

Respondent was authorized under Section 8(a)(3) to enter into a union-security clause with Gray, the certified individual representative of its employees, except for the fact that Gray was not in compliance with the then effective Section 9(f), (g), and (h) of the Act. In reaching this conclusion the Board construed the words "labor organization" as defined in Section 2(5) of the Act and used in Section 8(a)(3) as including an individual certified as an employee representative.

The Trial Examiner, on the contrary, had found that Gray, the certified individual representative, was not a labor organization within the meaning of the 8(a)(3) proviso, and that, therefore, Respondent was unauthorized to enter into the union-security contract with Gray, apart from consideration of his compliance status.

Thereafter the case was considered by the United States Court of Appeals for the District of Columbia upon the Charging Party's petition to review and the Board's petition for enforcement. On September 15, 1960, the court handed down its opinion, holding that an "individual" was not encompassed within the meaning of the term "labor organization" in the proviso to Section 8(a)(3), thus agreeing with the Trial Examiner's resolution of the problem.<sup>2</sup> The court remanded the case to the Board for further proceedings consistent with its opinion. The Board did not seek certiorari.

In conformity with the court's opinion, which is now the law of the case, we find that Gray, a certified individual representative, is not a labor organization within the meaning of Section 2(5) and Section 8(a)(3) of the Act, and that the Respondent violated said Section 8(a)(3) and (1) by entering into a contract with him containing a union-security clause.

Accordingly, we hereby amend the Board's Order already issued herein by striking from paragraph 1(b) the latter portion thereof beginning with the words "unless Robert E. Gray shall have taken steps to comply . . ."; and we hereby amend the second paragraph of Appendix A, the notice to be posted by the Respondent, in similar manner. In all other respects we affirm the Board's said Order and notice.

<sup>2</sup> *Joseph J. Schultz (The Grand Union Co.) v. N.L.R.B.*, 284 F. 2d 254 (C.A.D.C.).

**Spencer, White & Prentis, Inc. and Leonard T. Shover and John O. Mann.** *Cases Nos. 25-CA-1244-1 and 25-CA-1244-2.*  
August 16, 1961

#### DECISION AND ORDER

On March 31, 1961, Trial Examiner Leo F. Lightner issued his Intermediate Report in the above-entitled proceeding, finding that the Re-  
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spondent had not engaged in the unfair labor practices alleged in the consolidated complaint and recommending that the consolidated complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report.

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

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 briefs, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

[The Board dismissed the consolidated complaint.]

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### STATEMENT OF THE CASE

This proceeding was heard before the duly designated Trial Examiner in Indianapolis, Indiana, on August 2 and 3, 1960,<sup>1</sup> on the consolidated complaint of the General Counsel and answer of Spencer, White & Prentis, Inc., herein called the Respondent. The issues litigated were whether the Respondent violated Section 8(a)(1) and (3) and Section 2(6) and (7) of the Labor Management Relations Act, 1947. Respondent presented oral argument, and briefs filed by the General Counsel and Respondent have been carefully considered.

Upon the entire record, and from my observation of the witnesses, I hereby make the following:

### FINDINGS AND CONCLUSIONS

#### I. THE BUSINESS OF THE RESPONDENT

Respondent is a New York corporation, maintaining its principal place of business at New York, New York, and engaging in the business of heavy construction in New York State and other States of the United States. During the year preceding the issuance of the complaint in June 1960, Respondent performed services valued in excess of \$150,000, of which services valued in excess of \$150,000, were performed in States other than the State of New York. Respondent admits, and I find, that Respondent is engaged in commerce within the meaning of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Central Indiana District Council of Carpenters, AFL-CIO, herein called the Union or the Council, is a labor organization within the meaning of Section 2(5) of the Act. This organization is also identified in the record as the Indianapolis and Central Indiana District Council of the United Brotherhood of Carpenters and Joiners of America.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The issue*

The sole issue herein is whether Respondent, on or about March 21, 1960, failed and refused to employ Leonard T. Shover and John O. Mann because "they were not members of, cleared by, or sponsored by, the Union."

That the named individuals were members of the Union is undisputed.<sup>2</sup>

<sup>1</sup> Extended illness has delayed issuance of this report.

<sup>2</sup> Shover had been a member of Local 60 for 5 years, and was a member in good standing. Mann had been a member of Local 758 for 10 years, was a member in good standing.

### B. Background

The activity of the Respondent with which we are here concerned is limited to certain foundation work it undertook, as a subcontractor, at the site of the Marion County Courthouse in Indianapolis, Indiana. Foundations for the new structure had to be carried down some 30 feet and underpinning of the existing structure was essential to permit its continued use in the interim. Respondent's undertaking included a shoring of the banks abutting the adjacent streets to prevent erosion or a cave-in, and a consequent disruption of utilities.

The first step of Respondent's activity commenced in October 1959, and continued approximately 10 weeks, terminating on December 19, 1959, as the result of an areawide strike by the Operating Engineers. Respondent's construction employees, engaged in the described activity, were laid off approximately December 19, 1959, as a result.

Glenn Grant was superintendent of construction for Respondent during the first phase of the described activity. When work resumed in February 1960, Harry A. Armstrong was designated superintendent of construction for Respondent's activity.

### C. Events between February 8 and March 21, 1960

Armstrong has been employed as a superintendent of construction, by Respondent, since 1948. He arrived in Indianapolis, from New York, on February 8, 1960. That afternoon he contacted the Engineers' local and made arrangements for a resumption of Respondent's activity. The same afternoon, while at the worksite, he was approached by Ernest Bengé, a carpenter, who inquired as to when work would resume. Later that week, having verified Bengé's statement that he had worked for Grant, Armstrong hired him, as the first carpenter employee, when work started on Thursday, February 11, 1960. On the recommendation of Bengé, Armstrong at approximately the same time hired Delmar Majors. Armstrong described the scene outside the shanty, then and later, as "a sea of faces," attributable to a continuation of the Engineers' strike at other worksites in the area. It is undisputed that Bengé and Majors, the first carpenter employees of Respondent, were hired "off the street." Armstrong testified that at that time he had not contacted the Carpenters' union in any form. On Monday, February 15, Armstrong asked Bengé whom he should hire out of a group standing outside the shanty. Bengé identified Whitie Bradley as a former employee of Glenn Grant, whereupon Armstrong hired Bradley.<sup>3</sup> The undisputed testimony of Bengé, Majors, and Bradley was that they each were members of Local 60 in good standing.

On Friday, February 12, about 4:30 p.m., Armstrong asked Bengé to contact his business agent so that he could obtain a pile-driving crew and a pile-driving foreman. He described piledrivers as a "specialized group, not too common in this area."

On Monday, February 15, about 8:45 a.m., Chet Bereman, business agent of Local 60, appeared at the jobsite. Armstrong advised Bereman that he would need a pile-driving crew of six men and a foreman, including one welder. Armstrong also advised Bereman that "we intend to follow all the rules and regulations that your union has prevailing in this area." Armstrong testified that this was company policy. The following day, Tuesday, February 16, Bereman returned to the jobsite with Ralph R. Smith, business representative for the Central Indiana District Council of Carpenters. Armstrong advised Smith of his need of the pile-driving crew and a foreman. He also advised Smith that he would give him 24 hours notice when the men were needed.<sup>4</sup> A pile-driving crew was sent by the Union and started working on February 17. The crew included Garren, Griffin, Schweigel, Willey,<sup>5</sup> Stacey, Bowman, and Risk. Willey, designated as a welder, was not retained because Armstrong was dissatisfied with his performance and Armstrong so notified Smith.

During Armstrong's meeting with Smith on February 16, Smith advised him "we (Smith and Bereman) have decided if you need any more men, call my office number." Also during this conversation Smith advised Armstrong that William A. Griffin<sup>6</sup> would be the steward.

ing, and was a trustee (auditor) of the local. On March 21, 1960, Mann was delegate to the District Council from Local 758. Both locals are members of the District Council.

<sup>3</sup> This credible testimony of Armstrong was corroborated by the three named former employees who appeared on behalf of Respondent.

<sup>4</sup> Armstrong had rented a pile-driving machine the previous Friday, but on Saturday was advised that the machine was no longer available. It was not until Tuesday, February 16, in the afternoon, that he located a crane.

<sup>5</sup> Misspelled Willey in the transcript.

<sup>6</sup> Incorrectly spelled in the transcript as Griffen.

Other carpenter<sup>7</sup> employees hired by Respondent between February 11 and March 21 and their dates of hire<sup>8</sup> were: Valdez, February 19; Flora and Watson, March 1; Simpson, March 17; and Settles and Brown, March 18. It is undisputed that all except Simpson were hired "off the street." Flora and Watson appeared as witnesses for the Respondent and corroborated Armstrong's testimony insofar as it related to the hiring of each of them. It may be inferred from the testimony of Watson and Flora that this was their initial employment by Respondent. Flora was similarly hired "off the street" upon reapplication on both April 2 and April 9.

I find it unnecessary to recount in detail problems with which Armstrong was confronted in terms of essential labor force, arising, according to Armstrong, from fluctuating and unpredictable conditions. A different subcontractor was doing the excavation work. Armstrong described the sudden exposure of sheeting with the possibility of sudden collapse of the adjacent street or utilities, necessitating an immediate need for additional carpenters and laborers. Armstrong credibly testified that under these circumstances if there were any carpenters or laborers around he would hire them "on the spot"; when no carpenters were available he called the Union. Similarly, Armstrong reduced his work force when individuals were not needed.

#### D. Events of March 21 and 22, 1960

Respondent first employed Ray Perdue and Manuel Torres on March 21, 1960, and R. Klee on March 22, 1960.

Armstrong credibly testified that Perdue was "hired off the street." This testimony was corroborated by Perdue. Perdue inquired of Armstrong about a job and was told that he could not use him right then, that some lumber was coming in, and that if he would come back he would put him to work. Perdue returned 2 or 3 days later and Armstrong hired him.<sup>9</sup>

On Friday, March 18, as the result of a conference that day between a representative of the excavator, a representative of the general contractor, and himself, Armstrong anticipated the need of additional men commencing Monday, March 21. He called the Union, spoke to a Miss Elkins,<sup>10</sup> and advised her that he would need two men on Monday, March 21. When the two men did not show up on Monday morning at 8:30, he again called her at 10:30. As a result of these calls, Manuel Torres received a call at his home from Miss Elkins and was told to report to the courthouse job and see Armstrong. He arrived at the jobsite about 11 a.m. and was thereafter employed. Klee reported to work at 2:30 p.m. on Tuesday, March 22. Armstrong's undisputed testimony was that he was the second of the two men requested by Armstrong on Friday. Armstrong asserted that he would have been required to pay 2 hours "show up" time if he did not employ these individuals after requesting them.

Leonard T. Shover, one of the Charging Parties, testified that he first talked to Armstrong on Thursday, March 17, about 3 p.m., at which time he asked him if he was doing any hiring, and was advised to come back the first of the following week. Armstrong is quoted by Shover as advising him "I may need somebody around Monday, Tuesday, or Wednesday."<sup>11</sup> Shover testified that on Monday morning, March 21, he talked to Armstrong "right after he got all his men to work," and was advised by Armstrong that he didn't need anyone at that time, to try the next morning.<sup>12</sup>

On Monday afternoon, Shover contacted John O. Mann, a neighbor, whom he had known for 10 years, suggesting that they might obtain a job if they applied together because Shover did not think they would hire just one carpenter. Mann is the other Charging Party herein. Shover and Mann arrived at the worksite about

<sup>7</sup> The term carpenter is used solely to imply a distinction from engineer and laborer employees.

<sup>8</sup> See General Counsel's Exhibit No. 3, compiled from Respondent's records.

<sup>9</sup> General Counsel's Exhibit No. 3 is a list of carpenter employees who were employed by Respondent on this project. The exhibit reflects that the first day Perdue worked was March 21, 1960. Accordingly, I do not credit Perdue's testimony that he first applied for work in late February and was hired 2 or 3 days later. However, I do not consider this error as to the exact time of hiring of consequence in determining that the balance of his testimony was credible.

<sup>10</sup> Identified in the record as the office secretary.

<sup>11</sup> Armstrong did not recall this meeting. Whether it occurred or not is not significant herein.

<sup>12</sup> Armstrong likewise could not recall this meeting. I find it unnecessary to resolve any credibility question relative to the occurrence of this meeting.

7:30 a.m. on Tuesday, March 22. William A. Griffin, the steward on the job,<sup>13</sup> credibly testified that when he went to work that morning, Mann and Shover were sitting back on the bench in the back end of the trailer. Griffin went back and talked to them and they told him they were "wanting employment." He told them, "Well, just wait a minute and I will take you up and introduce you to Harry Armstrong, if that will do any good." Thereafter, Griffin introduced Shover and Mann to Armstrong. Griffin quoted Armstrong as responding "I am sorry, Grif, I can't use them this morning; but if anything comes up, I will." Armstrong credibly testified, "As a courtesy in our business, if a shop steward suggests you put men on, it's an unwritten rule you do." He responded, "Grif, the next time we need men, I will mention it to you and you can get them in here." Armstrong, in answer to a question of whether he needed men at that time responded, "Apparently not or I would have put them to work."

The credited testimony of Griffin and Armstrong is at variance with that of Mann and Shover, both of the latter having testified that they were told by Armstrong to wait until he got his men organized and at work and he would then talk to them. Shover then testified that in a subsequent conversation with only Armstrong, Shover, and Mann present, Armstrong said, "Well, boys, I am going to be fair with you, I am going to put it on the line. You have got to go down and get right with Smitty." Shover identified Smitty as business agent for the District Council. Shover testified that he responded, "Well, I don't know why we have to go down and get right with Smitty, we are both Union men." Shover testified that Armstrong responded, "Well, Smitty knows when I need men, I am getting my men through him." Shover testified he then said, "Well, if that's the way it is, we will go down and get right with Smitty."<sup>14</sup> The testimony of Mann relative to the second conversation with Armstrong is at variance with that of Shover. Mann testified that Armstrong came in, called them over to his desk, and said, "Well, gentlemen, I am going to put it to you straight, you will have to go down and see Smitty. I have a working agreement, and he furnishes me men, and he knows how many men and when I need them." Mann testified that he responded to Armstrong, "All right, I will go down and see Ralph, if that's the way it is."

Mann and Shover proceeded to the Council's office, which is also the location of Local 758. Only Mann talked to Smith. Mann testified that he asked Smith about a job on the courthouse job and that Smith responded that he would see, then said "Yes, he needs two men down there, you take your buddy and go down there and get ready to go to work." Mann testified that this conversation took place in Smith's office. Mann also testified that Smith stated, "I will call them down there." It was Mann's testimony that he told Smith that Armstrong had referred them to Smith. On cross-examination, Mann acknowledged that Smith did not ask him for money or anything and that he understood the substance of Smith's remarks to be to the effect that Smith would call Armstrong and they would then go to work.

Ralph R. Smith, business representative for the Council, appeared as a witness for the Respondent. Smith recalled having seen Mann and Shover at the Council's office but placed the location of his conference with Mann as occurring in the main meeting hall, not in his private office. Smith's credited testimony was that Mann "wanted a clearance from me or some such a thing as that." Smith testified that he did not know exactly what Mann meant by a clearance, that he understood Mann to

<sup>13</sup> Griffin was further identified by Mann as the president of Local 758, of which Mann was a member. Griffin had worked all the previous summer with Shover. Griffin referred to Shover and Mann as "they were both good friends of mine"

<sup>14</sup> On cross-examination, Shover testified in part as follows:

Q. What did you understand that Mr. Armstrong meant by "getting right with Smitty"?

A. Well, in my own opinion is the payoff per job, I never bought a job in my life, and I am too old now to start.

Q. But you understood this is what he meant?

A. Well, that is what I figured; any man in the Union would figure about the same thing for getting an okay from him.

Q. Had you heard of such practices in the past?

A. I have heard a lot of it, yes, but I have never been able to prove it. I don't know whether the man had ever done anything like that or not, I wouldn't swear to it.

Q. Did you ask Mr. Armstrong what he meant by "getting right with Smitty"?

A. No.

Q. Did Mr. Mann ask what he meant by "getting right with Smitty"?

A. No.

be saying that if Smith would recommend Mann to Armstrong that he would probably be hired. Smith testified, "I told Mr. Mann that if I could help him, that I would make a recommendation to Mr. Armstrong." Smith telephoned Armstrong and told him that Griffin had recommended two men to him and that those were as good as the Union had "and if he could use those men, it would certainly be fine with me."

Mann and Shover testified that they returned to the jobsite and had a further conversation with Armstrong. The testimony of each as to what was said is again at variance. Shover's testimony was that Armstrong said, "Well, boys, I told you this morning you had to get right with Smitty." Shover alleges he responded, "We just come from there and the man [Smitty] told us to go to work at noon." Shover then quoted Armstrong as saying he had not received word from Smith, that somebody had made a mistake somewhere, concluding with, "Well, you have to go get right with Smitty." Mann's version of the same conversation was that Mann asked Armstrong how work was and Armstrong responded, "Well, I am going to lay it on the line for you, you will have to go down and see Smitty; he has never called." To this Mann responded, "It's damn funny, we just came from there, and he said he would call down here." Armstrong then responded, according to Mann, "You will just have to go down and see him."

Shover and Mann thereafter returned to the Council hall and had a further conversation with Smith. Smith testified this second meeting was the following day. According to Shover, this conversation ended with Smith advising them, "You guys go back down there and be ready to go to work in the morning, I will call him [Armstrong] and straighten him out." Mann's testimony was that the conversation ended by Smith saying, "You go back down there in the morning and be prepared to go to work, I will straighten it out." Smith's testimony, which I find credible, was that Mann asked him what they should do and he told him that "it would be my [Smith's] opinion that he should go back down on the job, that probably there would be some hiring done." Shover and Mann testified they returned to the worksite the following morning, that Armstrong avoided them, and that they left.

To the extent the testimony of Griffin, Armstrong, and Smith is at variance with the testimony of Shover and Mann, I credit the first three named for reasons set forth *infra*.

#### E. Concluding findings

It is undisputed in this record, as set forth in subsection C, *supra*, that Respondent hired carpenters from the street, as needed, from February 8 to and including March 21, 1960. It may be reasonably implied from the evidence that, except for the hiring of specialists, i.e., piledrivers, burners, and welders, Respondent called the Union for carpenters only when men were not waiting "on the street," the anticipated need of two men on March 21, and consequent request of March 18, being an exception.

I find from the testimony of Watson, Bengé, Flora, Bradley, and Perdue, that when each of them was hired, or rehired, by Armstrong, the latter made no mention to those named of each, or any of them, obtaining clearance from the Union or from Smith.

Some eight members of the same Union, and the same locals, as the Charging Parties, all former employees of Respondent at the time of their testimony, testified, in effect, to the absence of a "hiring hall" or "exclusive hiring" arrangement. While some had worked for Grant, the prior superintendent, others had not. The credible evidence of probative value, herein, permits no other conclusion. I so find.

Smith and Armstrong credibly testified that the only "arrangement" was that the Union would furnish men when Armstrong requested them to do so. There is no credible evidence in refutation.

In arriving at my findings of credibility herein, I have considered carefully all of the testimony, the demeanor of the witnesses, and their interest in the outcome of the case, or lack of interest.

General Counsel urges in his brief that the market was "glutted" with unemployed carpenters during the Engineers' strike. He then postulates a disappearance of the "sea of faces," looking for employment, with the termination of the Engineers' strike, conjectured as being in the third week of March. This record is silent as to when that strike terminated. General Counsel further urges that "Armstrong, pursuant to his agreement with Smith, had ceased hiring from the street (on March 21) and required all applicants for employment to be referred by the Union." I have set forth above, in subsection C, *supra*, the credited testimony of Flora that he was hired "from the street" on March 1, and similarly rehired on both April 2 and April 9. Also noted,

*supra*, is the credited testimony of Perdue that he was similarly hired on March 21. Armstrong's undisputed and credited testimony, in addition, was that he hired C. Heck on March 30, and L. Sturgeon on April 11, "from the street." Thus the contention that all applicants for employment after March 21 were "required" to have a "reference" from the Union is not supported by credible evidence. I find accordingly.

I have set forth the basis upon which Klee was hired on March 22. The next carpenter hired thereafter was Adcock who was hired on March 29, 1960. Accordingly, for the reasons stated *supra*, I find that Mann and Shover were not hired by Respondent on March 22 because no carpenters were needed at that time, and that the refusal to hire was not because "they were not members of, cleared by, or sponsored by, the Union," as alleged.

#### Conclusions

In view of the above findings, it is my conclusion that this record does not contain the preponderant evidence needed to establish that Respondent failed and refused to employ Leonard T. Shover and John O. Mann for the reasons alleged in the consolidated complaint, in derogation of the provisions of Section 8(a)(1) and (3) of the Act. Accordingly, I shall recommend that the consolidated complaint be dismissed in its entirety.

On the basis of the foregoing findings of fact, and upon the entire record herein, I have reached the following:

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Central Indiana District Council of Carpenters, AFL-CIO, 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, within the meaning of Section 8(a)(1) and (3) of the Act.

[Recommendations omitted from publication.]

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**Building Material and Dump Truck Drivers Local Union No. 420, affiliated with I.B. of T.C.W. and H. of A. and Robert E. Sumner and Southern California Chapter of the Associated General Contractors of America and Matt J. Zaich Co., Parties to the Contract**

**Building Material and Dump Truck Drivers Local Union No. 420, affiliated with I.B. of T.C.W. and H. of A. and Walter Bosma, Jr. and Southern California Chapter of the Associated General Contractors of America and Asbury Construction Co., Parties to the Contract. Cases Nos. 21-CB-1331 and 21-CB-1359. August 17, 1961**

#### DECISION AND ORDER

On April 11, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The