

IN the Matter of ELECTRICAL TESTING LABORATORIES, INC. and METROPOLITAN FEDERATION OF ARCHITECTS, ENGINEERS, CHEMISTS AND TECHNICIANS, LOCAL 231, UNITED OFFICE AND PROFESSIONAL WORKERS OF AMERICA, CIO

Case No. 2-C-6238.—Decided December 4, 1947

Mr. Bertram Diamond, for the Board.

Sullivan & Cromwell, by *Mr. Roy H. Steyer*, of New York City, for respondent.

Mr. Thomas R. Sullivan, of New York City, for the Union.

DECISION

AND

ORDER¹

On December 4, 1946, Trial Examiner James R. Hemingway issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had not violated Section 8 (1), (3), or (4) of the Act² as alleged in the complaint and recommending that the complaint against the respondent be dismissed. Thereafter, counsel for the Board and the respondent filed exceptions to the Intermediate Report and supporting briefs. None of the parties requested oral argument before the Board.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report of the Trial Examiner, the exceptions and briefs, and the entire record in the case,³ and hereby adopts the findings, conclusions, and recommendation of the Trial Examiner, as set forth in the copy

¹ The power of the Board to issue a decision and order in a case such as the instant one, where the charging union has not complied with the filing requirements specified in Section 9 (f), (g), and (h) of the National Labor Relations Act, as amended, was decided by the Board in *Matter of Marshall and Bruce Company*, 75 N. L. R. B. 90

² The provisions of Section 8 (1), (3), and (4) of the National Labor Relations Act, which the Trial Examiner herein found were not violated, are continued in Section 8 (a) (1), 8 (a) (3), and 8 (a) (4) of the Labor Management Relations Act, 1947.

³ On December 9, 1946, the parties entered into a stipulation providing for certain minor corrections in the transcript of testimony. The stipulation is hereby approved and made a part of the record.

of the Intermediate Report attached hereto. We have considered and find, in accord with the Trial Examiner, that there is no merit in the respondent's contention that it is not engaged in commerce within the meaning of the Act.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint issued herein against the respondent, Electrical Testing Laboratories, Inc., New York City, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Mr. Bertram Diamond, for the Board.

Messrs. Sullivan & Cromwell, by *Mr. Roy H. Steyer*, of New York, N. Y., for the Respondent.

Mr. Thomas R. Sullivan, of New York, N. Y., for the Union.

STATEMENT OF THE CASE

Upon a charge filed on April 1, 1946, by Federation of Architects, Engineers, Chemists and Technicians, Metropolitan Chapter 31 (CIO),¹ herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Second Region (New York, New York), issued a complaint dated September 23, 1946, against Electrical Testing Laboratories, Inc., herein 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 (1), (3) and (4) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were served upon the Respondent and the Union.

In respect to the unfair labor practices, the complaint alleged, in substance, that since November 22, 1944, the Respondent had discriminated in regard to the hire and tenure of employment of Pauline Milous by (a) failing and refusing to alter her job classification from technical clerk to technical assistant, (b) failing and refusing to transfer her from temporary to permanent status, (c) providing her less desirable work and less work than she normally would have received, and (d) discharging her March 8, 1946, and thereafter failing and refusing to reinstate her, all because she had joined or assisted the Union and, as to such conduct as took place after May 15, 1945, because she gave testimony under the Act on the latter date.

The Respondent's answer, filed on October 7, 1946, denied that it had furnished said Milous with less desirable work, admitted that it had failed and refused to transfer said Milous from temporary to permanent status and to change her classification from technical clerk to technical assistant, although denying that there were any such classifications, admitted that it had discharged said Milous on March 8, 1946, and denied that such acts were for the reasons alleged in the complaint.

¹The name of the Union appeared in the complaint as it appeared in the charge. The Union changed its name after the charge was filed and the complaint was amended by motion made and granted at the opening of the hearing to appear as in the caption hereof.

Pursuant to notice, a hearing was held in Brooklyn, New York, and New York, New York, on October 21 and 22, 1946, respectively, before the undersigned Trial Examiner, duly appointed by the Chief Trial Examiner. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the opening of the hearing, Board's counsel moved to amend the complaint by inserting an allegation that the Union was a labor organization within the meaning of the Act. The motion was granted, and the Respondent was permitted to amend its answer to cover the amendment to the complaint. At the close of the Board's case, the Respondent moved to dismiss the complaint on the grounds of lack of jurisdiction and on the merits. The motion was denied without prejudice to the Respondent's right to make a similar motion at the close of the hearing. At the close of the hearing the Respondent repeated its motion to dismiss the complaint, and ruling thereon was reserved. It is now granted for the reasons hereinafter set forth. Board counsel moved, at the close of the hearing, to amend the complaint to conform to the proof as to names, dates, spelling, and other non-substantive matters. The motion was granted. At the conclusion of the Respondent's case, the Board's and Respondent's counsel argued orally before the undersigned. The Respondent, alone, filed a brief.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a New York corporation having its principal office and place of business in New York City, where it is engaged in the business of electrical research and the testing and inspecting of electrical equipment, appliances, and related products. It performs such services on a fee basis for manufacturers. It numbers among its clients Westinghouse Electric Corporation, General Electric Company, Commonwealth Edison Company of Chicago, Detroit Edison Company, Union Electric Company of St. Louis, Public Service Corporation of Northern Illinois, Duquesne Light Company of Pittsburgh, and other large corporations. Some of its clients, including Westinghouse and General Electric, operate on a Nation-wide basis, shipping finished products in interstate commerce. A substantial part of the Respondent's testing and research services are performed for such clients by inspectors who are employed by the Respondent but who are stationed at the plants of the clients. The Respondent employs approximately 177 employees. Of these between 35 and 40 are inspectors, 27 of whom are resident at clients' plants in States other than New York. The inspectors at such plants transmit records of the results of their testing and inspecting to the Respondent's laboratory in New York. Such records are frequently used in the preparation of reports prepared at the Respondent's laboratory, which in turn are sent to the clients by mail, railway express, telephone, or telegraph.

In some cases the Respondent certifies to the compliance of products with specifications. This certification is sometimes attested by a tag on the product for the guidance of the public. Other testing and research services are performed by the Respondent at its laboratory in New York upon specimens of products sent in by clients. During the year ending June 30, 1946, the total gross fees received by the Respondent for its services was in excess of \$100,000. For the year preceding June 30, 1946, the Respondent purchased for use in its

New York laboratory from \$5,000 to \$10,000 of equipment and supplies from points outside the State of New York.

The Respondent denies that it is engaged in commerce within the meaning of the Act. On February 20, 1946, the Board held in a prior case that the Respondent was engaged in commerce within the meaning of the Act.² The only material change in the Respondent's business since the hearing in that case is that the Respondent no longer receives certain products manufactured by clients for war purposes, such as rubber matting, which passed through the Respondent's hands for testing in the course of delivery from the manufacturer to the purchaser. The remaining functions of the Respondent clearly bring it within the jurisdiction of the Board.³ It is found that the Respondent is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

Metropolitan Federation of Architects, Engineers, Chemists, and Technicians, Local 231, United Office and Professional Workers of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The alleged discriminatory treatment and discharge of Milous*

1. The circumstances and background of the hiring of Milous by the Respondent

Paulne Milous began her technical training by taking a 5-months' course at Defense Training Institute in 1943. This consisted of courses in algebra and trigonometry, drafting, physics, and shop work. Subsequent thereto she worked in a testing department under supervision of the United States Army located at Columbia University.⁴ Here she was taught various mechanical tests, made use of the slide rule, and took measurements with the micrometer.

In July of 1944, Milous was told to leave Columbia University because the whole project was being reorganized. As a result of the reorganization some people were sent to Tennessee and others were transferred to another building. The inference is that Milous' proficiency was regarded as inadequate to warrant her retention.⁵

Upon reference from the U. S. E. S., Milous next obtained what she described as temporary employment doing drafting. She testified that she left this job, after 4 or 5 weeks, because some of the work called for greater skill than she possessed and the employer did not have enough of the less skilled work to keep her busy.

² *Matter of Electrical Testing Laboratories, Inc.*, 65 N. L. R. B. 1239.

³ *Matter of Foster D. Snell, Inc.*, 69 N. L. R. B. 764, *Matter of U. S. Testing Co., Inc.*, 5 N. L. R. B. 696. See also *N. L. R. B. v Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Polish National Alliance of the United States of America v. N. L. R. B.*, 322 U. S. 643.

⁴ She was paid a salary although she was apparently still learning. The evidence did not disclose whether Milous was being paid while attending a class or whether she was engaged in work incident to production. In one way or the other the activities related to the Manhattan Project. The undersigned received the impression that Milous was aggrandizing the extent of her experience and ability at Columbia.

⁵ Milous, asked if she used the machine which performed the tensile test, replied, "Yes, I did use it." When asked if she performed tests without assistance from anyone else, she testified that she had tried to use the machine but had had to give it up because her eyes were not equal to the task of reading the measurements. After that, she testified, she frequently acted as an observer.

In late September of 1944, the Respondent had an accumulation of clerical work to be performed in the high voltage and mechanical testing department. The clerical work had been handled by women loaned to the department from other departments, but because of the pressure of work on two war jobs a full time employee was needed. Early in October 1944, Milous filled out an application and was interviewed by Gordon Thompson, the chief engineer for the Respondent. Thompson read her application and questioned her. Milous informed Thompson that she had carried out some mechanical tests at Columbia University. Thompson was impressed by Milous' ability to express herself, and because of her statement of prior experience in mechanical testing⁶ Thompson offered her \$30 per week instead of the \$20 which would have been paid for one who would do only clerical work. He told her that the Respondent needed assistance in cleaning up a backlog of work in the high voltage department and that when that situation was corrected there would be an opportunity of going on to other work if she was qualified. Milous entered the Respondent's employ as a clerk on October 8, 1944.

2. The events during Milous' term of employment

Milous handled the clerical work incident to the testing of rubber gloves and occasionally assisted another employee in performing some of the testing and in taking micrometer measurements. She was also given some instruction in the performance of tests by her foreman, Boegehold, and by employees Bode and Levin.

A few weeks after Milous was hired, Thompson asked Boegehold how she was making out. Boegehold said she was slow. Thompson asked about Milous' technical ability and Boegehold said that she gave practically no evidence of having any. On another occasion early in Milous' employ when Thompson made inquiry about her, Boegehold said, "Oh, she's all right, but I have to watch her," and stated that she had made some mistakes in slide rule computations and on at least two occasions had read the micrometers wrong by one division (25 thousandths of an inch).

On November 22, 1944, in the seventh week of her employment, Milous, who had joined the Union,⁷ went to Thompson's office to request that she be classified as a technical assistant instead of as a clerk. Thompson asked why, and Milous said that she did not like to be classified as a clerk when she was doing technical work and that she did not want to do anything but technical work. She also claimed that it was bad for her record if she were to seek work elsewhere and that she could get more desirable work if she had a classification as a technical employee. Thompson, having heard rumors that the Union was attempting to organize only the technical employees, asked if Milous' reason for wishing a reclassification was not to enable her to join the Union and alluded to rumors that she was a paid organizer. There followed a colloquy in which Thompson expressed himself as opposed to a union at the Respondent's laboratory and stated that the people who were agitating for the Union were mainly the people who were not too well qualified for their work⁸. He also said that when restrictions on sala-

⁶ Thompson testified that from Milous' representation of her experience he incorrectly inferred that she had the ability to conduct tests by herself.

⁷ Eileen Corridan, a witness for the Board, testified that Milous attended union meetings and displayed interest but that she was not particularly active among other employees.

⁸ In *Matter of Electrical Testing Laboratories, Inc.*, 65 N. L. R. B. 1235, this conversation, based on Milous' testimony, is given at length on pp 1245-6. The Board there found

ries were lifted after the War the Respondent would have only the highest paid and best qualified people and that they would not retain any who were not properly qualified. Milous' classification was not changed then nor thereafter during the term of her employment.

It was the Respondent's practice to impress the pay envelope of new employees with a stamp reading, "Temporary employee" When such employees had established their ability to perform the work for which they were hired, they were transferred to permanent status, and the stamp was removed from their pay envelope. The only actual distinction between temporary and permanent status was that permanent employees were permitted absences with pay when they were sick or when they had procured permission to be absent. It was the Respondent's usual practice to transfer employees to permanent status within 2 months of their hiring.

In January 1945, 3 months after she was hired, Milous was still on temporary status. About January 8 she made a fruitless attempt to learn why from Boegehold. In May of 1945, under a question and answer system, Milous asked why she has not been put on permanent status. She received from President Preston Millar the following written reply:

I am informed that when you entered the Company's employ on trial, it was understood by your department head that you had had certain short-time training in mechanical testing at Columbia University. It was thought that you might fit into the organization and procedure of the department. However, the work to which you were assigned and on which we needed additional help at the time was of a character that might prove to be temporary, and your capability and attitude were observed with a view of ascertaining if, in case the work in this branch of the Company's business should decline, you could fit in to advantage elsewhere. As you must realize, the work in which you have been engaged in both rubber goods and mechanical testing has much diminished in the last few months and further decline is anticipated. I have been told that you have not been found to possess experience or skill that would clearly commend you for any other work in which additional help is needed. However, a survey of department heads is being made to ascertain if there is any opportunity for your transfer to other work.

Such being the trend of circumstances affecting your position, although it has been discussed on several occasions, there has been hesitancy to transfer you from the temporary payroll.

Milous was never given permanent status nor was she transferred to other work.

During January 1945, an employee named Weiss in the general testing department requested Milous to help her in a test which she was performing. Milous left her department on the first floor and went with Weiss to the fourth floor to assist her. After she had begun to assist Weiss, Milous contacted Boegehold and procured his permission. About half an hour later Boegehold telephoned Milous and told her that Koenig, head of the general testing department, did not want her there and that she had better not continue with the test. Milous then returned to her own department. Koenig and Boegehold did not testify

Thompson's statements to constitute interference, restraint, and coercion. Milous testified in the instant case substantially the same as in the previous case, and Thompson confirmed her testimony. In view of the Board's previous decision, Thompson's statements are set forth here solely by way of background relied on by Board's counsel to support the Board's case.

and Koenig's reason for not wanting Milous in his department is not in evidence, but Milous testified on cross-examination that Boegehold told her there was some objection to her going to the fourth floor without proper authority. While it was not unusual for employees in the two departments named to work on temporary transfer in the other department, it is a fair inference from the evidence that this was done on request from the department head needing assistance. Milous testified that most of the union members were concentrated on the fourth floor. The incident was proved in an apparent effort to show that Milous was being discriminatorily segregated from union members. The undersigned draws no inference that Koenig had an ulterior purpose in having Milous recalled to her own department and finds nothing discriminatory in the incident.

Beginning in about January 15, 1945, the volume of work in the high voltage and mechanical testing department began to decline. As a result, Milous was idle about half the time. Except for a few short busy periods this situation continued until the termination of Milous' employ in March 1946. During her idle periods, Milous wrote personal letters, knitted, or sewed without criticism from the Respondent. On March 15, Thompson wrote a memorandum to President Millar and to Norman Macdonald, Millar's assistant, in which he noted the decrease in the volume of work in Boegehold's department and suggested that, if the decline continued, the department could dispense with the services of Milous and a part-time man. On April 6, 1945, Macdonald sent memoranda to the nine department heads stating that a reduction in force would probably be necessary and that Milous and a Roland Levin would be affected, and asking if a position existed in their departments which might be filled by either. Only one affirmative reply was received by Macdonald. Koenig replied that he might use Levin, a man with radio repair experience, but that he had very little testing in which he could use Milous. Levin was transferred to Koenig's department, but Milous was not discharged. Thompson testified that the Respondent had a lenient policy on discharges and that they were reluctant to discharge Milous because she had a dependent child.

The volume of work continued to fall during the summer of 1945 during which time Milous continued to be idle about half the time. In August, Milous asked Boegehold to put her on a 30-hour week, explaining that it would be helpful because of home conditions. Boegehold said he would take it up with Thompson. About 2 weeks later, Boegehold told her that the Respondent would employ only full time people and suggested that Milous might do well to look for other employment. Milous replied that she would remain on full time and that if the Respondent terminated her employ she believed she could prove that she had been discriminated against because of union activity.

In September, Boegehold asked Milous if she was still interested in part-time work, suggesting that she might be put on a half-time schedule. Milous said she did not want half-time but wanted 30 hours. A few days later Boegehold told her that she was to start working half-time. Milous told Boegehold that in that case she should receive an increase in pay rate. A few days later Milous told Thompson she should receive a raise in pay and that she had asked for 30 hours per week instead of 20. Thompson told her that there was not enough work to keep her busy and that the Respondent could not increase her pay rate. Milous said that she regarded it as the Respondent's fault that she had not had enough work to do and that she believed she had been discriminated against because of her union activity. Thompson told her she was welcome to her conclusion. He also asked her why she did not look for work elsewhere. Milous replied that she did not like to be squeezed out by the tactics the Respondent was

using, which she likened to tactics commonly employed by anti-union employers who were trying to get rid of employees, and said that she would not leave on her own account but would wait until she was asked to go. Thereafter until the termination of her employ Milous was on a half-time schedule, but even then she was busy only about three-fourths of her time. During her idle time she continued to do personal work, making no attempt to conceal it.

Early in February 1946, Boegehold told Milous that, although the date had not been set, it would not be long before the Respondent would let her go, and he advised her to look for another position. On February 26, 1946, Milous was notified that her employment would terminate on March 8. On March 6, Milous was given permission to leave but she was paid to the end of the week.

Evidence was adduced tending to prove that other employees were not idle as much as was Milous and that employees had been hired after Milous, some of whom were retained. While other employees were not idle so much of the time as Milous, they were not so busy as they had been before V-E Day, and most of the employees who were hired after Milous were hired for technical work.

The evidence is convincing that there was not sufficient clerical or non-technical, manual work to warrant retaining or hiring an employee for such work at the time when Milous was discharged. The principal contention on Milous' behalf is that the Respondent should have offered her more opportunity to learn new tests and to work into the position of technical assistant. Thompson explained that the Respondent had not done so because Milous had only the most elementary technical knowledge and ability, because she was prone to make mistakes, and because she lacked the quality of initiative. There is sufficient basis for Thompson's appraisal of Milous' qualifications in these respects to convince the undersigned that Thompson was forming his conclusions honestly. The undersigned is satisfied that the extent of Milous' training prior to being employed by the Respondent was less than the Respondent had a right to expect from her description of it. Boegehold reported to Thompson mistakes which Milous had made, and Thompson, himself, caught certain errors in her reports which passed through his hands for certification. Milous conceded that she had made some errors but sought to excuse them on the ground that she lost her technical ability through disuse. The most favorable testimony on Milous' behalf was that given by Bode, a Board witness, who said that Milous was "fairly accurate." However, Bode's testimony made it plain that three other employees who assisted him during the time of Milous' employment were better qualified for his type of work than Milous. Thompson's conclusion that Milous lacked initiative seems to have been based in part on a comparison of her ability with that of other employees who could take an assignment and carry it through without being led by the hand and in part on Milous' practice of doing personal work in her idle time instead of finding some kind of work, however trivial, to do.

From the evidence and from Thompson's appearance and demeanor on the witness stand, the undersigned judges Thompson to be a man who would appraise an employee objectively and who would recognize brilliance, skill, and initiative apart from personalities or personal beliefs. The undersigned is convinced that whatever Thompson's prejudice against unions, he would not appraise an employee on the basis of the employee's union beliefs. On all the evidence the undersigned concludes and finds that Milous was not given a greater quantity of technical work because the Respondent was not impressed with Milous' capacity to develop in such work;⁹ that she was not transferred from temporary to per-

⁹ The same applied to the Respondent's refusal to classify Milous as technical assistant.

manent status because the Clerical job she was performing was not likely to prove permanent and the Respondent did not regard Milous as having enough potential technical ability to interest it in retaining her for other work; and that Milous was discharged because the Respondent had insufficient clerical work to warrant her retention. Conversely it is found that none of the foregoing conduct of the Respondent was prompted by Milous' union membership or activity. The undersigned further concludes and finds that if the Respondent was influenced in any way by Milous' union membership and activity it was in retaining her in its employ longer than it otherwise would have done.¹⁰

Upon the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The operations of the Respondent, Electrical Testing Laboratories, Inc., constitute a continuous flow of trade, traffic, and commerce among the several States within the meaning of Section 2 (6) of the Act.
2. Metropolitan Federation of Architects, Engineers, Chemists and Technicians, Local 231, United Office and Professional Workers of America, CIO, is a labor organization within the meaning of Section 2 (5) of the Act.
3. The Respondent has not violated Section 8 (1), (3), or (4) of the Act as alleged in the complaint.

RECOMMENDATION

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in the case, the undersigned recommends that the complaint against the Respondent, Electrical Testing Laboratories, Inc., be dismissed.

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.38 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. Proof of service on the other parties

¹⁰ The undersigned has considered the fact that Milous gave testimony against the Respondent in the previous Board hearing on May 15, 1945, but in view of the great lapse of time between that date and the date of her discharge, and in the light of all the circumstances of the case, the undersigned finds that such testimony did not influence the Respondent in discharging her. Milous testified that she was given notice of her discharge on the day the Board's decision in that case was rendered. Actually, Milous was notified of the date her employment would terminate about 6 days after the decision was rendered. However, early in February 1946 prior to the Board's decision, she had been notified that her employment would soon be terminated and that she should look for other work. Furthermore, as early as August 1945 she learned that her employment might be terminated because of the growing lack of work.

of all papers filed with the Board shall be promptly made as required by Section 203.65. As further provided in said Section 203.39, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

JAMES R. HEMINGWAY,
Trial Examiner.

Dated December 4, 1946.