

A. Cestone Company and Garrett Nagle

Local 138, International Union of Operating Engineers, AFL-CIO (A. Cestone Company) and Garrett Nagle. Cases Nos. 2-CA-4363 and 2-CB-1510. July 12, 1957

DECISION AND ORDER

On June 12, 1956, Trial Examiner David London 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 and the Charging Party filed exceptions to the Intermediate Report and the Respondent Union and the Charging Party filed supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modification.¹

The sole issue in this case is whether the Respondent Union unlawfully caused the Respondent Cestone to discriminate against Nagle on April 26, 1955, by refusing to hire him. If the Union in fact caused such loss of employment to Nagle in punishment for his choice of union activities, it violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act, as alleged in the complaint. If Cestone denied him work because the Union so wished, it in turn violated Section 8 (a) (1) and 8 (a) (3). As set out in detail in the Intermediate Report, and as found by the Trial Examiner, all of these facts are conclusively and fully supported by the record.

The evidence is clear that Cestone was ready to hire Nagle, indeed wished to do so, and simply referred the matter to Varello, the master mechanic, for decision. Varello, in addition to being the Company's virtual hiring boss, was the Union's steward on the job and responsible, as its agent, to enforce the union rules at Cestone's project. He rejected Nagle only because the latter was unable to obtain approval from the Union's higher officials.² That the Union

¹ The Union's request for oral argument is hereby denied as, in our opinion, the record, with the exceptions and the briefs, fully present the issues and the positions of the parties.

² The bylaws of the Respondent Union provide:

Article 6, Section 8: . . . A member of this Local Union must notify the office of the Local Union before starting to work on any job and get permission to work. . . .

Article 7, Section 8: The Shop Steward will be held responsible for conditions that may arise on the job. It becomes the duty of every member to report to the shop steward when he arrives on the job for work.

was responsible for Varello's action concerning Nagle's work application is now well settled.³ That the Company was equally accountable for Varello's decision stems not only from his clear supervisory status and authority, but also from the fact, clearly reported by the Trial Examiner, that the Company "abdicated its right to determine who was to be employed by it to the Union."⁴

The Cestone Company came into the jurisdictional area of this Union from another State only to carry out the single project involved in this case. It made no express contract with the Union and whatever arrangement it may have made orally, the complaint does not allege any illegal agreement as such. It alleges only that the Union caused the discrimination against Nagle because of his concerted activities on behalf of a reform or dissident group opposed to the incumbent union leadership. We are satisfied, and we find, that the record as a whole supports this allegation. The Union defends only on the asserted ground that there never was work for Nagle and that therefore it did not cause a rejection by the Company. The record shows otherwise. Nagle's testimony, however, does affirmatively reveal the true basis for the Union's animosity towards him and therefore the reason it caused the discrimination in employment. He had long been leader of a movement among operating engineers in that area seeking to oust Sofield, the union secretary, and DeKoning, its president, for malfeasance in office. The Union does not deny this: indeed its brief even more clearly shows the activities of Nagle which explain the events of this case.⁵ But the statute prohibits a union from resorting to curtailment of job rights—using the employer as a tool—for the purpose of curbing the independent preferences in union activities of individual employees.⁶ Such is the precise nature of the

³ *N. L. R. B. v. Local 1976, Carpenters (Sand Door & Plywood Co.)*, decided 241 F. 2d 147 (C. A. 9), enforcing 113 NLRB 1210; *Grove Shepherd Wilson and Kruge, Inc.*, 109 NLRB 209.

⁴ Anthony Cestone, the Company's president, candidly testified as follows:

Q. Did you have anything to do with the selection or hiring of the master mechanic?—A. No, truthfully a master mechanic, as far as a contractor is concerned, is not desirable. We know that you have to have one, that is a union ruling, so I went to Mr. Sofield, and I said as long as I have to have a master mechanic, please send me someone who has worked on this kind of work before, who has watched these types of machines that are on these jobs. At least I can get the best service out of him.

