

In the Matter of COLONIE FIBRE COMPANY, INC. and TEXTILE WORKER'S UNION OF AMERICA, CIO and UNITED TEXTILE WORKERS OF AMERICA, AFL, AND LOCAL 446, UNITED TEXTILE WORKERS OF AMERICA, AFL, PARTIES TO THE CONTRACT

Case No. 2-C-5895

SUPPLEMENTAL DECISION

October 14, 1946

On July 18, 1946, the Board issued its Decision and Order herein.<sup>1</sup> Upon further consideration thereof, the Board hereby amends said Decision and Order, *nunc pro tunc*, as of July 18, 1946, by striking the fifth and sixth paragraphs and substituting therefor the following:

While, like the Trial Examiner, we reach the same determination that the discharges of Blais and Blair were discriminatory, our finding is based on our conclusion that the maintenance-of-membership clause contained in the second contract between the AFL and the respondent is invalid because of its retroactive feature.<sup>2</sup> From March to May 1945, during the pendency of a question concerning representation, there was no contract in effect between the respondent and the AFL. Yet, upon the resolution of the representation question a new contract was executed with its maintenance-of-membership provision made retroactive in effect so as to cover the period during which the AFL's status as the employee representative was in doubt and during which contractual relations had lapsed. We find that this clause in the contract required that on the date of its execution, as a condition of further employment, all employees who were members of the AFL 15 days after August 28, 1944, must have maintained membership in the AFL for a period starting 8½ months prior to May 23, 1945.<sup>3</sup> It

<sup>1</sup> 69 N L R B 589

<sup>2</sup> In so holding, we are not passing on the validity of the contract as a whole which, though executed by the parties on May 23, 1945, was made retroactive to March 14, 1945; our finding relates solely to the maintenance-of-membership clause in this contract.

<sup>3</sup> This is a construction of the contract dictated both by its terms and by the obvious intent of the parties. The old contract had required employees covered by the maintenance-of-membership clause to remain members of the AFL until its expiration on March 14, 1945, by the terms of the new contract all such employees must have remained members not only during this period but from March 14, 1945, until May 23, 1945, as well, in order to meet the retroactive requirements of the new contract signed on the later date. Moreover, that the parties intended this provision to effect the immediate dismissal of those who had not maintained their membership during the interim period from March 14, 1945, to May 23, 1945, is borne out by the fact, among others, that on the very day of the contract's execution the AFL made its first demand for the discharge of Blais and Blair.

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included, therefore, a period of over 2 months during which no contract was in effect between the respondent and the AFL and subjected to the penalty of discharge those who had not lived up to its requirements during that period.

The validity of such a contractual provision can be upheld only if it falls within the protection of the proviso to Section 8 (3) of the Act.<sup>4</sup> That proviso, in sanctioning contracts which require membership in a union as a condition of employment, does not sanction contracts which require *past* membership as such a condition. A construction permitting such a retroactive requirement would be inconsistent both with the terms of the Act and with the principle of free self-organization which the Act is designed to protect.

The Act grants employees the right to self-organization and the right to membership or non-membership in labor organizations (Sections 1, 7, 8 (1), and 8 (3)). The "precise nature and limits" of the exception to these rights contained in the proviso to Section 8 (3) must be literally observed. *N. L. R. B. v. Electric Vacuum Cleaner Co.*, 315 U. S. 685, 695. See also *U. S. v. Dickson*, 15 Pet. 141, 165; *Fleming v. Hawk Eye Pearl Button Company*, 113 F. (2d) 52, 56 (C. C. A. 8); *Thompson v. U. S.*, 258 Fed. 196, 201 (C. C. A. 8), certiorari denied 251 U. S. 553. The proviso permits contracts which require union membership *during their term* of all employees including those who have not joined the contracting union prior to execution of the contract. But to construe the proviso as also permitting contracts which require membership in the past would bring about the very result condemned by the Supreme Court in *Wallace Corporation v. N. L. R. B.*, 323 U. S. 248, aff'g 141 F. (2d) 87 (C. C. A. 4), enf'g 50 N. L. R. B. 138. The burden of the Supreme Court's decision in that case was that since the Act "was designed to wipe out such discrimination in industrial relations," the closed-shop proviso could not be used to penalize employees for not having belonged to the victorious union at a time when they were within their rights in not belonging (321 U. S., at pp. 255-256).

