

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,¹ 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:

¹ 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.

1. Cease and desist from:

(a) Causing or attempting to cause Avco Construction, Inc., or any other employer, to discharge Kenneth E. Cooprider because he is not a member of the Respondent.

(b) Refusing to Kenneth E. Cooprider the use of the Respondent's exclusive referral system because Cooprider is not a member of the Respondent, provided that Cooprider makes application for referral in accordance with the terms of the collective-bargaining agreement between the Respondent and Avco Construction, Inc., dated May 6, 1959.

(c) In any like or related manner restraining or coercing employees or applicants for employment in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Notify Avco Construction, Inc., and Kenneth E. Cooprider, in writing, that it has no objection to the employment of Cooprider and that it will not refuse Cooprider the use of its exclusive referral system provided that Cooprider makes application for referral in accordance with the terms of the collective-bargaining agreement between Avco Construction, Inc., and the Respondent dated May 6, 1959.

(b) Make Kenneth E. Cooprider whole for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(c) Post at its office, referral office, and meeting hall in Terre Haute, Indiana, copies of the notice attached hereto marked "Appendix."² Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for the Twenty-fifth Region signed copies of the notice attached hereto marked "Appendix" for posting, if Avco Construction, Inc., is willing, at the Zionsville, Indiana, project, for 60 consecutive days in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by Respondent's representative, be forthwith returned to said Regional Director for such posting.

² 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"

(e) Notify the Regional Director for the Twenty-fifth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO ALL EMPLOYEES AND MEMBERS OF LOCAL #841, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

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 you that:

WE WILL NOT cause or attempt to cause Avco Construction, Inc., or any other employer, to discharge Kenneth E. Coopridner because he is not a member of Local #841, International Union of Operating Engineers, AFL-CIO.

WE WILL NOT refuse to Kenneth E. Coopridner the use of our exclusive referral system provided that registration for referral is made in accordance with the terms of our collective-bargaining agreement with Avco Construction, Inc., dated May 6, 1959.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee or applicant for employment in the exercise of his rights guaranteed in Section 7 of the Act.

WE WILL make Kenneth E. Coopridner whole for any loss of pay he may have suffered as a result of our discrimination against him.

LOCAL #841 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Labor Organization.

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 directly with the Board's Regional Office (614 ISTA Center, 150 West Market Street, Indianapolis, Indiana; Telephone Number, Melrose 2-1551) if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the duly designated Trial Examiner in Indianapolis, Indiana, on July 17 and 18, 1961, on the complaint of the General Counsel and answer by the Respondent. The issue litigated was whether Local #841, International Union of Operating Engineers, AFL-CIO, herein called the Respondent or the Union, caused Avco Construction, Inc., herein called Avco or the Company, to discharge Kenneth Coopridner because of Coopridner's lack of membership in the Respondent in violation of Section 8(b)(1)(A) and (2) of the Act. All parties were afforded full opportunity to examine and cross-examine

witnesses, to introduce evidence, to present oral arguments, and thereafter to file briefs. The parties waived oral argument. Briefs were received from the General Counsel and from counsel for the Respondent.

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

FINDINGS OF FACT

I. THE BUSINESS OF AVCO CONSTRUCTION, INC.

Avco, an Indiana corporation, with its principal office and place of business in Zionsville, Indiana, is engaged in general contracting work, primarily the construction of water and sewage treatment plants at various construction sites, including the Zionsville, Indiana, construction site, with which this proceeding is concerned. During the past 12 months, which is a representative period, in the course and conduct of its operations, Avco purchased, transferred, and delivered to its place of business in Zionsville, Indiana, and other construction sites located in Indiana, goods and materials valued in excess of \$100,000, of which goods and materials valued in excess of \$100,000 were transported to said place of business in Zionsville and to the construction sites located in the State of Indiana directly from States of the United States other than the State of Indiana.

Accordingly, I find that Avco is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

Local #841, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

The complaint alleges, in substance, that Avco and the Respondent maintained a hiring agreement whereby Avco agreed to hire all its employees in operating engineer classifications through the Respondents; that the Respondent discriminatorily refused Kenneth Coopridner the use of its hiring hall and caused Avco to discharge Coopridner because the latter was not a member of the Respondent.

The answer denies the foregoing allegations. By way of defense, the Respondent contends that it never demanded Coopridner's discharge, and, in any event, did not know that Coopridner was employed by Avco at the time of the alleged discharge. Moreover the Respondent asserts that Coopridner did not follow the procedure set up by the referral arrangement and that had he done so he would have been referred.

Thus, the principal issues are: (a) Did the Respondent know that Coopridner was employed by Avco? (b) Did the Respondent by the actions of its representatives unlawfully cause Avco to discharge Coopridner? (c) Was Coopridner's failure to follow the established referral procedure a defense herein or were the acts of Respondent's representatives of such a nature as to render futile any attempt by Coopridner to follow the said procedures?

B. *The Facts*

1. The referral agreement and procedures

At the outset, it should be noted that there is no contention made that the referral agreement and procedures set up pursuant thereto are discriminatory or in any way violative of the Act. The only contention made is that the benefits of the agreement and procedures were discriminatorily denied to Coopridner who thereby was deprived of employment. However, the agreement assumes importance by reason of the Respondent's defense that Coopridner failed to follow referral procedures provided therein.

After providing that Avco obtain its operating engineer employees from the Union, the agreement provides, among other things, for classification of applicants for jobs into groups, the first priority group being those who have 4 years of experience in their job classifications in the area serviced by the referral office, in this case the Terre Haute, Indiana, area. Coopridner would have qualified for inclusion in this group. Moreover, the job in question, at Zionsville, Indiana, came under the jurisdiction of the Terre Haute office.

In addition, the agreement provides that an applicant for referral may apply to the referral office during the regular office hours where he must give the necessary information regarding his name, address, telephone number, and work history. Sup-

plementing this provision, the Union provides application cards to be filed by the referral applicant on which are provided spaces for supplying the information outlined above. This card can be obtained only by calling personally at the referral office, but it may be filled out and mailed back to the office. Oral application for registration is never accepted so that a telephone call to the office would not fulfill the requirements and would not qualify the individual for referral. From the application card, a registration card is made out by clerks in the office, which card is a record of referrals for each individual. From these cards the lists are made in order of priority as to the classification and date of registration.¹

The agreement also provides that "employers may request a former employee for referral on a job or project, and the referral office shall refer said former employee to the job or project *provided he is a properly registered applicant in the referral office*,"² and is available for work at the time of the request. . . ."

2. Background—Coopriders' earlier relations with the Respondent

Prior to the time of the events hereafter related, Coopriders had been a crane operator for about 23 years. In 1945, while working in the St. Louis, Missouri, area, he had been a member of a local of the Operating Engineers but upon his return to the Terre Haute area, some years prior to the events herein, Coopriders allowed his membership to lapse. Nevertheless he had worked as a crane operator in the area near and around Zionsville, Indiana, where he had his home, although he was not a member of the Respondent Union which had jurisdiction over this area.

Late in 1959, or early 1960, while engaged as a crane operator for Avco on a bridge construction job near Mooresville, Indiana, Coopriders was approached by Gilbert M. Bosworth and Frank F. Rambis, respectively, president and assistant business representative of the Respondent Union, who asked him to join. Coopriders refused giving as his reason that the job was nearing its end.³ Also, about the same time, Bosworth spoke to Jerry Hugh Thomasson, Avco's job superintendent, about Coopriders and wanted to work where the "scab" (Coopriders) was working. However, Thomasson admitted that the Respondent did not request Coopriders' discharge at that time.⁴

3. The alleged discharge and refusal to refer

In the latter part of 1960, Avco was awarded a contract for the construction of a sewage treatment plant at Zionsville, Indiana. Around the latter part of December 1960, Charles Atkinson, Avco's president, spoke to Coopriders, relating to him the Company's plans to build the sanitary plant. At that time, Atkinson offered Coopriders a job as a crane operator on the project. Coopriders stated that he would accept the offer because he was then working as a crane operator in Indianapolis and that Indianapolis was too far from Zionsville where Coopriders had his home. Also, Coopriders stated that he would prefer the type of work that Avco offered. Sometime in late December 1960, Coopriders started to do some preliminary road grading at the jobsite for Avco on a part-time basis and as an independent contractor. This work ended by the first of the year.

In the early part of January, Coopriders actually did go to work as a crane operator employee for Avco at the sewage plant jobsite. However, because of bad weather the work was intermittent, and after working a few days each week for a period of several weeks the weather forced an extended job shutdown. The equipment was left at the jobsite with Coopriders as crane operator taking the key to the crane with him. He also left his personal hand tools on the crane.

Both at the time that Atkinson first spoke to Coopriders and during the shutdown caused by the weather, Atkinson asked Coopriders if the latter had become a member or had straightened out with the Respondent. Atkinson made it pretty clear to Coopriders that this must be done. For example, Atkinson reminded Coopriders that the Respondent had given him, Atkinson, some trouble at the Mooresville job a year before that because Coopriders, who was working for the Respondent on the Mooresville job, had refused to join the Respondent. Coopriders promised that he would attempt to get straightened out with the Respondent. Therefore, toward the latter part of January, when the job was shut down because of the weather, Coopriders called union headquarters in Terre Haute and spoke to Bosworth, the Respondent's

¹ From the credited testimony of Oliver L. Conlee and Gilbert M. Bosworth.

² Emphasis supplied.

³ From the credited testimony of Coopriders as corroborated in part by testimony of Bosworth.

⁴ From the credited testimony of Thomasson.

president and business agent. Cooprider told Bosworth that he wanted "to join the Union either on a permit or on a card." Bosworth recognized Cooprider and asked the latter to give him his telephone number so that two union representatives who were going to be in the Zionsville area that day could reach Cooprider. Bosworth further told Cooprider that the representatives would call him and talk to him.⁵

On the same day, Rambis and Conlee, the Union's assistant business representatives, called on Avco's president, Atkinson, at Atkinson's office in Zionsville. Also present was Thomasson, Avco's job superintendent. One of the business representatives asked Atkinson whether he was doing a job at Zionsville (describing the sanitary plantsite) and Atkinson acknowledged that he was. The business representatives then wanted to know how Atkinson was manning the job and why he had not called the union referral office for operating engineers. Atkinson stated that he had not thought that was necessary, at which time the union representatives reminded him of the referral agreement, aforementioned, and stated that Atkinson should adhere strictly to it. Atkinson promised that he would and then told the union representatives that Cooprider had been doing some work and asked if Cooprider would become a member in good standing would the Respondent refer him to the job. The answer of one or the other was to the effect at that time they had numerous men unemployed and it was unlikely that the membership would favor accepting Cooprider. One of the representatives also stated that Cooprider had had an opportunity to join the Union in 1959 but had refused.⁶

Although Bosworth had promised that the Respondent's business representatives would call on Cooprider on that day they did not. Cooprider waited for that call all the next day. Finally, on the second day after Cooprider had first spoken to Bosworth he again called the latter. According to Cooprider, at the time of this second call Bosworth's tone was not friendly. Cooprider asked Bosworth why the men had not called him and told Bosworth that he had waited for them. Bosworth answered that he knew that this was so, that the men were up there and found out what was going on between "you [Cooprider] and that damned company." Then Bosworth said to Cooprider, "you gave us a bad time at Mooresville, now we are going to give you a bad time." Bosworth mentioned the referral agreement in the conversation and said that the Union was going to have men up there every day on the job to make sure that the Company lived up to it. He also, according to Cooprider, told the latter that they had about 4,000 men unemployed and that all 4,000 men who were out of work would be put to work before Cooprider would be given a job. With this, according to Cooprider, the conversation became an argument in which Cooprider threatened to go to the Labor Board.

Bosworth's version of this conversation differed somewhat. According to Bosworth, he told Cooprider that the business representatives evidently did not have the time to contact Cooprider. Cooprider then stated that he wanted to come down and see Bosworth with another member of the Union who lived in Zionsville and Bosworth told him that he could come in and see Bosworth anytime he wanted to, that Bosworth was there every morning. Then Cooprider mentioned something about an opportunity to go to work in Zionsville and Bosworth said that he had learned that Avco had a job up there. Then Bosworth explained to Cooprider that Avco had an agreement with the Union and Avco was going to live up to that agreement and that agreement contained hiring procedures and Avco was going to follow the procedure as outlined. Whereupon Cooprider said something to the effect that Bosworth was telling him he could not go to work and Bosworth denied that and said that he was not telling Cooprider that the latter could not go to work; he was merely telling Cooprider that Avco was going to live up to its agreement with the Union. Bosworth then testified that Cooprider threatened to file a charge with the Board at which point Bosworth said that he did not care; he was not going to be threatened by anyone. Bosworth admitted that he did not inform Cooprider about how to get on the out-of-work list or whether Cooprider should register nor did Cooprider mention anything to him about using the Union's referral facilities.

I do not find that the Cooprider and Bosworth versions of this second telephone conversation differed so materially. I believe that both of the men remembered parts of the conversation and gave their own interpretation to the actual facts. I find that the testimony of both men established that (a) Cooprider explained that he had been working for Avco, (b) that Cooprider was refused membership in the Union, (c) that Bosworth told Cooprider that the agreement was to be strictly enforced, (d) that the Union had been up to the job and had learned of Cooprider's employ-

⁵ From the credited testimony of Cooprider.

⁶ From the credited testimony of Atkinson and Thomasson

ment by Avco, (e) that Cooprider was told by Bosworth that all of the unemployed men would be employed before Cooprider was, and (t) that Cooprider was not made aware of the hiring hall procedures nor was it hinted that they would be available to him if he registered.

I also find that it was Cooprider's first call which first alerted the Union to the fact that Avco was undertaking the sewage treatment plant and that Cooprider was working or about to work on that job. I find further that when the union representatives found out that Cooprider was to be employed on the job, they informed Avco that the latter would have to adhere strictly to their collective-bargaining agreement. I also credit that portion of Cooprider's version of the second telephone call to the effect that Bosworth did say to Cooprider "You gave us a bad time at Mooresville now we are going to give you a bad time" and that the Union found out "what was going on between you and that damn Company."

Later in the month of January, Atkinson asked Cooprider if the latter had done anything about straightening out or joining the Union and Cooprider told him that he had been unsuccessful. Around the same time Atkinson told Thomasson, Avco's job superintendent, that Cooprider had not informed him whether he had joined the Union and instructed Thomasson to call the union hall if he needed crane operators when the job opened up again, if Cooprider had not straightened out with the Union. At some time after this last conversation between Thomasson and Atkinson and before Thomasson did call the referral office for operating engineers, Thomasson was visiting at Cooprider's home and told Cooprider that he thought Atkinson was not going to use Cooprider inasmuch as Cooprider had not straightened out with the Respondent.

Finally, on February 13, the weather became good enough to reopen the job and Thomasson called the union hall telling them that the job was starting up again and asked if Cooprider was a member. Rambis took the call and told Thomasson that Cooprider was not a member and thereupon Thomasson without any further reference to Cooprider asked Rambis to refer two men to the job. On that same day the Union dispatched two members to the job and advised Thomasson who these men were. One of the men, a crane operator, replaced Cooprider. On the next day, when the men were to report to work, Thomasson sent a laborer from the job to Cooprider's home to pick up the keys to the crane. This was the first knowledge that Cooprider had that he was definitely discharged. That same day, or perhaps later in the week, Cooprider visited the jobsite to get his tools which were left on the crane and Thomasson explained to him that the latter could do nothing about the situation, that the job had to be filled by unionmen.

As can be seen from the foregoing, at no time did either Cooprider or Atkinson specifically ask of the Union that Cooprider be referred as a union referral applicant pursuant to the collective-bargaining agreement, or offer to follow the procedures through which all applicants must advance in order to become eligible for referral by the Union. Cooprider testified, and I credit him, that he did not know of the referral procedures and was unaware that he was eligible thereunder. Moreover, it is established that representatives of the Respondent neither offered to explain the referral system to Cooprider nor offered him a job through the referral system. Certainly, Cooprider did not go to the Terre Haute referral office to fill out a referral application card.⁷

C. Findings and conclusions

As heretofore stated, when Rambis and Conlee, the assistant business representatives of the Union, visited the office of Atkinson, Avco's president, late in January 1961, Atkinson told them that Cooprider was doing some work. Atkinson also asked whether Cooprider could become a member and be referred. Additionally, Bosworth told Cooprider over the telephone during their second telephone conversation that he knew what Cooprider and Avco were up to. The foregoing is sufficient to establish, and I find, that the Respondent knew that Cooprider had been working for Avco and that Avco desired Cooprider to continue in its employ as crane operator on the Zionsville sewage treatment plant job.

