

manifest to Weber through the Union's attempt of June 28 to represent McKenna. For I am persuaded that had McKenna himself sought directly to change that relationship, after the Respondent's decision of some 2 weeks earlier had been conveyed to him by Weber, reluctance to discontinue what Davis had initiated would just as readily have been dissipated, without the presence of any union in the picture at all.

In short, since there is not a scintilla of evidence as to any antiunion sentiment on the part of any representative of the Respondent's management, and since there is nothing in the record to indicate that Weber would have had any reason for trying to discourage membership in labor organization of which all of the employees in the admitted appropriate unit covered by the current agreement had for years been members, I do not see how the coincidence of timing alone can justify holding that the Respondent was motivated in terminating McKenna by his union affiliation. This is especially so since I am convinced that Weber honestly believed that McKenna was not an employee, and that the Union's request merely served to demonstrate McKenna's unwillingness to continue a relationship which the Respondent itself had for some time been considering discontinuing for "sound business economic reasons." In any event, I am not satisfied that the General Counsel has sustained his burden of proving that McKenna's discharge was caused by his union affiliation.<sup>41</sup> Accordingly, it will be recommended below that the allegations of the complaint as to McKenna's discharge be dismissed.

#### CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of the Act.
3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act.

#### RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law, I recommend that the complaint herein be dismissed in its entirety.

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<sup>41</sup> Compare *Community Shops, Inc*, 130 NLRB 1522, and cases cited therein. In the instant matter there are no such surrounding circumstances as would render the Respondent's action illegal because an illegal result must be assumed to have been intended.

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**Local 69, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO and Robert Levine and Plumbing and Heating Employers Association of Hudson and Bergen Counties, N.J., Parties to the Contract.** *Case No. 22-CB-417.*  
*April 26, 1962*

#### DECISION AND ORDER

On December 29, 1961, Trial Examiner Lloyd R. Fraker issued his Intermediate Report herein, finding that the Respondent had engaged in 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 and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

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 Leedom.]

The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record. The Board affirms the Trial Examiner's rulings and adopts his findings, conclusions, and recommendations with the following modifications.<sup>1</sup>

1. The Trial Examiner made his jurisdictional findings as to commerce, and correctly so, on the basis of the commerce facts alleged in the complaint, since the Respondent in its answer neither admitted, denied, explained, nor showed good cause why the commerce allegations should not be deemed to be admitted to be true. However, there is substantial undisputed evidence in the record that one member of the Employers Association received equipment valued in excess of \$100,000 from out of State during the year preceding the hearing and that three other members of the Association performed services out of State valued in excess of \$1,250,000 during the same period. We shall, therefore, also predicate the Board's jurisdiction on these additional jurisdictional facts.

2. In finding that the Respondent violated the Act the Trial Examiner credited the testimony of the two men who were refused referral by the Respondent, Levine and Besterman, and discredited the testimony of Zampella, Respondent's business agent, because of his demeanor on the stand. The Trial Examiner also credited the testimony of Geiger, proprietor of the Geiger Company. From the evidence in the record, however, the Trial Examiner drew only the negative inference that, since the Respondent's conduct could be rationally explained in no other way, its refusal to refer the two men must have been because of their nonmembership in Local 69. Although we agree with the Trial Examiner's conclusion that the Respondent failed to refer the two men because of their nonmembership in the Respondent, we do not find it necessary to predicate the finding on a negative inference. On the contrary, we agree with the General Counsel that, accepting the credibility findings of the Trial Examiner, there is ample evidence in the record to support an affirmative finding on this issue.

The record affirmatively establishes that: Levine and Besterman were officers of Local 14, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; in June 1960 the United Association revoked the charter of Local 14; thereupon the Respondent, Local 69, was chartered to take the place of Local 14; and Local 69 then admitted to membership the former members of Local 14 except Local 14's

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<sup>1</sup>The General Counsel excepted to the failure of the Trial Examiner to recommend that the Respondent be required to refer Levine and Besterman in a nondiscriminatory manner as well as to record them on its out-of-work list. We find merit in this contention and will therefore amend the Order and notice accordingly. And since the evidence reveals an attitude of opposition to the purposes of the Act we shall issue a broad cease-and-desist order.

former officers. As former officers, Levine and Besterman were excluded. The record also shows that Levine and Besterman have endeavored and are endeavoring through their attorney to become members of Local 69, but have been unable to do so.

On March 19, 1961, Levine and Besterman were laid off by Geiger. On May 22, 1961, the two men went to Respondent's office to sign up on Respondent's out-of-work list. Business Agent Zampella was informed of the visit by Respondent's office secretary. On May 29, 1961, the two men returned to the office to find out if their names were on the list. Zampella informed them that their names were on the list but that "I have fifty or sixty of my own union men out of work before I even think of you fellows, get out."

On Wednesday, June 21, Geiger sent a telegram to Zampella stating: "Request you refer Frank Besterman and Robert Levine to my shop for work on Monday morning, June 26, 1961." On Thursday, June 22, Zampella spoke to Geiger on the telephone. He told Geiger that the telegraphic request was insufficient and that Geiger would have to come to Respondent's office and sign a written request for the two men. During their conversation Geiger again asked for the services of Levine and Besterman.

On the following day, June 23, Levine and Besterman visited Respondent's office and asked if Geiger had requested that they be referred to him. Zampella conceded that he had received the telegram from Geiger but stated that he would not refer them until Geiger signed an affidavit. Levine and Besterman then asked that they be referred to work for Geiger and Zampella replied that he had no written request from Geiger and that Levine and Besterman were not members of the Respondent. He then asked the two men to leave the office. A fight then broke out and Zampella had warrants issued against Levine and Besterman.

In the subsequent criminal proceeding Zampella was asked to describe the operation of the Respondent's hiring hall. In doing so he stated that "he sends his own men out, union men out first, and then he will send others out."

The above findings of fact, based either on uncontradicted testimony or upon the testimony of witnesses credited by the Trial Examiner, presents a clear case of discrimination against individuals because of their nonmembership in a union. Zampella's repeated statements to Levine and Besterman that his refusal to refer them stemmed from their inability to acquire membership in the Respondent and his further statement in the criminal proceeding to the same effect, establish the Respondent's illegal motivation beyond question and obviate the necessity of extended discussion. We therefore hold that, in refusing to refer Levine and Besterman to the Walter F. Geiger Company, the

Respondent caused Geiger not to employ Levine and Besterman on and after June 26, 1961.<sup>2</sup>

### ORDER

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Local 69, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, its officers, representatives, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Causing or attempting to cause Walter F. Geiger, doing business as Walter F. Geiger Company, to discriminate against Robert Levine and Francis Besterman, Jr., in violation of Section 8(a) (3) of the National Labor Relations Act, as amended.

(b) Causing or attempting to cause any other member of the Plumbing and Heating Employers Association of Hudson and Bergen Counties, N.J., to discriminate against Levine and Besterman in violation of Section 8(a) (3) of the Act.

(c) In any other manner restraining or coercing the employees of Walter F. Geiger Company, or of any other member of the Association, in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a) (3) of said Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which is necessary to effectuate the policies of said Act:

(a) Make whole Robert Levine and Francis Besterman, Jr., for any loss of earnings they may have suffered as a result of the discrimination against them, in the manner indicated in the section of the Intermediate Report entitled "The Remedy."

(b) Notify Walter F. Geiger Company and the Plumbing and Heating Employers Association of Hudson and Bergen Counties, N.J., that it has no objection to employment by them of Levine and Besterman and concurrently therewith deliver copies of the notice to Levine and Besterman.

(c) Upon request, record the names of Levine and Besterman on its out-of-work list in the same manner and to the same extent in which it records the names of other journeymen plumbers on the list and refer Besterman and Levine to employment in a nondiscriminatory manner.

<sup>2</sup> In conformity with this finding we will amplify paragraph 4 of the Conclusions of Law of the Intermediate Report by the insertion after the word "Respondent" and before the word "caused," the words "violated Section 8(b) (2) and (1) (A) of the Act in that it"

(d) Post copies of the notice attached hereto marked "Appendix,"<sup>3</sup> in conspicuous places in its office in Jersey City, New Jersey, including all places where notices to its members are customarily posted. Copies of the notice, to be furnished by the Regional Director for the Board's Twenty-second Region to the Respondent, shall, after being signed by a responsible officer of the Respondent, be posted immediately as above provided and shall be maintained by the Respondent for a period of 60 consecutive days and the Respondent shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(e) Furnish to the Regional Director signed copies of the notice, for posting by Geiger and the other members of the Association, if willing, for a period of 60 days, at their respective places of business in places where notices to their employees are customarily posted.

(f) Notify the Regional Director, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith.

<sup>3</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."

## APPENDIX

### NOTICE TO ALL MEMBERS AND TO ALL EMPLOYEES OF THE MEMBERS OF THE PLUMBING AND HEATING EMPLOYERS ASSOCIATION OF HUDSON AND BERGEN COUNTIES, NEW JERSEY

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 Walter F. Geiger, doing business as Walter F. Geiger Company, or any other member of the above-named Association, to discriminate against Robert Levine or Francis Besterman, Jr., in violation of Section 8(a)(3) of said Act.

**WE WILL NOT** in any other manner restrain or coerce the employees of the said Walter F. Geiger Company or of any other member of the said Association, in the exercise of the rights guaranteed in Section 7 of said Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization, as a condition of employment, as authorized by Section 8(a)(3) of said Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

**WE WILL NOT** fail or refuse, upon request, to record the names of Robert Levine and Francis Besterman, Jr., on our out-of-work list, or refuse to refer them in a nondiscriminatory manner.

WE WILL make Robert Levine and Francis Besterman, Jr., whole for any loss of earnings suffered by them as a result of the discrimination against them, by paying each of them an amount equal to the amount which each of them would have earned during the period from June 26, 1961, to the date which is 5 days after the date we notify them and Walter F. Geiger Company and the Association that we have no objection to their employment by these employers as journeymen plumbers, less their net earnings during the period.

LOCAL 69, UNITED ASSOCIATION OF JOURNEYMEN  
AND APPRENTICES OF THE PLUMBING AND PIPE  
FITTING INDUSTRY OF THE UNITED STATES AND  
CANADA, 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 National Newark Building, Newark 2, New Jersey, Telephone Number MARKET 4-6151, if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This case was heard by me at Newark, New Jersey, on October 26 and 27, 1961. All parties appeared, were represented by counsel, and participated fully in the hearing. After the close of the hearing the General Counsel and the Respondent submitted briefs which have been duly considered.

It is alleged in the complaint herein, as amended, that at all times material to the issues herein, the Respondent and the Party to the Contract, hereinafter called the Association, have maintained and enforced an agreement between themselves whereby the plumbing contractors who are members of the Association are required to hire journeymen plumbers only through the Respondent, that Walter F. Geiger, doing business as Walter F. Geiger Company, herein called Geiger, is a member of the Association, that at all times since May 22, 1961, the Respondent has failed and refused to refer Robert Levine, the Charging Party herein, and one Francis Besterman, Jr., hereinafter called Levine and Besterman, respectively, "to employment with Geiger or other members of the Association pursuant to the exclusive hiring and referral provisions" of said agreement, because Levine and Besterman are not members of the Respondent and because the Respondent "has denied membership" to them "on grounds other than the failure . . . to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership," to cause Geiger and other members of the Association to "violate Section 8(a)(3) of the Act" and to encourage or discourage membership in the Respondent.

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYERS INVOLVED

Since the allegations of the complaint of the facts on which the jurisdiction of the Board in this case is predicated are neither denied, admitted, nor explained in the Respondent's answer herein and good cause not having been shown why said facts

should not be deemed to be admitted to be true, I find that during the past year Walter F. Geiger, doing business as Walter F. Geiger Company, a member of the Association, performed services of a value in excess of \$50,000 for Standard Brands Corporation which has an annual direct outflow of its products, in interstate commerce, of a value in excess of \$50,000, and that during the same period the members of the Association had a direct inflow, in interstate commerce, of goods and materials of a value in excess of \$50,000, which goods and materials were shipped to them in the State of New Jersey, directly from points outside of that State.

I find, therefore, that Geiger and the Association are engaged in "commerce" and in operations "affecting commerce" as those terms are defined in Section 2(6) and (7) respectively, of the National Labor Relations Act, as amended, herein called the Act, and that it will effectuate the policies of the Act to assert jurisdiction over said employers.

## II. THE LABOR ORGANIZATION INVOLVED

The General Counsel alleges, the Respondent admits, and I find that the Respondent is a labor organization as defined in Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES INVOLVED

### Basic Facts

The Association and the Respondent are parties to a collective-bargaining agreement which is in evidence as Respondent's Exhibit No. 1, hereinafter referred to as the Agreement, covering journeymen plumbers employed by the members of the Association.

The Agreement was executed May 1, 1959, is effective for the period from that date until April 30, 1962, and was in full force and effect at all times material to the issues herein.

The Agreement contains the following provisions, among others:

#### SEC. 53. Hiring Procedure

B. Exclusive Hiring. Contractors shall hire qualified journeymen plumbers by calling the Union. Whenever an employer requires a journeyman plumber on any job, he shall notify the local union office, either in writing or by telephone, stating the location, starting time, approximate duration of the job, the type of work to be performed and the number of workmen required.

C. Registration. The union shall establish and maintain an appropriate registration facility for qualified applicants available for employment as journeymen plumbers. Applicants shall be registered on the appropriate out-of-work list, i.e., either plumber etc., in the order of time and date of registration. Each applicant for employment shall be required to furnish such data, records, names of employers and licenses as may be deemed necessary and each applicant shall complete such form or registration as shall be submitted to him. Applicants for employment shall also list any special skills they possess.

D. Referral of Men. Upon request of a contractor for plumbers, the union shall immediately refer competent and qualified registrants to that contractor in sufficient number required by the contractor, in the manner and under the conditions specified in this agreement, from the separate appropriate out-of-work list on a first in, first out basis; that is, the first man registered shall be the first man referred, except that: (1) Requests by contractors for key men to act as supervisors, general foremen or foremen shall be honored without regard to the requested man's place on the out-of-work list. (2) Requests by contractors for particular plumbers previously employed by the contractor and who have been laid off or terminated by the contractor within one hundred fifty (150) days previous to the request shall be given preference of rehire and shall be dispatched to the contractor, regardless of the applicant's position on the out-of-work list.

Both Levine and Besterman are journeymen plumbers. Neither of them is a member of the Respondent. Both of them had been employed by Geiger within the 150-day period prior to June 26, 1951, having been laid off by that employer on March 19, 1961.

On May 22, 1961, Levine and Besterman went to the office of the Respondent and attempted to put their names of its out-of-work list. Whether they were technically successful in getting on such list at that time is immaterial since the Respondent admits that journeymen in the 150-day category would be referred to the employer for whom they had worked within such period whether or not their names were on such list. The Respondent's business manager, Peter Zampella, was not present and the

Respondent's employee McAndrews with whom they talked at that time wrote down the information and later gave it to Zampella.

On or about June 21, 1961, Geiger telegraphed the Respondent to refer Levine and Besterman to him for work on Monday, June 26, 1961. On that date the contents of Geiger's telegram were telephoned to the Respondent's office and on the following day the Respondent telegraphed Geiger, "Please report to this office re standard Brand job Friday morning." According to Zampella this telegram was sent to Geiger to determine if his telegram of the 21st was authentic.

On June 22, 1961, Geiger had a telephone conversation with Zampella in which he again requested the referral of Levine and Besterman. I base this finding on the testimony of Geiger, a straightforward witness who was not directly interested in the outcome of this case and who was obviously telling the truth on the witness stand. I do not credit the denial of Zampella because of his demeanor on the witness stand which indicated to me clearly that he was less than frank about the entire controversy. For the same reason I have also credited the testimony of Levine and Besterman where it conflicts with the testimony of Zampella.

Although neither the telegraphic request nor the telephonic request by Geiger for the referral of Levine and Besterman complied strictly with provisions of the Agreement, I think both of the requests complied substantially with the requirements of the Agreement and that in any event the Respondent, by its entire course of conduct, waived strict compliance. In this connection I note that neither the telegraphic request nor the telephonic request stated "the location, starting time, approximate duration of the job, the type of work to be performed." The Respondent, however, by insisting only that Geiger come to the office and put his request in writing, as a condition precedent to the referral of Levine and Besterman, waived strict compliance with the referral provisions of the Agreement.

On the basis of the decision of the Supreme Court in *Georgia, Florida & Alabama Railway Company v. Blish Milling Company*, 241 U.S. 190, I also find that Geiger's telegram of June 21, 1961, was a request in writing and therefore satisfied that requirement of the Agreement.

Since the conduct of the Respondent in this case is not referring Levine and Besterman, on the occasion in question, is not explainable on any rational basis other than on the basis of the fact that they were not members, I find that it failed to refer them because of such nonmembership, that it thereby caused Geiger not to employ them on June 26, 1961, and that such failure necessarily encouraged membership in the Respondent.

Since the Respondent's failure and refusal to permit them to register on its out-of-work list meant that they were not available for hire by any other member of the Association, I find that it, in effect, caused the other members of the Association not to consider them for employment.

The Respondent contends that, on June 26 or 27, 1961, Geiger withdrew his request for the referral of Levine and Besterman and that such withdrawal constitutes a defense to its violations of Section 8(b)(1)(A) and (2) of the Act. It is true that Geiger testified that after he learned of the "brawl" involving Levine, Besterman, and Zampella and the fact that warrants had been issued, apparently for Levine and Besterman, he concluded they were not available and consequently withdrew his request for their referral because, as he put it, "If this is the situation, then men who had warrants against them and the police are looking for them, I don't want to get mixed up in this."

The obvious answer to this contention is that the violations of the Act involved had, at the time of the withdrawal, already been consummated, in that previous to such withdrawal the Respondent had failed to refer Levine and Besterman to Geiger although it had received from him both a written request and a request by telephone for the referral of said journeymen, both and each of which requests satisfied fully the requirements of the Agreement.

#### IV. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices as indicated above, it will be recommended that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having caused Walter F. Geiger to fail and refuse, on June 26, 1961, to hire Robert Levine and Francis Besterman, Jr., it is recommended that the Respondent make each of them whole for any loss of earning they may have suffered as a result of said discrimination, by paying each of them an amount equal to the amount each of them would have earned from that date until the date which is 5 days after the Respondent notifies them, the said Geiger, and the Plumbing and Heating Employers Association of Hudson and Bergen Counties, N.J., that it has no

objection to their employment by said employers as journeymen plumbers, less their net earnings during said period. Such backpay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289.

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

#### CONCLUSIONS OF LAW

1. Geiger and the Association are each engaged in commerce and in operations affecting commerce as those terms are defined in Section 2(6) and (7) of the Act, respectively.

2. The Respondent is a labor organization as that term is defined in Section 2(5) of the Act.

3. Geiger and the Association each is an employer as that term is defined in Section 2(2) of the Act.

4. By failing and refusing, on June 21, 1961, and thereafter, to refer journeymen plumbers Levine and Besterman to Geiger for employment by him on June 26, 1961, the Respondent caused Geiger to discriminate against said journeymen in violation of Section 8(a)(3) of the Act and thereby coerced and restrained them in the exercise of the rights guaranteed them in Section 7 of the Act.

5. By failing and refusing, on or about May 22, 1961, and thereafter, to record the names of said journeymen on its out-of-work list, the Respondent attempted to cause the members of the Association to deny them employment in violation of Section 8(b)(2) and (1)(A) of the Act.

[Recommendations omitted from publication.]

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**Local 1199, Drug and Hospital Employees Union, Retail, Wholesale and Department Store Employees Union, AFL-CIO and Janel Sales Corporation and Food Packers, Cannery & Miscellaneous Workers Union, Local 220 of the Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, Party to the Contract.** *Case No. 2-CP-81. April 26, 1962*

#### DECISION AND ORDER

On November 9, 1961, Trial Examiner Henry S. Sahn issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was 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, and the General Counsel filed a memorandum in support of the Intermediate Report.

Pursuant to 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 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, memorandum, and the entire record, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent they are consistent with our decision herein.