**Beach Electric Co., Inc.; Nordling, Dean Electric Co., Inc.; J. R. Longo & Sons, a Corporation of New Jersey *and* Justin J. Daly and Local 581, International Brotherhood of Electrical Workers, AFL-CIO, Party in Interest.** Case 22-CA-3136

January 24, 1969

## DECISION AND ORDER

On January 31, 1968, Trial Examiner William Seagle issued his Decision in the above-entitled proceeding, finding that the Respondents had not engaged in certain unfair labor practices and recommending dismissal of the complaint in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief, and each of the Respondents and the Party in Interest filed answering briefs.

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

The Trial Examiner found that the Respondents had not violated Section 8(a)(2) of the Act on the grounds that the Respondents had only meager knowledge of the intraunion activity of the individuals alleged to be supervisors, there was no evidence that the Respondents ever interfered in any specific union activity or ratified the union activity of any of these individuals, and for the most part the supervisory status of these men was transitory. We agree. All of the individuals named in the complaint, with the exception of Eugene Kelly,[1] worked intermittently in supervisory and nonsupervisory positions. As indicated by the record, whether an individual is considered a foreman or just a journeyman varies from day-to-day in accordance with the parties' contract. Thus, if an individual works alone on a job or with one individual working under him, he is considered a journeyman or plan reader. On the other hand, if he has more than two individuals working under him, he is considered a foreman. The individuals in question seldom supervised more than five men. Although there is testimony that each of these individuals was in charge of the day-to-day operation of the job he was assigned to, all major decisions and all hiring, firing, and laying off of employees were the responsibilities of the project superintendents who periodically visited the jobsite. Consequently, while we acknowledge that the individuals here involved possessed supervisory authority, we adopt the Trial Examiner's finding that they were "low-level and intermittent supervisors." Further, all of the individuals here involved were included in the bargaining unit.

In the above circumstances, and bearing in mind the nature of the industry involved, the construction industry, we do not believe a violation of Section 8(a)(2) has been established. There is no evidence that any of the substantive evils contemplated by Section 8(a)(2) have resulted from the holding of union office by the Respondents' foremen. There is no allegation that any employee had difficulty processing grievances, nor is there any evidence of unequal treatment of employees or applicants in hiring, discharge, layoffs, or reinstatements.[2] Finally, the record reveals little knowledge on the part of the Respondents concerning the official positions held in Local 581 by the seven individuals named in the complaint. In fact, the Respondents do not negotiate with the Union at any time and their only contact with the Union appears to be through the Union's business manager in accordance with the referral procedure.

Our dissenting colleagues would nevertheless find the violation based on the activities of the Respondents as a group because they all subscribed to the same bargaining agreement with the Union. In reaching this conclusion the dissent seems to rely mainly on the facts that "the supervisors named in the complaint occupied, during the 10(b) period, virtually every responsible office in the Union," and "as a group had power to select the Union's bargaining committee, approve new members, apply Union discipline, and administer the Union's funds." In our view this approach is unwarranted. Neither the General Counsel nor the Charging Party claim that the Respondents were acting in concert at any time, nor that they had any knowledge of the union activities of one another's employees. Indeed, as we have indicated, the record shows that Respondents Beach and Longo did not even know of the union activities of their own employees until after the complaint was issued in this case. Under these circumstances we are persuaded, as was the Trial Examiner, that each of the Respondents' activities must be viewed separately.

For the above reasons, we agree with the Trial Examiner that the Respondents have not violated Section 8(a)(2) of the Act.[3]

[1] Eugene Kelly is no longer an officer in the Union.

[2] The record indicates that the Union's referral procedures were applied in strict compliance with the standards imposed by the contract between the Union and the local chapter of the NECA.

[3] *Nassau and Suffolk Contractors' Association, Inc.*, 118 NLRB 174, *National Gypsum Company*, 139 NLRB 916, 920; *Banner Yarn Dyeing Corporation*, 139 NLRB 1018, 1024.

## 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 the complaint herein be, and it hereby is, dismissed in its entirety.

CHAIRMAN MCCULLOCH and MEMBER BROWN, dissenting:

Contrary to our colleagues, we would find that the Respondents violated Section 8(a)(2) of the Act. We rely on the control possessed by their supervisors over the Union's internal affairs. While serving their respective employers in supervisory positions, the individuals named in the complaint occupied, during the 10(b) period, virtually every responsible office in the Union. Eugene Kelly, who has been employed as a general foreman for 5 years by Beach, served as president of the Union. Bertram Carr, a Nordling supervisor, is currently the Union's president. Before his election as president, in June 1967, Carr served as a member of the executive board for 2 years. At the time of the hearing, Richard A. Liddy was the chairman of the executive board, and Earl LaRoche and Bish Thomas, Jr., were two of its four other members. Edward Momm has been the recording secretary of the Union since June 1965, and John Eager has been treasurer since July 1, 1965. The record shows that these officers, as a group, selected the members of all the Union's committees, including the negotiating committee, approved new members, applied union discipline, and administered the Union's funds.

Each individual named above acted as his employer's sole supervisory representative on various projects within the 10(b) period. His responsibility included the authority to transfer individuals and assign work; to effectively recommend action with respect to hiring, layoffs, and overtime work; and to discipline employees at the project. As indicated by the record, this direction was not of a merely routine or clerical nature, but required the use of independent judgment. Moreover, some such individuals might have as many as 60 employees under their individual control. It seems clear to us that, during the pertinent period, all of the individuals named held substantial positions as supervisors within the meaning of Section 2(11) of the Act.

To be sure, the Board has in the past recognized certain customs and practices in the construction industry, and has made an effort to apply the prohibitions of Section 8(a)(2) to that industry in a manner that would not do violence to reality. Thus, in *Nassau and Suffolk Contractors' Association, Inc.*,[4] a majority of the Board held that mere inclusion of construction foremen in a bargaining unit along with non-supervisory employees was not *per se* proof of employer domination, justifying disestablishment of the union representing such unit. In another case,[5] the Board found too remote the danger that a supervisor's serving as union auditor would improperly influence the affairs of that union. Yet the fact that a case involves the construction industry, or construction unions, has not meant that the prohibitions of Section 8(a)(2) do not apply at all. In *Detroit Association of Plumbing Contractors,*[6] the Board, with Court approval, held that active participation in union affairs by supervisors constituted employer interference, and in the *Nassau and Suffolk* case previously referred to, the same Board majority that had found no domination nonetheless found that the employers had improperly assisted the Union by permitting supervisory master mechanics to participate in bargaining with members of the employer association on behalf of the Union. As the Board stated in that case, "employees have the right to be represented in collective bargaining negotiations by individuals who have a single-minded loyalty to their interests."[7] In our view, this latter principle is applicable to the facts of the present case.

In the case at hand, the supervisors named in the complaint occupied, during the 10(b) period, *virtually every responsible office in the Union.* The president, secretary, treasurer, and even the chairman and half of the members of the executive board were, for substantial periods, solely in charge of the employees at projects then being performed by their employers. As previously indicated, the record shows that these officers, as a group, had power to select the Union's bargaining committee, approve new members, apply union discipline, and administer the Union's funds. In our opinion, this carries the dual-function role too far. Employees having grievances pertaining to their jobs would, in many instances, find it difficult to secure effective representation from their union, for, upon going to the Union for assistance, they would be faced with representation answerable to precisely the same individuals as were the subject of their grievance. Moreover, it is entirely likely that, by virtue of the considerable responsibility they exercised for their respective employers, the supervisors named in the complaint would, on a given occasion, find it extremely difficult to administer the affairs of their Union without giving some weight to their responsibility to their employers. As indicated, we recognize that some overlapping of allegiance may exist in the construction industry. Where, however, as here, it has been shown to have occurred with such pervasiveness, both in terms of the degree of authority possessed by the supervisors, and the high positions they held within the Union, we find that the bounds of the statute have been overstepped. It is our opinion that, in the circumstances of this case,

[4] 118 NLRB 174

[5] *National Gypsum Company*, 139 NLRB 916

[6] 126 NLRB 1381, 1388, enfd. as mod 287 F 2d 354 (C A D.C.); 132 NLRB 658.

