

Second Region in writing as to what steps the Respondent has taken to comply with the terms of the Decision and Determination of Dispute.

LOCAL 428, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. L., AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY *and* NICHOLAS PALLADINO, CHARLES PALLADINO, FRED PALLADINO, WILLIAM PALLADINO, AND FRANK PALLADINO, INDIVIDUALLY AND AS CO-PARTNERS, TRADING AS N. PALLADINO BROTHERS. *Case No. 4-CB-63. August 30, 1951*

Decision and Order

On March 9, 1951, Trial Examiner C. W. Whittemore 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. Thereafter, the Respondents filed exceptions to the Intermediate Report, and a supporting brief, and the General Counsel filed a 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, Reynolds, and Murdock].

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

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 exceptions and briefs, and the entire record in the case. We find merit in the Respondents' contention that the Board, in the exercise of its discretion, should decline to assert jurisdiction in this case.

Palladino, the charging party and the employer of the employees involved herein, is engaged in the plumbing and heating business in Pottstown, Pennsylvania, and does an annual gross business of approximately \$138,000, all of which is local. Palladino's annual purchases amount to approximately \$73,500, of which purchases worth approximately \$10,800 are shipped directly to Palladino from outside the State. Palladino was hired as a subcontractor to install the plumbing and heating system in a supermarket being constructed for Ameri-

can Stores Company by Murrell Construction Company. Palladino's contract on this project was for \$2,122.20. Palladino is not a member of General Building Contractors Association.

Murrell, a general contractor in Pennsylvania, has an annual gross business of approximately \$500,000. Its annual purchases amount to approximately \$45,000. Almost all these purchases are made from local suppliers, but originate outside the State. In May 1949, Murrell began a project outside the State valued at approximately \$20,600, and completed this project in January 1950. During 1948, Murrell performed construction work for American Stores Company for contract prices totaling approximately \$244,900. Some of these projects were not completed until 1949. In 1949, it began construction of the Pottstown supermarket, where the present case arose, for a total contract price of \$98,800. This contract price includes payments to various subcontractors totaling approximately \$76,000. The total cost of materials for the Pottstown supermarket was approximately \$43,000, of which materials worth about \$9,000 were brought directly from outside the State. The Pottstown project was completed in 1950. Murrell is a member of General Building Contractors Association.

On the basis of these facts, we find that none of the tests for the assertion of jurisdiction under the criteria recently laid down by the Board have been met, and, accordingly, that it would not effectuate the purposes of the Act to assert jurisdiction in the instant proceeding.¹ We shall therefore dismiss the complaint.

Order

IT IS HEREBY ORDERED that the complaint issued herein against the Respondents, Local 428, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, A. F. L., and Building and Construction Trades Council of Philadelphia and Vicinity, be, and it hereby is, dismissed.

MEMBER REYNOLDS, dissenting:

The alleged 8 (b) (1) (A) and 8 (b) (2) unfair labor practices in this case involve the validity of a contract between the Respondents and the Association, which has approximately 163 members and, according to a stipulation in the record, is in "interstate commerce." Under the terms of the contract, members of the Association apparently agreed to employ "either directly or indirectly" none but members of the Respondents. In effect, the contract purports to

¹The relevant criteria established by the Board for asserting jurisdiction are set forth in *Stanislaus Implement and Hardware Company, Limited*, 91 NLRB 618; *Hollow Tree Lumber Company*, 91 NLRB 635; *Federal Dairy Co., Inc.*, 91 NLRB 638; *Dorn's House of Miracles, Inc.*, 91 NLRB 632; and *The Rutledge Paper Products, Inc.*, 91 NLRB 625.

cover all individuals who work on construction projects undertaken by association members, including employees of subcontractors who are not parties to the agreement. Indeed, one of the particular unfair labor practices alleged concerns the invocation of this contract by the Respondents because Murrell, an association member, let a subcontract to Palladino who employed nonunion help. Such a controversy is representative of the type of labor dispute involving the legality of the contract which could result in a complete cessation of all construction work by association members. It can hardly be denied that under these circumstances the impact on commerce would be very substantial. In my opinion, therefore, it is necessary to consider the commerce facts with respect to the Association in determining whether to exercise jurisdiction and upon the assumption that the Association is engaged in commerce, as conceded by the parties, I would assert jurisdiction.²

² See *Vaughn Bowen, et al.*, 93 NLRB 1147; *Federal Stores Division of Spiegel, Inc., et al.*, 91 NLRB 647; *Carpenter & Skaer, Inc., et al.*, 90 NLRB 417.

