WE WILL notify Waverly Arnold Brown, in writing, that we have no objection to Brown working for Worley under certain conditions, and that we have so notified Worley.

HOD CARRIERS', BUILDING & GENERAL LABORERS' UNION OF AMERICA, LOCAL NO. 652, AFL–CIO,
Labor Organization.

Dated_____ By_____
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, California, Telephone No. 688–5204, if they have any question concerning this notice or compliance with its provisions.

International Union of Operating Engineers, Local Union No. 9, AFL–CIO [Schmidt Construction, Inc.] *and* Nolan R. Ewing.
Case No. 27–CB–236. June 10, 1964

DECISION AND ORDER

On March 10, 1964, Trial Examiner E. Don Wilson issued his Decision 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 Trial Examiner's Decision. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision, and the Respondent filed a brief in support of its exceptions and an answering brief to the General Counsel's exceptions.

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 [Chairman McCulloch and Members Leedom 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 Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

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[1] The Trial Examiner found, and we agree, that the Respondent caused the discharge of Ewing because of his lack of union membership, in violation of Section 8(b)(2) and (1)(A) of the Act. The General Counsel has excepted to the Trial Examiner's refusal to find that the Respondent also operated a discriminatory hiring hall in violation of Section 8(b)(2) and (1)(A). We find no merit in this exception, in view of the fact that both the General Counsel and the Trial Examiner stated during the hearing that this matter was not in issue.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner and orders that Respondent, International Union of Operating Engineers, Local Union No. 9, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed on July 5, 1963, by Noland R. Ewing, an individual, herein called Ewing, the General Counsel of the National Labor Relations Board, herein called the Board, issued a complaint dated August 16, 1963, alleging that International Union of Operating Engineers, Local Union No. 9, AFL–CIO, herein called Respondent or Union, violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act, as amended, herein called the Act.

Pursuant to due notice, a hearing in this matter was held before Trial Examiner E. Don Wilson at Denver, Colorado, on September 10 and 11, 1963. The parties fully participated. Briefs have been received and considered. Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF SCHMIDT CONSTRUCTION, INC.

Schmidt Construction, Inc., herein called the Employer, is, and has been at all times material, a corporation duly organized and existing by virtue of the laws of the State of Colorado and has maintained its office and place of business in Arvada, Colorado. It is engaged in the construction of highways, streets, and airport runways. During the past year, in the course and conduct of its business operations, it has performed services valued in excess of $500,000, of which services valued in excess of $50,000 were performed in States other than the State of Colorado, where the Employer is located. At all times material the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

At all material times, Respondent and the Employer have been parties to a contract containing an exclusive hiring hall provision.[1] Article V(a) and (e) of the contract read:

ARTICLE V

HIRING PROCEDURE

(a) The Employer agrees that he will give the Union the first opportunity to furnish all classes of employment that are provided for in this Agreement. The Employer further agrees that all requests for workmen will be placed with the unit [sic] dispatching office within a reasonable time prior to the contemplated date of employment of such workmen.

* * * * * * *

(e) Notwithstanding the foregoing subparagraphs, the Employer shall have the right to request by name any job applicant who previously has been employed in work covered by the jurisdiction of this Agreement and who shall have registered with the Union, whether he be a member of the Union or not,

[1] The legality of the contract is not in issue.

and if said applicant is available the Union shall refer said applicant to the Employer, regardless of said applicant's position or priority on the Union's eligibility lists.

B. *The issues*

The issues are: (1) Did Respondent refuse to refer Ewing for employment by the Employer, pursuant to the Employer's request for him, by name, because Ewing was not a member of Respondent; and (2) did Respondent cause the Employer to discharge and refuse to reinstate Ewing because Ewing was not a member of Respondent? [2]

C. *Ewing*

It does not appear that Ewing was ever a member of any union. As of May 1963,[3] he had had about 15 years' experience in operating heavy equipment.[4] A very substantial portion of this experience was obtained by working for a county in Colorado. I give no credit to Ewing's testimony that he registered on Respondent's "out of work list" at Respondent's hiring hall in 1959 and 1960, nor to his testimony as to alleged conversations he had when so registering.[5] Early in May, Ewing went to the Employer's jobsite at Strasburg, Colorado, and spoke to Marion T. Graves, the Employer's job superintendent. Ewing asked for employment. Graves said the Employer had a contract with the Union and hired all men from the Union's hiring hall. Graves told Ewing that to get a job he would have to be on the Union's out-of-work list. Ewing left.

[2] There is evidence in the record that Respondent's dispatcher, Ronnie Webber, regularly discriminated against nonunion registrants and in favor of union registrants, in dispatching registrants who were not specifically called for by an employer-party to the contract. General Counsel urges that I find, on the basis of such evidence, that Respondent violated Section 8(b)(1)(A) and (2) of the Act. The charge makes no reference to such a violation. Such violation is not related to a failure to refer Ewing pursuant to the Employer's specific request nor is it related to Ewing's discharge. Such violation is not alleged in the complaint nor was an effort made to amend the complaint so as to encompass it. Before both sides rested, Respondent was not put on notice to defend against any allegation of such violation. I consider this to be an entirely new cause of action or violation not covered in the complaint and the Board has consistently rejected findings of violation made in such circumstances. *Porter-DeWitte Construction Co., Inc.*, 134 NLRB 963, 965–966. Aside from the due process problem arising from absence of notice to Respondent, I am not satisfied that this issue was "fully litigated." Further, since only the General Counsel, under the Act, has final authority on behalf of the Board in respect to the issuance of complaints and since he has not exercised such authority in this instance, I have nothing involving an illegal practice in the administration of the exclusive hiring hall before me to decide. Finally, since such violation, if it occurred, is in nowise related to the substance of the charge herein, the General Counsel has before him no basis for exercising his final authority in complaining (as he has not done) that Respondent violated the Act with respect to such possible violation. I shall make no finding herein as to whether Respondent violated the Act in this regard since there is no such issue properly before me.

[3] All dates herein refer to 1963, unless otherwise stated.

[4] He also had a diploma from a correspondence school "covering management, maintenance and care of Diesel Engines, Tractors and heavy equipment." There is no evidence as to the qualifications of the school or its requirements for issuing a diploma. I attach no weight or significance to the diploma as evidence of Ewing's qualifications. There is no substantial evidence that Ewing was not qualified as an operator. He was not discharged because of any lack of qualification.

[5] He testified with precision that when registering in 1959, 1960, and 1963, he dealt with Curtis (the Union's secretary). During his testimony, it became abundantly clear that he had not talked to Curtis. He explained that he said it was Curtis to whom he spoke because a field examiner of the Board told him he had spoken to Curtis. (I do not credit his testimony that he was so advised.) Having stated he did not speak to Curtis as he previously had testified, he then testified that it was Webber, Respondent's dispatcher, with whom he spoke in 1959 and 1960. This testimony was likewise demonstrably false. The uncontradicted and credited testimony of Webber establishes that in 1959 and 1960 Webber owned and operated a miniature railroad at a Denver City park and that he had no connection with Respondent until after Ewing allegedly visited Respondent's hiring hall in 1960. If Ewing was not deliberately testifying falsely in this regard, he was at least very careless with the truth and apparently not much concerned with his oath.

On May 6 Ewing went to the hiring hall and spoke to Webber. He asked to register. Webber gave him a registration form to fill out and told him to state thereon his name, address, and phone number and also to state the kind of equipment he operated. Ewing wrote on and returned the form to Webber. He failed to state what he operated. Webber asked Ewing if he was an "Oiler." Ewing shook his head "Yes," and Webber wrote the word "Oiler" on the form.[6] Ewing returned to the jobsite and told Graves he was on the list. He did not mention that he was registered only as an oiler or serviceman.

On the morning of June 20, Graves needed an operator "right away," and went to Ewing's home. He told Ewing's wife that he wished Ewing to report for work. Ewing did so and was put to work as an operator of various equipment. The Employer did not request a referral from the hiring hall before Ewing commenced work. Graves told Victor Karst, the Employer's timekeeper, to call the hiring hall for a referral.

Within about an hour, Karst placed a phone call to the hiring hall and spoke to Lela Cashion, a clerk there employed.[7] He learned that none of the men were present. He told Cashion he wished a clearance for Ewing to work. He did not tell her in what classification Ewing was to work. Cashion said she had no authority to give a clearance but would turn the matter over to Webber when he returned from lunch. Karst said he would call back. He did so about 2 p.m. Cashion told him Webber had not returned and repeated that she had no authority to give a clearance and would tell Webber of Karst's call. When Webber returned, she told him Karst had called seeking a referral or clearance for Ewing and that she had told Karst either to call back or Webber would call him.[8]

As observed in footnote 2, *supra,* there is evidence that in dispatching registrants who have not been requested by name, Webber discriminates against nonunion members.[9] However, in dispatching an applicant for referral pursuant to a specific request for such applicant by an employer, membership in the Union plays no part in the dispatch. When a contractor asks for an applicant by name the applicant is dispatched whether he is or is not a member of the Union. Webber testified that if the Employer had "called and requested Ewing to go to work for them I would have assigned him to go to work for them." He further testified that he didn't send Ewing out because he didn't have an "order" for him to go to work. He readily admitted that the Employer had called Cashion and she had relayed the message to him. He insisted that the call wasn't an "order" because the Employer had not stated in what classification it wished to have Ewing dispatched. He also insisted the message he received from Cashion was merely a request for a referral which he put on his desk "because he had no record of an order being received." He said that that which he received from Cashion was not an "order" because it did not state the classification in which Ewing was to work, e.g., oiler, dozer operator, etc. He denied that the Employer wanted him to refer or dispatch Ewing to the job but said the Employer wanted a referral or "okay from the office to put [Ewing] to work." He said he didn't send Ewing out because he didn't know what work Ewing was to do. Yet he testified he woudn't have sent out Ewing even if the Employer had said he wanted him to work as an "oiler" or "blade operator" because he "had no order." He said he would have dispatched Ewing if the Employer had called him or told Cashion "that this is an order," and stated when the man was going to work. He did not know that Ewing was already working. He further testified that if an employer requests an applicant by name,[10] he has no concern in what classification the applicant is to work. Nonetheless, Webber further insisted

[6] For reasons previously stated, I do not credit Ewing's testimony as to his experiences when he allegedly registered in 1959 and 1960. Neither do I credit Ewing's testimony as to the events in the hiring hall on May 6 where it conflicts with that of Webber.

[7] This was the first time Karst, in behalf of the Employer, had requested a referral for a specific person.

[8] The findings in this paragraph are based upon the credited testimony of Cashion, whose demeanor impressed me favorably. To the extent that testimony of Karst differs from that of Cashion, it is not credited. In some of his testimony, Karst displayed an inclination to assume facts. Some of his answers were not responsive and on occasion he volunteered testimony.

[9] This matter was opened up on direct examination of Webber by Respondent's counsel. I have no doubt that Webber's testimony in this regard surprised counsel. There is no evidence that Webber's superiors were aware of either his method of dispatch or that he may not have been complying with Section 5(c) of the contract which requires nondiscriminatory referrals from the hiring hall.

[10] As this Employer did with respect to Ewing.

that he didn't dispatch Ewing because he didn't have an "order." That Ewing hadn't registered every 10 days after May 6, as required by a hiring hall rule, had no effect on his nonreferral by the Respondent. Both counsel and I questioned Webber at considerable length in an effort to clarify the distinction between the Employer's request that Ewing be referred from the hiring hall, and an "order" from the Employer. It appeared to me quite possible that there might be, in Webber's mind at least, a substantial difference between this Employer's request for Ewing's dispatch and an "order" from the Employer. As Webber testified, I was unable to perceive any difference. Having studied his testimony in the transcript, I still can perceive no difference. It may be that Webber believed there was a distinction or that there is a substantial difference which was not developed or which has escaped me. Throughout his testimony, Webber appeared to be honest and straightforward. Thus, with no equivocation he testified as to the possibly illegal manner in which he dispatched applicants or registrants who were not requested by name. I have no reason to believe he knew such was not an issue in this case or that he was unaware he might be testifying against his employer's interest. He readily admitted he had received the message from Cashion. He appeared to be patient with our apparent inability to understand what was perhaps obvious to him. Had he wished to deceive he easily could have said that Ewing was not considered by him to be on the out-of-work list because he had not re-registered every 10 days after his May 6 registration. So, too, he could have adopted the testimony of Karst that the Employer said it wished Ewing dispatched as an operator and then Webber could have testified that he did not refer Ewing because he wasn't registered as an operator,[11] but only as an oiler. So, too, Webber conveniently could have said, had he wished to lie, that he did not send out a referral for Ewing because he had been hired in violation of the contract. But Webber gave no such false testimony. He testified that when he refused to refer or dispatch Ewing, he knew Ewing was not a member of the Union. He further testified that Ewing's lack of union membership had no bearing on his refusal to dispatch Ewing. I credit this testimony. I believe Webber would have admitted that Ewing's lack of union membership played a part in Webber's failure to dispatch Ewing, had such been the truth. I have considered his admission that he discriminated against nonunion registrants when dispatching in rotation. Having so considered, I still do not find Webber was influenced by Ewing's lack of membership when he failed to dispatch Ewing. Webber's insistence that there was a distinction between the Employer's request that Ewing be dispatched and an "order" has also been considered. I see no difference of substance despite the extended efforts of counsel and myself to develop the substance, if any existed. Nonetheless, I am not satisfied that Webber told anything but what appeared to him to be the truth when testifying as to the reason he failed to dispatch Ewing. He did not refuse to refer Ewing because Ewing was not a member of the Union. General Counsel has not established the contrary by a preponderance of the substantial evidence.

Ewing, as an operator, finished the workday on June 20 and continued on the morning of June 21. There were about 30 other operators on the job, presumably members of Respondent. Shortly after noon, during the lunch period, some of the operators spoke to Ewing.[12] They wanted to know if Ewing had a permit or a card. Ewing said he didn't. They inquired how things were at the hiring hall. Ewing said he didn't know. He was asked if he had a referral slip. He said he didn't but had "been looking for someone all morning." The men thanked him and left. At 12:30 p.m., only Ewing returned to work.

Graves arrived at the job about 12:30 p.m., and observed that none of the operators was working. He spoke to a group of about 16 of them and asked "Why the job wasn't started." They replied that it was because a nonunion man was on the job, obviously referring to Ewing. They said "They didn't feel like working with a man who didn't belong to the Union." They did not return to work. Nothing in the contract required Ewing to be a member of the Union at this time. There is no credible evidence that Respondent authorized the operators to engage in this work stoppage or strike.[13]

Shortly thereafter, Graves spoke to Respondent's secretary, Curtis, on the phone in an attempt to solve his problem. Graves asked Curtis about the walkout of the

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[11] Graves testified that if he requested a particular man be dispatched as an operator, the Union would not be complying with his request if it dispatched the man when he was registered only as an oiler. Ewing was registered only as an oiler and not as an operator.

[12] There is no evidence that there was a job steward on the job.

[13] I specifically do not credit Ewing's testimony that Webber subsequently told Ewing the, Webber, had told the men to strike.

operators. Curtis said it was unauthorized and there wasn't much anyone could do if the men walked off the job. Curtis said his advice "was to take Mr. Ewing off the roller [heavy equipment] and tell the men to go back to work, that Mr. Ewing was not a Union man and was not on the out of work list." [14] Curtis pointed out and Graves agreed that Ewing had been hired in violation of the contract. Curtis told Graves that the way to solve his problem involving the work stoppage was to "get rid of the man the same way he got him." Curtis also spoke to the Employer's vice president, Vandervort, and told him the Employer would have to let Ewing go. Neither Graves nor Vandervort requested a referral for Ewing. Graves discharged Ewing shortly after this conversation, "in order to get the men to go back to work, that was [his] only alternative, was to take Mr. Ewing off the roller." Graves did not discharge Ewing because he did not get a referral.[15] Graves discharged Ewing "in order to stop this strike so we could get some work done." [16]

Shortly after his discharge, Ewing went to the hiring hall and spoke to Webber. He told Webber he had just been laid off and wanted to know what the situation was. Webber told him the contract called for the Employer to call the hiring hall for employees, Webber had no order from the Employer, and Ewing solicited his own job and went to work without a referral. Webber said he had heard that the men were going to walk off the job if Ewing stayed on the job, Webber having received a call from the men earlier in the day.[17] Ewing asked that a change in his address be noted and having been given a slip of paper by Webber, Ewing wrote his new address. Webber attached the paper to Ewing's registration.

D. *Concluding findings*

I conclude General Counsel has failed to establish by a preponderance of substantial evidence that Respondent refused or declined to grant a referral for employment with the Employer to Ewing at the Employer's request, because Ewing was not a member of Respondent.[18]

It is plain that the Employer violated Section 8(a)(3) of the Act by discharging Ewing on June 21, and by failing and refusing to reinstate him since said date. Ewing was discharged because he was not a member of Respondent. Thirty operators of the Employer refused to work if nonunion Ewing continued working. The contract or absence of referral by the Union had nothing to do with their refusal to work. Did Respondent cause or attempt to cause the Employer to discharge Ewing in violation of Section 8(a)(3)? I conclude the answer is in the affirmative. Shortly after 12:30 p.m., Respondent had the problem of continuing the job. Ewing was working and was nonunion. Thirty fellow employees wouldn't work because of this. Respondent turned to Respondent's secretary, Curtis, and asked him how to solve the problem. No doubt various alternatives had occurred to Graves. He could have fired Ewing without looking to Curtis for advice. He could have kept Ewing and fired the 30 fellow employees. He could have fired some of them as an example to others. He could have permitted the job to stay shut down. He could call Curtis and seek a solution from him. Perhaps the solution would be an effective direction by Curtis to the 30 that they should return to work and a statement by Curtis to Graves that Ewing could be retained as an employee by the Employer.

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[14] Ewing was not a union man. He was on the out-of-work list but as an oiler.

[15] General Counsel unsuccessfully attempted to lead his witness, Graves, into testifying to the contrary.

[16] The findings in this paragraph are based upon credited testimony of Graves whose demeanor impressed me favorably and upon admissions of Curtis. Graves was frank and straightforward in his testimony and refused to be led. Curtis on the other hand displayed a poor memory at what appeared to be convenient occasions and was not candid. I do not credit his testimony where it conflicts with that of Graves.

[17] I specifically do not credit Ewing's testimony that Webber told him he had no business working for the Employer because he was not a member of the Union. Nor, specifically, do I credit Ewing's testimony that Webber told him he had told the men to go out on strike. I have previously referred to the quality of some of Ewing's testimony. I here find that Ewing's testimony is not worthy of belief unless corroborated by credited testimony of others. On at least three occasions in his testimony he said that in his June 21 conversation with Webber, Webber referred to *"hiring off the hook."* I asked him if he inquired of Webber what he meant by "off the hook." Ewing then testified he didn't believe "off the hook" was mentioned by Webber. Ewing's demeanor impressed me unfavorably. Webber's denials of statements attributed to him by Ewing are credited. There is no evidence that Webber had authority to tell men to stop working.

[18] That Respondent may have had a poor or no reason for failing to dispatch does not detract from this finding.

Probably these and perhaps other alternatives were considered by Graves. He chose to call Curtis. He asked Curtis for a solution. Curtis gave him one. Curtis told him to fire Ewing and the 30 would return to work. Of course, it was or should have been obvious that to discharge Ewing, because he was not a member of Respondent, in order to get the 30 back to work would be a violation of Section 8(a)(3) of the Act. Yet this is what Curtis told, if not directed, Graves to do. So, too, did Curtis tell Vice President Vandervort "to get rid of" Ewing. The Employer discharged and got rid of Ewing pursuant to Respondent's advice. It appears plain that Curtis could have given other advice which, if followed, would not have resulted in the Employer violating 8(a)(3). Indeed, Curtis could have declined to advise. But he didn't. The Employer took no action with respect to Ewing until Curtis told Graves to discharge Ewing in violation of 8(a)(3). Further, in other circumstances I might consider Curtis' reference to Ewing as a nonunion man while recommending his discharge, as merely incidental, and descriptive of Ewing and not as substantial evidence that Curtis considered Ewing's lack of union membership to be a substantial reason for procuring his discharge.[19] In light of the entire record herein, however, I am convinced that in referring to Ewing's lack of union membership when talking to Graves, Curtis was stating a reason why Graves should discharge Ewing. I find that Curtis' advice to Graves was a moving and proximate cause of the Employer's unlawful discharge of Ewing. By causing and attempting to cause the Employer so to discharge Ewing, Respondent violated Section 8(b)(2) and 1(A) of the Act. That the Employer might have violated 8(a)(3) without the advice of Curtis does not detract from this finding. The Employer chose none of available alternatives until Respondent told the Employer to choose the alternative violative of Section 8(a)(3) of the Act. It is useless to speculate on what the Employer might have done to solve his "problem" if Curtis had given other or no advice.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of the Employer described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has caused and attempted to cause Schmidt Construction, Inc., to discriminate against Nolan R. Ewing, it will be recommended that Respondent make Ewing whole for any loss of earnings sustained by reason of discrimination against him from June 21, 1963, to the date Respondent requests his reemployment. Backpay shall be computed in accordance with the Board's formula stated in *F. W. Woolworth Company*, 90 NLRB 289, together with interest at 6 percent per annum, as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

As Respondent's unfair labor practices found herein go to the heart of the Act, it will be recommended that the Order contain a broad injunction against any form of restraint or coercion by the Respondent.

Upon the basis of the above findings of fact, and on the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Schmidt Construction, Inc., is an employer engaged in commerce within the meaning of Section 2(2) and Section 2(6) and (7) of the Act.
2. International Union of Operating Engineers, Local Union No. 9, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By attempting to cause and causing Schmidt Construction, Inc., to discharge Nolan R. Ewing for discriminatory reasons, in violation of Section 8(a)(3) of the Act, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[19] Cf. *Building Material and Dump Truck Drivers Local Union No. 420, affiliated with I.B. of T.C.W. and H. of A. (Southern California Chapter of the Associated General Contractors of America and Matt J. Zaich Co.)*, 132 NLRB 1044, 1047.

5. There is insufficient substantial evidence to conclude that Respondent refused to refer Ewing for employment because Ewing was not a member of Respondent.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that International Union of Operating Engineers, Local Union No. 9, AFL–CIO, its agents, officers, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Schmidt Construction, Inc., to discriminate against employees in violation of Section 8(a)(3) of the Act.

(b) In any other manner restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act except in a manner permitted by Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Make whole Nolan R. Ewing for any loss of pay he may have suffered by reason of his discharge from Schmidt Construction, Inc., as provided in the section herein entitled "The Remedy."

(b) Notify Nolan R. Ewing and Schmidt Construction, Inc., in writing, that it has no objection to the employment of Ewing in any capacity satisfactory to Schmidt Construction, Inc., and that it requests Schmidt Construction, Inc., to return Ewing to the employment from which he was discharged.

(c) Post at its offices, copies of the attached notice marked "Appendix."[20] Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after having been duly signed by a representative of Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Promptly mail to said Regional Director signed copies of the Appendix for posting, Schmidt Construction, Inc., willing, at the jobsites of Schmidt Construction, Inc., in Colorado.

(e) Notify the Regional Director for the Twenty-seventh Region, in writing, within 20 days from the receipt of this Decision, as to what steps Respondent has taken to comply herewith.[21]

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[20] In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

[21] If this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL MEMBERS

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT cause or attempt to cause Schmidt Construction, Inc., to discriminate against Nolan R. Ewing or any other employee in violation of Section 8(a)(3) of the National Labor Relations Act.

WE WILL withdraw our objection to the continued employment of Nolan R. Ewing by Schmidt Construction, Inc., and request that he be returned to the employment from which he was discharged by said Company, and we will furnish Ewing with copies of this withdrawal and the request.

WE WILL make Nolan R. Ewing whole for any loss of pay suffered as a result of the discrimination against him.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act, except in conformity with Section 8(a)(3) of the Act.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 9, AFL-CIO,
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, 609 Railway Exchange Building, 17th and Champa, Denver, Colorado, Telephone No. Keystone 4-4151, Extension 513, if they have any questions concerning this notice or compliance with its provisions.

Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento *and* Edward J. Farrell *and* Sacramento 7-Up Employees' Union, Party to the Contract. *Case No. 20-CA-2657. June 10, 1964*

DECISION AND ORDER

On February 18, 1964, Trial Examiner Wallace E. Royster issued his Trial Examiner's Decision 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 his attached Decision. He also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended dismissal thereof. Thereafter, the Respondent filed exceptions to his Decision 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 [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 and the entire record in this case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its

[1] In the absence of exception thereto, we adopt *pro forma* the Trial Examiner's conclusion that the evidence is insufficient to support the allegation that Olson was discriminatorily discharged, and his recommended dismissal of this allegation of the complaint.