L & L Painting Co., Inc. *and* **Charles E. Voudy** *and* **Martin Weiner**
L & L Painting Co., Inc. *and* **Joseph Fierman.** Cases 29-CA-1114, 29-CA-1116, and 29-CA-1047

February 28, 1969

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND ZAGORIA

On August 1, 1968, Trial Examiner Milton Janus 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, and further finding that the Respondent had not engaged in certain other alleged labor practices and recommending that such allegations be dismissed. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified herein.

We adopt the Trial Examiner's findings, to which no exceptions were filed, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to recall employees Martin Weiner and Charles Voudy in reprisal against them because of their membership in Local 1511. However, for the reasons set forth below, we do not adopt the Trial Examiner's finding that the Respondent did not violate the Act by subsequently discharging Fierman on May 17, 1967

Adopting the Trial Examiner's credibility resolutions, we find that from the date of his employment and appointment by Local 1511 as job steward on the Seth Low project on March 14, 1967, Fierman assiduously policed the collective-bargaining agreement and the trade rules. Admittedly, because the Seth Low project involved painting eight apartments on each of 17 floors of four apartment buildings, Fierman spent some undisclosed portion of his work time in the performance of these activities. With equal assiduousness Fierman complained to the Respondent and reported to the Union and the City Housing Authority the numerous alleged violations he discovered. The record is clear that the Respondent strenuously objected to Fierman's activities and studiously sought to rid itself of Fierman and refused to recall other employees because they were members of Local 1511, unless Fierman was removed as job steward. In the light of this conduct, and upon the record as a whole, we are not persuaded that the Respondent discharged Fierman for policing the job on the Respondent's time in violation of the contract.

Moreover, we do not agree with the Trial Examiner that the collective-bargaining agreement, to which the Respondent was a party, prohibited Fierman from inspecting and policing the job during working hours. Paragraph (c) of Article IX, Section 2 of the contract, on which the Trial Examiner relied, relates only to the duties and limitations of *shop* stewards, and it makes no mention of job stewards. The evidence is uncontroverted that Fierman was appointed as the job steward on the Seth Low project, and another individual was appointed as shop steward.[1] Nor do we agree that Fierman's activities on the Seth Low project during working hours were prohibited by understanding, custom, or practice. On the contrary, the record reflects that it was the custom and practice for job stewards to police the job during working hours where prior violations of the contract or trade rules had been disclosed, and Fierman was instructed to this extent by an official of Local 1511 on the basis of Fierman's numerous complaints about the Respondent Considering the expense of the Seth Low project and the type of violations engaged in by the Respondent, it would have been patently futile for Fierman to have inspected the job at any time other than during working hours. Accordingly, we find that Fierman was not prohibited, either specifically or inferentially, by the contract from performing these aspects of his job steward's duties on the Respondent's time.

In addition to the absence of any contractual provision or practice prohibiting Fierman from inspecting and policing the job during working hours, the record also contains persuasive evidence that Fierman's utilization of Company time was not the motivating reason for his discharge. The record is replete with evidence of conversations of the Respondent's president, Levine, and its foreman, Schwartzberg, with Fierman, other employees, employee applicants, and union representatives concerning Fierman's investigation of the job and his reports to the Union and the city's building officials. In all of these conversations the Respondent's officials complained vociferously that

[1] Contrary to the Trial Examiner, we do not find that Fierman's admission that he performed certain of the functions outlined in the provision relating to shop stewards, such as checking work cards and dues books of journeymen, and making out weekly reports, warrants the conclusion that he was appointed as a shop steward and subject to the limitations outlined in paragraph (c)

Fierman was disrupting the job and affecting the work by uncovering and reporting violations of the bargaining agreement, the customs of the trade and the Respondent's contract with the city. At no time did the Respondent complain to Fierman, or any other person that his activities during working hours were in violation of the contract[2] and grounds for discharge. On the contrary, Levine told Fierman that it was not his "business to check anything" and when Fierman complained to Levine about the violations he had uncovered on the job, Levine told him to go to some other job and investigate conditions there Although Levine testified concerning certain letters he had allegedly written to the Association of Master Painters and Decorators complaining of Fierman's activities on Company time, the letters were not offered in evidence, and the Respondent likewise offered no evidence as to the unavailability of either the original letters or copies thereof. Similarly, the arbitrator's decision cannot be considered as dispositive of the reasons underlying Fierman's discharge, because the decision and the transcript of the arbitration proceeding were withdrawn from evidence by the Respondent. Moreover, the Respondent introduced no evidence of the amount of time Fierman was absent from work while performing his steward's duties, and Schwartzberg admitted that Fierman was a good mechanic and gave a fine day's work.

