In the Matter of WILLIAM W. KIMMINS, SR., WILLIAM W. KIMMINS, JR., AND RODMAN C. KIMMINS, CO-PARTNERS, D/B/A WILLIAM W. KIMMINS & SONS *and* ROBERT BROWN, AN INDIVIDUAL

Case No. 3–CA–215.—Decided November 15, 1950

DECISION AND ORDER

On July 14, 1950, Trial Examiner Albert P. Wheatley issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in certain other unfair labor practices alleged in the complaint, and recommended dismissal of these allegations. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Houston, Murdock, and Styles].

The Board has reviewed the rulings made by 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 Respondents' exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

The Respondents' request for oral argument is hereby denied as the record, the exceptions, and the Respondents' brief, in our opinion, adequately present the issues and positions of the parties.

No exceptions having been filed to the Trial Examiner's recommended dismissal of the allegations in the complaint with respect to

[1] The Respondents have excepted to the Trial Examiner's recommendation that the Board exercise jurisdiction herein. The jurisdictional facts, as fully set forth in the Intermediate Report, show that the Respondents furnish services valued at more than $50,000 per annum to Republic Light, Heat and Power Company, a public utility distributing gas in Buffalo and vicinity, and to New York Telephone Company. On the basis of these facts, we find, in accordance with our recently announced jurisdictional policy, that it will effectuate the policies of the Act to assert jurisdiction in this case. Cf. *Hollow Tree Lumber Company*, 91 NLRB 635.

interrogation of employees and applicants for employment, we shall dismiss these allegations.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents, William W. Kimmins, Sr., William W. Kimmins, Jr., and Rodman C. Kimmins, co-partners, d/b/a William W. Kimmins & Sons, their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in International Hod Carriers', Building & Common Laborers' Union of America, Local 210, AFL, or any other labor organization of its employees, by discharging any of their employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment, except to the extent authorized by Section 8 (a) (3) of the Act;

(b) Performing, giving effect to, or enforcing any agreement or arrangement with International Hod Carriers', Building & Common Laborers' Union, Local 210, AFL, which requires employees to join or maintain membership in such labor organization as a condition of employment unless such agreement has been authorized as provided by the National Labor Relations Act, as amended;

(c) In any other manner interfering with, restraining, or coercing employees in the right to refrain from exercising the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

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

(a) Offer to Robert Brown immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges;

(b) Make whole Robert Brown in the manner set forth in the section of the Intermediate Report entitled "The remedy" for any loss of pay he may have suffered by reason of the Respondents' discrimination against him;

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records

necessary to analyze the amounts of back pay due and the right of reinstatement under the terms of this Order;

(d) Post at their place of business in Kenmore, New York, copies of the notice attached to the Intermediate Report marked Appendix A.[2] Copies of said notice, to be furnished by the Regional Director for the Third Region, shall, after being duly signed by the Respondents' representative, be posted by them immediately upon receipt thereof, and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the third Region, in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is dismissed insofar as it alleges unlawful interrogation of employees and applicants for employment concerning their union membership or affiliation.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Messrs. William Naimark and *Milton Pravitz*, for the General Counsel.

Brown, Kelly, Turner & Symons, by *Mr. John E. Leach*, of Buffalo, N. Y., for Respondents.

STATEMENT OF THE CASE

Upon a charge and an amended charge duly filed September 12, 1949, and May 2, 1950, respectively, by Robert Brown, an individual, the General Counsel of the National Labor Relations Board by the Regional Director for the Third Region (Buffalo, New York), duly issued a complaint dated May 3, 1950, against William W. Kimmins, Sr., William W. Kimmins, Jr., and Rodman C. Kimmins, co-partners, d/b/a William W. Kimmins & Sons, herein called Respondents, alleging that Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act.

With respect to unfair labor practices the complaint alleged in substance that Respondents discriminatorily discharged Robert Brown on or about September 9, 1949, and failed or refused to reinstate said Robert Brown, and that Respondents, in the course of their business operate under and pursuant to an agreement or arrangement containing discriminatory and illegal union-security provisions.

[2] This notice, however, shall be and it hereby is amended by striking from the first paragraph thereof the words "the recommendations of the Trial Examiner" and substituting in lieu thereof the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order" the words "A Decree of the United States Court of Appeals Enforcing."

In their answer, as amended, Respondents admit certain allegations of the complaint, including an allegation that Respondents discharged Robert Brown for the reason that he was not a member in good standing in the International Hod Carriers', Building & Common Laborers' Union of America, Local 210, AFL, herein called the Union, but deny that Respondents refused to reinstate said Robert Brown and/or committed or are committing unfair labor practices.

Pursuant to notice, a hearing was held at Buffalo, New York, on May 22 and 25, 1950, before the undersigned Trial Examiner. The General Counsel and Respondents were represented by counsel.[1] All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. At the conclusion of the General Counsel's case-in-chief counsel for Respondents moved to dismiss the complaint (1) on jurisdictional or commerce grounds and (2) on the ground that the 6-month provision of Section 10 (b) of the Act had not been complied with. Respondents did not offer evidence on their own behalf. After oral argument on the record the undersigned, on the authority of *Cathey Lumber Co.*, 86 NLRB 157, denied the motion to dismiss insofar as it was based upon noncompliance with the 6-month provision of the Act, and took under consideration the motion to dismiss on jurisdictional or commerce grounds. It is now disposed of in accordance with the following findings and conclusions.

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

FINDINGS OF FACT

I. COMMERCE; THE BUSINESS OF RESPONDENTS[2]

William W. Kimmins, Sr., William W. Kimmins, Jr., and Rodman C. Kimmins, co-partners doing business as William W. Kimmins & Sons maintain their principal office and place of business in Kenmore, New York,[3] and engage in the installation of sewer mains, water mains, gas mains, and telephone conduits for various municipalities and utilities concerns.

In the course of their business operations Respondents purchase various supplies and equipment including pipe, fittings, hydrants, valves, cement, sand and gravel, lumber and building materials. During 1949 Respondents expended approximately $140,000 for such supplies and equipment. Approximately $45,100 represents supplies and equipment shipped to Respondents from points and places outside New York. During this same period Respondents purchased and received from within New York $5,000 worth of sewer pipe and a machine and crane valued at $30,000 all of which originated outside New York.

During 1949 Respondents rendered services for which it received approximately $431,974. Approximately $150,000 represents services for Republic Light, Heat and Power Company, Inc., herein called Republic, a public utility corporation distributing manufactured and natural gas[4] in Buffalo and nearby communities. Republic is a wholly owned subsidiary of City Service Company, a Delaware corporation engaged in interstate commerce. Approximately $100,000

[1] References hereinafter to the General Counsel are to his representatives at the hearing.

[2] The facts concerning Respondents' business were stipulated.

[3] A suburb of Buffalo, New York.

[4] Republic purchases most of its manufactured gas from Semet-Solvay Company, Buffalo, New York. Most of the natural gas served by Republic comes from outside New York and is purchased by Republic from New York State Natural Gas Corporation.

represents services rendered for the New York Telephone Company, consisting of installing telephone subways in Amherst and Batavia, New York. Approximately $120,000 represents services rendered for the Buffalo Sewer Authority, a subdivision of the City of Buffalo, New York. Between $15,000 and $20,000 represents services rendered for the Town of Tonawanda in Tonawanda,[5] Erie County, New York.

On the basis of the foregoing facts there is no question that Respondents' operations affect commerce. However there is considerable doubt as to whether the Board as a matter of policy would exercise its jurisdiction. In connection with the latter issue the undersigned has given careful thought and study to various theories and cases including cases cited during the oral argument, cases concerning "arteries essential to the flow of commerce," [6] and recent decisions involving the building and construction industry,[7] to determine the policy of the Board concerning enterprises similar to the one involved herein. Nevertheless the undersigned has not reached a definite conclusion, with a reasonable degree of certainty, as to whether the Board as a matter of policy would or would not assert jurisdiction herein. Accordingly, it is believed that this matter is best left to the determination of the Board itself with a recommendation from the undersigned that jurisdiction be exercised herein.

II. THE LABOR ORGANIZATION INVOLVED

International Hod Carriers', Building & Common Laborers' Union, Local 210, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The facts*

Robert Brown, laborer, was employed by Respondents from August 2, 1948, to January 1949 at which time he was laid off because of a reduction in force due to lack of work. Brown was recalled by William W. Kimmins, Jr., in May 1949 and worked for Respondents until September 9, 1949, when he was discharged, by William W. Kimmins, Jr., "because he wasn't a member of the Union."

On April 30, 1948, the Union and the General Contracting Employers Association [8] executed an agreement "effective on May 1, 1948, and shall continue in effect in its entirety until May 1, 1949, and thereafter from year to year unless . . . ." This agreement provides, *inter alia:*

---

[5] The Town of Tonawanda is the Keystone of the Niagara Frontier, consisting of Buffalo, Lackawanna, Town of Tonawanda and the cities of Tonawanda, North Tonawanda, and Niagara Falls; is strategically located for the assembly of materials, and for manufacture and distribution via water, air, rail, and truck; has an estimated population of from 50,000 to 52,000 and has approximately 48 industrial firms located and operating therein, including Allegheny Ludlum Steel Corp., Continental Can Company, Inc., Dunlop Tire and Rubber Corp., E. I. Du Pont De Nemours & Company, Western Electric, and several of the major petroleum products companies.

[6] *Strong Company,* 86 NLRB 687; *Brown-Ely Co.,* 87 NLRB 27; *J. R. Reeves and A. Teichert & Sons, Inc.,* 89 NLRB 54.

[7] *Denver Building and Construction Trades Council (William G. Churches, et al.),* 90 NLRB 378; *Carpenter & Skaer, Inc., et al.,* 90 NLRB 417; *United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting Industry (Pettus-Banister Company),* 90 NLRB 500; and *Local 596, IBEW (West Virginia Electric Corp.)* 90 NLRB 526.

[8] See *Carpenter & Skaer, Inc., et al.,* 90 NLRB 417.

> Provided the employment is in accordance with the terms of this agreement, the Union shall at all times furnish the Employer with all men needed.
>
> * * * * * * *
>
> The Employer shall have an optional right to hire men, either direct or through the representative of the Union, provided such men are members of the Union.

Respondents were not members of the General Contracting Employers Association but on May 1, 1948, executed an agreement with the Union providing:

> On and after May 1, 1948, we, the undersigned, agree that all laborers employed by the undersigned will be paid at the rate of —— per hour. All overtime shall be paid at the rate of Double Time. Further, we agree that a Union Shop will go into effect at such time as the National Labor Relations Board shall hold an election among the employees and shall certify authorization to make an agreement requiring union membership as a condition of employment.

An election pursuant to Section 9 (e) of the Act was never held.

William W. Kimmins, Jr., testified that Respondents abided by and operated under the terms of the agreement between the Union and the General Contracting Employers Association, that during 1949 and 1950 Respondents "operated under a closed shop contract," that employees were told that they would have to abide by "our union regulations" and that he (Kimmins, Jr.) in the latter part of 1948 told Brown "he would have to do something about it" [joining the Union]. Al DiSimone, cost clerk and estimator for Respondents, at the direction of William W. Kimmins, Jr., in August 1949 told Brown that he couldn't work for Respondents unless he was a member of the Union.

During August and September 1949 Brown unsuccessfully sought membership in the Union and on September 9, 1949, he was discharged by William W. Kimmins Jr., because "he wasn't a member of the Union."

After his discharge brown[9] telephoned Respondents office and asked for work. He was told by the person answering the telephone, identified by Brown as an office worker known as Tom, that he could have work if he got a union membership card.

B. *Conclusions*

In view of the illegal provisions of the contract between the Union and the General Contracting Employers Association pursuant to which Respondents operated, the arrangement pursuant to which Respondents operated a closed shop and required membership in good standing in the Union as a condition of employment, and the evidence of enforcement of these illegal conditions, the undersigned concludes and finds that Respondents conduct was unlawful, substantially as alleged in the complaint, and that Respondents thereby violated Section 8 (a) (1) and (3) of the Act. However, the undersigned finds that the evidence does not support the allegation of the complaint that Respondents "questioned employees and applicants for employment concerning their union membership or affiliation." The only direct evidence tending to support this allegation was given by Brown and was to the effect that DiSimone questioned him (Brown) as to whether he (Brown) had a union card. DiSimone, a cost clerk and estimator, is not a supervisory employee. Although there is evidence

[9] Date not fixed but apparently prior to May 2, 1950.

that DiSimone, at the direction of William W. Kimmins, Jr., told Brown that "he couldn't work for the Company without a Union card" there is no evidence establishing interrogation at the direction of Respondents or any of them. Furthermore, the undersigned believes and finds that there is insufficient evidence to warrant an inference and finding of interrogation by Respondents or at their direction or with their approval.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth in Section III, above, occurring in connection with the operations 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.

V. THE REMEDY

Since it has been found that Respondents have engaged in certain unfair labor practices it will be recommended that they cease and desist therefrom in order to effectuate the policies of the Act.

It has been found that Respondents discriminated in regard to the hire and tenure of employment of Robert Brown thereby encouraging membership in the Union. It will be recommended that Respondents offer Robert Brown immediate and full reinstatement to his former or substantially equivalent position,[10] without prejudice to his seniority or other rights and privileges, and that Respondents make whole Robert Brown for any loss of pay he may have suffered by payment to him of a sum of money equal to the amount he would normally have earned as wages from the date of the discrimination against him to the date of Respondents' offer of reinstatement, less his net earnings during such period.[11] The loss of pay shall be computed on the basis of each separate calendar quarter or portion thereof during the period from Respondents' discriminatory action to the date of a proper offer of reinstatement. It will be further recommended that Respondents make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay due.[12]

The scope of the unfair labor practices discloses a purpose to interfere with, restrain, and coerce employees in the right to refrain from any or all of the concerted activities guaranteed them by Section 7 of the Act. The undersigned will therefore recommend that Respondents cease and desist from in any manner infringing upon these rights.

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

CONCLUSIONS OF LAW

1. International Hod Carriers', Building & Common Laborers' Union of America, Local 210, AFL is a labor organization within the meaning of Section 2 (5) of the Act.

---

[10] *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch,* 65 NLRB 827.

[11] *Crossett Lumber Company,* 8 NLRB 440, 497–8.

[12] *F. W. Woolworth Company,* 90 NLRB 289; *Cen-Tennial Cotton Gin Company,* 90 NLRB 345.

2. By discriminating in regard to the hire and tenure of employment of Robert Brown thereby encouraging membership in a labor organization, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By entering into, performing, giving effect to, and enforcing agreements or arrangements with the Union requiring employees to join or maintain membership in such labor organization as a condition of employment Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

4. By such discharge and such illegal union-security arrangements and by otherwise interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

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

[Recommended Order omitted from publication in this volume.]