

sented by the Metal Polishers, and not to the Metal Polishers or its members.

### DETERMINATION OF DISPUTE

Upon the basis of the foregoing findings of fact and upon the entire record in this case, the Board makes the following determination of dispute pursuant to Section 10(k) of the Act:

Employees performing the work of snaggers in the Company's department 23 are appropriately included in the bargaining unit presently represented by Metal Polishers, Buffers, Platers, and Helpers International Union, Local No. 3, AFL-CIO, and not in the bargaining unit now represented by Aerol Aircraft Employees' Association, and are entitled to do the work of snagging.

MEMBER FANNING took no part in the consideration of the above Decision and Determination of Dispute.

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**Utah Plumbing and Heating Contractors Association and Its Members and Local Unions Nos. 19, 57, 348 and 466 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO. Case No. 27-CA-961 (formerly Case No. 20-CA-1670). April 29, 1963**

### SUPPLEMENTAL DECISION AND ORDER

On March 7, 1960, the Board issued a Decision and Order in the above-entitled case<sup>1</sup> finding that the Respondents had locked out certain employees for 3 days in violation of Section 8(a)(1) and (3) of the Act and directing that the Respondents make these 13 employees whole for any loss of pay suffered by reason of Respondents' discrimination against them. Thereafter, the Board's Order was enforced in full by the United States Court of Appeals for the Tenth Circuit and a decree was entered on September 27, 1961.<sup>2</sup>

On November 9, 1962, the Board's Regional Director for the Twenty-seventh Region issued a backpay specification and, on December 3, 1962, Respondent Association filed an answer thereto. Upon appropriate notice issued by the Regional Director, a hearing was held before Trial Examiner Howard Myers for the purpose of determining the amount of backpay due the 13 claimants. On February 7, 1963, the Trial Examiner issued his Supplemental Intermediate Report, attached hereto, in which he found that the 13 claimants were

<sup>1</sup> 126 NLRB 973.

<sup>2</sup> 294 F. 2d 165.

entitled to payment by the Respondent Association of \$995.04. Thereafter, the General Counsel filed limited exceptions to the Supplemental Intermediate Report.

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 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 entire record in this case, including the Supplemental Intermediate Report and General Counsel's limited exceptions, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modification noted below.

The General Counsel excepts to the Trial Examiner's failure to find that Respondent Pharris T. Roberts and Larry Roberts, a partnership d/b/a Standard Plumbing and Heating Contractors, herein called Respondent Standard, is also financially responsible for making the 13 discriminatees whole for any loss of pay they may have suffered. That the allegations in the backpay specification as to Respondent Standard must be deemed to be true is clearly established by the Trial Examiner's "Findings of fact" which rely upon the fact that Standard filed no answer to the backpay specification. Notwithstanding this, the Trial Examiner did not make conclusions and recommendations as to Respondent Standard apparently because "the credited evidence discloses that Standard has long since gone out of business and that Larry Roberts filed a voluntary petition in bankruptcy on November 13, 1962 . . . ."

In *Nathanson, Trustee in Bankruptcy of MacKenzie Coach Lines v. N.L.R.B.*,<sup>4</sup> the Supreme Court held that in the case of a backpay award against a bankrupt employer the Board occupies the position of a creditor and may prove the backpay claim as a debt founded upon an "implied" contract under the terms of the Bankruptcy Act. Therefore we shall include Respondent Standard in our Order.

### ORDER

On the basis of the foregoing Supplemental Decision and the entire record in this case, the National Labor Relations Board hereby orders that the Respondents, Utah Plumbing and Heating Contractors Association and its Members and Standard Plumbing and Heating Contractors, Salt Lake City, Utah, their officers, agents, successors, and assigns, shall make whole the employees here involved by the payment of the backpay set forth in the attached Appendix A.

<sup>4</sup> 344 U.S. 25.

APPENDIX A

Richard H. Grow.....	\$82.80	Fred K. Griffith.....	\$82.80
Marco Joe Brunotti.....	82.80	Robert C. Clifford.....	82.80
Richard D. Powers.....	82.80	Brent F. Roberts.....	67.68
Charles R. Moake.....	82.80	Gary P. Roberts.....	82.80
Robert J. Erskine, Jr....	37.20	Clifford Nielsen.....	82.80
James O. Barlow.....	82.80	Stanley Cahoon.....	82.80
Henry P. Mock.....	62.16	Total.....	995.04

SUPPLEMENTAL INTERMEDIATE REPORT

STATEMENT OF THE CASE

On March 7, 1960, the National Labor Relations Board, herein called the Board, issued its Decision and Order in the above-entitled case<sup>1</sup> directing that the Utah Plumbing and Heating Contractors Association and its Members, herein referred to as Respondents, take certain affirmative action, including, among other things, to make whole certain employees for any loss of pay resulting from Respondents' unfair labor practices in violation of Section 8(a) (3) of the Act.

The Board, as part of its remedy, specifically ordered (1) the Utah Plumbing and Heating Contractors Association, herein called Respondent Association, and Respondent Walsh Plumbing Company (formerly known as J. G. Wedding, d/b/a Walsh Plumbing Company and/or Fishland, Inc.), herein called Walsh, a member of Respondent Association, to make Robert A. Garity and Neill L. Brook whole for any loss of wages they might have suffered as a result of Walsh's and Respondent Association's discrimination against them; and (2) Respondent Association and the Respondent Partnership composed of Pharris T. Roberts and Larry Roberts, d/b/a Standard Plumbing and Heating Contractors, a member of Respondent Association, and herein called Standard, to make Richard H. Grow, Marco Joe Brunotti, Richard D. Powers, Charles R. Moake,<sup>2</sup> Stanley Cahoon, Robert J. Erskine, Jr., James O. Barlow, Henry P. Mock, Fred K. Griffith, Robert C. Clifford, Brent F. Roberts, Gary P. Roberts, and Clifford Nielsen whole for any loss of wages they might have suffered as a result of Respondent Association's and Standard's discrimination against them.

In due course, as detailed below, the aforesaid Board Decision and Order was reviewed by the United States Court of Appeals for the Tenth Circuit and on August 24, 1961, the court granted enforcement<sup>3</sup>

The parties having been unable, through informal negotiations, to agree upon the backpay due the 15-named discriminatees, the Regional Director for the Twenty-seventh Region, on November 9, 1962, by virtue of Section 102.52 of the Board's Rules and Regulations, Series 8, as amended, duly served upon Respondent Association and upon all of its members, including Walsh and Standard, backpay specification as called for by the aforesaid rule.<sup>4</sup>

The specification alleged that the 13-named employees of Standard each would have worked, absent the discrimination against him, a total of 24 hours from April 1 through April 3, 1959, and each of the 2-named employees of Walsh would have worked, absent the discrimination against him, a total of 8 hours on April 2 and 3, 1959.

The specification further alleged that there is due to Standard's 13-named discriminatees from Standard and Respondent Association the sum of \$1,076.40 and from Respondent Association and Walsh to the 2 named Walsh discriminatees the sum of \$110.40, less, in each case, whatever taxes are required to be withheld by Federal and State laws.

On December 3, 1962, Respondent Association duly filed an answer denying certain allegations of the specification. The answer affirmatively averred that Standard was not a member of Respondent Association at the time of the commission of the unfair labor practices in 1959, nor has it been a member since that date. The answer also disclaimed any financial liability for any backpay due the 15-named discriminatees.

<sup>1</sup> 126 NLRB 973.

<sup>2</sup> Also referred to in the record as Charles R. Mooke.

<sup>3</sup> 294 F. 2d 165.

<sup>4</sup> Walsh, however, was not served with the specification until November 14, 1962.

At the hearing herein, which was held, pursuant to due notice, at Salt Lake City, Utah, on December 18, 1962, before Trial Examiner Howard Myers, the Board and Respondent Association were represented by counsel. Full and complete opportunity was afforded the parties to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally on the record at the conclusion of the taking of the evidence, and to file briefs on or before January 11, 1963. A brief has been received from counsel for the Board which has been carefully considered.

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

### 1. Prefatory statement

During the course of the present hearing, the General Counsel's motion, to strike from the backpay specification all the allegations with respect to Walsh on the ground that Walsh had made Robert A. Garity and Neill L. Brook whole for any loss of wages suffered by them due to Respondents' discrimination against them, was granted without objection.

Standard filed no answer to the backpay specification and, in accordance with Rule 102.54(c) of the Board's Rules and Regulations, Series 8, as amended, I deem true all the allegations of said specification with respect to Standard.

### 2. Findings of fact

The evidence with respect to Respondent Association and Respondent Standard, most of which is either undisputed or admitted by stipulation or otherwise, may be summarized as follows:

On August 11, 1959, pursuant to due notice to Respondent Association and to each of its members, a hearing in the original proceedings was held before Trial Examiner William E. Spencer.

On October 6, 1959, Trial Examiner Spencer issued his Intermediate Report and Recommended Order in which he found that Respondent Association and its members had engaged in certain unfair labor practices. He further recommended that, in order to effectuate the policies of the Act, the Board order Respondent Association and each of its members, their respective officers, agents, successors, and assigns, to (1) cease and desist from engaging in the conduct found to be violative of the Act, and (2) make whole all employees discriminated against in the lockout, shut-down, or curtailment of operations which occurred beginning on April 1, 1959, for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in "The Remedy" section of the Intermediate Report and Recommended Order. "The Remedy" section provides in pertinent part:

It having been found that the Respondents threatened to lock out their employees in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that they cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that the Respondent's lockout constituted discrimination within the meaning of Section 8(a)(3) of the Act, it will be recommended that the Respondents make whole employees laid off or locked out as a result of the action taken by the Respondent Association and Its Members, for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of a sum of money equal to that which he normally would have earned during the period of the lockout . . . .

In addition, Trial Examiner Spencer recommended that (1) Respondent Association post at its Salt Lake City, Utah, offices, and (2) that each of its members post at their respective plants at such places as notices to employees are customarily posted, a notice reading, in part, as follows:

WE WILL make whole all employees discriminated against as a result of lock-out, layoff, or curtailment of operations, for any loss of pay suffered as a result of our discrimination against them.

Respondent Association and its members filed with the Board timely exceptions to Trial Examiner Spencer's Intermediate Report and Recommended Order.

On March 7, 1960, the Board issued its Decision and Order in which it adopted, without modification, the findings, conclusions, and recommendations contained in Trial Examiner Spencer's Intermediate Report and Recommended Order. The Board's Order directed each Respondent, its officers, agents, successors, and assigns, to take, *inter alia*, certain affirmative action which the Board deemed would effectuate

the policies of the Act, to wit: (1) make whole all employees discriminated against in the lockout, shutdown, or curtailment of operations which occurred beginning on April 1, 1959, for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in "The Remedy" section of Trial Examiner Spencer's Intermediate Report and Recommended Order; and (2) "Post at the Association's office in Salt Lake City, Utah, and at the plants of each of its Members at such places as notices to employees are customarily posted, copies of the notice attached hereto marked "Appendix" [footnote omitted]. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region,<sup>5</sup> shall, after being duly signed by the Association's representative and by representatives of its Members at their respective plants where the notices are posted, . . . ." Said notice, among other things, stated:

WE WILL make whole all employees discriminated against as a result of lockout, layoff, or curtailment of operations, for any loss of pay suffered as a result of our discrimination against them.

In due course, Respondent Association and its members petitioned the United States Court of Appeals for the Tenth Circuit to set aside the aforesaid Order of the Board and the Board cross-petitioned for enforcement.

On August 24, 1961, the circuit court handed down its decision which reads, in part, as follows:

The Board adopted the findings made by the examiner. And the Board entered an order in which it required the association and its interested members to desist and refrain from threatening their employees with a shutdown, lockout, or layoff in order to force such employees and their bargaining representatives to give up their bargaining demands and accept the proposals of the association and its members without further bargaining; to cease and desist from interfering with, restraining, or coercing their employees in any like or related manner in their right of self organization; to bargain collectively; to make whole employees discriminated against in the lockout, shutdown, or curtailment of operations which had occurred; and to post notices. The association and its interested members brought the proceeding here on petition to review the order.

The order of the Board is not challenged for lack of evidence to sustain the findings of fact . . . .<sup>6</sup>

On September 27, 1961, the aforesaid court entered its decree, the pertinent portion thereof reads as follows:

. . . it is ordered, adjudged and decreed by the United States Court of Appeals for the Tenth Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced, and that Utah Plumbing and Heating Contractors Association and Its Members, their officers, agents, successors and assigns abide by and perform the direction of the Board in said Order contained.

The 13-named Standard discriminatees were locked out for 3 8-hour days (April 1, 2, and 3, 1959) and they neither received nor earned any interim earnings during that 3-day period. At the hearing herein, the Board's motion was granted without objection to further amend the backpay specification so as to allege that the rate of pay immediately prior to and during the period of the aforementioned lockout for Robert J. Erskine, Jr., was \$1.55 per hour, for Henry P. Mock was \$2.59 per hour, for Brent F. Roberts was \$2.82 per hour, and the rate of pay for each of the other 10 discriminatees was \$3.45 per hour. Accordingly, I find that there is now due and owing:

Richard H. Grow_____	\$82.80	Fred K. Griffith_____	\$82.80
Marco Joe Brunotti_____	82 80	Robert C. Clifford_____	82.80
Richard D. Powers_____	82 80	Brent F. Roberts_____	67.68
Charles R. Moake_____	82 80	Gary P. Roberts_____	82.80
Robert J. Erskine, Jr._____	37.20	Clifford Nielsen_____	82.80
James O. Barlow_____	82.80	Stanley Cahoon_____	82.80
Henry P. Mock_____	62.16		

Respondent Association contended at the hearing that it should not be held financially liable for any moneys due to the 13-named Standard employees be-

<sup>5</sup> After the issuance of this Decision and Order the case was transferred to the newly created Twenty-seventh Region.

<sup>6</sup> The order was challenged on a ground not here pertinent.

cause (1) at the time of the aforementioned lockout, Standard was not a member of said employer association, and (2) it only acts in the capacity of a collective-bargaining agent for and on behalf of its members.

As to (1) the record clearly discloses, and I find, that at the time of the 1959 lockout, Standard was in arrears in its dues to Respondent Association. Nonetheless, Respondent Association neither suspended Standard's membership therein, nor did it expel Standard from membership. Furthermore, Standard participated in the March 31, 1959, Respondent Association meeting where the members of that organization were advised to lock out their employees if the union involved did not accept Respondent Association's contract terms. In addition, (1) in June 1960 Respondent Association billed Standard for dues covering the second quarter of 1959 through the third quarter of 1960; (2) under date of July 31, 1959, Respondent Association wrote Standard that the Board was seeking certain data concerning the complaint case and asked Standard to submit such data; (3) under date of November 12, 1959, Respondent Association sent Standard a letter addressed, "Attention All Members," advising Standard of a forthcoming association dinner meeting; and (4) under date of August 31, 1959, Respondent Association wrote Standard advising it what had transpired at a meeting of plumbing contractors held on August 27, 1959. In addition, the parties stipulated in the original proceedings that Standard was a member of Respondent Association on March 31 and April 1, 1959. Under the circumstances, I find no merit to Respondent Association's contention that Standard was not one of its members at the time of the lockout in question.

As to (2) the Board and court each found that Respondent Association and those of its members who had locked out their respective employees had violated Section 8(a)(3) and (1) of the Act. The Board ordered Respondent Association as well as those of its members who had discriminated against their employees to make said employees whole for any loss of wages they may have suffered as a result of the discrimination against them. The Tenth Circuit enforced said order. It thus follows that Respondent Association is financially responsible for making the 13 Standard discriminatees whole or any loss of pay they may have suffered.<sup>7</sup>

The credited evidence discloses that Standard has long since gone out of business and that Larry Roberts filed a voluntary petition in bankruptcy on November 13, 1962, listing his liabilities about \$150,000, and his assets, consisting mainly of "hand tools and various small items," about \$3,000.

### 3. Conclusions and recommendations

Upon the foregoing findings and computations, I conclude that Respondent Association is obligated to make whole the employees here involved the backpay set forth in the Supplemental Intermediate Report.

It is recommended that the Board adopt the foregoing findings and conclusions.

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<sup>7</sup> See *E. F. Shuck Construction Co., Inc., et al.*, 114 NLRB 727, *enfd.* 243 F. 2d 519 (C.A. 9).

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**Air Filter Sales & Service of Denver, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local No. 435. Case No. 27-CA-1250. April 30, 1963**

### DECISION AND ORDER

On January 31, 1963, Trial Examiner Herman Marx 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 attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.