evidence of improper electioneering and therefore adopt the Regional Director's recommendation.

As we have overruled the objections to conduct affecting the results of the election,[3] and as the tally of ballots shows that the Petitioner has secured a majority of the valid votes cast in the election, we shall certify it as the bargaining representative of the employees in the appropriate unit.

[The Board certified Local 676, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the designated collective-bargaining representative of all production and maintenance employees at the Employer's Camden, New Jersey, plant, excluding office clerical and plant clerical employees, professional employees, guards, and supervisory employees as defined in the Act.]

[3] Contrary to Local 80–A's request, we find no warrant for a further investigation or hearing in this matter.

Sinclair Refining Company (Wood River Refinery) *and* Norman L. Cope

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 553 [1] ***and*** **Norman L. Cope.** *Cases Nos. 14–CA–1324 and 14–CB–294. February 10, 1956*

DECISION AND ORDER

On September 29, 1955, Trial Examiner Lloyd Buchanan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in other alleged unfair labor practices. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

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 these cases, and hereby adopts the findings and conclusions of the Trial Examiner, to the extent that they are consistent herewith.

[1] The AFL and CIO having merged since the Trial Examiner issued his Intermediate Report, we are amending the designation of the Respondent Union accordingly.

As more fully set forth in the Intermediate Report, the Trial Examiner found that the transfer clause in the contract between the Respondents was illegal because it imposed a restraint on the employees' right to transfer from one craft to another, in violation of Section 8 (a) (1) and 8 (b) (1) (A) of the Act. However, as the transfer clause was never unlawfully enforced, or intended to be unlawfully enforced, the Trial Examiner found no violation of Section 8 (a) (3) or 8 (b) (2). The Trial Examiner concluded further that as the transfer clause was severable from the remainder of the contract, it did not vitiate the otherwise valid union-security provisions under which Cope was discharged and Cope's discharge was therefore lawful.

We agree with the Trial Examiner's conclusion with respect to the severability of the transfer clause and the legality of Cope's discharge. Thus, the only question remaining before us pertains to the legality of the transfer clause. However, as the record discloses that the transfer clause is no longer part of the contractual relationship between the parties, having been replaced by an admittedly legal provision, we find it unnecessary to determine whether the transfer clause was unlawful. Accordingly, we shall dismiss the complaints.

[The Board dismissed the complaints.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

The complaints in these consolidated cases allege that Sinclair Refining Company (Wood River Refinery), herein called the Company, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL, Local 553, herein called the Union, collectively called the Respondents, have respectively violated Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and (2) of the National Labor Relations Act, as amended, 61 Stat. 136, by maintaining and enforcing a collective-bargaining agreement which contained not only a 30-day union-security requirement but also a provision that, when an employee transfers from one craft to another, he must return to his former craft if he is refused union membership for good and sufficient reason; and by Cope's discharge on or about September 27, 1954, caused by the Union, for the reason that he failed to maintain his membership in good standing in the Union, as well as by the subsequent failure and refusal to reinstate him.

The Respondents concede that the agreement was maintained and enforced on September 27 and thereafter until it was superseded by an admittedly valid agreement on January 28, 1955, the relevant provisions of each agreement having been admitted. Confining ourselves to the former agreement, the issues are whether the transfer provision violated the Act; and, if it was so violative, whether it invalidated the entire security provision so that there was no lawful basis for discharging and failing to reinstate Cope or causing him to be discharged, these latter acts being essentially admitted.

A hearing was held before me at St. Louis, Missouri, on August 9, 1955. A letter from counsel for Company concerning proposed changes in the transcript and consent to such changes, addressed to me and dated September 8, 1955, and its accompanying motion to correct the transcript, are hereby received in evidence as Trial Examiner's Exhibits Nos 1 and 2, respectively; the motion to correct is granted. Pursuant to leave granted to all parties, and the time therefor having been extended, briefs were thereafter filed by the General Counsel, the Company, and the Union.

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

FINDINGS OF FACT WITH REASONS THEREFOR

I THE COMPANY'S BUSINESS AND THE LABOR ORGANIZATION INVOLVED

It was admitted and stipulated and I find that the Company, a Maine corporation with its principal office in New York, New York, maintains the Wood River Refinery at Hartford, Illinois, where it is engaged in the processing, sale, and distribution of petroleum and allied products; that during the year ending May 31, 1955, it purchased petroleum and allied products valued at more than $1,000,000, more than 50 percent of which was transported, sold, and shipped to said Refinery from points outside the State of Illinois; and that during the same period it sold and shipped petroleum and allied products valued at more than $1,000,000, more than 50 percent of which was transported, sold, and shipped from said Refinery to points outside the State of Illinois. It was stipulated, and I find, that the Company is engaged in interstate commerce within the meaning of the Act.

It was admitted and stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The collective-bargaining agreement*

1. The transfer clause

The agreement with which we are here concerned and which was in force in September 1954 was entered into with nine craft unions including the Union herein. Article 2 of said agreement is entitled "Union Security," and provides in its first paragraph for a 30-day probationary period for new employees, during which period the Company may dispense with their services with or without cause; the second paragraph, which is itself admittedly valid, includes 30-day membership requirements for all employees and details the provisos against discrimination as set forth at the close of Section 8 (a) (3) of the Act; the third paragraph, which will be referred to as the notwithstanding clause, is the basis for this proceeding, and reads as follows:

> Notwithstanding the provisions of the foregoing paragraph, when an employee transfers from one craft to another craft, he shall be required to take out a card in the craft to which he transfers, within three (3) pay periods and if he is refused membership for good and sufficient reason, stated in writing to the Company, he will return to his former craft.

The Respondents maintain first that this latter provision is not invalid on its face, and further that it was not intended to be invalid or to be illegally applied. In support of the first of these contentions, it was testified by the Union that the words "for good and sufficient reason" applied to payment of dues and initiation fees only; when it was pointed out that the preceding paragraph of the agreement spelled out the statutory limitations in detail, the explanation was offered that the parties did not want to repeat the same words! Such intent is not indicated by the terms employed, so that, as in connection with invalid deferral or nullity clauses,[1] the restraint on employees is clear. Further, the condition "if he [an employee] *is refused* membership for good and sufficient reason" cannot, I find, be reasonably construed to refer solely to the case of the *employee's* own failure to pay dues and initiation fees. [Emphasis supplied.] Here is no suspicion of intent (intent is considered immediately below), but acceptance of the plain and concededly loose language of the agreement. Notwithstanding the argument by the Company's counsel, the restraint is such and unlawful although it is limited to transfers and provides for return to a former craft, and not for complete loss of job. Further, while transfer may well depend on qualifications, as urged by the Union, it was here provided that a transferee must be returned to his former craft if refused membership in the new craft union regardless of his qualifications. The agreement itself and by its terms imposed restraint on employees by affecting their right to transfer from one craft to another, in violation of Section 8 (a) (1) and 8 (b) (1) (A) of the Act.[2] (Whether, as alleged by the General Counsel, the clause invalidates the entire union-security provision will be considered in the next subsection.)

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[1] *New York State Employers Association, Inc.*, 93 NLRB 127

[2] *Idem* at page 129

On the other hand, uncontradicted testimony by both the Company and the Union is to the effect that the invalid provision was never applied to prevent any transfer. Considering the use of the power as distinguished from its existence, and the evidence of the parties' intent and practice, there is no basis for finding a violation of Section 8 (a) (3) or 8 (b) (2).[3]

2. Severability

The issue now posed, as noted *supra,* is whether the transfer clause, itself invalid, vitiated the entire union-security article. Arguing that the article is indivisible and therefore entirely invalid, the General Counsel cites the *Pacific Intermountain Express Company* [4] and *Convair, a Division of General Dynamics Corporation* [5] cases. In the former, the Board found that "the Company's conduct, which required employees to become members of the Union immediately after they were hired," vitiated the valid 30-day provisions in the agreement. In the instant case, the 30-day provisions were in no way affected; on the contrary, the time was extended to three 2-week periods when the Union was unlawfully authorized to prevent transfers. In *Convair,* the Board held invalid and inseparable a provision which cancelled the 30-day provision as to all who had quit or transferred their employment. In the instant case, 30 days are still allowed to new employees and 6 weeks to transferees. Unlike the *Convair* case, whose 30-day clause was itself invalid for inclusion of payment of assessments in addition to dues and initiation fees, there is no unlawful limitation here on the time within which membership must be sought.[6] The 30-day provision in the instant case, unlike the 2 cases cited, remains unmodified. It is not even remotely affected by the transfer clause.

Nothing on the face of the agreement before us indicates such indivisibility that, with failure of the transfer clause, the entire article must fall. Certainly the practice of the parties indicates positively that the other provisions were enforced when that concerning transfer was not. Nor, when the parties to the agreement do not maintain that the entire agreement or more than one clause is invalid for failure of that clause, should the Board destroy more than that one clause which has been separately treated. (As already indicated, the violative clause may be set aside by the Board. But our present concern, to avoid confusion, is the question of separating that clause from the remainder or declaring all or more of the agreement invalid.) If the parties have, by ignoring it in practice, refused to treat the transfer clause as a material portion which will excuse continued performance, neither express statutory provision nor declared policy warrants a holding that continued performance is not only excused but indeed barred. To declare that different provisions are inseparable and in effect that there is a failure of consideration so that with the invalidity of one the other must also fall, when the parties to the agreement have made no such claim, would be strange indeed; [7] more so to hold that the parties are not to be permitted to abide by lawful provisions as they have. (Through all of this it must be borne in mind that the clause found invalid had no personal or intimate effect on Cope, and that it did not affect his actual employment. Only if it invalidated the entire security article could it be even indirectly connected with the otherwise valid termination of that employment.)

Where the majority status of the Union it not attacked, the Board has for a long time recognized, indeed enforced, the principle of separability in its recommendations that the parties cease giving force and effect to the violative portion of an agreement. Here, old employees would come under the valid 30-day provision and might never be affected by the transfer clause; likewise, new employees. Neither does the transfer clause depend on the 30-day provision. Each is independent of the other and can stand or fall without affecting the other.

This is not a case "where a forbidden provision is so basic to the whole scheme of a contract and so interwoven with all its terms that it must stand or fall as an

[3] *Jandel Furs,* 100 NLRB 1390, 1392; *Port Chester Electrical Corporation,* 97 NLRB 354, 355, *Monolith Portland Cement Company,* 94 NLRB 1358, 1363.

[4] 107 NLRB 837

[5] 111 NLRB 1055.

[6] In *Convair,* the Board declared: "It is also significant that the provisions in question were continued in a new agreement executed by the Respondent in February 1954." Contrary significance presumably attaches to the fact that the new agreement between the instant parties omits the provision here in question

[7] Some parallel thinking on this point may be found in Williston on Contracts, revised edition, Sections 1629A, 1660, 1779–1782

entirety."[8] What was otherwise valid and lawful action by the Company and the Union under the provisions of the Act should not be invalidated because the collective-bargaining agreement included a provision which was neither here applicable nor applied. (As will be seen *infra,* this provision had no bearing in fact on the employment of the individual involved or the action taken against him.)

It may further be noted that, despite the heading on the entire article as it appears in the agreement, the provision in restraint of transfers is not a union-security provision. As noted *supra,* the first paragraph of the article is limited to the matter of probationary employment and the Company's rights with respect thereto. The article entitled "Union Security" thus further includes provisions which are not union-security provisions.

The proviso in Section 8 (a) (3) of the Act has here been fully complied with and, unlike the *Pacific Intermountain Express* and *Convair* cases, is not itself modified or violated by the transfer clause. The latter, but for the evidence of intent and practice, would be a separate and different discrimination in regard to tenure and terms of employment; it is a different type of interference.

In the very recent case of *Kenosha Auto Transport Corporation,*[9] violation was found because action had been taken, "not pursuant to any agreed upon nondiscriminatory interpretation of the other clauses in the contract, but solely in effectuation of the unlawful clause." Providing further for "recourse to the valid provisions of [the] agreement," the Board thus recognized the severability of "other contract provisions" and their apparent sufficiency as a defense, if applicable, despite the presence of an unlawful provision. I find that the invalid transfer clause is wholly severable from the remainder of the agreement, which remainder was valid and could be maintained.

B. *Cope*

Like the issue over the agreement, the controversy concerning Cope is based on the notwithstanding clause. Cope was a member of the Union, employed by the Company, and covered by the agreement when, on September 27, 1954, he was discharged by the Company at the Union's request for nonpayment of dues. (He was then in arrears for the months of May through September.) The discharge was pursuant to the 30-day clause of the agreement and was clearly lawful.

