

Waldemar Häug, Respondent's vice president, testified without contradiction that the boiler department does not have a department chief and that the employees in the boiler department receive instructions from him, his brother, who is president of the Company, and Tony Calabrese, the plant superintendent. According to Moran's testimony, the employees in the department make repairs on their own initiative, and when necessary, ask other employees in the department to help them perform jobs requiring more than one man. When Superintendent Calabrese wishes to have a specific job done, he sends a message to the boiler department and whoever is there to receive the message will carry out the order. The record shows Moran receives a weekly salary of \$225, but the record does not indicate how Moran's salary compares with the salary of the next highest salaried employee in the department.

There is no evidence in the record to support a finding that Moran has the authority to hire or discharge employees or effectively recommend the same. Nor is it established that Moran responsibly directs employees. Therefore, as the record does not establish that Moran possesses the statutory indicia of supervisory authority, we affirm the Trial Examiner's ruling that the complaint be dismissed.³

[The Board dismissed the complaint.]

MEMBER LEEDOM took no part in the consideration of the above Supplemental Decision and Order.

³ Cf. *Nassau and Suffolk Contractors' Association, Inc., and its Members*, 118 NLRB 174, 181-184.

District Council No. 19 and Local 334, Brotherhood of Painters, Decorators and Paperhangers of America and Frank D. Fabian and William B. G. Pitman Co., Inc.; George Simmons t/a Simmons and Ruiter; and Other Employers. Case No. 22-CB-361. June 20, 1962

DECISION AND ORDER

On February 15, 1962, Trial Examiner John H. Eadie issued his Intermediate Report in the above-entitled proceeding, finding that Respondents 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 and the Respondents filed a brief in reply.

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 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 and briefs, and the entire record in the case, and hereby adopts the findings and conclusions of the Trial Examiner, only insofar as they are consistent with the Decision and Order.

On or about September 13, 1960, the Respondents entered into collective-bargaining agreements effective from about May 1, 1960, to about April 30, 1963, with Pitman, Simmons, and approximately 60 other employers, all of whom are engaged in the construction industry in the Bergen County, Paterson, and Passaic areas of New Jersey. These agreements have a union-security clause requiring union membership after 7 days of employment, and establish exclusive hiring halls to be maintained by the Respondents for the purpose of supplying the employers with painters. The agreements also contain the following provision:

Article III, Section 3.7(g). Anything to the contrary herein notwithstanding, any employee who has at any time registered at any Union Hiring Hall and who thereafter:

* * * * *

(3) works at the trade in an area not covered by this Agreement for an Employer who is not signatory or who has not accepted and is not abiding by a Collective Bargaining Agreement with a Trade Union covering said employment, shall thereafter be denied the use of the Hiring Hall for a period of one (1) year.

There is no evidence that any employee has ever been denied use of the hiring hall for failure to comply with the requirements of the foregoing contractual provisions. Similarly there is no showing that any employer ever violated its provisions. However, the Respondents' special notification to the employees concerning its provisions¹ clearly establishes that, at all times material, section 3.7(g) was in effect.

In finding no violation of Section 8(b) (1) (A) in the maintenance and enforcement of section 3.7(g) (3) of the agreements, the Trial

¹ On October 6, 1960, the Respondents sent a letter to all union members and posted copies of the letter at the District Council's office and meeting hall at the Passaic, Hackensack, and Paterson hiring halls of the District Council, as well as at the respective locals operating those hiring halls. In this letter the Respondents explained the operation of their hiring halls and stated, "You will be denied the use of the Hiring Hall for a period of one year if you work at the trade in the manner set forth in Section 3.7(g) (1) or (2) or (3) of the Union Agreement."

Examiner relied, in part, upon article II, section 2.3,² of the agreement which provides there shall be no discrimination against "new employees" either in hiring or referral "because of membership or non-membership in the Union." He also appears to accept the Respondent's position that under *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Los Angeles-Seattle Motor Express) v. N.L.R.B.*,³ there can be no violation absent a showing of actual discrimination designed to encourage or discourage union membership or activities. We are unable to agree with the Trial Examiner. Thus, section 3.7(g)(3), apart from any other consideration, applies to already registered employees and not to new employees as does article II, section 2.3. Secondly, the critical issue does not involve hiring practices alleged to be unlawful under Section 8(a)(3) and 8(b)(2) of the Act. Rather it is whether section 3.7(g)(3) unlawfully restrains and coerces employees in the exercise of their Section 7 rights to engage in, or refrain from engaging in, union activities, by barring previously registered employees from the use of the hiring hall for a period of 1 year, if they work under non-union conditions outside the area covered by the Respondents' agreements. To state the issue is to answer it. For, the penalty of relinquishment of the right by registered employees to have access to the hiring hall should they work under nonunion conditions outside the area inevitably serves as a restraint upon their right under the Act to engage or not to engage in union activities for the duration of the agreements. Under such circumstances the fact that the sanction of section 3.7(g)(3) has never been enforced against any employees does not preclude the finding of a violation, for it is the restraining and coercive effect of the 1-year sanction, which is tantamount to a threat of loss of employment opportunity in the contract area, that contravenes the Act. In fact, the need or opportunity to impose the sanction prescribed by the provision would diminish in direct proportion to the effectiveness of the unlawful threat.

Consequently, we find, contrary to the Trial Examiner, that Respondents by maintaining section 3.7(g)(3) in their agreements have been and are violating Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

The Board upon the basis of the foregoing facts and the entire record, concludes as follows:

1. William B. G. Pitman Co., Inc., and George Simmons t/a Simmons and Ruiters, are employers within the meaning of Section 2(2)

² The Trial Examiner's citation of this provision as article II, subsection (3), is an inadvertence because there is no subsection 3 under the article.

³ 365 U.S. 567.

of the Act and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District Council No. 19 and Local 334, Brotherhood of Painters, Decorators and Paperhangers of America, are labor organizations within the meaning of Section 2(5) of the Act.

3. By including and maintaining in effect a contract provision which denies the use of the hiring hall for a period of 1 year to any employee who works at the trade, in an area not covered by Respondents' agreement, for an employer who is not signatory to or who had not accepted and is not abiding by a collective-bargaining agreement with a trade union covering such employment, Respondents have engaged in and are engaging in unfair labor practices in violation of Section 8(b)(1)(A) of the Act.

4. The activities of Respondents set forth above, occurring in connection with the operations of the employers hereinabove described, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

As we have found that the Respondents have engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order that they cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act. Nothing in our order shall be deemed to set aside the existing collective-bargaining agreement between Respondent and employers nor to affect any provision thereof other than the one found above to be unlawful.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended the National Labor Relations Board hereby orders that Respondents, District Council No. 19 and Local 334, Brotherhood of Painters, Decorators and Paperhangers of America, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Including and maintaining in effect in collective-bargaining agreements with William B. G. Pitman Co., Inc.; George Simmons t/a Simmons and Ruiters; and any other employers with whom Respondents have collective-bargaining agreements, any provision which denies the use of the hiring hall, permanently or temporarily, to any employee who works at the trade, in an area not covered by Respondents' agreements, for any employer who is not signatory to or who has

not accepted and is not abiding by a collective-bargaining agreement with a trade union covering such employment.

(b) Notifying employees and members that they will be denied the use of the hiring hall for failure to comply with the provision referred to above.

(c) In any like or related manner restraining or coercing employees of William B. G. Pitman Co., Inc.; George Simmons t/a Simmons and Ruitter; or any other employer, in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

(a) Post at their offices, meeting halls, and hiring halls, copies of the notice attached hereto marked "Appendix."⁴ Copies of said notice, to be furnished by the Regional Director for the Twenty-Second Region, shall, after being duly signed by the Respondents' authorized representatives, be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that such notices are not altered, defaced, or covered by any other material.

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

⁴ 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 OF DISTRICT COUNCIL No. 19 AND LOCAL 334, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby give notice that:

WE WILL NOT include and maintain in our collective-bargaining agreements with William B. G. Pitman Co., Inc.; George Simmons t/a Simmons and Ruiter; or any other employer, any provision which denies the use of the hiring hall, permanently or temporarily, to any employee who works at the trade, in an area not covered by the above-mentioned agreement, for an employer who is not signatory, or who has not accepted and is not abiding by a collective-bargaining agreement with a Trade Union covering such employment.

WE WILL NOT notify employees and members that they will be denied the use of the hiring hall for failure to comply with the provision referred to above.

WE WILL NOT in any like or similar manner restrain or coerce employees of William B. G. Pitman Co., Inc.; George Simmons t/a Simmons and Ruiter; or any other employer, in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

DISTRICT COUNCIL NO. 19 AND LOCAL 334,
BROTHERHOOD OF PAINTERS, DECORATORS
AND PAPERHANGERS OF AMERICA,
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, 704 Broad Street, Newark 2, New Jersey, Telephone Number, Market 4-6151, if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding, initiated by a charge filed on March 13, 1961, by Frank D. Fabian, an individual, involves allegations that District Council No. 19 and Local 334, Brotherhood of Painters, Decorators and Paperhangers of America, herein jointly called the Respondents, violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended. A hearing before Trial Examiner John H. Eadie was held at Newark, New Jersey, on September 21, 1961. At the close of the hearing

the Respondents presented oral argument on the record. After the conclusion of the hearing the General Counsel and the Respondents filed briefs with the Trial Examiner.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANIES

William B. G. Pitman Co., Inc., is a New Jersey corporation with its principal office and place of business in the city of Hackensack, where it is engaged, and at various other places of business in the States of New Jersey, New York, and Connecticut, in the business of providing and performing painting and related services. During the year prior to July 20, 1961, the date of the complaint herein, Pitman performed services valued at in excess of \$50,000, of which services valued at in excess of \$50,000 were performed in States other than the State of New Jersey.

George Simmons, a private individual doing business under the name and style of Simmons and Ruter, has his principal office and place of business in the city of Paterson, New Jersey. He is engaged at said place of business, and at various other places of business in the State of New Jersey, in the business of providing and performing painting and related services. During the year prior to the date of the complaint herein, Simmons performed services valued at in excess of \$50,000, of which services valued at in excess of \$1,000 were furnished, *inter alia*, The Great Atlantic and Pacific Tea Company, a retail enterprise whose gross annual revenue is in excess of \$500,000 and which purchases annually produce and other goods valued at in excess of \$50,000 which are shipped to its stores across State lines in interstate commerce.

The complaint alleges, the Respondents' answer, as amended, admits, and the Trial Examiner finds that Pitman and Simmons each is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

District Council No. 19 and Local 334, Brotherhood of Painters, Decorators and Paperhangers of America, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Since on or about September 13, 1960, the Respondents have maintained in effect and enforced collective-bargaining agreements, effective from on or about May 1, 1960, to on or about April 30, 1963, with approximately 60 employers, including Pitman and Simmons, who are engaged in the construction industry in the Bergen County, Paterson, and Passaic areas of New Jersey. These agreements provide for compulsory union membership after 7 days of employment and establish exclusive hiring halls to be maintained by the Respondents for the purpose of supplying the employers with painters. The agreements contain the following provisions:

Article III, Section 3.7(g). Anything to the contrary herein notwithstanding, any employee who has at any time registered at any Union Hiring Hall and who thereafter:

(1) works at the trade and in the area covered by this Agreement without receiving the full rate of pay and all other benefits herein provided; or

(2) works at the trade and in the area covered by this Agreement for an Employer who is not signatory to this Agreement or for an Employer who has not accepted this Agreement and who is not fully complying with all the terms hereunder; or

(3) works at the trade in an area not covered by this Agreement for an Employer who is not signatory or who has not accepted and is not abiding by a Collective Bargaining Agreement with a Trade Union covering said employment, Shall thereafter be denied the use of the Hiring Hall for a period of one (1) year.

On or about October 6, 1960, the Respondents sent a letter to all union members, advising them that the above-quoted provisions were contained in the collective-bargaining agreements with the area employers. Copies of this letter also were posted

"at the District Council's office and meeting hall, and at the Passaic, Hackensack and Paterson Hiring Halls of the District Council, and the particular local operating those hire halls"

Joseph T. Iacone, a painting and building contractor and one of the employers mentioned herein, testified credibly and without contradiction that during the 1960 negotiations with the Respondents he as "chairman" represented "all the painting contractors of Bergen-Passaic County" and as such signed the resulting collective-bargaining agreement; that during the negotiations "we" requested language such as that contained in paragraph 3.7(g) of article III of the collective-bargaining agreement; and that the employers stated at the time the reason why they wanted such language was "to maintain an established way of negotiating for other contractors that would come into the area, or other people that would come into the area, a stabilized situation whereby someone weren't allowed to get a lesser rate or better working conditions than we normally had to fulfill ourselves and comply with."

The General Counsel does not contend, nor was any evidence adduced to establish, that the Respondents barred any applicant for employment from use of the hiring halls, pursuant to the contractual provisions in question. Nor does the General Counsel contend that subsections (1) and (2) of article III, section 3.7(g), which concern employment within the area covered by the agreements, are violative of the Act. He does contend, however, that *per se* "Subsection (3) which extends the prohibition and consequent penalty to areas not covered by the agreements infringes upon the rights guaranteed in Section 7 of the Act and thereby violates Section 8(b)(1)(A) of the Act." In this connection the General Counsel points out that Section 7 of the Act "preserves to an employee the right to refrain from self-organization of collective bargaining through a representative and the right to decide, who, if anyone, should represent him"; and argues that subsection 3, by threatening the loss of employment opportunities if an employee elects to refrain from engaging in collective bargaining through a labor organization, unlawfully restrains employees in the exercise of such rights.

The Respondents contend that ". . . in order to establish a violation, it must be shown, first, that actual discrimination was practiced, and second, that the discrimination stemmed from the motive of encouraging or discouraging membership in the union, or union activities. Subparagraph (3) of Section 3.7(g) has no relation at all to such a motive. It is obviously designed to preserve the standards of wages and conditions established, in this instance, not by the respondent union, but by one of its sister locals. It is obvious that both the Employers, who are painting contractors not limited to the territorial jurisdiction of the union, and the Union are directly and substantially interested in the maintenance of standards not only within the territorial jurisdictions of the local union, but wherever the Employers may have jobs and wherever the members of the local union or the district council work." As evidence of this the Respondent points to section 1.2 of the collective-bargaining agreement, which provides in part as follows:

The Employers when engaged in work outside the geographical jurisdiction of the union party to this agreement, shall comply with all of the lawful clauses of the collective bargaining agreement in effect in said other geographical jurisdiction and executed by the employers of the industry and the local unions in that jurisdiction, including, but not limited to, the provisions of the wages, hours, working conditions, and all fringe benefits therein provided. . . .

In support of its position the Respondents cite the opinion of the Supreme Court of the United States in *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Los Angeles-Seattle Motor Express) v. N.L.R.B.*, 365 U.S. 567.

In the instant case article II, subsection 3, of the collective-bargaining agreement specifically provides that there will be no discrimination against "new employees" either in the hiring by the employers or in the referral by the Respondents "because of membership or non-membership in the Union." Under the circumstances, I do not believe or find that subsection 3 of section 3.7(g) of the contract is *per se* violative of the Act.¹

RECOMMENDATION

It is recommended that the complaint be dismissed in its entirety.

¹ *Local 357, International Brotherhood of Teamsters, etc v. N L R B, supra.*