

**J. W. Saltsman doing business as Saltsman Construction Company and Construction & General Laborers Union Local No. 576, International Hod Carriers, Building & Common Laborers Union of America, AFL-CIO and United Construction Workers, Division of District 50, United Mine Workers of America, Party to the Contract**

**J. W. Saltsman doing business as Saltsman Construction Company and United Brotherhood of Carpenters and Joiners of America, Local Union 3223, AFL-CIO and United Construction Workers, Division of District 50, United Mine Workers of America, Party to the Contract. Cases Nos. 9-CA-1187 and 9-CA-1188. May 15, 1959**

### DECISION AND ORDER

On December 15, 1958, Trial Examiner Ralph Winkler issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair practices and recommending that the Respondent cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent and United Construction Workers, Party to the Contract, filed exceptions to the Intermediate Report, and the Respondent filed a supporting brief.

Pursuant to the provision of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Bean and Fanning].

The Board 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 Intermediate Report, the exceptions and briefs, and entire record in the cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modification noted below.

Among other things, the Trial Examiner found that the Respondent required newly hired employees at its Nolin River project to join the Union and to authorize checkoff of their union dues as a condition of employment, in violation of Section 8(a) (1) and (3) of the Act. We agree with this finding. However, the Trial Examiner recommended that the Respondent reimburse "all individual employees, excepting those who were members of the Union before going to the Nolin River project, for all moneys checked off pursuant to the checkoff cards." We do not agree that the remedy of reimbursement should be limited to those employees who became members of the Union after beginning employment at the Nolin River project. In our opinion, the illegal

practice of this Respondent, set forth above, inevitably coerced all employees of the Respondent at this project to become or remain members of the Union. In this respect, Respondent's practice had the same impact upon its employees as an unlawful agreement with a labor organization directed to the same result.

Accordingly, we shall order reimbursement of all moneys checked off from all employees while employed at the Nolin River project, regardless of whether any employees executed a checkoff authorization while employed at the Nolin River project or prior thereto. In all other respects, we adopt the Intermediate Report.

### 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 the Respondent, J. W. Saltsman, doing business as Saltsman Construction Company, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Assisting or contributing support to United Construction Workers, Division of District 50, United Mine Workers of America, or to any other labor organization.

(b) Encouraging membership in the aforesaid United Construction Workers or in any other labor organization by requiring union membership and checkoff authorization as a condition of employment or in any other manner discriminating against employees 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.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, or to refrain from any or all such activities, 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) Reimburse all Nolin River employees, as specified in the decision above in the full amount of dues, initiation fees, assessments, and all other moneys collected from them pursuant to United Construction Workers checkoff.

(b) Make whole Felix Pile as set forth in the section of the Intermediate Report entitled "The Remedy."

(c) 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 the amounts of moneys due to Pile and the other employees under the terms of this Order.

(d) Post at all its projects covered by contract with United Construction Workers copies of the notice attached to the Intermediate Report<sup>1</sup> marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by Respondent or his representative, be posted immediately upon receipt thereof, and maintained for at least 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Ninth Region in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

<sup>1</sup>This notice is hereby amended by substituting for the words, "The Recommendations of a Trial Examiner" the words "A Decision and Order." 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."

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### STATEMENT OF THE CASE

Upon separate charges filed by Locals 576 and 3223, the General Counsel of the National Labor Relations Board issued a consolidated complaint dated September 12, 1958, against J. W. Saltsman, d/b/a Saltsman Construction Company, herein called Respondent, alleging that Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, 61 Stat. 136, herein called the Act. Copies of the complaint and charges were duly served upon Respondent and United Construction Workers, Division of District 50, United Mine Workers of America, as Party to the Contract, herein called the Union, in response to which Respondent filed an answer denying the unfair labor practices alleged.

Pursuant to notice, a hearing was held on October 21 to 22, 1958, at Louisville, Kentucky, before the duly designated Trial Examiner. All parties were represented at the hearing and were given full opportunity to examine and cross-examine witnesses and to introduce evidence bearing on the issues; they were also given opportunity for oral argument at the close of the hearing and to file briefs as well.

