

did not tell Paul he discharged Zaremba and Leo Hoagland because they were organizing.

True the timing of the discharges of Zaremba and Leo Hoagland raises a suspicion that discriminatory action was taken against them. But suspicion is not proof and a finding of violation of the Act cannot be based on suspicion alone. *Valencia Service Co.*, 103 NLRB 1190. Other than the testimony of Friend, set forth in detail above, which I have not credited, the record contains no background<sup>8</sup> or context of union animus or antiunion activity on the part of the Respondent.

Upon the foregoing and the entire record I am convinced and find that the General Counsel has not sustained his burden of proving by a preponderance of the evidence that Zaremba and Leo Hoagland were discharged for the reasons alleged in the complaint.

I adopt Respondent's proposed findings of fact Nos. 1, 2, 3, 4, 5, and 7 and proposed conclusions of law Nos. 1, 2, and 3 and will recommend that the complaint herein be dismissed in its entirety.

#### CONCLUSIONS OF LAW

1. The operations of the Respondent, Max Francis, d/b/a Max Francis Trucking constitute and affect trade, traffic, and commerce among the several States within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local 886, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

[Recommendations omitted from publication.]

union to the boys. He further explained to Paul that because of the situation at Superior it would slow things up to come through Emd and he did not want to hold up the return load.

<sup>8</sup> For purposes of background only the General Counsel was permitted to adduce testimony from Zaremba that in August 1957, while he and driver Robertson were unloading a truck in Oklahoma City, Max Francis said, "if the boys ever wanted to deal their selves [sic] out of a job, that's all they had to do was to vote in the union and they would, because he would park every truck." Max Francis truthfully explained that in his type of operation, he hauls cheap commodities and in order to realize a profit he had to have close control of the drivers. He admitted he may have said that he could not abide by any regulations and that he would be forced to park the trucks because he would not be able to pay the wages. Such statement was more in the nature of a prediction rather than antiunion.

### **Victory Construction Co. and Franklin C. Butler**

**Construction and General Laborers' Union Local No. 758, International Hod Carriers', Building and Common Laborers' Union of America, AFL-CIO and Kenneth R. Brooks**

**Construction and General Laborers' Union Local No. 758, International Hod Carriers', Building and Common Laborers' Union of America, AFL-CIO and Franklin C. Butler. Cases Nos. 8-CA-1813, 8-CB-347, and 8-CB-348. April 25, 1960**

#### DECISION AND ORDER

On September 29, 1959, Trial Examiner Albert P. Wheatley 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 there-

from and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and 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 Intermediate Report, the exceptions, the briefs, and the entire record in these cases, and finds merit in the Respondents' exceptions. Accordingly, the Board adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.<sup>1</sup>

1. We disagree with the Trial Examiner's finding that the Respondents were parties to an unlawful hiring arrangement, understanding, or practice whereby members of the Respondent Union were given preference in hiring over nonmembers. The record of actual hirings negatives the existence of any such unlawful arrangement or practice. According to the Respondent Company's records, the accuracy of which has not been challenged, of 68 laborers hired on the project between June 24, 1958, and June 17, 1959, only 27, or 40 percent, had referral slips from the Respondent Union. Thus, more than half the laborers hired came from sources other than the Respondent Union. This record evidence, as well as the testimony of the Respondent Union's steward, Jesse Smith, that on instructions from Superintendent Rose and timekeeper Geisler he had customarily hired laborers "off the street" regardless of union affiliation, corroborates the testimony of union officials, Szuhly and Byrd, denying that an agreement for preferential hiring had been made with Rose. We note in this connection that the Trial Examiner expressly discredited Rose's statement that the alleged agreement for preferential hiring had been embodied in a written contract. Accordingly, we find, contrary to the Trial Examiner, that the Respondents were not parties to an unlawful hiring arrangement, understanding, or practice whereby members of the Respondent Union were given preference in hiring over nonmembers.

2. We also disagree with the Trial Examiner's finding that the Respondent Company discriminated against Brooks and Butler and that the Respondent Union caused such discrimination. The Trial Examiner's finding of specific discrimination was based upon his subsidiary finding that the Respondents were parties to an unlawful hiring-hall arrangement. As we have not adopted the latter finding, we do not adopt the finding of specific discrimination based thereon.<sup>2</sup>

<sup>1</sup> The Respondents requested oral argument. The request is hereby denied inasmuch as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

<sup>2</sup> Member Bean agrees with his colleagues in reversing the Trial Examiner's findings that the Respondents were parties to an unlawful hiring arrangement and that the

Regardless of the reason assigned by the Respondent Company to Brooks and Butler for not hiring the latter, the record is devoid of any evidence which would explain why the Respondents would have varied their nonexclusive, nondiscriminatory hiring arrangement in the case of these two individuals. Moreover, the record strongly suggests that there was no job opening when Brooks was refused work; and, in the case of Butler, two employees were hired without referral on the day he was refused employment.

In view of our reversal of the Trial Examiner's findings of unfair labor practices, we shall dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

CHAIRMAN LEEDOM took no part in the consideration of the above Decision and Order.

Respondent Union engaged in unlawful conduct by its failure to give Brooks and Butler referral slips. However, even in the absence of an unlawful hiring arrangement, an employer violates Section 8(a)(3) and (1) of the Act by conditioning employment upon receipt of union clearance. *The Lummus Company*, 101 NLRB 1628, enfd. in relevant part, 210 F. 2d 377 (C.A. 5). The Trial Examiner credited the testimony of Brooks and Butler that representatives of the Respondent Company had told them that they would be employed if they obtained referral slips from the Respondent Union. There is insufficient ground, in Member Bean's opinion, to upset these credibility resolutions of the Trial Examiner. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3). Accordingly, he would find a violation of Section 8(a)(3) and (1) on the part of the Respondent Company with respect to Brooks and Butler.

## INTERMEDIATE REPORT AND RECOMMENDATIONS

### ISSUES

The primary issues herein are whether Victory Construction Co., herein called Respondent Company, and Construction and General Laborers' Union Local No. 758, International Hod Carriers', Building and Common Laborers' Union of America, AFL-CIO, herein called Respondent Union, operated under an unlawful hiring hall arrangement or practice, whether Respondent Company unlawfully refused to hire Franklin C. Butler and Kenneth R. Brooks and whether Respondent Union caused Respondent Company to refuse employment to Franklin C. Butler and Kenneth R. Brooks.

### BUSINESS INVOLVED

Victory Construction Co., an Ohio corporation having its principal place of business in Dayton, Ohio, engages in building construction in, and outside of, the State of Ohio. During 1958 it performed services outside of Ohio in an amount in excess of \$1,000,000. At the times material herein, it was engaged in the construction of multiple dwelling units (a housing project) near Lorain, Ohio, and this case concerns events connected with this project. Ground breaking for this project took place on or about June 24, 1958.

### THE UNFAIR LABOR PRACTICES

#### The Hiring Hall

Immediately prior to the ground breaking ceremonies William Rose, general superintendent of the housing project for Respondent Company, met in Lorain, Ohio, with representatives of various craft unions, including officials of Respondent Union. On this occasion, Respondents arrived at a mutual understanding concerning rates of pay and other conditions of employment. However, there is a dispute as to whether they agreed upon union-security terms greater than permitted by the Act.

According to Rose, there was no discussion concerning the specific terms of a contract but there was a mutual understanding that he (Rose) would call Respondent Union when and as he needed laborers and Respondent Union would send him

laborers on request and following the reaching of this understanding he (Rose) signed a written agreement to this effect.<sup>1</sup>

According to Steve Szuhy, secretary-treasurer of Respondent Union, and James Byrd, president and assistant business representative of Respondent Union, Rose was shown the existing agreement between Respondent Union and the Lorain County General and Masons Contractors Organization and an oral understanding<sup>2</sup> was reached that the terms of this agreement, except those concerning union security<sup>3</sup> would be applied at the project involved herein.

Szuhy testified further that Rose was in a hurry to attend the ground-breaking ceremonies and that when he (Szuhy) attempted to discuss the union-security provisions Rose stated that he was going to "operate this job 100 percent union" and that he would discuss these details later. A subsequent conference concerning such details was not held.

At the time of the conference between Rose and the union officials noted above, employers and unions in the construction industry, including Respondent Union, had under consideration correction of unlawful hiring arrangements so as to conform with the standards of the *Mountain Pacific* case, *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 119 NLRB 883 and it appears highly probable that, and the Trial Examiner finds that Szuhy told Rose that the union-security clauses of the contract were in conflict with the decisions of this Board and modifications of these clauses were under consideration, that when efforts at modification were completed Respondent Union would seek to apply the provisions as modified and that Rose understood this situation and indicated a willingness to go along with these terms. However, the Trial Examiner is not convinced, as Szuhy's and Byrd's testimony reflects, that an understanding was reached that no union-security provisions were to be applicable while modifications were being worked out. At most, only something in the nature of a general savings clause was agreed upon.<sup>4</sup> In addition, Respondent Company's custom and practice is to employ union members and obtain them through union organizations and this procedure, with certain exceptions,<sup>5</sup> was followed with respect to laborers at the project involved herein. Furthermore, in early September 1958, Respondent Company's president (Victory Napolitano) was called to a meeting with representatives of various craft unions, including officials of Respondent Union, and criticized for obtaining workmen from sources other than union hiring halls and following this meeting Napolitano instructed Job Superintendent Rose not to hire workmen from sources other than union organizations.

