

**Louis Fatigati d/b/a Fatigati Plumbing & Heating Company
and Nicholas Perrine and Frank Gentile**

**Local 69, United Association of Journeymen and Apprentices of
the Plumbing and Pipefitting Industry of the United States
and Canada, AFL-CIO and Nicholas Perrine and Frank Gentile
and Louis Fatigati d/b/a Fatigati Plumbing & Heating Com-
pany, Party to the Contract, and Plumbing and Heating Em-
ployers Association of Hudson and Bergen Counties, New
Jersey, Party to the Contract. Cases Nos. 22-CA-1508 and
22-CB-587. September 10, 1963**

DECISION AND ORDER

On July 12, 1963, Trial Examiner Frederick U. Reel issued his Intermediate Report in the above-entitled proceeding, finding that the 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 attached Intermediate Report. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief in which the Charging Parties joined.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel [Members Leedom, Fanning, and Brown].

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 and the entire record in the case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

[The Board dismissed the complaint.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

These cases, consolidated by order of the Regional Director, were heard before Trial Examiner Frederick U. Reel at Newark, New Jersey, on May 13-15, 1963, pursuant to charges filed against both Respondents on February 25, 1963, and a consolidated complaint issued April 12, 1963. The basic issue is whether Respondent Union caused Respondent Employer to discriminate against the Charging Parties because of their opposition to the Union's leadership. Upon consideration of the entire record in this case, including my observation of the demeanor of the witnesses, and upon consideration of the briefs filed by all parties (Respondents filed a joint brief, and counsel for the Charging Parties submitted a letter adopting with a minor elaboration the brief of General Counsel), I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Louis Fatigati, an individual doing business as Fatigati Plumbing & Heating Company, a plumbing contractor with headquarters at Seaford, Long Island, New

York, is engaged in several States, including New York and New Jersey, in performing plumbing and heating installations and related services. The annual value of his installations and services exceeds \$1,000,000, of which over \$150,000 worth are performed outside the State of New York. Fatigati is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION AND THE LABOR AGREEMENTS INVOLVED

Respondent Union, a labor organization within the meaning of the Act, represents plumbers in the Jersey City area. The Union and Fatigati were parties to a labor agreement identical to that existing between the Union and an association of New Jersey contractors, which provided in part:

ARTICLE II

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.

* * * * *

D. *Referral of men.* Upon request of a contractor for plumbers, the union shall immediately refer competent and qualified registrants to that 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:

* * * * *

(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 that contractor, regardless of the applicant's position on the out-of-work list.

The complaint alleges and the answers admit that "At all times material herein, . . . Fatigati and [the Union] have maintained and enforced an agreement, understanding or practice whereby membership in or clearance by Local 69 is required as a condition of employment or of continued employment of all employees hired by or who perform work for Fatigati within the jurisdiction of Local 69."

III. THE ALLEGED UNFAIR LABOR PRACTICES

The critical facts in this case are the subject of sharply conflicting testimony. I shall first set forth the version of the witnesses called by General Counsel and the Charging Party, then indicate where this version is contradicted by Respondents, and then state my reasons for resolving the issues thus presented.

A. *The facts as presented by General Counsel and the Charging Parties*

This case (so it is urged) should be viewed as a sequel to an earlier proceeding against the same union, 136 NLRB 1556, in which the union was held to have caused another employer to discriminate against two employees because of their positions in Local 14, a predecessor to Respondent Union. Thus, as background evidence, Nicholas Perrine, one of the Charging Parties, testified that in June 1962 he was warned by Peter Zampella, business agent of the Respondent Union, not to associate with certain former members of Local 14, including Frank Gentile, the other Charging Party. In July 1962, according to Perrine, Zampella said "he was going to make damn sure that [Gentile] paid any moneys that he owed [the Union] and that when the time came it would be a cold day in hell before Frankie Gentile would work again." Gentile testified that he engaged in fisticuffs with Zampella in July 1962, that Zampella on that occasion assaulted him with a rock, and that he thereafter instituted a civil suit against Zampella which was later withdrawn following some union pressure on Gentile to do so. In October 1962, Gentile refused Zampella's request to come to the union hall to discuss Gentile's prospective testimony against the Union as a subpoenaed witness in a Federal district Court. (Gentile thereafter appeared in court, but was not called to testify.) Finally, on January 6, 1963, the Union held an election of officers; Gentile filed a protest over the election and expressed his views thereon at a union hearing which took place about 1 week after the election or shortly before his loss of employment on January 16.

On January 16, 1963, and for several months prior thereto, Gentile and Perrine were working as a "team" on a job variously known as the "Country Village" or "Route 440" job. This job, on which Fatigati held the plumbing contract, had been in progress for many months; Gentile and Perrine had been employed on it since May 1961 and March 1962, respectively. From time to time during the period of their employment they would be transferred to other Fatigati jobs in the area, and then would be transferred back to Country Village. On one occasion, well after his fight with Zampella, Gentile served as a foreman for Fatigati on the 28th Street job in Bayonne; shortly before Christmas 1962, Perrine served as foreman for Fatigati on the Clifton Place job. The latter job led to a complaint on Perrine's part that he had not received proper foreman's pay. He raised the matter with Zampella, his business agent, and received the money to which he was entitled.

In all their transfers away from and back to the Country Village job, Perrine and Gentile would simply report to the job to which they were assigned. Normally when they were working at Country Village, they would learn of a new assignment from the shop steward, Fallon, or from Fatigati's chief lieutenant, DeLuca, who would tell them that on the next day they were to report to Clifton Place, or 28th Street, or wherever the new job was to be. On the afternoon of January 16, 1963, however (according to testimony adduced by General Counsel, which is sharply contradicted by the testimony adduced by Respondents), Fallon told Perrine and Gentile that the next morning they were to report to Zampella at the union hall, get a "clearance," and then go to the Bayonne Boulevard Towers job. Perrine and Gentile then went to the field office where they talked to DeLuca, the general foreman; Foreman DeSanto was also present. Perrine asked if they could stay at Country Village, to which DeLuca replied that he had called Zampella, that Perrine and Gentile were to report to the hall the next morning, get their clearance, and go to the Bayonne Boulevard Towers job, and that if they had anything to say, they would have to say it to Fatigati.

Early the next morning Perrine and Gentile went to the union hall. Zampella told them he knew nothing about any clearance or about their being transferred to another job, and that so far as he was concerned they were laid off and could go on the out-of-work list. Perrine commented to Zampella that "this looks like a real railroad job to me." Gentile and Perrine then returned to the Country Village job where they told DeLuca of their conversation with Zampella. DeLuca said if they wanted any information they would have to call Fatigati. Although the record is none too clear, it appears that either on this occasion or on the following day, DeLuca gave them layoff slips, which they needed to collect unemployment compensation.

Perrine and Gentile then called their attorney, John Craner, who on January 18 telephoned Fatigati in their behalf. In this conversation, Fatigati stated that he knew nothing about the matter of clearance through the Union or the Bayonne job, but that he had heard from DeLuca that Perrine and Gentile "had slowed down on the job." According to Craner, Fatigati also stated at that time that he needed two men at the Bayonne job. Perrine telephoned Fatigati immediately thereafter (Gentile was with Perrine and "listened in" on the conversation), and Fatigati in substance repeated what he had said to Craner. When Fatigati told Perrine, "I hear you guys laid down on me," Perrine denied the accusation.

Perrine and Gentile have not worked for Fatigati since January 16, 1963. They were, however, referred by the Union to other jobs late in March.

The foregoing recital of events is taken from the mutually corroborative testimony of Gentile and Perrine. In certain key respects their version is substantiated by the testimony of Louis DeSanto, foreman of the Country Village job, and a supervisor within the meaning of the Act, who occupied a position subordinate to that of DeLuca, the general foreman, but superior to that of Gentile, Perrine, and the other workmen. According to DeSanto, about noon on January 16, 1963, DeLuca told him that Gentile and Perrine were to report to the Bayonne job the next day and that they would have to go to the union office "to clear through to the Bayonne job." DeSanto testified that he asked "why," and quoted DeLuca as replying that that is what Fatigati wanted. DeSanto, according to his testimony, was puzzled by the novel procedure of requiring clearance through the Union, and about 2 p. m. that day suggested to DeLuca that the latter telephone Zampella to verify that the two men were to report to the Bayonne job. DeSanto testified that DeLuca telephoned at 2, but was unable to reach Zampella. According to DeSanto, DeLuca telephoned again at 2:30, in DeSanto's presence, and DeSanto heard DeLuca's end of the conversation with "Pete" (presumably Peter Zampella) in which DeLuca stated that Perrine and Gentile were to go to Bayonne and were to get clearance from Zampella. DeSanto was in the office with DeLuca later that afternoon when Perrine

and Gentile came in. He corroborated their testimony that DeLuca told them to go to the union office to get clearance to go to Bayonne, and that DeLuca told them he had talked to Zampella on the telephone to confirm the arrangement.

B. The facts as presented by the Employer and the Union

The testimony of Fatigati, DeLuca, and Shop Steward Fallon, if credited, would establish that Perrine and Gentile were discharged for poor work. Fatigati and DeLuca testified that the former, on his weekly visits to the jobsite, had complained during December 1962 of the slow pace at which Gentile and Perrine were progressing with their work, and also of their poor workmanship. According to DeLuca and Fatigati, DeLuca agreed to have Foreman DeSanto, a friend of Perrine and Gentile, speak to them about their work. When fatigati inquired early in January 1963, DeLuca told him the work had not improved, and Fatigati directed DeLuca to discharge the men.

DeLuca testified that he had told not only DeSanto but also Shop Steward Fallon about the poor work Perrine and Gentile had been doing. Fallon corroborated DeLuca on this point, and also corroborated DeLuca's testimony that on January 16, 1963, DeLuca told him to tell Perrine and Gentile they were laid off. Fallon further testified that he told Perrine and Gentile of their dismissal on January 16. According to DeLuca, they came to the field office thereafter, where he told them they were laid off and if they wanted further information to call Fatigati. DeLuca corroborated Gentile, Perrine, and DeSanto to the extent of testifying that he was talking to DeSanto in the office when the other two entered. According to DeLuca, he was in the process of telling DeSanto that this time the men were definitely being laid off, and that DeSanto would not stop DeLuca from doing so as he had on an earlier occasion. (The parties stipulated that DeSanto, if called as a rebuttal witness, would have denied interceding with DeLuca on an earlier occasion to prevent the discharge of Perrine and Gentile.)

DeLuca denied ever telephoning Zampella or communicating with him in any other way with respect to transferring Perrine or Gentile to the Bayonne Towers job, a denial corroborated by Zampella. According to Zampella, Perrine and Gentile came to his office on the afternoon of January 16 and again on the morning of January 17. (Perrine and Gentile claim to have worked a full day on January 16, but Fallon testified that they left early that day and he had to pick up tools they left behind.) On January 16, according to Zampella, they asked him for referral slips to the Bayonne job, but he told them he had had no requests for referrals to that job. The next day they asked Zampella to be put on the out-of-work list, and Perrine as he left Zampella's office said that "it looks as though this is a railroad job." According to Zampella, the two men did not mention DeLuca's name when they saw Zampella on January 16 and 17; according to DeLuca, they did not mention Zampella when they returned to the Country Village jobsite on January 17 to pick up their layoff slips. Zampella testified that he telephoned DeLuca on the morning of January 17, after Gentile had left Zampella's office, at which time DeLuca said he had laid the two off. DeLuca corroborated Zampella's testimony to this effect.

C. Other evidence bearing on the conflicting versions

As the foregoing recital shows, the respective versions are in sharp conflict. This circumstance, not unusual in cases under this Act, is nonetheless distressing with each recurrence. In some instances, to be sure, the conflict may be the result of misunderstanding or honest "coloring" of the facts by witnesses who heard, or think they heard, what they wanted to hear. In the instant case it would be pleasant to think, for example, that Perrine and Gentile misconstrued or misunderstood DeLuca, who expressed merely a wish or an expectation that the two might be needed in the near future on the Bayonne job. But on this record, no such reconciliation of the conflicting testimony is possible. DeSanto testified that he sat in the office and heard DeLuca telephone Zampella; DeLuca and Zampella testified that no such call occurred. One side or the other is deliberately fabricating this testimony, and—whatever may be the formal resolution of this conflict in this case—the participants in this litigation know who is telling the truth and who has perjured himself. This certainty is, in the nature of things, not shared by the trier of fact who is required to pass judgment on this issue, and who must therefore rely on his observation of the witnesses, on analysis of their testimony, and on other evidence to make his best guess as to which group of witnesses has fabricated a story and which is relating the truth. See *N.L.R.B. v. Dinion Coil Company*, 201 F. 2d 484, 487-490 (C.A. 2).

The instant case is rich in possibilities for discrediting witnesses on both sides of the controversy. For example, Fatigati, DeLuca, and Fallon all testified that Gentile and Perrine were discharged because of the poor work they had been doing in the last few weeks of their employment. But Fatigati had earlier signed an affidavit in which he stated that he intended to request their reemployment "when we get busy again," and in a letter to the Board's Regional Office Fatigati stated that he terminated their employment because of "lack of work." Similarly DeLuca told the investigating Board agent that he (DeLuca) would have taken the men back when "things got started again" but for the fact that they filed the unfair labor practice charges in this case. On the witness stand, DeLuca stated that he had lied to the investigator in this respect, and also in telling the investigator that the men had been told at the time of their termination that they would be called back.

The Union's chief witness was Business Agent Zampella, who was expressly discredited in an earlier proceeding arising out of discrimination which this Union caused against officers of Local 14. See *Local 69, United Association of Journeymen, etc. (Plumbing and Heating Employers Association etc.)*, 136 NLRB 1556, 1557, 1563. Zampella was an evasive witness in the instant case also; see, for example, his evasiveness and equivocation on cross-examination as to whether he heard one of the men say "this looks like a railroad job."

The Union also called as a witness one John House, who supported Zampella's testimony that Perrine and Gentile came to the union hall on the afternoon of January 16. But House said he knew Perrine and Gentile were on the out-of-work list at the time of this episode and had been for at least a few days, whereas if anything is clear on this record, it is that Perrine and Gentile were not on the out-of-work list until January 17.

The chief support for Gentile and Perrine comes from the testimony of DeSanto. But DeSanto, although a foreman, was personally friendly with Gentile and Perrine, and his testimony is plainly not binding on the employer, notwithstanding his supervisory status. His credibility also is open to attack, for in the notebook he maintained during his tenure as foreman he first showed Perrine and Gentile as having been "laid off" and then changed the entry to "knocked off," a term which carries some slight connotation of union intervention in the matter. Asked why he changed the entry, DeSanto answered: "Well, I thought maybe this—I would have to take this book with me, of course, and I figured—." Although he finally stated that he made the change "to keep [his] records straight," I am left with a clear impression that DeSanto changed his book in a misguided effort to strengthen the case on behalf of Perrine and Gentile. Cf. *N.L.R.B. v. Walton Manufacturing Company*, 369 U.S. 404, 408, quoting *Dyer v. MacDougall*, 201 F. 2d 265, 269 (C.A. 2). On the other hand DeSanto was testifying contrary to the interests of his employer and of his union; his demeanor on the stand was at least as forthright as that of Fallon, whose testimony was in support of his employer and his union.

Certain aspects of the story told by each side tend to lend credence to their tales. For example, DeSanto testified that when he had DeLuca telephone Zampella, the first call was unsuccessful as they reached only the office secretary. This bit of immaterial detail lends a degree of truth to DeSanto's narrative. Along the same line, Perrine's comment to Zampella that "this looks like a railroad job" suggests that Perrine felt he had been the victim of an arrangement between the Employer and the Union. Indeed, one may well wonder where Perrine and Gentile could have obtained the idea that they were to go to the union hall for clearance to Bayonne if they did not get it from DeLuca, for no such course had been followed in their previous transfers to other Fatigati jobs. On the other hand, one may also wonder why, if the Union and the Company were "railroading" Perrine and Gentile, they would do so in a roundabout fashion; and why DeLuca would go through the charade of a telephone call to Zampella when it would have been far easier to lay the men off directly, either for lack of work, or poor work, or both. Another factor militating against Perrine and Gentile is that their chief ally, DeSanto, testified that DeLuca told him not to tell the men of their transfer until midafternoon. DeLuca testified that in the case of *transfers* he told the men at any hour, but in the case of *layoffs* he waited until midafternoon.

D. The payroll records and the conclusions drawn therefrom

As noted above, the testimony is in hopeless conflict, the demeanor of the witnesses and the content of their testimony gives good basis for doubting the veracity of each side, and each version has elements that seem plausible and other unexplained elements that render it implausible. The actual payroll records and the testimony concerning them, however, tip the scales in favor of the Respondents.

In the first place, the testimony of DeSanto, a witness sympathetic to Perrine and Gentile, establishes that they were not replaced at the Country Estates job until the following April. The record is also clear that layoffs of plumbers had been taking place at that job in the weeks immediately preceding their termination. Moreover, the records of the Bayonne job support the Employer's claim that it would not have transferred, or asked to transfer, Perrine and Gentile to that job in mid-January.

The payroll records show that two qualified journeymen plumbers were employed at that job during the week in question. These men were Thomas Melee, Sr., carried on the payroll as "super-foreman," and Pete Pavlick, who first appears as "foreman," then is off 1 week, and then reappears from time to time as "shop steward." Testimony, which I credit, establishes that Melee was selected to head this job because of his experience in "high rise" apartments of this nature; Fatigati considered other men for this position, but not Perrine or Gentile. Other testimony, which I credit, establishes that Pavlick is one of Fatigati's oldest and most trusted workmen, who, but for his age, would have been the superintendent. I find that these two men were chosen for this job on their merits and not in any sense as substitutes for, or second choices after, Perrine and Gentile. Apart from Melee Sr. and Pavlick, the only journeyman plumber to work at the Bayonne job until the middle of March was Thomas Melee, Jr., who worked there 2 days in each of the first and third weeks of February and 2½ days the last week of that month. The payroll records show that Fatigati employed one apprentice plumber and two laborers at Bayonne for a gross total of 76 hours in the week following the termination of Perrine and Gentile, and that in the next few weeks laborers were employed there for 2 or 2½ days. The laborers' rate, however, was \$3 60 per hour as against \$4.75 for journeyman plumbers.

In short, I find that Perrine and Gentile were not replaced at Country Village, and I find that the payroll records support Fatigati's claim that they were not needed at Bayonne. Relying primarily on these records, I credit the testimony of DeLuca, Fatigati, Fallon, and Zampella. I find that the Employer did not intend to transfer Perrine and Gentile to Bayonne in mid-January, and that the allegation that he failed to transfer them because of union pressure is not supported by a preponderance of the evidence.

E. The failure to rehire Perrine and Gentile because of their unfair labor practice charge

DeLuca admitted in effect telling the Board agent that the fact that Perrine and Gentile filed an unfair labor practice charge would be a factor militating against their reemployment. This statement was made in March 1963. In the middle of that month Fatigati hired plumbers for the Bayonne job; he may, of course, also have hired for other jobs. Perrine and Gentile were referred to jobs late in March.

General Counsel, conceding that the complaint contains no allegation of a violation of Section 8(a) (4), urges me to find that the Employer violated Section 8(a) (1) by the refusal to reemploy Perrine and Gentile for having filed a charge.

What DeLuca actually said, according to his own admission, is "now that they have done this, if you [the Board agent] were in my place, would you hire them?" This is something less than an admission that actual discrimination against them for this reason had already occurred. In any event, any discrimination which did occur must have occurred no earlier than March 1963 when plumbing jobs opened up in the area. Under all the circumstances, including the fact that the issue was tangentially raised at best, and the fact that the period of limitations governing any discrimination at that time will not expire until September 1963, I deem it inadvisable to make any finding in this case that Fatigati violated the Act by failing to rehire Perrine and Gentile because they filed charges.

CONCLUSIONS OF LAW

1. Fatigati is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The preponderance of the evidence does not establish that Respondents engaged in the unfair labor practices alleged in the complaint.

RECOMMENDED ORDER

The complaint should be, and hereby is, dismissed.