

[Direction of Election, including *Excelsior* footnote omitted from publication.]<sup>4</sup>

identical fringe benefits (As noted, resident advisers pay for room and board.) The hours of the teachers and counselors are the same, with the exception of the avocational teachers, whose schedule is virtually the same as that of the resident advisers. The general working conditions are basically the same for all, i.e., working at the Center with the enrollees.

The basic duty of each of these three groups is identical—helping the enrollees to help themselves. None of the groups is likely to be successful without the close cooperation of the other two and each is equally important. Each group is directly responsible for the well being of the enrollees and each is in constant association with them. In the recreational sphere, the avocational teachers and resident advisers work closely together and are completely interchangeable. Although there is evidence that communication among the groups is not at an optimum level, this is partially attributable to the newness of the Center, and the Employer, recognizing the problem, is in the process of establishing “personal committees” composed of a teacher, a resident adviser, and a counselor. Such committees will meet on a regular basis for the purpose of discussing a given group of enrollees. It seems clear that the duties of the teachers, resident advisers, and counselors are similar and closely related.

Along the same line, the skills found in the three groups are virtually identical. Of the 42 persons involved, only two or three have not attended college, two have master's degrees, the remainder have bachelor's degrees, and a large majority of these individuals have had teaching experience. The record shows that the Employer seeks the same basic qualifications when filling these positions, the paramount considerations being teaching experience, versatility, and an ability to relate to the enrollees, although the Employer has made very fine distinctions among the three groups during the entire course of its operation.

The integrated nature of the Employer's operation is manifest, and it is difficult to imagine an endeavor which would require more unity than the one with which we are here concerned. The record shows the need for close cooperation among teachers, resident advisers, and counselors in working with the enrollees, and the only reasonable inference is that the three groups in question will be drawn closer together as the Center matures.

For all of these reasons, especially the similarity and closely related nature of the duties, skills, and objectives of the employees herein, and the fact that a teachers unit would be inappropriate because avocational teachers are virtually indistinguishable from resident advisers, I conclude that a unit composed of teachers, resident advisers, and counselors is appropriate under all the circumstances here present, and that it must prevail over one limited to teachers only, assuming (but not finding) that such a smaller unit might conceivably also be appropriate.

<sup>4</sup> An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, on or before August 19, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

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**International Hod Carriers, Building and Common Laborers Union of America, Local 300, and Its Agent Joseph Murdock (HRH California, Inc.) and Ernesto O. Delgado.** *Case 31-CB-12 (formerly 21-CB-2492).* December 21, 1966

### DECISION AND ORDER

On August 10, 1966, Trial Examiner Stanley Gilbert issued his Decision in the above-entitled proceeding, finding that the Respondents had not engaged in and were not engaging in certain unfair

labor practices as alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief.

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

[The Board dismissed the complaint.]

### TRIAL EXAMINER'S DECISION

#### STATEMENT OF THE CASE

Based on a charge filed by Ernesto O. Delgado on February 16, 1965, the complaint herein was issued on December 29, 1965. The complaint, as amended,<sup>1</sup> alleges that International Hod Carriers, Building and Common Laborers Union of America, Local 300, hereinafter referred to as the Union, and its agent, Joseph Murdock, violated Section 8(b)(2) and (1)(A) of the Act. Respondents, by their answer, deny that they committed the unfair labor practices alleged in said complaint.

Pursuant to notice a hearing was held in Los Angeles, California, on April 12, 1966, before Trial Examiner Stanley Gilbert.

Upon the entire record in this case and upon observation of the witnesses as they testified, I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE EMPLOYER

HRH California, Inc., hereinafter referred to as the Employer or HRH, is a Delaware corporation with its principal office and place of business located in Beverly Hills, California, where it is engaged in business as a general building contractor. During the year preceding the issuance of the complaint, HRH purchased directly from points outside the State of California goods and materials valued in excess of \$50,000 which were shipped to its various job locations in the State of California.

Associated General Contractors of America, Southern California Chapter, herein called A.G.C., a California corporation, is a trade association which admits to membership firms engaged in building and construction activity and which exists in part for the purpose of negotiating, executing, and administering multiemployer collective-bargaining agreements on behalf of its employer-members, including HRH, with the collective-bargaining representatives of their employees. HRH is, and at all times material herein has been, a member of A.G.C. for the purpose of negotiating, executing, and administering multiemployer collective-bargaining agreements with the collective-bargaining representatives of their employees. In the course and conduct of their business operations, employer-members of A.G.C. annually ship goods valued in excess of \$50,000 directly to points located outside the State of California, annually receive goods and services valued in excess of \$50,000 directly from points located outside the State of California, and annually perform construction contracts valued in excess of \$50,000 outside the State of California.

