Paul La Berge, Aloyious M. Vanderhoef, Roger Severson, Henry Smith, and Lester Blakeley, thereby discouraging membership in a labor organization, Respondents have engaged 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 the rights guaranteed by Section 7 of the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

[Recommendations omitted from publication.]

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## Air Control Products, Inc. of Tampa and Air Control Products, Inc. of St. Petersburg *and* Teamsters, Chauffeurs, Helpers Local Union #79, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioner. *Cases Nos. 12-RC-1156 and 12-RC-1157. July 12, 1961*

### DECISION AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, a consolidated hearing was held before Joseph V. Moran, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

[1] On February 27, 1961, the Employers were served with notice of hearing in these cases to be held on March 8, 1961, and on March 1 were served with an order rescheduling hearing to March 9. On March 2, the Regional Office of the Board received a letter from the Employers' attorney, dated March 1, requesting adjournment of the hearing on the ground that he would be at a trial in the County Circuit Court on the scheduled date. The Employers did not serve a copy of this letter on the Petitioner nor submit to the Regional Office the copies required by the Board's Rules and Regulations, Series 8, as amended, Section 102.65(a). On March 2, the hearing officer was told by the Employers' attorney, in a telephone conversation, that he would advise the Regional Office before the close of business on March 7 whether or not he had completed the trial and could go to hearing on March 9, and would make an appointment for representatives of the Board and the Petitioner to examine certain records of the Employers which had been subpenaed. There was no communication from the attorney on March 7, but, at 4:30 p.m. on March 8, the day before the scheduled hearing, his secretary called the Regional Office to ask for an adjournment, and was told by the hearing officer that the request had come too late. On the morning of March 9, the Regional Office received a telegram from the attorney asking for an adjournment. A few minutes before the scheduled start of the hearing, the hearing officer told the attorney, in a telephone conversation, that adjournment was denied because of the failure to carry out the agreement with the Regional Office to communicate on March 7 and to arrange for examination of the subpenaed records. The hearing proceeded as scheduled. While the Employers' attorney was absent, the managers of both corporations were present throughout the hearing, but both refused to enter an appearance and, when called by the Petitioner to testify, refused to answer questions on the ground they had been advised by their attorney to refuse. Thereafter, the Employers filed a motion for a rehearing on the ground they had been improperly denied an adjournment. As the Employers had adequate notice of the hearing, did not comply with the Board's Rules and Regulations concerning the filing and service of written motions, did not comply with their own undertaking to give adequate notice to the Regional Office of their continuing need for an adjournment and to arrange for examination of records, and had both managers present throughout the hearing, we hereby affirm the hearing officer's refusal to adjourn the hearing, and, accordingly, deny the Employers' motion for a rehearing. *Pennington Bros., Inc.*, 124 NLRB 935.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel [Chairman McCulloch and Members Leedom and Brown].

Upon the entire record in these cases, the Board finds:

1. Both Employers, whose operations are almost identical, are engaged in the production, sale, and installation of windows, awnings, shower and tub enclosures, kitchen cabinets and counter tops, and related products. As the Employers failed and refused to present any evidence as to the effect of their operations on commerce, the hearing officer accepted secondary evidence presented by two former employees, who testified on the basis of information obtained while employed. One, Briell, who had worked for the Tampa corporation from April 1959 until December 22, 1960, as a glass installer, testified that this corporation received glass from various European countries valued at more than $100,000 annually. The other, Schubert, testified that he worked for the Tampa corporation for approximately 18 months before January 1961, that part of his duties was to help unload trucks making deliveries to the Tampa corporation, that such deliveries were made from 1 to 3 times a week, and that half the truckload was generally consigned to the St. Petersburg corporation. He also testified that such loads contained, among other things, glass marked "Made in Germany," masonite marked "Made in Belgium," and moulding from New Orleans, Louisiana.

We find, accordingly, that the record establishes that the operations of each corporation affect commerce within the meaning of the Act, that both are therefore within the Board's statutory jurisdiction, and that it will effectuate the policies of the Act to assert jurisdiction herein.[2]

2. The record demonstrates that the Petitioner is a labor organization within the meaning of the Act and that it claims to represent certain employees of the Employers.

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

4. The Petitioner seeks identical production and maintenance units at both the Tampa and the St. Petersburg operations. In a letter of March 1, 1961, to the Regional Office, the Employers' attorney contended that the units described in the petition were inappropriate because they "include persons who are not employees in the company but who are only acting in an independent contractual relationship." Briell testified that Whitaker, the manager of the Tampa operation, told him that the installers were considered by the Employers to be independent contractors.

[2] *Tropicana Products, Inc.*, 122 NLRB 121, 124.

The Petitioner contends that the installers are employees and should be included in the unit, but, at the hearing, stated its willingness to appear on the ballot in any unit deemed appropriate by the Board.

Briell testified that the installers own their own trucks and tools; that income tax and social security taxes are not withheld from their pay; that they are compensated on a piecework rather than an hourly basis, as are the admitted employees; and that they do not receive the vacation and hospitalization benefits received by these employees. On the other hand, Briell further testified that the installers work full time for the Employers, and are prohibited from working for anyone else. They report to work every morning at a time set by the Employers, and must perform their tasks to the satisfaction of the Employers' salesmen, who check on their work. Alterations due to a customer's complaint after an installation has been completed are made by the installer without additional compensation. The piece rates are unilaterally set by the Employers, and an installer has no right to reject any job to which he is assigned. Infractions of the Employers' rules are punished by withholding assignments from the offending installer or by discharging him. There has been some interchange between installers and plant personnel.

Upon the entire record, we find that the Employers have full control over the manner and means by which the installers are to perform their work, that their arrangement leaves no room for the installers to make decisions which will govern their profit and loss, and, therefore, that the installers are not independent contractors.[3] No other reason having been advanced for excluding the installers, we shall include them in the unit. There is nothing in the record to indicate that employees in any of the other categories sought by the Petitioner are independent contractors.

Accordingly, we find that the following employees of the Employer, excluding from each unit office clerical employees, salesmen, guards, and supervisors as defined in the Act, constitute separate units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

(a) All employees of Air Control Products, Inc. of Tampa in its Tampa, Florida, plant, including installers, formica workers, production employees, plant clerical employees, truckdrivers, and warehousemen.

(b) All employees of Air Control Products, Inc. of St. Petersburg in its St. Petersburg, Florida, plant, including installers, formica workers, production employees, plant clerical employees, truckdrivers, and warehousemen.

[Text of Direction of Elections omitted from publication.]

[3] *Lindsay Newspapers, Inc.*, 130 NLRB 680.