significant here. The Respondent does not deny that a verbal warning is a form of adverse disciplinary action which becomes a part of the employee's permanent record.

³ Each service specialist prepares a timecard and work order for every job he works on a daily basis.

⁴ See *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

⁵ See *Collyer Insulated Wire*, 192 NLRB 837 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

⁶ *Teamsters Local 788 (Marston Ball)*, 190 NLRB 24, 27 (1971).

the Act.⁷ Clearly, an employer who disciplines an employee for giving adverse testimony at an arbitration hearing similarly infringes on and restrains Section 7 rights in violation of Section 8(a)(1) of the Act.

The General Counsel contends that the Respondent took disciplinary action against Bartholomew, Tonachio, and De Paul because they testified against it at the Leckie arbitration hearing. The Respondent denies this and contends that these employees were given disciplinary warnings not because of the fact that they testified against the Company, but because of the misconduct to which they admitted in the course of their testimony, misconduct which is not protected by Section 7.

Whatever the subjective basis for the Respondent's decision to discipline these employees, it cannot be denied that there is a definite nexus between their testimony at the Leckie arbitration hearing and the warnings they were given. According to their testimony, the Respondent was necessarily already aware of the work-records falsification they testified about because it was done with supervisory knowledge and approval,⁸ yet no disciplinary action had resulted. It was only after and by virtue of their revealing their actions at the arbitration hearing that they were given warnings. But for their testimony at the Leckie arbitration hearing, these employees would not have been disciplined on December 5, 1979. Under the circumstances presented here whether the employees were disciplined for testifying against the Company or because of what they said during their testimony, the adverse effect on the integrity of the arbitration process is the same. Disciplinary action meted out to employees who have testified in an arbitration proceeding because of such testimony can reasonably be expected to intimidate and coerce employees who might resort to the grievance-arbitration process under the collective-bargaining agreement as well as employees who might be called to testify in such proceedings, thus, violating rights protected under Section 7 of the Act.

This is not a case in which the nature of the employees' testimony involved was such that it should be considered beyond the protection of the Act, as might be the case where, for example, malice or perjury has been established. Although unsuccessful, it appears that the Union's defense of Leckie on the grounds of supervisory condonation of work-record falsification was raised in good faith on the advice of counsel and that witnesses with knowledge of such practices were solicited from throughout the Company. If such did exist, and the fact that at least seven witnesses came forward to testify about them indicates there were more than a few isolated instances, the Union was entitled to present this evidence to the arbitration panel for its consideration and the witnesses were entitled to exercise their right to testify without fear of reprisal from their employer.

Protecting these rights in no way condones employee misconduct or prevents the Respondent from protecting

its legitimate interest. The Respondent is not precluded from carrying out its programs for monitoring and enforcing its rules concerning accurate recordkeeping. All it is prevented from doing is taking disciplinary action against specific employees solely on the basis of their testimony at an arbitration hearing.

I find that the Respondent infringed on and restrained employees in the exercise of rights guaranteed by Section 7 of the Act by giving verbal warnings to employees Bartholomew, Tonachio, and De Paul because of their testimony at the Leckie arbitration hearing, thereby violating Section 8(a)(1) of the Act.

2. Violation of Section 8(a)(3)

The complaint also alleges that the warnings to these employees violated Section 8(a)(3) of the Act. I find that the General Counsel failed to establish a prima facie case that the employees' union activity was a motivating factor in the Respondent's decision to issue these warnings. There is no evidence tending to establish that there was union animus on the Respondent's part or that there was any intent to discourage union membership. As noted above, the Respondent has a vital interest in obtaining accurate work records from its service specialists. The fact that in its efforts to protect that interest it ran afoul of Section 8(a)(1) does not, without more, establish an unlawful motive. There is evidence that the Respondent had a history of disciplining employees found to have falsified work records and of periodically reaffirming its position on the subject to all its service specialists. There is no indication that these employees were singled out because of union activity. Apparently, all of the Union's witnesses at the Leckie arbitration were union members and at least two who did not receive warnings held union offices, as did Bartholomew and De Paul. Carey and Ronald Henrich, another district manager, gave credible testimony that only these three witnesses were given warnings because they were the only ones still working as service specialists at the time of the warnings, thus, still in a position to falsify, whose testimony concerning falsification had been believed.⁹ This is a further indication that the reason for these warnings was for the legitimate business purpose of assuring accurate recordkeeping in the future and not to discourage union membership or activity. Accordingly, I conclude that the General Counsel has not sustained his burden of proof and I recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Public Service Electric and Gas Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing disciplinary warnings to Joseph Bartholomew, John Tonachio, and Robert De Paul because of

⁷ See *Amalgamated Transit Union*, 240 NLRB 1267 (1979); *Steelworkers Local 550*, 223 NLRB 854 (1976); *Freight Drivers Local 557*, 218 NLRB 1117 (1975); *Cannery Warehousemen Local 788*, above.

⁸ One of the supervisors alleged to have instructed employees to falsify their work records, Raymond Moore, participated in the December 5 meetings at which the warnings were given.

⁹ Henrich testified that employees Hennessey and Omert, who held positions of union president and shop steward, respectively, were not given similar warnings because he concluded that their testimony concerning falsifying work records was fabricated.

their testimony at an arbitration hearing involving the grievance of a fellow employee, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The Respondent did not engage in conduct in violation of Section 8(a)(3) of the Act.

5. The unfair labor practices found herein are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]