

spondent and the Independent on October 1, 1958, be set aside, and that the Respondent cease and desist from giving effect to it or to any extension, renewal, or modification thereof, or any other contract or agreement between said Respondent and the Independent which may now be in force, unless and until the said Independent shall have demonstrated its exclusive representative status pursuant to a Board-conducted election among said employees.

It has been found that the Respondent discriminatorily reduced work hours and laid off certain named employees, in order to discourage membership in and activity on behalf of a labor organization. It will therefore be recommended that the Respondent make whole these named employees for any loss of pay they suffered as a result of the discrimination against them, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period of discrimination against him, and in a manner consistent with Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289, and *Crossett Lumber Company*, 8 NLRB 440.

In view of the gravity and substantial nature of the Respondent's violations of certain sections of the Act, it will be recommended that it cease and desist from in any manner infringing upon the rights guaranteed to employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. International Association of Machinists, AFL-CIO, and Kiekhaefer Independent Workers Association are labor organizations within the meaning of Section 2(5) of the Act.

2. By contributing support and assistance to Kiekhaefer Independent Workers Association the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

3. By discriminating in regard to the hire and tenure of employment and other terms and conditions of employment of employees, thereby discouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

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

5. The unfair labor practices found herein are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

Mountain Pacific Chapter of the Associated General Contractors, Inc.; The Associated General Contractors of America, Seattle Chapter, Inc.; and Associated General Contractors of America, Tacoma Chapter and International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO and Cyrus Lewis, Charging Party. *Cases Nos. 19-CA-1374, 19-CB-424, and 19-CB-445. June 21, 1960*

SUPPLEMENTAL DECISION AND ORDER

On December 14, 1957, the Board issued its Decision and Order in these cases¹ in which it found that the Respondent Employers vio-

¹ 119 NLRB 883.

127 NLRB No. 156.

lated Section 8(a) (3) and (1) of the Act and the Respondent Unions violated Section 8(b) (2) and (1) (A) by executing and maintaining in effect a contract provision requiring the Employers to hire exclusively through the Union and by denying employment to job applicant Lewis, pursuant thereto. The Board stated that an Opinion would be issued later in which it would set forth its reasons for concluding that the clause vesting in the Unions' unfettered control over hiring violates the Act. Finally, the Board adopted, without discussion, the Trial Examiner's finding (to which no exceptions had been filed) that the Respondent Local also violated Section 8(b) (1) (A) of the Act by threatening job applicant Lewis and by offering him promises of benefit in an effort to induce him to withdraw the charges he had filed against it with the Board.

In its Opinion, issued on March 27, 1958,² the Board reasoned that a hiring clause which requires employers to hire only men referred by the union and, conversely, prohibits them from hiring anyone not referred by the union, encourages union membership. To summarize, in the Board's view, the vice in such a clause lies in the fact that: (1) It requires the employer to discriminate³ in hiring in favor of men selected by the union and against men not selected by it; (2) this discrimination is caused by the union; (3) employees whose job opportunities are controlled exclusively by the union will fear, and reasonably so, that union membership or lack of it will be a factor in obtaining referral by the union; (4) therefore, the employees will be encouraged to become or remain members of the union. The Board said in that Opinion that it is difficult to conceive of anything which would encourage membership more than an agreement which, in practical effect, means that a man can get a job "only through the grace of the Union or its officials" and, at the same time, leaves the union free to "pick and choose" on any basis it sees fit. (119 NLRB 883, 895.) Accordingly, the Board concluded that such a clause constitutes discrimination which encourages union membership within the meaning of Section 8(a) (3) and (1) and 8(b) (2) and (1) (A) of the Act. Thus, the Board found that both the discrimination and encouragement necessary to establish a violation of those sections are inherent in the hiring clause itself. It follows, therefore, that the violation exists wholly independently of the manner in which the union selects the men to be referred.

However, the Board reasoned further that if the contract contains "safeguard" clauses—as, for example, one requiring the parties to post notices setting forth the provisions of the hiring arrangement,

² 119 NLRB 893

³ As used in the statute, "discrimination" includes disparate treatment. Cf. the Supreme Court's statement that not all "discrimination" violates the Act but only that which encourages or discourages union membership. *The Radio Officers' Union etc. (A. H. Bull Steamship Company) v. NLRB.*, 347 U.S. 17, 42-43

including, among other things, an assurance of referral by the union of nonmembers equally with members—the unlawful encouragement of union membership otherwise inherent in such a clause is negated and the Board would find such a clause legal “on its face.”⁴

Thereafter, the Board’s findings and conclusions were considered by the United States Court of Appeals for the Ninth Circuit upon the Board’s petition for enforcement of its order. On August 28, 1959, the court handed down its opinion. *N.L.R.B. v. Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 270 F. 2d 425. The court refused to enforce the Board’s order and remanded the case to the Board for further consideration. Relying upon its decision in *N.L.R.B. v. A. B. Swinerton, et al., d/b/a Swinerton and Walberg Company*, 202 F. 2d 511, cert. denied, 346 U.S. 814, the court ruled that the Board cannot hold illegal, as a matter of law, a hiring clause which does not in terms give job preference to union members absent evidence that the union has in fact given them preference. Although the court recognized (as did the Board) that the record contains abundant evidence that the unions referred nonmembers only if no members were available, it nonetheless concluded that it could not enforce the order *sua sponte*, the Board’s conclusion not having been based on that ground.⁵ The court also refused to enforce the portions of the Board’s order based upon its finding that the parties violated the same sections of the Act by denying employment to job applicant Lewis, the Board’s conclusion not having been based upon a finding that Lewis was denied employment because he was not a member of Local 242.

The Board did not seek Supreme Court review of the circuit court’s remand of the cases to the Board. This is not to say, however, that, in accepting the remand, the Board agrees with the circuit court’s rejection of its holdings. But, having accepted the remand, the court’s holdings must become the law of these cases.

As instructed, having considered the entire record in these cases, we find that even though the hiring provision did not, on its face, give job preference to members of the Unions, the parties in fact gave

⁴ The Board further concluded that in denying Lewis employment, the parties were implementing their unlawful hiring provision, and, accordingly, found that the parties thereby further violated Section 8(a) (3) and (1) and 8(b) (2) and (1) (A) of the Act. It also again adopted the Trial Examiner’s conclusion that the Respondent Local’s efforts to induce Lewis to withdraw his charges by the use of threats and promises of benefits constituted an additional violation of Section 8(b) (1) (A) of the Act.

⁵ As will be seen, *infra*, in this opinion we first make the factual finding that the Local followed an illegal hiring practice and then base thereon our conclusion that the hiring clause violates the Act. Accordingly, we do not discuss what we believe to be an alternative method suggested by the court by which the Board could properly hold invalid, at least in future cases, a hiring clause such as the one in this case. As we read the decision, the court indicated that the Board, after notice, could find as a fact that a “loosely drawn” or “wide open” hiring clause, i.e., one which did not contain “protective” clauses, was evidence of an intent by the parties to leave the union free to give its members preference in employment and could then properly hold that the parties therefore violated the Act by executing and maintaining such a clause.

them such preference. Although it is true that nonmembers were employed occasionally, this occurred only when no members were available. Thus Robert Buchanan, who was one of the Local's officials at the time of the events in issue and whose testimony was credited by the Trial Examiner, testified that "We dispatch members first because they have preference." There are times, "naturally," he explained, when no members are available, in which case nonmembers are sent out. Accordingly, in view of the Local's practice of unlawfully giving preference to its members in supplying the employers with workmen, the Respondent Employers violated Section 8(a) (3) and (1) of the Act and the Respondent Unions violated Section 8(b) (2) and (1) (A) by executing and maintaining a contract provision which required the Employers to hire only men referred by the Unions.⁶

Similarly, the record contains ample evidence, also credited by the Trial Examiner, that job applicant Lewis' failure to obtain work was due to the Local's refusal to refer him, initially, because he was not a member and, later, because he had also filed with the Board, and refused to withdraw, charges against the Unions. We so find. We conclude, therefore, that the Respondent Employers violated Section 8(a) (3) and (1) of the Act and the Respondent Unions violated Section 8(b) (2) and (1) (A) by denying employment to employee Lewis for these reasons. The respondents' denial of employment to Lewis was also violative of the Act on an entirely separate and independent ground, *i.e.*, because it constituted implementation of a hiring clause which, for the reasons set forth in this Decision, was illegal. See *N.L.R.B. v. Charles E. Daboll, Jr., and Operative Plasterers' and Cement Masons' International Association, AFL, Local Union No. 797*, 216 F. 2d 143, 145 (C.A. 9), cert. denied 348 U.S. 917.

