Wood, Wire and Metal Lathers' International Union, Local No. 238, AFL-CIO *and* Phillip A. Contreras, Jr. *Case No. 28-CB-354. January 18, 1966*

DECISION AND ORDER

On August 17, 1965, Trial Examiner Max Rosenberg 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 Examnier's Decision. Thereafter, the Respondent and General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.

The National Labor Relations 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 this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified below.

The essential facts as stipulated are set forth in the Trial Examiner's Decision. It is undisputed that the Charging Party, Contreras, was, at all times material, a member of Respondent Wood, Wire and Metal Lathers' Local No. 238. On two occasions in 1965, Respondent imposed a fine upon Contreras for filing with the Board unfair labor practice charges against Respondent without first exhausting the internal union remedies. The Trial Examiner found, and we agree, the Board has jurisdiction herein to proceed.

Respondent admits that it is a party to collective-bargaining agreements with employers named in the complaint whose business operations meet the Board's jurisdictional standards. It contends, however, that the Board has no jurisdiction to proceed in this matter because Contreras, at all material times, was neither an employee nor job applicant of any of those employers; moreover, no evidence was introduced to show that *any member* of Respondent was employed by or had sought employment from any of the named employers. Respondent argues that the term "employee" [1] designates the present existence of, or prospect of establishing, an employer-employee relationship between the member alleging coercion by his union and an employer engaged in commerce with whom that union has a collective-

[1] Respondent is charged with violating Section 8(b)(1)(A) of the Act which makes it an unfair labor practice for a union to coerce or restrain *employees* in the exercise of their Section 7 rights.

bargaining agreement. Therefore, Respondent urges that the failure of Contreras to meet the employment requirements as described in the foregoing, deprives the Board of jurisdiction, and, in any event, the complaint should have been dismissed on jurisdictional grounds because the General Counsel failed to show that the fine of Contreras affected any employee of the named employers or related to a labor dispute involving those employers.

We reject Respondent's construction of the statutory provisions as unduly restrictive. Section 2(3) of the Act provides that "the terms 'employee' shall include *any* employee, and shall not be limited to the employees of a particular employer unless the Act specifically states otherwise." [Emphasis supplied.] It is settled that the term "employee" is not restricted by Section 2(3) of the Act to those who stand in proximate relationship of employer-employee but means "members of the working class generally and not employees of a particular employer."[2] It is manifest that Contreras fits the foregoing definition. The mere existence of his membership in a labor organization underscores his intention to be a participating member of the general work force, entitled to the rights assured by Section 7 and protection from coercion afforded by Section 8(b)(1)(A). Moreover, public policy demands that a union member's access to the Board's processes, in order to vindicate those rights and that protection, be untrammeled,[3] regardless of his employment status at the time of the coercion. Therefore, when through an internal rule a union seeks to undermine that policy, the Board will exercise its statutory jurisdiction and decide the substantive issues presented, notwithstanding the absence of evidence that the employee involved or any union member was, at any material time, employed by any employer engaged in commerce with whom the union has a collective-bargaining agreement. Statutory jurisdiction is satisfied by the evidence presented herein and set forth by the Trial Examiner.

Having resolved the jurisdictional issue, we agree with the Trial Examiner that Respondent's conduct herein was violative of Section 8(b)(1)(A) of the Act.[4]

THE REMEDY

In order to remedy the unfair labor practices which he found had been committed, the Trial Examiner ordered Respondent to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The General Counsel has excepted to the failure of the Trial Examiner also to order rescission of the fine

[2] See *Briggs Manufacturing Company*, 75 NLRB 569, 570, footnote 3, quoting *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177.

[3] See *Local 138, International Union of Operating Engineers, AFL–CIO (Charles S. Skura)*, 148 NLRB 679

[4] *Ibid.*

unlawfully imposed upon Contreras. As it appears that the modification sought by the General Counsel is in accord with established Board policy,[5] we find merit in his exception. We shall, therefore, in addition to the remedy recommended by the Trial Examiner, order that Respondent rescind the fine.

