

2. Respondent Union, on and after October 18, 1963, was not "currently certified" as the bargaining representative of the employees here involved within the meaning of Section 8(b)(7) of the Act.

3. In picketing for such object for more than 30 days after October 18, 1963, without a petition under Section 9(c) having been filed, Respondent engaged in an unfair labor practice within the meaning of Section 8(b)(7)(C) of the Act.

4. The unfair labor practice here found affects commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

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**Bateson-Cheves Construction Co. and John A. Mascarenas**

**International Union of Operating Engineers Local 428, AFL-CIO; Construction, Building Material and Miscellaneous Drivers Union, Local No. 83 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America [Bateson-Cheves Construction Co. and Grand Oil & Transport Co., Inc.] and John A. Mascarenas.**  
*Cases Nos. 28-CA-1018 and 28-CB-283. December 22, 1964*

**DECISION AND ORDER**

On May 13, 1964, Trial Examiner William E. Spencer issued his Decision in the above case, 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 his attached Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning 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 Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

The complaint alleged in substance that the Respondents conditioned the employment of certain employees on their membership in Engineers or Teamsters. We adopt the Trial Examiner's recommendation that the allegations of the complaint be dismissed, because we agree with him that the General Counsel has not proved that the Respondents failed to transfer the employees because of lack of "Union" membership or clearance. Thus, as the Trial Examiner found, Respondent Engineers' contract with Bateson-Cheves contained a clause requiring Bateson-Cheves to engage only "union"

subcontractors for work at the project. Bateson-Cheves had violated this provision when it engaged Grand Oil & Transport Co., Inc., to perform certain excavation work. When Respondent Engineers complained and the threat to picket the project was made to Dunn, president of Grand Oil, Dunn suggested to Bateson-Cheves that the lease arrangement be substituted for the subcontract. When Bateson-Cheves adopted this suggestion, Respondent Engineers indicated that it would not require Bateson-Cheves to obtain operators for equipment already on the project from the hiring hall but that it would clear the employees then operating the equipment.<sup>1</sup> In view of the above, we cannot find that an object of the threat to picket was to force Bateson-Cheves to replace Grand Oil with a "union" subcontractor,<sup>2</sup> or to eliminate Grand Oil's nonunion employees from the project.

The record also reveals that Cheves discussed with Featherston, the representative of Respondent Engineers, the pieces of Grand Oil equipment and the operators thereof which were to be transferred to Bateson-Cheves. When Cheves failed to mention the "self-loading scraper" operated by Mascarenas, Featherston asked him about his intentions concerning it, and Cheves replied that "the rig was down and that we do not know when it will be back into operation . . . I understand he [Mascarenas the operator of the rig] is a good hand and would you agree to refer him if we need him?" Featherston replied that "We'll cross that bridge when we get to it." Grand Oil's other employees were cleared without regard to their union membership. There is nothing in the record to indicate that Bateson-Cheves thereafter had work for Mascarenas or that Mascarenas ever attempted to obtain clearance from either Respondent Engineers or Respondent Teamsters. In these circumstances, we conclude that the failure of Mascarenas to be transferred to Bateson-Cheves' payroll was due to factors unconnected with his union membership or lack thereof.<sup>3</sup> Accordingly, in agreement with the Trial Examiner's recommendation, we shall order that the complaint herein be dismissed.

[The Board dismissed the complaint.]

<sup>1</sup>This included equipment leased from Grand Oil and equipment leased from one Hassel.

<sup>2</sup>We need not decide whether picketing with such an object necessarily constitutes an attempt to cause application of discriminatory hiring policies within the meaning of Section 8(b) (2) of the Act.

<sup>3</sup>In reaching this conclusion, we rely also on the fact that the solicitation of Grand Oil's employees to join either the Teamsters or the Engineers, depending on the nature of the work they performed, occurred after Bateson-Cheves had decided which employees it would transfer to its payroll, and on the Trial Examiner's finding that the denial of membership to Mascarenas did not cause Bateson-Cheves to refrain from hiring him.

