International Union of Operating Engineers, Local Union No. 12, AFL–CIO (Oltmans Construction Company; Jackson Bros.) *and* Associated Independent Owner-Operators, Inc.

International Union of Operating Engineers, Local Union No. 12, AFL–CIO (Webb and Lipow) *and* Associated Independent Owner-Operators, Inc.
Cases 31–CC–80 and 31–CC–89

December 12, 1967

DECISION AND ORDER

BY MEMBERS BROWN, FANNING, AND JENKINS

On April 21, 1967, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof, and the General Counsel filed an answering 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.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the extent consistent herewith.

The Trial Examiner concluded that the Respondent violated Section 8(b)(4)(ii)(B) by engaging in threats, restraint, and coercion of certain employers with the object of forcing them to cease doing business with Vance and Watson. He further concluded that the Respondent had violated Section 8(b)(4)(ii)(A) by engaging in threats, restraint, and coercion with the object of forcing Watson to join the Respondent. Essential to both conclusions is the Trial Examiner's subsidiary finding that Vance and Watson were independent contractors, not employees. In making this finding, the Trial Examiner relied on the facts that both men determined their profits by setting their own rates of pay, and that they owned their own equipment and incurred all expenses of maintaining and operating that equipment. He further concluded that the control exercised by the contractors was limited to the result to be achieved, not reaching the means of attaining that result.

In making determinations whether an individual is an independent contractor or an employee, the common law "right of control" test governs. The proper application of this test demands a balancing of all evidence relevant to the relationship in issue. We do not agree with the Trial Examiner's interpretation of the facts as to control over the means utilized or his failure to take into account the nature of the work involved. The Trial Examiner has emphasized the fact that the control exercised by the contractors with respect to Vance and Watson was limited to the achievement of the desired result and did not include control over the means. However, the crucial factor is the degree of control reserved over the means, not the degree of control exercised.

When they were hired, both Vance and Watson received their initial instructions from the project superintendents indicating the jobs to be accomplished. However, the simple description of the job assignment limited the manner and means to be used to accomplish the job. For example, Watson was instructed to grade a certain area, the boundaries and level of which were marked by stakes. Vance's work, removing and spreading the dirt resulting from a drilling operation, was similarly limited by the instructions he received the first day on the job.

Thus, the initial instructions given Vance and Watson, both skilled equipment operators, clearly defined the manner of accomplishing the assigned tasks. Close continuing supervision over Vance and Watson was unnecessary in this situation. Both Vance and Watson were hourly paid and engaged to perform duties that could have been assigned to acknowledged employees of the contractors. In the context of the work to be performed, supervision exercised over Vance and Watson would appear to be no less than would be exercised over acknowledged employees of the various contractors. The degree of control exercised over the means of operation of Vance and Watson is further evidenced by their reecurrent dependence upon the contractors for future employment on these and other construction jobs, and the fact that the manner in which they perform will be determinative of future assignments from these contractors. In our opinion, all of these considerations indicate that sufficient control over the manner and means by which Vance and Watson performed their duties was retained by the contractors to vitiate the conclusion that Vance and Watson were independent contractors. See *Construction, Building Material and Miscellaneous Drivers Local Union No. 83, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers etc. (Marshall & Haas)*, 133 NLRB 1144.

As we find the contractors in hiring Vance and Watson and their equipment reserved the right to control the means by which each performed the job for which he was hired, we conclude that Vance and

Watson were employees. Thus, the Respondent was involved in disputes with the Employers relating to their employees, and was not, therefore, in violation of Section 8(b)(4)(ii)(A) and (B) of the Act. Accordingly, we shall dismiss the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

E. DON WILSON, Trial Examiner: A charge in Case 31–CC–80 was filed by Associated Independent Owner-Operators, Inc., herein Associated, on June 23, 1966.[1] This charge was amended by Associated on October 25. A charge in Case 31–CC–89 was filed by Associated on August 29. This charge was amended by Associated on October 25. On October 27, the General Counsel of the National Labor Relations Board, herein the Board, issued an Order consolidating Cases 31–CC–80 and 31–CC–89. On the same date he issued the consolidated complaint and notice of hearing herein.[2]

Pursuant to due notice, a hearing in this matter was held before me in Los Angeles, California, on February 16 and 17, 1967. The parties were afforded full opportunity to participate. Briefs of the parties have been received and considered.