[The Board adopted the Trial Examiner's Recommended Order with the following modifications:

[1. Insert the following as paragraph 2(a) and reletter the succeeding original paragraphs accordingly:

["(a) Rescind the fine unlawfully imposed upon Phillip A. Contreras, Jr."

[2. Add as the first paragraph of the Appendix:

[WE WILL rescind the fine unlawfully imposed upon Phillip A. Contreras, Jr.]

[5] *Id.* at 685.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before Trial Examiner Max Rosenberg in Albuquerque, New Mexico, on July 7, 1965, on complaint of the General Counsel of the National Labor Relations Board, as amended at the hearing, and answer of Wood, Wire and Metal Lathers' International Union, Local No. 238, AFL–CIO, herein called the Respondent.[1] The pleadings raise the issues of whether the Board has jurisdiction to proceed in this matter, and whether the Respondent violated Section 8(b)(1)(A) of the Act by imposing a fine upon Phillip A. Contreras, Jr., the Charging Party, because he filed unfair labor practice charges against the Respondent with the National Labor Relations Board without first exhausting his internal union remedies. At that hearing, the parties stipulated to the facts which control this litigation, and at the conclusion hereof, they waived oral argument. Briefs have been received from the General Counsel and the Respondent, which have been duly considered.[2]

Upon the entire record, including the stipulations of the parties, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. THE BUSINESS OF THE EMPLOYERS

The parties stipulated that, during the 12-month period preceding the hearing herein, Bill C. Carrol Construction Company, in the course and conduct of its business operations, performed services valued in excess of $50,000, of which services valued in excess of $50,000 were performed in States other than the State of New Mexico, wherein said employer is located. They further stipulated that, during the same period, Gossett's Lath and Plastering Company, and Arthur Silva Plastering and Lathing Contractor, in the course and conduct of their business operations, performed services valued in excess of $50,000, of which services valued in excess of $50,000 were performed for and furnished to, *inter alia,* Allen Brothers and O'Hara, Sproul Homes, Inc., H. G. Hall Construction Company, and Lembke Construction Company, each of which enterprise annually performs services valued in excess of $50,000 outside the State of New Mexico wherein said enterprises are located. The

[1] The complaint, which issued on May 5, 1965, is based upon a charge filed on March 31, 1965.

[2] At the hearing, I denied Respondent's motion to quash notice of hearing The motion is again pressed in Respondent's brief. I perceive no reason for departing from my original ruling on the motion, and the same is again denied.

stipulation also recites that the Union has collective-bargaining agreements with, *inter alia,* the following named employers: Bill C. Carroll Construction Company, Gossett's Lath and Plastering Company, and Arthur Silva Plastering and Lathing Contractor. Finally, it was stipulated that the Charging Party, Phillip A. Contreras, Jr., at all times material to this proceeding, and within the 12-month period preceding the date of the hearing herein, made no application for employment with Bill C. Carroll Construction Company, or Gossett's Lath and Plastering Company, or Arthur Silva Plastering and Lathing Contractor, and that none of the operations of these enterprises were in any way affected by the conduct attributed to Respondent as constituting unfair labor practices under the Act.

The Respondent contends that the Board lacks jurisdiction over the subject matter of this proceeding and therefore the complaint should be dismissed on the ground that it fails to show that the act of fining the Charging Party in any way affected the business operations of the employers named in the complaint or related in any manner to a labor dispute involving those employers. In support of this contention, Respondent further asserts that the fact that such employers have labor contracts with Respondent and engage in collective bargaining with it does not warrant the Board's assertion of jurisdiction inasmuch as none of the employers are a party to this proceeding. I find no merit in this contention.