Under all of these circumstances, and particularly in view of the Respondent's several threats to rid itself of Fierman, we find that the Respondent's asserted reason for the discharge was an afterthought and a pretext, and that the underlying and motivating reason for the termination was Fierman's protected concerted activities.[3]

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, as modified below, and orders that the Respondent, L & L Painting Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Amend paragraphs 2(a) and (b) of the Trial Examiner's Recommended Order by inserting "Joseph Fierman," before Charles Voudy.

2. Delete the paragraph of the Trial Examiner's Recommended Order in which he recommends dismissal of the complaint in all other respects.

3. Insert as a first indented paragraph in the notice attached to the Trial Examiner's Decision the following language.

WE WILL NOT discharge or otherwise discriminate against any employee because of performance of his duties as job steward in regard to his hire, tenure of employment, or any term or condition of employment.

4. Insert "Joseph Fierman," before Charles Voudy wherever Charles Voudy appears in the indented paragraphs in the notice attached to the Trial Examiner's Decision.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MILTON JANUS, Trial Examiner Charles E Voudy filed a charge on September 27, 1967, in Case 29-CA-1114, alleging that L & L Painting Co., Inc , referred to hereafter as L & L or the Employer, had discriminatorily terminated his employment on or about March 31, 1967 On September 29, 1967, Martin Weiner filed his charge in Case 29-CA-1116, alleging a similar discriminatory termination on or about the same date. On November 29, 1967, the Regional Director for Region 29 issued a complaint, notice of hearing, and an order consolidating these two cases The complaint alleged that the two charges had been served on Respondent by registered mail on or about October 2, 1967, thus making it appear on its face that the service had been made more than 6 months after the date of the alleged discriminatory termination [1]

However, after Respondent's answer raised the untimeliness of the charges as an affirmative defense, the Regional Director issued an amendment to the complaint so as to allege that Voudy's charge had been served on September 28, and Weiner's charge on September 29. At the hearing, when these matters were again raised, Respondent did not dispute that copies of the charges were mailed to it on these dates, but argued rather that they were still untimely because it had not received them until October 2, 1967. As I stated at the hearing, the argument is without merit in view of Section 102 133(a) of the Board's Rules and Regulations, which provides in part that the date of service shall be the day when the matter served is deposited in the United States mail.

On July 14, 1967, Joseph Fierman filed a charge in Case 29-CA-1047, and on April 22, 1968, the Regional Director for Region 29 issued a complaint in that case, alleging that Respondent had discriminatorily discharged Fierman on or about May 17, 1967. On May 1, 1968, the Regional Director ordered that Case 29-CA-1047 be consolidated with Case 29-CA-1114 and 1116. At the start of the hearing, Respondent objected to the consolidation of the Fierman matter with that of the other two charging parties on two grounds. The first was that the Fierman matter was being brought to trial too expeditiously, since the complaint had been issued only 2 weeks before, and second, that the issues in the Fierman case were different from those in the Voudy and Weiner matters, and that a joint hearing would prejudice Respondent's defense Since Respondent could not claim surprise at the allegations of

[2] Although the Respondent relies essentially in its defense on Fierman's violation of the bargaining agreement, the record is clear that the Respondent itself ignored the specific provisions of the agreement when it discharged Fierman before the completion of the job, without first having obtained approval from the Trade Board

[3] Accordingly, we amend the section of the Trial Examiner's Decision entitled "The Remedy" by inserting the name of Fierman before Voudy and Weiner, and delete Conclusion of Law 4

[1] Section 10(b) of the Act says that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge and the service of a copy thereof upon the person against whom such charge is made

Fierman's discharge (as his charge had been filed in July 1967) I ruled that the consolidation into a single proceeding was justified for the convenience of the Board and the other charging parties, but that I might require the General Counsel to present the two aspects of the case separately if it should appear that the issues were in fact unrelated. During the hearing, the connection between Fierman's termination and that of Voudy and Weiner became clear, and I am satisfied that Respondent was not prejudiced in any way by having to defend the separate allegations of the complaint in a single hearing

I conducted a hearing in this matter at Brooklyn, New York, on May 7 and 8, 1968 A brief has been received from the General Counsel and has been fully considered

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I THE BUSINESS OF THE RESPONDENT

