of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

MILKDRIVERS AND DAIRY EMPLOYEES UNION, LOCAL 338, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Labor Organization.

Dated_____ By_____
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 745 Fifth Avenue, New York 22, New York, Telephone Number, Plaza 1-5500, if they have any question concerning this notice or compliance with its provision.

The Lane Construction Corporation *and* Elmer G. Travis. *Case No. 3-CA-1627. September 27, 1962*

DECISION AND ORDER

On May 7, 1962, Trial Examiner John H. Dorsey 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 attached Intermediate Report. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting 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 Intermediate Report, the exceptions and brief, and the entire record in the case, and adopts the findings and conclusions of the Trial Examiner except as modified herein.[1]

The Trial Examiner found that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it refused to rehire Elmer G. Travis, and he recommended that the complaint be dismissed in its entirety. We agree with the Trial Examiner.

Specifically the Trial Examiner stated as his grounds for dismissing the complaint: ". . . I am convinced by the facts and by my observations of the demeanor of the witnesses that Travis, while in

[1] In the Intermediate Report, the Trial Examiner discussed whether the precedent set forth in *Gibbs Corporation*, 124 NLRB 1320, applies to the instant case. Further, he stated that the complaint fails for lack of proof of the fact that there was a job available for Travis. In view of our dismissal of the complaint on other considerations, we do not adopt the portions of the Intermediate Report dealing with these matters.

the employ of Respondent, did not perform his duties as a driver to the satisfaction of Respondent; and, it was for this reason alone that Respondent would not hire Travis on the Town of Gates job . . ." The General Counsel contends that in making this statement the Trial Examiner did not make credibility resolutions against the General Counsel's witnesses. While we agree that the Trial Examiner did not clearly state that he had made credibility resolutions, we believe the above statement must be construed as meaning that the Trial Examiner had discredited in material respects on both facts and demeanor the only testimony on which a violation of the Act could be based; that is the testimony of Union President Buscemi, Union Business Agent Saeva, and Travis. Indeed, such credibility findings are essential to the Trial Examiner's finding of no violation, and we cannot adopt a construction of the Trial Examiner's language which must run contrary to his intent. Therefore we find contrary to the General Counsel's contention that the Trial Examiner has discredited the General Counsel's witnesses in material respects.

The General Counsel also asserts that if the Trial Examiner did make such credibility resolutions, they are erroneous in view of the testimony of the Respondent's principal witness, Percy D. Hamilton, which he views as tending to support that of Buscemi, Saeva, and Travis, and therefore urges the Board to reject the Trial Examiner's credibility resolutions. It appears from Hamilton's own testimony, that during the discussion with the union representatives, he did refer to Travis as a "troublemaker" and that he used similar terminology in statements to Board agents during the investigative stages of these proceedings, citing this characteristic of Travis as one of the reasons why he was unwilling to take him back. However, Hamilton did testify as to Travis' incompetent work performance, and he also stated that it was such poor work performance, and the consequences thereof, which led him to characterize Travis as a "troublemaker" and the like. The Trial Examiner credited, Hamilton, and, though the matter may not be entirely free from doubt, we do not find, sufficient basis in this record, considered as a whole, for rejecting the Trial Examiner's credibility resolutions.[2] Accordingly, as he credited Hamilton as to the reasons why he did not rehire him, we cannot find that Travis' complaints and filing of grievances brought about Respondent's refusal to hire him, and we shall dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

[2] *Standard Dry Wall Products, Inc*, 91 NLRB 544.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge filed June 8, 1961, by Elmer G. Travis, an individual, complaint issued alleging that The Lane Construction Corporation, herein called Respondent,

refused to hire Travis on or about June 5, 1961, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (61 Stat. 136). Respondent filed an answer denying violation of the Act. Upon the issues raised by the pleadings hearing was held on March 19, 1962, at Rochester, New York, before Trial Examiner John H. Dorsey. Respondent and the General Counsel were each represented by counsel and each filed a brief subsequent to the hearing.

Upon consideration of the entire record, the briefs submitted, and upon my observation of the demeanor of the witnesses. I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent maintains its principal office and place of business in the city of Meriden, Connecticut, and is now and has been continuously engaged in road, bridge, and airport construction and other general construction business in the States of Massachusetts, New York, and other States of the United States other than the State of Connecticut.

At times material herein Respondent was engaged in the Rochester, New York, area on four jobs; namely, the East Rochester job, the Sea Breeze job, the Subway job, and the Town of Gates job.

During the 12 months prior to the issuance of the complaint, a representative period, Respondent in the course and conduct of its business caused goods, materials, and supplies valued in excess of $50,000 to be purchased, transferred, and delivered directly from States of the United States other than the State of New York to its construction projects within the State of New York.

I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 398, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. CONTRACTUAL RELATIONSHIP BETWEEN RESPONDENT AND UNION

Respondent and the Union have been, for many years, parties to collective-bargaining contracts. The current agreement was entered into on February 12, 1960. Insofar as here pertinent the contract provides:

> Art. III. (2) When the Employer needs additional employees, he shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union.
>
> * * * * * * *
>
> Art. XV. (1) Seniority shall be determined on a job or project basis. . . .

Also, the contract includes a four-step grievance procedure of which the ultimate step is arbitration; and, "The decision of the arbitrator shall be final and binding upon the parties."

Implicit in the contract is the prerogative of management to determine competency of job applicants.

The record reveals no antiunion animus on the part of Respondent.

IV. PERTINENT FACTS

Travis is a member of the Union and on its executive board.

Travis first worked for Respondent on a job in Batavia, New York, during 1953–54. He again went to work on an East Rochester job in 1957, the Sea Breeze job in 1958 and on the Subway job in 1959.[1] The latter two jobs were in part simultaneously under construction. Travis drove a Euclid dump truck and a Euclid converted to a water sprinkler and smaller vehicles including a pickup truck. Upon the completion of the jobs in 1960 his employment was terminated. While on these jobs he filed two grievances—one in the spring of 1960, the other about July 1960.

[1] Most of the jobs begin in the spring and work ceases on them in the fall because of the weather. Employees working on a job which is not completed are laid off and recalled according to seniority.

Both concerned his number on the seniority list. The first was resolved in his favor moving him from ninth to fourth on the seniority list; the other has not been resolved. He also complained to the New York State Labor Board, in the spring of 1959, which informally settled the matter with Respondent; and, in November 1959, he filed a charge with the National Labor Relations Board which was administratively dismissed.

Travis testified that at no time during the course of his employment on the Sea Breeze and Subway jobs did the Respondent express dissatisfaction with his work. He did state that on one occasion the bulldozer operators complained that he dumped 2 or 3 feet short of the dumping area which was causing them to do extra work. He admitted this and said it was because the brakes on his truck were not holding and for him to approach the edge of the dumping area would be dangerous. He reported the mechanical defect to Henry Reese, the master mechanic.

Reese, the master mechanic on both the Sea Breeze and Subway jobs, is a member of Local 832, Operating Engineers, its vice president and member of the executive board. He recalled the incident involving the brakes but did not recall whether they were found to be defective. Further, he testified that starting in 1959 he received numerous complaints from the shovel operators that Travis would not or could not properly place his truck with relation to the shovel to permit efficient operation. Percy D. Hamilton, Respondent's superintendent, testified that starting in 1959 he received numerous complaints from his two foremen concerning Travis' inability or refusal to properly place his truck and as a result he on numerous occasions informed the Union's business agent, John Saeva, that he wanted to discharge Travis. Saeva asked Hamilton, as a favor, to retain Travis until the completion of the Subway job, which Hamilton did.[2] Hamilton characterized Travis as a "troublemaker" and an "agitator." He explained that in using these terms he meant that because of Travis' failure to properly place his truck more work was created for other employees and this caused dissension.

In the spring of 1961 Respondent commenced hiring drivers for a new job known as the Town of Gates job. This being a new job Respondent, as provided for in the collective-bargaining contract, was free to hire whom it chose.[3] By the terms of the collective-bargaining contract persons previously employed by Respondent on other jobs had no seniority rights entitling them to employment on the Town of Gates job.

In the latter part of May 1961 the executive committee of the Union, of which Travis was a member, discussed Travis' seniority as an employee of Respondent. As a result of the discussion the committee directed Union President Buscemi and Union Business Agent Saeva to visit Respondent and attempt to have Travis employed on the Town of Gates job; this notwithstanding that Travis had not previously applied for a job and had no claim to a job by right of seniority.

On June 5, 1961, Buscemi and Saeva visited Superintendent Hamilton in his field office Travis who had accompanied them stood outside the office and overheard the conversation. Hamilton refused to hire Travis. According to Buscemi, Hamilton said he would not hire Travis because "he was a troublemaker, and he had filed many grievances with the Company."[4] Buscemi and Saeva admitted that at the time of the meeting Hamilton stated, and they did not question, that Respondent had no need for a driver at that time. The Union's representatives did request that Travis be hired to displace a laborer who was driving a dynamite truck. The record contains no evidence to support such a request. Hamilton rejected it

Following Hamilton's refusal to hire Travis on June 5, Travis filed a written grievance which was submitted to an arbitrator. The award, which issued on July 10, 1961, held:

> Lane Construction Corporation was justified under the Agreement and on the facts in refusing to employ Elmer Travis.

---

[2] Saeva admitted that Hamilton retained Travis as a favor to him. He recalled specifically only one occasion but indicated there may have been others. Upon my consideration of the demeanor of the witnesses I credit Hamilton.

[3] The contract contains a 7-day union-security clause permitted by Section 8(f) of the Act

[4] Business Agent Saeva testified that the Union's representatives told Hamilton that they wanted Travis hired so the Union could designate him as job steward. Respondent was under no contractual compulsion to hire a union member that the Union wanted to act as job steward The custom had been to designate the first union member hired on a job as steward

Prior to the issuance of the award Travis filed the charge in this case alleging that Respondent's failure to hire him on June 5 violated Section 8(a)(1) and (3) of the Act.

V. CONTENTION OF THE PARTIES

General Counsel contends that Respondent refused to hire Travis on June 5 because he filed grievances, and charges with the State and the National Labor Relations Board, during his previous employment; and, this violated Section 8(a)(1) and (3) of the Act.

Respondent contends that: (1) seniority rights on other jobs created no right to employment on the Town of Gates job; (2) Respondent had the exclusive right to determine the qualifications of new job applicants; and (3) Travis, on the Sea Breeze and Subway jobs, had failed to perform his job to the satisfaction of Respondent.

CONCLUSIONS

The collective-bargaining contract forecloses any claim by Travis to employment rights on the Town of Gates job because of seniority.[5]

The issues are whether Respondent refused to employ Travis because of the grievances and charges he filed while employed on the Sea Breeze and Subway jobs, and, if it did, was it a violation of Section 8(a)(1) and (3) of the Act.

The General Counsel relies on *Gibbs Corporation,* 124 NLRB 1320, in which the Board held that an employee in presenting complaints to an employer regarding his contractual seniority rights was engaged in activities protected by Section 7 of the Act;[6] and, in discharging an employee for engaging in such activities the employer, "clearly violated Section 8(a)(1) of the Act." Further, the Board said, "we find it unnecessary to decide whether the Company's conduct was also violative of Section 8(a)(3)" since the remedy would be the same.[7]

It is to be noted that the *Gibbs* case involved the termination of an employer-employee relationship, a relationship which is lacking in the instant case. Whether the principles enunciated in that case are applicable in a failure-to-hire case has not been pointedly decided. However, because of the ultimate findings of facts, which follow, the question need not be herein resolved.

Inasmuch as Respondent's Superintendent Hamilton, in and after 1959, advised the Union's business agent on numerous occasions that he wanted to discharge Travis—and only continued him in employment as a favor to the business agent[8]—I am convinced by the facts and by my observation of the demeanor of the witnesses that Travis, while in the employ of Respondent, did not perform his duties as a driver to the satisfaction of Respondent; and, it was for this reason alone that Respondent would not hire Travis on the Town of Gates job.[9] The credible testimony of Master Mechanic Reese, an officer of a union, which corroborates Hamilton's testimony regarding Travis' shortcomings, I find particularly persuasive.

Technically the complaint fails for lack of proof that there was a specific job(s) available for which Travis was qualified at the time he applied for employment.[10] The fact that Respondent hired additional drivers after June 5, in the absence of evidence identifying the duties of each job and proof of Travis' qualification to do one or more of the jobs, has no probative value.

I find that Respondent's refusal to hire Travis on and after June 5, 1961, did not violate Section 8(a)(1) and (3) of the Act as alleged in the complaint.

[Recommendations omitted from publication.]

---

[5] See contract provision, *supra.*

[6] This disposes of the argument in Respondent's brief that the filing of grievances by an individual is not within the purview of Section 8(a)(1) of the Act.

[7] In view of the holding in the *Gibbs* case it is unnecessary to find whether Respondent's failure to hire Travis discouraged membership in a labor organization in violation of Section 8(a)(3) of the Act

[8] There is no evidence that Hamilton's desire to discharge Travis on these occasions was motivated by Travis having filed grievances.

[9] I am not unmindful that Union President Buscemi and Business Agent Saeva testified that Hamilton said on June 5 that he would not hire Travis because "he was a trouble-maker, and he had filed many grievances with the Company." This I have weighed in reaching my conclusions.

[10] The complaint contains no allegation that work was available or that Travis was qualified. See, *Newton Brothers Lumber Co.,* 103 NLRB 564.