The issue of concern here is the effect of Respondent's conduct and activities on its members who are employed by the various enterprises described above, employees who concededly are represented in collective bargaining by the Respondent. As to them, the net effect of the imposition of a fine on Contreras was to cause union members reasonably to fear that the Respondent would visit the same action upon them if they filed charges against Respondent in a Board proceeding to enforce their rights guaranteed under Section 7 of the Act. Viewed in this posture, it seems clear that the enterprises whose employees are represented under contract with the Respondent may be directly affected by the Respondent's conduct in fining its members. Accordingly, I find and conclude that the effectuation of the policies and purposes of the Act requires that jurisdiction be asserted in this proceeding.[3] I therefore deny Respondent's motion to dismiss the complaint for lack of jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The complaint, as amended at the hearing, alleges that the Respondent fined Contreras on January 8 and May 21, 1965, because he filed unfair labor practice charges with the Board on August 3, 1964. The stipulated record discloses that, by letter dated December 15, 1964, the Respondent directed Contreras to appear before its executive board at an appointed time on January 8, 1965, to answer charges that he had violated section 103 of Respondent's International constitution by having filed unfair labor practice charges with the Board. Contreras did not appear in response to this letter and, on January 30, 1965, Respondent served upon Contreras a "Report on Fines" in which he was notified that a fine of $100 had been assessed against him for having filed the unfair labor practice charges and in which he was informed that authorization to impose an additional fine in the same amount had been requested of the Respondent's International Union. Thereafter, the International Union declined to approve the action taken by the Respondent's executive board and, by letter dated April 27, 1965, Respondent notified Contreras that it had rescinded its previous action and again directed him to appear before the board on May 21, 1965, to defend against Respondent's charges. Once more, Contreras failed to appear On June 10, 1965, the Respondent served on Contreras another "Report on Fines" in which he was notified that a fine in the amount of $100 had been imposed because he had filed unfair labor practice charges with the Board "without first exhausting all procedures and remedies provided for" under the Respondent's constitution and bylaws. A similar report was made to the Respondent's International Union which also embodied a request for authorization to tax

[3] See *Local 138, International Union of Operating Engineers, AFL–CIO (Charles S. Skura),* 148 NLRB 679. It should be noted that Respondent does not challenge the allegations in the complaint that the employers named therein meet both the statutory jurisdictional requirements as well as the Board's jurisdictional standards for such enterprises.

Contreras for all costs and expenses incurred by Respondent in pressing its charges against him. The International Union has taken no action with respect to the assessment of the fine on June 10, which Contreras has refused to pay. Rounding out the stipulation of the parties, the Respondent, on July 1 and 6, 1965, posted notices at its offices which informed all members that it would not fine them for filing unfair labor practice charges with the Board provided they first exhausted Respondent's internal procedures and remedies. However, the fine against Contreras has not been rescinded, despite these notices.

Respondent contends that its foregoing conduct was not violative of Section 8(b)(1)(A) of the Act because the right to file unfair labor practice charges against a labor organization with the Board is not one of the rights conferred upon employees by Section 7 of the Act, and because Section 101(4) of the Labor-Management Reporting and Disclosure Act of 1959 imposes the duty on union members to exhaust reasonable hearing procedures within such organization before instituting legal or administrative proceedings against their unions.

In *Local 138, International Union of Operating Engineers, AFL-CIO (Charles S. Skura)*,[4] the Board considered at length the issue of whether the imposition of a union fine upon a member for filing charges with the Board without first exhausting his internal union remedies was in contravention of the Act, as well as the arguments and contentions advanced by the Respondent herein, and concluded:

> There can be no doubt that a [union] fine is by nature coercive, (citations omitted) and that the imposition of a fine by a labor organization upon a member who files charges with the Board does restrain and coerce that member in the exercise of his right to file charges. The union's conduct is no less coercive where the filing of the charge is alleged to be in conflict with an internal union rule or policy and the fine is imposed allegedly to enforce that internal policy. Thus, we find that the fine imposed upon Skura herein is in clear conflict with Section 8(b)(1)(A) of the Act and a violation of that section. . . .[5]

In view of the stipulation of the parties that Contreras was fined by Respondent for filing charges with the Board without first pursuing the Union's remedial avenues provided in its constitution and bylaws, I find and conclude, based on the teachings of *Local 138*, that the Respondent thereby violated Section 8(b)(1)(A) of the Act.

