

In the Matter of REVERE COPPER AND BRASS INCORPORATED *and* UNITED
ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, C. I. O.

Case No. 3-C-934.—Decided December 23, 1948

DECISION

AND

ORDER

On January 30, 1947, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board¹ 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, the exceptions and brief, and the entire record in the case, and adopts the findings of the Trial Examiner only insofar as they are consistent with this Decision and Order.

We do not agree with the Trial Examiner's conclusion that the Respondent violated the Act by terminating the employment of Novisky and Fillipponi in July and August 1946, respectively. Since June 1945, the Respondent had been operating under two consecutive agreements with Interstate Metal Workers Union, which in substance and effect required Novisky and Fillipponi to maintain their membership in Interstate until April 1, 1947, as a condition of employment. After *May* 15, 1946, the date on which the Respondent's second agreement with Interstate became a bar to a change of representatives,² these employees engaged in activities on behalf of an-

¹ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-man panel consisting of the undersigned Board Members [Chairman Herzog and Members Murdock and Gray].

² The Trial Examiner, in finding that a change of representatives was not barred until *June* 15, 1946, ignored the fact that the agreement of June 15, 1945, contained provision for its automatic renewal if notice were not given 30 days before the initial expiration date of that agreement. We have consistently held that, regardless of any "premature extension," our established contract-bar principles apply to an attempt to change repre-

80 N. L. R. B., No. 220.

other union, United Electrical, Radio & Machine Workers of America, C. I. O.³ They were thereafter first suspended and then expelled from membership by Interstate for engaging in said activities;⁴ the Respondent thereupon terminated their employment pursuant to the existing agreement, which was lawful under the proviso to Section 8 (3) of the Act.

The contract that was in effect between the Respondent and Interstate after May 15, 1946, was to remain in effect for more than 10 months, until April 1, 1947. The purpose of the rival union activity in May and June 1946 that led to the expulsion and discharge of Novisky and Fillipponi could only have been to oust Interstate from its status as bargaining representative at once, rather than at the termination of the contract 10 months later. The discharges were therefore not in violation of the Act.⁵

Having found that the Respondent did not violate the Act by discharging Novisky and Fillipponi, and agreeing with the Trial Examiner's finding, to which no exceptions were filed, that the Respondent did not otherwise violate the Act, we shall dismiss the complaint herein.

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, Revere Copper and Brass Incorporated, Rome Division, Rome, New York, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Mr. Stanley D. Kane, for the Board.

Evans & Evans, by Mr. Arthur S. Evans, of Rome, N. Y., for the respondent.

Mr. Michael A. Jimenez, of Rome, N. Y., for the C. I. O.

STATEMENT OF THE CASE

Upon a second amended charge filed November 4, 1946, by United Electrical, Radio & Machine Workers of America, C. I. O., herein called the CIO, the National

representatives after such an automatic renewal date, whether the asserted bar arises from the automatic renewal of the original contract or from a superseding contract. *Matter of Habitant Shops, Inc.*, 72 N. L. R. B. 263; *Matter of Mississippi Lime Company of Missouri*, 71 N. L. R. B. 472; *Matter of Greenville Finishing Company, Inc.*, 71 N. L. R. B. 436; *Matter of Northwestern Publishing Company (WDAN)*, 71 N. L. R. B. 167; *Matter of Mill B. Inc.*, 40 N. L. R. B. 346.

³ We find it immaterial in this case that they had also engaged in C. I. O. activities before May 15, 1946.

⁴ As to Fillipponi the record shows that he was expelled for C. I. O. activity "at various times during May and June, 1946," some of which must have taken place after May 15. As to Novisky, the record shows that he was expelled for C. I. O. activity within the 30 days before June 15, 1946.

⁵ *Matter of Southwestern Portland Cement Co.*, 65 N. L. R. B. 1.

Labor Relations Board, herein called the Board, by its Regional Director for the Third Region (Buffalo, New York), issued its complaint dated November 7, 1946, against Revere Copper and Brass Incorporated, 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) and (3) 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 thereon were duly served upon the respondent, Interstate Metal Workers Union, herein called Interstate, and the CIO.

