

In the Matter of BENJAMIN LEVINE, DOING BUSINESS UNDER THE NAME  
AND STYLE OF ESTELLITE FIXTURES COMPANY *and* INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. 438

*Case No. C-258.—Decided April 4, 1938*

*Lighting Equipment Manufacturing Industry—Interference, Restraint, or Coercion:* expressed opposition to labor organization—*Discrimination:* recall of non-union employee following temporary lay-off in preference to union members with seniority ratings—*Reinstatement Ordered:* of non-recalled employee—*Preferential List Ordered:* to be followed in further reinstatement—*Back Pay:* awarded two employees, where only one position available: to one employee, from date of denial of reinstatement to date other employment obtained; to other employee, from latter date to date of offer of reinstatement.

*Mr. John J. McCann*, for the Board.

*Mr. Sylvester E. Scott*, of Hoosick Falls, N. Y., for the respondent.

*Mr. Eugene R. Thorrens*, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges filed by International Brotherhood of Electrical Workers, Local Union No. 438, herein called the Union, the National Labor Relations Board, herein called the Board, by Elinore M. Herrick, Regional Director for the Second Region (New York City), issued its complaint, dated July 28, 1937, against "Harry Levine, doing business under the name and style of Estelite Fixtures Company," Hoosick Falls, New York, herein called the respondent.<sup>1</sup> The complaint and notice of hearing thereon were duly served upon the respondent and the Union.

The complaint, as amended at the hearing, alleged that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, contrary to Section 8 (1) and (3) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. In reference to the unfair labor practices, the complaint, as amended,

<sup>1</sup> It appears from respondent's answer that the correct name of the respondent is Benjamin Levine, doing business as Estelite Fixtures Company, and the complaint was so amended upon the Board's motion.

alleged in substance that on May 19, 1937, the respondent discharged Raymond Armitage, John Griffin, Charles Rugemer and Arthur Cutler<sup>2</sup> for joining and assisting the Union and for engaging in concerted activities for the purposes of collective bargaining and other mutual aid and protection, and that the respondent refused and continues to refuse to reinstate said discharged employees.

The respondent filed an answer to the complaint in which he denied that he is engaged in interstate commerce, denied that he discharged the persons named in the complaint, and alleged that such persons were temporarily laid off because of lack of orders and work in his factory, and that he did not discharge them on account of their union activities.

Pursuant to the notice, a hearing was conducted before H. R. Korey, the Trial Examiner duly designated by the Board, in Hoosick Falls, New York, on August 19 and 20, 1937. The Board and the respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to cross-examine witnesses, and to produce evidence was afforded all parties.

Subsequently, the Trial Examiner filed his Intermediate Report, finding that the discharge of Armitage, Griffin and Rugemer were unfair labor practices, within the meaning of the Act, and recommending reinstatement of Rugemer and Griffin with back pay, and the award of back pay to Armitage.<sup>3</sup> The Trial Examiner made no finding as to the alleged discharge of Cutler, but did find that the earnings of Cutler in his new employment so far exceeded the sum which he would have earned as employee of the respondent during the period of his lay-off, that he did not sustain financial loss, and recommended that no further cognizance be taken of Cutler in this proceeding. The Union did not file exceptions to the Intermediate Report. Inasmuch as we do not find that the lay-off of Cutler was motivated by his Union membership, we will dismiss the complaint as to Cutler. Exceptions were filed by the respondent. The respondent also filed with the Board an informal brief, in the form of a letter, to which we have given due consideration.

The Board has reviewed all the rulings made by the Trial Examiner on motions and objections to the admissibility of evidence and finds that no prejudicial errors were committed. The rulings are hereby affirmed. For the reasons hereinafter stated, we depart in certain respects from the conclusions and recommendations of the Trial Examiner, and to that extent, sustain the exceptions to the Intermediate Report. Otherwise, we find them without merit.

<sup>2</sup> On motion of the Board the complaint was amended, dropping similar charges as to J. W. McMurray, Jessie Byers, George Dorata, and Robert G. Hamilton, without objection on the part of the respondent.

<sup>3</sup> At the hearing Arthur Cutler and Raymond Armitage testified that they had secured new jobs and did not desire reinstatement.