## TRIAL EXAMINER'S DECISION

## STATEMENT OF THE CASE

The General Counsel's complaint based on charges duly filed by John A. Mascrenas, an individual,<sup>1</sup> issued under date of December 18, 1963, and alleged in substance that Respondents Engineers and Teamsters violated Section 8(b)(1)(A) and (2) of the Act, and Respondent Bateson-Cheves violated Section 8(a)(1) and (3) of the Act, by conditioning the employment of certain named employees on their becoming members of, or being cleared by, Respondents Engineers or Teamsters, according to the jurisdiction of each. In their duly filed answers the Respondents denied the commission of the alleged unfair labor practices.

All parties participated in the hearing upon the aforesaid complaint conducted by Trial Examiner William E. Spencer, at Phoenix, Arizona, on February 17 and 18, 1964, and, after the evidence had been taken, stated their positions orally or in briefs filed with me.

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 THE RESPONDENT EMPLOYER

Bateson-Cheves Construction Company, herein called Bateson-Cheves, a Texas corporation with an office and place of business at Mesa, Arizona, is a contractor in the building and construction industry in several States, including Arizona. It is and has been a prime contractor of the Bureau of Indian Affairs for the construction of certain facilities at Tes Nos Pas, Arizona. During the past 12-month period it has sold goods and materials and furnished services in excess of \$50,000 directly to firms in States other than Texas. During the same period it purchased, transferred, and had delivered to its construction site at Tes Nos Pas goods, materials, and services in excess of \$50,000, of which in excess of \$50,000 in value were transported to the construction site directly from States other than Arizona.

## II. THE LABOR ORGANIZATIONS INVOLVED

International Union of Operating Engineers, Local 428, AFL-CIO, herein called Engineers, and Construction, Building Material and Miscellaneous Drivers Union, Local No. 83, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called Teamsters, are, each of them, labor organizations within the meaning of the Act.

## III. THE UNFAIR LABOR PRACTICES

A. *The situation*

Respondent Bateson-Cheves, a prime contractor of the Bureau of Indian Affairs for the construction of certain facilities at Tes Nos Pas, Arizona, began work on the project about July 1963. Its president, G. K. Cheves, testified that it was a party to the Arizona Master Labor Agreement, to which Respondent Teamsters was also a party. He also testified that the job in question was covered by an agreement with Respondent Engineers.<sup>2</sup> The agreements in question provided for exclusive hiring halls, and Engineers agreement, at least, had a subcontractor clause requiring substantially that all subcontractors working on the Bateson-Cheves project be bound by the terms of Engineers agreement, including its hiring hall provisions.

About July, Bateson-Cheves subcontracted certain excavation and other work on the Tes Nos Pas project to Grand Oil and Transport Co., Inc., herein called Grand

<sup>1</sup> An original charge and a first amended charge were filed against Respondent Bateson-Cheves, on October 23 and December 16, 1963, respectively; original charges and first and second amended charges were filed against Respondent Engineers and Respondent Teamsters, respectively, on October 23, November 15, and December 16, 1963.

<sup>2</sup> Apparently, both Teamsters and Engineers agreements were industrywide and there is some question whether Respondent Bateson-Cheves formally executed either. I have no doubt, however, that this Respondent verbally agreed to be bound by the terms of these agreements, respectively, and the General Counsel conceded as much at the hearing.

Oil, and Grand Oil began work under its subcontract about August. Cheves admitted that he did not inform Grand Oil of Respondent Bateson-Cheves labor agreements at the time the subcontract was made. Admittedly Grand Oil was not a party to any labor agreement.

In August and September there were several conversations, some by telephone, some in person, between Cheves and Engineers Representatives Charles A. Slack and C. W. Featherston, and also conversations between these representatives and Ralph Dunn, president of Grand Oil. These conversations reflected Engineers' concern over Cheves' violation of the subcontracting clause of his agreement with Engineers, and insistence that Grand Oil be subjected to the terms of the agreement. The matter was held in abeyance for some time while Engineers representatives attempted to persuade Grand Oil to accept its agreement. Engineers made certain offers to permit present Grand Oil employees to remain on the job provided new hires, or a percentage of them, were cleared through the hiring hall, offers which Dunn admitted were fair. He, however, ultimately refused to come under Engineers agreement.<sup>3</sup> Engineers then made it known to both Cheves and Dunn that it would picket the project unless the terms of its agreement with Cheves were extended to cover subcontractor Grand Oil. Rather than have the job picketed, the existing agreement between Cheves and Dunn was terminated and a lease agreement was entered into whereby Grand Oil's equipment was leased to Bateson-Cheves, and its employees on the project, including Dunn himself who was assigned to a supervisory post, were, with one exception, transferred to the Bateson-Cheves payroll.