Upon the entire record in the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYERS

At all times material, Swinerton and Walberg Company, Oltmans Construction Company, herein Oltmans, and Jackson Bros., herein Jackson, all California corporations with principal offices located in Los Angeles, Monterey Park, and Los Angeles, California, respectively, have been engaged as general contractors in the building and construction industry in California. At all times material, Swinerton and Walberg Company has been a member of the Associated General Contractors of America, herein AGC, and Oltmans has been a member of Building Contractors Association of California, Inc., herein BCA. AGC and BCA are each an association of employers engaged as contractors in the building and construction industry, and they engage in negotiating and entering into collective-bargaining agreements on behalf of their employer-members with the collective-bargaining representatives of the members' employees, including Respondent, in the Southern California area, and in representing their employer-members in matters of labor disputes, grievances, and other phases of labor-management relations. In the operation of their businesses the employer-members of BCA annually perform services outside the State of California valued in excess of $50,000. In the operation of their businesses, the employer-members of AGC annually perform services outside California, valued in excess of $50,000 and annually purchase and receive goods directly from points outside California, valued in excess of $50,000.

At all times material, Swinerton and Walberg Company, Oltmans, and Jackson have been engaged in the construction of a shopping center in California, known as Glendale Fashion Center, pursuant to separate contracts, the collective value of which is $4,700,000.

At the Center the contractors described immediately above and their subcontractors have purchased for use at the Center products, goods, and materials valued in excess of $50,000 from California suppliers who received said products, goods, and materials directly from outside California.

Webb and Lipow is a California corporation engaged in the sharing and underpinning of structures, with its principal place of business in Los Angeles, California. At all material times it has been performing its works on a multimillion dollar building on Wilshire Boulevard in Los Angeles, California, pursuant to a contract valued at approximately $100,000 with C. L. Peck, the general contractor. Peck and its subcontractors, including Webb and Lipow, purchased for use at the Wilshire project products, goods, and materials valued in excess of $50,000 from California suppliers who obtained them from outside of California.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

1. Were Samuel J. Vance and Jon Watson self-employed persons within the meaning of the Act? This include whether they were persons.
2. By threats, restraint, and coercion to Webb and Lipow, did Respondent violate Section 8(b)(4)(ii)(B) of the Act?
3. By threats, restraint, and coercion to Oltmans and Jackson, did Respondent violate Section 8(b)(4)(ii)(A) and (B) of the Act?

B. *The Facts With Respect to the Self-employment Status of Vance*

I find that at material times Vance was a self-employed person.[3] He was in the business of excavating and grading, using a skip loader and dump truck in his operations. He owns the skip loader and tractor and, when necessary, rents the dump truck by the hour. He pays his own costs, thus, he pays for needed insurance, fuel, repairs, and services on his own equipment and pays for the rental of the dump truck and the fuel therefor, when he uses it. He either solicits work for himself or through the services of a company known as El Monte Equipment Co. He pays

[1] Hereinafter all dates are 1966 unless otherwise specified.

[2] The consolidated complaint alleges that International Union of Operating Engineers, Local Union No. 12, AFL–CIO, herein Respondent, committed unfair labor practices

[3] Disputes with self-employed contractors are as primary in character as if the self-employed contractor had others doing the work for him. *Northwestern Construction of Washington, Inc.*, 152 NLRB 975, 980.

El Monte 10 percent of his earnings for El Monte's services in doing his bookkeeping, providing telephone service, advertising, and parking his equipment. Vance's customers are billed by El Monte and, upon payment, El Monte deducts 10 percent for itself and remits the balance to Vance. During the last year, Vance worked for about 100 customers, including contractors and homeowners. He charges and is paid by the hour. No deductions for social security or income tax are made from his compensation. During material times, Vance obtained an excavating and grading job with Webb and Lipow at the C. L. Peck Wilshire Plaza Construction Project. Webb and Lipow was performing the shoring operations on the Project pursuant to a contract with Peck. The shoring required the digging of holes by drills. Vance was retained to use his skip loader and take the dirt away from the holes and to spread it. The only directions he received were on his first day when he was told to keep ahead of the drills and spread the dirt.

C. *The Facts With Respect to the Self-employment Status of Watson*

Watson does grading work. He uses a truck, trailer, and skip loader. He owns all his equipment. He pays the insurance on his equipment. He pays for the fuel. He pays for the maintenance and service on his equipment. In the past year he has worked for about 75 different persons through self-solicitation and job referrals from contractors and friends in the excavating business. Prospective customers reach him through his own phone where he has a telephone answering service for which he pays. While he works principally for contractors, he also works for private homeowners. He has no employees but is paid for his services and the use of his equipment. Social security or income tax is never deducted from the compensation he receives from customers. He works by the hour for a fee which he sets and changes on occasion. He keeps his own record of the hours he works.[4] Swinerton and Walberg Co., Oltmans, and Jackson used Watson's services separately and from time to time to do finished grading work for cement or concrete. A superintendent from each company told him where he was to work and that he was to grade from grade stakes. He first started work on this project through a referral from an excavator.