On December 1, the Union in a letter addressed to the Company and which it gave to Cope declared that he had met his union obligations and that it was "agreeable with" the Union to put him back to work. Cope delivered the letter to the Company's assistant manager on December 4, but was told that he could not then be put to work because his seniority had been broken by the discharge. He was reinstated on April 25, 1955, with so-called full seniority.

The complaints scarcely allege, nor was there trial of, any issue other than the right of the Respondents to take any action under the agreement in view of the invalid transfer clause. But with a possibility that consideration may be given to a claim which was first clearly made in the General Counsel's brief, it may be well at this time to go briefly beyond the issues as actually presented. Although the General Counsel declared at the hearing that he made no claim of violation in the failure to put Cope back to work on December 4, it appears that he later sought to explain that he had meant only the Union in this connection.

While it is not clear, one may assume that the claim of the Company's continued liability, i. e., from September 27, 1954, beyond December 4 and until Cope was reinstated on April 25, 1955, is based on its failure in December to restore Cope to full seniority and its reliance on the validity of the earlier discharge; but neither did the Union's letter, while stating its willingness that Cope go back to work, admit that the discharge had been unlawful originally or indicate that he was entitled to full seniority so as to impose possible liability on the Company. As for the events of September 27, even if there was a wrongful refusal by the Union later that day to accept Cope's back dues, as does not appear to be claimed, such fact was not communicated to the Company, which relied on the earlier and accurate report by the Union (admitted by Cope) that Cope was delinquent and the request, lawful when made, that he be discharged.

In any event, and to repeat, any liability here could develop only if the discharge of September 27 was unlawful or if the Company in December unlawfully refused to employ Cope.[10] But, as found, the discharge was lawful; consequently Cope had

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[8] *N. L. R. B.* v *Rockaway News Supply Co., Inc.*, 345 U. S. 71, 78.

[9] 113 NLRB 643.

[10] The General Counsel cites a statement that "nothing was said about there not being any work" on December 4 to indicate "that the amount of work existing at the Company

no prior or special claim to employment in December since, with the termination of his employment, his seniority had been broken as the Company advised him. Nor has it been shown or even claimed that Cope retained any seniority in December; in fact, the General Counsel has specifically disclaimed any violation on December 4 in connection with seniority. His "reinstatement" with full seniority the following April need not be questioned here; such reinstatement created no rights or violation as of December. I find that Cope was not discriminatorily discharged or refused employment. It thus becomes unnecessary to answer the question of "sympathy" or policy raised by the Union regarding award of back pay to an employee who was in fact discharged for failure to pay dues.

III THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents set forth in section II, above, occurring in connection with the operations of the Company 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

IV. THE REMEDY

It has been found that the Respondents respectively violated Section 8 (a) (1) and 8 (b) (1) (A) of the Act by maintaining an illegal transfer clause in their agreement While the invalid provision is the only violation found and is no longer in effect, the Respondents maintain, as noted, that it was lawful. I shall therefore recommend that they cease and desist from any like or related conduct, and from giving effect to the clause [11] of the agreement which violates the Act, or similar clauses of any extension or renewal thereof.

For the reasons stated in the subsection entitled "*Cope*," I shall recommend that the complaints be dismissed insofar as they allege the discriminatory discharge and failure to reinstate Cope.

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

CONCLUSIONS OF LAW

1. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL, Local 553, is a labor organization within the meaning of Section 2 (5) of the Act.

2 By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, Sinclair Refining Company (Wood River Refinery) has engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Union has engaged 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.

5. The Respondents have not engaged in other unfair labor practices within the meaning of the Act with respect to Norman L Cope.

[Recommendations omitted from publication.]

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or lack of same had absolutely nothing whatsoever to do with the discharge of Cope or [his] subsequent reinstatement" But at the same point and previously Cope testified that the Company had told him in December that the letter was all right but he could not be put back to work "on account of the seniority clause in the union contract" There would be no question of seniority had there been a vacancy when Cope applied in December, nor does he claim that there was any vacancy Seniority would be considered in the absence of a vacancy and in connection with possible replacement of a junior employee In any event I cannot join the General Counsel in speculating that the failure to put Cope to work in December had "nothing to do" with availability of work Unless the Company was obliged to make room for Cope by discharging another employee, it is the General Counsel's burden to show that a place was in fact available for Cope when he applied There is no such evidence

[11] There is neither allegation nor evidence attacking the majority status of the Union It will therefore not be recommended that the agreement be set aside in its entirety