

Local 373, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Local 1006, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Middlesex County (N.J.) Building Trades Council and Marshall Maintenance Corporation, Charging Party. *Case No. 22-CC-201. April 24, 1964*

DECISION AND ORDER

On December 5, 1963, Trial Examiner Owsley Vose issued his Decision 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, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision with a supporting brief, and the Respondents filed briefs in opposition to exceptions and brief of the General Counsel.

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 [Members Fanning, Brown, and Jenkins].

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 Trial Examiner's Decision, exceptions, and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon the charge filed by the Charging Party (herein called Marshall) on May 20, 1963, the General Counsel, on June 7, 1963, issued a complaint against the Respondents alleging that they had violated Section 8(b)(4)(i) and (ii)(B) of the Act (the so-called secondary boycott provisions) by picketing the premises of Okonite Company, thereby inducing and encouraging the employees of Okonite and other individuals to engage in a strike, with an object of forcing Okonite to cease doing business with Marshall. The parties filed answers denying the commission of any unfair labor practices. The case was heard by Trial Examiner Owsley Vose on October 23 and 24, 1963, at Newark, New Jersey. All parties appeared and were represented by counsel at the hearing, and were afforded a full opportunity to be heard and to examine and cross-examine witnesses. At the close of the hearing counsel for Respondents made brief oral arguments. The filing of briefs was waived by all parties.

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

FINDINGS AND CONCLUSIONS

I. THE NATURE OF THE BUSINESS OF THE EMPLOYERS

Marshall, a New Jersey corporation, has places of business at Trenton and various other places in New Jersey, where it is engaged in the business of repairing buildings, installing and moving machinery, and performing related services. In the year ending September 30, 1963, a representative year, Marshall caused more than \$50,000 worth of machine parts and other goods and materials to be shipped to its places of business in New Jersey from out-of-State sources.

Okonite, a subsidiary of Kennecott Copper Corporation, is a New Jersey corporation having its principal place of business at Passaic, New Jersey. Okonite also operates various other places of business in New Jersey and Rhode Island, including a plant at North Brunswick, New Jersey, where the unfair labor practices involved in this case allegedly occurred. At its various places of business Okonite is engaged in the manufacture and sale of wire, cable, splicing tape and related products. In the course of its operations in the past year, a representative period, Okonite caused to be delivered to its various plants in New Jersey from out-of-State sources in excess of \$50,000 worth of goods and materials. It is found, in accordance with the stipulation of the parties, that Marshall is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Okonite is engaged in commerce within the meaning of Sections 8(b)(4) and 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS

The Respondents, Local 373, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, and Local 1006, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as they admit, are labor organizations within the meaning of Section 2(5) of the Act. The Respondent Middlesex County (N.J.) Building Trades Council, hereinafter referred to as the Council, denies for the purposes of this case, that it is a labor organization within the meaning of Section 2(5) of the Act. In view of my ultimate decision herein that the picketing complained of was permissible primary picketing conducted in accordance with the requirements of the Act, it is unnecessary for me to resolve this issue.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Sequence of events

1. Events prior to the picketing at the Okonite plant

Okonite entered into a contract with Marshall to have it perform certain construction work within its New Brunswick plant. The work, which was commenced on May 13, 1963, included the moving of one bank of machines to a new location in the location in the plant, the assembling of a cabling machine sent from Okonite's main plant at Passaic, and the erection of a platform and catwalk as an extension of an existing platform. The completion of the work required the services of both ironworkers and carpenters.

John Wade, the business agent of Iron Workers Local 373, received a report that the work was in progress inside the plant the same day it was started. Wade directed Arthur Jensen, the assistant business agent of Iron Workers Local 373, to go to the Okonite plant to investigate. On Tuesday, May 14, 1963, Jensen, accompanied by Julius Fekete, the business agent of Carpenters Local 1006, went to the plant. Arriving at the guardhouse at the one employee entrance to the plant, Jensen asked to see officials of the company which was doing construction work in the plant. The guard informed Jensen and Fekete that they would not be permitted to do so, but that they could see Charles Ludolph, the personnel manager for the Okonite New Brunswick plant.

Upon arriving at Ludolph's office, Jensen inquired as to what concern was doing the construction work in the plant. When Ludolph informed him that Marshall was doing the work, Jensen requested permission to go into the plant and talk to the person in charge of Marshall's work there. Ludolph refused this request, declaring that it was against company policy to allow anyone inside the plant.