It would make no difference even if we were to assume (1) that the contract gave Blais and Blair the opportunity to remain employees by paying up their past dues after its execution, or (2) that, whether or not the contract so provided, Blais and Blair were given such opportunity. Either assumption would serve only to confirm the fact that the contract required past in addition to present membership.

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<sup>4</sup> This proviso states that nothing in the Act "shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

Not only a reasonable construction of the proviso to Section 8 (3), but also effectuation of the policies of the Act, dictates the result we reach. Approval of a contract which made it possible for the contracting union to require payment of past dues as a condition of future employment would have a seriously detrimental effect upon freedom of organization. The period from March 14, 1945, to May 23, 1945, to which this contract would apply, was one during which Blais and Blair and all other employees of the respondent were free to exercise without restraint the right to select and change representatives and the right to be or refrain from being members of any union. This freedom would be under substantial restraint if employees knew that they would have to pay, in a lump sum, dues which they were free to refrain from paying currently if the union from which they withheld support was eventually chosen. Legalization of this practice would provide a device for effectively constraining those who have not remained members of the dominant union at a time when they are under no obligation to do so.<sup>5</sup> In all cases where it appeared likely, or even possible, that a maintenance-of-membership or closed-shop contract might follow the selection of a representative, the employees would be impelled to speculate as to which organization would ultimately win the support of the majority in order to avoid the possibility of being faced with the requirement of paying a large sum in back dues. Hence in actual practice the employee's right to support and select the bargaining representative he wanted would largely be reduced to the right to guess which of two or more competing unions would ultimately be chosen by the majority. Thus, approval of the contract before us would substantially impair freedom of choice at a time when the statute requires such freedom. To permit this impairment would make it difficult for advocates of a change in representation to present their case to their fellow employees.

We conclude that the maintenance-of-membership clause of the 1945 contract, being retroactive in effect to 15 days after August 28, 1944, is not within the protection of the proviso to Section 8 (3) of the Act and is invalid. Since Blais and Blair were discharged pursuant to this clause because they were not members in good standing with the AFL, their discharges were discriminatory. We find that by discharging Blais and Blair under the circumstances hereinabove set forth, the respondent discriminated against them in regard to the

<sup>5</sup> Cf. *International Association of Machinists, Tool and Die Makers Lodge No. 85, et al. v. N L R B.*, 110 F (2d) 29, 43 (App D C), aff'd 311 U S. 72, in which the Court of Appeals stated, "The practice of antedating contracts may be legitimate or otherwise according to varying circumstances. Whatever its effect between the parties, rights of third parties should not be affected adversely, particularly when they involve interests so important and controversial as collective bargaining and the closed shop. To stamp with judicial approval a practice so questionable would invite evasion of the statute's intended protections."

hire and tenure of their employment, discouraged membership in the CIO, encourage membership in the AFL, and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.<sup>6</sup>

**MR. JAMES J. REYNOLDS, JR.**, took no part in the consideration of the above Supplemental Decision.

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<sup>6</sup> Although Blais and Blair did not pay dues in the AFL from January through March 1945, it is unnecessary to pass on the effect of such non-payment, inasmuch as the original contract expired on March 14, 1945, and no demand was made during the effective period of this contract that these employees be discharged for failure to pay dues. Since the maintenance-of-membership provision of the 1945 contract was invalid, it is unnecessary for us to determine whether, subsequent to May 23, 1945, the respondent or the AFL afforded Blais and Blair an opportunity to establish themselves as members in good standing of the AFL.