Respondent is a New York corporation whose principal office and place of business is in the Borough of Queens, New York City It is engaged in performing painting and related services as a contractor to government agencies, institutions and commercial establishments It is a member of the Association of Master Painters and Decorators of the City of New York, a New York corporation referred to hereafter as the Association, which negotiates, executes, and administers collective-bargaining agreements on behalf of its employer-members with labor organizations representing employees employed by such members During a recent representative 12-month period the employer-members of the Association, in the course of their business, purchased paints and other goods and materials valued in excess of $50,000 which were transported and delivered to them in interstate commerce directly from States other than that in which they are located

I find that Respondent and the Association are each engaged in commerce within the meaning of the Act

II THE LABOR ORGANIZATION INVOLVED

Local 1511, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, herein called Local 1511, is a labor organization within the meaning of the Act. It is affiliated with District Council No 9 of New York City, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, which bargains and executes agreements with the Association on its behalf and on behalf of other local unions which comprise its membership

III. THE ALLEGED UNFAIR LABOR PRACTICES

L & L was the painting contractor for a public housing project, the Seth Low Homes, being constructed for the New York City Housing Authority in 1967. The project consists of four 17-story buildings, each with eight apartments to a floor. As a member of the Association of Master Painters and Decorators, L & L has a bargaining relationship with District Council 9, consisting of a large number of Painter Locals in the New York Metropolitan area As a union contractor, L & L hires only members of locals affiliated with the Council Business agents of the various locals gain employment for their members by getting contractors to promise them a certain number of jobs on a project, which they then parcel out among their members

William Levine is the president of L & L, and Sam Schwartzberg was the foreman at the Seth Low project L & L had a number of other painting projects going at the time it was working on the Seth Low Homes Painting work was begun at Seth Low in mid-March 1967, with the hiring of Joseph Fierman, the president of Local 1511, who was assigned or recommended to the job by, his local's business agent, Harry Zitowsky In accordance with the contract, as the first man on the job after the foreman, Fierman was appointed job steward. The contract also provides that a job steward shall not be removed from the job until it has been completed, except with the approval of the Trade Board, a bi-partite organization of employer and union members of the industry

Other painters were soon hired, including members of Local 1511, but on Friday, March 31, all the painters were laid off The job resumed the following Tuesday with fewer painters than before, and with no members of Local 1511 except Fierman employed. That week, another member of Local 1511, DiGennaro, was employed for one day, having apparently been transferred from some other project to L & L The Seth Low job was again stopped on Friday, April 7, and did not resume until April 17 Fierman again was the only 1511 member employed there That situation continued until May 17 when Fierman was discharged

Voudy and Weiner, members of 1511, were employed between March 27 and 31, but were not recalled or rehired thereafter

Issues and Contentions

1 Did Respondent discharge job steward Fierman because he reported violations of the trade rules to the Union and complained to the Housing Authority's inspectors that L & L was not complying with specifications for the job, or did it discharge him because he carried out his activities as steward in a manner inconsistent with the contract

2 Did Respondent refuse to recall Voudy and Weiner because it had decided not to hire any other members of Local 1511 so long as Fierman remained on the job as steward, or because they had failed to reapply

As for Fierman's discharge on May 17, the General Counsel contends that it was due to Respondent's displeasure with Fierman's concerted protected activity in policing the trade rules, reporting violations to the District Council, and urging the housing inspectors to investigate its alleged failure to meet specifications by eliminating one of the required coats of paint

Respondent does not deny that it was displeased by what it regarded as Fierman's excessive policing of the trade rules, but claims that it finally discharged him because he was doing it on the employer's time, in violation of the contract, and because his activities as steward affected his own production. Further, by introducing into evidence Respondent's Exhibits 1 and 2, a transcript of an arbitration proceeding and the arbitrator's decision on the Fierman discharge, it seemed that Respondent was going to contend that the Board should dismiss the allegations of the complaint as to Fierman on the ground that it should defer to the arbitrator's decision

upholding its discharge of Fierman. I am unable to take this into account, however, because, after I permitted Respondent's counsel to withdraw the exhibits for copying, he failed to return either the original or the copies for inclusion in the Board's official record.[2]

As to the failure to recall Voudy and Weiner after March 31, when the job was temporarily suspended, the General Counsel argues that Respondent's subsequent action and the statements of Levine and Schwartzberg conclusively establish that Respondent was discriminating against them solely because they were members of the same local as Fierman. Respondent, on the other hand, contends that the layoff of March 31 was prompted by legitimate business considerations, and that Voudy and Weiner never asked to be rehired. To establish the absence of any animus on its part against Local 1511, Respondent points out that DiGennaro who worked for one day at the Seth Low project the first week of April was a Local 1511 member