[7] *Nassau and Suffolk Contractors' Association, Inc., supra* at 187.

the Respondents have interfered with the administration of the Union in violation of Section 8(a)(2) and (1) of the Act.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

WILLIAM SEAGLE, Trial Examiner: Upon a charge filed on May 29, 1967, an amended charge filed June 9, 1967, a complaint issued on October 20, 1967, by the Regional Director of Region 22, in which the violation of Section 8(a)(2) and (1) of the Act was alleged, and the answers of the respondents, in which the commission of the alleged unfair labor practices was denied, I heard this case at Newark, New Jersey, on November 27 and 28, 1967.

After the commencement of the proceeding, Local 581 of the International Brotherhood of Electrical Workers (hereinafter referred to as Local 581), filed a motion for leave to intervene as a respondent and to file an answer as such, and under date of November 2, 1967, the Regional Director entered an order, allowing Local 581 to intervene but not as a respondent. Insofar as the motion pertained to leave to file an answer, the Regional Director referred it to the Trial Examiner who would conduct the hearing. At the hearing I granted leave to file the answer, which was duly filed Like the respondents, Local 581 denied the commission of any unfair labor practices. At the close of the taking of testimony at the hearing, counsel for Local 581 and for the General Counsel presented oral argument, and subsequent to the hearing counsel for all of the respondents and for Local 581 filed written briefs, which have been duly considered.

Upon the record so made, and in view of my observation of the demeanor of the witnesses, I hereby make the following findings of fact:

### I. THE RESPONDENTS

Beach Electric Co., Inc. (hereinafter referred to as Beach), is a New Jersey corporation which, at all material times, has maintained its principal office and place of business at 18 Springdale Avenue, East Orange, New Jersey, and which has been engaged as a contractor in the building and construction industry in performing electrical work and related services at various jobsites located in the State of New Jersey and in other States of the United States.

In the course and conduct of its business operations during the calendar year 1966, which is a representative period, Beach provided and performed electrical construction services valued in excess of $50,000 within States of the United States other than the State of New Jersey.

Nordling, Dean Electric Co., Inc. (hereinafter referred to as Nordling), is a New Jersey corporation, which at all material times, has maintained its principal office and place of business at 44 Middle Avenue, Summit, New Jersey, and which has been engaged as a contractor in the building and construction industry in performing electrical work and related services at various jobsites located in the State of New Jersey and in other States of the United States.

In the course and conduct of its business operations during the calendar year 1966, which is a representative period, Nordling provided and performed electrical contracting services valued in excess of $50,000 within States of the United States other than the State of New Jersey.

J. R. Longo & Sons (hereinafter referred to as Longo) is a New Jersey corporation, which, at all material times, has maintained its principal office and place of business at 74 Abbett Avenue, Morristown, New Jersey, and which has been engaged as a contractor in the building and construction industry in performing electrical work and related services at various jobsites located in the State of New Jersey.

In the course and conduct of its business operations during the calendar year 1966, which is a representative period, Longo caused to be purchased, transferred and delivered to its New Jersey jobsites, electrical connectors and other goods and materials valued in excess of $50,000, which goods and materials were transported to its New Jersey jobsites in interstate commerce directly from States of the United States other than the State of New Jersey.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

The violation of Section 8(a)(2) and (1) that is alleged in the complaint is based on the allegation that since the beginning of 1967, the respondents have permitted certain named individuals, who occupy supervisory positions with the respondents, to hold responsible offices in Local 581, and to act as agents thereof, thereby rendering unlawful assistance and support to Local 581.

The relationship between the respondents and Local 581 are determined by a collective-bargaining agreement made April 12, 1966, by and between the Tri-County Division of the New Jersey Chapter of the National Electrical Contractors Association[1] and Local 581. The NECA agreement took effect on June 1, 1966, and was to remain in effect until June 1, 1969, and from year to year thereafter unless changed or terminated in accordance with the procedure specified therein Nordling is bound by the NECA contract as a member of NECA, and Beach and Longo, who are not members of NECA, are bound by it by virtue of the execution of letters of assent to be bound by its terms.

Insofar as material to the present proceeding, the NECA agreement contains a union security provision requiring all employees who are members of Local 581 to remain members in good standing during the term of the agreement, and requiring all employees who are not members at the time of their employment to become members on the 30th day of their employment. The NECA agreement covers all employees performing work within the jurisdiction of Local 581, and their foremen are not excluded from membership, nor are they excluded from holding union office.[2] Indeed, all but 10 of the 135 journeymen members of Local 581 have been foremen at one time or another Species of foremen enumerated in the NECA agreement include "General Foreman," "Assistant General Foreman," "Foreman," "Supervising Job Foreman," "Working Job Foreman," and "Sub-Foreman." It is provided that all jobs must be manned by combinations of journeymen and foreman as indicated in a ratio schedule, which is printed on pages 13 to 17, inclusive of the NECA agreement. In this schedule

[1] The Association will be referred to hereinafter as the NECA, and the agreement between the NECA and Local 581 will be referred to as the NECA agreement

[2] Article IX, Sec 4 of the Bylaws of Local 581 provides, however, that no member holding a position as "Superintendent" or as "Foreman" shall serve as a steward.

the ratio of foremen of various ranks depends upon the number of journeymen on the job. Thus, if there is only one journeyman on a job, no foreman is required, and when there are only two journeymen on a job, only a plan reader is required; from there on foremen of various ranks are required, the rank of the foremen, depending on the number of the journeymen. In addition to the ratio schedule, there is a provision which reads as follows:

> Any Journeyman in charge of a job which anticipates the employment of over eighteen journeymen shall be called a General Foreman. An Assistant General Foreman shall be appointed on any job where five or more Sub-Foremen are employed. The General Foreman after the second Sub-Foreman is appointed shall stop the supervision of Journeymen, and the General Foreman and the Assistant General Foreman shall only supervise the Sub-Foremen and the Sub-Foremen shall supervise the Journeymen.

The NECA agreement sets up an exclusive hiring hall procedure which makes Local 581 the sole source of applicants for employment. The employer has, however, the right to reject any applicant for employment, and the union is bound to refer applicants for employment without discrimination against them by reason of membership or non-membership in the union. It is also expressly provided that referrals "shall not be affected in any way by rules, By-Laws, constitutional provisions or any other aspect or obligation of Union Membership policies or requirements."

There are seven employees of one or another of the respondents who are alleged to have occupied positions as foremen at the same time that they had occupied positions as officers of Local 581. These seven employees are Eugene Kelly, employed by Beach, Richard A. Liddy, Bertram Carr, Earl La Roache, John Eager and Bish Thomas, Jr., employed by Nordling; and Edward W. Momm, employed by Longo.

The evidence shows that Eugene Kelly was president of Local 581 between 1965 and 1967, but ceased to be president in July 1967; that Richard A. Liddy has been a member of the executive board of Local 581 for about 5 years and that he is presently the chairman of the executive board; that Bertram Carr is president of Local 581 at the present time and that prior to his election as president in June 1967 he had been a member of the executive board of Local 581 for a period of 2 years; that Earl La Roache has been a member of the executive board of Local 581 for 6 years; that John Eager has been treasurer of Local 581 since July 1, 1955; that Bish Thomas, Jr., was a member of the executive board of Local 581 from 1954 until the election in June 1967, but that he holds no office in the union at the present time; and that Edward Momm has been recording secretary of Local 581 since the election in June 1965.

The record reveals, however, but meager knowledge on the part of officers of the respondents concerning the official positions held in Local 581 by the seven individuals enumerated in the complaint. It is shown that William E. Travis, the vice president and general manager of Beach, learned some time during Eugene Kelly's term of office that he was president of Local 581 but as of the time of the hearing Travis did not know the identity of any of the present officers of the local and he was also ignorant of the composition of the local's present collective-bargaining committee.[3] It is also shown that S. Philip Dean, who is secretary of Nordling and who also supervises some of the company's operations, learned that Liddy was a member of the local's executive board only when the charges in the present case were under investigation, and he did not learn of La Roache's membership on the local's executive board until May 1966. As for Bish Thomas, Jr., Dean never learned that he had been a member of the local's executive board. Dean did learn in July 1967 that Carr had been elected president of the local, but even then he did not become aware that Carr had previously been a member of the local's executive board. Even as of the time of the hearing Dean did not know that Eager had long been the treasurer of the union. Joseph J. Longo, the president of Longo, did not learn that Momm was recording secretary of the local until after the charges in the present case began to be investigated. There is, moreover, no evidence that the respondents ever interfered in the internal affairs of the union, or even discussed union affairs with any of the officers of the local. It is also shown affirmatively that while Kelly was president of the local he did not participate in any way in the handling of grievances.

As is to be deduced from the nature of the employing industry and of the provisions of the NECA agreement, the employment of the seven officers of Local 581 has been of a transitory nature. This is perhaps least true of Eugene Kelly, the ex-president of the local, who during the past 5 years has been the general foreman on a building project known as Sandos Pharmaceuticals, which at times has employed as many as 60 journeymen electricians, but even on this job there have been rare occasions when less than 5 journeymen have been on the job, and Kelly has himself engaged in manual work, or acted as plan reader. Liddy has worked for Nordling for about 2 1/2 years on a considerable number of jobs, most of which he has held for brief periods. His two principal jobs appear to have been on an Esso job in Florham Park, which started in November 1966, when he was first hired, and his current job described as the Varityper Corporation project which is scheduled for completion in June 1968. On the Esso job, there were never more than 7 or 8 journeymen, and, when there were that many, Liddy was foreman on the job; there were times on this job, however, when Liddy was the only journeyman on the job, or when there were less than 5 journeymen on the job, and Liddy was a working foreman who worked with his tools. On the Varityper Corporation project, as many as 30 journeymen have been employed and Liddy has been their foreman. Carr, who has been employed by Nordling for 2 or 3 years, has been working since November 27, 1966, at the Morris County Hall of Records. At first Carr worked on this job with only one helper, and he was a journeyman but as the job grew in size Carr became general foreman. La Roache has worked on various jobs in 1966 and 1967, but he has never had more than 3 or 4 journeymen working under him, and he was only a working foreman, except that at the end of July 1967, he went on a job with Liddy and was an assistant foreman Eager has worked on an addition to the Overlook Hospital between July 1965 and November 1965, but he then had only 2 men and he was only a working foreman. Between November 1965 and July 1967, Eager was, however, general foreman at the Overlook Hospital. Between August and October

[3] Eugene Kelly himself testified, however, that he appointed the members of the local's collective-bargaining committee that negotiated the 1966 NECA agreement The members of this committee then were Elmer McCracken, Orlan Van Duyne, John Tyrone, Frank Kelly, and one other individual who remains unidentified. Of these individuals, John Tyrone was also an officer of the local, being vice president at the time.

1967, he worked as a lone journeyman at a Shop-Rite market in Florham Park. On November 5, 1967, Eager became plan reader at American Telephone and Telegraph Repeater Station at Netcong, New Jersey, and he is still employed there. Between November 1966 and November 1967, Bish Thomas, Jr. worked on two jobs designated as Keuffel-Esser and Singer Sewing Machine, but he never had more than two journeymen working with him, and he was no more probably than a working foreman. Edward R. Momm, who is no longer employed by Longo, has worked principally on a Whippany Paper Company job from November 30, 1966, to April 25, 1967, but on this job, he either worked as a lone journeyman or with a number of other journeymen who never exceeded 5. When there were only 3 men on the job, Momm would work along with them as working foreman, all of them merely following the plans.

Whether it was a general foreman or a foreman who was in charge of a job, the nature of the supervision does not seem to have varied substantially. The general foreman or foreman supervised the day-to-day operation of the job but he made no major decisions, and he had no power to hire, fire, lay off, or even discipline employees. These powers were vested in the project superintendent or manager, or his employers. It seems to be the general practice for the project superintendent to visit the job at least once a week, and sometimes daily.

Of the seven union officers who are involved in the present case, the one who held the job of the greatest magnitude and for the longest time was undoubtedly Eugene Kelly. Although potentially his job was no less transitory than those of the other union officers, he was general foreman, with the exception of a few brief intermissions, for approximately 5 years, and on the same job. The general foremanships or foremanships of the others were, however, for relatively brief periods. Assuming, *arguendo,* that some of them were in supervisory positions at various times within the meaning of Section 2(11) of the Act, the question arises whether their tenure of union offices during these periods constituted "interference" in union affairs within the meaning of Section 8(a)(2) and (1) of the Act.

It would seem that this question must be answered in the negative, in view of the principles established by the leading cases in this field that include *Nassau and Suffolk Contractors' Association, Inc.,* 118 NLRB 174; *Anchorage Businessmen's Association, Drug Store Unit,* 124 NLRB 662; *Detroit Association of Plumbing Contractors,* 126 NLRB 1381;[4] *Bottlefield-Refractories Company etc.,* 127 NLRB 188, and *National Gypsum Company,* 139 NLRB 916.

The Board has held in these cases that it is not illegal *per se* for supervisors to be included in a bargaining unit, and that their employer is not responsible for their participation in internal union affairs unless he has instigated or ratified their conduct. The Board has specifically held that voting in union elections and the holding of union office by supervisors does not constitute interference unless such supervisors are of high rank. A form of activity that has uniformly been held, however, to constitute interference is participation by supervisors as union representatives in bargaining negotiations with employers.

Although Eugene Kelly, who was then president of the union, appointed the committee that negotiated the NECA agreement in 1966, the committee did not include any of the officers of the union who are included in the complaint in the present proceeding. Assuming, *arguendo,* that the appointment of the committee by Kelly may have constituted an unlawful act of interference, a finding to this effect would seem to be barred by Section 10(b) of the Act, notwithstanding the continued maintenance of the agreement within the 6-month period of limitation established by this provision of the Act.[5]

The case of the General Counsel in the present proceeding would seem to be exceptionally weak Counsel for the General Counsel has not shown that any substantive evils have resulted from the holding of union office by the respondent's supervisors. Indeed he has not even shown that Beach and Longo representatives knew the identity of the present officers of Local 581 before the hearing in the present case. The fact that the union officers in the present case were, with one possible exception, transitory supervisors is also hardly an element of strength in the General Counsel's case.

In his presentation of the present case, counsel for the General Counsel seems to have also proceeded on the assumption that the three separate respondents acted in concert, and that the holding of union office by the supervisors of all three of them can be charged therefore, to each of them. As there is no evidence of concerted activity, however, this would hardly seem to be possible. Considering each of the respondents separately, only Nordling had a number of supervisors who held union office but these were only low-level and intermittent supervisors. Beach and Longo each employed only a single supervisor who held union office. Apart from any other consideration, Beach and Longo cannot be found guilty of interfering in union affairs by permitting their supervisors to hold union office when they had no knowledge that they were holding such office.

## CONCLUSIONS OF LAW

1. Beach Electric Co , Inc.; Nordling, Dean Electric Co., Inc.; J. R. Longo & Sons, a corporation of New Jersey, are employers engaged in commerce in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 581, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By employing respectively, Eugene Kelly, Richard A. Liddy, Bertram Carr, Earl La Roache, John Eager, Bish Thomas Jr., and Edward W Momm, in positions which may have been of a supervisory nature, Beach Electric Co., Inc., Nordling, Dean Electric Co., Inc., and J. R. Longo & Sons, the respondents, did not either singly or collectively render unlawful assistance and support to Local 581 of the International Brotherhood of Electrical Workers, AFL-CIO, and did not, therefore, interfere in the internal affairs of the said local within the meaning of Section 8(a)(2) and (1) of the Act.

[4]Enforced but remanded in part in 287 F 2d 354 (C.A.D.C.) See also 132 NLRB 658 (on remand)

[5]See *Local Lodge 1424, IAM, AFL-CIO (Bryan Mfg. Co ),* 362 U.S 411, and *Ace Wholesale Electrical Supply, Co.,* 133 NLRB 480, 503-04, together with the cases cited therein.

## RECOMMENDED ORDER

In view of my findings of fact and conclusion of law, I recommend that the Board enter an order dismissing the complaint.