The several Grand Oil employees transferring to the Bateson-Cheves payroll were interviewed at the jobsite on October 15 by Featherston for Engineers, and Jack Giger and Walter Vadin for Teamsters. All transferees not already union members, signed applications for membership and paid the required initiation fees and dues to Engineers or Teamsters, as the case may be. The only Grand Oil employee denied transfer to Bateson-Cheves was the Charging Party in this case, John A. Mascarenas. Those transferring were: Darwin Bell and Steven Johnson, operators under the jurisdiction of Engineers, and Gary Harlan and Guy Stocks, truckdrivers under the jurisdiction of Teamsters.

Two other employees, Dinny Hassel and Bob Lowery, came onto the Bateson-Cheves job when Cheves leased some equipment from one, Hassel, with the understanding that the equipment would come "manned." Cheves' advice to Engineers that he intended to bring these two operators on the job without clearance through Engineers hiring hall engendered controversy, a controversy which apparently was settled when the two former Hassel employees became affiliated with Engineers or were granted clearance on the job by Engineers, as the case may be. As far as I am able to tell, the disposition of the former Hassel employees was worked out by Cheves and Engineers in conjunction with the agreed-upon transfer of former Grand Oil employees to the Bateson-Cheves payroll.

#### *B. Issues; concluding findings*

The General Counsel's position appears to be that Respondent Engineers by threatening to picket the Tes Nos Pas project caused Respondent Bateson-Cheves to break off its contract with Grand Oil, and that Respondent Engineers and Respondent Teamsters conditioned the transfer of Grand Oil and Hassel employees to Bateson-Cheves on their becoming members of Engineers or Teamsters, as the case may be. With respect to Mascarenas, the allegation is that Engineers caused Bateson-Cheves to deny him employment because of his lack of membership in and clearance by Engineers.

I have no doubt that Bateson-Cheves terminated its contract with Grand Oil and entered into the lease agreement with the latter because of Engineers' threat to picket the project. Teamsters made no such threat and was a party to no such threat. Therefore it is clear from the outset that Teamsters is not involved in this phase of the case. Though no violation by Engineers of 8(b)(4) of the Act is alleged, and no question is raised on the validity of Engineers agreement with Bateson-Cheves,

<sup>3</sup>As a matter of fact he was at no time open to persuasion on executing a union contract because, as he testified, his religious convictions barred him from making such an agreement.

if the threat of picketing involved an unlawful object the General Counsel's theory of a violation by Engineers and Bateson-Cheves of 8(b)(1)(A) and (2) and 8(a)(3), respectively, could be sustained. I am not convinced, however, that Engineers' statements to Cheves and Dunn amounted to threats of picketing for an unlawful object. Engineers exerted every reasonable means of persuading Grand Oil to an agreement and, failing, could lawfully resort to an organizational picket directed against Grand Oil's work on the project. I do not know that Engineers spelled out precisely that picketing would be of that character, as perhaps it should have, but in any event Bateson-Cheves knew that the probable effect of such a picket, though directed solely against Grand Oil, would be to shut down all work on the project, and this would suffice in itself to cause Cheves to do what he did do. Entirely aside from the subcontracting clause in its agreement, I do not see anything wrong in Engineers' attempt to solicit and urge Bateson-Cheves' assistance in persuading Grand Oil to accept the terms of Engineers' agreement. Nor do I think it was an infraction of the Act for Engineers to inform Bateson-Cheves directly and unequivocally that the failure of Grand Oil to accept the agreement would result in a picket line being established against Grand Oil's work on the project. *Construction, Building Material and Miscellaneous Drivers, Local Union No. 83, etc. (Marshall & Haas)*, 133 NLRB 1144, 1145, 1146. It would be somewhat derelict in its obligations to Bateson-Cheves if it did not do so. For these reasons I am unable to accept the General Counsel's theory that the violations charged were caused by Engineers' unalleged violation of Section 8(b)(4), though I appreciate that on this point the line may be very thin between a violation and no violation, so thin as to be at times almost though perhaps not quite meaningless, and this is so because the operations of the prime contractor and his subcontractor are so interdependent and intermingled on most construction projects that we resort at times to artificial concepts in our efforts to distinguish between primary and secondary action. *Denver Building and Construction Trades Council (William G. Churches)*, 90 NLRB 378, at 391-399. Another factor contributing to, but not controlling, my conclusion of no violation at this point, is Bateson-Cheves' decision to bring the two Hassel employees on the project without first clearing with Engineers, a direct violation of the hiring hall provisions of its agreement. It is not at all clear to me that this action did not enter into Engineers' picketing threat, and picketing Bateson-Cheves because of its violation of the hiring hall clause in the agreement, admittedly valid, would not be unlawful.<sup>4</sup>

