

**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 338, AFL-CIO (Eidal International Division Southwest Factories, Inc.) and C. E. Church.** Case 28-CB-399

July 27, 1967

### DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS  
BROWN AND JENKINS

On May 16, 1967, Trial Examiner Eugene K. Kennedy issued his Decision in the above-entitled proceeding, finding that 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, Respondent filed exceptions to the Trial Examiner's Decision.

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.

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 the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

The Charging Party, Church, returned to work for Eidal on September 19, 1966. Eidal's collective-bargaining contract with Respondent contained a union-security clause which required Church to become a member of Respondent 31 days following the start of his employment. Church had a withdrawal card from Respondent. On the day he commenced working for Eidal, Frank Mora, business representative of Respondent, asked Church to deposit his withdrawal card. Church did not have it with him. He had to send away for it. On October 17, Church tendered his withdrawal card to Mora. The latter asked Church to pay monthly dues for September as that was the month the International Constitution required deposit of the withdrawal card. Church acknowledged that he owed dues for October which he tendered, but denies that he owed dues for September and refused to pay dues for that month. Respondent rejected the tender of October dues and on October 20, which was the 31st day after Church began working for Eidal, informed Church that his membership had been canceled and that he would have to pay a \$60 reinstatement fee to return to good-standing membership in the Union and to retain his job. In other words, Respondent

canceled Church's membership and imposed a reinstatement fee, after he had started work for Eidal only because he had refused to pay dues for the month of September which he could not be required to do under the union-security clause. If Church had agreed to pay dues for the month of September his membership would not have been canceled. This is not a case, therefore, where a union member had allowed his membership to lapse during a period of unemployment and had then been required to pay a reinstatement fee as a condition of resuming union membership. Accordingly, this case is governed by *Spector Freight System, Inc.*, 123 NLRB 43, enfd. 273 F.2d 272 (C.A. 8), cert. denied 362 U.S. 962, whose continued validity was recognized in *Simmons Company*, 150 NLRB 709, 712, upon which the dissent relies.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 338, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

MEMBER BROWN, dissenting:

I would reverse the Trial Examiner and dismiss the complaint in its entirety. The question presented is whether Section 8(b)(1)(A) and 8(b)(2) precludes a labor organization from invoking a lawful union-security clause to collect a reinstatement fee from a former member who failed to meet uniformly applied financial responsibilities during a prior period of nonemployment and who now seeks to avoid payment of either an initiation fee or the constitutionally required reinstatement fee. The majority finds this unlawful, citing *Local 545, Operating Engineers (Joseph Saraceno & Sons, Inc.)*, 161 NLRB 1114, and *Spector Freight System, Inc.*, 123 NLRB 43, where violations were predicated upon demands for discharge of former members for nonpayment of dues during periods of nonemployment, debts not legitimately collectable under a union-security agreement. In this case, however, the evidence merely shows that discharge of former member Church was sought only after expiration of the contractual grace period, and following Church's refusal to pay the uniformly required reinstatement fee of \$60. Every indication in the record is that the demand for September back dues had been abandoned by the Union when Church's membership had been canceled in accordance with article XXXII, section 2, of the Union Constitution, and the applicable union-security clause was effectively invoked against him.

Nevertheless, the Trial Examiner, whose Decision my colleagues would affirm, finds that as "the reinstatement fee demand of the Union occurred because Church refused to pay dues when he was not obligated to do so," Respondent violated 8(b)(1)(A) and 8(b)(2) of the Act. In my opinion this reasoning not only results in an unwarranted extension of *Saraceno* and *Spector*, but effectively forecloses enforcement of a union-security clause to collect any constitutionally established reinstatement fee. For, a reinstatement fee, by its very nature, is always required as an alternative to the satisfaction of constitutionally imposed financial obligations necessary to the maintenance of membership in good standing during periods of nonemployment.

The Board has recognized that a reinstatement fee is no different in legal effect than an initiation fee required of employees with no membership history and for which a union-security clause may lawfully be invoked. See *Food, Machinery and Chemical Corporation*, 99 NLRB 1430, 1433, and *Precision Lodge No. 1600, International Association of Machinists*, 120 NLRB 1223. Furthermore, to hold, as does the majority, that Respondent's demands were unlawful in the circumstances presented, conflicts directly with the principles expressed in our recent decision in *Simmons Company*, 150 NLRB 709, where at page 712, it was stated:

... a Union may lawfully condition employment upon a payment of a reinstatement fee where a lawful union-security agreement exists, and the mere fact that a union has looked to a prior period to determine whether an employee is in good standing does not *per se* render its conduct unlawful.

