

**Winston Bros. Company and Green Construction Company d/b/a Winston & Green and T. J. Turner.** *Case No. 20-CA-2001-3.*  
*January 30, 1962*

### DECISION AND ORDER

On September 18, 1961, Trial Examiner Howard Myers issued his Intermediate Report, finding that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof. The General Counsel filed a brief in support of the Intermediate Report.

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 [Chairman McCulloch and Members Rodgers and Fanning].

The Board has reviewed the Trial Examiner's rulings and finds no prejudicial error. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

### ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Winston Bros. Company and Green Construction Company d/b/a Winston & Green, Fresno, California, their respective officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist the Hod Carriers Building and Construction Laborers, Local 294, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

(b) Discouraging membership in Hod Carriers Building and Construction Laborers, Local 294, and encouraging membership in Tunnel

and Rock Workers of America, by transferring, laying off, or discharging and refusing to reinstate any of its employees, or by discriminating in any manner in regard to their hire or tenure of employment or any term or condition of their employment.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to T. J. Turner, Sidney G. Andrus, and Richard Lee Fisher immediate and full reinstatement to the jobs each held on January 31, 1961, or substantially equivalent positions, without prejudice to his seniority or other rights and privileges.

(b) Make whole T. J. Turner, Sidney G. Andrus, and Richard Lee Fisher for any loss of pay they may have suffered by reason of the discrimination against them by payment to each of a sum of money equal to the amount which each normally would have earned as wages from January 31, 1961, to the date of Respondent's offer of reinstatement, less his net earnings during said period.

(c) Preserve and, upon request, make available to the Board or to its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due and their right of reinstatement under the terms of this Order.

(d) Post at the jobsite where it is currently performing the so-called Pacific Gas & Electric tunnel job, copies of the notice attached hereto marked "Appendix."<sup>1</sup> Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent's representative, be posted immediately upon receipt thereof, and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twentieth Region, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply therewith.

## APPENDIX

### NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

**WE WILL NOT** in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization,

<sup>1</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order"

to form labor organizations, to join or assist Hod Carriers Building and Construction Laborers, Local 294, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer to T. J. Turner, Sidney G. Andrus, and Richard Lee Fisher immediate and full reinstatement to the job each held on January 31, 1961, or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of our discrimination against them.

All our employees are free to become or remain members of the above-named Union, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

WINSTON BROS. COMPANY AND GREEN  
CONSTRUCTION COMPANY D/B/A WIN-  
STON & GREEN,

*Employer.*

Dated----- By-----  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Employees may communicate with the Board's Regional Office (830 Market Street, Room 703, San Francisco 2, California; Telephone Number, Yukon 6-3500) if they have any question concerning this notice or compliance with its provisions.

#### INTERMEDIATE REPORT AND RECOMMENDED ORDER

##### STATEMENT OF THE CASE

Upon a charge and an amended charge duly filed on February 23 and March 14, 1961,<sup>1</sup> respectively, by T. J. Turner, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel<sup>2</sup> and the Board, through

<sup>1</sup> Unless otherwise noted, all dates mentioned herein refer to 1961.

<sup>2</sup> This term specifically includes counsel for the General Counsel appearing at the hearing.

the then Acting Regional Director for the Twentieth Region (San Francisco, California), issued a complaint, dated April 14, against Winston Bros. Company and Green Construction Company d/b/a Winston & Green, herein called Respondent, alleging that Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended from time to time, 61 Stat. 136, herein called the Act.

Copies of the charges and complaint, together with notice of hearing thereon, were duly served upon Respondent and copies of the complaint and notice of hearing were duly served upon Turner.

Specifically, the complaint, as amended at the hearing, alleges that Respondent: (1) on or about January 30, assigned Turner, a member of Hod Carriers Building and Construction Laborers, Local 294 (herein called either the Union or Local 294), to a lower-paying and less agreeable job, on or about January 31, laid off Turner, and on or about February 13, terminated Turner's employment, and thereafter refused to reinstate him, all because certain of its employees who were members or adherents of Tunnel and Rock Workers of America (herein called Tunnel Workers) refused to work with Turner; (2) on or about January 31, assigned Sidney G. Andrus and Richard Lee Fisher, members of Local 294, to lower-paying and less agreeable jobs because certain of its employees who were Tunnel Workers members or adherents refused to work with Andrus and Fisher, and on or about February 7 terminated the employment of Andrus and Fisher, and thereafter refused to reinstate them to their former jobs, because of their unwillingness to accept or continue employment in their former job assignments on terms and conditions not applicable to other employees; and (3) by the aforesaid conduct and by other acts and conduct, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On April 27, Respondent duly filed an answer denying the commission of the unfair labor practices alleged.

Pursuant to due notice, a hearing was held on May 10, 11, and 12, before the duly designated Trial Examiner. The General Counsel and Respondent were represented by counsel. Full and complete opportunity was afforded the parties to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to file briefs on or before June 21.<sup>3</sup> Briefs have been received from the General Counsel and from Respondent's counsel which have been carefully considered.

At the end of the session on May 12, the hearing was adjourned to May 17 in order to allow Respondent's counsel an opportunity to consider whether Respondent had any further evidence it desired to introduce. On May 15, the Trial Examiner received a letter, dated that date, from Respondent's counsel, a copy having been duly served upon the General Counsel, stating that Respondent did not desire to introduce any further evidence. Said letter is hereby received in evidence and marked "Trial Examiner's Exhibit No. 1." On May 17, the Trial Examiner received a letter, dated May 16, from the General Counsel, a copy of which has been duly served upon Respondent's counsel, stating that he had no further evidence to introduce. Said letter is hereby received in evidence and marked "Trial Examiner's Exhibit No. 2." Under date of May 17, the Trial Examiner sent the following telegram to the General Counsel, Respondent's counsel, and to Turner:

Re: Winston & Green, 20-CA-2001-3. Having been advised by counsel that they do not desire to offer any further evidence in this case the hearing herein is hereby closed. Briefs are to be filed with me on or before June 21, 1961.

Upon the entire record in the case, and from his observation of witnesses, the Trial Examiner makes the following:

#### FINDINGS OF FACT

##### I. RESPONDENT'S BUSINESS OPERATIONS

Winston & Green is, and during all times material has been, a joint venture composed of Winston Bros. Company, a construction company with headquarters in Minneapolis, Minnesota, and Green Construction Company, also a construction company with headquarters in Des Moines, Iowa. This joint venture is, and during all times material has been, engaged in constructing a tunnel into the mountainside located some 65 miles east of Fresno, California. This job is part of an overall

<sup>3</sup> At the request of Respondent's counsel the time to file briefs was extended to July 24

hydroelectric construction project being performed by Respondent for Pacific Gas & Electric Company. Respondent, during all times material has been principally engaged in constructing dams, tunnels, powerhouses, and related projects in various States of the United States.

During the calendar year immediately preceding the issuance of the complaint herein, a period representative of all times material, Respondent's purchases of materials from points located outside the State of California exceeded \$50,000 and during said period Respondent rendered services valued in excess of \$50,000 to customers located outside the State of California.

On the basis of the foregoing facts, the Trial Examiner finds, in line with established Board authority, that Respondent is engaged in, and during all times material was engaged in, business affecting commerce within the meaning of the Act and that its operations meet the standards fixed by the Board for the assertion of jurisdiction.

## II. THE LABOR ORGANIZATIONS INVOLVED

Local 294 and Tunnel Workers are labor organizations admitting to membership employees of Respondent.

## III. THE UNFAIR LABOR PRACTICES

### A. *The pertinent facts*<sup>4</sup>

In September 1959, Respondent commenced the so-called Pacific Gas & Electric tunneling job, the persons working thereon being the only employees of Respondent involved in this proceeding.

In October 1960, and in December 1960, the Tunnel Workers filed three petitions with the Board seeking to be certified as the collective-bargaining representative of certain employees, including certain employees of Respondent working on the aforementioned tunneling job. Said petitions were dismissed by the Regional Director with whom they had been filed on the ground that the units sought were inappropriate.<sup>5</sup>

On January 9, the Tunnel Workers struck Respondent's Pacific Gas & Electric tunneling job as well as other northern California tunnel construction projects. The legend appearing on the signs carried by the pickets at Respondent's jobsite was to the effect that the Tunnel Workers were demanding immediate Board representation elections. The strike at Respondent's jobsite was called off on January 26.

During the strike some of Respondent's employees crossed the picket line and worked; others observed the picket line and refrained from working. In fact, Local 294 considered the strike an "unauthorized" one and its members were permitted to cross the picket line and work behind it.

Among those members of Local 294 who worked on the job during the strike were the three complainants; viz, T. J. Turner, Sidney Andrus, and Richard Lee Fisher. Prior to and during the strike, Turner worked as a chuck tender. Prior to the strike Andrus and Fisher were chuck tenders but worked as miners during the strike. In fact, Andrus and Fisher were the only ones who worked as miners during the strike, the regular miners having struck.

Normal work after the strike resumed with the day shift on January 27, following oral assurances on all sides that the crews (day, swing, and graveyard) were to be manned the same as they had been before the strike and that there was to be no

<sup>4</sup>In the light of the Trial Examiner's observation of the conduct and deportment at the hearing of all the persons who testified herein, and after a very careful scrutiny of the entire record, all of which has been carefully read and parts of which have been re-read and rechecked several times, and being mindful of the contentions of the parties with respect to the credibility problems here involved, of the fact that in many instances testimony was given regarding events which took place many months prior to the opening of the hearing, and of the fact that very strong feelings have been generated by the circumstances of this case, coupled with the fact that it would unduly protract this report greatly to summarize all the testimony or to spell out fully the confusion and inconsistencies therein, the following is a composite picture of all the factual issues involved with respect to this subsection. The parties may be assured that in reaching all resolutions, findings, and conclusions herein, the record as a whole has been carefully reviewed; relevant cases have been studied; and each of the contentions advanced has been duly weighed, even though not specifically discussed.

<sup>5</sup>At the time of the hearing herein, there were pending before the Board petitions for reconsideration of the Regional Director's dismissals.

discrimination or recrimination against anyone who participated in or who refrained from participating in the strike.<sup>6</sup>

About 30 minutes prior to the commencement of the January 30 graveyard shift, Turner, in order to change into his work clothes, went into the change house,<sup>7</sup> where Henry (Slim) McKenny, Toby Williams, Elmer Strobe, Fisher, and Andrus were getting ready to go to work. Upon seeing Turner, McKenny asked Turner if he wanted to know what he had said to him on the bridge, located near the jobsite, some nights previous. When Turner replied in the affirmative, McKenny said, "You be down [at the bridge] and I will sure tell you what I said." When Turner remarked that he had to pass the bridge on his way home, McKenny said, "You may not get home, scab." Turner made no response to that remark. Whereupon McKenny called Turner a "\_\_\_\_\_ scab." Turner then called McKenny a scab, adding a vulgar and obscene appellation to the word "scab." McKenny thereupon rushed toward Turner with a drawn knife, saying, "You are fired. You used to tend chuck for me but you are fired, and I am going to cut your \_\_\_\_\_ throat." Turner, while backing away from McKenny, said, "Aw, Slim, no use feeling like that." McKenny, nevertheless, continued toward Turner swinging the drawn knife in a menacing manner. Turner then picked up a broom, which was near the door of the change house, and while using it to ward off McKenny, pushed the brush end into the latter's face. When the broom handle broke, Turner dropped the broom and picked up his lunch pail, threw it at the oncoming McKenny, and then ran out of the change house.

Upon leaving the change house, Turner "ran into" Al Costner, Respondent's general superintendent. Turner told Costner what had happened in the change house. Costner then went into the change house and asked McKenny whether he had "pulled a knife" on Turner. When McKenny denied doing so, Costner called William D. Hostetter, Respondent's general foreman or "walker."

When Hostetter arrived he called all the men out of the change house. Hostetter, in Costner's presence, then asked McKenny whether he had pulled a knife on Turner. When McKenny denied doing so, Hostetter asked Andrus about the matter. Andrus replied that Hostetter should ask one of his own men, suggesting the name of Toby Williams.<sup>8</sup> Thereupon, Hostetter asked Williams whether McKenny had pulled a knife on Turner. When Williams tried to avoid answering the question directly, Hostetter said, "Toby, be a man. Did he pull that knife out?" to which question Williams answered in the affirmative. Hostetter then told McKenny that he was fired. Hostetter then said to Turner that Turner had his permission to take McKenny out and beat his head off because of the knife-pulling incident. Turner replied that because McKenny was drunk, McKenny was not "his equal" and hence he would not fight him.<sup>9</sup>

Hostetter, after firing McKenny, told the others to go to work. Turner, his brother Lonnie, Andrus, Fisher, Strobe, and Clemmon Beck went to the mouth of the tunnel and all of them, except Strobe who did not work inside the tunnel, got on the motor preparatory to going to their respective work stations. When it became obvious that the miners were not going to work, the above-named five persons who were waiting at the mouth of the tunnel went into the tunnel and to work.

In the meanwhile, Hostetter and the five remaining miners and Don Kempvance<sup>10</sup> stayed near the change house discussing the situation; the six employees maintaining that if Hostetter did not immediately fire Turner they would all quit and Hostetter stating that he would not discharge Turner. Finally, at about midnight, Hostetter left the group and went into the tunnel to supervise the workmen therein, and the miners and Kempvance went to confer with Costner.

Upon arriving in Costner's office, Williams, who apparently was the spokesman for the employee group, informed Costner that the six of them were quitting because Hostetter refused to discharge Turner and requested that their paychecks

<sup>6</sup> The credible evidence establishes that at the time of the strike about 50 percent of Respondent's employees, in the classifications herein involved, had dual membership in the Tunnel Workers and in Local 294 and that all the strikers were not only members of the Tunnel Workers but were also members of Local 294; for all Respondent's employees, strikers and nonstrikers, were members of Local 294.

<sup>7</sup> A 30- by 8-foot or so house trailer was used for the men to change their clothes.

<sup>8</sup> A miner who went out on strike and a Tunnel Workers member.

<sup>9</sup> Hostetter testified, and the Trial Examiner finds, that he noticed that night that McKenny was very drunk, smelled of liquor, staggered, and his speech was impaired.

<sup>10</sup> The miners were Williams, Portugee Soars, Richard and Frank Smith, and a man called "Doc" Kempvance was "the nipper" on the job. All of these six men had joined the Tunnel Workers' January 6 to 29 strike referred to above.

be made out. During the discussion which ensued, Costner expressed his regrets that the group was determined to quit because they were good workmen. To Costner's remarks, Williams responded, "You can [rectify] the whole thing very simply. Just get rid of Turner and we will go to work."

As found above, Hostetter left the five miners and Kempvancee at midnight and went into the tunnel. About an hour and a half later, he decided to go out and contact the miners and Kempvancee to ascertain "what was going on." He went directly to Costner's office where the six men were talking to Costner while waiting for their paychecks. In an effort to get the men to go to work, Hostetter offered to quit his job. Williams stated that "it wasn't him" that the men objected to but Turner's presence on the job. After further discussion, Hostetter turned to Costner and said, "We had better get [these] men back on the job." Costner replied that it was up to Hostetter to straighten the matter out. Thereupon, Hostetter said, "Let's go to work, then. I will get Turner out of the tunnel."

About 2 a.m., the five miners and Kempvancee went to work. At the same time, Hostetter told Turner to get on the motor and ride out of the tunnel and help Strobe who was then working on the dump pile,<sup>11</sup> adding, "We have got to iron this thing out." A little later Hostetter told Turner that Turner should remain off the job for a few days until the whole situation could be cleared up.

Turner worked on the dump pile for approximately 2 hours when he injured his ankle. Hostetter drove him to the first-aid man who bandaged the ankle and gave Turner a slip to report to his family doctor. Hostetter then drove Turner back to the jobsite and Turner waited in Fisher's car.<sup>12</sup>

On the morning of January 31, at the end of the graveyard shift, a meeting was held between James G. Tripp, Respondent's project manager, Costner, Hostetter, Jesse Bernard, the Union's business representative, Andrus, and Fisher. Thereat, Andrus and Fisher were informed by Hostetter that they were being transferred out of the tunnel to the sand trap commencing with the February 1 day shift. When Andrus asked the reason for the transfer, Hostetter replied that they were being transferred in order "to keep the trouble down, that [Andrus and Fisher were] troublemakers." Andrus then said, "It is funny. We worked with these guys in 14 tunnels, and all of a sudden overnight we are troublemakers, which doesn't make sense to me. . . . When we go to the sand trap we are actually taking a cut in pay. We are taking a cut in travel time, in shift time, and in bonus." When Hostetter replied, "Bonus has no bearing on it. It is a gift." Andrus said, "Why don't you give it over there just as easy?" Hostetter then remarked, "I wouldn't give any one of these miners I got for the whole bunch of you guys, not one of them. You are not as good as them. They are good miners, and I am going to keep them on this job, and I am going to keep this job open." Tripp also stated at this meeting that the bonus was just a gift, adding, "We are giving that to you people. You still have your jobs; you don't have a cut in pay." When Andrus stated, "What is this? No cut in pay? We don't get travel time. We don't get shift time, and we don't get no bonus. The way I look at it, our take-home pay is salary, regardless of what way you look at it." Tripp replied, "Oh, no, not at all. That is a gift."<sup>13</sup> When questioned about Turner, either Tripp, Hostetter, or Costner stated that Turner would be returned to his job as soon as he was released by his doctor.

During the course of the meeting referred to immediately above, Costner remarked that Andrus and Fisher were being transferred in order to keep "trouble down" and that anything Hostetter decided to do with respect to those two men he would approve because Hostetter was the general foreman on the job.

With respect to the transfers of Andrus and Fisher, Tripp testified, and the Trial Examiner finds, that Costner told him that Hostetter had recommended that Andrus and Fisher be transferred to the sand trap, that he approved the transfers; that Andrus and Fisher were to remain on the sand trap "until we [could] . . . get the strong flow of feelings against each other settled down" and the transfers were made in order to "separate those two particular fellows from the rest of the group because of the friction which did exist between them . . . we had two groups, basically speaking; one consisting of Andrus and Fisher, and one, the miners. We [had] a tunnel job going. We had found by experience that Andrus and Fisher were unable to drive that tunnel;<sup>14</sup> that we could not put the rest of the men over in the

<sup>11</sup> The dumpman's job pays 14 cents per hour less than a chucker's

<sup>12</sup> Turner normally drove to and from work with Fisher

<sup>13</sup> Men working on the sand trap do not share in the bonus, nor do they receive travel and shift time.

<sup>14</sup> Andrus and Fisher worked as miners during the aforementioned strike

sand trap which was the only other area we had to separate these groups. So, it was my decision that Andrus and Fisher . . . would have to be the ones that would be moved over to the other side. I had planned that as a temporary expedient until we [could] get the whole thing quieted down and smoothed out . . . there was quite a strong tide of feeling flowing."

On Sunday, February 5, Tripp, Costner, Hostetter, Joseph McDonald, Respondent's vice president, and Paul R. Haerle, Esq., Respondent's counsel, met with Charles Robinson, business agent of the Northern California District of Laborers, Bernard, Chester Mucker, business representative of Local 294, Turner, Andrus, and Fisher.

During the course of the discussion at the meeting referred to in the preceding paragraph, McDonald stated that he would visit the jobsite during the week and try to induce the members of the Tunnel Workers to permit Turner, Andrus, and Fisher to return to the jobs they held immediately prior to the strike; that the men's safety had to be considered; that Turner, Andrus, and Fisher were shifted from their regular assignments by their supervisors "for the expediency of the job" and he had to support his job supervisors; that it was of utmost importance to keep the job going by having the entire crew working together; that, in the interim, Andrus and Fisher could return to work immediately in the sand trap, and Turner on the dump pile as soon as he was released by his doctor; that Turner, Andrus, and Fisher would be returned to the jobs each held immediately prior to the strike if "it could be worked out"; and that he would discuss the whole matter with the Tunnel Workers and try to get them to agree to allow Turner, Andrus, and Fisher to return to their original jobs; but he doubted whether the Tunnel Workers would work on the job with Fisher, Andrus, and Turner.

At the above-mentioned meeting, Tripp stated, among other things, that if Andrus and Fisher had not been shifted to the sand trap, the members of the Tunnel Workers would have walked off and the job would be shut down; and that their transfers were made "simply for the expediency of the job and the safety of the crews."

At the aforesaid meeting, Hostetter stated that the Tunnel Workers maintained a "blue book and nobody who worked behind the picket lines during this strike will be allowed to work in tunnels in the State of California."<sup>15</sup>

On February 7, Tripp, Costner, Hostetter, and Foreman Proffitt met at the jobsite with five or six of the miners as well as with Strobe, Beck, and Lonnie Turner. The main purpose of the meeting was "to bring Andrus and Fisher and Turner back into the shift as it had been composed previously." At this meeting, Hostetter begged and pleaded with the miners to permit Andrus and Fisher to go back to their original jobs. One of the miners stated, during the course of the meeting, that they would permit Fisher, who was a nonstriking miner, to work in the tunnel, provided he was demoted to a chuck tender. The net result of the meeting, which lasted some 30 or 40 minutes, was that Andrus and Fisher could return to their regular graveyard shift starting that night but the miners refused to allow Turner to return to his chuck tender job and demanded his immediate termination. Shortly after this meeting Tripp decided to discharge Turner.

That night, February 7, Tripp went to the home of Andrus where he talked to Andrus and Fisher. The sole purpose of this visit was to offer Andrus and Fisher reinstatement to their tunnel jobs. During the course of the meeting, Tripp told Andrus and Fisher that after talking to the miners "for quite a spell," they finally agreed to allow Andrus and Fisher to return to their original tunnel jobs. Andrus testified, and the Trial Examiner finds,<sup>16</sup> that the following then ensued:

. . . he (Tripp) said, "You can come back on one condition: That you go there, anything they [the striking miners] tell you, you take; anything they say, you do."

<sup>15</sup> It is significant to note that, during the aforesaid Tunnel Workers strike, Hostetter, who did not work during the aforementioned strike, except the first night thereof, even though at least six members of his crew worked behind the picket line, stopped the car in which Turner, his brother Lonnie, Andrus, Fisher, Beck, and Strobe were and asked the two Turner brothers and Beck whether they knew what they were doing by crossing the picket line and that when they replied that it was an unauthorized strike and their Union gave them permission to cross the picket line, Hostetter remarked, "Someone is going to get hurt over this and it won't be me." Hostetter also remarked on that occasion, "If your walker (foreman) is not crossing the picket line, you should know better not to cross it."

<sup>16</sup> Andrus' version of what transpired at this meeting is substantiated, in the main, by the credited testimony of Fisher.

I said, "Mr. Tripp, you expect me to buy that?" He said, "That is the only condition you can come back in."

I said, "I can't accept them."

\* \* \* I said, "I can't buy that. The other guys are working the same as us. I can work right along with them, but that isn't a condition to go back on. We can't say nothing, can't do anything; but the rest of them can do and say what they want; and we take it." . . . He said, "That is the way it is going to be. The job is going smooth and I intend to keep it that way."

So I said, "I can't accept those conditions, Mr. Tripp."

I said, "You going to fire me?" . . . He said, "No, I am not going to fire you because if I do, I break my contract with [Local 294], and then [Local 294] is going to get on me."

I said, "You going to lay me off?" He said, "Definitely not," . . . "I can't do that because the [Local 294] will get me . . . because I have an agreement with [it] . . . that each man goes back to his specific job."

I said, "In other words, we are laid off, then?" He said, "Well, take it as you want it, but that's the agreement: come back under my terms as I offered it or don't come back."

I said, "I can't; not under those agreements, because, . . . it is not right. Me and Fisher go back; anything they tell us, anything they do to us, we must take." . . . "No, that's no agreement, and I don't accept it."

And he said, "Well, that's it."

Fisher also informed Tripp that he would not accept reinstatement under the proffered terms.

When Tripp was asked by Fisher regarding drawing unemployment compensation, Tripp replied, to again quote from Andrus' credited testimony, ". . . go down and draw unemployment. Send the papers to me and I will see that you get your unemployment."

On February 13, Bernard, business representative of Local 294, informed Tripp by telephone that Turner had been released by his doctor and was ready to go to work. Tripp replied that he had talked to the miners and he had been informed that Turner was equally responsible for the January 30 McKenny fight and that he would not put Turner back on the job.

### B. Concluding findings

The credited evidence, as epitomized above, clearly establishes that the sole reason Respondent transferred Turner, Andrus, and Fisher out of the tunnel and later discharged them was to escape the penalties that were implicit in the threats of the Tunnel Workers. In other words, Respondent feared that if it allowed Turner, Andrus, and Fisher to remain in the jobs they held at the commencement of the January Tunnel Workers strike, it would be faced with another Tunnel Workers strike or other economic reprisals. The choice selected by Respondent was outside the pale of the Act. Between the penalties attached to a disregard of the obligation imposed by the Act not to discriminate against any employee with respect to his hire or tenure of employment or any term or condition of his employment and the economic hardships that might develop by ignoring the Tunnel Workers' threats, Respondent elected to bow to the latter and accept the former. Respondent therefore must be directed to reverse its position to conform to the requirements of the law. As the Ninth Circuit carefully pointed out in *N.L.R.B. v. Star Publishing Co.*, 97 F. 2d 465, 470, "The Act prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by the employer." This rule has been followed in numerous other cases involving employers who have refused to obey the mandate of the Act because of pressure by one union which was party to a jurisdictional labor dispute. The statute "permits no immunity because of undue hardship or economic pressure imposed on the employer. It leaves no room for the appeasement of hostile interests . . ." <sup>17</sup>

<sup>17</sup> *McQuay-Norris Manufacturing Co v N.L.R.B.*, 116 F. 2d 748, 752 (C.A. 7). See also *N.L.R.B. v Isthmian Steamship Company*, 126 F. 2d 598 (C.A. 2); *N.L.R.B. v Hudson Motor Car Company*, 128 F. 2d 528 (C.A. 6); *N.L.R.B. v John Engelhorn & Sons*, 134 F. 2d 553 (C.A. 3); *South Atlantic Steamship Co v. N.L.R.B.*, 116 F. 2d 480 (C.A. 5); *N.L.R.B. v. Gluck Brewing Co., et al.*, 144 F. 2d 847 (C.A. 8); *Warehousemen's Union*

A contrary principle making enforcement of the provisions of the Act dependent upon considerations of the economic hardships imposed upon an employer would, as here, nullify the rights guaranteed employees by the Act to engage in, or to refrain from engaging in, any of the activities described in the statute.

Under the circumstances, and upon the entire record in the case, the Trial Examiner is convinced, and finds, that Turner was transferred by Respondent from his chuck tender job to the dump pile, laid off, and subsequently discharged because of the unlawful pressure brought upon Respondent by the Tunnel Workers. This conclusion becomes inescapable when consideration is given to Tripp's admission, made during the course of his cross-examination by the General Counsel, that he would have reinstated Turner to his chuck tender job if it had not been for the miners' objections. Accordingly, the Trial Examiner finds that the aforesaid transfer, layoff, and discharge of Turner were violative of Section 8(a)(3) of the Act. The Trial Examiner also finds that Respondent bowed to the unlawful pressure exerted by the Tunnel Workers and transferred Andrus and Fisher from their tunnel jobs to the sand trap and then, being fearful that the Tunnel Workers might provoke trouble on the job if Andrus and Fisher were returned to their tunnel jobs, offered Andrus and Fisher reinstatement to their original jobs under conditions clearly discriminatory. In fact, the Trial Examiner is convinced, and finds, that Tripp well knew that neither Fisher nor Andrus would return to their tunnel jobs under the conditions outlined by him. The offers of reinstatement therefore were not made in good faith and hence were not bona fide offers of reinstatement. Since the aforesaid discriminatory acts of the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, they were likewise violative of Section 8(a)(1) thereof.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

#### V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has discriminated in regard to the hire and tenure of employment, and the terms and conditions of employment, of Turner, Andrus, and Fisher, the Trial Examiner will recommend that the Respondent offer them immediate and full reinstatement to the jobs each had at the commencement of the Tunnel Workers January 1961 strike, or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. The Trial Examiner will also recommend that the Respondent make Turner, Andrus, and Fisher whole for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, by payment to each of a sum of money equal to the amount he normally would have earned as wages from January 31, 1961, to the date of the Respondent's offer of reinstatement, less his net earnings during that period.

Loss of pay shall be computed and paid in accordance with the formula adopted by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

The unfair labor practices found to have been engaged in by Respondent are of such a character and scope that in order to insure Respondent's employees their full rights guaranteed them by the Act it will be recommended that Respondent cease and desist from in any manner interfering with, restraining, and coercing its employees in their rights to self-organization.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

*Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, AFL (McKesson & Robbins, Inc) v. NLRB*, 121 F.2d 84 (D.C.D.C.).  
*NLRB v National Broadcasting Company, Inc, et al*, 150 F.2d 895 (C.A. 2)

## CONCLUSIONS OF LAW

1. Hod Carriers Building and Construction Laborers, Local 294, and Tunnel and Rock Workers of America are labor organizations within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employment and the terms and conditions of employment of Turner, Andrus, and Fisher, thereby discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

[Recommendations omitted from publication.]

**Local #841, International Union of Operating Engineers, AFL-CIO [Avco Construction, Inc.] and Kenneth E. Coopridier.**  
*Case No. 25-CB-435. January 30, 1962*

## DECISION AND ORDER

On October 13, 1961, Trial Examiner Morton D. Friedman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and is engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter the Respondent filed exceptions to the Intermediate Report.

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 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 the entire record in this proceeding,<sup>1</sup> and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

## ORDER

Upon the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Local #841, International Union of Operating Engineers, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

<sup>1</sup> As the record and the exceptions adequately present the issues and the positions of the parties, the Respondent's request for oral argument is denied.