Upon the entire record in the case, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

The respondent is an individual engaged in the manufacture of electric lighting fixtures. His sole plant and place of business is located in Hoosick Falls, New York. His gross sales for the year 1936 amounted to \$98,560.84. The respondent's pay roll for the same year totaled \$25,240.92. Approximately 30 persons are employed in the plant.

The respondent purchases approximately 30 per cent of the raw materials used in his plant, consisting of brass, steel, spelter, castings, electric wire, electric wiring devices, polishing and plating materials, lacquers, glasswork, etc., outside the State of New York. The raw materials are subjected in the plant to various operations, including stamping on power and draw presses, casting of spelter in permanent bronze moulds, polishing, electroplating, spraying with lacquer, and assembling of parts.

Seventy-four per cent of the finished products are transported to customers outside of the State of New York by automobile, truck, and rail. The respondent maintains sales agencies in San Francisco, California, Boston, Massachusetts, Kansas City, Missouri, and Atlanta, Georgia. The respondent's finished products are sold in almost every State in the country.

### II. THE UNION

International Brotherhood of Electrical Workers is a labor organization, affiliated with the American Federation of Labor. Local Union No. 438 was originally organized in 1902 as Local 392, which consolidated in 1931 with other locals as Local 11. In 1932 these locals separated from Local 11 and the membership of old Local 392 became known as Local Union No. 438.

### III. THE ALLEGED DISCHARGES

The background of labor relations of the respondent indicates hostility on his part towards labor organizations and union workers. The respondent started in business in New York City in 1923. In March 1935, he entered into an agreement with the Lighting Equipment Workers' Local No. 19427, affiliated with the American Federation of Labor. This agreement by its terms expired January 15, 1936. Prior to the expiration of the agreement the respondent, without notifying the Union, made arrangements for the leasing of the plant at Hoosick Falls, New York, to which place he moved his oper-

ations during the first week in January 1936. At the time he moved to Hoosick Falls, the respondent brought with him to the new plant five of his New York City employees, who were subsequently expelled from Local Union No. 3, the successor by consolidation to Local Union No. 19427, for assisting the respondent to establish a non-union shop in disregard of the rules of the I. B. E. W. In February or March 1936, Haynes, who at that time was the supervisor of the respondent's entire plant, stated in a conversation in the plant with one of the employees that "they would have no union in the shop and anybody found talking about a union would be laid off."

The Union began its organizational drive in the Hoosick Falls plant on the night of May 17, 1937, when its business manager addressed a meeting of the respondent's employees at the local Odd Fellows Hall. At this meeting 17 of the employees signed applications for membership in the Union. Among these were Arthur Cutler, Raymond Armitage, Charles Rugemer, and John Griffin, whose alleged discriminatory discharges give rise to this proceeding.

On May 19 the respondent had in his employ 22 workers, not including 3 foremen and 2 office helpers. On that day, 2 days after the meeting just referred to, the respondent laid off 13 employees. Of these, 11 were Union men. The two non-union men so affected, Ernest Gibbons, Jr. and John McMahan, were recalled to work by the respondent on June 1, but none of the Union men were then recalled.

Gibbons, Jr. was the youngest in seniority rank among the workers in the polishing and buffing department, where Armitage and Rugemer, who were not offered reinstatement, were employed. There is evidence of complaints by the foreman in regard to the quality of the work performed by Gibbons, Jr., a relatively inexperienced nickel and chrome buffer. On the other hand, Armitage, who was often used by the respondent as an instructor for new employees, had a good reputation and 15 years' experience in brass buffing, which requires more skill and is one of the most important duties in the buffing department. As to Rugemer, who had 2 years' previous experience in Germany as a polisher and buffer, the respondent had previously expressed satisfaction with his work and had granted him two increases in pay. With the exception of a few odd jobs at which he earned a total of approximately \$14 from the date of his lay-off to the date of the hearing, Rugemer has been unemployed.

McMahan declined to return to work. Nevertheless the respondent failed to offer reemployment to John Griffin, who had been employed in the spraying department with McMahan, doing the same type of work, and who, with the exception of McMahan, was the only one in that department laid off. However, McMahan's place was never filled. Griffin was unemployed for 4 or 5 weeks after his lay-off

and has since been temporarily employed by the town of Hoosick as a road worker.

Of the nine workers not laid off, six were Union members and three non-union members. Subsequent to the filing of charges with the Regional Director in this proceeding, the respondent reinstated three Union men and recalled another to replace a worker who had fallen ill.

The respondent contends that he was compelled to order the lay-offs because of a lack of business and lack of work in the plant. There is evidence in the record which is somewhat inconsistent with this contention. Thus there is testimony indicating that the lay-offs were ordered at a time when the employees had not completed the work assigned to them and when there was the usual amount of work "on the floor" ready to be assigned. Again, after the lay-offs the respondent and the supervisory employees engaged in production work, which was not a customary practice. The remaining employees were required by their foremen to "speed up" production and increase output. Nevertheless, the respondent did not hire any new men to replace Armitage, Rugemer, Griffin, and Cutler, indicating that the respondent had no need for their labor.<sup>4</sup> Their places were still unfilled at the time of the hearing in August.

The respondent also maintains that he had no knowledge of the Union or the Union meeting when he ordered the lay-offs. The record discloses, however, that the employees talked about the Union on May 18 within earshot of Minkema, the foreman in the plating department.

There is conflicting evidence as to whether the respondent admitted to Gibbons, Sr., a non-union worker, that he contemplated the lay-offs to retaliate against those employees who attended the Union meeting. On Monday, May 17, the day of the meeting, Cutler and Gibbons, Sr. were employed in the stamping department. On that day, Gibbons asked Cutler if he were going to the Union meeting, to which Cutler answered in the affirmative. Gibbons stated to Cutler that he was not certain, but that he thought he would attend the meeting. Gibbons failed to attend the meeting, however, and did not join the Union. The next morning, the 18th, Gibbons again approached Cutler and ascertained from him that he had attended the Union meeting. Cutler and Griffin testified that on Wednesday, the morning of the 19th, Gibbons informed them that he had been speaking with Levine, the respondent, and that the respondent had asked him whether he had joined the Union, to which he had replied in the negative. Cutler

<sup>4</sup> However, on May 25, the Monday following the discharges, the respondent hired for a period of 2 days four women, who were ineligible to membership in the Union, for packing and wrapping work which had previously been done by the men. One of the women, Mrs. Sirard, was still in the employ of the respondent at the time of the hearing.

was laid off about 11 o'clock on the 19th. Rugemer, Armitage, Griffin, and Flynn<sup>5</sup> testified, in substance, that after lunch on the 19th, Gibbons notified them that Cutler had been laid off, that 12 or 13 more men were, as Gibbons put it, "to get it that night", and that Gibbons commented, "That is your union now, Cutler was laid off and 12 or 13 are going to be laid off tonight again." Griffin testified that Gibbons stated that it was Levine who advised him of the contemplated discharges.

Gibbons, Sr., an ordinary employee, admitted that he stated to these men: "Boys, maybe the union won't be quite so good as we think, or maybe we will all get done", but denied that he said that Levine had told him that a number of men were to be laid off that night because they attended a Union meeting, denied that he told any of the employees that Levine had talked to him about the Union, or that he had talked to Levine at any time about the Union. The respondent categorically denied that he had discussed the Union or its members with Gibbons, Sr.

There appears to be no substantial evidence to rebut the contention of the respondent that the curtailment occurred by reason of business conditions. The evidence to sustain the charges consists of hearsay testimony, which is denied, and testimony that there was still work in the plant and that the remaining employees worked harder than before, indicating an increased operating efficiency in the plant, which is not inconsistent with the respondent's position. Under all the circumstances, it is unlikely that the curtailment would have continued for a period of 3 months if its only purpose was to destroy the Union. We are not convinced that the respondent's reduction in force on May 19 constitutes discriminatory action designed to discourage membership in the Union, rather than a curtailment occasioned by reason of business inactivity.

It is clear, however, that the respondent discriminated against Rugemer and Armitage in its selection of Gibbons, Jr. when he reinstated him and failed to recall Rugemer or Armitage on June 1. Although it does not appear in the record that the respondent followed any system of seniority in making lay-offs, either Rugemer or Armitage, on the basis of their superior ability, greater experience and length of service, should have been reinstated in preference to Gibbons, Jr. The respondent has made no showing by way of explanation of such favoritism. The evidence, therefore, warrants the conclusion that the respondent's choice of Gibbons, Jr., a non-union employee, was dictated by a desire to differentiate against Armitage and Rugemer because of their Union membership.

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<sup>5</sup> Flynn, a Union member, was not laid off, and at the time of the hearing was employed in the respondent's plant.

Accordingly, we find that the respondent has discriminated against his employees in regard to hire and tenure of employment, thereby discouraging their membership in a labor organization, and by his expressed opposition to labor unions, has interfered with, restrained, and coerced his employees in the exercise of the rights guaranteed in Section 7 of the Act.

#### IV. THE EFFECT OF 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 tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### THE REMEDY

We have found that the respondent has engaged in unfair labor practices by his discriminatory failure to reinstate Armitage or Rugemer to the place given to Gibbons, Jr. on June 1. As between Armitage and Rugemer, the former enjoyed seniority rating and therefore should have been reinstated to the available job. Since Armitage does not desire employment with the respondent, however, we will order that Rugemer, who followed Armitage in seniority rank, be reinstated with back pay to the date of offer of reinstatement, dismissing, if necessary, Gibbons, Jr. Armitage should be awarded back pay for the period from June 1 to June 17, when he obtained employment elsewhere. Since only one job was available, Rugemer's back pay should begin to run from June 17.

The Board has adopted the theory of the respondent that the curtailment of May 19 was a temporary lay-off occasioned by a decrease in business and available work in the plant. However, in view of the respondent's unfair labor practices in his expressed opposition to labor organizations and his discriminatory failure to reinstate Rugemer or Armitage, and in order to effectuate the policies of the Act, we will require the respondent to place John Griffin, for whom work was not available at the time of the hearing, upon a preferential list for employment as it arises.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

#### CONCLUSIONS OF LAW

1. International Brotherhood of Electrical Workers, Local Union No. 438, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. The respondent, by discriminating in regard to the hire and tenure of employment of Raymond Armitage and Charles Rugemer, and each of them, and thereby discouraging membership in a labor organization, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. The respondent, by interfering with, restraining, and coercing his employees in the exercise of the rights guaranteed in Section 7 of the Act, 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.

### ORDER

Upon the basis of the findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Benjamin Levine, doing business in the name and style of Estellite Fixtures Company, Hoosick Falls, New York, and his agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Electrical Workers, Local Union No. 438, or in any other labor organization of his employees, by discharging or threatening to discharge, or refusing to reinstate, any of his employees, or otherwise discriminating in regard to hire and tenure of employment or any term or condition of employment, or by threat of such discrimination;

(b) In any other manner interfering with, restraining, or coercing his employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act.

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

(a) Offer to Charles Rugemer immediate and full reinstatement to his former position at not less than the rate of pay he was receiving at the time of his lay-off, without prejudice to seniority or other rights and privileges previously enjoyed by him, and place John Griffin on a preferential list to be offered employment as it arises on the basis of seniority by classification before any other persons are hired;

(b) Make whole Raymond Armitage, for loss of pay he has suffered by reasons of his lay-off by payment to him of a sum of money equal to that he would normally have earned during the period from June 1,

the date of the respondent's discriminatory failure to reinstate him, to June 17, the date when he secured regular and substantially equivalent employment elsewhere, less any amount earned by him during such period;

(c) Make whole Charles Rugemer for loss of pay he has suffered by reason of his lay-off by payment to him of a sum of money equal to that which he would normally have earned as wages during the period from June 17, the date when work became available for him, to the date of offer of reinstatement, less any amount earned by him during such period;

(d) Post immediately notices in conspicuous places in his plant stating that the respondent will cease and desist in the manner aforesaid; and keep said notices posted for a period of at least thirty (30) consecutive days from the date of posting; and

(e) Notify the Regional Director for the Second Region in writing within ten (10) days from the date of this order what steps the respondent has taken to comply herewith.

And it is further ordered that the allegations of the complaint that the respondent discharged and refused to reinstate Arthur Cutler pursuant to an unfair labor practice within the meaning of Section 8 (3) of the National Labor Relations Act be, and they hereby are, dismissed.