Having thus disposed of the preliminary issue of the Respondent's knowledge of the employment status of Cooprider, there are now presented for disposition the issues of whether the Respondent caused Avco to discriminatorily discharge Coop-

⁷ Although it is not charged that the Respondent operated its hiring hall in a discriminatory fashion generally, it should be noted that it was testified credibly by Bosworth and the two assistant union business representatives that others were working on jobs throughout the area who had been referred by the Union who were not members of the Union. Specific places of employment and individuals were not named.

Coopriders and whether the Respondent unlawfully refused to refer Coopriders to the use of its referral facilities. While at first blush these issues seem to be separate, they are, in fact, capable of a single resolution because the circumstances which caused Avco to discharge Coopriders are the same circumstances which brought about Coopriders' failure to be referred. If there is a violation as to the first, there is a violation as to the second.

There is no contention by the General Counsel that the Respondent did not have the legal right to insist that Avco honor the terms of the collective-bargaining agreement between the Respondent and Avco. The question presented here is whether the Respondent was protected by its right to insist upon the honoring of the referral agreement in view of the actions of its representatives and the circumstances under which those actions occurred.

As noted above, Conlee and Rambis insisted that Avco live up to its part of the agreement and hire only through the Respondent's referral system. At the same time and in the same conversation, when Atkinson inquired of Conlee and Rambis whether Coopriders could become a union member and be referred, the answer was in the negative and to the effect that the Union had too many men out of work. Thus, by insisting that Avco hire only through the Union and at the same time anticipatorily refusing membership and referral to Coopriders, the Respondent, in effect, did force Avco's hand in discontinuing Coopriders' employment.

However, Atkinson's inquiries with regard to Coopriders were made in the context of union membership and not solely in terms of referral through the procedures established by the agreement. Moreover, when Coopriders made telephonic inquiries of Bosworth, the Respondent's president, some days later, he, too, spoke again in terms of joining the Union "on a permit or card or something." None of the Respondent's representatives stated that the Respondent would refuse to refer Coopriders as a former employee requested by Avco to be referred pursuant to the agreement. But, this question was not asked of them. As far as the record shows, Respondent did not in fact refuse to refer any properly registered applicant. On the basis of these facts, the Respondent contends that it did nothing more than insist upon the enforcement of the contract to the letter, that it had a legal right to do so, and therefore since Coopriders did not register at the referral office there could not have been a violation.

The General Counsel contends, however, that the Respondent went beyond merely requiring that the lawful agreement be complied with and that the conduct of the Respondent's representatives showed (1) the Respondent did not intend to refer Coopriders under any circumstances and (2) that therefore had Coopriders gone through the registration procedures his action would have constituted an empty and futile gesture.

In answering this contention the history of the relationship between Coopriders and the Respondent cannot be ignored. Coopriders had at least once before, at the time he worked for Avco on the Mooresville bridge job, refused the invitation of Bosworth to join the Union. Bosworth, at about that time in his conversation with Thomasson, Avco's job superintendent, called Coopriders a scab.

From this can be drawn the inference that Respondent had little regard for Coopriders. This inference is bolstered by the statement of Bosworth to Coopriders during their second January telephone conversation to the effect that Coopriders had given the Respondent a hard time and in return the Respondent was going to give Coopriders a hard time. Moreover, it is not unreasonable to assume that unions generally do not favor individuals who refuse to become members and yet occupy positions which would otherwise be open to union members.

However, it is doubtful whether this alone would establish that the Union would have refused Coopriders had he registered. One more factor of the case must be considered. As noted above, when Coopriders made his two telephonic inquiries of Bosworth in January, Coopriders did not ask whether if he registered at the referral office would he be referred. He simply asked if he could join the Union and be referred either on a permit or on a card. Bosworth, angered by Coopriders' past behavior and by what he termed was going on between Coopriders and Avco, did not inform Coopriders of the manner in which the referral system was operated nor did he offer to refer Coopriders if Coopriders would come in and register. He thus left Coopriders, who did not know of the lawful referral system, with the impression that membership was necessary for referral and that Coopriders would not be welcome to become a member. And this is the same impression left with Atkinson, Avco's president, when Conlee and Rambis told Atkinson that Coopriders could not become a member.