Discussion

The contract between the Association and District Council 9 provides for the appointment both of job stewards and shop stewards The differences between their functions and responsibilities is none too clear from the contract, nor did the attempts of Fierman and others to explain them do much to clarify the problem In any event, the actions of the parties indicate that neither Respondent, the Association, nor the Council, relied on whatever differences there are, in their dealings with Fierman For what it is worth, however, let me point out that Article IX, Section 1 of the contract, which provides for the position of job steward, says nothing about what his responsibilities are to be. Article IX, Section 2, relating to shop stewards sets out his powers and duties as examining working cards and dues books, reporting violations of the trade agreement to the Union; and receiving a weekly report from the employer as to the location of all his projects and the names of the journeymen on each job Paragraph (c) of the same section reads as follows

> A steward shall perform his full day's work as a Painter the same as the other Journeymen and shall not perform his duties as a Steward on the Employer's time.

Although Fierman insisted he was a job steward, he assumed some of the duties of a shop steward, such as checking work cards and dues books of journeymen, making out a weekly report, and particularly, checking and policing the project to uncover whether work rules were being violated. It is also undisputed that much, if not all, of his policing work was done on the employer's time, but it is also quite clear that Fierman could have learned of these violations only when painters were actually at work

Fierman's watchfulness as to whether Respondent was living up to the contract and the trade rules began the first morning he started work. He discovered two union apprentices who had not reported to him before going to work Fierman learned of their presence on the job by leaving the work he had been assigned to and going to other floors in his building. He immediately complained to Foreman Schwartzberg that there were more apprentices on the job than it was entitled to under the agreement. The next day, Schwartzberg gave him a 5-gallon paint pot from which to work Fierman protested to him and to Levine that the trade rules provide for painters to work only out of 2- or 3-gallon pots Levine said his men would not work out of 3-gallon pots, and Fierman answered that if they would not there would be no work on the job at all Fierman then left his assignment to go pick up a 3-gallon pot at the premises of another contractor, so that he would not be in violation of the Agreement. He reported the violations he had already found to Zitowsky, business agent of his local.

Other violations which Fierman testified he found in the course of checking the job on other days were the use of long sticks attached to roller handles, and the use of roller handles which were unplugged so that sticks could be attached to them He called these matters to Schwartzberg's attention Fierman also testified that he rebuked the foreman for expecting the men to complete a specified amount of work per day

Under a union rule designed to spread work during the winter months, Fierman had left the Seth Low job a few days before the end of March. Fierman asked Weiner, who had started a day or two before, to act as steward while he was away The next day, according to Weiner, Schwartzberg told him that the job could be much happier without Fierman, and asked him if he would not want to be the steward at the job Weiner declined. On March 31, when Weiner and the other painters were laid off, he asked Schwartzberg what the reason for the layoff was Schwartzberg told him it was because of Fierman, and that until they got rid of him they had ways of stopping the job

Weiner called Fierman that day to tell him the job had been stopped, and although neither of them testified as to what else they had spoken of, it is not unreasonable to assume that Weiner also told Fierman what Schwartzberg had said about getting rid of him as steward In any event, after Weiner called him, Fierman called Arber, assistant secretary of the Council, who told him to go back to the job the following Monday with Zitowsky, the business agent of Local 1511 The two of them got to the job before 8 a.m. that Monday, and found Schwartzberg in painter's overalls ready to work They told Schwartzberg that Arber had advised them that if Schwartzberg was going to work as a painter, then Fierman as job steward would also have to be employed. Fierman testified that Schwartzberg answered that Levine had ordered him not to put Fierman back on the job. Zitowsky then told him he could not work either, and after a call to Arber, Schwartzberg agreed that he would not work Fierman and Zitowsky then left, but Fierman returned later that morning and discovered Schwartzberg painting

Sometime that same Monday, Weiner also returned to the project to see about returning to work. According to his testimony, Schwartzberg told him that as long as Fierman was steward no men from 1511 would be hired The next day, Fierman resumed work at Seth Low. Sometime that day, Fierman met Levine and proceeded to give him a rundown on the violations he had already uncovered Fierman said that Levine became very irritated at his recital, and asked him to go to some other job and investigate conditions there. Fierman retorted that he was the steward, he intended to stay on the Seth Low job and

[2] I cannot explain the failure of Respondent's counsel to complete the submission of the exhibits he had himself offered Even if it was originally no more than an oversight, it has now been so long sustained, after requests and warnings by the Regional Office and by myself as to its consequences, that I must now regard it as a deliberate abandonment of his contention

see that the agreement was lived up to Fierman continued to work the rest of the week, through Friday, April 7, when the job was again suspended.

Work resumed on April 17, and again Fierman was the only 1511 man to be hired or recalled That day, Voudy and Zitowsky went to see Levine Voudy testified that Levine told them he would not rehire the men who had previously been on the job because Fierman was still steward and he wanted to get rid of him. Although Zitowsky did not corroborate Voudy's testimony directly as the conversation with Levine on April 17, he did testify to a number of conversations he had had with Levine during the first half of April when he tried to get Levine to put 1511 men back to work after the first layoff on March 31 According to Zitowsky, Levine's invariable response was that he would not put them back as long as Fierman was steward.

Fierman continued to work at the Seth Low project until May 17. Shortly before 2 p.m. that day, he had left the building he was working in to go to another building in order to check whether the men were working with the proper tools He happened to meet Levine who told him he was glad to see him there because he had his check for him Levine then told him he was fired. Fierman did not bother to ask him why

Based on stipulations of the parties and the credited testimony of Fierman, I find that between March 27-31, there were 10 to 13 painters employed at Seth Low of whom 5 were members of 1511 For the week ending April 5, there were a maximum of eight painters, with Fierman the only 1511 member on the job On or about April 7, DiGennaro, a member of 1511, was employed for one day The job was then shut down until April 17, and in the following week there were about 20 painters on the job, with Fierman the only man from 1511 The number of employees remained about that figure, and until May 17, when he was discharged, Fierman was still the only 1511 member at Seth Low

I have already mentioned that the agreement between the Association and the District Council specifically provides that stewards are not to perform their steward's duties on their employer's time. Despite the unambiguity of this provision, Fierman stoutly maintained that it had been the practice over many years for stewards to check on an employer's compliance with the trade rules on working time, once violations had been discovered Fierman insisted that his absences from work in order to police the job were reasonable considering that there were four separate buildings where he had to check.

On the other hand, Rees, a business representative of District Council 9, testified that although it had once been the accepted practice in Brooklyn for stewards to police jobs on their employer's time, the rules and the practice had been changed when District Council 9 had assumed jurisdiction over the entire New York metropolitan area some years before 1967, and that since then stewards had not been entitled to police jobs in working time However, Rees also testified that because of Fierman's many complaints to the Council about violations at the Seth Low project, Rees had been ordered by Damery, an official of the International who had been appointed trustee of the Council, to allow Fierman to police the Seth Low job twice a day Rees also testified that one of the responsibilities of local business agents was the policing of jobs where his members were working His testimony on this point contradicts that of Zitowsky who claimed that his only duty was to place his members on jobs. I credit Rees and find that Zitowsky had the right to police the jobs where Local 1511 members worked, and in fact had done so at least once, when he told Schwartzberg not to work unless a job steward were also employed. It is apparent, however, that Fierman, perhaps because he was president of Local 1511, and had a strong, self-assured personality, assumed Zitowsky's responsibility for policing the job, and had it confirmed by Damery, the top official of the Council

Concluding Findings

Fierman Levine did not tell Fierman on May 17 why he was being discharged, nor did Fierman feel any need to ask Their relationship from the first day Fierman began working at the project was unfriendly, and it had deteriorated over the course of the 2 months that Fierman was employed. Levine had written and called Elkin, a representative of the Association, a number of times to complain about Fierman's activities and to urge him to take up the problem of Fierman's conduct of his stewardship with the District Council Elkin finally did so and arranged a conference between Association and Union officials early in May at Damery's office. The results of the conference were inconclusive Either at the conference or later, Fierman had gotten the word from Damery that he could continue his policing activities, but that he should act reasonably. Fierman interpreted those instructions as authorization to keep on the course he had been following Some days, he testified, he did not leave his work at all, and never did he leave oftener than twice a day It is not clear how much time Fierman actually spent in policing but it is apparent that walking between four separate buildings, and moving from floor to floor to check on as many as 20 painters must have taken a fair amount of time from his own work.