In the light of the foregoing and the facts hereinafter noted with respect to Kenneth Brooks the Trial Examiner believes and finds that the evidence adduced establishes an unlawful hiring hall arrangement or understanding or practice between Respondents whereby members of Respondent Union were given preference in regard to employment over nonmembers (see *Gay Engineering Corporation*, 124 NLRB 451).

#### Kenneth R. Brooks

On or about August 14, 1958, Brooks asked Project Superintendent Rose for employment as a laborer. Rose asked Brooks if he could get a referral slip from

<sup>1</sup> In the light of the entire record herein, the Trial Examiner believes and finds that Rose did not in fact sign such an agreement.

<sup>2</sup> Szuhy and Byrd testified Rose did not sign any document on this occasion.

<sup>3</sup> Article II which limits employment to members of the Union.

Article V, section 5, which states, "Any workman sent by the Union at the Employers' request shall have preference over any other workman and shall be paid two (2) hours at the regular rate if not put to work."

Article V, section 6, which provides, "When a workman is sent to a job by the Union upon request of the Employer he shall carry an official referral from the Union."

Article VII, section 3, provides, "All foremen shall be members of the Union in good standing."

Article VII, section 5, provides, "The Employer shall bring in no more than one labor foreman. Any additional labor foreman needed shall be furnished by the Union."

Article VIII, section 3, which provides, "Any employee before going to work must clear his union standing with the steward."

<sup>4</sup> A general savings clause does not make valid an otherwise unlawful understanding or arrangement. See *Honolulu Star-Bulletin*, 123 NLRB 395; and *Argo Steel Construction Company*, 122 NLRB 1077.

<sup>5</sup> Some laborers were obtained by Respondent Company from sources other than Respondent Union. However, such fact does not nullify an otherwise unlawful arrangement. See *Honolulu Star-Bulletin*, *supra*.

Respondent Union and upon receiving an affirmative reply said "Well, if you get a slip from the Hall you got yourself a job." Another laborer (Pickett Johnson) then asked Rose if he (Johnson) got a referral slip whether he (Johnson) would also get a job. Rose told Johnson he (Rose) was not sure whether Johnson would also be given work. Brooks and Johnson then got in Brooks' automobile and started toward Respondent Union's business office. En route they met James Byrd, president and assistant business representative of Respondent Union, and told him what had happened. Byrd then said he was going to the jobsite and that he would meet them there. At the jobsite that day Brooks asked Byrd for a referral slip and Byrd said he would go see whether Respondent Company wanted anybody. Byrd then entered Respondent Company's jobsite office. A discussion ensued between Byrd and Respondent Company's officials about Rose promising laborers work without first clearing through Respondent Union and the inconvenience this caused Byrd. During the course of this discussion Rose denied promising Brooks and Johnson jobs and, in response to Byrd's inquiry "Do you want these two fellows?" (Rose) answered "No." Upon his return from the office Byrd told Brooks Respondent Company did not need anybody and refused to issue a referral slip. Brooks did not thereafter receive a referral slip or employment.

Between August 14, 1958, and June 17, 1959, both inclusive, Respondent Company hired approximately 75 laborers.

#### Franklin Butler

On or about Friday, November 14, 1958, Franklin Butler asked Project Superintendent Rose for employment as a laborer. Rose referred Butler to Respondent Company's field superintendent (Meade). Meade told Butler he (Meade) was about to call Respondent Union for two men and that if he (Butler) got a referral slip from Respondent Union he "could be one of the two." Butler then went to Respondent Union's business office, arriving there about 8:45 a.m., and talked to Steve Szuhly, secretary-treasurer of Respondent Union.

Butler told Szuhly about his efforts to get work at the project and asked for a referral slip. He was told "to sit out there [in the union hall] and wait and he [Szuhly] would see what he could do." Butler waited until the hall closed, about 10 a.m. While he was waiting Szuhly received a telephone call but said nothing to Butler. After the closing of the union hall Butler returned to the project site.<sup>6</sup>

When Butler arrived at the project site the second time, on or about November 14, 1958, he went to the jobsite office and was told, by someone in the office who Butler could not identify but who was processing the employment papers of two laborers then being hired, that he (the office worker) was signing up two men sent to the project by Respondent Union at the request of Respondent Company. Butler identified one of the laborers as Jake Jones. He did not know the name of the other and was unable to identify him except as a member of Respondent Union. Respondent Company's records reflect that Jake Jones and Joe Hegedus were hired on November 14, 1958. Butler testified that he noticed that Jake Jones had in his possession a (referral) slip.