Under the foregoing circumstances it cannot be said that the Respondent's representatives were not under a duty to correct the given impression. Thus I make the

further inference that they utilized this means to convey to both Atkinson and Coopridner that the latter could not be referred unless he became a member and furthermore that Coopridner would not be accepted into membership. In thus concluding I do not overlook the uncontroverted testimony of Bosworth that men were working on jobs in the Respondent's jurisdiction who were referred to those jobs by Respondent and who had been rejected for membership in the Respondent. This is not sufficiently persuasive, in my judgment, to overcome the evidence of the bad blood that existed between Coopridner and the Respondent, and that the Respondent, in the final analysis, made it apparent to Coopridner that he (if no others) would not be referred because of lack of union membership.⁸

Accordingly, I find that under all of the circumstances herein presented the Respondent caused Avco to discriminatorily discharge Coopridner and furthermore discriminatorily refused Coopridner the use of the lawful referral system set forth in the collective-bargaining agreement. By these actions the Respondent violated Section 8(b)(2) and (1)(A) of the Act.

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 Company set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(b)(2) and (1)(A) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies and purposes of the Act.

It having been found that Respondent caused the Company discriminatorily to discharge Kenneth E. Coopridner on February 14, 1961, it will be recommended that the Respondent cease and desist therefrom and notify the Company and Kenneth E. Coopridner, in writing, that it has no objection to the employment of Coopridner provided Coopridner registers for referral with the Respondent in the manner prescribed in the collective-bargaining agreement between the Company and the Respondent dated May 6, 1959. It will be further recommended that the Respondent make Coopridner whole for any loss of earnings he may have suffered by reason of the discrimination against him, by the payment of a sum of money equal to that which he would normally have earned from the date of the discrimination to a date 5 days after the giving of the aforesaid notice, or the date of completion by the Company of the Zionsville sewage disposal plant project, whichever shall first occur, less his net earnings during said period. Backpay shall be computed on a quarterly basis in a manner consistent with the policy established by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

It will also be recommended that the Respondent cease and desist from discriminatorily refusing to Kenneth Coopridner the use of its referral office and to register Coopridner provided that Coopridner makes proper application for referral in accordance with the aforesaid agreement.

In view of the nature of the unfair labor practices committed, the commission of similar and other unfair labor practices reasonably may be anticipated. I shall therefore recommend that the Respondent be ordered to cease and desist from in any manner infringing upon the rights guaranteed to employees under the provisions of the Act.

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

CONCLUSIONS OF LAW

1. Local #841, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
2. By causing the Company to discriminate against Kenneth E. Coopridner within the meaning of Section 8(a)(3) of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.
3. By the aforesaid conduct, the Respondent has also restrained and coerced

⁸ In making his conclusion I do not mean to infer that under all circumstances it would be necessary for a union to inform a prospective employee of its referral system. The conclusion to which I have come is based upon the peculiar circumstances of this case.

employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

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

[Recommendations omitted from publication.]

M. Eskin & Son and William R. Gerics

**Confectionery and Tobacco Drivers and Warehousemen's Union,
Local 805, International Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America and William R. Gerics.**

Cases Nos. 22-CA-555 and 22-CB-246. January 30, 1962

DECISION AND ORDER

On January 12, 1961, Trial Examiner Ralph Winkler issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. The Trial Examiner found that the Respondents had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

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 these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following exceptions, additions, and modifications.

As set forth in the Intermediate Report, the Respondent Employer and the Respondent Union were parties to a contract containing a no-strike clause when 21 of the Employer's 25 employees, on December 2, 1959, walked out in violation of this contract. On the following day, the Respondent Employer discharged the strikers. In the course of State court proceedings on the Respondent Employer's request for an injunction, settlement terms, including reinstatement of all strikers, were agreed upon but no settlement agreement was executed. Thereafter, the Employer refused to reinstate 9 strikers, referred to as the "out" group, but offered to reinstate the other 12, referred to as the "in" group, on condition that they obtain clearance from the Union. The General Counsel excepts, *inter alia*, to the Trial Exam-