The testimony concerning the rest of the conversation between Jensen and Fekete, for the Locals, and Ludolph, for Okonite, is not altogether consistent. According to Ludolph, Jensen stated that "while he did not particularly care whether

Marshall Maintenance did the work or not, he was desirous . . . of Marshall Maintenance taking on employees from the particular Locals that he and Mr. Fekete represented." Throughout his testimony Ludolph stressed that the Locals were seeking to have Marshall employ members of Iron Workers Local 373 and Carpenters Local 1006. On the other hand, in their testimony both Jensen and Fekete were equally insistent that Jensen had not requested the hiring of union members but had merely stated that he wanted to see to it that Marshall observed the prevailing union wages and working conditions.¹ I find it unnecessary to resolve the conflicting testimony above set forth, for even if it be found that Jensen requested that Marshall employ members of Iron Workers Local 373 and Carpenters Local 1006, this does not establish that the Locals were supporting an impermissible objective in their dispute with Marshall. Squarely in point is *International Brotherhood of Boilermakers, etc., Local No. 193 (Combustion Associates, Inc.)*, 144 NLRB 1206, in which the Union demanded of the secondary employer in a similar common situs situation that "the job done by the subcontractor should be done by union boilermakers." The Board, in reversing the Trial Examiner's holding that the union's picketing of the secondary employer's premises violated Section 8(b)(4)(i) and (ii)(B) of the Act, noted that the union "was carrying out a legal protest against Green's (the subcontractor) use of nonunion labor at the situs." It is, of course, settled that primary picketing to protest the employer's failure to observe area wages and working conditions is lawful. *Houston Building and Construction Trades Council (Claude Everett Construction Company)*, 136 NLRB 321, 322-323.

In any event, Ludolph's response to Jensen's statement, either that he wanted union men hired by Marshall or that he wanted Marshall to observe the prevailing union wages and working conditions (depending upon which version one accepts), was that Jensen should take the matter up with Marshall. When Jensen requested Marshall's phone number Ludolph replied that he knew no more about Marshall than did Jensen. Jensen then asked Ludolph if he could arrange a meeting with officials of Marshall. Ludolph, apparently construing this as a request for a joint meeting between Marshall and Okonite and the representatives of the Locals, replied that he could see no useful purpose in holding such a meeting, that such a meeting should be held with Marshall. Ludolph added, however, that he would consult with his superiors about the matter and let Jensen know if he could arrange such a meeting.² Jensen and Fekete handed Ludolph their business cards and departed.³

On Wednesday morning May 15, a regular meeting of the board of agents of the Respondent Council was held. The Board consists of the business agents of the 22 craft unions which comprise the Council. Wade reported to the board of agents that Marshall was doing construction work at the Okonite plant. A decision was reached that pickets be placed outside the Okonite plant. The record does not make it clear who made this decision. The testimony of Wade, the business agent of Iron Workers Local 373, attributes the decision to commence picketing Okonite to himself and Business Agent Fekete of Carpenters Local 1006. While the complaint charges the Council also with responsibility for the picketing which occurred in this case, in view of my ultimate decision herein I need not resolve the question which is raised by some of the evidence in this case as to whether the Council, through its board of agents, also participated in the decision to picket the Okonite plant.

While at the board of agents meeting, Wade was informed that Solomon Kreitman, the attorney for Marshall, had called him. Wade requested Frank Marchitto, the

¹ On cross-examination, Ludolph testified as follows: ". . . the point was made by Mr. Jensen in the first meeting, that Marshall was nonunion and did not pay the wage scale that they should, in his estimation, have been paying."

² Ludolph testified that Jensen said in addition on this occasion that his organization had "particularly good relationships with the IBEW in Washington, D.C. (Okonite's production and maintenance employees are represented by Local 1992 of the International Brotherhood of Electrical Workers) and that if we could not reach an amicable conclusion in New Jersey, that he would contact the IBEW for whatever steps were necessary to reach an amicable conclusion." Both Jensen and Fekete denied that any such statement was made by Jensen on this occasion. I find it unnecessary to resolve this conflict in the testimony for under applicable Board law such a statement, even if believed, lacks probative value with regard to the issues before me.

³ For reasons which will become apparent hereinafter, it should be noted that the card which Jensen gave Ludolph is primarily the card of Wade, the business agent of Iron Workers Local 373. In the lower left hand corner Jensen's name appears in smaller type, with the title below, "Assistant Business Agent."

business agent of Local 456, International Brotherhood of Electrical Workers, and the president of the Council, to call Kreitman back in his behalf. Local 456 was in no way involved in the dispute with Marshall at the Okonite plant. Wade explained his action in having Marchitto call Kreitman by saying that since Fekete was not present he wanted to have Marchitto verify the substance of the conversation.