D. *Conclusions as to the Self-employment and Person Status of Vance and Watson*

I find the facts establish Vance and Watson as independent contractors, or self-employed persons. Respondent contends they are employees. The "right of control" test governs. It is recognized that no one factor is determinative of this issue. The persons for whom Vance and Watson performed work had the right of control only over the end to be achieved and not over the means to be used in reaching such end. Vance and Watson were independent contractors in law and as a matter of economic reality. They were persons and self-employed persons. They determined their own profits by what they paid for, or the rate at which they rented, their equipment; they set their own rates of pay; they determined what repairs and services they needed and arranged for the same to be done; they determined what insurance they needed and paid for the same. They were told what they should do but it was substantially left to them as to how they should achieve the ends. They assumed the risks of their businesses. They were to accomplish results or to use care and skill in accomplishing results. The control exercised by the contractors with respect to Vance and Watson was limited to the achievement of a desired result and did not include control of the means. They were self-employed persons within the meaning of the Act. I consider it irrelevant that neither possessed a license as a contractor.

E. *Violation of Section 8(b)(4)(ii)(B) at Webb and Lipow*[5]

On August 24, 1966, Vance was working on the Wilshire Project of Webb and Lipow. The foreman on the job was Marshall Fletcher. Fletcher did the hiring and firing and was "top authority" on the jobsite. On this day, Respondent's agent, business representative Clyde Wilson, came on the job and asked Vance to show his union card. Vance displayed a card he had from Associated Independent Owner-Operators, Inc., and Wilson said the card meant nothing to him. He wrote Vance's name down and approached Fletcher. Wilson told Fletcher Vance was a nonunion contractor and he should be removed from the job. Thereupon, Fletcher told Vance that Wilson had said he could not work on the job because he was nonunion. After a very short time, Wilson told Fletcher that Vance was still on the job. Wilson said, "I want him off immediately. If you don't get him off I will have to stop your operators."[6] Fletcher said he would remove Vance immediately. He told Vance to leave the jobsite and Vance did so. By Wilson's threat, restraint, and coercion to stop the operators in their work,[7] Respondent violated Section 8(b)(4)(ii)(B) of the Act.

F. *Violations of Section 8(b)(4)(ii)(A) and (B) at Oltmans and Jackson*

The Respondent's activities with respect to Watson took place on June 16 and 17, 1966. Watson was employed by Oltmans and Jackson and others at that time. Having considered the entire record and recognizing that it is undenied, I credit the testimony of General Counsel's witnesses as to the relevant events on these days. In any event, the parties stipulated that Respondent's agents, in demanding the removal of Watson from the jobsites of Oltmans and Jackson,[8] threatened to use economic force, to picket the jobsites, if Watson were not removed, and that another object was to force Watson to join Respondent, and to sign a short form labor agreement with Respondent. I find the threats, restraint, and coercion to Oltmans and Jackson for the objects found above, with respect to Watson, violated Section 8(b)(4)(ii)(A) and (B) of the Act.

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[4] It must be noted that Respondent considered Watson a self-employed person since it required him to sign a collective-bargaining agreement with Respondent.

[5] In making findings of fact herein, having observed the demeanors of Vance, Fletcher, and Wilson, I do not credit the testimony of Wilson where it conflicts with that of Vance or Fletcher. Fletcher impressed me as an honest and forthright witness and I accept his testimony as truthful and accurate.

[6] Fletcher had 4 or 5 operating engineers, members of Respondent, working under him. To stop them would be to close down the job

[7] Shut down the job.

[8] The Glendale Fashion Center Construction Project.

That Respondent had a contract with the Employers requiring the latter to subcontract only to union subcontractors does not change my view. Under Section 8(b)(4) of the Act, such contracts may be enforced through lawsuits but not through economic action.

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 Employers' operations described in section I, above, have a close, intimate, and substantial relationship 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 Respondent has violated Section 8(b)(4)(ii)(A) and (B) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.[9]

[9] I find insufficient probative evidence of a violation of Section 7 of the Consolidated Complaint.

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

CONCLUSIONS OF LAW

1. At all times material the Employers named in section I have been Employers within the meaning of the Act and have been engaged in commerce and/or in an industry affecting commerce within the meaning of the Act.
2. Respondent is a labor organization within the meaning of the Act.
3. Vance and Watson are persons and self-employed persons within the meaning of the Act.
4. By threats, restraint, and coercion, as found above, to Webb and Lipow, with the object of forcing or requiring Webb and Lipow to cease doing business with Vance, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.
5. By threats, restraint, and coercion, as found above, to Oltmans and Jackson, with the objects of forcing or requiring Watson to join Respondent and forcing or requiring Oltmans and Jackson to cease doing business with Watson, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) and (B) of the Act.

[Recommended Order omitted from publication.]