It having been found that Bateson-Cheves' termination of its subcontract with Grand Oil, and simultaneous entering into a lease agreement with the latter, and agreement to transfer Grand Oil employees to the Bateson-Cheves payroll, are actions which do not of themselves sustain any of the unfair labor practices alleged in the complaint, it follows that both Engineers and Teamsters, under the hiring hall provisions of their respective agreements with Bateson-Cheves, could lawfully require that employees added to the Bateson-Cheves payroll be obtained through the said hiring hall procedures, whether these employees were added through transfer or otherwise. Engineers and Teamsters could not, however, require union affiliation as a condition precedent for bringing the employees involved onto the Bateson-Cheves payroll, and if the General Counsel has a case it rests, in my opinion, on such a requirement and not on an unalleged violation of Section 8(b)(4) of the Act.

Both Cheves and Dunn testified that Engineers representatives told them that Grand Oil employees would have to "go union" or "be union," but Cheves admitted that they might have stated, as they testified they did, that these employees would have to be subjected to the hiring hall provisions of the labor contract, or "cleared" with the union involved, and Dunn, who admitted on cross-examination that an Engineer representative advised him that it would be preferable if two of his employees, who were on the job temporarily, did *not* clear through the union, like Cheves, admitted that Engineers representatives may have had reference to clearance through

<sup>4</sup> It was Featherston's credited testimony that in his first telephone conversation with Cheves, the latter told him that he was renting the Hassel equipment and had agreed to bring it on the project already "manned." Featherston replied that to bring in the equipment manned would be a violation of the hiring hall agreement, and that if he persisted in this action he, Featherston "would have no alternative except to give him twenty-four hours' notice and put a picket on the job."

the hiring hall rather than union affiliation.<sup>5</sup> Cheves testified that to his way of thinking the two things meant the same since he had never known an employee to be dispatched through the hiring halls who was not a union member. This may well have been his experience and I do not question it, but in testing for a violation of the Act "union affiliation" and "clearance through a union hiring hall" do not mean the same thing. Slack and Featherston denied that they told either Cheves or Dunn that the employees in question would have to become union members; admitted that they made reference to making the job a "union" job; and testified that their reference at all times was to clearance through hiring hall procedures. The testimony of Cheves and Dunn, qualified as it was on the point, does not carry credence over that of Slack and Featherston. In so finding, I have not overlooked the fact that the two Hassel employees, and the four Dunn employees who were kept on, apparently all made applications for membership in Engineers or Teamsters, as the case may be. The fact that they made such applications and that their applications were accepted does not compel the conclusion that these applications were required as a condition of continued employment. With respect to the two Hassel employees, there is no evidence whatever other than what may be inferred from Cheves' testimony, that their acceptance of union affiliation was not voluntary. The same is true with respect to all former Dunn employees who on transferring to the Bateson-Cheves payroll made application for membership in Engineers. If one or more of these employees had refused union membership and then been denied clearance for the job, or if we had evidence that they were coerced into accepting union affiliation, the issue would be clearcut, but that is not our situation. The only evidence from which coercion could be inferred is that which established that union representatives were on the jobsite, interviewed them there, solicited their membership applications, and received them, and that they were dispatched from their jobs for the purposes of the said interviews. This is not sufficient, in my opinion, to establish that their membership applications were obtained under duress. They doubtless knew that in order to retain their jobs they would have to be cleared through the unions' hiring halls, and this being a fact and a lawful requirement, may very well have voluntarily taken the next step by making membership applications.