For these reasons and because the record shows no more than Respondent's application of a lawful union-security clause to enforce payment of a uniformly applied reinstatement fee, I would dismiss the complaint herein.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

EUGENE K. KENNEDY, Trial Examiner: This matter was heard in Albuquerque, New Mexico, on January 10, 1967.<sup>1</sup> The question presented is whether there was a violation of the National Labor Relations Act, as amended, herein the Act, in connection with the termination of the employment of Cecil Church. Upon the entire record, a consideration of the briefs submitted by Respondent and the General Counsel, and my observation of the demeanor of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE EMPLOYER AND THE JURISDICTION OF THE BOARD

Eidal International Division Southwest Factories, Inc., herein Eidal, is, and at all times material herein has been,

a New Mexico corporation with its principal office in Albuquerque, New Mexico. It is engaged in the manufacture of trailers, tanks and related heavy equipment. During the last 12-month period, it purchased materials valued in excess of \$50,000 which were transported to New Mexico directly from States of the United States other than the State of New Mexico. Eidal is, and has been at all times material herein, an employer engaged in commerce within the meaning of the Act.

#### II. THE UNION INVOLVED

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 338, AFL-CIO, herein the Union, is a labor organization within the meaning of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Events*

Cecil Church first worked for Eidal in 1944 and worked intermittently for this Employer through 1962. He was a charter member of the Union and on leaving the employ of Eidal secured a withdrawal card.

At the time the pertinent events here involved occurred, there was included the following union-security agreement between the Union and Eidal:

All present employees covered by this Agreement and coming under the jurisdiction of the Union, as set forth in the Recognition Clause, article 1, shall, as a condition of employment, become members of the Union on the thirty-first (31st) day following the effective date of the Agreement and shall remain members in good standing during the life of this Agreement. All employees hired after the effective date of the Agreement shall, as a condition of employment, become members of the Union on the thirty-first (31st) day following the date of their employment, and shall remain members of the Union in good standing during the life of this Agreement.

"Good Standing," for the purpose of this Agreement, is interpreted to mean the payment or tendering of initiation fees and periodic Union dues.<sup>2</sup>

Church returned to work for Eidal on September 19, 1966. On this date, Frank Mora, the business representative of Respondent Union, saw Church at work. He requested that Church give him his union withdrawal card. Church responded that he did not have it but he expected to have it within a few days.

On October 3, 1966, Mora again requested Church to give him his withdrawal card. Church explained that he had written for it and would get it as soon as he could. Mora replied, "Well, that is fine, but I guess you know that you beat me out of September's dues." Church received his withdrawal card in the mail on that same afternoon.

Church did not see Mora again until October 17, 1966, and gave Mora his withdrawal card. Church

<sup>1</sup> The charge was filed by C E Church on October 21, 1966. The complaint was issued November 8, 1966.

<sup>2</sup> Respondent orally amended its answer to admit the existence of this union-security clause.

acknowledged he owed dues for October but not for September. Mora told Church that, according to the Union Constitution, he had to pay September dues as that was the month the withdrawal card should have been deposited.<sup>3</sup>

Mora then contacted Charles Helman, shop superintendent for Eidal, and advised him that he was having trouble with Church and that he should tell Church he should get straightened out with the Union. Later that day, Mora called Helman and advised him to wait until October 20 and then to tell Church he could not continue working until he was "straightened" out with the Union.

On October 18, 1966, Church gave Union Steward Herrera a check for his October membership dues. Herrera returned it to Church the following day. Church then sent it to Mora who returned it to Church with a letter dated October 20, 1966, advising Church that his membership card was sent to the International offices for cancellation, and that for Church to become a member in good standing, he would have to apply for reinstatement.

On October 20, 1966, Mora called Helman and advised him that he should tell Church he could not continue working until he was straightened out with the Union. This was on the 31st day since Church started to work on September 19, 1966. The practice followed by the Union was to charge a \$60 reinstatement fee which on two previous occasions Church had paid when returning to work for Eidal, after being away less than 6 months.

On October 20, 1966, Superintendent Helman advised Church he could not continue working until he got straightened out with the Union. Thereupon Church gathered up his tools and left his employment.

#### CONCLUDING FINDINGS

It is evident from the undisputed facts that the Union caused the termination of Church's employment because of his refusal to pay dues for September 1966. Section 8(a)(3) of the Act limits the payment of union dues after a period of employment of 30 days as a condition of continued employment under a collective-bargaining agreement. The Union's demand that Church pay dues for September 1966 contravened this portion of the Act.

In *Local 545, Operating Engineers (Joseph Saraceno & Sons, Inc.)*, 161 NLRB 1114, the Board stated: "It is well settled that a demand for back dues and a reinstatement fee, based on a period when there was no statutory obligation to maintain membership as a condition of employment is violative of the Act. See *Spector Freight System, Inc.*, 123 NLRB 43, enfd. 273 F.2d 272 (C.A. 8), cert. denied 362 U.S. 962.