<sup>1</sup> Motions to amend the complaint were granted in the course of the hearing.

HRH is an employer which is, and at all times material herein has been, engaged in commerce and is an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

As is admitted by Respondents, the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act, and Respondent Murdock is, and at all material times has been, an agent of Respondent Union within the meaning of Section 2(13) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

It is alleged in the complaint that the Respondents unlawfully caused HRH to discharge Delgado on or about February 15, 1965. It is further alleged that Respondent Union unlawfully promised Delgado an economic benefit if he would withdraw the charge filed in the instant case.

### A. *The issues*

1. The record discloses that Respondents admit that they did cause HRH to discharge Delgado on or about February 15, 1965. The General Counsel contends that causing his discharge was unlawful in that it was for a reason "patently arbitrary, irrelevant and unfair," relying upon *Miranda Fuel Company, Inc.*, 140 NLRB 181. Respondents contend that causing Delgado's discharge was not unlawful, because the reason therefor was that Delgado had not been referred to HRH for employment in accordance with the procedures of the hiring hall maintained by Respondent Union for the purpose of supplying employer-members of A.G.C., including HRH.<sup>2</sup> The issue is as to which of the above two contentions is supported by the record.

2. There is a direct conflict in the testimony as to whether or not Respondent Union through one or two of its representatives unlawfully promised Delgado employment if he would withdraw his charge in this proceeding. The issue is one of credibility; i.e., whether to credit Delgado's testimony that such promises were made or the testimony of the Union's witnesses denying Delgado's testimony.

### B. *Re Delgado's discharge*

Delgado<sup>3</sup> testified, which testimony was uncontradicted and is credited, that: on February 3, 1965, he, accompanied by a business agent of the Respondent Union, Mike Ortega, went to a jobsite of HRH where Ortega told HRH's foreman, Carlos Cobos, Delgado would be the union steward on the job; on the following morning, February 4, he, Delgado, received a job referral from the union dispatcher, Lupe Villanueva; when he reported to the jobsite, he was informed by Cobos that he could not put him to work that day, that he was "going to lay off some guys"; Cobos told him "when I get some men, I will call you up"; he returned to the union hall and informed Villanueva of what he had been told by Cobos; Villanueva assured him that he did not need another referral slip for the job, but that his referral was good for a month; he received a similar assurance from another business agent of Respondent Union, Mike Quevado; on February 15 he returned to the jobsite, gave his referral slip to the timekeeper, and was put to work, as was also one Louis Amaro; and about the middle of the afternoon, after Respondent Murdock and two business agents of the Respondent Union had visited the jobsite and conferred with management, he and Amato were told by Cobos that he had orders to let them go upon the instigation of Murdock. The record discloses that Delgado had never worked for HRH previously and there is no evidence as to how it happened that Delgado reported for work on February 15. Murdock testified without contradiction, which testimony is credited, that he asked Cobos if he had sent any men to the Union to get referrals and was told that he had not.

Murdock testified as to his action in causing the discharge of Delgado which testimony is uncontradicted and is credited. His testimony is as follows that: about the middle of the day on which Delgado was discharged, he, Murdock, received

<sup>2</sup> There is no contention that the hiring hall or its procedures were unlawful.

<sup>3</sup> Delgado was a member in good standing of Respondent Union at the time material herein and had been a member thereof since 1949.

word that some men were working on the HRH job without proper job referrals; he went to the jobsite with two business representatives; he informed the representatives of management that the Union had been having trouble with bogus referrals; he requested to see work referral slips which had been submitted by the laborers on the job; he was given five referral slips; from his examination of them he was able to ascertain that the referral slips of Delgado and Amaro had not been properly issued;<sup>4</sup> he informed management that Delgado and Amaro had not been properly dispatched; and he requested that Delgado and Amaro be discharged.

According to Thomas P. Matteson, a witness called by the General Counsel, he, Matteson, was one of the management representatives on the jobsite at the time. Matteson testified that after Murdock had asked to see the five referral slips he informed the management representative present that Delgado and Amaro were improperly dispatched because their slips were not issued in proper sequence, and that Murdock<sup>5</sup> requested that they be terminated for that reason, with which request management complied. The above testimony of Matteson, which corroborates that of Murdock, is credited, and it is concluded from their testimony that the stated reason for the request for the termination of Delgado (as well as Amaro) was that they had not been dispatched in accordance with the hiring hall procedures.