⁵ The Union's brief says of Nagle:

. . . he was a key figure in a dissident group within the union which had carried on a running fight with the union's administrative officers. The activities of Nagle's group included three civil actions in the Supreme Court of Nassau County against the Union, one of which is still pending, the other two having been decided in favor of the union, one criminal action against several members of the union, at least one of whom was and still is a union official, which was decided by the jury in favor of the defendants and in the case of the union official, was dismissed on the People's case, four proceedings before the National Labor Relations Board, two of which were dismissed, and two still pending including this proceeding. In addition to the above activities members of the group have made radio broadcasts, and given interviews to the press concerning matters which are, by the I. U. O. E. constitution, confidential. All of the above activities have violated the union constitution, and have been carried on to constantly harass the union officers. . . ."

⁶ *Acme Mattress Co., Inc.*, 91 NLRB 1010, enforced 192 F. 2d 524 (C. A. 7).

unlawful conduct of the two Respondents in this case and the extent of our unfair labor practice findings.⁷

Accordingly, we find that by refusing to employ Nagle the Respondent Company violated Section 8 (a) (1) and (3) of the Act, and that by causing such denial of employment by this Company, the Respondent Union violated Section 8 (b) (2) and 8 (b) (1) (A).

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

(A) The Respondent, A. Cestone Company, its officers, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Refusing to hire employees because they have not obtained clearance, job referral or approval through, or from, the Union or by discriminating against them in any other manner in regard to their hire or tenure of employment, or any term or condition of employment, except to the extent permitted by Section 8 (a) (3) of the Act.

(b) In any other manner interfering with, restraining, or coercing its employees or prospective employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights 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.

(2) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Jointly with the Respondent Union make Garrett Nagle whole for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in the section entitled "Remedy" in the Intermediate Report.

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

(c) Post copies of the notice attached to the Intermediate Report, and marked "Appendix A,"⁸ at its principal office and place of

⁷ At the hearing and in its brief, for the first time and long after the events, the Union suggests that Nagle was in any event not entitled to the Cestone job that day under normal operation of the Union's job rotation system. This argument ignores the fact that Union Secretary Sofield, at the very moment of denying Nagle approval for the Cestone job, offered to send him out on another less desirable assignment.

⁸ This notice shall be amended, however, by substituting the words "A Decision and Order" for the words "The Recommendations of a Trial Examiner." In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "A Decision and Order" the words "A Decree of the United States Court of Appeals, Enforcing an Order."

business at Glen Ridge, New Jersey, and at all sites, if any, within the territorial jurisdiction of the Respondent Union herein, where it is now engaged in construction work. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by its representative, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees or prospective employees are customarily posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced, or covered by other material.

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

(B) Respondent Local 138, International Union of Operating Engineers, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Causing, or attempting to cause A. Cestone Company, its officers, agents, successors, or assigns to refuse employment to employees, or applicants for employment because they have not been referred by, or secured clearance or approval from, the said Union, or in any other manner to discriminate against employees, or applicants for employment, in violation of Section 8 (a) (3) of the Act.

(b) In any like or other manner, restraining or coercing employees of, or applicants for employment with, the said Company in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

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

(a) Jointly with the Respondent Company make Garrett Nagle whole for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in "Remedy" above.

(b) Post at its business office and meeting hall on Long Island, New York, and all other places where notices to members of Respondent Union are customarily posted, copies of the notice attached to the Intermediate Report and marked "Appendix B."⁹ Copies of said notice, to be furnished by the Regional Director for the Second Region shall, after being duly signed by the representative of Respondent Union, 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 the members are customarily posted. Reasonable steps shall be taken by said Respondent to insure

⁹ See footnote 8, *supra*.

that said notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for the Second Region signed copies of the said notice marked "Appendix B," for posting, if Respondent A. Cestone Company is willing, at all of their projects, if any, within the territorial jurisdiction of Respondent Union, in places where notices to employees and prospective employees are customarily posted.

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

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

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon charges duly filed by Garrett Nagle, the General Counsel of the National Labor Relations Board, by the Regional Director for the Second Region, issued (1) an order consolidating the above-entitled cases, and (2) an amended complaint, dated December 27, 1955, against A. Cestone Company, herein called the Company, and Local 138, International Union of Operating Engineers, AFL-CIO,¹ herein called the Union. The amended complaint alleges that both Respondents had engaged in and were engaging in unfair labor practices affecting commerce—the Company in violation of Section 8 (a) (1) and (3), and the Union in violation of Section 8 (b) (1) (A) and 8 (b) (2) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. Charges, order of consolidation, the amended complaint, and notice of hearing were duly served upon all the parties hereto.

