

within the appropriate unit concerning rates of pay, wages, hours, and other terms and conditions of employment, including merit increases, and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the foregoing findings of fact, and upon the entire record in this case, I make the following:

#### CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7).

2. International Brotherhood of Electrical Workers, Local Union No. 584, AFL-CIO, is a labor organization and is the currently certified bargaining representative of Respondent's employees in the unit certified by the Board.

3. By refusing to bargain with the Union respecting merit increases in wages and rates of pay granted to employees in the bargaining unit, Respondent has failed to bargain in good faith with the certified exclusive bargaining representative in violation of Section 8(a)(5) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

**Construction, Building Material and Miscellaneous Drivers Local Union No. 83, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind. [Marshall & Haas] and Floyd W. Drake.** *Case No. 28-CC-78 (formerly 21-CC-394).* *October 18, 1961*

#### DECISION AND ORDER

On May 12, 1961, 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.

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

The Board has reviewed the rulings made by the Trial Examiner 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, the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

1. While the issue is close, we are in agreement with the Trial Examiner that the relationship of Yuma Builders Supply and Drake and Nooney constituted an employer-employee relationship. Drake and Nooney were hired to perform a specific hauling operation and in the performance of this operation their work and the manner of its performance did not differ from that of the four employees driving

for Yumã. Each driver was required to load his truck in succession at the Yuma plant and drive the mixer to the batch operation at the construction site. There each unloaded in turn and returned to the Yuma plant for reloading. At all times Nooney and Drake were subject to the direction and control of one of the Pittmans, one of whom was the owner of Yuma. It was necessary, according to Howard Pittman, that the unloading of the concrete be a continuous operation and six trucks were required for this purpose. It was also necessary, therefore, that the drivers operate in tandem formation and maintain this steady pattern of unloading. Neither Drake nor Nooney could vary from this pattern nor could either, by the exercise of independent skill or judgment, increase his profits by additional hauling. The only advantage either could obtain was by being the first truck out in the morning and the last to return at night. For these and other reasons set forth in the Intermediate Report, we do not find that the fact that Drake and Nooney owned their trucks and were paid haulage rates instead of hourly rates sufficient to establish an independent contractor status.

2. Nor do we find any violation of Section 8(b) (4) (ii) (B) in the conversations between Respondent's Business Agent Mullenax and Superintendent Davis of Marshall & Haas. Mullenax testified that on November 16 he was at the site of the drainage and irrigation channel job under construction by Marshall & Haas at Yuma. He went to the jobsite for the specific purpose of checking the drivers for proper referrals under the contract between Respondent and Yuma. He asked Drake for his referral and was shown Drake's union card. He then asked Drake what payroll he was on and told him he would have to be referred through the Phoenix dispatcher. Mullenax then told Pittman, batching superintendent for Yuma, that he was in violation of the contract and that he had 24 hours in which to straighten it out. Mullenax then went to the Marshall field office, saw Sam Marshall, and told him that he had given Yuma 24 hours in which to get their dispute straightened out. He did not tell Marshall that Marshall & Haas would be struck and Mullenax testified that the visit was a "courtesy" one for the purpose of advising the prime contractor that one of his subcontractors might be "in trouble."<sup>1</sup> Returning from the Marshall field office Mullenax saw Superintendent Davis of Marshall & Haas and told him he had given Yuma 24 hours in which to "straighten out." Mullenax described this conversation as another "courtesy" to Davis. The next day Mullenax returned to the construction site and found Drake and Nooney still driving for Yuma. Mullenax testified that, although the 24 hours had expired, he decided not to shut the job down in middle of a pour (of concrete) and to wait

<sup>1</sup> Mullenax testified that it was the general practice for Respondent to notify the prime contractor when a dispute with a subcontractor was threatened.

until the next morning. He was called over to Davis by Booth, a representative of the Laborers' Union, who told him Davis wanted to see him. Mullenax then told Davis he had decided not to shut the job down. Although Mullenax testified he had not asked Davis to do anything he stated that Davis told him he would try to "come up with something." The next morning Mullenax was on the jobsite at 7:30 at which time he was told by Drake that Yuma had two union members coming out to drive the trucks. The employment of these men ended the dispute between Respondent and Yuma.

The testimony of Davis, although less certain as to dates, is not substantially different with respect to these conversations. Davis did testify that Mullenax made no threat to call a strike of the Marshall drivers but that he (Davis) anticipated that a strike of the Yuma drivers would close down the operation since the Yuma concrete was essential to the operation. Without accepting Mullenax's conversations with Marshall and Davis as purely "courtesy" notice of contemplated action, we do not find that they can be fairly construed as either threats, coercion, or restraint within the meaning of the Act. While it is obvious that Marshall & Haas was not a disinterested party and that a strike against Yuma could adversely affect the entire construction operation, this does not, of itself, establish coercion or restraint. Assuming that Respondent believed (and there is no evidence of this) that Marshall & Haas might be moved to intervene to secure a settlement of the dispute, the attempted enlistment of such assistance—which was not forthcoming—was not unlawful. In short, we do not hold that the mere giving of notice of prospective strike action against a subcontractor to the prime contractor is a violation of Section 8(b)(4)(ii)(B).

[The Board dismissed the complaint.]

**MEMBER LEEDOM, dissenting:**

Contrary to my colleagues, I would reverse the Trial Examiner and find that the Respondent's conduct violated Section 8(b)(4)(ii)(B).

Marshall & Haas, as general contractor, entered into a subcontract with Yuma Builders' Supply to supply concrete at one of its construction projects. Yuma entered into an arrangement with Drake and Nooney under which they would use their trucks to deliver concrete from Yuma's plant to the project. The Respondent then engaged in certain conduct, as hereafter appears, aimed at removing Drake and Nooney from the project. The complaint alleges that by this conduct the Respondent threatened, restrained, and coerced Marshall & Haas and Yuma with an object of requiring Yuma to cease doing business with Drake and Nooney and with an object of requiring Marshall & Haas to cease doing business with Yuma, in violation of 8(b)(4)(ii)(B). The majority finds that since Drake and Nooney were em-

plóyees of Yuma, they were not doing business with Yuma and therefore an object of the Respondent's conduct was not to require Yuma to cease doing business with Drake and Nooney; it also finds that the Respondent did not threaten, restrain, or coerce Marshall within the meaning of Subsection (ii) of Section 8(b) (4). I disagree with both these conclusions.

The basic facts respecting the status of Drake and Nooney are not in dispute. Both Drake and Nooney operate their own businesses, Drake under the name of Drake and Harris Trucking and Nooney under his own name. Each owns his own truck. Under the contracts between Yuma and Drake and Nooney, Yuma agreed to pay them \$1.85 per cubic yard of concrete delivered to the project. The contracts do not require Drake and Nooney to drive their trucks themselves nor does it restrict their right to hire helpers. Drake and Nooney paid all costs of truck operations and all applicable taxes. Yuma did not deduct withholding tax from the sums it paid to Drake and Nooney nor did it pay on their behalf unemployment insurance or social security.

The Board has ordinarily applied the common law "right of control" test in deciding whether an individual is an employee or an independent contractor. Applying that test here, I think it plain that Drake and Nooney were independent contractors. They agreed only as to the result sought, namely, to deliver concrete to the construction site. Yuma did not control the "manner or means" by which this result was to be accomplished. Drake and Nooney enjoyed complete freedom in the use of their trucks. Drake and Nooney were free to drive themselves or to hire helpers. They had no regular hours and they were not restricted as to where they could park their trucks. Nor were they subject to discipline in the performance of the tasks involved.

The majority, while claiming that the issue is "close," relies in substance on three factors to establish that Drake and Nooney are employees: (1) the work of Drake and Nooney and the manner of its performance do not differ from that of Yuma's other drivers; (2) Drake and Nooney were subject to the direction and control of Yuma; and (3) they had no opportunity for profit. In my opinion, the first of these factors, is irrelevant and the record fails to support the majority's conclusion as to the second and third factors. Unlike my colleagues, I do not believe that *the nature of the work* performed by an individual is determinative as to whether he is an employee or an independent contractor. The only real question is *the nature of the relationship* between the individual and the person alleged to be his employer. In concluding that Drake and Nooney were under Yuma's direction and control, the majority relies on the fact that Drake and Nooney were required to take their turn in the line of trucks unloading concrete. But, surely, the fact that Yuma insisted that Drake and Nooney adjust the manner in which they performed their work to the

fact that Yuma employed other drivers does not even remotely establish the type of "minute and comprehensive" control upon which the Board has relied in finding that an individual is an employee.<sup>2</sup> Finally, the majority finds that Drake and Nooney were unable to increase their profits. The facts here indicate the contrary. Since Drake and Nooney were paid by the cubic yard delivered, if they failed to make deliveries, their profits, of course, would be reduced. They also were in position to increase their profits by keeping expenses down or by hiring helpers to do the driving while they engaged in other profit-making activities. While these potential additional profits may have been modest, this fact is immaterial. It is the *possibility* of profit and not the extent of the profit which characterizes the business entrepreneur. In this crucial respect, Drake and Nooney were unlike Yuma's driver-employees who were paid by the hour and who therefore had *no possibility* of additional income. In view of all the facts, I would find that Drake and Nooney were independent contractors and that an object of the Respondent's conduct was to cause Yuma to cease doing business with Drake and Nooney in violation of Section 8(b)(4)(ii)(B).

Nor do I agree with the majority that the Respondent did not "threaten, restrain, or coerce" Marshall within the meaning of Subsection (ii) of Section 8(b)(4). The majority concludes that the Respondent merely gave Marshall notice of its proposed strike against Yuma. I am unable to reconcile this explanation with the facts in the case. On November 16, Mullenax, the Respondent's agent, told Yuma's superintendent that Yuma had violated their contract by hiring Drake and Nooney, and that Yuma had 24 hours in which to straighten the matter out. Mullenax then told Sam Marshall and Davis, Marshall's superintendent, that the Respondent had given Yuma 24 hours in which to settle the dispute. On the following day, Mullenax again went to the project and found that Drake and Nooney were still driving. At that time, he told Davis that he decided not to close the job down until the following day. According to the testimony of Mullenax, which the majority apparently accepts, Mullenax did not ask Davis to do anything. However, *the Trial Examiner credited the testimony of Davis and found that Mullenax told Davis that he would give Marshall until 8 the next morning "to get this straightened out someway."* The Trial Examiner further found that Davis understood Marshall's statement to mean that there would be a strike if Mullenax's demands were not complied with and Davis thereupon went to Yuma's superintendent and told him that Yuma "would have to dispose of those boys or do something about it before the next morning or the union would stop us." The majority does not reverse the credibility findings of the Trial Examiner.

<sup>2</sup> See *National Van Lines*, 117 NLRB 1213, 1219-1220

In light of these facts, the only possible interpretation that Marshall's representatives could have put on the Respondent's statements, particularly Mullenax's statement to Marshall's superintendent that Marshall had until 8 the next morning to get the matter straightened out, is that the Respondent was threatening Marshall that unless it put pressure on Yuma to dispose of Drake and Nooney, the Respondent would strike Yuma and thus adversely affect Marshall's interests at the construction site. It is obvious that Davis understood Mullenax's statement as a threat rather than as a notification, because he immediately went to Yuma in an effort to cause Yuma to remove Drake and Nooney, stating that otherwise the union would "stop us." It is true that the Respondent's threat against Marshall may not have been explicit. However, the import was plain. It should be easily understood that even the less skillful business agents would coerce with caution and courtesy. I would, accordingly, find that the Respondent, in violation of 8(b)(4)(ii)(B), threatened, restrained, and coerced Marshall with an object of requiring Marshall to cease doing business with Yuma, and requiring Yuma to cease doing business with Drake and Nooney.

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### STATEMENT OF THE CASE

This matter came on to be heard before me in Yuma, Arizona, on January 26 and 27, 1961. Upon a charge duly filed and served the General Counsel of the National Labor Relations Board has issued a complaint against Construction, Building Material and Miscellaneous Drivers Local Union No. 83, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., herein called Respondent or Local 83, alleging that the Respondent has threatened, coerced, and restrained Marshall & Haas, a partnership, herein called Marshall, and Yuma Builders Supply, herein called Yuma, with objects (1) to force or require Yuma to cease doing business with Floyd W. Drake and John Nooney, individuals, and (2) to force or require Marshall to cease doing business with Yuma. Thus, it is asserted, the Respondent violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 61 Stat. 136, herein the Act.

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

### FINDINGS OF FACT

#### I. THE BUSINESS ENTITIES INVOLVED

Marshall is a California partnership with its principal office in Belmont, California. As prime contractor, Marshall has undertaken the construction of a drainage and irrigation channel near Yuma, Arizona, for the United States Department of Interior. The contract contemplates the expenditure of \$1,400,000. Marshall has imported to Arizona supplies and materials valued at more than \$67,000 for use in this project.

Pursuant to a subcontract from Marshall, Yuma has undertaken to supply ready-mixed concrete to the project in an amount valued at \$167,000. Yuma has imported to Arizona in connection with performing this contract, equipment, materials, and supplies valued at more than \$70,000.

I find that both Marshall and Yuma are engaged in activities in commerce and affecting commerce within the meaning of Section 2(6) and (7) of the Act and that the jurisdictional standards of the Board are met.<sup>1</sup>

Floyd W. Drake is the owner of a ready-mix concrete truck valued at \$13,000. John Nooney owns a similar but older truck valued at about \$5,000.

<sup>1</sup> This finding is conceded in Respondent's brief.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

On November 12, 1960, Yuma entered into separate oral agreements with Drake and Nooney concerning the delivery of concrete from Yuma's batch plant to the project. On November 17 the contracts were reduced to writing and read:

Per our oral agreement of November 12, 1960 you are hereby authorized to furnish us with one 7 cu. yd. [This is the capacity of Drake's truck. Nooney's is smaller.] transit mix truck, completely operated and maintained, to deliver concrete from our batch plant in the Wellton-Mohawk Valley, to the Extrudacast slip form for the agreed sum of \$1.85 per cubic yard.

The above price was based upon an average delivery of 50 cubic yards per day or more, at 5 days per week, to extend over a period of 4 to 5 months.

In the event that there be less than 50 cu. yds. per day, it will be your option to cancel this agreement, provided one week of notice be given us before cancellation.

Drake and Nooney began work on November 16. Each paid all costs of truck operation, assumed responsibility for all applicable taxes, and had no coverage for workmen's compensation or unemployment insurance from Yuma. No sums were withheld by Yuma from amounts due to them for income or social security taxes. Each was wholly dependent upon his ability and opportunity to deliver concrete from the batch plant for income to compensate them for the use of the trucks and the personal efforts each contributed.

The General Counsel argues that the relationship between Yuma and Drake and Nooney is such as to constitute the latter two as independent contractors and it is true that the arrangement is one bearing many of the indicia commonly descriptive of such a status. There is testimony that Drake and Nooney were not required to observe the work hours established for other drivers. If neither reported for work when the batch plant was ready to load no hourly wage would be docked but the opportunity to earn would be lessened. Neither could work during hours when the batch plant was closed for there would be nothing for them to haul. Each was expected to work when concrete was to be hauled and the work of Drake and Nooney to the observer was indistinguishable from that of the drivers who were compensated by an hourly wage. The six trucks hauling from the batch plant loaded and unloaded in turn. Drake and Nooney took their respective places in the parade of transit-mix trucks from batch plant to slip form to batch plant to slip form throughout the day. Their earnings were calculated upon a basis different from that used for the hourly workers and they were paid a truck rental gauged by cubic yards delivered. Compensation for personal efforts and for truck rental was lumped in a single, undivided figure per cubic yard but considerations of the value of a truckdriver and the value of truck use must have entered into this determination. Thus, although the amount is uncertain, part of the payment is attributable to the work of Drake and Nooney as operators of their respective trucks. The contract does not in terms require either Drake or Nooney to drive. Thus it is urged, neither was an employee. There is nothing to indicate, however, that Yuma expected either to hire a driver and it is the fact that until it became impracticable to do so each drove his own truck.

I have not been requested to do so and I do not take official notice of the laws and myriad decisions and regulations affecting the responsibility of an employer to deduct income taxes and social security taxes from earnings. These factors may have a peripheral significance in resolving the question of who is an employee but their central purpose is to insure the collection of taxes; a purpose in which the Act plays no part. An individual who sells his labor to another and who subjects his efforts to the control of another is in general terms an employee. If the business activity in which this arrangement arises meets certain criteria, the provisions of the Act apply. I think that the relation between Yuma on the one hand and Drake and Nooney on the other is no more than a piece-rate agreement for the payment of work done including of course an increased payment deriving from the fact that each supplied equipment. So far as work was concerned Drake and Nooney did just what the other drivers did under the same working conditions and during the same hours. They were so far as work is concerned, wholly under the control of Yuma. I find that Drake and Nooney were at all times material employees of Yuma.<sup>2</sup>

Both began hauling concrete for Yuma on November 16. In the afternoon of that day, Ellis Mullenax, an agent of the Respondent, asked Drake if he had been

<sup>2</sup> See *Lindsay Newspapers, Inc.*, 130 NLRB 680.

referred from Respondent's hiring hall as a contract between Yuma and the Respondent required. Drake answered that he had not. Mullenax said that Drake was not entitled to work on the job. Shortly thereafter, Mullenax told Howard Pittman, Yuma's superintendent, that Yuma had violated the contract by permitting Drake and Nooney to drive; that unless the situation was corrected within 24 hours Mullenax "would have to close down the job."

About 3 the next afternoon, noting that Drake and Nooney were still driving, Mullenax spoke to Robert Davis, superintendent for Marshall on the project, told Davis that Yuma was using drivers not properly referred to the job, and that he would give Marshall until 8 the next morning "to get this straightened out somehow." Davis understood from what Mullenax said that unless Yuma came into compliance with Mullenax' demand there would be a work stoppage which would, at the very least, affect the delivery of concrete from the batch plant to the slip form. Davis then went to Howard Pittman and told Pittman that Yuma "would have to dispose of those boys or do something about it before the next morning or the union would stop us."

On November 18 Yuma assigned two of its regular drivers to the Drake and Nooney trucks. For a few days Drake and Nooney did the driving with the Yuma drivers going along as passengers but drawing driver's pay. Yuma paid its drivers for a time but by later arrangement the cost of the drivers was split between the owners of the trucks and Yuma. Drake and Nooney unsuccessfully attempted to be referred to Yuma through Respondent's hiring hall. After the failure of this effort Drake and Nooney left the project although Yuma continued to use their trucks for a few weeks.

It is obvious and it is not denied that the Respondent threatened Yuma with a strike if Drake and Nooney continued to drive and that this threat caused the removal of Drake and Nooney from the job. Whether this was a lawful exertion of Respondent's asserted rights under its contract with Yuma need not be decided. Drake and Nooney were employees of Yuma and were not "any other person[s]" within the meaning of Section 8(b)(4)(B) of the Act. Thus the Respondent did not by its threats, coercions, or restraints violate that section.

Davis did not testify with certainty that Mullenax threatened to cause any work stoppage among Marshall's employees and the sense of Mullenax' testimony is that he did not do so. According to Mullenax, he told Davis of the dispute and of his purpose to shut down the Yuma operation as a courteous warning to Davis of what might eventuate. Davis, of course, would be seriously concerned by such a development. Not alone would an interruption in the concrete work delay completion of the project which Marshall had undertaken but I suppose that Davis might have considered the possibility that any strike or picketing might result in a work stoppage by Marshall's employees.

I do not find evidence to sustain the allegation that the Respondent threatened to strike any Marshall operation if Drake or Nooney were not removed. Even if the evidence be evaluated so as to support such a conclusion, it seems amply clear that the Respondent had no purpose or object to force or require Marshall to cease doing business with Yuma. The only concern evidenced by the Respondent was with the continued employment of Drake and Nooney. I find no substantial evidence that the Respondent was seeking in any way to disrupt the contractual relation between Marshall and Yuma. The threat of a shutdown was of course of concern to Marshall, and Mullenax might well have believed that by notifying Davis of the impending difficulty the latter would use his influence with Yuma to forestall it. This falls well short I am convinced of ascribing to the Respondent an object of forcing Marshall to cease doing business with Yuma.

I conclude that the evidence does not establish by its preponderance that the Respondent has violated the Act as alleged and I will recommend that the complaint be dismissed in its entirety.

#### CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. Yuma and Marshall are persons engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) and Section 8(b)(4)(ii) of the Act.
3. The Respondent has not violated Section 8(b)(4)(B) of the Act.

[Recommendations omitted from publication.]