Fierman also continued to complain or to check with the authority's inspectors about his suspicion that L & L was stealing a coat of paint This was a matter of concern to him for the same reasons that he objected to 5-gallon paint pots or to extensions of roller handles and brushes In all these cases, compliance with the trade rules and the city's specifications meant more work for the painters or more time spent in doing the same work

Respondent argues that it was prompted to discharge Fierman because he left work to police the trade rules, in violation of the contract, because his own production was affected by his absences, and because he kept making unsubstantiated complaints to the inspectors that a coat of paint was being stolen Whether Fierman's discharge was justified under the contract between the Association and the Council was an issue considered at the arbitration proceeding, and was apparently disposed of favorably to Respondent If that proceeding were before me, I would have been confronted with the question whether to defer to the arbitration award, without reaching the substantive issues involved in the discharge But as I am not officially cognizant of the arbitration proceeding and the award, I must consider the nature of Fierman's activities as job steward, and the merits of Respondent's asserted reasons for his discharge.

It is undisputed that Fierman left his assigned work during working hours without first obtaining his supervisor's permission, in order to check up on compliance with the trade rules. When he found violations, and it is not seriously disputed that he did, he took steps to ensure that the trade rules be enforced Thus, on one occasion, he and Zitowsky told Foreman Schwartzberg to stop painting because no journeyman was

employed at the time, and on other occasions, he cut the ropes which painters were using to tie long sticks to their handles or brushes

Respondent admitted at times to union officials that Fierman was a competent journeyman, but it claimed at the hearing that his production declined because he was making his rounds as steward Although no evidence was available on Fierman's quantum of work performed, since no work quotas could be imposed under the trade rules, it is obvious, as I have already noted, that when Fierman was proceeding from floor to floor and from one building to another to observe what other journeymen were doing, his production must have suffered somewhat more than minimally.[3]

In addition to its claim that Fierman countermanded its orders to journeyman painters and foreman, Respondent also argues that Fierman's conduct justified his discharge because he violated the contract in doing his job as steward on the employer's time Article IX, section 2(c), which I have set out previously, supports Respondent's position, in my opinion, and Rees, a business representative of District Council 9 so testified He said, in part "The law under District Council 9 is that the job steward does not have the authority to police in the time that he is working I just explained to you it's either before eight o'clock, at twelve o'clock, or after quitting time" Rees did not qualify that conclusion, nor did he claim that a steward may police a job during working time if he acts reasonably in doing so, or if he has already uncovered violations Rees recognized that Fierman was acting contrary to the contract by policing during working hours, and his only explanation or justification for it was that Damery, his superior, had ordered him to tell Fierman that he could act contrary to the specific mandate of the contract. Rees also testified that Zitowsky, the Local's business agent, had the authority to police the job, and that he himself could too. As a matter of fact, Rees had gone to the Seth Low project four or five times in April and May "to see that everything was all right on the job." He found no violations.

Fierman's attempts to exact compliance with the contract and the trade rules, and his efforts to check on whether Respondent was living up to the specifications of the Housing Authority, constituted concerted activity under Section 7 of the Act [4] However, a steward's right to defend, and to insist on the observance of established working conditions is not entirely without limitation Insubordination, inefficiency, invasion of management prerogatives, and conduct not sanctioned by the contract, have all been held by the Board to justify the discharge of a steward even though he was simultaneously engaged in protesting real or alleged contract violations, processing grievances, or was otherwise engaged in concerted activities [5]

There is no question but that Levine resented Fierman and all his works As the General Counsel puts it in his brief to me, Fierman "was obviously a thorn in Respondent's side. It is undisputed that he enforced the Union's contract rights with a gusto which upset and 'aggravated' Company President Levine" Whether all that "gusto" was necessary, in view of the fact that full-time business agents and representatives of the Council and the various locals were available to police the job, is beside the point A steward is permitted even excessive zeal in carrying out his legitimate functions, and the annoyance such zealousness may cause his employer must be borne as part of the price for protecting the employees' statutory right to act concertedly without fear of reprisal.

The critical issue then, as in so many cases of alleged discriminatory discharge, is that of motivation Did Levine fire Fierman because Fierman was looking for, finding and protesting contract violations, or did he fire him because Fierman was looking for them while he was supposed to be working Under the contractual scheme of things, a steward could hunt for violations of the working rules either during nonworking times, or by soliciting his fellow workers to come to him with their complaints, and then relaying meritorious protests directly to the employer or to union officials for further action Fierman's system was more efficient. He did not wait for his fellow workers to come to him with complaints, but went out and did his own investigating on his employer's time. Although it is manifestly impossible to disentangle the possible strands which made up what Levine considered Fierman's harrassment of him to be, the fact is that Fierman never gave him an opportunity to decide whether to proceed against him merely for carrying out his contractual duties as a steward, no matter with what zeal he might have pursued them From his first day on the job Fierman neglected his work in order to learn whether Respondent was observing the trade rules Despite Levine's protests to the Association that Fierman was acting improperly under the contract, and the Association's protest to the Union, Damery chose to leave the problem unsettled since he told Fierman that he could continue policing on the employer's time so long as it was done "reasonably" Damery's solution was unrealistic, since the contract either meant what it said about job stewards, in which case Levine could discipline Fierman for violating it, or the contract could be ignored without fear of counteraction Fierman interpreted Damery's instruction to act reasonably as meaning that he could leave his job twice a day, and since the Union had shown, at the conference early in May, that it did not intend to restrain Fierman, Levine was left with two choices Either he could suffer Fierman's taking off twice a day to search through four high-rise buildings for whatever he could find, or he could get rid of him, in the expectation that the contract would be honored and the discharge be upheld I believe that it was the Union's failure to act responsibly under the contract, by asserting its authority over its job steward and ordering him to comply, which was the effective cause of Levine's decision to discharge Fierman and thus bring matters to a head by forcing the matter to arbitration I consider this tantamount to a decision by Levine to discharge Fierman because he was violating the contract by policing the trade rules on the employer's time. I believe that Fierman's violation of the contractual provision against such policing deprived his concerted activities of their protected nature, and I shall therefore recommend that the allegations of the complaint which relate to Fierman's discharge be dismissed

Voudy and Weiner: These two members of Local 1511 were hired on or about March 27, as the painting project got underway and the need for painters grew They were laid off with all the other painters at the end of that same

[3] Cf *Sandpiper Builders*, 152 NLRB 796, 799

[4] *Bunny Bros Construction Company*, 139 NLRB 1516, *New York Trap Rock Corporation*, 148 NLRB 374, *Interboro Contractors Inc*, 157 NLRB 1295, and *Procon Incorporated*, 161 NLRB 1304

[5] *Russell Packing Company*, 133 NLRB 194, *Pathe Laboratories, Inc*, 141 NLRB 1290, *Market Basket*, 144 NLRB 1462, *Northside Electric Company*, 151 NLRB 34, *Traylor-Pamco*, 154 NLRB 380, *Stop & Shop, Inc*, 161 NLRB 75, *Klate Holt Company*, 161 NLRB 1606, and *Riviera Manufacturing Co*, 167 NLRB No 103

week Their names, addresses and phone numbers were part of Respondent's personnel records, and they could also have been reached promptly by letting Zitowsky, their business agent, know that they were wanted Their desire and willingness to work at the Seth Low job were shown by the fact that each returned separately to the project to inquire about prospects for further employment I am satisfied that Respondent did not recall them because of its dislike of Fierman and its intention to retaliate against his local. I also find that when men are hired for a large project such as Seth Low, it is for the duration of the project, even though there may be some subsequent temporary layoffs. The Seth Low job was estimated to take at least a year to complete

I credit the testimony of Voudy, Weiner and Zitowsky that Levine and Schwartzberg had told them, on a number of occasions, that it would be a happier job without Fierman, that they had ways of stopping the job to get rid of Fierman, and that 1511 members who had been employed the first week would not be recalled because Fierman was still on the job. I do not credit the explanations of Levine and Schwartzberg as to why the job had to be shut twice early in April, and I find that the shutdowns were caused in fact by Levine's desire to put pressure on Local 1511 to replace Fierman as job steward. However, regardless of the true reasons for the two temporary shutdowns and layoffs, I also find that Voudy and Weiner would have been recalled when the job was resumed on April 17, except for the fact that Levine intended to retaliate against them because they belonged to the same local as Fierman An employer's refusal to hire applicants for employment or to recall former employees, because of their membership in a particular union discourages membership in that labor organization and is thereby a violation of Section 8(a)(3).[6] I find, based on the foregoing, that Voudy and Weiner were not recalled for Respondent's Seth Low project once work was resumed there, as an act of reprisal against Fierman's conduct as job steward and against the local of which he was a member

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 operations of Respondent 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 of commerce