Marchitto called Kreitman with Wade listening to the conversation on an extension telephone. Kreitman asked Marchitto what the problem was. A brief discussion ensued, so Marchitto testified, "as to whether Marshall was observing union wages and working conditions at the Okonite plant." Kreitman stated that a representation case was pending before the Board involving Local 731 of the United Automobile Workers and Marshall's employees at another plant, and that an election had been held. Kreitman gave Marchitto the number of the representation case and said that Marchitto could inquire of the National Labor Relation Board to verify his statement. Marchitto said that he would check with his attorney. This conversation was the only contact the Respondents had at any time with Marshall. No other attempts were made by any of the Respondents to get in touch with Marshall.

Later that day, upon checking back with his office, Wade was informed that Ludolph, Okonite's personnel manager, was trying to reach him by telephone.⁴ When Wade returned the call Ludolph informed him that he had consulted his superiors and that they agreed that Wade's problem was with Marshall and that no useful purpose would be served by Okonite's sitting in on a meeting with Marshall and representatives of the Locals.⁵ There is a dispute as to Wade's concluding remark in this conversation. According to Ludolph, Wade closed with the remark that "he was not satisfied, that he wanted union personnel used on the job." Wade testified that he had said that his "only interest is that the union prevailing wages and conditions be upheld." Again, as indicated above, I need not resolve this conflict in the testimony for neither version is inconsistent with a lawful union objective.

After the decision was made to picket the Okonite plant, Wade asked Marchitto, the president of the Council, to consult "the attorney" about the wording of the picket sign. Pursuant to this request, Marchitto called Thomas Parsonnet, who represented both Iron Workers Local 373 and the Council at the hearing.

Later, after Marchitto had received advice from Parsonnet about the wording of the signs, Wade asked Marchitto to have the picket signs prepared in his office. This was Marchitto's office as business manager of Local 456 of the IBEW. The Council does not have an office of its own. Marchitto complied with this request and arranged with Jensen of Ironworkers Local 373 and Fekete of Carpenters Local 1006 to deliver the signs to them early Friday morning near the Okonite plant.

2. The picketing

Marchitto delivered the picket signs to Jensen and Fekete at about 6:45 a.m. on Friday, May 17, 1963. At 6:50 a.m., five pickets wearing picket signs commenced walking back and forth on a small curving triangle of land immediately outside the front gate to the plant premises. The picketing continued until 4:30 p.m. that day. The picket signs carried the following text:

Employees of Marshall Maintenance Company
which is performing construction work in
this plant are receiving less than
building trades prevailing wages.⁶

⁴ Ludolph apparently called Wade in fulfillment of his promise to Jensen on the day before. In view of the fact that the business card which Jensen handed Ludolph as he left Ludolph's office on the previous day was that of Wade, the business agent of Iron Workers Local 373, it may be that at the time Ludolph called Wade he was under the impression that he had been talking to Wade on the day before.

⁵ The foregoing finding is based on the credited testimony of Ludolph. Wade's recollection was that he requested Ludolph in this conversation to arrange a meeting with Marshall and that Ludolph said he would check into it and call Wade back. While Ludolph's memory of the circumstances under which this conversation was held is somewhat hazy, I believe his version is more consistent with the undisputed facts of the case.

⁶ It is admitted that none of the union representatives were informed at the time as to the wages paid by Marshall to employees on the Okonite job. However, in view of my ultimate conclusion herein that the picketing here involved was permissible primary picketing conducted in accordance with the requirements of the Act, I find this fact immaterial.

The Okonite plant is located on U.S. 1 in New Brunswick. At this point U.S. 1 is a limited access highway. The front gate of the plant is served by access roads from U.S. 1 and these roads which lead to the front gate are the only means of ingress and egress to and from the plant for employees and others having business at the plant. The small triangle of land on which the pickets were patrolling is bounded on one side by the entering access road and on another side by the departing access road.

Okonite's first shift is from 7:30 a.m. to 3:30 p.m. Okonite's employees commence arriving at the plant at 6:10 a.m. and the bulk of the employees normally arrive between 7 and 7:15 a.m.

The scheduled hours of Marshall's employees while on the Okonite job were from 8 a.m. to 4:30 p.m. They usually arrived at the plant about 7:50 a.m. When the picketing began, the Locals admittedly had no knowledge of the starting times of either the Okonite or Marshall employees. They made no inquiry about these matters at any time. The 6:50 a.m. starting time for picketing was chosen, according to Wade, because the Locals did not know when Marshall's employees would arrive and wanted to be there in the event the Marshall employees commenced work at 7 a.m.

The next morning, Saturday, May 18, picketing again commenced at 6:50 o'clock. However, it commenced raining hard and the pickets left at 7:15 a.m. and did not return that day. At the time the pickets were instructed to report on Saturday morning, the Locals did not know whether any Okonite employees would be working or not. There was no picketing on Sunday, May 19.

On Monday morning, May 20, the pickets again resumed picketing in the same place outside the front gate at 6:50 o'clock. Both the Okonite and Marshall employees went past the pickets and entered the plant premises. However, the Okonite employees did not go into the plant and go to work. Neither did the Marshall employees. Only Raymond Katzmar, Marshall's field supervisor at the Okonite plant, went into the building. Katzmar talked to Ludolph, but did not do any work.

David Peiffer, manager of employee relations for all of Okonite's plants, sought to reach Wade at his office by telephone around 11 o'clock that morning, but Wade was out checking jobs. Wade happened to encounter Marchitto as he was making his calls that morning. Wishing to use a telephone, Wade and Marchitto went to Marchitto's office. There Wade received a message to call his office. Upon calling his office, Wade was told to call Peiffer. After calling Peiffer several times and finding the line busy each time, Wade and Marchitto decided to go to the plant which was only two or three blocks away.

Inside the plant gate Wade and Marchitto met four officials of Local 1992, which represented Okonite's employees. The Local 1992 officials had apparently been seeking a meeting with Ludolph. The six union officials walked into the plant together. The group saw Peiffer and Ludolph inside the plant. Peiffer said that he only wanted to talk to Wade. Marchitto prevailed upon Peiffer to include him also in the talks. The four Local 1992 officials asked Peiffer to permit them to sit in on the discussions. Peiffer, after referring to the hardship to Okonite which Local 1992's work stoppage had caused and stating that they would have to suffer the consequences, finally consented to include them in discussions. Wentworth, the plant manager, sat in on the discussions also.

Peiffer opened the discussion by asking who had called the meeting and what was its purpose. Wade replied that he had received a message concerning a telephone call from Peiffer, and that it was just as convenient to call at the plant to talk to him. As to the purpose of the meeting it was stated that there was a dispute with Marshall into which Local 1992 (the Okonite employees' representative) had injected itself. Peiffer then asked what unions were on the picket line. Marchitto, who was president of the Council, replied that it could be any of the unions belonging to the Council. Peiffer then stated that he had placed the telephone call to Wade not to arrange a meeting but for the purpose of informing those concerned "that Marshall Maintenance was through as far as the job was concerned." Peiffer then asked Marchitto, who was acting as spokesmen for the picketing organizations, if that was what he wanted. Marchitto replied, "not necessarily," that he was still concerned about the conditions under which the balance of the work was to be completed. According to Ludolph, Marchitto stated in effect that he wanted "union personnel" to be used. Marchitto testified that he stated that he was still concerned about the work being completed under prevailing union wages and working conditions. For the reason indicated above, it is unnecessary for me to resolve this conflict in the testimony. At this point Marchitto and Wade asked for a recess. After stepping to one side and conferring briefly, they returned to the conference table, and Marchitto

announced "that in the light of the company's statement that Marshall was to be removed from the job, he would remove the pickets."⁷

Marchitto and Wade then left and the pickets were promptly removed. This happened between 12 and 12:30 p.m. The second shift Okonite employees reported for work on schedule. Marshall performed no further work at the Okonite plant.

B. Conclusions

It is well established that Section 8(b)(4)(B) of the Act is designed to prohibit labor organizations from engaging in picketing, strikes, and other related activities against secondary employers in an effort to achieve their goals in their disputes with the primary employers. Section 8(b)(4)(B) was not intended to reach primary picketing. Indeed, Congress in the 1959 amendments included a specific proviso stating that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing" (Section 8(b)(4)(B)). In common situs situations, such as is involved in this case, picketing may often affect the employees of secondary employers as well as the employees of the primary employer with which the union has the dispute.

In order to protect the right of unions in common situs situations to engage in primary activity the Board has established a set of criteria for determining whether the picketing or other activity is of the prohibited secondary character or is protected primary activity. As laid down in *Sailors' Union of the Pacific AFL (Moore Dry Dock Company)*, 92 NLRB 547, picketing at a common situs will be deemed of the permissible primary character if (1) the picketing is strictly limited to times when the situs of the dispute is at the secondary employer's premises, (2) at the time of the picketing the primary employer is engaged in its normal business at the situs, (3) the picketing is limited to places reasonably close to the location of the situs, and (4) the picketing clearly discloses that the dispute is with the primary employer.

