Peter Kiewit Sons' Co. *and* General Drivers & Helpers Local 74, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Cases Nos. 18–CA–1159 and 18–CA–1251. March 5, 1962*

DECISION AND ORDER

On October 18, 1961, Trial Examiner Thomas A. Ricci issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter, the Charging Party 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 the case to a three-member panel [Members Rodgers, Leedom, 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,[1] and the entire record in the case, and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner.

[The Board dismissed the complaint.]

[1] In its exceptions, the Charging Union requests a new hearing before a different Trial Examiner, contending, in effect, that by crediting the testimony of Respondent's project superintendent, Harper, the Trial Examiner demonstrated "anti-union feelings" and "bias and prejudice." Upon careful analysis of the entire record, we find nothing to support this contention of the Charging Union. Indeed, the Supreme Court has stated that even "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *N.L.R.B. v. Pittsburgh S.S. Company*, 337 U.S. 656. In any event, we have independently reviewed the Trial Examiner's credibility findings, and perceive no basis for finding that there was bias or prejudice on his part. Accordingly, the Charging Union's request for a new hearing is denied.

[2] Having found, as did the Trial Examiner, that the Respondent did not violate the Act subsequent to entering into the settlement agreement in Case No. 18–CA–1159, we shall honor that settlement agreement and, like the Trial Examiner, not make any unfair labor practice findings on the basis of the charge therein.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before Thomas A. Ricci, the duly designated Trial Examiner, in Minot, North Dakota, on September 12, 1961, on a consolidated complaint issued by the General Counsel against Peter Kiewit Sons' Co., herein called the Company and the Respondent. The issues litigated were whether the Respondent had violated Section 8(a)(1) and (3) of the Act. Thereafter briefs were filed by the General Counsel and the Respondent.

The initial charge (Case No. 18–CA–1159) was filed on June 16, 1960, and accused the Respondent, by statements of various supervisors, of having illegally coerced and restrained employees in their statutory right to engage in strike action. That charge was disposed of by settlement agreement between the Respondent and the General Counsel. The second charge (Case No. 18–CA–1251) was filed on

April 15, 1961, and accuses the Respondent of having illegally refused to employ Thomas Wolf the immediately preceding month. Upon investigation of the latter charge the earlier settlement was set aside, the first charge reinstated, and a consolidated complaint issued based on both charges, containing allegations of violations of Section 8(a)(1) in the year 1960, and a violation of Section 8(a)(3) of the statute in the 1961 failure to employ Wolf.

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

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

Peter Kiewit Sons' Co., a corporation with its principal place of business in Omaha, Nebraska, is a contractor engaged in highway and heavy construction work throughout the world. The events giving rise to this case occurred at a project of the Respondent being carried out at the Minot Air Force Base in North Dakota. Since June 1, 1959, the Respondent, in the course and conduct of its business operations at Minot, has furnished services to the United States Government at that base valued in excess of $500,000 annually. During the same period of time Respondent purchased from points directly outside the State of North Dakota, asphalt, cement, pipe, and other construction materials valued in an amount of excess of $50,000, all of which materials were used by Respondent in its construction work at the Minot Air Force Base. I find that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to exercise jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find that General Drivers & Helpers Local 74, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

In 1955 the Company entered into a very extensive contract for heavy concrete and asphalt construction work at the Minot Air Force Base. Among the employees it used was a category of truckdrivers, whose trucks carried gravel, asphalt, and ready-mix concrete. The volume of work was seasonal in nature, declining sharply in the winter months. It was at its peak in 1957 and 1958 when over 300 drivers were used; as the job neared completion, this number was reduced in 1960 to a maximum of 18 and in the summer of 1961 fell to only 9.

Shortly after the project started the Respondent recognized Local 74 as bargaining representative for its truckdrivers and executed successive collective-bargaining agreements with that Union. The last such contract was signed on June 2, 1960, to extend for a 2-year period.

For reasons which do not appear on the record, and, apparently, while the parties were negotiating this last contract, the Union called a strike which lasted from May 26 through June 2. The complaint alleges that on various occasions during this strike and shortly thereafter representatives of management threatened drivers with economic reprisals for having gone on strike and otherwise coerced them in violation of Section 8(a)(1) of the Act.