Cases applying the same principle are, *Local Union No. 1842, International Brotherhood of Electrical Workers (Avco Manufacturing Corporation, Crosley Divi-*

*sion)*, 124 NLRB 794; and *Idarado Mining Company*, 77 NLRB 392.

Here the reinstatement fee demand of the Union occurred because Church refused to pay dues when he was not obligated to do so. The provisions of the Union Constitution in such a situation are subordinated to the statutory right of an employee to the 30-day grace period.

The conflict here presented between the Union's right to enforce its rules including its demand for a reinstatement fee and the right of an employee to the statutory grace period of 30 days before the obligation to pay dues occurs, must be resolved against the Union as I read *Joseph Saraceno & Sons, Inc.*, *supra*. Since the demand for the reinstatement occurred only because Church refused to pay dues for a period when he was under no statutory obligation to do so, it is found that the demand for the reinstatement fee as well as dues for September 1966 was unlawful and the termination of the employment of Church because of such demands violated Section 8(b)(1)(A) and (2) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Employer's operations 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

It has been found that Respondent Union has engaged in unfair labor practices and it will therefore be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It will be recommended that Respondent Union notify Eidal that it has no objection to the reinstatement of Cecil Church and that it make him whole for any loss of pay he may have suffered by payment to him of a sum of money equal to what he would have normally earned from the date of his termination until the date of Respondent Union's notice to Eidal. Such loss of earnings shall be computed in accordance with the formula established in *F. W. Woolworth Company*, 90 NLRB 289, together with interest in accordance with the formula in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

#### CONCLUSIONS OF LAW

1. Eidal is an employer engaged in commerce within the meaning of the Act.

cause it to be immediately canceled or revoked. Any former member who has held a Withdrawal Card for six (6) months or less, shall pay to the Local Lodge in which the Withdrawal Card is deposited all dues and assessments which have accrued since the issuance of the Withdrawal Card, plus one (1) month's death benefit contribution if a participating member; and if the former member has held such Withdrawal Card for more than six (6) months, he shall pay one (1) month's dues, and one (1) month's death benefit contribution if a participating member, and assessments, if any, for the month in which the Withdrawal Card is deposited.

<sup>3</sup> The following portion of the Union Constitution is the one relied on by Mora to require that Church pay his September dues:

#### ARTICLE XXXII

Section 2. A member who holds a Withdrawal Card, on returning to work at the trade, whether such member is employed in either an organized or unorganized shop, shall deposit such Withdrawal Card with the Business Manager or Secretary-Treasurer of the Local Lodge having jurisdiction over the territory or the work. Failure on the part of a former member to deposit the Withdrawal Card shall

APPENDIX

2. Respondent Union is a labor organization within the meaning of the Act.

3. By causing Eidal to terminate the employment of Cecil Church in violation of Section 8(a)(3) of the Act, Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that Respondent Union, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Eidal to discriminate against Cecil Church or any other of its employees in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees of Eidal in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment in accordance with Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Notify Eidal, in writing, that it has no objection to the reinstatement of Cecil Church and furnish Cecil Church a copy of such notification.

(b) Notify Cecil Church if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application.

(c) Make whole Cecil Church for any loss of pay which he may have suffered as a result of the discrimination against him in the manner set forth in the section of this Decision above entitled "The Remedy."

(d) Post at its office in Albuquerque, New Mexico, and any other place where it customarily posts notices to its members, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of said notice, on forms provided by the Regional Director for Region 28, after being signed by a representative of Respondent Union, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where Respondent customarily posts notices to its members. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(e) Deliver to the Regional Director for Region 28, signed copies of said notice in sufficient number to be posted by Eidal, if willing.

(f) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Decision, what steps have been taken to comply herewith.<sup>5</sup>

<sup>4</sup> In the event that this Recommended Order is 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 is 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."

<sup>5</sup> In the event that 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."

NOTICE TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE No. 338, AFL-CIO

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, as amended, we hereby notify you that:

WE WILL NOT cause or attempt to cause Eidal International Division Southwest Factories, Inc., to discriminate against Cecil Church or any other of its employees in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees of Eidal International Division Southwest Factories, Inc., in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment in accordance with Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL notify Eidal International Division Southwest Factories, Inc., in writing, that we have no objection to the reinstatement of Cecil Church, and we shall furnish the said employee with a copy of such notification.

WE WILL make whole Cecil Church for any loss of pay he may have suffered by reason of the discrimination against him, and offer him immediate and full reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE No. 338, AFL-CIO (Labor Organization)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

Note: We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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, Room 7011 Seventh Floor Federal Building and United States Court House, 500 Gold Avenue S.W., Albuquerque, New Mexico 87101, Telephone 247-2583.