

Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act. *General Drivers, Chauffeurs and Helpers, Local Union No. 886, etc.* (James D. O'Dell et al., d/b/a Ada Transit Mix), 130 NLRB 788; *United Wholesale and Warehouse Employees, Local 261, etc.* (Perfection Mattress & Spring Company), 129 NLRB 1014. I further find that the Respondent illegally induced and encouraged individuals employed by secondary employers within the meaning of these same sections of the Act, when Barney requested Jack Edwards, an employee of Centropolis Transfer Company, not to perform any more delivery work for Ets-Hokin. Moreover, Barney's threats of "trouble" in the event the Joint Board award was not accepted, made to Sargent and Horne, as well as his comments to Ets-Hokin officials that the Respondent would not take the rejection of that award "lying down" constituted threats for a proscribed objective within the meaning of Section 8(b)(4)(ii)(B). I so find.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Employer described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices and otherwise effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce and the Respondent Union is a labor organization, all within the meaning of the Act.

2. By inducing and encouraging employees of Centropolis, Independent, Blaw-Knox, Bayer, Hamm, Western, Erectors, Reese, and other employers, to engage in strikes or refusals in the course of their employment to perform services, with the object of forcing or requiring the Corps of Engineers, the Air Force, and I.T.T. Kellogg to cease doing business with Ets-Hokin, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

3. The aforesaid unfair labor practices having occurred in a connection with the operations of Ets-Hokin, as set forth above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and substantially affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

**American Federation of Television and Radio Artists, AFL-CIO
and L. B. Wilson, Inc. (Radio Station WCKY)**

**Cincinnati Local, American Federation of Television and Radio
Artists, AFL-CIO and L. B. Wilson, Inc. (Radio Station
WCKY). Cases Nos. 9-CC-131 and 9-CC-132. October 31, 1961**

SUPPLEMENTAL DECISION AND AMENDED ORDER

On January 19, 1961, the United States Court of Appeals for the Sixth Circuit refused to enforce the Board's Order in this case (125 NLRB 786), and remanded the case to the Board for further proceedings.¹ The court's action was based on the Trial Examiner's preju-

¹ 285 F. 2d 902.

dicial error in denying at the hearing before him the Respondents' lawful request for the pretrial statements given the General Counsel by witnesses Thornburgh and Sheppard. The court authorized the Board to rectify this prejudicial error either by reopening the hearing and granting the Respondents' request, or by making findings of fact upon the evidence exclusive of the testimony of Thornburgh or Sheppard.

Pursuant to the directive, the Board has reconsidered the entire case, including not only its own prior Decision and Order and the separate dissenting opinions of the minority therein, but also the decision of the United States Court of Appeals for the Sixth Circuit affirming the action of the district court in granting an injunction against the Respondents under Section 10(1) of the Act.² For the reasons set forth below, in numbered sections corresponding to those in its original Decision and Order, the Board is now of the opinion that even if it were to accept and reaffirm in full the evidentiary facts found in that Decision, such findings do not warrant issuance of any order against the Respondents.³

1. In the latter part of October 1957, the National sent an order to its members requiring them to have the producer of each transcription fill out a report or questionnaire stating whether or not the transcription was intended for use on WCKY. The order explained that the purpose of the report or questionnaire was to compile accurate information on the supply of transcriptions to "unfair WCKY." The Trial Examiner found that National's order had neither the purpose nor the effect of inducing or encouraging any of its members to engage in conduct violative of Section 8(b)(4)(A) of the Taft-Hartley Act. The original Decision reversed this finding, and in this respect we now find the decision unsupported by the record. The evidence relied on for the reversal consisted of an interpretation of the National's order *by the Local*, in a letter sent to the Local's membership at the end of October. However, the record shows and the Trial Examiner found that the Local based this interpretation upon a chain of events which the National did *not* instigate. A few days *before* issuance of the order, Local Representative Katz had made a long-distance telephone call to the National's headquarters about other matters, in the course of which the National's representative mentioned the order it *proposed* to issue; Katz thereupon passed this information on to another Local representative, Carlon; Carlon, under

² 258 F. 2d 698.

³ For the reasons set forth in his prior dissenting opinion in this case, Member Fanning agrees with his colleagues in the majority that the complaint should be dismissed. In his dissent, Member Fanning was unable to find on the record before him that the General Counsel had proved that "employees" of any identifiable secondary employer had been induced in violation of Section 8(b)(4)(A). Accordingly, reaffirming and relying exclusively on the same evidentiary facts, Member Fanning adheres to his original decision in this case.

the impression that the order would appeal for strike action, prepared the letter, stating in part that the National *had ordered* its members not to make any transcriptions without a written statement from the producer that the transcription would not be used on WCKY; when Carlon read the letter to Katz on the telephone, Katz was very busy with other matters, but nevertheless approved; and the letter was thereupon sent out. As the Trial Examiner further found, the evidence also shows that by the time the Local's erroneous interpretation was noticed by the National, the Local's members had already received a verbatim copy of the National's order as actually issued; and the National, although at first deciding that in these circumstances no express disavowal was necessary, subsequently did send a disavowal to the Local's members. Contrary to the original Decision, therefore, we find no reason to reverse the Trial Examiner's finding that the order did not appeal for strike action.

Moreover, there is no evidence in the record that any of National's members were in fact employees of any producer of transcriptions, or that any such producers had an arrangement with National which created an employee relationship for the members. Under the Taft-Hartley Act the finding is essential that a union's appeal be directed to the "employees of any employer" before a violation of Section 8(b)(4)(A) can be found. We do not consider this essential finding supplied by proof that the Respondents' members were the only "pool" of artists available to the producers of transcriptions, in view of evidence (discussed below) supporting the Trial Examiner's finding that the artists in the "pool" were independent contractors and not employees.

In these circumstances we cannot find, as did the original Decision, that the National should be charged with a violation of Section 8(b)(4)(A).

2. (a) With respect to the Local's inducement of Sheppard not to make transcriptions for Sixty-Second Shops to be broadcast over WCKY, the Trial Examiner had found that Sheppard was an independent contractor and not an employee of any producer of transcriptions within the meaning of Section 8(b)(4)(A). The original Decision reversed this finding for two reasons: (1) Because Sheppard conducted a "disc-jockey" program for radio station WCKY, in which role he was admittedly an employee of WCKY, and because both programs were similar in that they were periodic and required consultations with Sixty-Second Shops and WCKY, respectively, and (2) because of the fact that Sheppard was part of the "pool" or exclusive source of artists available to transcription producers desirous of engaging artists. In our view, however, the periodic use of and consultation with an independent contractor does not necessarily convert him

into an employee. Nor does the fact that all the independent contractors are organized into an exclusive source of supply convert them into employees. We think the evidence relied on in the original Decision does not warrant disturbing the Trial Examiner's finding that the amount or degree of control exercised over Sheppard was not sufficient to deprive him of his status as an independent contractor in his relationship with Sixty-Second Shops. This is particularly so in view of evidence that Sixty-Second Shops contracted with Sheppard because he was an independent radio personality, and did not make any employee deductions from the talent fees it paid him such as are required by law where an employment relationship exists.

(b) With respect to the Local's resolution that no member be allowed to work at or "through" the facilities of WCKY, the Trial Examiner regarded it in effect as a lawful appeal not to work at WCKY or make transcriptions or broadcast through WCKY, and not as an unlawful appeal for secondary employee action. The original Board Decision reversed this finding, simply because the resolution used the word "through" as well as the word "at." However, we cannot agree that the Trial Examiner was wrong in his finding. We find that the Local, as part of its lawful strike against WCKY, was merely encouraging its members, none of whom were shown to be secondary employees, to refuse to enter upon WCKY's premises to participate in a "live" broadcast, or to do what any radio listener would find indistinguishable: participate in such a broadcast by means of making a transcription intended to be used over WCKY. This legitimate primary object of the Local could be accomplished only by advising its members not to make "live" broadcasts from WCKY *or* transcriptions intended for broadcasts through WCKY.

(c) With respect to the Local's letter to its members misstating the contents of the National's order, we agree that despite its genesis as discussed above, it may have been a technical violation of Section 8(b)(4)(A) chargeable to the Local. Contrary to the original Decision, however, we agree with the Trial Examiner that it did not warrant an unfair labor practice finding or a cease-and-desist order, since the Local did not otherwise violate the Act, and since the letter was but a single unintentional and completely ineffectual violation and in any event was nullified a few days later when the Local's members received verbatim copies of the National's order.

For the foregoing reasons, we cannot agree with the original Decision that reversal of the Trial Examiner was warranted. We find that it would not effectuate the policies of the Act to sustain the allegations of the complaint or to issue an order.

[The Board dismissed the complaint.]

MEMBERS RODGERS and LEEDOM, dissenting in part:

Like the majority, we would adhere to the findings of facts heretofore made, although we would base such findings exclusively on testimony other than that of Thronburgh and Sheppard. Unlike the majority, however, we would adhere to the conclusions and order originally made, for the reasons therein set forth.

Myrna Mills, Incorporated and Amalgamated Clothing Workers of America, AFL-CIO, Petitioner. Case No. 5-RC-3251. October 4, 1961

REPORT ON OBJECTIONS*

Pursuant to a Decision and Direction of Election issued by the Board on January 11, 1961,¹ a secret ballot election was conducted under the supervision of the Regional Director on January 26, 1961, with the following results:

Approximate number of eligible voters.....	184
Void ballots.....	0
Votes cast for Petitioner.....	61
Votes cast against participating labor organization.....	120
Valid votes counted.....	181
Challenged ballots.....	5
Valid votes counted plus challenged ballots.....	186

Objections to conduct of and conduct affecting the results of the election were received from the Petitioner on February 3, 1961.²

The objections state:

The Amalgamated Clothing Workers of America, . . . hereby files objection to the conduct of and the conduct affecting the results of the election . . . on the grounds that the actions of the employer, agents of the employer and others acting in its behalf during the period subsequent to the issuance of the Order and Direction of Election created among the employees, their families and the entire community an atmosphere of fear in which the free and independent choice guaranteed by the National Labor Relations Act, as amended, was denied to the employees of the employer.

The employees of Myrna Mills in Mineral, Louisa County, Virginia are approximately equally divided, one-half being white and the other half being Negro. Louisa County is a primarily rural community with limited industrial employment and with particularly limited employment opportunity for its Negro citizens, a fact blatantly exploited by the employer and its agents. The U.S. Department of Commerce, Bureau of Census in *A Report of the Seventeenth Decennial Census of the U.S. Census of Population: 1950, Volume I, Number of Inhabitants*, page 46-14, shows the population of Louisa County as 12,826. The *Directory of Virginia Manufacturing and Mining, 1957-1958*, prepared by the Virginia State Chamber of Commerce shows a total reported industrial employment opportunity for this County population of 451 jobs. In addition thereto, there are two lumber companies reported in existence which furnished

* Supplemental Decision appears on p. 767.

¹ The unit was "All production and maintenance employees at the Employer's Mineral, Virginia, plant, including the shipping leadman, cleaning men, and plant clerical employees, but excluding office clerical employees, professional employees, guards, executives, and all supervisors as defined in the Act."

² The Petitioner's objections were sent by certified mail in an envelope postmarked February 1, 1961, in New York, New York. They were received in the Regional Office on February 3, 1961. It is reasonable to assume that in the normal operation of the United States mails a letter sent by certified mail from New York, New York, on February 1, 1961, would be received by this office in Baltimore, Maryland, by the close of business on the following day, February 2, 1961. Since the delay in receiving the objections appears not to be attributable to the Petitioner the objections are considered as being timely filed. See *Rio de Oro Uranium Mines, Inc.*, 119 NLRB 153.