THE REMEDY

Having found that the Respondents, and each of them, have violated the Act, we shall order that they cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act:

Because we have found herein, for the first time, that the parties' hiring practice was to give job preference to union members, we will incorporate into our Order proscriptions against both maintaining or giving effect to a contract provision which gives such preference and against the continuation of such practices. Furthermore, having found that the parties in fact gave job preference to union members and, having based thereon our conclusion that the hiring provisions

⁶ As stated in the Board's original Decision, as only the charge against Respondent Local 242 was filed within 6 months of the execution of the contract in question, our finding against the other Respondents is limited to the maintenance of the hiring provisions of the contract rather than their execution. Our remedial action herein is in no way affected by this difference. 119 NLRB 883, 884, footnote 1.

of the contract violated the Act, we will retain in our Order the prescriptions against entering into or maintaining a contract provision which makes union clearance or approval a condition of employment. *N.L.R.B. v. Mountain Pacific Chapter of the Associated General Contractors etc.*, 270 F. 2d 425, 429-430, (C.A. 9). See also *N.L.R.B. v. Charles E. Daboll, et al.*, 216 F. 2d 143, 145 (C.A. 9), cert. denied 348 U.S. 917, enf. 105 NLRB 311, 312-313; *N.L.R.B. v. National Maritime Union of America, et al. (The Texas Company)*, 175 F. 2d 686-689 (C.A. 2), cert. denied 338 U.S. 954, enf. 78 NLRB 971, 991-992. Moreover, the parties' illegal hiring practices,⁷ despite the fact that the "written text" of the hiring provision was "nondiscriminatory," indicate that when the parties entered into a "wide-open" or "loosely drawn" hiring clause, their intention was to leave the unions a "free hand" to engage in discrimination against nonmembers in referral. Cf. *N.L.R.B. v. Mountain Pacific Chapter, etc.*, 270 F. 2d 425, 430 (C.A. 9).

It has also been found that the Respondents discriminated against Cyrus Lewis by refusing him employment because he was not a member of Local 242. The nature of the employment situation in this industry is such that no order of reinstatement is possible. Furthermore, as indicated above, this record does not specify the number of instances or the amounts of actual loss of employment by Lewis. Accordingly, the amounts of backpay due him shall be computed in compliance proceedings. The backpay period shall begin March 15, 1956, when Lewis appeared at the Unions' hiring hall in search of employment.⁸ We shall order the various Respondents to notify Charging Party Lewis that they have no objection to his immediate employment.⁹ The backpay liability of any Respondent shall be tolled 5 days after it serves such written notice on Charging Party Lewis. Backpay shall be computed in accordance with the formula stated in *F. W. Woolworth Company*, 90 NLRB 289.

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 Respondents Mountain Pacific Chapter of the Associated General Contractors, Inc.; The Associated General Contractors of

⁷ We note in this connection that we do not infer an illegal intent from the wording of the contract here in issue; rather we infer such intent from the parties' clearly illegal hiring practices found herein.

⁸ As the Trial Examiner did not find that the Respondents discriminated against Lewis, the period from the date of the Intermediate Report to the date of our original Decision and Order herein (119 NLRB 883, issued on December 14, 1957) shall, in accordance with our usual practice, be excluded in computing the amount of backpay due him. *Utah Construction Co.*, 95 NLRB 196.

⁹ *Babcock & Wilcox Company*, 110 NLRB 2116.

America, Seattle Chapter, Inc.; and Associated General Contractors of America, Tacoma Chapter, and their officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Performing, maintaining, or otherwise giving effect to provisions of any agreement with the Respondent Unions or any other labor organization, which expressly give union members preference in obtaining or retaining employment or which unlawfully condition the hire of applicants for employment, or the retention of employees in employment with any employer, upon clearance or approval by the Respondent Unions or any other labor organization, except as authorized by the proviso to Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.
 - (b) Giving preference in obtaining or retaining employment to members of any of the Respondent Unions or of any other labor organization, except as authorized by the proviso to Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.
 - (c) In any like or related manner encouraging membership in the Respondent Unions, or in any other labor organization, or otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

- (a) Make whole Cyrus Lewis for any loss of pay he may have suffered by reason of the discrimination against him, as provided in the section herein entitled "The Remedy."
- (b) Preserve and, upon request, make available to the Board or its agents, 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 backpay due under the terms of this Order.
- (c) Post at their offices, and at the offices of each employer member of the Respondents, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto marked "Appendix A."¹⁰ Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by representatives of Mountain Pacific, Seattle, and Tacoma Chapters, be posted by them immediately upon receipt thereof and maintained by them for 60

¹⁰In 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."

consecutive days thereafter. Reasonable steps shall be taken by Respondent Associations and their employer members to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify Cyrus Lewis and the Respondent Unions, in writing, that they have no objection to his employment, or to the employment of any other employees who are not members of the Respondent Unions or any other labor organization.