V. THE REMEDY

Having found that Respondent violated Section 8(a)(3) of the Act by refusing to recall Charles Voudy and Martin Weiner, I will recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act Although it is probable that L & L has completed its work at the Seth Low Homes project, it is nevertheless possible that there may still be some work available for painters. The following recommendations are therefore made in the alternative If the project has not been completed, I recommend that Respondent offer Charles Voudy and Martin Weiner immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them by payment to them of a sum of money equal to that which they would have earned as wages from the date they would have been recalled to the date of Respondent's offer of reinstatement, less their net earnings during such period, in accordance with the formula prescribed in *F W. Woolworth Company*, 90 NLRB 289, together with interest on such sums, such interest to be computed in accordance with the formula prescribed in *Isis Plumbing & Heating Co*, 138 NLRB 716. If the project has already been completed, I recommend the following modification: The Respondent need not offer reinstatement to Voudy and Weiner, but shall instead send each of them a letter stating that, notwithstanding its past refusal to recall them, they will be considered for employment in the future at any of Respondent's projects if they should choose to apply. In addition, Respondent shall include in the letters to Voudy and Weiner copies of the notice which would otherwise have been posted if the project had not been concluded

Conclusions of Law

1 L & L Painting Co Inc, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discriminating with respect to the hire and tenure of employment of Charles Voudy and Martin Weiner, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act

4 The Respondent has not committed any violation of the Act by discharging Joseph Fierman.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, upon the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby recommend that L & L Painting Co., Inc., its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Refusing to recall employees or otherwise discriminating in regard to their hire, tenure of employment, or any term or condition of employment, because they are members of, or participate in the activities of a labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in, or to refrain from engaging in, any or all of the activities specified in Section 7 of the Act, except to the extent that such right may be affected by an

[6] I recognize that the employment of DiGennaro, a member of Local 1511, for one day in the week ending April 7 is seemingly inconsistent with my finding that Respondent intended to retaliate against Local 1511 because it refused to remove Fierman as job steward I think the most likely explanation for his one day's employment is that he was transferred from another L & L project, and that Levine or Schwartzberg either did not know then that he was a member of 1511, or had to use him anyway because of some emergency In any event, the parties stipulated that from April 17 on, no other member of 1511 was employed at the Seth Low job, so that Respondent's discrimination against Voudy and Weiner began no later than that date

agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959

2 Take the following affirmative action which is necessary to effectuate the policies of the Act

(a) If Respondent's operations at the Seth Low Homes project are still in progress, offer to Charles Voudy and Martin Weiner immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss he may have suffered by reason of the failure to recall him, in the manner and to the extent set forth in the section entitled "The Remedy."

(b) If Respondent's operations at the Seth Low Homes project have been completed, make whole Charles Voudy and Martin Weiner for any loss of pay they may have suffered by reason of Respondent's failure to recall them, and assure them of their future eligibility for employment by Respondent in the manner and to the extent set forth in the section entitled "The Remedy"

(c) Notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll, social security and personnel records and reports, and all other documents necessary and relevant to analyze and compute the amounts of backpay due under this Recommended Order.

(e) If Respondent's operations at the Seth Low Homes project are still in progress, post at said project copies of the attached notice marked "Appendix."[7] Copies of said notice, to be furnished by the Regional Director for Region 29, shall, after being duly signed by the Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and remain posted as long as operations on the project are in progress, but for a period of no longer than 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material

(f) If Respondent's operations at the Seth Low Homes project have been completed, mail copies of the aforesaid notice to the employees specified in the section entitled "The Remedy."

(g) Notify the Regional Director for Region 29, in writing, within 20 days from the date of receipt of this Decision, what steps it has taken to comply herewith [8]

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects.

[7] In the event that this Recommended Order be 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 be enforced by a decree of a United States Court of Appeals, the words "a Decision of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

[8] In the event that this Recommended Order be 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 the Respondent has taken to comply herewith"

APPENDIX

NOTICE TO ALL EMPLOYEES

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 our employees that

WE WILL NOT refuse to recall employees or otherwise discriminate against them in regard to their hire, tenure of employment, or any term or condition of employment, because they are members of Local 1511, Brotherhood of Painters, Decorators, and Paperhangers of America, AFL-CIO, or of any other labor organization, or because they participate in the activities of any such labor organization

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act, as amended

WE WILL offer Charles Voudy and Martin Weiner immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, if we have not completed operations at the Seth Low Homes project, Brooklyn, New York.

WE WILL, if operations on that project have been completed, assure Charles Voudy and Martin Weiner that they are eligible for future employment by us

WE WILL make Charles Voudy and Martin Weiner whole for any loss of pay they may have suffered by reason of the discrimination practiced against them.

L & L PAINTING CO, INC.
(Employer)

Dated By
(Representative) (Title)

Note We will notify each of the above-named employees, 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 the 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 employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, 4th Floor, Brooklyn, New York 11201, Telephone 596-3535.