With respect to unfair labor practices the complaint alleged in substance that the respondent: (1) on or about June 29, 1946, suspended Mike Novisky and on July 22, 1946, suspended Charles Fillipponi, for the reason that each of them had joined and assisted the CIO; (2) on or about July 29, 1946, discharged Mike Novisky and on or about August 22, 1946, discharged Charles Fillipponi because of the membership in and activity of each on behalf of the CIO; and (3) from on or about November 1, 1945, to the date of the issuance of the complaint, interrogated its employees with respect to union affiliation and warned, discouraged, and coerced them from assisting or becoming members of the CIO.

The respondent in its answer admitted certain of the jurisdictional allegations in the complaint; denied the commission of unfair labor practices; and, admitting the suspension and discharge of Novisky and Fillipponi on the dates alleged, asserted, as an affirmative defense, that its actions in respect to them were pursuant to and in accordance with the requirements of a valid, subsisting, collective bargaining agreement with Interstate.

Pursuant to notice, a hearing was held on December 11, 1946, at Rome, New York, before the undersigned, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel; the CIO by its Field Organizer. Interstate, although served with notice of hearing, entered no appearance and its secretary, present as a spectator, stated on the record that it had no desire to intervene. 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 close of the hearing, a motion by counsel for the Board to conform the pleadings to the proof in minor matters, such as dates and names, was granted without objection. Counsel for the Board argued orally before the undersigned. All parties were advised of their right to file a brief or proposed findings of fact and conclusions of law or both. A brief has been received from the respondent.

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

Revere Copper and Brass Incorporated, a Maryland corporation having its principal offices in the City of New York, is engaged in manufacturing enterprises at several locations in the United States. This proceeding concerns only the operations of the respondent at its Rome Division, in Rome, New York. At its various manufacturing plants the respondent is engaged in the manufacture of copper sheets, rods, bars, and tubes. In the operation of the Rome Division, the respondent uses raw materials shipped to it from points outside the State of New York, having a value in excess of \$100,000 annually, and ships finished products to points outside the State of New York having a value in excess of

\$100,000 annually. The respondent concedes that it is engaged in interstate commerce within the meaning of the Act.

II. THE ORGANIZATIONS INVOLVED

United Electrical, Radio and Machine Workers of America, affiliated with the Congress of Industrial Organizations, and Local No. 1, Interstate Metal Workers Union, affiliated with Mechanics Educational Society of America, are labor organizations admitting to membership employees of the respondent in the Rome Division.

III. THE UNFAIR LABOR PRACTICES

As a result of a Board-conducted election in 1940, Interstate was certified as the exclusive bargaining representative of respondent's employees in the Rome Division. Under authority of its certificate and without question raised in this proceeding as to its majority status, the respondent and Interstate effective June 15, 1945, entered into a contract containing a maintenance-of-membership clause and providing:

This agreement shall continue in full force and effect for the period of one year from the date hereof and shall continue thereafter from month to month until either party shall give to the other a notice in writing of its intention to terminate this agreement or any of the paragraphs or provisions thereof at the expiration of thirty (30) days from date of such notice.

Simultaneously the parties executed a supplemental agreement, affecting wages only. The supplement was terminable after August 15, 1945, upon 30-day notice from either party. Presumably in accordance with the provisions of the supplement, Interstate and the respondent entered into negotiations in February 1946, looking to the establishment of new wage rates. Progress of these negotiations was reported to employees at Interstate meetings and was publicized in the local press. Apparently, however, not until March 17, 1946, were the employees generally aware that new contracts to supersede those then in effect were being discussed. On March 22, a new contract containing a maintenance-of-membership provision with an initial 15-day escape clause and otherwise closely following the agreement it replaced, and a supplemental contract entailing an 18½ cents hourly wage rise were executed. Both were effective March 18 and were to continue in effect until April 1, 1947. The contracts of June 15, 1945, were abandoned.

Starting in November 1945, the CIO sought to interest the respondent's employees in changing their allegiance from Interstate and distributed CIO literature in and about the plant in furtherance of this purpose. On the day that the new contracts were signed, the CIO wrote the respondent as follows:

MARCH 22nd, 1946.

Mr. F. E. RICHMOND, *Works Manager,*
Revere Copper & Brass, Inc., Rome, New York.

DEAR SIR: Please be advised that a majority of the employees of your Company have designated the United Electrical Radio & Machine Workers of America, CIO, to represent them for the purposes of collective bargaining. We, therefore, request that you do not enter into any contractual relationship with any other labor organization until the National Labor Relations Board has determined the appropriate collective bargaining representative.

The above notice in no manner impedes you to negotiate and enter into an agreement with another party with reference to wages and rates of pay, as

provided in your current supplemental agreement, dated June 15th, 1945, Section 14. Our Union fully supports the wage demands of the Revere workers for an immediate hourly increase of at least \$0.18½, "with no strings attached."

Very truly yours,

MICHAEL A. JIMENEZ,

Field Organizer, U. E. R. & M. W. A.-CIO.

The respondent received this letter on March 23 but made no answer. The CIO continued its organizational campaign under the direction of Jimenez, who advised CIO supporters that the Act would protect their activities from retaliation by Interstate until June 15, the first anniversary of the superseded contract.

Mike Novisky, an employee of the respondent since March 1, 1929, became a member of Interstate in 1941 or 1942. During 1943 and 1944, he was a steward for that organization and was reelected to serve in that office for 1946. For some reason not clear in the record, but apparently of no moment here, Novisky was removed from his office in Interstate in early April 1946, but continued his membership. In May 1946, Novisky designated the CIO to represent him and became active in the plant in soliciting others to follow his example. His activities appear to have continued during the months of June, July, and August.¹ On June 13, Interstate's president delivered to Novisky the following letter:

JUNE 13, 1946.

Mr. MICHAEL NOVISKY,
R. F. D. #3, Rome, New York.

DEAR SIR AND BROTHER: You are ordered to appear before a special session of the National Executive Board of the Interstate Metal Workers Union which is convening at 4:30 P. M. Thursday, June 13, 1946 at the Union Headquarters, 104 N. George Street, Rome, New York, to participate in an investigation surrounding certain allegations pertaining to acts detrimental to the welfare of the Interstate Metal Workers Union.

Section 8, of the National Constitution provides in part that,

"The National Executive Board may proceed and make determination notwithstanding the failure of any person to appear, who has been fully notified."

Fraternally yours,

(Signed) FRANK O. EDWARDS, *National Secretary-Treasurer.*

Novisky did not appear before the "special session" and on June 15, received another letter and accompanying charge from Interstate as follows:

JUNE 14, 1946.

Mr. MICHAEL NOVISKY,
R. F. D. #3, Rome, New York.

DEAR SIR: This is to advise you that the National Executive Board of the Interstate Metal Workers Union, after an investigation is exercising the power granted it under Article VI, Section 6 of the National Constitution.

Therefore, by the authority of the National Executive Board your membership in Local #1, Interstate Metal Workers Union is hereby suspended.

¹ Novisky testified that he procured the signatures of about 100 employees on CIO cards and principally before his suspension from employment.

Formal hearing on the attached charges will be held Thursday, June 27, 1946, 4:30 P. M. at Union Headquarters, 104 N. George Street, Rome, New York.

Very truly yours,

(Signed) FRANK O. EDWARDS,
National Secretary-Treasurer.

Charges attchd.

JUNE 14, 1946.

Charge:

Michael Novisky, Clock No. 2847, has on several occasions within the last thirty (30) days committed acts detrimental to the welfare of the Interstate Metal Workers Union, in that he has distributed application cards and has asked for signatures for a rival labor organization.

Specifically, on Thursday, June 13, 1946 at approximately 7:15 A. M., Michael Novisky handed a UE-CIO application card to Herman Knubel, Clock No. 2949, for signature.

At the hearing, Novisky denied the charge but was found guilty and on June 28 the respondent, having been advised by Interstate that he was no longer in good standing, complied with the request that he be suspended for a period of 30 days. At the expiration of that period, a further request by Interstate that Novisky be discharged because he had not placed himself in good standing in that organization was honored by the respondent on July 28, 1946. Novisky has not been reinstated.

Charles Fillipponi, employed by the respondent since February 1932, joined Interstate in 1943 and while continuing this membership joined the CIO in December 1945. Fillipponi too became active for the CIO, passing out designation cards to employees and urging them to join. On June 13, he, too, was notified by Interstate that his activities in this respect were the subject of investigation. On July 6, he was notified by Interstate of his suspension from membership on the following charge:

JULY 6, 1946.

Charge:

Charles A. Filippioni, Clock No. 3600, while a member in good standing of Local #1, Interstate Metal Workers Union did at various times during May and June, 1946 commit acts detrimental to the welfare of the Interstate Metal Workers Union in that he has solicited membership for the U. E. (C. I. O.) and has participated in other organizational activities of the U. E. (C. I. O.) all in violation of the Local Constitution and the National Constitution of Interstate Metal Workers Union.

(Signed) FRANK O. EDWARDS.

On July 18, he was tried on the charge and found guilty. Effective July 22, at the request of Interstate, the respondent suspended him from employment for 30 days and effective August 21, pursuant to the further request of that organization, discharged him.

By effecting the suspension and the discharge of first Novisky and then Fillipponi, the respondent contends that it was merely discharging its contractual obligations to Interstate. The applicable provision of that instrument reads as follows:

Article II (3) (a) All employees who, fifteen (15) days after March 22, 1946, are members of the UNION in good standing in accordance with the constitution and by-laws of the UNION and all employees who there-

after become members shall, as a condition of employment, remain members of the UNION in good standing for the duration of this agreement.

The contract further provides that should Interstate find an employee no longer to be in good standing, the respondent is then obligated upon the request of Interstate to suspend that employee for a period not to exceed 30 days and, if at the expiration of that period the employee remains in bad standing, the respondent undertakes, upon the request of Interstate, to discharge him. The undersigned finds the provisions in the contract as above described were in existence at the time of the suspensions and discharges of which complaint is made, that Novisky and Fillipponi were members of Interstate in good standing at a time more than 15 days after March 22, 1946, and that the contract of which these provisions are a part was one validly made between the respondent and Interstate, the latter not then being an organization established, maintained, or assisted by the respondent. The questions remaining for decision are, however, whether Novisky and Fillipponi were first suspended and later expelled from Interstate because they engaged at an appropriate time in activity which the Act was designed to protect and, if so, whether the respondent, in complying with the requests to suspend and then discharge these individuals from their employment, was aware of Interstate's motivation.

Counsel for the Board contends that Novisky and Fillipponi were engaged in a protected activity in soliciting their fellow workers to join the CIO; that they were suspended and expelled from Interstate for that reason; and that the respondent with that knowledge, acceded to Interstate's demands.

Michael Jimenez, whom the undersigned finds to be a credible witness, testified without contradiction that he learned on June 14, 1946, that Novisky and Fillipponi, among others, were being threatened with disciplinary action by Interstate because of their activity on behalf of the CIO. Upon receipt of this information, Jimenez telephoned J. S. Beasley, respondent's personnel manager, to advise that any action taken by the respondent against these individuals, naming them, by reason of their CIO activity, would be in violation of the Act. On the same day Jimenez addressed a letter to respondent's works manager reiterating this warning as follows:

JUNE 14, 1946.

REVERE COPPER & BRASS, INC.,

Riverdale, Rome, New York.

(Att: Mr. F. E. Richmond, Works Manager)

DEAR SIR: This is to advise you that we have been informed that the Interstate Metal Workers Union is attempting to retaliate against employees of your plant who Interstate says are engaging in UE activities.

Kindly be advised that we will institute appropriate legal action against your company if you discharge or take any disciplinary action against any employee at the request of Interstate when such discriminatory discharge or disciplining is a result of an employee being an active UE member or for enjoying rights and participating in activities guaranteed by Federal law.

Very truly yours,

MICHAEL A. JIMENEZ,
Field Organizer, U. E. R. & M. W. A.

On July 30, Jimenez sent the following letter :

JULY 30, 1946.

REVERE COPPER & BRASS, INC.,
Riverdale, Rome, New York.

(Att: J. F. Beasley, Personnel Manager)

SIR: We have already advised you that

Michael Novisckey (sic)

Charles Fillipponi

were suspended by Interstate because of their activities in behalf of our organization, the United Electrical Radio & Machine Workers of America (UE-CIO) during the organizational campaign of the UE-CIO and prior to the expiration date of your 1945-46 contract with Interstate. As you undoubtedly know both these employees were paid up in their dues.

