

**Westinghouse Electric Corporation and International Union of Elevator Constructors, Local No. 71, AFL-CIO.** Case 12-CA-4484

January 28, 1970

**DECISION AND ORDER**

**BY MEMBERS FANNING, BROWN, AND JENKINS**

On September 10, 1969, Trial Examiner Thomas A. Ricci issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in 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 attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Westinghouse Electric Corporation, Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

**TRIAL EXAMINER'S DECISION**

**STATEMENT OF THE CASE**

THOMAS A. RICCI, Trial Examiner A hearing in the above-entitled proceeding was held before the duly designated Trial Examiner on July 31, 1969, at Miami, Florida, on complaint of the General Counsel against Westinghouse Electric Corporation, herein called the Respondent or the Company. The sole issue of the case is whether the Respondent discharged an employee in violation of Section 8(a)(1) and (3) of the Act. A brief was filed after the close of the hearing by the Respondent.

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

**FINDINGS OF FACT**

**I. THE BUSINESS OF THE COMPANY**

The Company has its principal place of business in Pittsburgh, Pennsylvania, and operates through many states, including Florida, its business is manufacture and distribution of electrical and other products. Annually it receives goods and materials in its Florida operations valued in excess of \$50,000 directly from out-of-state sources. I find that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to exercise jurisdiction herein.

**II. THE LABOR ORGANIZATION INVOLVED**

International Union of Elevator Constructors, Local No. 71, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE UNFAIR LABOR PRACTICE**

John Devitt works on installation of elevators, a category of employees called elevator constructors, and has long been a member of the International Union of Elevator Constructors. Many years a member of its Local No. 1 in New York, he went to Florida, and in the winter of 1968-69 was employed by Westinghouse, with a work permit out of Elevator Constructors Local No. 71, of Miami. He was assigned to a new 16-story building — the Regency Towers, in Ft. Lauderdale, where the Company was installing three elevators. In addition to Devitt, and other elevator constructor employees, there were two iron workers, these were members of International Association of Bridge, Structural, and Ornamental Iron Workers. One of the iron workers was William Carter, long a member of Iron Workers Local 272, of Miami, another was Harold Mahoney, his helper. Like Devitt, Mahoney had long been a craftsman in New York, member of Iron Workers Local 580 there, and had recently come to Florida, where he enjoyed a traveling card out of Iron Workers Local 272.

On February 20, 1969, the Respondent discharged Mahoney, and the next day released Devitt. The complaint is silent as to Mahoney, it alleges that the release of Devitt constituted a violation of Section 8(a)(3) of the Act. Samuel Eldon, superintendent of construction for the Company, who personally made the decision to dismiss Devitt, said at the hearing the reason was because Devitt "conspired" with Mahoney, was attempting to have the Ft. Lauderdale job run "like the New York area," and because Devitt was the "source of trouble." To Devitt, at the moment of discharge, he said the dismissal was because his "attitude and work was completely wrong."

In the usual language the complaint says Devitt was discharged because he "assisted the Union and engaged in union or protected concerted activities." It then details the concerted activities to have been that Devitt informed Foreman Jerry Perkins "the Respondent's hoisting operations were in violation of its collective-bargaining agreement with the Union." A more exact statement of what the Respondent is said to have resented is that Devitt and Mahoney favored a too literal enforcement of conditions of employment set out in the union contracts, both that of the Elevator Constructors and of the Iron Workers, and that it was Devitt's conduct in turning to his union for help towards this end that really caused his

discharge. This is not a case where the antiunion, and therefore illegal, animus is to be seen in any desire to eliminate unions from the picture, to discourage union membership as such, or to avoid the statutory duty to deal with a labor organization. If ever there was a totally unionized job this was it. The real purport of the charge, and what the evidence strongly indicates, is that the Company wanted to curb too technical and exact enforcement of the contract terms. As the Respondent puts it, what it wanted to stop, and what it had a right to stop, was insistence upon working conditions which would have been either illegal or contrary to the agreed-upon terms in Florida, whatever they may have been in New York.

#### The Case in Support of the Complaint; Contract, or Noncontract Conditions of Employment

Three separate aspects of working conditions came to light during the hearing, either because the General Counsel thought them important or because the Company pointed to them as significant: (1) how is material to be raised to the roof of a construction project?; (2) is there a limitation upon the number of elevator doors that are to be installed during a given workday?; and (3) is protective scaffolding to be installed in elevator shafts while work is in progress?

On January 20, 1969, there were heavy materials to be lifted to the roof of the Regency Towers. Devitt, with a helper, was stationed on the sidewalk to attach the materials to the cable of the crane used for hoisting; Foreman Perkins, the supervisor as stipulated, was on the roof giving instructions by two-way radio. Three generators, three machines and three control boards went up. Perkins then ordered Devitt to send up six metal machine beams and three deflector sheaves. Devitt said that according to the contract no more were to be raised by crane, but Perkins repeated the order. The beams and the sheaves were hoisted by crane and came to rest on the roof. The raising of these beams and sheaves required 5 minutes.

The next day Devitt reported the incident to Eugene Stevens, business representative of Elevator Constructors Local 71, and on January 23 Stevens filed an intraunion charge against Perkins, who is also a member of that Local for using the derrick "on the outside of the building" to lift the beams and sheaves to the roof. The charge shows Devitt as the witness to the offense. A copy of the charge was mailed to Perkins on January 26, and was brought to the attention of Superintendent Eldon, as well as all other persons on the job, shortly thereafter. It was conceded at the hearing by the Respondent that this raising of the beams and the sheaves by crane was a violation of the express provisions of the Elevator Constructors contract then in effect in the Miami area.

One day, up on the roof, Stevens told Perkins the beams and the sheaves were improperly up there because they had been lifted by crane; in consequence of this position taken by the Union, they were brought down again. There is some confusion in the record as to precisely when this was done, but it is clear they were downstairs again by Thursday, February 20. Devitt testified, and no one contradicted him, that he was told to do this 2 days before his discharge. He was released on Friday morning, February 21. Hal Schlicker, an elevator constructor who worked together with Devitt, testified that sometime earlier, during February, Perkins spoke to him about the charge filed against him in Local 71, and

said Devitt "was doing it." Schlicker also testified that during the morning of Thursday, February 20, he was occupied "hoisting the material [beams and sheaves] back up again." There remains unexplained the statement at the hearing of Carter, the foreman iron worker, that he understood from Superintendent Eldon on the morning of the 21st that Devitt was to be released "because this material we was speaking of in this room had to come back down through the shaft and it could not come back down here with it decked over." He was not the most articulate witness, and I find that by Thursday, the 20th, the materials in question had been brought down through the elevator shafts and moved back to the sidewalk. Eventually it went up again, but through the shafts, as, apparently, the contract required. It was also stipulated that the time required for bringing down the beams and sheaves and placing them outside the building "took about a day's work."

A day or two before Thursday, Mahoney, the iron worker helper, told his foreman, Carter, that the shafts would have to be scaffolded at various levels for protection of the workmen. Again the testimony is confused as to exactly at which levels he wanted the scaffolding placed. At one point Carter quoted Mahoney as saying the scaffolding had to be placed "three floors above us and two floors below us," "to keep anything from falling down on us." Later, in response to a leading question by company counsel, he agreed Mahoney was "demanding every other floor." According to Mahoney, when Carter told him he would have to work in the shaft, he said "we have to have protection above and below us." What the pertinent contract provided on this point is not shown in this record by the contract itself, and Carter, who has long worked in Florida, referred to it twice, once that it "provides that every other floor in an elevator shaft shall be scaffolded," and once that it requires scaffolding "two floors above and one floor below."

Mahoney also told Carter, either on February 18 or 19, but surely before the morning of Thursday, February 20, that the employees should install no more than two doors per working day. The then applicable Iron Worker contract said nothing about this matter, and Carter's answer to Mahoney was that 8 hours' pay called for 8 hours' work, regardless of the number of doors installed.

#### Discharge of Devitt; Affirmative Defense and Conclusion

Early on the morning of February 20 Foreman Carter telephoned Superintendent Eldon to tell him of Mahoney's announcement that there must be protective scaffolding to safeguard iron workers in the shafts. There is a conflict in testimony between Carter and Eldon as to what was said between them. According to Carter, he told Eldon that "Mr. Mahoney had told us that we had to deck the shaft oval [sic-over] . . . three floors above us and two floors below us," that there was no material available to do this, that Mahoney had spoken of limiting the day's work to two doors, and that Mahoney had also said "We are going to run this thing like we run it in New York." Eldon's answer to all this, still according to Carter, was "We have got no material out there. The thing to do is let Mr. Mahoney and Mr. Devitt go," "that we couldn't do piece work, that there wasn't anything in the Contract saying we could do two and get paid for a day." Carter repeated more than once he had no recollection of himself speaking Devitt's name when talking to Eldon on the telephone.

Eldon's version of this conversation is that Carter "... says, 'Well, they have finally done it to us,' and I said, 'They done what?' and he said, 'Well, you know this boy Devitt and this Mahoney, my helper, they had been advocating for some time that they were going to run this job like they do in New York,' and I said, 'Just what do you mean?' This is when he told me that he would have to scaffold every other floor and that we could set no more than two entrances a day. . . . I told him that we could not live with this. I says, 'Look, we pay you people for working eight hours a day. It doesn't make a damn to me if you set one or if you set ten fronts.' . . . I says, 'The only thing I know to do is to remove the source of trouble.' . . . So I said, 'The only thing I know to do now, we will get rid of Mahoney.'" Eldon flatly denied having said anything about releasing Devitt then. He added that it was not until 2 or 3 p.m. that afternoon, when Foreman Perkins called him to complain of Devitt, that he decided to discharge the second man and instructed Perkins to dismiss Devitt.

Between Carter and Eldon I credit the former as to their telephone conversation early that morning. In his story Carter continued that he did as Eldon ordered, and went directly from the telephone to Perkins with the instruction to discharge Mahoney and Devitt. He said Perkins put the necessary money together to pay off Mahoney then and there and sent a helper to tell Devitt up on the roof to bring his tools downstairs, but that when another employee warned Perkins he might have trouble with the union, the foreman called the messenger back. The incident is corroborated by Stevens, the business representative of the Elevator Constructors, who testified Perkins called him that morning to say he was going to release Devitt, but that he, Stevens, then warned only Eldon could fire Devitt, and not Perkins. And David Taylor, the helper who was then present, called as a witness for the Respondent, also testified that Perkins that morning did send him to the roof to bring Devitt downstairs. Perkins, the pivotal point for Eldon's version of events, was not offered as a witness.

The next morning, February 21, Eldon appeared at the jobsite and discharged Devitt. When the employee asked why he was being dismissed, as he himself recalled, Eldon said "Because you are in a conspiracy with that iron worker." Devitt denied the charge, and Eldon then said: "Let's just say I don't like your New York attitude." According to Eldon all he told Devitt was "Your attitude is wrong and your work is unsatisfactory."

I think the evidence in its totality fully warrants the inference Devitt was discharged because he wanted his union's contract enforced, because he was the moving factor which necessitated bringing the metal beams and the sheaves down from the roof and up again via the shaft, and because he acted through Local 71 to achieve his objective. This was pure concerted activity, literally action through a union, aimed at unqualified application of contract terms, and therefore protected by the statute. I find that by discharging Devitt on February 21, 1969, the Respondent violated Section 8(a)(1) of the Act.<sup>1</sup>

Much of Superintendent Eldon's explanation of his asserted reason for discharge was couched in elusive and general terms. He spoke of Devitt having been a "source

of trouble," wanting to bring "New York area conditions" to the Florida job. The only complaint by Devitt shown by true probative evidence on this record, was his statement to Foreman Perkins, reiterated in his report to Business Representative Stevens, and implemented by his being the witness to the charge filed against the foreman, that the beams and the sheaves ought not have been hoisted to the roof by derrick. The Respondent's first stipulation at the hearing was that Devitt was correct in his complaint, that Perkins that day violated the union contract Eldon may have chosen to call this "trouble," and disconcerting imposition of "New York conditions" at the Regency Towers construction project, but his phrases could not alter the significant facts. He said he was shocked to see the beams and sheaves downstairs again late in February. He may well have been, but the question here is not whether or not there was economic, nor indeed equitable justification, for the contractual clause which prohibited the hoisting of such building materials by crane. So far as Devitt was concerned, New York area conditions meant the union agreement had to be lived up to, and nothing more.

The offensive behavior which the Respondent by implication throughout the record sought to impute to Devitt and thereby put him in an unfavorable light now, was the desire to limit production work to only part of the 8-hour day, i.e., two elevator doors and no more. The business of the protective scaffolding at various floors served little for criticism even of Mahoney, who alone was shown to have demanded it. The proof would not support a definitive finding that he asked for more than his own union contract required, for Carter's testimony on that point virtually conceded the scaffolding was necessary. Here, as well as with respect to the hoisting of specified materials, Eldon was equating the phrase "New York area conditions" and its offensive connotation, with living up to a union contract. It may well be that the Iron Workers Union did not protest Mahoney's discharge for the very reason that he demanded privileges beyond the contract terms. But there is no evidence Devitt joined in such improper demands. When Carter called to tell Eldon of his problem on Thursday morning he did not talk about Devitt at all, and yet it was at that very moment that the superintendent ordered his immediate dismissal. With this the credible testimony, I cannot rely upon Eldon's further testimony that later that afternoon Perkins told him Devitt was unhappy because Mahoney had been relieved, and that this was the reason for the discharge the next day. From Eldon this was pure hearsay on what is offered as a critical part of the affirmative defense. Perkins, who is supposed to have heard this from Devitt, did not testify. It is probably true that at a much earlier date Devitt did say that in New York a job like this would be 2 years in the making. And he might even have been correct in the appraisal. Against the direct annoyance caused Eldon by bringing the local union to bear in enforcing the existing contract, the isolated statement has little meaning in this case.

I also find unconvincing Eldon's assertion at the hearing that a further reason for dismissing Devitt that day was for work incompetence. According to the employee the superintendent said nothing to him about unsatisfactory work at the moment of discharge, but spoke only of "conspiring" with the "iron worker," and his "New York attitude." And Eldon, while testifying, first said he told the man "his attitude and his work was completely wrong," and then corrected himself by saying

<sup>1</sup>*Eastern Illinois Gas and Securities Company*, 175 NLRB No 108

There is no evidence in the record of union animus motivating the discharge, and I therefore do not find that Respondent's conduct also constituted a violation of Section 8(a)(3) of the Act, as alleged in the complaint

he said "your attitude is wrong and your work is unsatisfactory." Devitt testified there had never been any complaints about his work, he had never been reprimanded, and Perkins once told him he was doing a "nice job." He also denied ever having been ordered to return to his work station. Eldon, in support of the asserted unsatisfactory work basis of discharge, said that one day on February 13, Perkins reported to him that Devitt had been away from his work station; he went on to add he checked with Foreman Carter, who confirmed Perkins; "He [Carter] complained about it, but there was nothing ever really said about it." And again Perkins did not appear to give body to the hearsay testimony, and Carter, who did testify, was asked nothing about this matter. Moreover, while denying he had ever complimented Devitt, Eldon did concede he had referred to him as "average," or "a reasonably fair mechanic." I do not believe the quality of Devitt's work performance had anything to do with his discharge.

In its posthearing brief the Respondent for the first time advances still another defense, an argument predicted upon a factual assertion not mentioned at the time of the events and not suggested at all at the hearing. It contends that Devitt's union activity shown on this record was not protected by the Statute and that therefore the Company could discharge him with impunity. The Board's decision in *San Francisco-Oakland Mailer's Union*, 172 NLRB No. 252, upon which the Respondent relies for this defense, is inapposite. The Respondent there was the union, and the conduct which the Board found to be an unfair labor practice was the union's internal act of imposing fines upon members who were also supervisors as defined in the Act. It is argued here that because the conduct of Devitt's union, Elevator Constructors Local No. 71, might have been subject to Board prosecution under the *San Francisco-Oakland* case, it follows that the employee's appeal to his union was also unlawful and made him fair game at the hands of the employer. But Devitt is not the union; he is only a rank-and-file member, and all he did, indeed all he had power to do, was inform on Foreman Perkins. For all he knew, and all he was in a position to control, the Union might have proceeded to enforce the contract by the grievance procedure, or even by strike. To hold, as the Respondent now argues, that he committed an unfair labor practice and could be discharged for it, would require an unwarranted extension of the rule of *San Francisco-Oakland*. In fact, such a theory would expose each and every workman who reports employer contract violations to summary discharge. In any event, the question of this case is one of motivation. Why did Eldon discharge the man? He could hardly have had this belated thought in mind, for he never mentioned any such thing when he fired Devitt, said nothing about it when the case was investigated, and gave no hint of such a reason throughout his testimony. Indeed he insisted the Union charge against Perkins had nothing to do with his decision.

#### THE REMEDY

Having found that the Respondent violated Section 8(a)(1) by discharging John Devitt, I shall order the Respondent to cease and desist from such conduct and to offer Devitt immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of pay he may have suffered by reason of Respondent's discrimination against

him, by payment to him of a sum of money equal to that which he would normally have earned as wages from the date of his discharge to the date of the Respondent's offer of reinstatement, less his net earnings during the set period, in a manner consistent with Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289. Interest on backpay shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact, and upon the entire record in the case, I make the following:

#### CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Elevator Constructors, Local No. 71, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging John Devitt for engaging in protected, concerted activity, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices proscribed by Section 8(a)(1).

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

#### RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, I hereby recommend that Respondent, Westinghouse Electric Corporation, Ft. Lauderdale, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in the exercise of their right to engage in concerted activities for mutual aid and protection by discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in, or to refrain from engaging in, any or all the activities specified in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer John Devitt immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges and make him whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, as set forth in the section of this report entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and all other rights under the terms of this Order.

(c) Notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Post at each and every location where the Respondent is currently installing elevators within the territorial jurisdiction of Local 71 copies of the attached

notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 12, shall, after being duly signed by the Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 12, in writing, within 10 days from the date of this Decision, what steps it has taken to comply herewith.<sup>3</sup>

<sup>3</sup>In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

<sup>3</sup>In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their right to engage in

concerted activities for their mutual aid and protection by discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to engage in, or refrain from engaging in any or all the activities specified in Section 7 of the Act.

WE WILL offer John Devitt immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of our discrimination against him.

WE WILL notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WESTINGHOUSE ELECTRIC CORPORATION  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7257.