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 operation of the employers 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 thereof.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.[6]

Upon the basis of the foregoing findings of fact and conclusions, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Wood, Wire and Metal Lathers' International Union, Local No. 238, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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[4] 148 NLRB 679. See also *H. B. Roberts, Business Manager of Local 925, International Union of Operating Engineers and Local No. 925, International Union of Operating Engineers (Wellman-Lord Engineering, Inc.)*, 148 NLRB 674, enfd. 350 F. 2d 427 (C.A.D.C.).

[5] At page 682.

[6] So far as this record stands, the Charging Party, although fined by the Respondent, did not satisfy that exaction. Accordingly, there is no necessity for ordering the Respondent to reimburse and make whole Phillip A. Contreras, Jr., for the amount of the fine.

3. By imposing a fine upon Phillip A. Contreras, Jr., for filing unfair labor practice charges with the Board or failing to exhaust his internal union remedies prior to filing charges with the Board, Respondent restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and thereby violated Section 8(b)(1)(A).

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that Respondent, Wood, Wire and Metal Lathers' International Union, Local No. 238, AFL–CIO, and its officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Fining employees for filing unfair labor practices with the Board or failing to exhaust their internal union remedies prior to filing charges with the Board, or for otherwise participating or cooperating in Board proceedings.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act:

(a) Post at its offices, in conspicuous places, and at all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix." [7] Copies of this notice, to be furnished by the Regional Director for Region 28, shall, after being duly signed by an official representative of Respondent, be posted immediately upon receipt thereof and maintained for a period of 60 consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 28, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply therewith.[8]

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[7] 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 Board's 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."

[8] In the event that this Recommended Order be 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 the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL MEMBERS OF WOOD, WIRE AND METAL LATHERS' INTERNATIONAL UNION, LOCAL NO. 238, AFL–CIO

Pursuant to a 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, as amended, we hereby notify you that:

WE WILL NOT fine employees for filing unfair labor practice charges with the National Labor Relations Board or for failing to exhaust their internal union remedies prior to filing charges with the Board, or for otherwise participating or cooperating in Board proceedings.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WOOD, WIRE AND METAL LATHERS' INTERNATIONAL UNION,
LOCAL NO. 238, 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.

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1015 Tijeras Street NW., Albuquerque, New Mexico, Telephone No. 247-0311.

Dubois Fence & Garden Co., Inc. ***and*** **International Association of Machinists and Aerospace Workers, AFL-CIO.** *Cases Nos. 12-CA-2979 and 12-RC-1947. January 18, 1966*

DECISION AND ORDER

On August 20, 1965, Trial Examiner Robert Cohn issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended dismissal of those allegations. Thereafter, Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Zagoria].

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 the case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as herein modified.[1]

The Trial Examiner found, on the basis of the testimony with respect to the time and place where certain cards were signed and circumstances attending the signing, that the Union could not be found to have represented a majority of Respondent's employees on May 13, 1964, the date on which the Union demanded recognition and bargaining. We do not agree with this conclusion.

The parties agree that the stipulated appropriate unit embraced 61 employees on the critical date. The Union has submitted 41 cards. Of these, 32 variously dated cards had been forwarded to the Board's Regional Office and received there on May 13, the critical date.

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[1] In section I, C, 4 of his Decision, the Trial Examiner inadvertently found certain conduct to be a violation of Section 8(a)(3) of the Act rather than of Section 8(a)(1) which we find it to be.