(e) Notify the Regional Director for the Nineteenth Region, in writing, within 10 days from the date of the Decision herein, what steps they have taken to comply herewith.

B. The Respondents International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, and their officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Performing, maintaining, or otherwise giving effect to provisions of any agreement with the Respondent Employers or with any other employer within the meaning of the Act, which expressly give union members preference in obtaining or retaining employment or which unlawfully condition the hire of applicants for employment, or the retention of employees in employment with any employer upon clearance or approval by the Respondent Unions, except as authorized by the proviso to Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

(b) Causing or attempting to cause the Respondent Employers, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8(a) (3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

(a) Make whole Cyrus Lewis for any loss of pay he may have suffered by reason of the discrimination against him, as provided in the section herein entitled "The Remedy."

(b) Notify Cyrus Lewis and the Respondent Employers, in writing, that they have no objection to his employment, or to the employment of any other employees who are not members of the Respondent Unions or any other labor organization.

(c) Post at their offices in conspicuous places, including all places where notices to employees or prospective employees are customarily

posted, copies of the notice attached hereto marked, "Appendix B."⁴¹ Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by representatives of the Respondent Unions, be posted by them immediately upon receipt thereof and maintained by them for 60 consecutive days thereafter. Reasonable steps shall be taken by them to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Nineteenth Region, in writing, within 10 days from the date of the Decision herein, what steps they have taken to comply herewith.

MEMBER FANNING took no part in the consideration of the above Supplemental Decision and Order.

⁴¹ See footnote 10, above.

APPENDIX A

NOTICE TO ALL EMPLOYEES OF AND APPLICANTS FOR EMPLOYMENT WITH ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., MOUNTAIN PACIFIC, SEATTLE, AND TACOMA CHAPTERS, AND THEIR CONSTITUENT MEMBERS

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT perform, maintain, or give effect to the provisions of any agreement with International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, or with any other labor organization, which expressly give union members preference in obtaining or retaining employment or which unlawfully condition the hire of applicants for employment, or the retention of employees in employment with any employer, upon clearance or approval by the aforementioned labor organizations, except as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT give preference in obtaining or retaining employment to members of any of the Unions listed above or of any other labor organization, except as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT in any like or related manner encourage membership in the aforementioned labor organizations, or in any other labor organization, or otherwise interfere with, restrain, or coerce

employees in the exercise of the rights guaranteed them in Section 7 of the Act, except in a manner permitted by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL make whole Cyrus Lewis for any loss of pay suffered as a result of the discrimination against him.

All our employees and prospective employees are free to become, remain, or refrain from becoming or remaining, members of the above-named Unions or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED
GENERAL CONTRACTORS, INC.,

Employer.

Dated _____ By _____

(Representative) (Title)

SEATTLE CHAPTER, THE ASSOCIATED GENERAL
CONTRACTORS OF AMERICA, INC.,

Employer.

Dated _____ By _____

(Representative) (Title)

TACOMA CHAPTER, THE ASSOCIATED GENERAL
CONTRACTORS OF AMERICA,

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 EMPLOYEES OF AND APPLICANTS FOR EMPLOYMENT WITH ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., MOUNTAIN PACIFIC, SEATTLE, AND TACOMA CHAPTERS, OR THEIR CONSTITUENT MEMBERS

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT perform, maintain, or give effect to the provisions of any agreement with Mountain Pacific Chapter, Seattle Chapter, or Tacoma Chapter, of The Associated General Contractors of America, Inc., or with any other employer, which expressly give

union members preference in obtaining or retaining employment or which unlawfully condition the hire of applicants for employment, or the retention of employees in employment with any employer, upon clearance or approval by any labor organization, except as authorized by Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT cause or attempt to cause the above-named Employers or any other employer to discriminate against employees or applicants for employment in violation of Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, except in a manner permitted by Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL make whole Cyrus Lewis for any loss of pay suffered as a result of the discrimination against him.

INTERNATIONAL HODCARRIERS, BUILDING AND
COMMON LABORERS UNION OF AMERICA,
LOCAL No. 242, AFL-CIO,
Labor Organization.

Dated _____ By _____
(Representative) (Title)

WESTERN WASHINGTON DISTRICT COUNCIL,
INTERNATIONAL HODCARRIERS, BUILDING AND
COMMON LABORERS UNION OF AMERICA,
AFL-CIO,
Labor Organization.

Dated _____ By _____
(Representative) (Title)

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

Sea View Industries, Inc. and United Steelworkers of America,
AFL-CIO. Case No. 12-CA-352. June 22, 1960

DECISION AND ORDER

On September 10, 1959, Trial Examiner Thomas N. Kessel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom