

It is further recommended that, unless the Company shall within 20 days from the date of receipt of this Intermediate Report notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Company to take the action aforesaid.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a Trial Examiner 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 discourage membership in Los Angeles Typographical Union No. 174, International Typographical Union, AFL-CIO, or any other labor organization of our employees, by discharging, refusing to reinstate, or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL offer Jose Nabor Villasenor immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered by him as the result of the discrimination against him.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities.

All our employees are free to become or remain, and to refrain from becoming or remaining, members of the above-named or any other labor organization.

LOZANO ENTERPRISES,
Employer.

Dated _____ By _____
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles 14, California, Telephone Number Richmond 9-4711, if they have any question concerning this notice or compliance with its provisions.

**Local Union 825, International Union of Operating Engineers,
AFL-CIO and Wm. C. Ehret. Case No. 22-CC-137. May 15,
1962**

DECISION AND ORDER

On January 29, 1962, Trial Examiner John F. Funke issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations 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 made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and the brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

[The Board dismissed the complaint.]

¹In our opinion, the General Counsel failed to sustain the burden of proving that Respondent committed the violations of Section 8(b)(4)(i) and (ii) as alleged in the complaint. Like the Trial Examiner, we therefore dismiss the complaint for this reason.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge filed August 25, 1961, by Wm. C. Ehret,¹ herein called Ehret, the General Counsel issued a complaint on September 29, 1961, against Local Union 825, International Union of Operating Engineers, AFL-CIO, herein called Local 825 or the Respondent. This proceeding, with the General Counsel and Respondent represented, was heard before me at Trenton, New Jersey, on January 2 and 3, 1962, upon the complaint and amended complaint of the General Counsel and the answer and amended answer of Respondent.

The complaint, as amended, alleged that Local 825 induced and encouraged the employees of Nami Bros., herein called Nami, to engage in a strike or a concerted refusal to perform services for Nami and threatened, coerced, and restrained Nami with the object of forcing or requiring Nami to cease doing business with Ehret. It further alleged that by such conduct Local 825 violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Respondent's answer, as amended, denied such inducement, encouragement, threats, coercion, and restraint and denied the commission of any unfair labor practices.

At the conclusion of the General Counsel's case Respondent moved to dismiss the complaint and renewed this motion at the close of the hearing. Decision was reversed and the motion is now disposed of in accordance with the recommendation herein.

At the conclusion of the case the parties were given 21 days in which to file briefs and counsel for Respondent submitted oral argument.²

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

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE COMPANIES

Ehret is a New Jersey corporation having its principal place of business at 1723 North Olden Avenue, Trenton, New Jersey. It is engaged in the construction industry as a general contractor and during the past year it purchased materials valued in excess of \$50,000 from States other than the State of New Jersey and caused them to be transported to the State of New Jersey.

Nami is a partnership comprised of Dewey A. Nami and Dominick Nami and has its principal place of business at Route 33, Mercerville, Trenton, New Jersey. It is engaged in the building and construction business as an excavating contractor. During the past year it performed services valued in excess of \$50,000 for Ehret, for Belli Construction Co., Inc., and for Paternoster Construction Company.³ The out-of-State purchases for Belli from January 1, 1960, to January 1, 1961, totaled in excess of \$275,000 and the out-of-State purchases of Paternoster from November 1, 1960, to October 31, 1961, totaled in excess of \$185,000.

¹An amended charge was filed August 30, 1961, and a second amended charge was filed December 22, 1961.

²The General Counsel neither presented oral argument nor filed a brief. In view of the record this omission is understandable.

³The testimony indicates that Nami performed services valued in the approximate amount of \$33,000 for Belli and of \$19,600 for Paternoster from August 1, 1960, to July 31, 1961.

On the basis of the foregoing, I find that Ehret and Nami are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.⁴

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The facts*

On August 14, 1961, Ehret entered into a contract with the State of New Jersey for the erection of a five-story office building for the Department of Education at West State and Calhoun Streets, Trenton. Ehret subcontracted various phases of the work, including excavation, furnishing of reinforced steel, painting, plumbing, flooring, glazing, acoustical work, etc. The excavation work, the first stage of construction, was subcontracted to Nami on August 18. This work included the removal of trees and sidewalks, the stripping of topsoil, rough grading and excavation. It was estimated that the excavation would take 3 or 4 weeks.

On August 22 a meeting was held at the jobsite among representatives of the State of New Jersey, Ehret, and the price subcontractors, including Dewey Nami. Donald G. Ehret, executive vice president of Ehret, testified that as he left the meeting he was approached by Jack Smith, business representative of Local 825, who identified himself and told Ehret that since Ehret had no contract with 825 there would be pickets at the premises the next day. According to Ehret this was all that was said.

According to the record the first incident occurred at the jobsite either on the morning of August 21 or 22 prior to the alleged conversation between Ehret and Smith. Joseph Kowleski, a member of Local 825, testified that he was at the jobsite when he noticed a front-end loader with the motor running and a bucket load of dirt. He asked the operator, never identified on the record, for his union card and was told by the operator that he was not a member of any union. About this time Kowleski saw Dewey Nami leaving the building on the jobsite and went up to Nami, introduced himself, and asked Nami why a nonunion man was running the front-end loader. According to Kowleski (Dewey Nami was not examined on this incident), Nami replied that he had tried to get the man in the Union but had been unable to and he then told Kowleski he would not work the machine any more that day. The next day Kowleski reported the incident to Smith but Smith's reaction is not revealed.

On August 22, Nami delivered equipment to the jobsite without incident. On August 23, Richard Davison, a truckdriver for Nami, and Charles Nami, an operating engineer and the son of Dewey Nami, delivered a backhoe to the jobsite. Charles Nami testified that he was approached at the site by a man (identified as Kowleski) who stated he was a member of the Operating Engineers and who told him that Ehret was in trouble with Local 825 and that they (Nami and Davison) should not work for Ehret. Kowleski was given a Nami Bros. card by Charles and, at Charles' request, Kowleski wrote down Smith's name and telephone number, his own name,⁵ and then gave the card back to Charles. The backhoe was left at the jobsite and Charles Nami, upon his return, delivered the card to his father and told him to call Jack Smith. Kowleski denied having any conversation with Charles Nami, testifying only that Charles made the request for Smith's name and number.⁶ Since it has not been shown that Kowleski was an agent for Local 825 it is unnecessary to resolve this issue of credibility.

The next day Charles returned to the jobsite in a pickup truck with Steve Nagy, also a Nami employee and a member of the Operating Engineers. On arrival at the site they found several men standing about, among them Jack Smith. (The men were standing along the curb line and carried neither picket signs nor armbands.) Charles testified that he asked Smith if it was a picket line and was told it was not. He then asked Smith if he could go to work and was told he could but he was also told by Smith "you know the consequences, what they will be like, if you work."

⁴ The complaint alleges that the Building Contractors Association of New Jersey is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Ehret is a member of the Association. No finding of jurisdiction is based on these allegations.

⁵ General Counsel's Exhibit No 5

⁶ Kowleski also testified that he did not believe that Davison was the man operating the front-end loader the day before.

Although Nami testified that he did not know what Smith meant by this remark, he did not go to work. According to Charles, he and Nagy had been sent to the site to start the removal of the trees.

Nagy testified that he drove the pickup to the site with Charles and that Smith asked him for his book, which he did not have. He had no conversation with Smith concerning the consequences of going to work nor concerning any dispute between Local 825 and Ehret. He did, however, testify that he had a conversation with a member of Local 825 named Eldridge in which Eldridge told him that if he went to work "there was a possible chance that I could lose my book." While the testimony discloses that Smith was seated in a car close to Eldridge and Nagy when this conversation took place, Smith, in testifying, denied hearing it and I accept his denial. More importantly, however, Nagy testified that before leaving for the site he had been instructed by Dewey Nami not to do any work and that he knew when he went there he was not going to work.⁷

Dewey Nami was the chief witness for the General Counsel. He attended the meeting at the jobsite, together with the other subcontractor, on August 22. After the meeting, according to his testimony, he had a conversation with Jack Smith. He told Smith, in response to Smith's question as to when they (Nami) would start work, that they "weren't quite ready yet." Since Dewey Nami's testimony, which was neither clear nor convincing, is vital to the determination of the issues, particularly as to threats, coercion, and restraint, it is necessary to report it verbatim. Quoting his conversation with Smith on August 22, he testified

. . . And, of course, the conversation started when we were going to start work. I said we weren't quite ready yet. So then it was mentioned that there was some kind of trouble having a contract with Ehret. So it was a question whether we were going to be able to perform.

* * * * *

TRIAL EXAMINER: What we want is what you said to him and what he said to you. We will draw our own inferences and conclusions from it.

A. He said they were having some kind of trouble with Ehret Construction Company with regards to signing their contract. And, of course, what I said, the excavation part of the contract, that we were using our own men for that and we had a sub-contract. But the main—I didn't want to see—I didn't want to get in trouble with the Union or didn't want to get in trouble with Ehret.

Q. What did he say to you? Was that all he said or did he say anything else?

A. He thought within a couple of days things would be straightened out. I said up until that time, we were going to continue to cooperate with you and we were going to continue to cooperate with the men. I didn't want to get into trouble and I didn't want my men to get into trouble. That wasn't the only job I was ever going to do.

* * * * *

Q. Do you recall whether Smith said anything else to you besides what your testimony has been so far?

A. No. The only question in my mind was how soon things would be straightened out with Ehret, and he thought in a couple of days, why it would be about the time when things would be straightened out as far as the contract was concerned.

Dewey Nami also testified to the telephone conversation he had with Smith when he received the card Kowleski had given his son Charles on August 23. He summarized this conversation as follows:

. . . After I held the wire for possibly half a minute or so, Jack Smith answered, and I told him I was given this number for me to call.

So the conversation was in reference to the job and how things progressed—making any headway as far as a settlement is concerned. And he said he thought within a couple of days everything would be all right.

I told him I was willing to go along and not—to go along and do whatever the Union thought was all right so my men wouldn't get into trouble and I wouldn't get into trouble, and for him to let me know what's what, keep me posted, and that we weren't going to go to work until I was sure that things would be straightened out.

So he didn't think it was going to be more than two or three days, the most.

⁷ Dewey Nami was not questioned as to what instructions he gave Charles and Nagy on this date. His testimony indicates he did not intend to perform services if Local 825 objected.

On redirect his testimony as to the telephone conversation was substantially the same:

Q. Yes. Do you recall that [telephone] conversation?

A. Well, not too clearly. What I can recall was that this number was left for me to call and I didn't know what it was going to be. So when he answered, I says, "So and so asked me—left this number for me to call you." I said, "What is it all about?" So he said, "Well," he says, "things are not quite straightened out yet, but in about two or three days we expect things to be straightened out."

Jack Smith was the chief witness for Respondent Local 825. With respect to Ehret's testimony that he told Ehret on August 22 that there would be a picket line⁸ at the site the next day, Smith denied having any conversation at all with Ehret on that day. He tried to talk to Ehret but, to use his words, was "brushed off."

Smith admitted having a conversation with Dewey Nami on that day but his version is contradictory in important respects to that of Nami. According to Smith it related to the fact that the operator of the front-end loader was not a member of Local 825 and Nami assured Smith it would not happen again. Thus the testimony of Smith inferentially supports the testimony of Kowleski that the dispute first arose over the operation of the front-end loader by a nonunion man (Like Kowleski, Smith could not identify the nonunion operator of the front-end loader.)⁹

Smith's version of his telephone call from Dewey Nami on the evening of August 23 also deviates from Dewey's testimony. Smith testified that in this conversation Dewey told him he might need two men and Smith told him he would have to call Larry Cahill, dispatcher for 825. Smith then asked Nami about the latest contract between Nami and Local 825 and was told by Dewey that he (Smith) had the contract.¹⁰ Smith stated he then checked and found that Nami had not signed the latest contract.¹¹ Dewey Nami, in his testimony, made no mention of discussing the contract, although he admitted discussing his possible need for more engineers. Smith, on the other hand, did not testify that he told Dewey things would be all right in a couple of days.)¹²

There were no other or further incidents at the jobsite and no further conversations between Nami and Smith. Nami commenced work at the jobsite about September 1 and completed its work without interruption. The record does not reveal why operations were commenced at this time.¹³

B. Conclusions

The testimony of the witnesses in this case is at times contradictory, at times confusing, at times evasive, and in general unsatisfactory. It is, however, the testimony on which recommendation to the Board must be made. The theory of the General Counsel's case is that the Respondent, seeking a collective-bargaining contract with Ehret, induced and encouraged the employees of Nami to cease or refrain from work at the Trenton jobsite and threatened, coerced, and restrained the Nami partnership with the object of forcing Nami to cease doing business with Ehret.

⁸ No picket line was ever established at the jobsite.

⁹ Dewey Nami's version of this is that he asked Smith's permission to move the front-end loader to another location and that permission was readily granted by Smith. He did not testify to any complaint about the use of a nonunion operator on the loader.

¹⁰ The contract (General Counsel's Exhibit No. 7) ran from July 1, 1959, to September 5, 1961.

¹¹ The situation respecting this contract is confusing. Charles Wilson, bookkeeper for Nami, testified that he returned two signed copies of the contract to Local 825 in 1959 and that no copy was returned to Nami by 825. On August 22 Dewey Nami asked Wilson about Nami's copy of the contract and was told Nami had no copy. Dewey told Wilson to get a signed copy. Wilson then called Local 825 and copies were forwarded by the Local on August 28 (Respondent's Exhibit No. 3.) These were signed by Nami and returned to Local 825 in an envelope postmarked August 30 (Respondent's Exhibit No. 1.)

¹² Smith was not examined by either counsel on this point so Nami's testimony is uncontradicted.

¹³ Counsel for Respondent contends that receipt of the contract ended any dispute with Nami. Smith's only explanation was that on September 1 or 2 "We all went for coffee and that was it." According to this record no contract between Local 825 and Ehret was ever signed.

Respondent's defense rests, in part, on its claim that its dispute with Nami was a primary dispute provoked by Nami's use of a nonunion operator at the jobsite and continued by its discovery that Nami had no contract with Local 825. Respondent's conduct was designed, according to Respondent, to stop Nami from using nonunion operators on Nami equipment and to secure a contract, objectives not unlawful under Section 8(b)(4)(B). Both theories suffer from inconsistencies and implausibilities when factual support in the record is asserted but the preliminary issue of the case eliminates the necessity of choice between them. The *prima facie* case of the General Counsel requires proof of inducement and encouragement of employees and threats, coercion, and restraint of Nami. This is where the case flounders.

With respect to inducement and encouragement of employees, the General Counsel's evidence discloses that only two employees of Nami had any discussion with any representative of Local 825.¹⁴ This took place on August 24 at the jobsite, the employees were Charles Nami and Steve Nagy, the union representative was Jack Smith, and the discussion was brief. Nami initiated the conversation when he approached the site and saw Smith among a group of five or six men standing at the curb. Although the men were merely standing about with neither signs nor armbands, Nami asked Smith if it was a picket line. He was told it was not and was also told that he could go to work. According to Nami he was also told by Smith that he knew what the consequences would be if he did go to work. (Nagy did not hear this; Nagy's only conversation with Smith occurred when Smith asked for his card and Nagy said he did not have it with him.) I do not assume that the General Counsel contends that Smith's statement that Nami could go to work constitutes inducement not to work. If not, then his entire case under 8(b)(4)(i) rests on Smith's parenthetical and cryptic remark regarding the consequences. Charles Nami, who was a member of Local 825 and who knew Smith and who was aware of the situation to the extent that Nami was involved, testified that he did not know what Smith meant. It could have had reference to the fact that Nagy did not have his card; it could have had reference to the dispute with Nami over the use of a nonunion operator; it could have had reference to the fact that Smith did not believe that Nami had a contract with Local 825; or it could have had reference to the Local's alleged dispute with Ehret. A remark so cloaked with ambiguity cannot be clarified by speculation and meaning cannot be supplied by hypothesis. If rejection of the General Counsel's theory required further support it could be found in Nagy's testimony that he had been instructed by Dewey Nami *not* to do any work at the jobsite and that he knew he was not going to work there on that day. This is corroborated by Dewey Nami's testimony that he told Smith that Nami would do no work until "things straightened out." I would, therefore, if I reached this point, encounter difficulty in finding an inducement not to perform services where no performance had been contemplated. No violation of Section 8(b)(4)(i)(B) has been established.

Turning to the 8(b)(4)(ii) allegations, I find them equally void of probative support. In the absence of any 8(b)(4)(i) finding, the General Counsel must rely on direct evidence of threats, coercion, and restraint. Dewey Nami was the only partner to testify and the only partner who talked to Smith and Dewey had only two conversations, one by telephone, with Smith. The substance of these conversations has been incorporated in this report verbatim, *supra*. The most that can be made of these, and they are not free from a suggestion of evasiveness, is that Dewey Nami, upon being advised by Smith that he was having trouble with Ehret over a contract, volunteered not to perform any work for Ehret until Ehret and Local 825 settled their differences. There is not a scintilla of evidence that Nami agreed not to work at the jobsite in response to any threat, veiled or otherwise, by Smith. While it may be suspected that, since Nami's economic well-being would be aided and abetted by amicable relations with Local 825, Dewey Nami may have modified his testimony, it is still beyond the province of the Trial Examiner to cure deficiencies in the proof by his own conjecture. More than a suggestion or request (and it is impossible to find any request made by Smith to Nami in the testimony) is required to establish threats, coercion, and restraint.¹⁵

RECOMMENDED ORDER

I recommend that the complaint be dismissed in its entirety.

¹⁴ The complaint does not allege and I do not find that either Kowleski or Eldridge were agents of Local 825 or possessed authority to bind Respondent by their statements.

¹⁵ *Carolina Lumber Company*, 130 NLRB 1438.