

paycheck to the office employees of the same date. The Regional Director concluded that the timing of the increase was designed by the Employer to influence the outcome of the elections. The Regional Director therefore recommended that the elections be set aside.

The Employer contends that the increase was granted on January 9 because it was the first regular payday after it received notice of approval of the increase by the Wage Stabilization Board. However, nothing in the Wage Stabilization Board ruling required that the Employer give the increase on that date, or precluded the Employer from waiting a few more days until after the election before granting the increase. In granting the increase despite the imminence of the elections, the Employer repeated essentially the same conduct which impelled the Board to set aside the prior elections of March 13, 1952. Those elections were set aside because the Employer only 10 days before the elections granted an increase to about one-third of the eligible voters. The Board said: "No reason appears why the Employer could not have postponed this March 3, 1952, increase until after the election. In view of the foregoing, we find that the purpose of the granting of this increase in wages, particularly in view of its timing, was to influence the results of the elections; and that the granting of such increase interfered with the elections."<sup>8</sup> For similar reasons, we find that the January 9, 1953, increase interfered with the elections of January 14.

We, accordingly, sustain Objection No. 2 filed by the Petitioner to the conduct of the elections. We shall, therefore, set aside the elections of January 14, 1953, and direct new elections at such time as the Regional Director advises the Board that the circumstances permit a free choice among the employees herein concerned.

[The Board set aside the elections.]

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<sup>8</sup> 101 NLRB 55

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CHARLES E. DABOLL, JR. *and* CLARENCE B. SELLS

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL, LOCAL UNION 797 *and* CLARENCE B. SELLS. Cases Nos. 20-CA-707 and 20-CB-244. June 3, 1953

### DECISION AND ORDER

On March 31, 1953, Trial Examiner David F. Doyle 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.

The Board<sup>1</sup> 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 the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the exceptions, modifications, and additions set forth below.

The Trial Examiner found, and we agree, that the Respondent Employer's operations affect commerce within the meaning of the Act. During the year 1952, the Respondent Employer simultaneously performed services in the States of both California and Nevada, and thus conducted a multistate enterprise.<sup>2</sup> And since the services performed in each of these States during this period was over \$25,000 in value, the Respondent Employer performed out-of-State services of such value, irrespective of whether the Respondent Employer's base of operations during this period was either the State of California or the State of Nevada.<sup>3</sup> Accordingly, there are two grounds on which we assert jurisdiction in this case.<sup>4</sup>

#### THE REMEDY

Having found that the contract between the Respondents contained illegal provisions, the Trial Examiner recommended that the Respondents cease giving effect to the entire contract. However, as no violation of Section 8 (a) (2) has been alleged or found, we shall limit our order in this respect to requiring the Respondents to cease giving effect to the unlawful union-security provisions of the contract.<sup>5</sup>

#### 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 Charles E. Daboll, Jr., Las Vegas, Nevada, his officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Performing or giving effect to those provisions of his contract with Operative Plasterers' and Cement Masons' International Association, AFL, Local Union 797, which require that employees be members of, or obtain a clearance from, that labor organization as a condition of employment.

<sup>1</sup> 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].

<sup>2</sup> The Borden Company, Southern Division, 91 NLRB 628.

<sup>3</sup> Stanislaus Implement and Hardware Company, Limited, 91 NLRB 618.

<sup>4</sup> Arthur G. McKee and Company, 94 NLRB 399.

<sup>5</sup> Acme Mattress Company, Inc., 91 NLRB 1010.

(b) Encouraging membership in Operative Plasterers' and Cement Masons' International Association, AFL, Local Union 797, or in any other labor organization of its employees, by requiring that applicants for employment be members of, or obtain a clearance from, the above-named Union as a condition of employment.

(c) In any like or similar manner, interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Make whole Clarence B. Sells and Wesley Sinclair for any loss of earnings suffered as a result of the discrimination against them in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(b) Upon request, make available to the Board or its agents for examination or copying all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary or useful to an analysis of the amount of back pay due under the terms of this Order.

(c) Post at its office in Las Vegas, Nevada, copies of the notice attached hereto as Appendix A.<sup>6</sup> Copies of such notice, to be supplied by the Regional Director for the Twentieth Region, shall, after being duly signed by a representative of Charles E. Daboll, Jr., be posted immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by other material.