Coming now to the one Dunn employee who was refused transfer to the Bateson-Cheves payroll, Mascarenas, it is clear that he was willing to affiliate with Engineers, that Engineers representative was fully aware of that fact, and that he was denied clearance by Engineers because with the addition of the two Hassel operators to the Bateson-Cheves payroll, the quota of operators agreed upon by Engineers and Bateson-Cheves was already filled. Mascarenas was fully aware of hiring hall procedures, but never at any time registered on the out-of-work list maintained by Engineers and Teamsters in their respective hiring halls. It cannot be said that had he done so he would not in due course have been referred to the Bateson-Cheves payroll. The fact

<sup>5</sup> Excerpts from Cheves' testimony on cross-examination:

Q. I will ask you to think carefully now, and tell us whether the words union applications or applications were used or whether Mr. Featherston said that the union would refer some of Dunn's employees or issue referrals on Dunn's employees on that job?

A. I don't remember the exact phrasing or how it was put.

On redirect:

TRIAL EXAMINER: But as to this [Featherston's] actual words, you can't say whether he said union application or clearance for work?

The WITNESS: That's right.

On re-cross:

Q. Now reference has been made to whether the reference was to union membership to referrals or clearance, I believe. Is there a distinction in your mind at the present time as to the meaning of these three?

A. No.

Excerpts from Dunn's testimony on cross-examination:

Q. . . . concerning the requirement that in order for the men to continue on the job, that they either join the union or that they be cleared by the union or that they be referred by the union, did you have any conversation with any of the union representatives concerning that?

A. Well, yes, sir, that was the gist of our conversations prior to this lease arrangement . . . .

Q. Was the discussion that the men would have to join the union?

A. No, I don't think it was. I don't know that he said they had to join. He said they would have to be cleared by the union.

is that while the complaint alleges that Engineers prevented his transfer to Bateson-Cheves because of his lack of affiliation in Engineers, the testimony reveals that Mascarenas, at Dunn's urging, chiefly attempted to get clearance through Teamsters. He was at the time of the attempted transfer a member of another Teamsters local on a withdrawal card; testified that he discussed transferring to the contracting local with Giger, the Teamsters representative, that Giger told him the transfer fees, etc., would amount to about \$25; and that, because he did not have this amount on him in cash, Giger in effect refused his transfer. Giger admitted discussing the transfer fees with him; denied having refused him a transfer; and testified, credibly I believe, that because Mascarenas was employed by Dunn as an operator, he came under the jurisdiction of Engineers, and he, Giger, lacked the authority to give him job clearance as an engineer. There is no question that Mascarenas was willing and eager to affiliate with the contracting Teamsters local or with Engineers. I am unable to find that the evidence preponderates in support of a finding that he was denied transfer to the Bateson-Cheves payroll, by either Teamsters or Engineers, because of his union affiliation or lack of it.

Finally, there is the testimony of Guy Stocks, a truckdriver, who was one of the Dunn employees transferred to the Bateson-Cheves payroll, that on being interviewed by Giger, the latter told him he would have to make application in Teamsters in order to be transferred. Stocks testified that he wanted to affiliate with Teamsters, and inasmuch as it is clear from his own testimony that he would have applied for membership in Teamsters on an entirely voluntary basis, it is puzzling to say the least, that Giger would have felt called upon to use pressure in signing him up. Furthermore, this is the sole evidence that Dunn or Hassel employees were told, at any time, by a representative of either Teamsters or Engineers, that their continued employment was conditioned on their applying for membership. Under such circumstances I am unable to give Stock's testimony credence over Giger's denial. It may well be that he, like Cheves, considered clearance through a union hiring hall and union affiliation one and the same thing.

For the reasons aforesaid and upon consideration of the entire evidence, I shall recommend dismissal of the complaint in its entirety.

#### CONCLUSIONS OF LAW

1. Respondent Bateson-Cheves is, and has been at all times material to the issues in this proceeding, an Employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Engineers and Respondent Teamsters are, each of them, labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents have not engaged in any of the unfair labor practices alleged herein.

#### RECOMMENDED ORDER

It is recommended that the complaint be dismissed in its entirety.

### **Coamo Knitting Mills, Inc. and Federacion Puertorriquena de Sindicatos Democraticos**

**International Ladies' Garment Workers' Union, AFL-CIO and Federacion Puertorriquena de Sindicatos Democraticos. Cases Nos. 24-CA-1806 and 24-CB-476. December 23, 1964**

#### DECISION AND ORDER

On May 11, 1964, Trial Examiner Sidney S. Asher, Jr., issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial