

**Apex Ventilating Co., Inc. and Robert Mahan. Case
25-CA-3621**

November 10, 1970

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
FANNING AND JENKINS

On June 3, 1970, Trial Examiner Sidney Sherman 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 and the General Counsel filed exceptions to the Trial Examiner's Decision and 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.

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 this case, including the exceptions and briefs, and hereby adopts the findings,¹ conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent, Apex Ventilating Co., Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

¹ In adopting the Trial Examiner's finding that Respondent discriminatorily refused to consider R. Mahan for employment because of his nonunion status, we do not adopt his comments contained in fn. 8 that discussion of the availability of work was "merely part of a charade." Such comments are speculative and not supported by the record.

While we concur generally with the Trial Examiner's remarks contained in the remedy section of his Decision, final determination of job availability and possible backpay liability will be properly left to compliance.

TRIAL EXAMINER'S DECISION

SIDNEY SHERMAN, Trial Examiner: The charge herein was served on Respondent on January 5, 1970, the complaint issued on February 27, and the case was heard on April 8. The only issue litigated was whether Respondent violated Section 8(a)(3) and (1) of the Act with respect to R. Mahan's job application. After the hearing briefs were filed by the General Counsel and Respondent.

Upon the entire record,¹ including observation of the witnesses' demeanor, the following findings and conclusions are adopted:

I. RESPONDENT'S BUSINESS

Apex Ventilating Co., Inc., herein called Respondent, is a corporation under Indiana law, with a place of business in Indianapolis, Indiana, and is there engaged in the fabrication and installation of heating and ventilating equipment. It annually receives from out-of-state suppliers goods and materials valued at more than \$50,000, and derives gross revenues in excess of \$500,000 from the sale of its products. Respondent is engaged in commerce under the Act.

II. THE UNION

Local Union No. 41, Sheet Metal Workers' International Association, AFL-CIO, herein called the Union, is a labor organization under the Act.

III. THE UNFAIR LABOR PRACTICES

The pleadings raise only the issue whether Respondent has since December 9, 1969,² conditioned the employment of R. Mahan on his obtaining union clearance and has refused to hire him because he did not obtain such clearance, thereby violating Section 8(a)(3) and (1) of the Act.

A. Sequence of Events

R. Mahan is a young man, who under the Union's auspices had completed only 2 years of a 4-year apprenticeship training program as a sheet metal worker, and had aroused the ire of the Union's agent, Kerberg, by trying to obtain work as a union journeyman through a sister local. At the time of the events here in question R. Mahan was neither a union member nor a journeyman sheet metal worker.

His father, J. Mahan, was on December 9 working in Respondent's fabrication shop, and was not only a union member but also the union steward in that shop. Day was foreman of the shop employees, all of whom were sheet metal workers.

On December 8, R. Mahan, who had been doing sheet metal work for a nonunion contractor, was laid off. The next day he visited his father in Respondent's shop and told

¹ For corrections of the transcript, see the order of May 1, 1970.

² All dates hereinafter are in 1969, unless otherwise indicated.

him of his layoff. There ensued a series of conversations involving both the Mahans and Day, as to which there was conflicting testimony, but in the course of which it is agreed that there was some reference to the matter of the hiring of R. Mahan by Respondent to "beat duct" and that Day indicated that he could not hire him at that time. When, a few days later, R. Mahan returned to the shop, there was another discussion of the matter with the same result.

B. Discussion

1. Day's supervisory status

Respondent denies that Day was a supervisor under the Act.

On December 9, Day had worked for Respondent since October 23. He was paid 50 cents an hour more than the journeyman rate, and he assigned fabrication work to others in the shop from drawings. In selecting men for such assignments, he took into account their individual skills and aptitudes. He had had as many as 30 men under his direction, made recommendations to higher management about the hiring of job applicants, and no sheet metal worker could be hired in the shop without a favorable recommendation from him.³

It is clear, and I find, that Day was at all times here material a supervisor under the Act, and, *inter alia*, possessed the authority effectively to recommend hiring.