The amended complaint alleges that on or about April 25, 1955, the Company refused to hire Garrett Nagle at its Franklin Square, Long Island, sewer project, and has refused to hire him since that date, because he was not referred for employment by the Union, and/or because of concerted activities on behalf of the reform or dissident group in the Union. The amended complaint also alleges that on or about, and since April 25, 1955, the Union has caused, and/or attempted to cause, the Company to discriminate against its employees in regard to hire or tenure of employment, or other terms or conditions of employment by requiring or instructing the Company to refuse to hire Nagle at the project aforementioned because he was not referred for employment by the Union, and/or because he engaged in concerted activities for and on behalf of the reform or dissident group in the Union. By their answers both Respondents denied the commission of any conduct violative of the Act.

Pursuant to notice, a hearing was held at Hempstead, New York, March 20 to 23, 1956, before the Trial Examiner duly designated to conduct the hearing. The General Counsel, both Respondents, and the Charging Party, appeared through counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence was afforded all parties. After the close of the hearing, the Union filed a brief with the Trial Examiner which has been duly considered. Upon the entire record in the case, and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS

A. Cestone Company is a corporation duly organized under, and existing by virtue of, the laws of the State of New Jersey. It has its principal office at Glen

¹ The AFL and CIO having merged subsequent to the commencement of this proceeding, the identification of the affiliation of the Respondent Union is accordingly amended.

Ridge, New Jersey, where it is engaged in the sewer construction business. Sometime prior to April 25, 1955, it entered into a contract with the county of Nassau, New York, by which it agreed to dig and construct a sewer at Franklin Square, Long Island, New York, for which the county agreed to pay the sum of \$1,897,000. On the entire record I find that Respondent Company is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and during all times mentioned herein has been, a labor organization within the meaning of Section 2 (5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Franklin Square sewer project above described was the Company's first business venture on Long Island. On or about March 25, 1955,² about a month prior to the beginning of operations on the project, Anthony Cestone, president of the Company, met with Messrs. DeMarco and Ciccone, friends of long standing, and who were engaged in similar work on Long Island. Cestone sought information and assistance from them with respect to the acquisition of a working force on the Franklin Square job. During the course of the conversation, Cestone also arranged to purchase from DeMarco and Ciccone two trench digging machines and some additional equipment which DeMarco and Ciccone no longer needed because the work in which they were engaged was then practically completed. In connection with that purchase, Cestone requested that the 2 men who had operated the 2 trench digging machines aforementioned be transferred to the Franklin Square job. DeMarco wrote the names of the two operators on a slip of paper and gave it to Cestone, but also told him that he had to notify the Union that these men were to be transferred.

Sometime during the week ending April 23,³ Cestone went to the hall operated by the Union and talked to Verner Sofield and Jack Dunning, respectively, the secretary and business representative of the Union. Cestone told Sofield about the arrangements he had made with DeMarco and Ciccone, that he would need 3 trench operators, 2 right away for the machines purchased as aforementioned, and 1 for another machine that he had purchased elsewhere and expected in a day or two. He specifically requested the 2 men from DeMarco and Ciccone, previously identified as Basil Hales, Jr., and John Niemczyk, and in case 1 did not want to come, he asked Sofield to get 3 men for the trenchers within a couple of days because Cestone had also made arrangements to have a number of laborers, timbermen, and other tradesmen report for work at the same time.

On April 26, Garrett Nagle, the Charging Party herein, accompanied by John DeKoning,⁴ went to the union hall in search of work, and had a conversation with Charles Britton, president of the Union. Nagle is, and since 1945 has been, a member of Local 138A, 1 of 3 divisions of the Union. Nagle testified that "for the past two years . . . [he has] had a running fight" with the officers of the Union over the administration of its affairs. The Union, in its brief, summarizes Nagle's activities in this "fight" as follows: "As a member of a dissident group within the Union, Nagle has been engaged in constant litigation and disputes with the administrative officers of the [Union], and has constantly had the [Union] or members of the [Union], before the Courts, both Civil and Criminal, and before lay committees." DeKoning is, and since 1940 has been, a member of the Union and served as its business representative from October 1951 to October 1954, when he was discharged by Britton. He was also a member of the dissident group aforementioned.

The two men told Britton they were looking for work and the latter replied there was nothing available for them. DeKoning asked if it was all right for the men to go to the Company's job to see if they could find work and both men proceeded to that site. They encountered Joseph Varello, master mechanic, and asked if he could put them to work. Varello replied that he had just come on the job that morning and suggested that they see Anthony Orsino, the job superintendent. The two men told Orsino that they were looking for work and he replied that operations would begin in a day or two. At about that time, the group was

² Unless otherwise specified, all references to dates hereafter are to the year 1955.

³ Cestone mistakenly testified that the week ended April 25.

⁴ Another DeKoning will be mentioned in the findings that follow. Unless otherwise specified, however, all references to DeKoning are to John DeKoning.

joined by Clem Hudson, the Nassau County inspector. Hudson asked Nagle whether he was looking for employment. Nagle answered in the affirmative and asked Hudson whether he would "put in a good word" for him. Hudson replied that he would, and told Orsino that Nagle had worked for him for 4 or 5 years on sewer work and that he "was a very good trencher operator." Orsino expressed satisfaction concerning the recommendation and stated he was looking for that "kind of a man" to operate a new Parsons trencher. When Nagle announced that he was "here and ready," Orsino stated that Bill DeKoning⁵ and Jack Dunning, the Union's business representative, had been around and had "made arrangements that Cestone has to hire through the Union hall." Nagle informed Orsino that he had just come from the hall and that Britton had told him he could "go and get [his] own job." Orsino answered that "if it is all right with the master mechanic, it [was] all right with" him, and that Nagle would have to see Varello. Nagle went to Varello, asked "to go on the job," and was told that he would "have to work through the hall." Nagle repeated what he had told Orsino, that Britton had sent him and DeKoning to Cestone but that they would nevertheless "go back to the hall and get clearance."

The two men went to the hall where Nagle told Britton that the Cestone job was "going to start a couple of trenchers in a day or so," that Nagle had applied as operator for the Parsons trencher and DeKoning for the "Buckeye," that Cestone was "agreeable, but they had to get clearance from the hall." Britton answered: "All right, when they call in the job, it is yours." The two men went back to the sewer site and informed Orsino of their conversation with Britton. Orsino expressed approval and told the men that Varello "went down to call the hall." Nagle and DeKoning found Varello and were told that, in their behalf, he had just called the hall and had left a message with Tony Peninnici that the two men were at the site looking for a job and that Peninnici had said he would get the message "to whoever is supposed to get it."

The two men went to DeKoning's home where Nagle called Sofield on the phone and informed him of what had happened, including Nagle's conversation with Britton. Sofield said he had received no message from Peninnici and that the matter was in the hands of Varello, at which point the conversation terminated. After a short wait, Nagle called Sofield again and told him that he had talked to Varello who had informed him that his hands were tied and that Nagle would "have to go through the hall." At that point, Sofield, in vile language, told him to "never mind" about the trencher job, that he would "take care of it," and suggested that Nagle take a job operating a vibrator. Nagle inquired how long that work would be available and Sofield replied that it would last only 2 or 3 days. When Nagle asked whether Sofield expected him "to take a job for 2 or 3 days and give up a job that might continue for a year," Sofield answered: "Never mind that God damned trench job, I will take care of that."

At about 7:45 a. m. of the following day, Nagle went to the Cestone project and encountered Basil Hales, Jr., who told him he had been "sent over from the hall." The two men went to the office and talked to Orsino. Hales asked that he be put to work and Nagle reminded Orsino that Britton had told him that it was his job, and that he was prepared to go to work. Orsino's only answer was: "They sent this man out from the hall, what can I do?"

Hales was put to work immediately as a trencher operator. The Company's records also establish that two other trench operators were hired by it at about the same time—Daniel Hanlon, on April 26 and Joseph Beauliu on April 29. Niemczyk, who had been expected to come from DeMarco and Ciccone with the two trenching machines, never made application for work.