The facts above set forth disclose that criteria (1), (3), and (4) are fully satisfied in this case. The General Counsel contends that because the pickets arrived at Okonite's entrance gate at 6:50 a.m. when the Marshall employees did not arrive until an hour later, the Respondents did not comply with criteria (2), and therefore the picketing is to be deemed unlawful.

Under all the circumstances of the case I cannot agree with General Counsel's contention in this regard. Employees, even though they have set working hours, do not normally arrive on the job at the very moment the workday is to begin. They ordinarily arrive somewhat ahead of time, how much depending upon a number of factors, such as the individual employee's personal habits, his means of transportation, his other early morning chores, and the like. Hence, if a picketing union is to reach the employees of the primary employer some latitude must be allowed in regard to the time it may commence picketing.

The record in this case shows that the picketing commenced about an hour before the actual arrival time of the Marshall employees and ended each day at 4:30 p.m. when the Marshall employees left. There was no picketing during the other shifts although Okonite had three shifts of employees working around the clock (except those shifts which began or ended between 6:50 a.m. and 4:30 p.m.).

The Board, in *International Brotherhood of Electrical Workers, Local Union 861, and Arneith Lard, its agent (Plauche Electric, Inc.)*, 135 NLRB 250, 255, has indicated that the *Moore Dry Dock* criteria are not to be mechanically applied but are rather to be given a reasonable commonsense application taking into consideration all of the circumstances of each individual case.

In this case, the picketing organizations were entitled to attempt to reach Marshall's employees and try to communicate their message to them. However, the picketing organizations were unaware either of the identity of the Marshall employees or of their reporting times. As pointed out hereinabove, there are normally considerable variations in the reporting times of employees generally. The picketing at the gate of the Okonite plant actually occurred on but three occasions, once from 6:50 a.m. to 4:30 p.m., another time from 6:50 a.m. to 7:15 a.m., when it was discontinued

⁷The foregoing findings are based upon the combined testimony of Ludolph, Peiffer, Marchitto, and Wade. While the individual versions of the discussions at this meeting are not completely consistent; they are substantially in harmony, and the above account is the result of my efforts to reach the most logical reconciliation of such inconsistencies as there are in the testimony. The quoted testimony is that of Personnel Manager Ludolph, who, I believe, had a more accurate recollection of the events of this meeting than did Employee Relations Director Peiffer.

because of a hard rain, and a third time from 6:50 a.m. to 12:30 p.m. On these days the Marshall employees were actually on Okonite's premises from 7:50 a.m. to 4:30 p.m. Under all circumstances of the case, I conclude that the picketing at the Okonite plant gate for 1 hour at most before the actual arrival of the Marshall employees at the plant did not constitute noncompliance with criteria (2) of the *Moore Dry Dock* standards. I am fortified in this conclusion by the recent decision of the Board in *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (New Power Wire etc.)*, 144 NLRB 1089, another common-situs case, in which "the absence of primary employees from some of the sites of the picketing for substantial periods of time," several weeks at some sites, was held under all the circumstances of that case not to establish unlawful inducement of the employees of secondary employers.

Accordingly, I conclude that the picketing at Okonite's plant gate complained of in this case was permissible primary picketing and not in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

IV. CONCLUSION OF LAW

Local 373, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Local 1006, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Middlesex County (N.J.) Building Trades Council have not violated Section 8(b)(4)(i) and (ii)(B) of the Act, as alleged in the complaint.

RECOMMENDED ORDER

It is ordered that the complaint herein be, and it is hereby, dismissed.

Tubesales and United Steelworkers of America, AFL-CIO, Petitioner. *Case No. 21-RC-8621. April 24, 1964*

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a stipulation for certification upon consent election executed on October 23, 1963, and approved by the Regional Director, an election by secret ballot was conducted on November 20, 1963, under the direction and supervision of the Regional Director for the Twenty-first Region of the National Labor Relations Board among the employees in the unit herein found appropriate. Following the election, the parties were furnished a tally of ballots. The tally shows that, of approximately 86 eligible voters, 84 cast ballots, of which 39 were for the Petitioner, 36 were against the Petitioner, and 9 ballots were challenged.

As the challenged ballots were sufficient in number to affect the results of the election, the Regional Director, pursuant to the Board's Rules and Regulations, conducted an investigation and, on January 13, 1964, issued and served upon the parties his Report on Challenged Ballots. On January 31, 1964, the Employer filed exceptions to the Regional Director's report.

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 [Members Leedom, Fanning, and Brown].