You are aware of the fact that a discharge by an employer under such circumstances constitutes an unfair labor practice under the Wagner Act.

We again request the immediate reinstatement of these two employees to their former jobs with necessary back pay.

Very truly yours,

MICHAEL A. JIMENEZ,
Field Organizer, UE-CIO.

On several other occasions, during the months of June and July, Jimenez was in communication by telephone with Beasley reminding the latter that the employees had a right to urge their fellow workers to join the CIO free from threat of retaliation and specifically asserting, in early July, that Novisky and Fillipponi were being "framed up" by Interstate because of CIO activity.

The receipt of these warnings is not disputed but the respondent argues that Jimenez' protestations did not constitute proof of Interstate's motives and that therefore no duty developed upon it even to inquire as to the possible basis of his assertions.

Against the background of the information in its possession, the respondent had no reason to doubt Jimenez. The CIO had been active in attempting to organize the employees in the plant and had claimed to represent a majority; both discharges had been active openly in support of the CIO; and its own records would have disclosed unrevoked dues check-off authorization cards from both. Thus, the respondent knew that neither Novisky nor Fillipponi were in bad standing because of failure to pay dues; probably knew that both were CIO protagonists; and were placed on notice concerning Interstate's motivation in imposing discipline. Granting that the respondent could, perhaps, have speculated on the possibility that other, but undisclosed, reasons could have provided a basis for the suspensions, the only evidence before it must, necessarily, have led it to the conclusion that CIO activity was the true and logical explanation.

The undersigned finds that Novisky and Fillipponi were suspended and expelled from Interstate because of their membership in and activity on behalf of the CIO and that the respondent was given clear notice of this before it suspended and discharged them from its employment.

Still to be determined is the serious and perplexing question concerning the reasonableness of the activity of Novisky and Fillipponi. This problem, which has confronted the Board in numerous cases, has generally been determined in accordance with the particular factual situations involved. Certain broad principles have been enunciated, however, which will to some extent serve as a guide here. For example, it is clear that when the end of a contract term nears, it is

the privilege of the employees then to consider the desirability of changing bargaining representatives for the ensuing contract period and that an employer may not then knowingly discharge them for activity having that purpose even though his action be taken at the request of the contracting union and in accordance with the contract terms.² On the other hand, employees who seek an immediate change of bargaining representatives during the middle of a contract term of reasonable length and who are discharged at the request of the union holding a closed shop contract, have not been unlawfully discharged within the meaning of the Act.³ A further refinement, for which the *Southwestern Portland* case seems to stand, is that activity on behalf of a rival union may be protected from retaliation by way of discharge in accordance with contract terms if it is clear that activity for the rival does not have for its purpose the supplanting of the contracting union prior to the expiration of the contract term.

The entire problem is closely allied to proceedings under Section 9 of the Act and has an analogy, particularly, to those cases where it is asserted that a contract bars an election on the petition of a rival organization. In such cases, the Board has weighed the specific guarantee of the Act that employees bargain through representatives of their own choosing in balance against the sometimes conflicting public interest that the bargaining relation have some degree of stability. Certainly confusion would exist were employees permitted to renounce their selected representatives at will without regard to contractual obligations made on their behalf. Just as unappealing would be a situation where employees were unable to rid themselves of an undesired agent because of a contract for an unreasonably long term.

In consequence, the Board has said, in effect, "Once your bargaining agent has entered into a contract in your behalf, you are bound not to revoke the agency for the term, be it reasonable, of the contract. We will not find a question concerning representation to arise in that period." When, however, a new contract for a new term is in prospect, the Board has fully implemented the employees' statutory right of selection and has not hesitated to direct elections in the face of existing contracts where to do otherwise would frustrate the reasonable exercise of that right. Thus where a contract for 1 year was prematurely extended during its 10th month for an additional year, the Board directed an election on a petition filed more than a month later.⁴ The undersigned concludes that a petition filed by the CIO at a reasonable time before June 15, 1946, would not have been dismissed as untimely. As a necessary corollary, activity by employees of the respondent in behalf of the CIO would until that date, at least, have been at a time appropriate within the meaning of the *Rutland Court* decision, cited above.⁵

The Board decisions cited, and others not heretofore referred to,⁶ stand clearly for the proposition that whenever conditions exist under which the Board

² See *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587.

³ *Matter of Southwestern Portland Cement Company*, 65 N. L. R. B. 1.

⁴ *Matter of Dryden Rubber Co.*, 71 N. L. R. B. 572.

⁵ The respondent disputes this conclusion on the grounds (1) that, since no petition was filed within 10 days following the letter claiming a majority, the new contract became an absolute bar and (2) that since no petition was filed no question concerning representation ever arose. The first of the points has been answered adversely to the respondent's contention in the decision in the *Dryden* case, cited above. The fallacy of the second is apparent. If employees might be subjected to discrimination for rival union activity, even though undertaken at a time which the Board has described as appropriate, unless the activity was sufficiently successful to warrant the filing of a petition, few would dare to avail themselves of their statutory rights.

⁶ I. e., *Local Lumber Workers Union v. N. L. R. B.*, U. S. C. C. A., Ninth Circuit, November 22, 1946, 158 F. (2d) 365, and *Matter of Colgate-Palmolive-Peet Co.*, 70 N. L. R. B. 1202.

would entertain a petition, activity on behalf of an organization possible of selection as bargaining representative is protected activity and an employer must resist a demand by a contracting union seeking to affect the tenure of employment of the protagonists of its rival.

By finding the law to be as stated above, the undersigned has resolved the issue as to Novisky for he was expelled from Interstate for activity on behalf of the CIO during the 30 days' period ending June 14. Thus his subsequent suspension and discharge were in violation of Section 8 (3) of the Act. It is so found.

The case of Fillipponi has a further aspect, for his offense consisted of similar activity during the months of May and June, 1946. Admittedly his activity did not cease on June 15.⁷ The possibility is thus suggested that Fillipponi by the accident of being tried and found guilty on a charge broader in point of time, may have removed himself from the protection of the Act. That such a result would seem to be carrying artificiality to the point of absurdity may be expected when an attempt is made to determine at just what point the closed-shop proviso of Section 8 (3) contravenes and overrides the express policy of the Act. Assuming, as the undersigned does, that the contract of March 18 became an absolute bar to a representation proceeding on June 15, it then becomes clear that the Board would not have entertained a petition by the CIO filed soon after that date. Perhaps the corollary is that activity on behalf of the CIO after that date might lawfully result in expulsion from Interstate membership and consequent discharge by the respondent. Clearly, this would be so if the dual union activity was initiated at the beginning of a contract term and had for its purpose the supplanting of the contracting union.⁸ However, the case of Fillipponi is distinguishable. He, with others, participated in a campaign to persuade the employees that the CIO offered them better representation at a time when the employees in the exercise of their rights under the Act were free to consider such a change. The campaign was apparently not sufficiently successful to justify the filing of a petition. Fillipponi's activity after June 15, the crucial date for success, was indistinguishable from and, more importantly, a continuation of, his activity before that date. The campaign must reasonably be viewed as a whole and so must Fillipponi's participation in it. In this light, there was no separation of his activity before and after the date referred to and penalizing him, as the respondent did, for the whole of his activity, was in violation of the Act.⁹

In consideration of the facts outlined above and the law applicable thereto, the undersigned finds that by suspending from employment and discharging

⁷ Nor did Novisky's; the essential point is, however, that Novisky was disciplined for acts performed before that date. It does not appear that the respondent was aware of this factor.