Upon the entire record in the case, and upon observation of the demeanor of witnesses, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

Respondent is engaged in the building and construction industry, as a general contractor, throughout the Commonwealth of Kentucky, having his principal office and place of business in Bardstown, Kentucky. In 1957 and 1958 Respondent was engaged in four bridge and approach projects producing an income in excess of \$487,000; these projects were undertaken pursuant to contracts with the Kentucky Department of Highways. The contract for one of these projects, the so-called Nolin River project in Hardin County, recites *inter alia* that its specifications are in accordance with "required contract provisions for Federal Aid Interstate Projects"

under the Federal-Aid Highway Act of 1956, 70 Stat. 374. Insofar as is here pertinent, the Highway Act deals with the construction of roads, bridges, and approaches, all as part of a national highway system; the Federal Government under a so-called "9-1" arrangement with Kentucky contributed 90 percent to the cost of the Nolin River project. Respondent's Nolin River project began in 1957 and, perhaps except for finishing operations, was completed in 1958. The estimate contract price for the project is \$371,742.60, with the Federal Government reimbursing the Commonwealth of Kentucky in the amount of 90 percent of said cost as mentioned above. During the 12-month period ending in October 1958, Respondent purchased fabricated steel, costing more than \$40,000, from a Kentucky building and supply concern and which was fabricated by said concern; this steel was originally obtained by the building and supply concern outside the State of Kentucky and Respondent herein used about one-half of this amount in the Nolin River project.

It is contemplated that the Nolin River project will be part of a Federal highway extending southward to the Kentucky-Tennessee border. Because this project was not actually connected with an existing Federal highway or with any other highway during the construction period, Respondent urges that its construction work was of a local nature beyond the Board's jurisdictional limits; and, in support thereof, Respondent cites a line of cases arising under the Fair Labor Standards Act wherein, for jurisdictional purposes, the Federal courts distinguished between new construction on one hand and displacement or additional construction on the other. The most recent of these cited cases is *Van Klaveren v. Killian-House Co.*, 210 F. 2d, 510 (C.A. 5). In 1955, however the Supreme Court referred to these aforementioned cases as of "another vintage," and rejected the "new construction" doctrine as a jurisdictional touchstone under the FLSA. *Mitchell v. Vollmer & Co.*, 349 U.S. 427; *Southern Pacific Co. v. Gileo*, 351 U.S. 493, 500. See also *Archer v. Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5), cert. denied 355 U.S. 825; *Mitchell v. Empire Gas Engineering Company*, 256 F. 2d 781 (C.A. 5). This consideration aside, moreover, there is no question but that, by its own terms, the National Labor Relations Act is of broader reach than the Fair Labor Standards Act. *Polish National Alliance, etc. v. N.L.R.B.*, 322 U.S. 643, 647-648. Cf. *A. B. Kirschbaum v. Metcalfe Walling*, 316 U.S. 517, 520-523.

I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. *Madison County Construction Co.*, 115 NLRB 701 ("clearly the construction of State highways and bridges, which themselves constitute essential links in channels of interstate commerce, affects commerce within the meaning of the Act"); *Siemons Mailing Service*, 122 NLRB 81.

## II. THE LABOR ORGANIZATION INVOLVED

United Construction Workers, Division of District 50, United Mine Workers of America, herein called the Union, is a labor organization as defined in Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

Respondent and the Union have been in contractual relationship for approximately 10 years, under a series of collective-bargaining agreements which contracts have successively applied to all of Respondent's construction jobs during their respective terms. The operative contract during material times here was executed on April 23, 1957, and, as already indicated, applied to the aforementioned four projects, including the Nolin River project involved in this case. This contract was executed a day after Respondent entered into agreement with Kentucky Department of Highways for the Nolin River job.<sup>1</sup> The 1957 contract between Respondent and the Union covers the usual subjects found in such agreements and provides, *inter alia*, that the Union will be "sole bargaining representative for all workmen," excluding engineering, clerical, and supervisory personnel, and that Respondent will, "upon the beginning of its projects, notify the Union of the locality where the work is being performed." The contract does not contain a union-shop or other similar provision; it does provide for a monthly checkoff of union dues, initiation fees, and lawful assessments "where so authorized and directed by an employee in writing upon an authorization form."

Respondent Saltsman testified that it is the universal practice of highway contractors in Kentucky, including Respondent's own practice, to maintain at all times the necessary nucleus of skilled employees of various trades and crafts and to move

<sup>1</sup>The chronological relationship between Respondent's Nolin River contract with Kentucky and the execution date of Respondent's 1957 contract with the Union is coincidental and not causal.

this crew of employees from one job to the next. Unskilled workers, Saltsman further testified, are hired locally in the vicinity of any particular job. Respondent's records show that as of October 9, 1958, a total of approximately 44 employees have been engaged at various times on the Nolin River project and that approximately 13 of this number had been in Respondent's prior employ on other projects; the remainder were hired locally.

William L. Clark was the job superintendent on the Nolin River project; he was in charge of construction and the hiring of personnel and he had a desk in a construction shack at the project. One of Clark's duties in hiring new employees was to have such employees execute income tax withholding forms, both Federal and State.

The Union had job stewards at the project, the first one being Ansel "Tim" Hines who served in that capacity from the beginning of the project (he was the second employee hired) until he left Respondent's employ on June 22, 1957; he was succeeded by Louis Broyles who served in that capacity until becoming a carpenter foreman on the project on August 12, 1957; Clyde Craig followed Broyles as steward, and remained in such position until the project was completed. The principal union function and activity of the job stewards was to have employees sign "membership application and checkoff authorization" cards; the stated checkoff was "all such amounts of money . . . provided in the applicable [the 1957] agreement." Superintendent Clark testified to his awareness of this card-signing function and activity of the union stewards. Of the 44 employees engaged at the project, only 3 did not sign the aforementioned application and checkoff cards; these 3 were the last employees hired at the project, their employment running from August 1958 until October 1958. Of the 13 employees on the job who had previously worked elsewhere for Respondent, 8 had executed such cards before coming to Nolin River.

It was Clark's responsibility, as already indicated, to have new employees sign the aforementioned tax forms. Clark testified that he delegated such function to the respective job stewards because, as Clark testified, "they're dependable boys and . . . I thought I would take a load off of myself." Clark thus directed all new employees into the construction shack in order to "get signed up" by whoever was job steward at the time. When the employees then reported at the shack, the respective job stewards presented to the employees for their signature the aforementioned tax forms as well as union application and checkoff card. Clark testified in effect that his only purpose in directing employees to be "signed up" was in connection with tax forms and perhaps employment purposes and not for union purposes; he also testified that, although he knew of the mentioned union activity of the stewards, he did not know whether or not the stewards were so engaged on the same occasions the employees executed the tax forms. Of the three mentioned stewards, only Broyles was available as a witness in this proceeding. Broyles testified that neither Clark nor any other Respondent official or supervisor ever discussed with him "about requiring the men to join a union." Broyles testified in effect that during his stewardship he signed up all new employees on the project in the manner above described, and the record shows that the other stewards acted similarly.

Although, as stated above, Clark testified that he assigned the obtaining of tax form signatures to the respective stewards, Broyles as a Respondent witness, first testified that no one had instructed him to perform this function but that he did it on his own because he had previously done so on an earlier job for another employer where he had been a foreman. Broyles later testified that he was merely following the practice of the prior steward, Hines, in such respect.

#### Discrimination Against Felix Pile

Felix Pile applied for carpentry work at the project in May 1957. The job was just getting under way at the time and the weather was inclement, and Superintendent Clark advised Pile that carpenters would be hired and that Pile should return when the weather improved. Pile returned to the project several more times at Clark's suggestion during the following few weeks and on the last such occasion, although it was raining at the time, Clark told Pile that it "looked like we might go to work" that day. Pile testified that, while Clark did not specifically state that Clark was hiring Pile at the time, Pile took it to mean that Pile would begin work that morning.

Immediately following this conversation with Clark, according to Pile's testimony, Pile went to his car, parked nearby, to obtain his tools preliminary to going to work and then he returned to Clark. Meanwhile, an unidentified person came up to Clark and Pile, and the three men had some discussion concerning the Union. Pile was unable to recall exactly who brought up the subject, but he did testify that either Clark or the unidentified person in Clark's presence stated that Pile would have to

join the Union in order to work on the project. Pile further testified that he then advised Clark and this other person that he, Pile, did not think he should have to join the Union as he was already affiliated with another labor organization. The conversation ended, according to Pile, with Pile telling Clark that Pile "didn't feel like I wanted to belong to two unions and that I would be back if I decided to do it." Pile has not since returned.

The record shows that Respondent was hiring employees during the aforementioned period, and Respondent does not contend otherwise.

Clark testified that he did not recognize Pile, who was in the hearing room at the time, and that he did not recall whether or not Pile had ever applied to him for work on the project; nevertheless, he denied ever having told any employee or applicant that union membership was a condition of employment and thus he denied informing Pile to such effect.

#### Conclusions

Clark testified, it is recalled, that he knew the successive union stewards were signing up union members but that he did not know whether they did so on the occasions when he sent employees to them at the construction shack "to be signed up." Clark, in my opinion, is not a credible witness and I am satisfied that he was fully aware that the stewards were "signing up" the employees for union membership and checkoff purposes at the same time as for tax withholding purposes. Indeed, in my judgment, that is why Clark delegated the "signing up" function to the union stewards and why, when Craig succeeded Broyles as steward, Clark assigned the function to Craig, even though Broyles remained on the project. I have no doubt, and I find, that when employees were instructed by Clark to be "signed up" by stewards, the employees understood such direction, as indeed it was in the circumstances, as an order to sign the union cards as well as the W-2 forms as a condition of employment. Even assuming contrary to the foregoing, that Clark in good faith did not intend his use of the expression "sign up" to encompass the signing of union cards, Respondent would nevertheless be responsible for the Union signing, as well, in a situation where with admitted knowledge that union stewards were signing up union members, Clark directs employees to the stewards in the circumstances outlined above. *N.L.R.B. v. Mississippi Products, Inc.*, 213 F. 2d 670, 673 (C.A. 5), and cases cited therein; *Fairbanks Transit System, Inc.*, 108 NLRB 958, 974-975. Cf. *Millwrights' Local 2232, United Brotherhood of Carpenters, etc. (Farnsworth & Chambers, Inc.)*, 122 NLRB 300.

I conclude that, by the action of Superintendent Clark, Respondent imposed union membership and checkoff authorization on employees as a condition of employment, not only within the 30-day free period prescribed in the proviso to Section 8(a)(3) of the Act, but also in a situation where no legally operative contract permitted a requirement of union membership at any time.<sup>2</sup> Respondent has thereby encouraged membership in the Union and assisted and contributed support to the Union and has interfered with, restrained, and coerced his employees in violation of Section 8(a)(1) and (3) of the Act. *The Danspur Company, Inc.*, 114 NLRB 40; *General Molds and Plastic Corporation*, 122 NLRB 182; cf. *United Construction Workers, Division District 50, United Mine Workers of America (The Jeffrey Manufacturing Co.)*, 122 NLRB 1.

Respecting the case of Pile, I am satisfied and find that Pile was an honest, even though at times a confused, witness and that Clark, as I have already indicated, was not a credible witness. I find that Clark imposed an unlawful condition of union membership on Pile and that, by such wrongful requirement to which Pile did and could properly refuse to submit, Respondent discriminatorily denied employment to Pile in violation of Section 8(a)(3) and (1) of the Act. See cases cited above.

This leaves for consideration the General Counsel's final allegation that Respondent further assisted the Union in violation of Section 8(a)(1) of the Act by executing an exclusive recognition agreement before engaging employees for the project. At the close of the hearing the record might have supported a finding that the aforementioned 1957 agreement with the Union was a prehire contract entered into solely with reference to the Nolin project which had not yet begun. Thereafter, however, Respondent requested that the record be reopened to show by the testimony of Respondent Saltsman that the 1957 contract was an employerwide agreement not confined to the Nolin project and that such contract was merely one in a series of agreements of 10 years' standing; and that Respondent followed a general industry practice by bringing to the Nolin job a nucleus of skilled workmen from its other

<sup>2</sup> The Union cannot qualify for such contract under Section 8(a)(3) of the Act, because of its failure to comply with Section 9(f), (g), and (h) of the Act.

projects, such other workmen having been covered by earlier similar agreements with the Union. The General Counsel, while opposing the motion to reopen, stated his willingness to have received in evidence an affidavit of Saltsman filed in support of Respondent's motion. I thereupon directed that Saltsman's affidavit be received as part of the record herein and also advised the parties that the matter would be treated as if Saltsman had appeared and testified to such effect.<sup>3</sup> My earlier findings herein are made accordingly.

