

go to Ayuso's office. Her testimony then becomes confusing. At best it would indicate that she met Pacheco, Hector Cintron Ayuso (Cintron), Respondent's general manager, and Ayuso—one of them said, "Go and lock yourself in the bathroom until after the elections." When she refused, Ayuso told her to use an inside stairway from his office to the offices of a lawyer in the building. This she did not do.

In addition to the above, Cunipiano testified that Pacheco gave her \$2 to go to the movies. On cross-examination she testified that at the end of the lunch hour (on April 25), before the election, she met Pacheco and told him that "Ayuso wanted me to go to the movies" and Pacheco "pulled out \$2 and gave" it to her.

All of the above testimony by Cunipiano was uncorroborated. Ayuso's testimony with reference to his conversation with Cunipiano during the period in question was, he remonstrated, concerning her habitual tardiness. By stipulation this was corroborated by Ayuso's secretary. Ayuso denied offering her a car and a salary increase from \$173 to \$250 a month, denied offering her any inducement to abstain from voting, denied authorizing anyone to give her any money, and asserted he did not think she had even the right to vote because she was a conditional employee. In addition, Ayuso testified, in effect, that it was ridiculous to think he would offer such inducements to Cunipiano to refrain from voting because "I knew we had enough votes. . . ."

Pacheco testified that at lunch time on the day of the election he was talking to a group of fellow workers when Cunipiano asked him for \$2 to go to the movies. Two witnesses testified that they were present when Cunipiano called Pacheco aside, spoke to him out of their hearing, and saw Pacheco hand some money to Cunipiano. Pacheco admits giving the money; he had done so often in the past. He denied that anyone had given him instruction to give the money to Cunipiano on this occasion. There is unrebutted testimony that Cunipiano was in the habit of borrowing money.

In the light of all the facts it seems unlikely that Ayuso would make such extravagant offers to induce Cunipiano not to vote. She was but 1 employee out of 47 eligible to vote, of whom 46 voted.

I find that Cunipiano's testimony as to offers of inducements and other suggested actions to refrain from voting is incredible; also, that she, for reasons of her own, solicited the \$2 from Pacheco. Further, I find that the General Counsel has not proven, by a preponderance of evidence, the allegations set forth in the caption of this section. I recommend they be dismissed.

Upon the basis of the foregoing findings of fact, the Trial Examiner makes the following:

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce and in activities affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices as alleged in the complaint.

[Recommendations omitted from publication.]

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**Local 324, International Union of Operating Engineers, AFL-CIO and Brewer's City Coal Dock.** *Case No. 7-CC-118. April 24, 1961*

#### DECISION AND ORDER

On August 29, 1960, Trial Examiner William Seagle issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent did not engage in the alleged unfair labor practices as set forth in the copy of the Intermediate Report attached hereto and recommending that the complaint be dismissed. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a brief in support thereof.

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 and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified herein.

1. We find, as did the Trial Examiner, that the Respondent did not threaten, coerce, or restrain Wellpoint, the secondary employer, in violation of Section 8(b)(4)(ii)(B) of the Act. In agreement with the Trial Examiner, we find that the Respondent's business agent, Giaimo, did not threaten the Wellpoint supervisor, Davidson, with any reprisals if Wellpoint accepted the delivery of Brewer's sand, but merely informed him of the existence of the strike at Brewer's and appealed to him not to use Brewer's sand until the strike was over.

2. We also find, as did the Trial Examiner, that Supervisor Davidson, who in the absence of Superintendent La Russo was the top management representative on the project, was not an "individual employed by any person" within the meaning of clause (i) of Section 8(b)(4), and that for this reason the Respondent by inducing Davidson to refuse to accept the delivery of two carloads of Brewer's sand did not violate Section 8(b)(4)(i)(B) of the Act.

In *Carolina Lumber*<sup>1</sup> the Board found that the term "individual employed by any person" as used in clause (i) of Section 8(b)(4) refers to "supervisors who in interest are more nearly related to rank-and-file employees than to management, as the term is generally understood." Accordingly, the Board found that a project superintendent who was free to exercise authority, including requisitioning and purchasing supplies, without immediate on-the-job supervision, was not an "individual." On the other hand, the Board also found that a working foreman, who had no authority beyond supervising a small group of laborers, was an "individual" within the meaning of clause (i).<sup>2</sup> In the instant case, the record shows that Davidson was a supervisor who under general supervision of Superintendent La Russo was in charge of the installation of dewatering equipment on the construction site. Superintendent La Russo was the top management representative on the job. He hired and had charge of all men working on the project. He did all the buying of materials required and could reject any of such materials. He apparently had authority to make independent decisions without consulting the home office of his company. As La Russo did all the buying for the project, which

<sup>1</sup> *Local 505, International Brotherhood of Teamsters, etc (Carolina Lumber Co.)*, 130 NLRB 1438

<sup>2</sup> See also *Alpert v. Excavating and Building Material Chauffeurs and Helpers Local Union No. 319, etc. (Consalvo Trucking, Inc.)*, 184 F. Supp. 558 (D.C. Mass.), where Judge Wyzanski found that "Section 8(b)(4)(i) is concerned with appeals addressed to those who perform services manually or clerically, or who manually use goods, or who have minor supervisory functions."

took a considerable amount of his time, Davidson, would be left "in charge" of the project in La Russo's absence. Davidson was specifically instructed by La Russo in case of labor trouble or any other problem arising in his absence to do what he thought best and that La Russo would handle it from there. Davidson testified, without contradiction, that at the time of the incident and generally during La Russo's absence "this type of problem was in his hands," that he was "in charge" of the project, and that as the "top man" he had also other problems to deal with.<sup>3</sup>

On the entire record we find that Superintendent La Russo, who was the top management representative on the project with authority to make independent decisions without immediate on-the-job supervision, was "more nearly related to the managerial level than to rank-and-file employees," and therefore was not an "individual employed by any person" within the meaning of clause (i) of Section 8(b)(4).<sup>4</sup> We further find that Supervisor Davidson, who in Superintendent La Russo's absence from the project had authority to make decisions in dealing with problems arising at the project without immediate on-the-job supervision, was also not an "individual employed by any person" within the meaning of Section 8(b)(4)(i) of the Act while so substituting for La Russo.<sup>5</sup>

[The Board dismissed the complaint].

CHAIRMAN McCULLOCH and MEMBER BROWN took no part in the consideration of the above Decision and Order.

<sup>3</sup> Business Agent Giaimo testified that on the day in question he approached Davidson, whom he knew to be an assistant to La Russo, asked him where La Russo was, and who was in charge when La Russo was not there, and that Davidson said that he was. It was after Giaimo thus ascertained that Davidson was in charge in La Russo's absence that he had asked Davidson not to accept the delivery of Brewer's sand.

<sup>4</sup> Cf. *Copeland Refrigeration Corporation*, 118 NLRB 1364, where the Board excluded from the unit, as a person "primarily allied with management," an employee who *substituted* as head of the purchasing department during the frequent absences of the chief purchasing agent, and who in exercising this managerial prerogative used independent judgment. See also *The Santa Fe Trail Transportation Company*, 119 NLRB 1302, where the Board found that a *substitute* for an employee in charge of a freight terminal who acts as an employer's representative in soliciting freight business and protecting employer's interest was a managerial employee.

<sup>5</sup> Board Member Rodgers agrees that Supervisor Davidson was "in charge" of the project in La Russo's absence. For this reason he agrees that Davidson was not an "individual" within the meaning of Section 8(b)(4)(i). See Member Rodgers' concurring opinion in *Carolina Lumber*.

## INTERMEDIATE REPORT

### STATEMENT OF THE CASE

The complaint charges Local 324, International Union of Operating Engineers, AFL-CIO, with violation of Section 8(b)(4)(i) and (ii)(B) of the Act in general terms. However, the specific violation alleged in paragraphs numbered 10 and 11 of the complaint is that on or about December 11, 1959, the union, through its agent, Anthony Giaimo, induced, encouraged, threatened, coerced, and restrained individuals employed by Wellpoint Dewatering Corporation not "to perform services in the course of their employment" with the result that such individuals refused to perform such services.

These allegations of the complaint having been denied by the union, a hearing with respect to them was held by the duly designated Trial Examiner at Grand Rapids, Michigan, on July 27, 1960. It should be noted that no representative of Brewer's City Coal Dock, the Charging Party, appeared at the hearing or testified in support of the charges. Subsequent to the hearing, counsel for the General Counsel filed a brief which has been considered by the Trial Examiner.

Based upon the record so made, and on my observation of the witnesses, I hereby make the following:

#### FINDINGS OF FACT

##### I. THE UNION

Local 324, International Union of Operating Engineers, AFL-CIO (hereinafter referred to as the Union), is a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE EMPLOYERS

Brewer's City Coal Dock (hereinafter denominated Brewer's) is a copartnership consisting of Cornelius and Henrietta J. Brewer who do business under the name of Brewer's City Coal Dock. The copartnership, which has its principal office and place of business at Holland, Michigan, is engaged in the business of selling and distributing ready-mix concrete aggregates, coal, and sand. The total sales of Brewer's for the calendar year 1959 to businesses meeting the Board's jurisdictional standards exceeded \$55,000.

Wellpoint Dewatering Corporation (hereinafter denominated Wellpoint) is a subsidiary of Griffin Wellpoint Corporation. Wellpoint, which is a New York corporation, is engaged in the dewatering and stabilization of the soil in connection with construction projects in at least three States of the Union other than New York, namely Florida, Texas, and Indiana, and performs in these States services valued in excess of \$50,000. At the time of the violation charged in the complaint, Wellpoint was engaged in the dewatering of the site of a powerplant being constructed at Fort Sheldon, Michigan, for Consumers Power Company, a public utility which annually receives gross revenue in excess of \$11,000,000. The name of the general contractor constructing the powerplant for Consumers was Townsend & Bottum.

##### III. THE ALLEGED UNFAIR LABOR PRACTICE

The Union, together with Local 406 of the General Teamsters Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, had been joint bargaining representative at Brewer's since 1953. Two days before Labor Day in 1959, the two unions went out on strike over the negotiation of a new contract, and this strike was continuing at the time that Wellpoint commenced dewatering the site for the construction of the Consumers powerplant at Fort Sheldon, Michigan. This work has not yet been completed.

The incident that forms the basis of the charge against the Union occurred a week or two before Christmas 1959. There are two versions of this incident, one by James K. Davidson, who, under the general supervision of one LaRusso, was in charge of the installation of Wellpoint equipment in connection with dewatering of the site of the Consumers powerplant,<sup>1</sup> and the other by Anthony Giaimo, business agent of Local 324.<sup>2</sup>

Davidson testified as follows: On the day in question two dump trucks loaded with sand—they were the first two truckloads of sand to arrive on the jobsite—approached the Wellpoint job. He went over and asked the drivers if the sand was for the Wellpoint job, and they replied in the affirmative. He told them to wait while he went to find the best place to dump the sand. On the way back, he met Giaimo who asked him whether he was going to use the sand. When Davidson informed Giaimo that such was his intention, the latter said to him: "Well, that

<sup>1</sup> In supervising the installation of Wellpoint equipment, Davidson engaged in considerable traveling over the United States. Of course, he performed no physical labor himself, merely supervising the installation crews. Although La Russo was his superior, the former appears to have been principally engaged in buying activities. Davidson was in full charge when La Russo was away.

<sup>2</sup> Davidson and Giaimo were the only two witnesses at the hearing, which opened at 10 a.m. and closed at 12:25 p.m. It did not take much more than an hour to complete the examination of both Davidson and Giaimo. The rest of the time was spent in off-the-record discussions and in oral argument at the conclusion of the hearing.

they had pickets around, picketing the plant,<sup>3</sup> and *he didn't know if his men<sup>4</sup> would handle the sand or not.*<sup>5</sup> As Davidson had been instructed by LaRusso that if labor trouble should develop, he should do what he thought best at the moment, and report the matter to him. Davidson told Giaimo that he would send the sand back, and Giaimo could take the matter up with LaRusso. As Davidson put it: "I was too busy to debate the point." Davidson also reported the incident to LaRusso, and this was the last contact that he had with the matter.

Davidson testified that he was not sure whether the first two truckloads of sand which he sent back had the name of the supplier on them. While he also testified that there were no further interruptions in the delivery of sand, and that they obtained all the sand which they needed on the job,<sup>6</sup> he had no direct firsthand knowledge concerning the supplier or suppliers of this sand. He did testify that he was subsequently told by LaRusso that the first loads of sand had been from Brewer's, and that the sand had been ordered from Brewer's but he was not told by LaRusso whose sand was being delivered, and it was merely his surmise that subsequent loads of sand did not come from Brewer's, the surmise being based on the fact that the trucks were not Brewer's. He finally exclaimed: "I don't know whose sand it was."

Giaimo testified with respect to the delivery of the sand as follows: On the day in question he was in the Townsend and Bottum office, and as he looked out of the window, he saw two Brewer's trucks drive on the project with loads of sand. He walked out and found Davidson whom he asked if LaRusso was around. When informed by Davidson that LaRusso was away from the project, Giaimo pointed out to Davidson that the trucks were Brewer's and said to him that "we had a picket line—by we, I mean the Teamsters and Operating Engineers—had a picket line at Brewer's City Coal Dock and the trucks were coming through our picket line and we would appreciate it if he did not use the material until after the strike was over." [Emphasis supplied.] Davidson said nothing at all to Giaimo in reply but did say to one of the drivers something which Giaimo, being too far away, could not overhear. Giaimo did observe that the trucks, which had the name of Brewer's on them, turned around and left. Giaimo specifically denied that he ever said anything to the members of the Union about not handling the sand, and he testified that he never discussed the matter with LaRusso, although he had subsequent meetings with him. However, Giaimo did ask a "fellow" who was not the union steward, to let him know "if any of Brewer's trucks came on the job . . ." but he received no such reports, and he, himself, during subsequent visits to the jobsite, which occurred about once a week, did not observe any trucks of Brewer's delivering sand. Indeed, the trucks which he did observe delivering sand were not Brewer's trucks.

In the course of his examination, Giaimo's attention was called by counsel for the Respondent to the conflict between his testimony and that of Davidson, and he was asked how he could be sure that his testimony rather than Davidson's was correct. Giaimo replied that when the strike started at Brewer's he had sought his advice, and had been told by him that he could only "ask the contractors not to use materials that had gone through the picket line," and that in approaching Davidson he had merely carried out this advice.

Not only is there no evidence that Giaimo ever attempted to induce the members of the Union not to handle Brewer's sand—indeed such an attempt would have been pointless since Davidson had readily acceded to his request—but Davidson, when asked whether the job had been held up in any way because he had sent back the two truckloads of sand, replied: "No, it was not." It is also undisputed that the approach of Giaimo to Davidson did not result in the refusal of the members of the union to perform any services normally performed.

I do not believe it is necessary for me to determine whether Giaimo's musing about whether his men would handle the sand amounted to a threat since I have reached

<sup>3</sup> The "plant" to which Davidson was referring was not the powerplant under construction but Brewer's place of business in Holland, Michigan, which was 8 to 10 miles from the construction site.

<sup>4</sup> The "men" referred to were the members of Local 324 on the construction job. Seven members of the local were employed by Wellpoint and about 30 of them were employed by Townsend & Bottum.

<sup>5</sup> On cross-examination, Davidson gave a somewhat different version of what he remembered Giaimo to have said. Thus, he testified: "I asked or rather Mr. Giaimo asked me if I was going to use the sand. I replied that I was. He said *he didn't think it would be a good idea because he didn't know if his men would handle it or not.* I said all right I will send the sand back." It should be noted that Davidson did not now make any reference to the picketing of any plant.

<sup>6</sup> This was from 2,000 to 2,500 yards of sand.

the conclusion that Giaimo's rather than Davidson's version of the conversation between them must be accepted. I have not reached this conclusion because I doubt at all the veracity of Davidson. Indeed, my contact with him, as well as with Giaimo, was so brief that I should hesitate to reach any conclusion with respect to the testimony of either of them that was based solely on what is called "demeanor" evidence. I believe that Davidson, as well as Giaimo, testified in accordance with his best recollection. It seems to me, however, that there is more reason to rely on Giaimo's than on Davidson's recollection. It is my distinct impression that Davidson attached very little importance to his encounter with Giaimo, and, treated the whole incident in a rather casual and offhand manner. This is apparent alone from his testimony that he was "too busy to debate the point," and his inability to recollect whether the trucks about which Giaimo had talked to him were Brewer's, despite the fact Giaimo had called his attention to the ownership of the trucks. Thus, it is not very likely that he would remember too well precisely what Giaimo had said to him more than 7 months earlier. Moreover, it is apparent from his testimony that he was not repeating Giaimo's exact words, since his version of the conversation on cross-examination was not the same as on direct examination. On the other hand, while Giaimo, too, may not have remembered the precise words he used in talking to Davidson, it is likely that he would be careful and circumspect in his choice of words, since he had sought and received legal advice as to how he should comport himself. The fact that the words Giaimo used were not followed by coercive deeds is also persuasive that the words themselves were not of a threatening nature. Finally, it is apparent from Giaimo's testimony itself that he was being entirely candid as a witness. He made no effort to conceal the fact that the first two truckloads of sand came from Brewer's, although Davidson had been unable to identify them, nor did he attempt to conceal the fact that he had asked someone on the job to keep him informed of sand deliveries by Brewer's. The admission of these facts were certainly not to his interest. I find, therefore, that Giaimo merely informed Davidson of the existence of the strike at Brewer's, and appealed to the latter not to use Brewer's sand until the strike was over.

As for the question whether Giaimo's appeal to Davidson served to prevent any further delivery of Brewer's sand to the jobsite, the proof of this can hardly be said to meet the requirements of the best evidence rule. Davidson, the only witness on behalf of the General Counsel, had no direct knowledge concerning the deliveries of sand. Indeed, as already mentioned, if it had not been for Giaimo's testimony, there would not even be any proof that the first two truckloads of sand that were turned back were Brewer's. It is true that Giaimo also testified that he neither observed any further deliveries of sand by Brewer's, nor received any information concerning such deliveries. It is possible, however, that Brewer's did deliver sand on days when Giaimo was not on the jobsite, or that trucks that did not bear the name of any supplier were used to deliver the sand. But whatever inferences might be justified by Giaimo's testimony are greatly weakened, if not undermined, by the failure of Brewer's to participate in any way in the hearing. For all that appears to the contrary, this lack of interest may have been due to the fact that the order for the sand may have been canceled for reasons that had nothing to do with Giaimo's appeal to Davidson. Conceivably, Brewer's may have been unable, as a result of the strike, or for some other reason, to obtain sufficient sand to supply all of its customers, and may have decided, therefore, to supply more favored customers. I must conclude therefore, that there is no satisfactory proof that Giaimo's intervention had any greater effect than to prevent the unloading of the first two truckloads of sand.

#### IV. THE LAW OF THE CASE

Despite the variance between the specific violation alleged in the complaint and the specific violation which the General Counsel attempted to prove, it would seem that this variance was not fatal, since the complaint also alleged generally the violation of Section 8(b)(4)(i) and (ii)(B), and the issue whether the Respondent induced the secondary employer not to accept the primary employer's sand, or threatened reprisals if it were accepted, was fully litigated at the hearing without objection by either party.

I have found that Giaimo, the business agent of the Respondent, did not threaten Davidson, the supervisor of Wellpoint. Thus, the actual issue is whether the Respondent's agent violated the Act by inducing Wellpoint's supervisor to refrain from accepting the two truckloads of sand which Brewer's had attempted to deliver. Insofar as pertinent to this case, Section 8(b)(4)(i) and (ii)(B) provide that it shall be an unfair labor practice for a labor organization or its agents

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person . . . affecting commerce, where in either case an object thereof is

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(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . .

In the only judicial decision construing these provisions to which my attention has been called,<sup>7</sup> the court aptly characterized the type of conduct proscribed by Section 8(b)(4)(i) as "prohibited inducements," and the type of conduct proscribed by Section 8(b)(4)(ii) as "prohibited threats." Absent any threats by the union, the court held that Section 8(b)(4)(i)(B) had not been violated by the union where it attempted to enforce its contract with a prime construction contractor, under which subcontractors also were required to observe the contract's provisions, through inducement of the construction job superintendent to terminate a subcontract with a nonunion subcontractor from whom the union had been seeking to gain recognition. In coming to this conclusion, the court reasoned that:

Unlike § 8(b)(4)(ii)(B), § 8(b)(4)(i) has not within its scope conduct which has merely the object of persuading another to cease doing business. § 8(b)(4)(i) is concerned with appeals addressed to those who perform services manually or clerically, or who manually use goods, or *who have minor supervisory functions*. It does not cover appeals to those who on behalf of their employer have power lawfully to terminate, cease, or otherwise control business relations with the so-called primary employer. [Emphasis supplied.]

The court also reasoned that, in view of the provisions of the First Amendment, and of Section 8(c) of the Act, which protects the right of free speech in the absence of threats of reprisals, it could not have been the intention of Congress to prevent a union or its representatives from addressing "noncoercive pleas to employers or to individuals who had authority on behalf of the employer to make and terminate contracts."

Four of the Board's Trial Examiners have already had occasion to consider how high up in the pyramid of management Congress intended to go in enacting Section 8(b)(4)(i), but have reached diverse conclusions. One Trial Examiner has reached the conclusion that the provision prohibits inducement of supervisors only when the supervisor is being induced "to do something against the interest of his employer rather than the contrary."<sup>8</sup> Two other Trial Examiners, while agreeing that Section 8(b)(4)(i) extends to supervisors, would not include in this category individual proprietors, partners, and the officers of corporations.<sup>9</sup> The fourth Trial Examiner, after a searching and painstaking analysis of the legislative history, has come to the same conclusion as Judge Wyzanski, namely that Section 8(b)(4)(i) extends only to working foremen.<sup>10</sup>

In view of the extended examination which the question has already received, there would be little justification for my setting forth in detail the basis for my concurrence in the view that Section 8(b)(4)(i) extends only to such minor supervisory employees as working foremen. I must say, however, that I attach more importance to the language of Section 8(b)(4)(i) than to its legislative history.<sup>11</sup>

<sup>7</sup> *Alpert v. Excavating and Building Material Chauffeurs and Helpers Local Union No. 319, etc (Consulvo Trucking, Inc)*, 184 F. Supp. 558 (D.C. Mass.).

<sup>8</sup> Trial Examiner Wallace E. Royster in *Amalgamated Meat Cutters etc (Peyton Packing Company, Inc)*, 131 NLRB 406.

<sup>9</sup> Trial Examiner Ramey Donovan in *Upholsterers Frame & Bedding Workers (Minneapolis International Furniture Co)*, 132 NLRB 40, and Trial Examiner Martin S. Bennett in *International Brotherhood of Teamsters, etc (Lohman Sales Co.)*, 132 NLRB No. 67.

<sup>10</sup> Trial Examiner A. Norman Somers in *Local 294, International Brotherhood of Teamsters, etc (Van Transport Line, Inc)*, 131 NLRB 242.

<sup>11</sup> All Government lawyers dote on legislative history. I suppose it is because, being located at the seat of government, it is so readily available to them. While legislative history is of some value in illuminating the background of a statute, it has been my experience that it rarely supplies anything conclusive as to any particular point at issue. In the last analysis, it is the language of the statute that counts, and, if it is not seriously ambiguous, all the legislative history in the world should not prevail against it.

especially when the provision is considered in relation to Section 8(b)(4)(ii) of the Act. To be sure, Section 8(b)(4)(i) does not speak in terms of an express distinction between higher and lower echelons of supervisory personnel. But the distinction is, nevertheless, implicit in the provision because it does speak in terms of individuals who in the course of their employment "use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials," or "perform services." This language seems to suggest that it could be applied appropriately only to such horny-handed sons of toil as working foremen. The importance which I attach to Section 8(b)(4)(ii) derives from the fact that there would be little, if any, need for this provision, which is aimed at threatening or coercive action against any person, if mere inducement was prohibited in most cases.

Upon the basis of my findings of fact, and upon the entire record, I hereby reach the following:

#### CONCLUSIONS OF LAW

1. Local 324, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Brewer's City Coal Dock and Wellpoint Dewatering Corporation are persons engaged in commerce or in industries affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. By inducing and encouraging James K. Davidson, a supervisor of Wellpoint Dewatering Corporation, who at the time was in complete charge of operations at a construction site being dewatered by the Wellpoint Dewatering Corporation, not to accept two deliveries of sand made by Brewer's City Coal Dock against which the Respondent was conducting a strike, the Respondent did not engage in any unfair labor practice affecting commerce within the meaning of Section 8(b)(4)(i) or (ii)(B) of the Act.

[Recommendations omitted from publication.]

**Barr's Jewelers<sup>1</sup> and Retail Clerks Union Local 1390, Retail Clerks International Association, AFL-CIO, Petitioner.** *Case No. 4-RC-4388. April 24, 1961*

#### DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Katherine W. Neel, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to Section 3(b) of the National Labor Relations Act, the Board has delegated its powers herein to a three-member panel [Members Rodgers, Leedom, and Fanning].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The appropriate unit:

<sup>1</sup> As noted at the hearing, Employer is composed of the five following separate corporations, all owned and operated by members of the Barr family: Associated Barr Stores, Inc.; Barr's Jewelers and Silversmiths, Inc.; Barr's, Inc.; Barr Brothers of New Jersey; and Barr Brothers, Inc.