

A. B. SWINERTON, RICHARD WALBERG AND HOWARD HASSARD, D/B/A  
SWINERTON AND WALBERG COMPANY AND JABEZ BURNS & SONS, INC.  
and INTERNATIONAL ASSOCIATION OF MACHINISTS. *Cases Nos.*  
*20-CA-335 and 20-CA-359. June 6, 1951*

### Decision and Order

On December 27, 1950, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged 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. Thereafter the Respondents filed exceptions to the Intermediate Report and supporting briefs. The Respondents also requested oral argument which is hereby denied as the record and briefs in our opinion, adequately present the issues and positions of the parties.

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 Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications:<sup>1</sup>

1. We agree with the Trial Examiner that both Respondents had a discriminatory hiring policy of employing only millwright workers who were members of, or referred by, the Millwrights Union and that pursuant to such policy Respondent Swinerton refused employment to Nelson, Eakle, Stake, and Callaway; and Respondent Burns refused employment to Gustaveson, Witaschek, Lord, and Gilbert, in violation of Section 8 (a) (1) and (3) of the Act.<sup>2</sup>

Aside from denying the existence of a discriminatory hiring policy, the Respondents' principal defense is that the admitted absence of

<sup>1</sup>The Intermediate Report contains certain inadvertences, none of which affects the Trial Examiner's ultimate conclusions, or our concurrence therein. Accordingly, we note the following corrections. (1) The Trial Examiner implies that Doane, a representative of the Machinists, spoke to Foreman Turk on October 20, 1949, and that Foreman Sabrowske was not present as he did not begin to work at the project until October 24, 1949. The record shows that Doane spoke to Turk on the latter date, and we find, in accord with Doane's testimony, that Sabrowske was present during the conversation. (2) To dispel any contrary implication that may be derived from the Intermediate Report, the record shows that Gilbert, an applicant for employment, did not testify.

<sup>2</sup>As more fully described in the Intermediate Report, the record shows that at the time they sought employment, the complainants were told by the respective Respondents that in order to obtain jobs they must be members of, or have clearance from, the Millwrights Union; and that the actual hiring practices of each Respondent followed such policy. In addition, before the complainants applied for work, Machinists' Representative Doane was also informed by the Respondents of their unlawful hiring practice.

available jobs at the time the complainants applied for work, precludes a finding of actual discrimination against them. As the Board has recently held in a like situation, however, the Act was first violated by the Respondents when the complainants initially applied and were told that membership in the Millwrights Union was a condition of employment, even though no jobs were then available.<sup>3</sup> By imposing such an unlawful condition, the complainants were discriminatorily denied an opportunity to be considered for employment by the Respondents. This method of discrimination is of a continuing nature and quite obviously precluded their actual employment when jobs became available shortly thereafter. In these circumstances, where further applications for employment would have been futile, it is settled that the complainants were not required to continue making the useless gesture of reapplying in order to establish that they were victims of the Respondents' discriminatory hiring policy.<sup>4</sup> However, under our back-pay order for these complainants, no actual back pay would start to accrue until work became available and, as pointed out by the Trial Examiner, no complainant who was unable or unwilling to accept employment at such time would be entitled to back pay.

2. The Trial Examiner recommended that both Respondents post compliance notices at their respective offices and at all presently operating projects within Alameda County, California, where the unfair labor practices were committed. We agree with the contention of Respondent Burns that it should not be required to post notices at its office in New York City, far removed from the locality of the unfair labor practices and where its major operations are confined to manufacturing as distinguished from its machinery installation work. However, in view of the intermittent nature of their operations, we shall also require both Respondents to post such notices at any project in Alameda County in which they may be engaged within 1 year of the date on which compliance with the Order herein is commenced.

### Order

Upon the basis of 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 Respondent, A. B. Swinerton, Richard Walberg and Howard Hassard, d/b/a Swinerton and Walberg Company, San Francisco, California; and the Respondent, Jabez Burns & Sons, Inc., New York City, their respective officers, agents, successors, and assigns, shall:

1. Cease and desist from:

<sup>3</sup> *Arthur G McKee and Company*, 94 NLRB 399.

<sup>4</sup> *N. L. R. B. v. Daniel Hamm Drayage Company, Inc*, 185 F. 2d 1020 (C. A. 5), enf. 84 NLRB 458.

(a) Discouraging membership in International Association of Machinists, or in any other labor organization of employees or applicants for employment, or encouraging membership in labor organizations affiliated with the Bay Counties District Council of Carpenters, A. F. L., including Millwrights' Local 102, or in any other labor organization of employees or applicants for employment, by refusing to hire and employ properly qualified applicants, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment, except insofar as such activity is affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(b) In any other manner interfering with, restraining, or coercing employees or applicants for employment, in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization.

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

(a) As to the Respondent Swinerton:

(1) Make whole A. B. Nelson, A. C. Eakle, Albert Stake, and E. C. Callaway for any loss of pay they may have suffered by reason of the Respondent Swinerton's discriminatory refusal to hire them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy", as modified herein.

(2) Upon request, make available to the National Labor Relations 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 under the terms of this Order.

(3) Post at its San Francisco, California, office, and at all its projects now operating or which may be in operation in Alameda County, California, within 1 year from the date on which compliance with the Order herein is commenced, copies of the notice attached to the Intermediate Report and marked Appendix A.<sup>5</sup> Copies of such notice,

<sup>5</sup> This notice, however, shall be, and it hereby is, amended by striking from the first paragraph thereof the words "The Recommendations of a 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."

to be furnished by the Regional Director for the Twentieth Region shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof at its office and its presently operating projects in Alameda County; and, as to any projects undertaken by it in Alameda County within 1 year from the date on which compliance with the Order is commenced, immediately upon the beginning of such project; and maintained by it for sixty (60) consecutive days thereafter at its office and projects, in conspicuous places, including all places where notices to employees and applicants for employment are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) As to the Respondent Burns:

(1) Make whole Arthur Gustaveson, Albert Witaschek, Fred F. Lord, and James M. Gilbert for any loss of pay they may have suffered by reason of the Respondent Burns' discriminatory refusal to hire them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," as modified herein.

(2) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel reports and records, and all other records necessary to analyze the amounts of back pay due under terms of this Order.

(3) Post at all its projects now operating or which may be in operation in Alameda County, California, within 1 year from the date on which compliance with the Order herein is commenced, copies of the notice attached to the Intermediate Report and marked Appendix B.<sup>6</sup> Copies of such notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof at its presently operating projects in Alameda County; and, as to any projects undertaken by it in Alameda County within 1 year from the date on which compliance with the Order is commenced, immediately upon the beginning of such project; and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees and applicants for employment are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) As to both the Respondent Swinerton and the Respondent Burns:

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<sup>6</sup> See footnote 5, *supra*.

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

MEMBER MURDOCK took no part in the consideration of the above Decision and Order.

#### Intermediate Report and Recommended Order

*Eugene K. Kennedy, Esq.*, for the General Counsel.

*George A. Smith, Esq.*, San Francisco, Calif., for Respondent Swinerton.

*Gardiner Johnson, Esq.*, San Francisco, Calif., for Respondent Burns.

*Mr. A. C. McGraw*, Oakland, Calif., for the Machinists.

#### STATEMENT OF THE CASE

Upon amended charges duly filed by International Association of Machinists, herein called the Machinists, the General Counsel of the National Labor Relations Board,<sup>1</sup> by the Regional Director of the Twentieth Region (San Francisco, California), issued his consolidated complaint dated October 10, 1950, against A. B. Swinerton, Richard Walberg and Howard Hassard, d/b/a Swinerton and Walberg Company, and Jabez Burns & Sons, Inc., herein called respectively the Respondent Swinerton and the Respondent Burns, and, jointly, the Respondents, alleging that the 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. Copies of the charges, the order consolidating cases, the consolidated complaint, and notice of hearing were duly served on the Respondents and the Machinists.

With respect to unfair labor practices, the complaint alleged in substance that the Respondents respectively refused to employ certain named individuals because of their membership in the Machinists or their lack of membership, association or referral from Millwright's Local 102, United Brotherhood of Carpenters & Joiners of America, AFL, herein called the Millwrights.

In their duly filed answers the Respondents denied the commission of the alleged unfair labor practices and that they are engaged in commerce within the meaning of the Act.

Pursuant to notice a hearing was held at San Francisco, California, on November 28, 29, 30, 1950, before William E. Spencer, the undersigned duly designated Trial Examiner. All parties were represented at and participated in the hearing where full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded them.

At the close of the General Counsel's presentation, and, again, upon the completion of the evidence, the Respondents, respectively, moved to dismiss the complaint in its entirety and as to specific allegations. These motions are disposed of by the findings made below. The General Counsel's unopposed motion to conform the pleadings to the proof as to formal matters, was granted. Upon the conclusion of the evidence there was oral discussion of the issues, and the parties were advised that they might file briefs and proposed findings of fact

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<sup>1</sup>The General Counsel and his representative at the hearing will be called herein the General Counsel; the National Labor Relations Board, the Board.

and conclusions of law with the undersigned. The Respondents, respectively, and the General Counsel, filed briefs.

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

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENTS

The Respondent Swinerton is a general contractor in the building construction industry. It has offices in San Francisco, Los Angeles, Oakland, and Sacramento, California. It is a member of the Associated General Contractors of America, Inc. It operates primarily within the State of California, but does occasional construction work outside the State. Currently, it holds a contract for the construction of a distribution plant for Western Electric in Denver, Colorado. Total cost of this construction job is approximately \$1,000,000. It is building an addition to the Standard Oil Building in San Francisco at a cost of more than \$5,000,000. Fifteen percent of this cost is in structural steel, all of which is shipped to the building site; in addition, a substantial amount of materials manufactured outside the State of California is used. It is building an addition to the State Capitol in Sacramento, California, at a cost of over \$5,000,000, and 15 percent of the steel used in that construction is shipped from outside California. It is building a municipal stadium in Denver, Colorado, at a cost of over \$1,000,000. The only location involved herein is a processing plant being constructed for General Foods Company in San Leandro, California. The total cost of this construction is about \$2,000,000. Over 15 percent of this amount is in structural steel which is shipped to the location from outside California. All of the machinery to be used in this building, amounting to 30 percent of the total cost, is shipped to the location from outside California. Most of the lumber, totaling over \$100,000 in value, is shipped to the location from outside California.

The Respondent Burns is a New York corporation engaged in the manufacturing and installing of equipment for the coffee, tea, peanut, and chocolate industries. It maintains its office and plant in New York. The principal raw materials purchased by it are castings, sheet steel, structural shapes, motors, and motor bearings and parts. During the fiscal year ending with 1949, said purchases were in excess of \$100,000 in value, approximately 75 percent of which was shipped to its New York plant from places outside that State. During the same period sales of its finished products were in excess of \$1,000,000, of which approximately 75 percent was shipped to places outside the State of New York. In the instant proceeding, the Respondent Burns was subcontractor to Respondent Swinerton in the construction of a plant for the General Foods Company in San Leandro, Alameda County, California.

It is found that the Respondents, and each of them, are engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act for the Board to assert jurisdiction.

##### II. THE LABOR ORGANIZATION INVOLVED

International Association of Machinists is a labor organization admitting to membership employees of the Respondents.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *The Machinists' representative visits the job site*

Respondents Swinerton and Burns were, respectively, contractor and subcontractor on the construction of a processing plant for the General Foods Company

at San Leandro, in Alameda County, California, during portions of 1949 and 1950.

On or about October 20, 1949, Amos W. Doane, a representative of the Machinists, visited the construction site for the purpose of making a job survey on behalf of the union he represented. While there he introduced himself to Arnold Thomas, Respondent Swinerton's superintendent, and questioned the latter concerning employment of machinists on the job. Thomas informed him that in order to get employment applicants would first have to get clearance from the Millwrights Union.

Doane next saw John Turk, foreman on Respondent Burns' portion of the construction. Turk advised Doane that there was an agreement between his employer and the Carpenters Union requiring that only millwrights with millwright clearances be employed on the job.<sup>2</sup>

### B. *The applications*

On various dates between October 20 and late November 1949, certain members of the Machinists came on the job site, individually or in groups and, allegedly, made application for work. Inasmuch as the bona fides of these applications is in issue, attention is now directed to this phase of the testimony.

It is alleged that Respondent Swinerton refused to employ the following individuals: A. B. Nelson, A. C. Eakle, Albert Stake, E. C. Callaway; and that Respondent Burns refused to employ Arthur Gustaveson, Albert Witaschek, Fred F. Lord, and James M. Gilbert.

First, as to Respondent Swinerton:

Nelson testified that he presented himself at the job site on October 25 and told Thomas, Respondent Swinerton's superintendent, that he was looking for a job installing machinery and briefly outlined to Thomas his job experience. "I was out of work and looking for a job," Nelson testified.

Eakle testified that he saw Thomas at the job site in late October and asked him if he could fill out an application for installing machinery. "I was out of work and the dispatcher at the Machinists Union office told me I might be able to find work out there," Eakle testified.

Stake, Callaway, and a third individual not named in the complaint went to the job site about November 15, and saw Thomas. Callaway, the only one of the group who spoke to Thomas, testified concerning the incident:

I asked him was he doing any installing of machinery; he said yes, and I asked him what craft was doing the work, and he said all crafts. And I asked him, well, did he have any work for the machinists, and he made a big wink with his eye and turned around and said, "I'm wise to you guys," and that was the end of the conversation.

Callaway testified that he was working on a swing shift at the time, on a job in the paper industry at a substantially lower rate than was paid machinists working on Respondent Swinerton's construction job. Stake testified:

Well, I was out of work; I was looking for work and I went down to the Union; some men were talking about the plant, there was hiring out there or something like that, so we went out there.

Turning now to Respondent Burns:

On or about November 14, Witaschek, Gustaveson, Lord, and Gilbert were driven to the job site by a business agent of the Machinists. In the presence of

<sup>2</sup> Doane testified that he also saw and spoke to Aliso Sabrowske, subforeman under Turk on the job. Sabrowske testified that he did not come on the job until October 24. Doane was a credible witness but may have been mistaken about seeing Sabrowske on this occasion. No finding is based on his alleged conversation with Sabrowske.

Witaschek, Lord, and Gilbert, Gustaveson asked Sabrowske, Respondent Burns' subforeman, if he was hiring any men.<sup>3</sup> Sabrowske replied that he would be hiring some millwrights within a few days, but that in order to work, applicants would have to get clearance from the Millwrights Union. Lord testified that the group of four men went to the construction site referred to "specifically to look for jobs" installing machinery. Witaschek testified that prior to visiting the construction site, he went to the Machinists' hall because he was out of a job and wanted to see if anything had "turned up." After visiting the site on November 14 and being told that they could get jobs there only on clearance from the Millwrights, Lord and Gilbert visited the office of the Millwrights Local and asked for working permits. Lord testified that he was told "they didn't give out any working permits, that I would have to sit down and take an examination and pay fifty dollars."

None of the four men at any later date returned to the building site or made further efforts to obtain employment on this job.

#### Conclusions

Nelson, Eakle, Stake, Callaway, Gustaveson, Witaschek, Lord, and Gilbert were all, according to their undisputed testimony, qualified machinists with years of experience. Their testimony as to their qualifications was credible and there is no evidence to the contrary.

I am also of the opinion, and find, that they were bona fide seekers of employment on the respective dates on which they appeared at the job site. Nelson and Eakle, appearing individually, clearly made known to Thomas, Respondent Swinerton's superintendent, their wish to be employed. While Stake did not speak to Thomas personally, it is clear that Callaway acted as his spokesman. Under the circumstances, it was not required that he individually address Thomas. Callaway's interrogation of Thomas whether he had any work for machinists, was sufficient to put the latter on notice that here were men looking for work, and when Thomas retorted, "I'm wise to you guys" and walked away, it could hardly be required that they follow him in order to make their applications more explicit.

Similarly, with the group that approached Sabrowske on November 14, it was not required that each approach the latter individually, inasmuch as it is clear and must have been clear to Sabrowske that Gustaveson was the spokesman for the four of them. When Gustaveson asked Sabrowske if he was hiring any men, and Sabrowske replied that he would be hiring millwrights in a few days but that applicants must have clearance through the Millwrights it would have been but a futile and meaningless gesture for each of the group then to have come forward to make formal application, and this was not required of them in order to establish their status as bona fide applicants. Obviously, there is no particular formality required in the matter of making an application for a job. All that is required is that the employer reasonably be placed on notice that here are men seeking employment, and if by his own improper statements and conduct the employer forecloses an explicit proffer of services, he may not reasonably complain thereafter that no such application was made.

It is Respondents' contention, however, that the Machinists dispatched or brought all of these applicants to the job site for no purpose other than to gather evidence with which to support a charge of unfair labor practices. That a jurisdictional dispute between the Machinists and certain of the building trades

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<sup>3</sup> Though subordinate to Turk, Sabrowske had authority to hire. He testified concerning his own hiring of personnel.

unions, including the Millwrights, exists, and has existed for years, is undoubtedly true. The existence of a jurisdictional dispute and the efforts of one of the disputants to obtain jobs for its members at a location where members of its rival also are employed has but little bearing on the bona fides of the job applicants, without some showing that the applicants had no intention of accepting work if offered them. There is no such showing here. The evidence is to the contrary. It may well be, and is in fact likely in view of Doane's visit to the building site on or about October 20, that the Machinists in dispatching their members to the job site had slight expectation that their members would be employed, but they had every right to test the employment policies of the Respondents by sending actual job applicants to the building site, and their having done so does not impugn the bona fides of the applications where those applications were made by actual job seekers.

It is found that Nelson, Eakle, Stake, Callaway, Gustaveson, Witaschek, Lord, Gilbert, and each of them, were bona fide seekers of employment and made such applications for employment as could reasonably be required of them under the circumstances.

### C. *The refusals*

When Nelson applied to Respondent Swinerton's Superintendent Thomas for work as a machinist, he was told by the latter that he, Thomas, "used only members of the Millwrights Organization for that type of work." When Eakle asked Thomas if he could fill out an application for installing machinery, Thomas asked him if he belonged to the Millwrights and when Eakle answered, no, that he belonged to the Machinists, Thomas said, "I'm sorry, I can't do anything for you . . . We are all tied up with the Millwrights Union." When Callaway, accompanied by Stake, asked Thomas if he had any work for machinists, Thomas retorted, "I'm wise to you guys," and walked away.

Respondent Burns' Sabrowske informed Gustaveson, who as spokesman for himself, Witaschek, Lord, and Gilbert had inquired concerning employment, that he would be hiring millwrights within a few days, but that in order to work applicants would have to get clearance from the Millwrights Union. Sabrowske told Nelson that if the "policy" on hiring was changed and he could use Nelson at a later date, he would call him. Nelson gave him his name, address, and telephone number but Sabrowske never called him.<sup>4</sup>

These findings are based on the credited testimony of the General Counsel's witnesses. Sabrowske, a member of the Millwrights when employed by Respondent Burns, notified the Millwrights of his employment shortly after going on the job, and admitted that he called the Millwrights to report on men that went to work on the job under him. James W. Curry, who employed some 25 men for machinist or millwright work<sup>5</sup> for Respondent Swinerton, notified the Millwrights, with whom he was affiliated, when men were employed by him.<sup>6</sup>

<sup>4</sup> It is not alleged that Respondent Burns discriminated against Nelson but Nelson's testimony regarding his conversation with Sabrowske supports and corroborates Gustaveson.

<sup>5</sup> The terms are used interchangeably, referring to the same general type of work.

<sup>6</sup> Curry's testimony.

Q. And when other men were employed there did you tell the Union that they had come to work?

A. I imagine I did, yes; that is our practice.

Q. And did you receive from these men, any slips or notes or memoranda from the Union that were signed by Mr. Chowning?

A. I probably did.

The testimony of Sabrowske and Curry generally corroborates the General Counsel's witnesses.<sup>7</sup>

It is clear from the entire testimony that no one was hired on the General Foods Company job by either the Respondent Swinerton or the Respondent Burns who to their knowledge was not a member of the United Brotherhood of Carpenters & Joiners of America, or one of the unions affiliated with it. This could hardly have been mere coincidence. Whether or not new employees secured clearance slips from the Millwrights or others of the building trades unions, is not dispositive of the issue, although it is clear that some of them did. It is also not controlling that the written agreement between the Central California Chapter of the Associated General Contractors of America, Inc., of which the Respondent Swinerton was a member, and the Bay Counties District Council of Carpenters, A. F. L., provided for no more than a union shop upon compliance with Sections 8 (a) (3) and 9 (d) of the Act. The essential and determinative fact is that despite this provision in the contract, in *practice* the Respondents maintained a closed shop, employing only members of unions affiliated with the Bay Counties District Council of Carpenters, A. F. L.<sup>8</sup> Were this not the fact, the Respondents surely would have come forward with evidence showing that they had, with knowledge, hired persons not affiliated with any of the unions comprising the Bay Counties District Council of Carpenters. The only reasonable inference to be drawn from the evidence before me is that their hiring policies excluded the hiring of such individuals. I believe and find this to be the fact.

The Respondents in their briefs argue two additional points which merit consideration.

It was the testimony of Turk, Sabrowske, and Curry that in the main, or altogether as the case may be, they hired persons who had worked with them or under their supervision on prior construction jobs. The Respondent argues therefrom, that regardless of their affiliation with the Machinists, the persons herein alleged to have been discriminatorily denied employment, would not have been employed, inasmuch as none of them had worked with or under the persons in charge of the San Leandro job. The difficulty with the argument is that there is no way to test its validity, and that is because of the Respondents' illegal hiring policy, a policy which excluded *consideration for hiring* of any person not affiliated with one of the unions comprising the Bay Counties District Council of Carpenters. It is also obvious that the Respondents had no general hiring policy which required that applicants must have worked previously under

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<sup>7</sup> Turk denied generally that he told anyone seeking employment that he would have to get clearance from a union. This denial is not credited. Turk, though no more reluctant a witness than Sabrowske, was far less candid and forthright in his testimony. The following excerpt from his testimony illustrates his evasiveness:

Q Do you know whether or not Mr. Sabrowske is a member [of the Millwrights Union]?

A I never asked him.

Q. The question is, do you know?

A. Well, I can't swear to it.

Q Do you have any idea?

A No, sir; I might as well say no, because it's none of my business.

<sup>8</sup> Thomas' general denials, of much the same order, also are not credited. The undersigned rejected evidence proffered by the Respondents which tended to show that on the basis of statements by the General Counsel and conferences addressed by him, there was a reasonable expectation that the Bay Counties District Council of Carpenters, A. F. L., would have been certified as bargaining representative of Respondents' employees had the Board's election machinery not "broken down." The most that such testimony could stand for would be a plea in confession and avoidance.

their supervisors in order to qualify for employment. As a matter of fact, both Sabrowske and Curry testified that they hired some personnel at the job site and it could have been no more than adventitious if persons so hired worked previously with these supervisors.

A second contention, more persuasive than the first, is that there were no job vacancies for machinists on the dates on which the persons here alleged to have been discriminatorily rejected, applied. It appears that hiring on Respondent Burns' job occurred on various dates between November 2 on which date two machinists were hired, and December 2. Hiring of machinists on Respondent Swinerton's job began on or about December 5. It is clear, therefore, and is found, that there was no work available for machinists on the dates on which the persons herein involved applied. Beginning December some 50 machinists were hired by the Respondent Swinerton, and a lesser number were hired on various dates by the Respondent Burns. The issue is, whether, in view of their having been informed, in effect, that they could obtain work only upon affiliation with or clearance from the Millwrights, the applicants were required to return to the job site and renew their applications on a date on which the Respondents were actually hiring machinists. In my opinion, contrary to the contentions of the Respondents, this issue is disposed of by the Board's decision in the *Daniel Hamm, Drayage Company* case.<sup>9</sup> In that case, as here, there was no work immediately available for the applicants on the dates on which applications were made. There, as here, after the first application, the complainants did not reapply. While the discriminatory hiring practices were perhaps more explicit in the *Daniel Hamm* case than here, they are nevertheless firmly established here, and there is not the slightest evidence that the Respondents' hiring policies underwent any change during the period of hiring. All reasonable inferences are to the contrary. In these circumstances, the applicants having made their initial application and having been informed of the Respondents' discriminatory hiring policy, "were not obliged to continue making the useless gesture of continuous reapplication in order to establish the Respondent's responsibility for the discrimination practiced against them."<sup>10</sup>

#### Conclusions

It is found that by Respondent Swinerton's refusal to employ Nelson, Eakle, Stake, and Callaway, and by Respondent Burns' refusal to employ Gustaveson, Witaschek, Lord, and Gilbert, because of their membership in the Machinists or their lack of membership, association, or referral from the Millwrights, the Respondents, respectively, discriminated against these applicants in regard to their hire and tenure of employment, thereby discouraging membership in the Machinists while encouraging membership in the Millwrights, in violation of Section 8 (a) (3) of the Act, and also thereby interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act.

<sup>9</sup> *Daniel Hamm Drayage Company, Inc.*, 84 NLRB 458, 460. See also: *Julius Resnick, Inc.*, 86 NLRB 38; *Salant & Salant, Incorporated*, 87 NLRB 215; *Russell Manufacturing Company, et al.*, 82 NLRB 1081; *Jos N Fournier, Rome Lincoln-Mercury Corporation*, 86 NLRB 397. In reaching the conclusions herein, I have considered also decisions cited by the Respondents, notably *Wilson Co.*, 123 F. 2d 411, 418; *R. R. Donnelley and Sons Company*, 60 NLRB 635, 640; *Valley Fruit Company*, 59 NLRB 896, 902; *Piedmont Shirt Co.*, 49 NLRB 313, 319; *Antonio-Tomasell*, 46 NLRB 375; *F. W. Poe Mfg Co.*, 119 F 2d 45, 48, and am of the opinion that in none of these cases was the employer's discriminatory hiring policy so clearly enunciated to the applicant for employment as to make further application futile.

<sup>10</sup> *Daniel Hamm Drayage Company, Inc.*, 84 NLRB 458, 460.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

It having been found that the Respondents; and each of them, have engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act, it will be recommended that they cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It has been found that the Respondent Swinerton discriminated against A. B. Nelson, A. C. Eakle, Albert Stake, and E. C. Callaway, and the Respondent Burns discriminated against Arthur Gustaveson, Albert Witaschek, Fred F. Lord, and James M. Gilbert, in regard to their hire and tenure of employment, by their refusal, respectively, to hire those individual applicants on the San Leandro building construction job. The job was completed in the summer of 1950, and for that reason no recommendation of reinstatement will be made.<sup>11</sup> It will be recommended, however, that the Respondent Swinerton make Nelson, Eakle, Stake, and Callaway, and that the Respondent Burns make Gustaveson, Witaschek, Lord, and Gilbert, whole for any loss of earnings suffered by them by reason of the Respondents' discrimination against them, by payment to them of a sum of money equal to that which they would have earned as wages from the date of the refusal of employment to the date on which the employment normally would have been terminated, absent discrimination, less their net earnings<sup>12</sup> during said period. The back pay shall be computed in the manner established by the Board in *F. W. Woolworth Company*<sup>13</sup> and the Respondent, and each of them, shall make such records available as is hereinafter provided.<sup>14</sup> The General Counsel seeks also an order requiring the Respondents to place the persons discriminated against on a preferential list for future hirings on any new projects on which the Respondents may be engaged in this same general locality in the future. Because of the discontinuous nature of construction jobs and generally prevailing hiring practices in this industry which is customarily done on a job-to-job basis, it does not appear to the undersigned that a preferential list is a feasible or necessary remedy, and therefore no recommendation will be made that such a list be established and maintained in this case.

The unfair labor practices found to have been engaged in by the Respondents are of such character and scope that in order to insure to employees and prospective employees their full rights guaranteed them by the Act, it will be recom-

<sup>11</sup> As to the Respondents' argument that the issue is moot due to the completion of the job, see *Local 74, United Brotherhood of Carpenters and Joiners of America, et al.*, 181 F. 2d 126 (C. A. 6), April 4, 1950. 25 L. R. R. M. 2612.

<sup>12</sup> *Crossett Lumber Co.*, 8 NLRB 440, 497-98.

<sup>13</sup> 90 NLRB 2890.

<sup>14</sup> The duty of the General Counsel to show the availability of the applicants at the time jobs became available, was argued at the hearing. Upon reflection, it appears to the undersigned that this is a matter properly disposed of in compliance. Clearly, there is nothing in the recommendations and order contained herein which would require the Respondents to pay back pay to persons who would have been unwilling or unable to accept employment at the time work became available.

mended that the Respondents, and each of them, cease and desist from in any manner interfering with, restraining, or coercing their employees or prospective employees in their right to self-organization.<sup>15</sup>

On the basis of the above findings of fact and upon the entire record in the case, I make the following:

#### CONCLUSIONS OF LAW

1. The International Association of Machinists is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of A. B. Nelson, A. C. Eakle, Albert Stake, E. C. Callaway, Albert Witaschek, Fred F. Lord, Arthur Gustaveson, and James M. Gilbert, thereby discouraging membership in International Association of Machinists and encouraging membership in labor organizations affiliated with the Bay Counties District Council of Carpenters, A. F. L., including Millwrights Local 102, the Respondents, respectively, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing their employees, respectively, in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (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.

[Recommended Order omitted from publication in this volume.]

<sup>15</sup> *May Department Stores v. N. L. R. B.*, 326 U. S. 376.

#### INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 10 and ROOSEVELT STAFFORD

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AND  
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,  
LOCAL 10 and JOSEPH SORCE. *Cases Nos. 20-CB-87 and 20-CB-89.*  
*June 6, 1951*

#### Decision and Order

On October 30, 1950, Trial Examiner Eugene F. Frey issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents, International Longshoremen's and Warehousemen's Union, herein individually called the International, and International Longshoremen's and Warehousemen's Union, Local 10, herein individually called the Local, 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. Thereafter,