When work began for the 1961 season the project superintendent called the union hall and asked that five or six drivers, whom he named, be given referral slips to start work. Some of them were sent out by the Union. Later three or four more men were hired, with the Company simply calling for additional drivers, without specifying anyone by name. Thomas Wolf, who had worked during the preceding season, was not among the ones specifically requested when the work began, and was never sent out by the Union. It is a second allegation of the complaint that the reason why the Respondent did not hire Wolf in 1961 was to punish him for his strike activity the previous year, this in violation of Section 8(a)(3) of the Act.

A. *Coercive statements*

Although in its answer the Respondent denied the illegally coercive statements attributed to its management representatives in the complaint, it offered no evidence at the hearing to contradict or impeach the testimony of the General Counsel witnesses who gave testimony in support of these allegations. Accordingly, upon the direct, plausible, candidly given, and credible testimony of a number of em-

ployee witnesses called by the General Counsel, the following uncontradicted facts are found.

All of the illegal statements which the witnesses related were uttered by Leonard Schaefer, one of the foremen on the project and concededly a supervisor within the meaning of the statute. The striking drivers held a meeting at their union hall in town each evening during the 7-day strike and Wolf was designated strike captain. He placed the pickets, checked on them, and himself carried a picket sign with others. A few days after the strike started Schaefer called him a "big shot" and said, "We know everything about 30 minutes after your meeting at 5 o'clock at night or 5:30, when you get through with your meeting we know more about it than you do." [1]

At the time of the strike the Company had contracted for and was planning to carry out another construction project at Velva, 15 miles away; the drivers knew all this. On one occasion during the strike Wolf asked Schaefer what were the prospects of getting work at Velva, and Schaefer replied: ". . . there'll be nobody going down there from here, that's a nonunion job. If they do, they'll have to drop out of the Union . . . we don't take no union people to the job." The next day Schaefer also said to Wolf: ". . . there would be a lot of guys be fired or laid off after all this is over. He says you'll be one of the first ones that I think will be laid off when the work slacks down."

Also during the strike Schaefer asked Weigum, one of the truckdrivers, whether he wished to go to Velva, but that to do so he must withdraw from the Union and take a cut in wages. Again, a day or two later, Schaefer said to truckdriver Cox there would be no Kiewit men on the job at Velva, that it "wasn't no union job. He said as far as he knew Wolf wouldn't be going for sure." About this same time Schaefer also said to driver Pounds, when the latter inquired about the Velva job, that to work there "the boys . . . would have to forget the Union or else they would get farmers to drive the trucks."

A week after the strike Wolf asked Dan Johnston, another foreman, did Ratchye, the then plant superintendent, "hold anything against us on account of that Union," and the foreman said, "Yes." Asked why, he replied: ". . . he [Ratchye] figured you guys didn't put up your picket signs as long as Wally Johnson [Ratchye's immediate predecessor] was here, you waited until he got here and took over as superintendent."

A week or two after the strike, but still in the month of June 1960, Schaefer told Wolf: "Everything is over with now . . . in order to get another job with Kiewit, a new job, you'll have to drop out of the Union. He says they'll be a lot of these guys be fired over this deal, drivers." Schaefer also said to Wolf late in June: ". . . we know you're steward . . . You know how well we like stewards out here. You know what we do with stewards out here. We find some way to get rid of them."

Foreman Schaefer's statements to various employees, detailed above, that they would be denied employment by the Respondent because of their union membership, that a steward would be discriminated against out of turn because of his union activities, and that drivers must abandon their union membership to work at the Company's new project, were clearly coercive within the meaning of Section 8(a)(1). His further statement that the Company was aware of what happened at union meetings clearly conveyed the impression that the Company was keeping the union meetings under surveillance; the Board has held that such statements are coercive and illegal under the statute.[2]

One General Counsel witness also testified that at the time of the strike Foreman Schaefer said that the Company could not afford the Union's demands, and that it would have to shut down the job before paying what the Union was asking.

B. *The alleged illegal discrimination against Wolf in 1961*

The assertion of unlawful refusal to hire Wolf among the drivers needed in 1961 centers entirely on what Robert Harper, project superintendent, did in late March

[1] Hendrickson, another driver, who also worked in 1960, gave testimony of Schaefer saying he knew who spoke at the meetings and how people voted On this detail I cannot fully accept Hendrickson's testimony because (1) his testimony shows clearly he left the Respondent's employ in consequence of a personal quarrel with certain foremen, and (2) he said Schaefer said these things to him in a number of conversations "from sometime in April up until the time of the strike." Hendrickson later admitted he only started to work at the Minot project after the early part of May

[2] *Nebraska Bag Company, d/b/a Nebraska Bag Processing Co*, 122 NLRB 654

of that season. He had been superintendent from 1955 through 1959, but worked at another location of this Company throughout the 1960 season, returning only in September to help out as the season waned and to take over again in 1961. He was personally acquainted with many of the drivers, from both their past years' work and their performance late in 1960.

He started by telephoning the union hall and requesting that the Union approve the hiring of Pounds, Cox, Hoiland, and Peterson. Hubrig, the Local 74 business representative, protested Harper should hire other drivers to be selected by Hubrig, instead of these four, and particularly Wolf and Bostow. Harper insisted and no one went. The next day Harper asked Hubrig to approve Miller and Nelson, if not the other group, and again Hubrig argued the Union should make the choice of men from its "list," and not the Company. Under protest, the Union then did refer the requested drivers, all except Hoiland, who, by the date of the hearing on September 12, had not appeared at the project. Four more drivers have been used this season, all referred by the Union after requests from the Company without individual specification of names.

The General Counsel relies primarily upon two elements of evidence to support the complaint allegation that Harper's failure to include Wolf among the drivers he requested by name, and his refusal to substitute Wolf for one of them when Hubrig protested what he called improper preference by the superintendent, was but a means to carry out a planned scheme to deny employment to Wolf because of his union activities. The first is the uncontradicted fact that 10 months earlier Foreman Schaefer had told Wolf he would be discharged prematurely and that the Company would deny him further employment because of his strike activities; the second is the testimony of Hubrig, denied by Harper, that in their conversations in 1961, the superintendent said he did not want Wolf and Bostow on the project and that his reasons were personal ones.

A third contention said to support the inference of illegal motivation, is that the Respondent departed from a long-existing contract, or arrangement, or practice requiring it to call drivers in any given season in accordance with a certain list maintained by the Union in its office. A final argument seems to be that Harper did not call for the type of drivers he really needed only to avoid rehiring Wolf.

It does not appear definitively, on the basis of all the evidence, that the Respondent was under any obligation to permit the Union to decide which employees could work or to hire drivers in accordance with any particular preferential arrangement among them. The only contractual language on the subject of hiring that was ever in effect appears in the current agreement, received in evidence. In pertinent part, it reads as follows:

ARTICLE IV—MANAGEMENT

(A) It is distinctly understood and agreed by the Union that the Contractor reserves the right of management at all times and that it may select, in case of original employment, reduction or replacement of forces, drivers who are in its estimation, the best qualified.

(B) The Contractor shall be the judge of the competency of any drivers employed under the terms of this agreement.

ARTICLE V—EMPLOYMENT

(A) It is agreed by the parties that the Union can be of assistance to the Contractor in the procurement of qualified and competent drivers.

(B) When drivers are to be needed, the Contractor agrees to notify the Union of its needs, allowing a reasonable amount of time for the Union to furnish men competent in the classifications needed, who are or may be available for employment by the Contractor. Nothing in this paragraph shall be construed or interpreted by any party hereto so as to require the other party to violate the provisions of any State or Federal Law.

Although from the witness stand Hubrig said the arrangement and practice had been established in 1955 when this project started, he also conceded there never was anything in writing on the subject except the clauses set out above.

The contract language is ambiguous at best; while article V may indicate the Union was to "furnish" the men when needed, article IV seems to indicate that the employer would be the judge of competence and would therefore be free to select people provided they cleared the union hall. I read article IV as saying at least the Company has the right to reject any person "furnished" by the Union, on the basis of its estimate of qualifications. Certainly the contract means the Company could not hire

"off the street," but must call the Union first, requiring clearance or referral from it before putting anyone to work or going outside the union hall in search of drivers. Hubrig was careful to say that the list of available drivers he keeps includes all persons who appear in his office seeking work, nonmembers as well as members of the Union. With membership in Local 74 thus not being the condition requisite for clearance under the contract, all its language otherwise indicates is that men must be "qualified and competent" and "available." As to any selection of which among the qualified and available drivers must first be hired, or could be put forward by the Union to fill vacancies at any given time, the contract is silent. It may well be that Superintendent Harper did, while using hundreds of drivers in a single season and honoring the Union's clearance agreement, call indiscriminately for men, as the business representative testified. I credit Harper's statement, however, that in prior years he also called for drivers of his choice and received referral slips for them.[3] Similarly, and with no possible area of ambiguity, the contract language refers not at all to any preference in hiring based on prior employment or layoff date. I see nothing in the written contract making Harper's request for certain qualified and available drivers of his choice at all improper.

As for the assertion that Harper asked for the type of drivers he did not need in the light of what work was available, the facts fall short of proof. There was very little work to be done in the 1961 season; what was available was diversified, including movement of gravel, water, ready-mix concrete, and even long-distance hauling. The drivers requested by Harper had in the past driven trucks for these different purposes, and in fact as the months went by they were transferred from one type of driving to another. Thus Harper's explanation that his reason for selecting the particular men he requested at the start was because he expected little work of any one type and that these men had had experience with diversified hauling is entirely plausible in the light of the facts.

Moreover, the entire argument that of all the drivers who did not work in 1961, Wolf alone must be viewed as having been selected for pinpointed discrimination, rests upon a further assertion by Hubrig which I cannot except. He said that when drivers are laid off at the end of a season they report to the Union and sign a register in the order of their release and that this list is used the following year to send men back to the same companies in accordance with the position of their names on that list—the first to have been laid off being first choice to return to the project before any other driver. He then said Wolf's name was at the top of the list, and therefore Harper was obligated to accept him first at Hubrig's suggestion. A list of some sort there is, but I do not accept Hubrig's word that Wolf's name was at the top or his uncorroborated statement that all parties knew the list served a first-off—first-back-to-work purpose.

During cross-examination counsel for the Respondent asked Hubrig to produce the list, and then raised a question as to the authenticity of the document placed in his hands as purportedly the regularly kept union register of names. The General Counsel did not himself offer any original written list in evidence. In these circumstances, a strong inference is suggested that had the Union come forth with the list on which Hubrig relied, careful examination of the document would not support, indeed might even belie, his oral testimony.[4] Further, Wolf himself, long a member of Local 74, a union steward on the job, and for five consecutive seasons employed at the Minot Air Force Base, testified that the laid-off union members signed the list in question because they thereby suspended their union dues obligation, and that he knew nothing about any system whereby the first to have signed the list would be first entitled to return to work. But if there is one thing a union steward is likely to know, it is any right to preference or recall among laid-off employees.

Essentially, the General Counsel's case with respect to Wolf rests upon the fact that the year before Foreman Schaefer said to him that he would be the first to be laid off, that the Company had ways of getting rid of stewards, and that he would not be employed in the future. There is also the further fact, resting upon uncontradicted testimony in the record, that in June 1960, after the initial charge was filed in this case, Foreman Schaefer said to truckdriver Hendrickson that he knew who had caused the charge to be filed—by clear inference indicating Wolf—and directly told Wolf he, Schaefer, knew that Wolf had signed the moving papers. As to what happened in 1961, there is only the ambiguous statement by Plant Superintendent

[3] Hubrig's flat statement that over all the years of this huge operation drivers had never been requested by name I find less credible, particularly in view of his failure to place in evidence the written list of drivers which formed the major pillar of his oral testimony.

[4] *A E Anderson Construction Company*, 129 NLRB 1447

Harper that he told the business representative he did not want Wolf on the job and that this was for personal reasons.

Harper impressed me as the more credible witness in contradicting Hubrig, and I credit his denial respecting these last two statements. On this minor point it is significant that the last several drivers hired in 1961 were simply sent out by the Union when calls came in for anyone at all. Hubrig said his office girl, using the "list," sent them out without his knowledge and that he never told her not to refer Wolf. But if the girl knew nothing of Harper's alleged exclusion of Wolf from the project, there remains unanswered the question why she did not follow the arrangement of names of which Hubrig spoke. Or could it be that the eight drivers who had been laid off before Wolf the year before had signed the list in front of him? On this record I believe Harper's testimony that had Wolf been referred to work by the Union later in the season he would have been hired.

At best, a finding of illegal motivation in the failure to ask for Wolf in 1961 on the part of Harper must be an inference that 10 months later the Company carried out the threat and promise of discrimination voiced by Foreman Schaefer the year before. There are other facts which tend to rebut such an inference and on the record as a whole I do not believe the General Counsel has sustained the affirmative burden of proof resting upon him to support the complaint allegation.

There is every indication that this Respondent is well disposed toward this union; if anything, perhaps a little too well disposed. It started by extending voluntary recognition when the project started in 1955; it immediately extended the further courtesy of an exclusive referral system. Even as late as 1961 no driver was permitted to work without first clearing the union hall. One of the very witnesses for the General Counsel in this case said he met a supervisor of the project who wished to put him to work, but told him first to report in town to obtain a referral slip from the Union. No driver ever worked on this project over the years, even when there were as many as several hundred at a time, who was not a member of Local 74.

As to any particular animosity against Steward Wolf, the Respondent's treatment of him, after the promise of discrimination voiced by Foreman Schaefer, belies any real intent to carry out his words by action. Schaefer said he would be the first to be released; instead, of the 18 drivers employed in 1960, 8 were released after Schaefer's statements, 5 of them dump truckdrivers like Wolf, before Wolf's separation on November 7.[5] Schaefer also said there would be particular discrimination against Wolf because he was a union steward, and that the Company had ways of getting rid of stewards. But one of the first drivers Harper asked the Union to send out the following year was Pounds, the only other person who had been a steward of this Union on this job. Most significant, however, is the further fact that in July 1960, a month after the intimidating statements of Foreman Schaefer, Wolf was sent to work at the Velva job, the very location which Schaefer said would be "nonunion," and where striking employees would have to drop union membership as a condition of employment. The Company even used Wolf one day that month at a third of its locations.

Perhaps Schaefer spoke out of personal pique, because he learned that some action or statement of his had formed, in part, the basis of the first charge in 1960. The Respondent is, of course, responsible for his coercive statements, but the foregoing facts certainly are strong indication that any resentment of Wolf's activities in 1960 did not carry over into the following season. The record also shows Schaefer left the Minot Project in the summer of 1960 never to return.

A final incident back in 1960 upon which the General Counsel also relies to support a general inference of antiunion and anti-Wolf animus the following spring is the fact that on the first day of the strike on May 26, 1960, Ratchye, the project superintendent, appeared at one of the gates near the pickets and took several photographs of them. At that time there were a number of unions representing employees of the Respondent at the project and Ratchye explained at the hearing his purpose was to record the writing on the picket signs, to assure that Local 74 precisely identified itself as the striking organization. In fact, he asked the pickets to hold their signs facing his camera so that the signs would be clearly visible. The entire incident seems to have been on a perfectly friendly basis, and he showed the pictures which his Polaroid camera quickly printed to the pickets and to Business Representative Hubrig, who was also present. I do not believe Ratchye's photographing of the pickets, conduct which in some circumstances the Board has held to be a form of coercion upon strikers, adds any material support to the case against Wolf, particularly since one of the pickets who chanced to be present and appeared in one

[5] While testifying, Wolf recalled having been released on October 7 A stipulation of the parties, read into the record transcript from the Company's employment rolls, sets Wolf's layoff as November 7

of the pictures was Pounds, one of the first drivers sought by the Respondent for reemployment the next season.

I find the record as a whole insufficient to support the complaint allegation that the Respondent illegally discriminated against Wolf in his employment and I shall therefore recommend dismissal of this allegation of the complaint.[6]

C. Procedural disposition of Case No. 18–CA–1159

In the consolidated complaint the allegations relating to 1960 activities of the Respondent's representatives are supported by the charge filed on June 16, 1960, in Case No. 18–CA–1159. Absent that charge, Section 10(b) of the statute would now preclude any unfair labor practice findings based on those events because they occurred more than 6 months before the filing of the second charge—in Case No. 18–CA–1251—on March 31, 1961. Moreover, as appears in the formal exhibits, Case No. 18–CA–1159 was settled by agreement between the Respondent and the General Counsel on October 12, 1960; that settlement was set aside and the charge reopened only because the General Counsel was of the opinion that subsequent conduct of the Respondent constituted further violations of the Act. In these circumstances, and as it now appears that the Respondent did not commit any unfair labor practices within the 6-month period before March 31, 1961, I shall recommend that the settlement agreement in Case No. 18–CA–1159 be reinstated, and that the consolidated complaint be dismissed in its entirety.[7]

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, it is hereby recommended that the settlement agreement in Case No. 18–CA–1159 be reinstated.

It is hereby further recommended that the complaint in this proceeding be dismissed in its entirety.

[6] Cf. *Inland Seas Boat Co.*, 131 NLRB 706.

[7] *Eveready Garage, Inc.*, 126 NLRB 13.

Benjamin Miller and Julius Tarr, Co-Partners trading as Monroe Upholstery Company *and* Textile Workers Union of America, AFL–CIO–CLC. *Case No. 5–CA–1883. March 5, 1962*

DECISION AND ORDER

On September 13, 1961, Trial Examiner Louis Plost 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 and the Charging Party filed exceptions to the Intermediate Report and supporting briefs. The Respondent filed a reply 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 [Chairman McCulloch and Members Rodgers and Fanning].

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 Inter-