It is further concluded that the stated reason was also the actual reason. According to the testimony of both Murdock and Delgado, Delgado and Amaro, as well as a number of other "Mexican-Americans," went to Murdock's office the day following the discharges. Delgado and Amaro accused Murdock of discriminating against them, and Murdock asked them where they got their "work referrals." Amaro refused to tell Murdock and Delgado told him that he got his referral slip from the dispatcher. Murdock further testified that he then called the Dispatchers Villanueva and Silas Randolph and questioned them as to whether they had issued the referral slips, and both denied that they had done so. According to the testimony of Delgado, Murdock replied to Delgado that he did not care where he got his referral slip, and that Delgado said that he did not "want to see you guys working in that company." Delgado admitted on cross-examination that before Murdock questioned him about his referral slip he talked to Amaro about referral slips having been stolen or lost. However, he also testified that after he, Delgado, claimed to have obtained his referral slip from the dispatcher, Murdock did not question either of the dispatchers who were present at the time.<sup>6</sup> Murdock testified without contradiction, which testimony is credited that Amaro admitted to him that he did have a bogus work referral slip.<sup>7</sup>

It appears that the referral slip which Delgado had received did have Villanueva's signature upon it. Villanueva, however, was not called as a witness by any of the parties. However, the record shows, and Delgado admitted, that on February 4, the date which appears on the referral slip, and the date which Delgado testified that he received it from Villanueva, there were at least 90 or more names on the out-of-work list prior to that of Delgado. There is uncontradicted testimony of Silas Randolph, one of the two union dispatchers, that on said date no call had been received from HRH for laborers to be dispatched; that on January 27, 1965, Delgado had been dispatched to a "Henry C. Beck" job; and that it would not have been possible for Delgado to have worked his way up on the out-of-work list to a position to have been dispatched again on February 4. The above testimony of Randolph is credited.

Considerable testimony was elicited with respect to the method by which the out-of-work list was maintained and the procedures which were followed in dispatching. It appears from the testimony with respect thereto and the above-credited

<sup>4</sup> From the numbers on the referral slips he determined that the slips of Delgado and Amaro were not in proper sequence to have been issued in the normal course of dispatching.

<sup>5</sup> Although his testimony is somewhat confused, because of an interruption, as to whether it was Murdock or Union Representative Sam Coney who requested the discharges, a careful reading of the transcript indicates that it was Murdock to whom Matteson was referring as the one who requested the discharges.

<sup>6</sup> The above-noted variations and conflicts in the testimony of Delgado and Murdock are of no materiality in resolving the issue in view of the findings hereinbelow that Delgado was not properly dispatched, and that there is no basis for inferring that said reason was pretextual.

<sup>7</sup> It is noted that the charge alleged that both Delgado and Amaro were unlawfully discharged, but that the complaint alleged only the unlawful discharge of Delgado.

testimony of Randolph that the dispatch slip which Delgado received on February 4 and which he used in obtaining employment from HRH on February 15 was not issued in accordance with the procedures and provisions applicable to the hiring hall. There is nothing in the record which would support an inference that some reason other than the reason stated by Murdock prompted his action in causing Delgado's discharge. The only evidence tending to support such an inference is the testimony of Delgado that Murdock stated that he did not want Delgado or Amaro to work for HRH. Even if this testimony were to be credited, such an ambiguous statement, with nothing in the record to explain it, is of little aid to the General Counsel's contention that Respondents had some "patently arbitrary, irrelevant and unfair" reason for causing Delgado's discharge. The record clearly discloses that Delgado was not due to be dispatched on February 4 and that the referral slip which he used to obtain employment on February 15 could not have been issued in accordance with the procedures and provisions governing the operation of the hiring hall. Delgado's testimony offers no explanation of how he obtained the referral slip on February 4, although there were 90 or more men on the out-of-work list who had priority over him. Speculation as to the meaning of the aforesaid ambiguous statement is far from a basis for ignoring the existence of the valid reason offered.

Therefore, it is found that the reason stated by Murdock for his request that HRH discharge Delgado was also the actual reason; namely, that he wanted to enforce the procedures and provisions governing the hiring hall. Consequently, it is concluded that the General Counsel has not proved by a preponderance of the evidence that Delgado's discharge was for a reason "patently arbitrary, irrelevant and unfair." It is well established that it is not unlawful for a union to cause the discharge of an employee for the reason that his employment has been in violation of the lawful procedures and provisions governing a hiring hall such as the one involved in this proceeding.