On or about May 12, after Nagle had filed charges with the Board alleging that the Union had, on or about April 26, discriminatorily caused the Company to deny him employment, "the hall" sent Nagle to the job site and he was employed by the Company as a payroll operator at a rate about \$11 a week less than that received by trenchers. He continued in that work until December 20. From December 21 to February 26, 1956, he was employed as an oiler. On the latter date, he was made trencher operator and was so engaged at the time of the hearing herein. During the course of his employment he was laid off once because of a reduction in the work force, and Bill DeKoning interceded in his behalf so that he was able to get his job back.

The foregoing factual findings based on credited testimony, most of it uncontradicted, compel the conclusion that the Company, on and after April 26, abdicated

⁵ Bill DeKoning served as president of the Union prior to June 1954, assumed the same office in May 1955, and was so serving at the time of the hearing herein.

its right to determine who was to be employed by it to the Union.⁶ This conclusion is buttressed by the following testimony, also uncontradicted, of Orsino, the Company's superintendent, and Varello, the master mechanic, pertaining to the relationship existing between the Company and the Union with respect to the employment of all payload men, trencher and crane operators employed by the Company in the performance of its contract.

Orsino testified that he hired all operating engineers "through the hall"; that whenever he needed a man, he, or Varello, under his instruction, would call the Union and tell them there was need for "an operator for a bulldozer, or a pay-loader, or what ever the qualification was, . . . and they sent down a man" who, when he reported, "went on the job . . . and the payroll." And, when Orsino was asked specifically: "If Nagle had been referred by the Union for the Parsons [machine] would you have put him to work?" his answer was: "Definitely."

Varello, a member of the Union for 18 or 19 years, was himself hired as master mechanic "through the hall." Prior to the day he began working for the Company on April 26, he had never talked to either of the two Messrs. Cestone, officers of the Company, or to Orsino. According to his own testimony, he had just finished another job and, "automatically, through the hall, through the office, was assigned to this job." He first appeared on the job site on the same day that Nagle and DeKoning made their first appearance there, and bluntly introduced himself to Orsino "as the master mechanic [who] had just come from the Union hall."

At this point it is appropriate to consider the dual capacity in which Varello served and by which each Respondent became severally liable for acts or conduct engaged in on its behalf. *Grove Shepherd Wilson and Kruge, Inc.*, 109 NLRB 209, 215.

In behalf of the Company, Varello acted in a supervisory capacity. Thus, he testified that when a man comes on the job, it is his duty "to stay with the man to see that he performs his work, . . . to see that he is a qualified operator, and . . . that he doesn't endanger the other people's lives." It is also his responsibility to see that the machines, some of which cost \$10,000 and more, are not damaged through the negligence of operators. If he determines that an operator is not qualified to do the work in which he is engaged and "is beyond help," he would "call the Union and get a new man." While operators were paid an hourly rate, Varello was paid a weekly salary which was substantially more than the aggregate of the hourly rate paid to operators.

Varello, however, was also the representative of the Union on the project performing functions usually performed by a shop steward. According to his own testimony, it was "part of [his] duties as master mechanic to check a man's union book . . . if he is a paid-up member." If the man reporting on the job did not carry the proper union book, or a union permit, he would not "hire the man . . . unless [he] checked back with the Union." If the Union mistakenly sent a man to the job who was not qualified to fill the vacant post, Varello testified he "would have to wait for orders from the Union hall to see whether *they want [him] to keep [the unqualified man]*, or send another man in his place."⁷

On the entire record I find that the Company on April 26 refused to hire Nagle because he had not been referred by, or received clearance from, the Union. Consideration of all the testimony permits only of the conclusion that Nagle would have been hired by the Company on April 26 had he received the clearance required by it and which Nagle vainly sought from the Union. Both Orsino and Varello expressed satisfaction with Nagle's qualifications,⁸ but made it clear to him that employment could be made only "through the hall" pursuant to "arrangements" made with Bill DeKoning and Jack Dunning. Orsino further testified that "if Nagle had been referred by the Union . . . [he] would . . . definitely . . . have put him to work." Varello testified that he said to Nagle and DeKoning: "I will

⁶ It was undisputed that there was no union-security agreement in effect between the parties.

⁷ Article 7, section 7 of the Union's bylaws makes the shop steward "responsible for conditions that may arise on his job." Article 6, section 8 thereof requires every member of the Union, "before starting to work, . . . to get permission to work . . . [from] the office of the Union."

⁸ Orsino, after receiving the county inspector's recommendation that Nagle was "a very good trencher operator" told Nagle that he was the "kind of man" that the Company wanted. Varello told Nagle that he knew that Nagle could "do a job for him."

call the union hall, and if [they] send you fellows, or either one of you, *the job is yours.*"⁹

The Company's verified answer pleads that the reason Nagle was not hired was because the Company "had not commenced work at that time under its contract." Significantly, however, neither Orsino nor Varello assigned that as the reason for denying employment to Nagle when they talked to him on April 26, or when Orsino spoke to him on April 27. Indeed, the Company's own records establish that Hanlon commenced his employment as a trencher on April 26, Hales on April 27, and Beauliu on April 29. It is thus apparent that on April 26 the Company required the services of at least 1 trencher, at least 2 such operators by April 27, and at least 3 by April 29. The preference given Hales was explained. His services had been requested by Cestone prior to April 26, he had received the necessary clearance from the Union, and was employed on April 27. But, Niemczyk, the other operator whose services Cestone desired, never sought employment with the Company. His post was vacant on April 26, and must have been so regarded by the Company, because it was filled on *that day* by Hanlon, with clearance from the Union. And, when another trencher job became available on April 29, it was given to Beauliu with similar union clearance.¹⁰

On the entire record I find that the Company, on April 26, discriminated against Nagle by refusing to hire him because he had not been cleared by the Union. By that conduct the Company violated Section 8 (a) (1) and (3) of the Act. *N. L. R. B. v. Philadelphia Iron Works, Inc.*, 211 F. 2d 937 (C. A. 3); *N. L. R. B. v. Alaska Steamship Company*, 211 F. 2d 357 (C. A. 9); *N. L. R. B. v. A. B. Swinerton, Richard Walberg and Howard Hassard*, 202 F. 2d 511 (C. A. 9); *H. E. Stoudt & Sons, Inc.*, 114 NLRB 838; *Imparato Stevedoring Corporation*, 113 NLRB 883; *Bickford Shoes, Inc.*, 109 NLRB 1346.

I further find that the Union, in violation of Section 8 (b) (2) and 8 (b) (1) (A) of the Act caused the Company on April 26 to discriminate against Nagle by refusing to clear or refer him for employment by the Company. *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17; *Grove Shepherd Wilson and Kruge, Inc.*, 109 NLRB 209; *N. L. R. B. v. International Brotherhood of Boilermakers*, 218 F. 2d 299 (C. A. 3); *International Union of Operating Engineers, Local No. 12, AFL*, 113 NLRB 635.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth 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.

V. THE REMEDY

Having found that Respondents engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Company has discriminated against Nagle in violation of Section 8 (a) (3) and (1) of the Act, and that the Union caused the Company to engage in such discrimination in violation of Section 8 (b) (2) and 8 (b) (1) (A) of the Act. I shall therefore recommend that the Company and the Union be ordered, jointly and severally, to make Nagle whole for any loss of pay he may have suffered as a result of the discrimination against him by payment to him of a sum of money equal to the amount he would normally have earned as a trencher operator from April 26, 1955, to February 26, 1956, when he was transferred to

⁹ At another point in his testimony Varello testified that he didn't *think* he "would have hired [Nagle] because [the job] called for a full-fledged book man, an engineer," whereas Nagle was only classified by the Union as an apprentice. Nevertheless, he testified, "if the Union said it was o. k., [he] would have put him to work."

¹⁰ Even if it be assumed, as the Company pleads in its answer, that Nagle was not hired on April 26 because operations had not yet begun, its conduct on that day was nevertheless violative of the Act. "The Board has consistently held that where an employer engages in a discriminatory hiring practice and where such practice is communicated to applicants for employment, albeit when no jobs are available, an inference and finding is warranted that further application would be futile because from the existence of discriminatory practice it is clear that the same discriminatory conditions would be attached whenever the jobs became available." *Consolidated Western Steel Corporation*, 108 NLRB 1041, 1044, and cases cited therein.

such a position, less his net earnings during that period. Back pay shall be computed on a quarterly basis in accordance with Board policy established in *F. W. Woolworth Company*, 90 NLRB 289, 291-299. It is also recommended that the Company make available to the Board, upon request, payroll and other records to facilitate computation of the amount of back pay due.

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

CONCLUSIONS OF LAW

1. Local 138, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Garrett Nagle, Respondent A. Cestone Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By the above conduct, thereby interfering with, restraining, and coercing employees and prospective employees in the exercise of rights guaranteed by Section 7 of the Act, Respondent A. Cestone Company has engaged in and is engaging in unfair labor practices within the mean of Section 8 (a) (1) of the Act.

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

5. By causing the Company to discriminate as aforesaid, thus restraining and coercing employees and prospective employees in the exercise of rights guaranteed in Section 7 of the Act, the 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 within the meaning of Section 2 (6) and (7) of the Act.

[Recommendations omitted from publication.]

APPENDIX A

NOTICE TO ALL EMPLOYEES AND APPLICANTS FOR EMPLOYMENT

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 our employees and applicants for employment that:

WE WILL NOT refuse to hire prospective employees because they have not obtained clearance, job referral or approval through, or from, Local 138, International Union of Operating Engineers, AFL-CIO, or any other labor organization, or by in any other manner discriminate in regard to hire or tenure of employment or any term or condition of employment, except to the extent permitted by Section 8 (a) (3) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees or prospective employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights 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 whole Garrett Nagle for any loss of pay he may have suffered as a result of our discrimination against him.

A. CESTONE COMPANY,
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 MEMBERS OF LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND TO ALL EMPLOYEES OF, AND APPLICANTS FOR, EMPLOYMENT WITH A. CESTONE COMPANY

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:

COMPLIANCE STATUS OF BOOT AND SHOE WORKERS' UNION 679

WE WILL NOT in any manner cause or attempt to cause A. Cestone Company to refuse to hire prospective employees because they have not been hired or obtained clearance, job referral or approval through or from the undersigned labor organization, or to discriminate against its employees or prospective employees in any other manner in regard to their hire or tenure of employment, or any term or condition of employment, except to the extent permitted by Section 8 (a) (3) of the Act.

WE WILL NOT in any other manner restrain or coerce employees or prospective employees of A. Cestone Company in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

WE WILL make whole Garrett Nagle for any loss of pay he may have suffered as a result of the discrimination against him.

LOCAL 138, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO,
Labor Organization.

Dated _____ By _____
(Representative) (Title)

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

Compliance Status of Boot and Shoe Workers' Union, AFL-CIO.
July 12, 1957

**ADMINISTRATIVE DETERMINATION OF
COMPLIANCE STATUS**

On March 29, 1957, General Shoe Corporation, an employer in interest in certain proceedings pending before the Board, filed a petition with the Board for the redetermination of the compliance status of the above-named Union or, in the alternative, that a hearing be held for the purpose of adducing evidence regarding the Union's alleged noncompliance status. It alleges that the Union was not in compliance with Section 9 (h) of the Act because general auditors and James T. Ryal, a regional director of the Union, are officers of the Union who failed to file the required affidavits.

In support of its contention that general auditors are officers of the Union required to file affidavits, the Petitioner relies on provisions of the Union's constitution dealing with the qualifications and election of candidates to certain offices;¹ the fact that general auditors are listed in these provisions along with the general executive board whose

¹"Sect. 5: The General Officers, General Executive Board, and General Auditors of the Boot and Shoe Workers' Union shall be elected for a term of two years at the regular convention.

"Sect. 6: Any shoe worker who has been an active member in continuous good standing for at least three years, who is not a member of an independent union, shall be eligible as a candidate for any office in the Union.

"Sect. 8: In electing officers in convention, after all delegates have had an opportunity to nominate candidates for the particular office being filled. . . .

"Sect. 9: The officers elected shall be installed and take office at the adjournment of the convention and hold office until their successors have been elected and installed."