Intermediate Report

STATEMENT OF THE CASE

Upon a charge duly filed by Nicholas Palladino, Charles Palladino, Fred Palladino, William Palladino, and Frank Palladino, individually and as copartners, trading as N. Palladino Brothers, herein referred to as Palladino, the General Counsel of the National Labor Relations Board, herein respectively called General Counsel and the Board, on behalf of the Board by the acting Regional Director for the Fourth Region (Philadelphia, Pennsylvania) on August 30, 1950, issued a complaint against Local 428, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, A. F. L., and Building and Construction Trades Council of Philadelphia and Vicinity, herein respectively called Local 428 and Council and collectively as the Respondents, alleging that the Respondents had engaged and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and (2), and Section 2 (6) and (7)¹ of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charges were duly served upon the Respondents; copies of the complaint and notice of hearing were duly served upon the Respondents, Palladino, and Murrell Construction Company, Inc., herein called Murrell.

With respect to unfair labor practices, the complaint, as amended at the hearing, alleges that: (1) Palladino and American Stores Company, herein called Acme, are engaged in commerce within the meaning of the Act; and (2), pursuant to an existing illegal contract between the Council and General Building Contractors Association, Incorporated,² herein called the Association,

¹ Although the complaint nowhere specifically refers to Section 2 (6) and (7) of the Act, the Trial Examiner considers the oversight inadvertent. The complaint, in its closing allegation, alleges that activities theretofore described "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," language akin to that in Section 2 (6) and (7) and, in the opinion of the Trial Examiner, effectively invoking the two subdivisions of said section.

² Also known as, and named in the complaint, before amendment to conform to proof, as Associated General Contractors of America, Philadelphia Chapter.

in September 1949 the Respondents Local 428 and Council caused Murrell, a general contractor, to cancel a subcontract with Palladino, thereby causing Palladino to terminate the employment of its employees because said employees were not members of the Respondent Local 428.

Thereafter the Respondents filed a joint answer, in which they denied the commission of the alleged unfair labor practices.

Pursuant to notice, a hearing was held at Pottstown and Philadelphia, Pennsylvania, on December 5 and 6, 1950, before the undersigned duly designated Trial Examiner. The General Counsel and the Respondents were represented by counsel. Both counsel participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. Ruling was reserved upon the Respondents' motion to dismiss the complaint; disposition of said actions is made in the findings, conclusions, and recommendations below. Briefs were received from the General Counsel and the Respondents on February 12, 1951.

Upon the entire record, and from his observation of the witness, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE ASSOCIATION AND ITS MEMBERS

The Association, of Philadelphia, Pennsylvania, is an organization comprised of 83 general contractors and about 80 subcontractors and building material dealers engaged in the building-construction industry in what is known as the "Philadelphia Five-County Area," which includes the city of Philadelphia and 5 surrounding counties.

Its purpose, among other things, as described in its bylaws, is:

To establish various standard contracts and to coordinate such contracts so that the respective interests of owners, General Contractors, subcontractors, manufacturers and dealers may be properly protected.

Article X, Section 1, of the same bylaws, reads in part:

The President shall appoint a Labor Conference Committee . . . The duties of this Committee shall be to confer with similar committees from Labor Organizations and to pass on all questions that may arise between this Association and Labor Organizations relating to the execution of agreements, the establishment of wage rates, and the settlement of all questions that may arise in connection therewith . . .

Article XV, Section 1, of said bylaws reads in part:

No contract shall be entered into by any member of this Association with any labor organization or with men employed in any capacity that may be at variance with or contrary to the agreements made by their Association . . .

Murrell is a member of the Association.

At the hearing General Counsel contended, and counsel for the Respondents conceded, that the Association and its members are engaged in commerce. In consonance with Board decisions in *Carpenter and Skaer, Inc., et al.* (90 NLRB 417 and 93 NLRB 188) the Trial Examiner concludes and finds that (1) the Association and its members, specifically Murrell, are engaged in commerce within

the meaning of the Act,³ and (2) that because these proceedings arise from a contract between the Council and the Association the Board should exercise jurisdiction.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 428 and the Council are labor organizations within the meaning of Section 2 (5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The kernel of this case is the problem as to whether or not the Council and Local 428 violated the Act by involving an existing contract between the Council and the Association, thereby causing Murrell, a member of the Association, to cancel its subcontract with Palladino, thereby causing Palladino to discharge employees for the reason that they were not members of Local 428.

B. *The facts*

In September 1949, Murrell was engaged in erecting, for Acme, a "Super Market" in Pottstown. Early the same month Murrell awarded to subcontractor Palladino the job of installing the plumbing and heating system. About September 19, Palladino began this work, employing for the purpose six laborers and two mechanics. On the same day Nicholas Palladino was approached on the job site by Business Agent Banks of the Building and Common Laborers Union. Banks asked if Palladino's laborers were "union." When Palladino said "No," Banks asked if he did not know it was a union job. Palladino again replied in the negative and Banks left.

On September 22, Business Agent Dwyer of Local 428 approached Palladino with similar questions. Later that day Dwyer sent the following letter to Murrell:

I visited the new construction job of the American Stores in Pottstown, Pennsylvania, today and talked with Nick Palladino of the same company. I asked him about the job and he informed me he was told it was not necessary for him to be union; also said he had both the plumbing and heating. I, in turn, told him I thought he had been misinformed about the job being nonunion, and intended to investigate.

Upon returning to my office I looked over the list of contractors signed with the Building Trades Council of Philadelphia and vicinity, and found that your company is a member of the Associated (sic) General Contractors of Philadelphia.

So this is to inform you that the Trades Council will have a meeting tomorrow morning September 23, 1949, and I am citing your Company for a violation of your agreement.

The said Nick Palladino Company are not signed with the United Association or Local No. 428 which has jurisdiction over Pottstown.

³ Although contended, litigated, and argued, again apparently by oversight General Counsel failed in the complaint to allege, as in the cases of Acme and Palladino, that either the Association or Murrell were "engaged in commerce within the meaning of the Act." However, the Trial Examiner does not consider the defect sufficiently serious to warrant dismissal or amendment of the complaint. In view of the nature of the controversy, described fully hereinafter, the Trial Examiner considers it unnecessary to resolve the questions as to whether Murrell is "in commerce" because of its business done with Acme, concededly in commerce, or as to whether Palladino, a subcontractor not an association member, is likewise "in commerce" within the meaning of the Act.

Hoping we can straighten this job out 100% to the satisfaction of all concerned.

The Council, referred to in Dwyer's letter, is an organization comprised, according to its bylaws, of members which are "local unions in good standing with International Unions affiliated with the Building and Construction Trades Department" of the American Federation of Labor. Its purpose, according to Joseph F. Burke, its president, is to protect, advance, and represent the interests of the local unions which are its members. Local 428 is a member of the Council. At the time of this controversy in 1949, and at the time of the hearing, there existed an agreement, executed in January 1943, between the Association and the Council which contains this significant provision:

1. It is agreed that the members of the Party of the First Part [Association] will employ, either directly or indirectly, none but members affiliated with the Party of Second Part [Council].

On September 26, Murray Eisman, president of Murrell, was visited by a committee of the Council, including Dwyer and Banks. Eisman was informed by the committee, in effect, that if Palladino were not removed the unions would call their men off the job.⁴ Dwyer reminded him that as a member of the Association he was required to live up to the association agreement. The same day Eisman wrote, in part, to Palladino:

. . . This is to advise that we are terminating your employment . . . as of Wednesday, September 28, 1949 . . . As members of the General Builders Contractors Association, we are bound by contract signed by the Association with the various unions concerned and must live up to our contractual agreement.

On September 28 Palladino and his eight employees left the job. The following month Palladino, in consideration of \$2,000, released Murrell from any claim arising out of the contract between them.

C. Conclusions

The Trial Examiner concludes and finds that the Council and Local 428, by involving the provision in the Association-Council agreement above quoted, caused Murrell to cancel its contract with Palladino, and Palladino to terminate the employment of the eight employees on the Acme job.

It is General Counsel's contention, opposed by Local 428 and the Council, that by this act Local 428 and the Council "caused an employer to discriminate against an employee in violation of Section 8 (a) (3) of the Act, proscribed by Section 8 (b) (2)." Without reviewing here the able and erudite arguments advanced by opposing counsel in their briefs, the plain fact appears to be precisely as claimed by General Counsel. Section 8 (a) (3) makes illegal employment discrimination "to encourage or discourage membership in any labor organization,"—unless there exists a legal "union shop" agreement requiring membership in a labor organization. Here there is no claim that Palladino's employees were removed from the job because of a legal "union shop." On the contrary, the contract involved was a "closed shop" agreement, clearly not countenanced by the Act. However devious its channels, as argued by counsel for Local 428 and the Council, a single transaction occurred. Murrell, an employer, bound by his membership obligations in the Association to observe the closed-shop agreement between the Association and the Council, was caused by action of

⁴ This finding rests upon Eisman's credible testimony.

Local 428 and the Council to effect discrimination against eight employees for the sole reason, so far as the record shows, that at least two of them were not members of Local 428. That these employees were not on Murrell's payroll, but Palladino's, is no valid defense. Neither Section 8 (a) (3) nor Section 8 (b) (2) confines application of the Act to discrimination by an employer against employees on his own payroll. Eight employees were working on the Acme job on September 28, 1949, presumably with reasonable expectation of continuing this employment until the job was finished. That day they were dismissed from this employment for the reason that two of them were not members of Local 428. Causation of their dismissal originated in action by Local 428 and the Council, invoking an illegal closed-shop provision.

In summary, the Trial Examiner concludes and finds that on September 28, 1949, Local 428 and the Council, both being labor organizations, by invoking said contract "caused an employer to discriminate against an employee in violation of subsection (a) (3),"⁵ thereby violating Section 8 (b) (2) of the Act.

The same facts support the conclusion, and the Trial Examiner further finds, that by invoking the above-described closed-shop contract, and causing their discharge, Local 428 and the Council restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act,⁶ thereby violating Section 8 (b) (1) (A) of the Act.⁷

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

Having found that the contract of January 1943 between the Association and the Council contains illegal provisions, the Trial Examiner will recommend that the Respondents cease and desist from giving effect to the entire contract,⁸ and from entering into, renewing, or enforcing any agreement which requires membership in Local 428 or other members of the Council as a condition of employment, unless such agreement is authorized as provided by the Act.

Having found that the Respondents engaged in unfair labor practices the Trial Examiner will recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondents engaged in unfair labor practices by causing Murrell to discriminate against eight employees of Palladino, encouraging membership in Local 428, and thereby restraining and coercing employees in the exercise of rights guaranteed by the Act. Since the job has been completed, reinstatement will not be recommended. No recommendation that any employee be made whole will be included for the following reasons: (1) None

⁵ Quotation is from Section 8 (b) (2) of the Act.

⁶ Relevant excerpts from Section 7 read: "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities. . . ."

⁷ *Carpenter & Skaer, Inc., et al.*, 93 NLRB 188.

⁸ Nothing in these recommendations shall be deemed to require parties to said contract to vary or abandon any substantive provisions of such agreement, not herein found illegal, or to prejudice the assertion by employees of any rights they may have acquired thereunder.

of the employees involved was identified by name or offered as a witness at the hearing, nor were any employees' names listed either in the charge or the complaint; (2) the only evidence bearing upon the point shows that Palladino's contract price for the job was \$2,000, and that he received this amount from Murrell upon releasing his claim; in the absence of contrary evidence it must be presumed that he, in turn, made his employees whole for the amount presumably included in his original bid; and (3) because of the foregoing facts it does not appear that it would effectuate the policies of the Act to recommend back pay.⁹

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

CONCLUSIONS OF LAW

1. Local 428, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, A. F. L., and Building and Construction Trades Council of Philadelphia and Vicinity are labor organizations within the meaning of Section 2 (5) of the Act.

2. By enforcing the contract of January 1943, and by causing an employer to discriminate against employees in violation of Section 8 (a) (3) of the Act, the above-named labor organizations have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

3. By restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the above-named labor organizations have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) 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.]

Appendix A

NOTICE TO ALL OFFICERS, REPRESENTATIVES, AGENTS AND MEMBERS OF LOCAL 428, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. L., AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY

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

WE WILL CEASE performing or giving effect to our contract of January 1943, with GENERAL BUILDING CONTRACTORS ASSOCIATION, INCORPORATED.

WE WILL NOT enter into, renew, or enforce any agreement with GENERAL BUILDING CONTRACTORS ASSOCIATION, INCORPORATED, which requires employees to be members of, to join, or to maintain membership in our organizations, or any of them, unless or until such agreement has been authorized as provided in the National Labor Relations Act, as amended.

WE WILL NOT cause or attempt to cause any employer to discharge or otherwise discriminate against employees in regard to their hire or tenure of employment or any term or condition of employment in violation of Section 8 (a) (3) of the Act.

WE WILL NOT in any manner restrain or coerce employees of any employer in the exercise of the rights guaranteed by Section 7 of the Act, except to

⁹ Section 10 (c) states, "back pay may be required," language which is not mandatory.

the extent that such right may be 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.

LOCAL 428, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. L.

By -----
(Representative) (Title)

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY.

By -----
(Representative) (Title)

Dated -----

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

WEBB-LINN PRINTING COMPANY *and* CHICAGO PRINTING PRESSMEN'S UNION No. 3 AND FRANKLIN UNION No. 4, SUBORDINATE TO THE INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AFL, PETITIONERS.¹ *Case No. 13-RC-1994. August 30, 1951*

Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Irving M. Friedman, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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, Reynolds, and Murdock].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The Petitioners seek a unit of all pressmen, apprentice pressmen,² press assistants, and apprentice press assistants at the Employer's printing plant in Chicago, Illinois, excluding office, professional, and all other employees, and all supervisors as defined in the Act. The Employer takes the position that the pressmen and press feeders or press assistants comprise two separate units. However, in the event

¹ The names of the Petitioners appear as amended at the hearing.

² The record reveals that there are no apprentice pressmen as such and that the pressmen are recruited from press feeders, assistant press feeders, and press assistants.