### C. *Re the alleged unlawful promises*

Delgado testified to several conversations he had with representatives of the Respondent Union upon which testimony the General Counsel relies in support of the allegation in paragraph 13 of the complaint that the Union violated Section 8(b)(1)(A) of the Act. According to Delgado's testimony, he had two conversations with Sam Coney, a union representative, the first of these conversations about a week or two after filing the charge herein (filed on February 16, 1965) and the second on October 24, 1965. His testimony as to the first conversation is as follows:

He [Coney] said, "What happened to you, Ernie?"

I said, "What you mean, what happened?"

He say, "How come you got a complaint against Joe?"

I said, "What you mean?"

"He stopped me just for nothing," I told him, "Because I got the clear from Lupe. Then he went up to the job—you and him and Mike—and stopped me from the job. They don't give me any reasons. How can you stop me from the job?"

He said, "Forget about it, Ernie. Don't worry about the job. I can send [you] to another job if you drop the charge."

I said, "No, I am not going to drop the charge." And I said, "I don't care if I lose or win," I told him, "Because he stopped me from that job just for nothing."

His testimony as to the second conversation is as follows:

He [Coney] said, "Ernie, you been a good man and good member of Local 300. Look, I'm going to give you a job any place you want to go, but you have to drop the charge to Joe Murdock."

I told him, "No, sir, I am not going to drop the charge. I told you already at one time. No use to talk to me more about Joe Murdock—he don't like Mexicans. That is why he do what he did. He did other jobs here in the city, and he don't send Mexican guys."

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He gave a card [his business card] to me.

He said, "Look, Ernie, I am going to put the telephone number of my house. In case you make up your mind to drop the case, you can call me up any time after 6:00 in the afternoon."

Delgado also testified to a conversation he had with Lee Barker, president of the Union, about a month after the charge was filed. His testimony with respect to this conversation was as follows:

He [Barker] said, "Ernie, how come you got a complaint against Joe?"

I said, "What you mean, how come, when he stop my job just for nothing, and I was going to be the steward up there in that job?"

He says, "Oh, forget all about it, and we can send you to work any place. If you drop the charge, I send you to a job."

I say, "I am not going to drop the charge. I don't care if I lose or win. Don't talk to me more about this complaint, because I am not going to throw the charge out," I told him.

Coney testified that he "probably did ask" Delgado to drop the charge against the Respondents, but categorically denied that he offered him a job or employment. He further testified that he remembered giving Delgado his card with his phone number which was unlisted, but that it was at a time when Delgado was a shop steward, that "it might have been a year before this case come up." Barker denied that he had any conversation with Delgado about the charge and that he promised Delgado a job if he would drop the charge.

There is no objective evidence which would tend to support Delgado's testimony or discredit that of Coney and Barker.<sup>8</sup> All three were interested parties, Delgado as the Charging Party, and Barker and Coney as officials of the Union. Inasmuch as the General Counsel has the burden of proof, it is concluded that he has not proved by a preponderance of the evidence the allegation in paragraph 13 of the complaint that Respondent Union unlawfully promised Delgado employment if he would withdraw the charge he filed in this proceeding.

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

#### CONCLUSIONS OF LAW

1. The General Counsel has failed to prove by a preponderance of the evidence the allegation that Respondents violated Section 8(b)(2) and (1)(A) of the Act by causing HRH to discharge Delgado.
2. The General Counsel has failed to prove by a preponderance of the evidence the allegation that Respondent Union violated Section 8(b)(1)(A) of the Act by unlawfully promising Delgado employment if he would withdraw the charge he filed in this proceeding.

#### RECOMMENDED ORDER

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

<sup>8</sup> While the record discloses that Delgado was not dispatched to a job by Respondent Union after his discharge by HRH until October 28, 1965, there is no showing that he would have been entitled to have been dispatched prior thereto. There is no contention, nor was it alleged, that Respondent Union discriminatorily failed to dispatch him earlier. Further, there is no showing that he was not due to be dispatched on October 28.

**Montgomery Ward & Company, Inc. and Truck Drivers, Oil Drivers, Filling Station and Platform Workers, Local 705, I.B. of T.** *Case 13-CA-7470. December 21, 1966*

#### DECISION AND ORDER

On September 9, 1966, Trial Examiner Charles W. Schneider 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