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

Upon the same considerations, the National Labor Relations Board hereby orders that Operative Plasterers' and Cement Masons' International Association; AFL, Local Union 797, its officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Performing or giving effect to those provisions of its contract with Clark E. Daboll, Jr., which require that employees be members of, or receive a clearance from, the Union as a condition of employment.

(b) Causing or attempting to cause Charles E. Daboll, Jr., to discriminate against any of its employees or applicants for employment because such employees are not members of, or have not obtained a clearance from the above-named labor organization, except in conformity with Section 8 (a) (3) of the Act.

(c) Restraining or coercing employees of Charles E. Daboll, Jr., in the exercise of their rights under Section 7 of the Act.

<sup>6</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

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

(a) Make whole Clarence B. Sells and Wesley Sinclair for any loss of pay suffered by reason of the discrimination against them in the manner set forth in the section of the Intermediate Report entitled "The Remedy," and notify in writing the Respondent Employer, Sells, and Sinclair that the Union has withdrawn its objection to the employment of the two named employees.

(b) Post at its business office in the Las Vegas, Nevada, area copies of the notice attached hereto as Appendix B.<sup>7</sup> Copies of such notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being signed by a representative of said Union, be posted by it immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members customarily are posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by other material.

(c) Additional copies of Appendix B, to be furnished by the Regional Director, shall be signed by a representative of the said Union and forthwith returned to the Regional Director. These notices shall be posted on the bulletin boards of Charles E. Daboll, Jr., where notices to employees are customarily posted.

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

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<sup>7</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

## APPENDIX A

### NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order 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 those provisions of our contract with Operative Plasterers' and Cement Masons' International Association, AFL, Local Union 797, which require that employees be members of, or obtain a clearance from, that labor organization as a condition of employment.

WE WILL NOT enter into, renew, or enforce any agreement with said labor organization which requires our employees to be members of, or obtain a clearance from, that labor organization as a condition of employment, except in conformity with the Act, as amended.

WE WILL NOT encourage membership in said labor organization by discriminatorily refusing to hire applicants for employment because they have not received the clearance of the above-named labor organization, or in any other manner discriminate in regard to hire or tenure of employment, or any terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to 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.

WE WILL make Clarence B. Sells and Wesley Sinclair whole for any loss of pay suffered as a result of the discrimination against them.

All our employees are free to become, to remain, or to refrain from becoming or remaining members of the above-named union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act, as amended.

CHARLES E. DABOLL, JR.,  
Employer.

Dated..... By .....  
(Representative) (Title)

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

APPENDIX B

NOTICE TO ALL OFFICERS, REPRESENTATIVES, AGENTS,  
AND MEMBERS OF OPERATIVE PLASTERERS' AND CEMENT  
MASONS' INTERNATIONAL ASSOCIATION, AFL, LOCAL  
UNION 797

Pursuant to a Decision and Order 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 those provisions of our contract with Charles E. Daboll, Jr., which require that employees be members of, or receive a clearance from, our union as a condition of employment.

WE WILL NOT enter into, renew, or enforce any agreement with the above-named employer which requires employees to be members of, or obtain a clearance from,

our union as a condition of employment, except in conformity with the provisions of the Act, as amended.

WE WILL NOT cause or attempt to cause any employer to 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, as amended.

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

WE WILL notify Clarence B. Sells, Wesley Sinclair, and Charles E. Daboll, Jr., that we withdraw our objections to the employment of Sells and Sinclair by Charles E. Daboll, Jr.

WE WILL make Clarence B. Sells and Wesley Sinclair whole for any loss of pay suffered because of the discrimination against them.

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL, LOCAL UNION 797, Labor Organization.

Dated..... By..... (Representative) (Title)

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

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

Upon separate charges duly filed and later amended by Clarence B. Sells, an individual, against Charles E. Daboll, Jr., herein called the Employer, and Operative Plasterers' and Cement Masons' International Association, AFL, Local Union 797, herein called the Union, the General Counsel of the National Labor Relations Board, herein called respectively the General Counsel and the Board, caused the cases to be consolidated, and issued a complaint dated October 21, 1952, against the Employer and the Union, collectively called herein the Respondents, alleging violations of the National Labor Relations Act, as amended, 61 Stat 136, herein called the Act. Copies of the charges, the consolidated complaint, and notice of hearing were duly served upon the Employer, the Union, and Sells

Pursuant to notice a hearing was held on November 13 and 14, 1952, and on February 4, 1953, at Las Vegas, Nevada, before the undersigned Trial Examiner, duly designated by the Associate Chief Trial Examiner The General Counsel, the Employer, and the Union were represented by counsel, who participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues All parties were offered opportunity to argue upon the record and to file briefs No argument was had, but the Respondents filed a brief which has been considered

With respect to the unfair labor practices, the complaint alleged in substance that: (1) On or about January 1, 1950,<sup>1</sup> the Employer and the Union executed a labor agreement violative of the Act, in that it required individuals to obtain clearance from the Union before the Employer would hire them, (2) on March 10, 1952, the Employer refused to employ Clarence B Sells and Wesley Sinclair for the reason that they had not obtained clearances from the Union pursuant to the aforesaid labor agreement, (3) the Union attempted to cause and did cause the Employer to refuse to employ Sells and Sinclair because neither of them had obtained a clearance from the Union; (4) both the Employer and the Union by giving effect to the terms of the labor agreement above mentioned are thereby discriminating in regard to the hire, tenure, and terms and conditions of employment of employees, thereby encouraging membership in a labor organization, (5) the Employer by the above conduct has violated Section 8 (a) (1) and (3) of the Act, and the Union has violated Section 8 (b) (1) (A) and Section 8 (b) (2) of the Act

At the hearing the Respondents filed a verbal answer to the complaint, in which certain allegations of the complaint were admitted and others denied. In general the Respondents denied the commission of any unfair labor practices. Both Respondents also denied that the Board has jurisdiction over the operations of the Employer, contending that Daboll's operations did not affect interstate commerce within the meaning of the Act.

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

## FINDINGS OF FACT

### I. THE BUSINESS OPERATIONS OF THE EMPLOYER

The above-named Employer is an individual who, prior to June 5, 1952, was a resident of the State of California. Daboll is a plastering contractor. Apparently, until approximately December 20, 1951, he confined his business activities to the State of California. During 1951 his total receipts from all sources were \$274,266.33. In that year he received \$242,205 from Michael Grayson, a general contractor, in payment for services and materials furnished in plastering 433 residential units, which Grayson was building. He received \$32,061.33 from other contractors for performing several smaller jobs. In 1951 Daboll spent \$51,205.80 for such plastering materials as lath, sand, cement, and wire. All this material was purchased and used within the State of California.

On December 20, 1951, Daboll entered into a contract with the Federal Home Development Company, Inc., to plaster 352 residential housing units which the Federal Home Development Company, Inc., was building at Henderson, Nevada. The Federal Home Development Company, Inc., hereinafter referred to as Federal Homes, is a privately owned Nevada corporation which maintains offices at Las Vegas, Nevada, and at Beverly Hills, California. In the course of the construction which it performed, Federal Homes purchased steel from Michigan, lumber from California, and cabinets from Ohio. The total cost of these items for all units was \$343,100. The contract price for the labor and materials to be furnished by Daboll was \$323,000. Early in 1952 Daboll began performance of the contract, and in October 1952 completed the plastering of all 352 units. By the terms of his agreement with Federal Homes, Daboll was to supply both the labor involved and the materials necessary to the completion of the contract. He ordered all building materials from the Atwater Company Limited of Los Angeles, California, who shipped the material to the job site in Nevada. These purchases amounted to \$132,518. These materials were all used in the Henderson project except for a small amount which was used on a small job at Las Vegas, Nevada, for which Daboll was paid \$2,400. Over objection by the General Counsel, Daboll testified that approximately \$55,000 worth of the material ordered from Atwater Company Limited was manufactured by the Blue Diamond Company of Nevada, which mined, manufactured, and shipped this material to the job site from its plant at Las Vegas. The remainder of the material was shipped to the job site from outside the State of Nevada. The Henderson project and the small job previously mentioned constituted Daboll's entire business operation for the year 1952 in Nevada.

However, during the year 1952, Daboll performed services for various customers in the State of California, to the extent of \$27,484.42. Daboll also testified that on June 5, 1952, he moved permanently from California to Nevada, and at that time moved his business into Nevada.

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<sup>1</sup> Evidently this date is a typographical error. All parties agreed their relationship was governed by a contract dated January 1, 1951, General Counsel's Exhibit No. 2 in evidence.

Henderson, Nevada, where the housing units were built, is a town of approximately 7,000 population, situated approximately 12 miles from Las Vegas. Henderson is the site of several large industrial plants which are connected with the magnesium industry, which in turn is connected with the atomic energy program. Among the plants located at Henderson contributing to the atomic energy program are Titanium Metals Corporation, Manganese Incorporated, Western Electro-Chemical Company, Stauffer Chemical Company, and United States Lime Products Corporation. The residential units were erected within walking distance of these plants. However, there is no proof in this record that a person connected with defense production has any priority as to the rental or purchase of any of the housing units erected by Federal Homes. Apparently the rental or purchase of the units is offered to the general public, without regard to personal occupation.

On the basis of the above facts, the General Counsel contends that the operations of Daboll affect interstate commerce on two points. The first is that Daboll is conducting a multistate enterprise by performing plastering work in each of the States of Nevada and California to an extent above \$25,000 in value. The second point is that Daboll's operations, regarded in connection with the entire housing project of Federal Homes, which is situated near a center of defense activity, substantially affects the national defense.

The Respondents on the other hand contend that Daboll's operations did not bring into either California or Nevada, from outside the boundaries of either State, sufficient materials to bring his operations within the legal definition of interstate commerce. Respondents claim that Daboll is simply a small plastering contractor who for a portion of his time operated in California, and who at a later period operated in the State of Nevada, which on June 5, 1952, became his home, and the situs of his business operations.

The question is a close one. However, on the basis of all the evidence, I find that Daboll operated on a two-State basis. In 1951 he performed services in the State of California in the amount of \$274,266.33. However, with the advent of the job at Henderson, Nevada, his operations extended across State lines. In 1952, he simultaneously performed services in the State of California in the amount of \$27,484.42, and services in the State of Nevada in the amount of \$323,000. In view of this simultaneous operation in two States, I find that Daboll was conducting a multistate enterprise in the States of California and Nevada and, since he performed services of a value over \$25,000 in each State in the year 1952, that his operations affect commerce within the meaning of the National Labor Relations Act as defined in previous cases of the Board.<sup>2</sup>

With the General Counsel's contention that Daboll's operations substantially affected the national defense, I cannot agree. There is no evidence that the Federal Homes project was other than a private project of a private corporation, financed by private funds, for the purpose of private gain. Though the houses were built in the vicinity of certain plants which produce products ultimately used in the national defense program, that fact is not sufficient to sustain the allegation that Daboll's operations substantially affect the national defense.

For the reasons stated above, I find that the Employer is engaged in interstate commerce within the meaning of the Act.

## II. THE UNION

Operative Plasterers' and Cement Masons' International Association, AFL, Local Union 797, is a labor organization within the meaning of Section 2 (5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. The illegal contract

At the hearing the Respondents admitted that the hiring procedures followed on the Henderson job were set forth in a contract dated January 1, 1951, executed by the Master Plasterers of Las Vegas and the Union. The Employer is not a signatory of this contract, but it is clear that the Employer and the Union adopted this contract sometime prior to hiring men for the Henderson job, and that in all hiring for the job, the contract was rigidly enforced by the Respondents. The General Counsel's complaint alleges that this agreement contains a union-security clause which requires individuals to obtain clearances to work from the Union, before the Employer may hire them. The terms of the contract establish this allegation. The contract in part reads as follows:

<sup>2</sup>McKee and Company, 94 NLRB 399, 400; Stanislaus Implement and Hardware Co., Ltd., 91 NLRB 618.

The Employer does hereby agree and affirm that he does recognize the O. P. & C. F. I. A., Local #797 as exclusive representative of all work performed which the Plasterers' have jurisdiction on and shall require that all Plasterers on the job shall be members in good standing of this Local Union, known as the Party of the Second part. Evidence of good standing to be determined by the possession of a paid up current working Building Trades Card issued by the Secretary of Local No. 797.

This Local Union agrees to furnish requested men to all employers. Should an occasion arise wherein the Local Union is unable to furnish requested men within forty-eight hours after said requisition is placed, the employer shall be free to request men himself through other Local Unions, provided the employer abides by the International Constitution of the O. P. & C. F. I. A., and the Constitution of the Local Union and that the men have clearances from Local #797 before going to work. (Emphasis supplied.)

### B. The hiring procedure; the discrimination against Sells and Sinclair

Charles E. Daboll, Jr., testified credibly that when he came to the Las Vegas area to enter upon the Federal Homes contract he brought Fred Longstreet with him as foreman. Longstreet, as Daboll's foreman of plasterers, gave daily supervision to the job. Daboll spent approximately 2 days in each week on the job site. Longstreet had full authority to hire, fire, discipline, and direct the plasterers and laborers. Daboll testified that when he came to the Las Vegas area he required a group of plasterers to perform the job. He found a bona fide group of plasterers, capable of performing the job, in the Union. He made arrangements with the Union to provide him with plasterers, and thereafter all the men who were hired by Longstreet or Daboll were referred to the job by the Union.

Clarence B. Sells, a colored man, testified credibly that he has been a plasterer for approximately 15 years. For approximately 5 years prior to the time he came to the Las Vegas area he had been a member of Local 400, Operative Plasterers and Cement Finishers International Association of the United States and Canada, AFL, Santa Monica, California. Around September 11, 1951, work at Santa Monica became slack. He then journeyed to Las Vegas, where he met Wesley Sinclair, his brother-in-law, who was also a plasterer, and who had informed him that some work was available in the Las Vegas area. Sells and Sinclair went to the union hall and saw Jerry Berry, the business agent for the Union. Sells asked Berry to accept his travelbook. Berry told the men that there was no work in the area for plasterers, and refused to accept Sells' travelbook. Berry told the men that there were some jobs finishing cement and laboring in the area, and that if they switched over to the appropriate trade local, they could perhaps find a job at those trades. Berry also told the men that if some plastering work arose he would let them know. For some time thereafter both men worked as laborers in the Las Vegas area, while they sought jobs throughout the area at their trade of plastering. During all this time the men kept in touch with Berry who told them that there were no plastering jobs available.

On or about March 10, 1952, Sells and Sinclair went to the project at Henderson where Daboll was performing the plastering for Federal Homes. They sought out Foreman Longstreet and asked him if he needed plasterers. Longstreet said he needed plasterers but that he could not hire the men, that they would have to obtain a clearance from the Union. He took the men aside from the job to a place where he could speak to them privately. He told them that they had to see Jerry Berry, the representative of the Union, because Berry did all the hiring on the job. Longstreet told them that if he hired them without a clearance from the Union, Berry would pull all the men off the job.

Sells and Sinclair then went again to see Jerry Berry. They located Berry at the union hall and told him that Longstreet would put them to work the following morning if Berry would give them a clearance. Berry became very angry and said that Longstreet didn't know what he was talking about, that if Longstreet needed plasterers, Berry would know about it. The men repeated to him Longstreet's assurance of work, and again asked that they be given clearance. Berry again refused clearance, saying that there was no work for them. A few days later Sells went back to Henderson and saw Longstreet on the project. When Longstreet saw Sells, Longstreet immediately threw up his hands and told Sells that he could not employ him without a clearance. Sells then obtained a job with the Tee Plastering Company as a hod carrier. After working about 2 weeks as a hod carrier, he quit the job and went back to Berry and told Berry that he had quit carrying the hod, and that he wanted work at his trade as a plasterer. He also paid Berry \$28 dues which he owed the Union. At

this time Sells spent considerable time at the union hall waiting for a job. On occasion he saw other plasterers obtain clearances from Berry. He called this situation to Berry's attention but Berry told him that there was no job as plasterer available to Sells. On several later occasions Sells spoke to both Longstreet and Berry, without obtaining employment.

Sells filed the instant charges with the Board on April 29, 1952. On that date Miller, a field examiner for the Board, interviewed both Sinclair and Sells. Miller then accompanied the men to Daboll's office where they saw Daboll. Miller explained the situation, and Daboll said that he personally was willing to give the men a job, but that he could not do it as the Union had his hands tied. In the course of this conversation, Sinclair and Sells spoke about being discriminated against because of their color. Daboll said that he had employed many colored plasterers in Los Angeles but in Las Vegas the matter was out of his hands, that he employed only men who had obtained clearance from the Union and that he couldn't give the men a job without a clearance from the Union. On this same date, Sells again went to the Local and talked to Berry and received the same answer, that there was no work for him.

Sells stated that the Union maintains a list of plasterers who are out of work, at the union hall, and that he had requested Berry on many occasions to put his name on the list but that Berry had never complied with his request. Wesley Sinclair and Annabelle Sells both testified credibly corroborating certain portions of Sells' testimony. I credit the testimony of these three witnesses.

Jerry Berry testified as a witness for the Respondent Union. He testified that he first talked with Sells around September 1, 1951. Sells asked him for work on that occasion, and he explained to Sells that work was very slow, and that the Union had a large number of members out of work. Berry denied that he refused to accept Sells' book. He testified that he told Sells that he would accept his book, but that there wasn't any work for him, and if he had any knowledge of where he could get a job, he might as well keep his book. Later, on November 13, 1951, when Sells again presented his book for deposit, Berry accepted it. About a week after deposit of the book, Sells again came to the office and asked Berry for work. Berry again told him there were a lot of men out of work, and there wasn't any work at the time. Berry admitted that Sells came to the office on half a dozen occasions and that Berry always told him that there wasn't any work. On a couple of occasions Berry saw Sells on different construction jobs where Sells was working as a laborer. On those occasions he also told Sells that there was no work. Berry stated that on one occasion Sells' wife called him on the telephone and asked him how work was, and he told her there wasn't any work at that time. Berry explained that on some occasions he had as high as 20 to 30 men out of work at a time and that some of these men had been out of work as long as 6 months. Berry stated that no employer had ever requested that Sells be dispatched to the job. Berry also admitted that in assigning work from the out-of-work list, a preference was given to members who were residents of Las Vegas.

Berry's testimony that no jobs were available during the time that Sells and Sinclair were requesting work was proven false by records of the Employer, which were produced pursuant to a subpoena issued by the General Counsel. These records established that in the period beginning with the payroll period of March 5, 1952, and ending with the payroll period of April 30, 1952, Daboll through the Union hired approximately 28 plasterers, all of whom were steadily employed on the project thereafter.

Berry also testified that the contract between the Master Plaster Contractors and the Union, dated January 1, 1951, was originally signed by the parties in the year 1946, and that the contract in evidence,<sup>3</sup> dated January 1, 1951, was the contract for that year. He testified that no changes were made by the parties in the contract during the period 1946 to 1951, except on the subject of wages. Wages were negotiated annually between 1946 and 1951.

I do not credit the testimony of Berry. His testimony that there were no plastering jobs available in the Las Vegas area during March and April 1952 is established to be false by the payroll records of the Employer. Furthermore, Berry's demeanor and bearing on the witness stand were not such as to inspire confidence.

#### Concluding Findings

It is worthy of note that the testimony of Sells, his wife, and Sinclair is practically undisputed in this record. Both the Employer and the Union admit that Sells and Sinclair were not given clearance and were not hired at a time when the Union was referring plasterers

<sup>3</sup>General Counsel's Exhibit No. 2 in evidence.

to the job and the Company was accepting these men as employees. The Respondents seek to escape responsibility for this discrimination by a rather ingenious defense.

It is the claim of the Respondents that the pertinent union-shop provisions, including that of clearance, were originally set up in a contract between the Master Plumbers of Las Vegas and the Union in the year 1946, sometime prior to the enactment of the Labor-Management Relations Act of 1947; that the contract was automatically renewed from year to year, except that wages were negotiated annually, and that therefore the contract dated January 1, 1951, is lawful, and unaffected by the Labor-Management Relations Act. The Respondents claim that the January 1, 1951, contract is in reality the 1946 contract, which has been "extended" within the meaning of the court's decision in *Clara-Val Packing Co.*, 191 F. 2d 556 (C. A. 9), and *International Ass'n. of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL*, 199 F. 2d 321 (C. A. 9).

I find that contention to be without merit. In the first place, I find Respondents' evidence is insufficient to establish that the contract dated January 1, 1951, is in fact a 1946 contract between the Master Plasterers and the Union "extended" into 1951. Respondents have not introduced in evidence any document purporting to be the original 1946 contract. Such a document would, of course, be the best evidence on that point. The Respondents base their contention on the unsupported testimony of Jerry Berry, business agent of the Union, that the contract in evidence is the same contract which was executed in 1946. Heretofore I have stated that I found a very substantial portion of Berry's testimony to be false. His testimony that there were no jobs available in March and April 1952 was proven false by the Employer's records. Inasmuch as Berry's testimony has been entirely unreliable on one of the major issues in the case, I do not accept his unsupported testimony on this point.

The Respondents' contention is also without merit for a second reason. Even if we assume arguendo that the Master Plumbers of Las Vegas and the Union executed a contract in 1946 governing wages, hours, and conditions of work for plasterers in the Las Vegas area, such a contract would not be available as a defense to the Respondents in this proceeding. Daboll was not operating in Nevada at that distant date, and could not have been a party to any contract in 1946. Indeed he is not a signatory to the contract of January 1, 1951. The evidence is that Daboll, at the time he undertook to perform plastering in the Las Vegas area, on or about January 1, 1952, agreed with the Union to adopt the January 1, 1951, contract between the Master Plasterers and the Union. That was the first time that any contractual relationship existed between Daboll and the Union. Surely, these Respondents cannot now be permitted to claim that they are exempted from the operation of the Labor-Management Relations Act because of a contract of other parties. For these reasons, I find that the only contract here involved is that of January 1, 1951, and that its terms are clearly violative of the Act. In that posture of the case, the violations of the Act alleged in the complaint are, for all practical purposes, admitted.

Upon the entire record I find that: (1) On or about January 1, 1952, the Respondent Employer and the Respondent Union entered into a labor agreement which contained a union-security clause which restricted employment to members of the Respondent Union and to those individuals to whom the Union would issue a clearance for work; (2) pursuant to that agreement the Respondent Employer on March 10, 1952, refused to employ Clarence B. Sells and Wesley Sinclair, for the reason that they had not obtained work clearances from the Union; (3) by such action the Union caused the Employer to refuse to employ Sells and Sinclair, as stated above; and (4) by giving effect to the terms of the aforementioned labor agreement, the Respondent Employer engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act, and the Union engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and Section 8 (b) (2) of the Act.<sup>4</sup>

#### V. THE REMEDY

Having found that the contract of January 1, 1951, between the Respondents contains illegal provisions, it will be recommended that the Respondents cease and desist from giving effect to the entire contract,<sup>5</sup> and from entering into, renewing, or enforcing any agreement which requires membership in the Union or clearance from the Union as a condition of employment.

<sup>4</sup>*Carpenter and Skaer, Inc., et al.*, 93 NLRB 188; *Phoenix Tinware Co.*, 100 NLRB 568; *Mundet Cork Corporation, et al.*, 96 NLRB 1142.

<sup>5</sup>Nothing in these recommendations shall be deemed to require the Respondents to vary or abandon any substantive provision of such agreement or to prejudice the assertion by employees of any rights they may have acquired thereunder.

Having found that the Respondents engaged in unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It has been found that: (1) From March 10, 1952, until the completion of the plastering at the Henderson project, the Respondent Employer discriminated against Clarence B. Sells and Wesley Sinclair in their hire, tenure, terms, and conditions of employment; (2) such conduct by the Employer encouraged membership in the Respondent Union and interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act; and (3) the Respondent Union engaged in unfair labor practices by causing the above-named Employer to so discriminate, thereby restraining employees in the exercise of rights guaranteed by the Act. Since it appears that the plastering on the Henderson project has been completed, and hiring in the building trades is on a job basis, it will not be recommended that employment be offered to Sells and Sinclair by the Respondent Employer. However, it is recommended that the Union notify the Employer, Sells, and Sinclair in writing that it has withdrawn its objections to the employment of Sells or Sinclair, and that the Employer is free to employ those men on any job which may arise in the future.

Having found that the Employer and the Union were jointly responsible for the discrimination in the hire and tenure of employment of Sells and Sinclair, it is recommended that: (1) The Employer and the Union, jointly and severally, make Clarence B. Sells and Wesley Sinclair whole for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to the amount he would normally have earned as wages during the period of discrimination against him, less his net earnings during this period. This period begins in each case on March 10, 1952, and ends on the date upon which the plastering on the Henderson job was completed.

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. Operative Plasterers' and Cement Masons' International Association, AFL, Local Union 797, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By executing and enforcing the contract of January 1, 1951, the Respondent Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. By causing the Respondent Employer to discriminate against employees in violation of Section 8 (a) (3) of the Act, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

5. By restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

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

[Recommendations omitted from publication.]

<sup>6</sup> The proposed findings of fact and conclusions of law submitted by the Respondents are hereby specifically not found.

In the hearing the General Counsel moved that the Daboll Company, Inc., a Nevada corporation which has taken over the plastering contracting business of the Employer, be named specifically as a "successor" in this recommended order. The motion is hereby denied, on the ground that the corporation is not a party to this proceeding, and has had no opportunity to present evidence on the question of whether or not it is Daboll's "successor," as that term has been legally defined. That question can be resolved in an appropriate proceeding in which the corporation is made a party, if the need arises. This proceeding has extended to only a part of the evidence on that question. Until the corporation has had an opportunity to present its evidence, the motion is premature.