2. The union contract

Respondent has had contractual relations with the Union for about 20 years. Its current contract, which runs from 1968 to 1971, contains a union-shop clause, with an 8-day grace period, and an undertaking by the Union to furnish sheet metal workers on request by Respondent but no requirement that Respondent hire through the Union. However, Respondent's vice president, Ricketts, admitted that Respondent has rarely hired sheet metal workers without first calling on the Union, and that all Respondent's sheet metal workers have been union members, except for two who were hired in the summer of 1969, after the Union reported that it had no one available. Ricketts, also, admitted at one point that he thought that he was required by the contract to hire only union members.⁴ Foreman Day attested that he knew of no nonunion sheet metal workers being hired by Respondent, and that every employee in the shop is required to show the union steward proof of his current good standing in the Union. Finally, J. Mahan, who was the shop steward from October 1969 until early in 1970, testified that he would not permit Respondent to hire any sheet metal workers who had not been cleared by the Union, that only union members could obtain such clearance,⁵ and that only union members worked for Respondent as sheet metal workers.

Accordingly, it is found that, while the contract between

³ The foregoing findings are based on the testimony of Ricketts, Respondent's vice president.

⁴ Later, he apparently attempted to retract this admission, asserting he thought he was free to hire anyone he pleased. However, in the face of his prior admission I do not credit such retraction because of its self-serving nature and the other circumstances next discussed in the text.

⁵ Later, he stated that, whether or not it would clear nonunion men, the

Respondent and the Union provided only for a union shop and for referrals by the Union on request, it was Respondent's usual practice to request referrals from the Union before attempting to hire sheet metal workers directly and that in no event would Respondent hire any such workers who were not union members, unless it had first determined from the Union that none was available. There was thus in effect as to Respondent's sheet metal workers a modified closed shop arrangement, which was policed, as J. Mahan explained, by himself, as union steward, and the sanction for which was the Union's policy of not permitting its members to work with nonmembers.⁶

While the foregoing arrangement would seem to be unlawful, the General Counsel does not attack it but only the Respondent's treatment of R. Mahan. Accordingly, no violation finding is made with respect to such arrangement, itself.

3. The refusal to hire R. Mahan

With regard to the events of December 9, R. Mahan testified that after he told his father he was out of work and looking for a job the older man offered to talk to Day; that, after conferring with the latter for several minutes out of the witness' hearing, his father returned with Day and reported that the latter could use the youth to "beat duct";⁷ that, when the witness sought confirmation of this from Day, he replied that there was plenty of duct-beating work available and that it did not require any experience and he could teach the witness whatever else he needed to know later; that Day added that he had authority to hire without consulting Ricketts, but that young Mahan would have to obtain clearance from the Union; and that after the witness admitted that he had had some trouble with the Union's business agent Day still insisted that he would hire him, if he was cleared by the Union.

J. Mahan's version was that he did not ask Day to hire his son, because it would have been contrary to the "Union's rules" to hire a nonunion man, but he admitted that he discussed his son's unemployed status with Day in a private conversation, and at the same time indicated to Day his son's nonunion status. J. Mahan added that Day then volunteered that he would give the youth a job beating duct, if the Union's business agent, Kerberg, would clear him, and that Day repeated this to young Mahan, asserting that he could hire him without consulting Ricketts. J. Mahan admitted however, that he knew all along that his son would not be cleared by the Union.

Day's testimony was to the effect that the father asked him if he could give the son a job beating duct; that the witness answered that he could not do so at that time, because of a lack of work; that, when the father explained that his son had not completed his apprenticeship program with the Union and had been working on a nonunion job, the witness advised the boy to go to the union hall and get

Union would not permit its members to work with them, and he was emphatic that he had never worked in a shop with nonunion sheet metal workers and that union members would not work with nonmembers.

⁶ See preceding fn.

⁷ This was a relatively unskilled operation that admittedly could have been performed by one with R. Mahan's training.

"straightened out." While denying that on that occasion he made any conditional promise to hire young Mahan, Day admitted that on a later date he might have indicated that he might be able to use young Mahan "if he was fixed up with the union and got his card." Presumably, Day here had reference to the incident a few days after December 9, when, as noted above, R. Mahan returned to Respondent's shop. He had made no effort in the meantime to obtain union clearance, because he was convinced of the futility thereof, and his only purpose in visiting the shop was to accompany his father to lunch. Both Mahans agreed that on that occasion the father asked Day if his son could go to work beating duct and that Day reiterated that he would first have to be cleared by the Union. Thus, there is no substantial dispute that at least on that occasion Day conditioned the hiring of young Mahan on union clearance. Moreover, I credit the mutually corroborative testimony of the Mahans as to the events of December 9, and find that on that date Day had also promised R. Mahan a job if he obtained union clearance. He never did obtain such clearance and was not hired by Respondent, and Day admitted that he could not hire R. Mahan until he became a union member.

Respondent contends that there can, nevertheless, be no finding here of a discriminatory refusal to hire, because there is no proof that there was work available for R. Mahan at the time of the refusal or at any time thereafter. However, the Board has held that proof of a contemporaneous or subsequent job vacancy is not essential to a finding of unlawful discrimination, but that it suffices to show that the employer failed to "consider an application for employment for reasons proscribed by the Act."⁸

Here, Day's promise to hire R. Mahan, subject to union clearance, implied that, absent such clearance and the union membership, which was a prerequisite thereof, no consideration would be given to his job application. R. Mahan was thus put on notice that he was barred from employment by Respondent as a sheet metal worker because of his nonunion status, and he was, in fact, as Day admitted, for that reason not considered by him eligible for employment. It follows that, even if, as appears to be the case,⁹ there was no work for young Mahan on December 9, his nonunion status would continue to operate as a bar, if and when such work did become available, and it is this

⁸ *Shawnee Industries, Inc.*, 140 NLRB 1451, 1453, enforcement denied on other grounds, 333 F.2d 221 (C.A. 10). The Board there stated that the "question of job availability is relevant only with respect to the employer's backpay obligation." Accord: *Lipsey, Inc.*, 172 NLRB No. 171 (TXD). While there is therefore no need to determine finally at this time the question of job availability, it may not be amiss to offer the following comments: There was uncontradicted testimony by Day and Mahan that no one was ever actually hired to do the duct-beating work referred to by Day on December 9, and since that date Respondent's complement has declined from 55 to 34. While it has been found that Day promised to hire R. Mahan, if he obtained union clearance, it is clear from the record that both Day and the elder Mahan were well aware that the youth could not obtain such clearance and that the promise was an empty one. (Day characterized his conditional promise of a job as "a lot of nonsense to make the boy feel good," and to work, on the occasion of his second visit to the shop, was merely jocular.) Accordingly, I would construe any related discussion of the availability of duct-beating work, Day's authority to hire, etc., as merely part of a charade that the two older men were acting out, the purpose of which was to spare the elder Mahan the embarrassment of having to tell his son that he could not allow him to go on the job without

circumstance which was the vice of Respondent's conduct under the rule of the *Shawnee* case.¹⁰

It is accordingly found that there was a refusal to consider R. Mahan for employment on and after December 9, because of a lack of union clearance, and that, there being no valid hiring hall agreement in effect, Respondent thereby violated Section 8(a)(3) and (1) of the Act.¹¹

It is clear, in any event, that, even if there was no 8(a)(3) violation here, Respondent violated Section 8(a)(1) of the Act by serving notice on R. Mahan that he could not be hired without union clearance, which meant, under the circumstances, that he could be hired only if he was or became a union member.

IV. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be directed to cease and desist therefrom and take appropriate affirmative action.

It having been found that Respondent unlawfully discriminated against R. Mahan with respect to his application for employment, it will be recommended that Respondent be required to offer him employment in the same position in which he would have been hired absent the discrimination against him, if such position became available subsequent to his December 9 application, and, if no such position became available, in a substantially equivalent position. Since, in view of Respondent's retrenchment program, it is not likely that any position of the sort described above has become available since December 9, it will be further recommended that, in such case, Respondent be required to place R. Mahan on a preferential hiring list, and offer him the first such position that becomes available, in which it would have employed him absent any discriminatory considerations. It will be further recommended that Respondent be required to make R. Mahan whole for any loss of earnings he may have suffered by reason of the failure to give him nondiscriminatory consideration for employment in the manner outlined above, less his net earnings during the period of such backpay accrual. Such backpay shall be computed in accordance with the rule of *F. W. Woolworth Company*, 90 NLRB 289, and interest at 6 percent per annum shall be

union clearance. Evidently, the older men though it would be less embarrassing to the father, if they created the impression that there was no obstacle at their level to hiring the son, and if they shifted final responsibility in the matter to higher union authority.

⁹ See preceding fn.

¹⁰ The cases cited in Respondent's brief as contrary to *Shawnee* are distinguishable on their facts. In *Consolidated Casinos Corp.*, 164 NLRB 961, 964, it was found, in effect, that the only reason for the refusal to hire was the unavailability of work and that the applicant's union activity was not a factor. Similarly, in *United Steel Inc.* 161 NLRB 432, it was found that the refusal to hire was due solely to lack of work. Moreover, in neither of those cases was there any finding, as there is here, that the applicant's union status precluded consideration of his application, if and when work became available. In *N.L.R.B. v. Frost-Whited Co.*, 350 F.2d 365 (C.A. 5), also cited by Respondent, the court refused to enforce the Board's finding of a discriminatory refusal to hire but only because, unlike the Board, it did not construe a remark made by the employer to the applicant as implying that such refusal was due to his union activity rather than to lack of work.

¹¹ *United Construction Company*, 169 NLRB No. 1.

added pursuant to *Isis Plumbing & Heating Co.*, 138 NLRB 716.

In view of the nature of Respondent's violation, a broad cease-and-desist provision will be recommended.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. By conditioning the employment of R. Mahan on and after December 9, on his obtaining clearance from the Union, in the absence of a valid hiring hall agreement, Respondent has violated Section 8(a)(3) of the Act.

4. By the foregoing conduct, Respondent has interfered with, restrained, and coerced R. Mahan in the exercise of the rights guaranteed to him by Section 7 of the Act and thereby has violated Section 8(a)(1) of the Act.

5. 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 basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that Respondent, Apex Ventilating Co., Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall be required to:

1. Cease and desist from:

(a) Conditioning employment of job applicants on their obtaining clearance from Local Union No. 41, Sheet Metal Workers' International Association, AFL-CIO, of any other labor organization, in the absence of a valid hiring hall agreement, and from notifying job applicants of such condition.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent permitted by the proviso in Section 8(a)(3) of the Act.

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

(a) Make Robert Mahan whole for any loss of pay he may have suffered by reason of the discrimination against him in the manner and to the extent set forth in the section of this Decision entitled "The Remedy."

(b) Offer Robert Mahan immediate employment, subject to the conditions and limitations set forth in the section of this Decision entitled "The Remedy."

(c) Post at its Indianapolis, Indiana, establishment, copies of the attached notice marked "Appendix."¹² Copies of said notice, on forms provided by the Regional Director for Region 25, shall be signed by Respondent's authorized representative, and posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.¹³

¹² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted pursuant to a Judgment of the United States Court of Appeals, enforcing an Order of the National Labor Relations Board."

¹³ 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 had taken to comply herewith"

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through a representative of their own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any and all of these things.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT condition the hiring of job applicants on their membership in Local Union No. 41, Sheet Metal Workers' International Association, AFL-CIO, or any other union or on their being referred by any union with which we do not have a lawful hiring hall agreement.

WE WILL pay Robert Mahan any money he lost as a result of our failure to consider him for employment on a nondiscriminatory basis on and after December 9, 1969, with interest at 6 percent, and we will offer him any job which he would have received had his application been properly considered.

APEX VENTILATING CO.,
INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 614 ISTA Center 150 West Market Street, Indianapolis, Indiana 46204, Telephone No. 317-633-8921.