⁸ *Matter of Southwestern Portland Cement Company, supra.*

⁹ *Aluminum Company of America v. N. L. R. B.*, U. S. C. C. A., Seventh Circuit, decided December 28, 1946, 159 F. (2d) 523, follows a contrary and, the undersigned believes, erroneous principle. There the Court held, in effect, that a discharge made pursuant to the terms of a valid union security contract could not, in itself, constitute an unfair labor practice. Thus, the Court, in the opinion of the undersigned, gives effect to the 8 (3) proviso as if it were the essence of the Act instead of the narrow exception to the Act's overriding policies which clearly it is. Under such an interpretation, a union holding a closed shop contract could maintain its agency in perpetuity and, by apt provisions in its contract, deprive its principals of any or all of their rights under the Act. The

Novisky and Fillipponi, the respondent discriminated in regard to their hire and tenure of employment because of their membership in and activity on behalf of the CIO. The undersigned further finds that the respondent's actions, as found, were not protected by the maintenance-of-membership provisions in the contract with Interstate although pursuant thereto. It follows as of course, and is found, that the respondent thereby violated Section 8 (1) and (3) of the Act. It is also found that the respondent did not otherwise act unlawfully.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the respondent has engaged in unfair labor practices, it will be recommended that the respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Normally, in cases in which an employer has unlawfully discriminated against employees by discharge, in addition to affirmative relief, the Board order requires that he cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act. However, the respondent suspended and discharged Novisky and Fillipponi not to satisfy any illegal purpose of its own but in the honest, though mistaken, belief that its contract with Interstate required such action. Possibly, also, in the case of Fillipponi, it was influenced by Interstate's strike threat. There is no evidence that further unfair labor practices are to be anticipated.

It will be recommended, however, that the respondent offer to Novisky and Fillipponi immediate and full reinstatement to their former or substantially equivalent positions¹⁰ and that each of them be made whole for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he would normally have earned as wages from June 28, 1946, in the case of Novisky, and July 22, 1946, in the case of Fillipponi, to the date each is offered reinstatement less, in the case of each, his net earnings¹¹ during that period.

decision of the Supreme Court in *Wallace Corporation v. N. L. R. B.*, 323 U. S. 248, seems *contra* to the above decision. There the Court said:

We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the *prime purpose* of the Act to protect for all workers. [Italics supplied.]

¹⁰ In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See *Matter of The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 N. L. R. B. 827.

¹¹ By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See

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

CONCLUSIONS OF LAW

1. United Electrical, Radio and Machine Workers of America, affiliated with the Congress of Industrial Organizations, and Interstate Metal Workers Union, affiliated with Mechanics Educational Society of America, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Mike Novisky and Charles Fillipponi, thereby discouraging membership in and activity in behalf of United Electrical, Radio and Machine Workers of America, C. I. O., the respondent has engaged in unfair labor practices within the meaning of Section 8 (3) of the Act.

3. By said acts, respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (1) of the Act.

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

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the case, the undersigned recommends that the respondent, Revere Copper and Brass Incorporated, Rome Division, Rome, New York, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in United Electrical, Radio and Machine Workers of America, C. I. O., or in any other labor organization of its employees by suspending and discharging any of its employees, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(b) Any other acts in any manner interfering with the efforts of its employees to designate a new bargaining agent at an appropriate time.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Mike Novisky and Charles Fillipponi immediate and full reinstatement each to his former or substantially equivalent position without prejudice to his seniority and other rights and privileges;

(b) Make whole Mike Novisky and Charles Fillipponi for any loss of pay each may have suffered by reason of the respondent's discrimination against him, by payment to each of them of a sum of money equal to the amount each would normally have earned as wages during the period from the date of discrimination against each of them to the date each is offered reinstatement;

(c) Post at its Rome Division plant in Rome, New York, copies of the notice attached hereto, marked "Appendix A." Copies of such notice, to be furnished by the Regional Director for the Third Region, shall, after being duly signed by respondent's representative, be posted by the respondent immediately upon

Matter of Crossett Lumber Company, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7.

receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the respondent to insure that such notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Third Region in writing within ten (10) days from the date of receipt of this Intermediate Report what steps the respondent has taken to comply therewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

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 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.

WALLACE E. ROYSTER,
Trial Examiner.

Dated January 30, 1947.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, C. I. O., or any other labor organization, by discharging, suspending, or refusing to reinstate any of our employees or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of employment, except insofar as such conduct is required of us by a contract made and administered in conformity with the proviso of Section 8 (3) of the Act.

WE WILL NOT engage in any other acts in any manner interfering with the efforts of our employees to designate a new bargaining representative at an appropriate time.

WE WILL offer to Mike Novisky and Charles Philliponi immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

REVERE COPPER AND BRASS INCORPORATED,
Employer.

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.