With this change in the record after the close of hearing, the General Counsel asserts in his brief that Respondent nevertheless has assisted the Union by applying the existing 1957 agreement to a new project where a majority of the ultimate employee complement is newly hired. The General Counsel cites in support of his position a case involving a plant relocation from one State to another. *National Electronic Manufacturing Corp. et al.*, 113 NLRB 620. But Respondent's defense involving an employerwide bargaining unit with the factor of a comparatively permanent core of skilled employees transferring from one job to another, presents a somewhat different situation. Before resolving the application of the *National Electronics* decision to the instant case involving the building and construction industry, I should like to have additional facts before me as well as further argument on the matter from all counsel. In the circumstances, therefore, including the fact that the Nolin project is now completed and in view of the fact that I am finding other violations of unlawful assistance and encouragement, I believe it fairer to all parties concerned to pretermit such issue in this proceeding.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Certain of the activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, have a close, intimate, and substantial relation to trade, traffic, and commerce in 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 Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act.

Having found that Respondent unlawfully required its employees to sign a union application and checkoff authorization card, I shall recommend that Respondent reimburse all individual employees, excepting those who were members of the Union before going to the Nolin River project, for all moneys checked off pursuant to the checkoff cards. See *General Molds and Plastic Corporation*, 122 NLRB 182; *Lakeland Bus Lines, Incorporated*, 122 NLRB 281; *N.L.R.B. v. Broderick Wood Products Company, etc.*, 261 F. 2d 548 (C.A. 10). I shall also recommend that Respondent make Pile 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 that which he would have earned as wages from the date of such discrimination until such time, absent discrimination, as he would have remained in Respondent's employ, less his net earnings during such period, to be computed on a quarterly basis in accordance with *F. W. Woolworth Company*, 90 NLRB 289.

In view of the nature of the unfair labor practices committed, I shall also recommend that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

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

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce and the Union is a labor organization, both within the meaning of the Act.

2. By requiring employees to join the Union and to execute union checkoff authorization cards and by making Pile's employment contingent on such union membership, Respondent has violated Section 8(a)(1) and (3) of the Act, which conduct constitutes unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

<sup>3</sup> Respondent's motion to reopen with Saltsman's attached affidavit, the General Counsel's response thereto, and the Trial Examiner's order thereupon will be included in the Exhibit File, and respectively labeled Respondent Exhibits Nos. 1, 2, and 3.

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL reimburse all employees at the Nolin River project for all dues, initiation fees, assessments and all other moneys which we have collected from them under checkoff for United Construction Workers, Division of District 50, United Mine Workers of America.

WE WILL make whole Felix Pile for any loss of pay suffered by him as a result of the discrimination against him.

WE WILL NOT encourage membership in United Construction Workers or in any other manner discriminate against employees in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT require employees to be members of, or to sign checkoff cards for, United Construction Workers.

WE WILL NOT assist or contribute support to United Construction Workers or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities 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 National Labor Relations Act.

SALTSMAN CONSTRUCTION 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.

**Window Glass Cutters League of America, AFL-CIO and Libbey-Owens-Ford Glass Company and United Glass and Ceramic Workers of North America, AFL-CIO-CLC**

**Charleston Local, Window Glass Cutters League of America, AFL-CIO and Libbey-Owens-Ford Glass Company and United Glass and Ceramic Workers of North America, AFL-CIO-CLC**

**Shreveport Local, Window Glass Cutters League of America, AFL-CIO and Libbey-Owens-Ford Glass Company and United Glass and Ceramic Workers of North America, AFL-CIO-CLC**

**Window Glass Cutters League of America, AFL-CIO, and Its Locals at Mt. Vernon, Ohio, Henryetta, Oklahoma, and Clarksburg, West Virginia and Pittsburgh Plate Glass Company and United Glass and Ceramic Workers of North America, AFL-CIO-CLC. Cases Nos. 9-CD-36, 9-CD-37, 9-CD-38, and 9-CD-40. May 15, 1959**

DECISION AND DETERMINATION OF DISPUTE

This proceeding arises under Section 10(k) of the Act, which provides that "whenever it is charged that any person has engaged in an