On about Monday, November 17, 1958, Butler again called at Respondent Union's business office. He complained about the manner in which he had been treated (about his not being sent to the project) and a heated discussion ensued resulting in the closing of the union hall and dispersement of members.<sup>7</sup>

Butler did not thereafter seek or obtain a referral from Respondent Union or a job from Respondent Company.

In view of the hiring-hall arrangement between Respondents (mentioned earlier in this report) and the facts found above concerning Brooks and Butler the Trial

<sup>6</sup> Based upon the testimony of Butler. Szuhly denied that he talked to Butler that morning and denied that Butler ever asked him for a referral to the Victory job. Szuhly testified that Andrew Marcks, business agent for Respondent Union, not he (Szuhly), talked to Butler that morning. Marcks corroborated Szuhly and testified further that the conversation with Butler was in no way related to Butler's efforts to get a job. In the light of the entire record herein, including Butler's efforts to get a job immediately prior to this visit to the union business office and the events immediately after this visit (hereinafter noted) the Trial Examiner believes and finds Butler's version of this incident more reliable than the versions given by Szuhly and Marcks.

<sup>7</sup> The testimony concerning the details of this incident is conflicting with Butler giving one version and Szuhly and Byrd giving a somewhat different version. In the light of the facts previously found, Butler's version appears more reliable than Szuhly's and Byrd's. However, both versions support the facts found above.

Examiner believes and finds that Brooks and Butler were discriminatorily denied employment by Respondent Company, that Respondent Union caused Respondent Company to engage in said discriminations and that by said conduct Respondent Company violated Section 8(a)(3) and (1) of the Act and Respondent Union violated 8(b)(2) and (1)(A) of the Act. See *Schenley Distillers, Inc.*, 112 NLRB 613.

#### Ultimate Findings and Conclusions

In summary, the Trial Examiner finds and concludes that: (1) by the aforementioned hiring-hall arrangement understanding or practice between Respondents, Respondent Company violated Section 8(a)(3) and (1) of the Act and Respondent Union violated Section 8(b)(2) and (1)(A) of the Act; (2) by conditioning employment upon clearance from Respondent Union and denying employment to Kenneth R. Brooks and Franklin C. Butler because they did not obtain such clearance, Respondent Company violated Section 8(a)(3) and (1) of the Act; (3) by denying clearance to Kenneth R. Brooks and Franklin C. Butler thereby causing Respondent Company to deny employment to Kenneth R. Brooks and Franklin C. Butler Respondent Union violated Section 8(b)(2) and (1)(A) of the Act; and (4) these unfair labor practices occurring in connection with the operation of the business involved herein 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.

#### THE REMEDY

Having found that Respondents have engaged in unfair labor practices in violation of the Act, the Trial Examiner recommends that Respondents, to effectuate the policies of the Act, cease and desist therefrom and take the affirmative action herein-after specified.

At the hearing in this matter the Trial Examiner dismissed allegations of the complaint to the effect that moneys had been unlawfully exacted. Thereafter, the Trial Examiner notified the parties that perhaps this ruling was in conflict with *Local 138, International Union of Operating Engineers, AFL-CIO, etc.*, 123 NLRB 1393, and requested their comments concerning this matter. Counsel for the General Counsel asserts that the above-named case is controlling and that under that decision the aforementioned ruling should be reversed and that the *Brown-Olds*<sup>8</sup> remedy should be applied herein. Counsel for Respondent Company asserts that the ruling was appropriate when made, as there is no evidence that moneys were exacted, and that the Trial Examiner should adhere to the ruling. Counsel for Respondent Union takes the same position as counsel for Respondent Company and asserts further that under the decided cases a *Brown-Olds* remedy is not appropriate herein and that, in any event, the Trial Examiner cannot now reverse the ruling without reopening the hearing and affording Respondents an opportunity to adduce evidence that no moneys were exacted. On the basis of the case cited above and *Gay Engineering Corporation, supra*, the Trial Examiner hereby rejects the contentions of Respondents, reverses the ruling made and recommends the application of the *Brown-Olds* remedy to expunge the effect of the illegal conditions of employment imposed upon employees of Respondent Company.

[Recommendations omitted from publication.]

<sup>8</sup> *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (J. S. Brown-E. F. Olds Plumbing and Heating Corporation)*, 115 NLRB 594, 597-602.

**Steel Builders, Inc. and United Steelworkers of America, AFL-CIO.** Case No. 10-CA-3970. April 25, 1960

#### DECISION AND ORDER

On September 16, 1959, Trial Examiner Ralph Winkler, issued his Intermediate Report in the above-entitled proceeding, finding that the  
127 NLRB No. 59.