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

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

Case 31-CC-80 and 31-CC-89

June 17, 1969

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On December 12, 1967, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had not violated Section 8(b)(4)(ii)(A) and (B) of the Act by threatening certain contractors on a construction project with strikes and picketing with an object of forcing the contractors to cease doing business with Vance and Watson, two nonunion "owner-operators" of "skip-loading equipment" working on the jobsites, and by forcing them to join the Union. The Board, reversing the Trial Examiner, found that as the "owner-operators" in question were employees of the contractors involved, the Union's conduct was primary in nature, and dismissed the complaint. Thereafter, the Associated Independent Owner-Operators, Inc., filed a petition for review of a Decision and Order of the National Labor Relations Board with the United States Court of Appeals for the Ninth Circuit. The court, reversing the Board's finding, held the owner-operators to be independent operators, and remanded the case for further proceedings consistent with the Court's decision.[2]

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.

We have accepted the Court's remand, and accept the Court's opinion as the law of this case. Accordingly, we now find, as did the Trial Examiner, as set forth in his Decision, that the International Union of Operating Engineers, Local Union No. 12, AFL-CIO, the Respondent, violated Section 8(b)(4)(ii)(A) and (B) of the Act by threatening certain contractors on a construction project with strikes and picketing with an object of forcing the contractors to cease doing business with Watson and Vance, two nonunion owner-operators working on the jobsites, and by forcing Watson and Vance to join the Union. Accordingly, we adopt the recommended remedy of the Trial Examiner that the Respondent cease and desist therefrom and take the affirmative actions, as set forth in the Trial Examiner's Decision.

SUPPLEMENTAL 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 Respondent, International Union of Operating Engineers, Local Union No. 12, AFL-CIO, their officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

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

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

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

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYERS

At all times material, Swinerton and Walberg Company, Oltmans Construction Company, herein Oltmans and Jackson Bros., herein Jackson, all California corporations with principal offices located in Los Angeles, California, Monterey Park, California and Los Angeles, California, respectively, have been engaged as general contractors in the building and construction industry in California. At all times material, Swinerton and Walberg Company has been a member of the Associated General Contractors of America, herein AGC, and Oltmans has been a member of Building Contractors Association of California, Inc., herein BCA. AGC and BCA are each an association of employers engaged as contractors in the building and construction industry, and they engage in negotiating and entering into collective-bargaining agreements on behalf of their employer members with the

[1] 168 NLRB No. 112.

[2] *Associated Independent Owner-Contractors, Inc.* v. *N.L.R.B.*, 407 F. 2d 1383 (C.A. 9).

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

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

collective-bargaining representatives of the members' employees, including Respondent, in the Southern California area, and in representing their employer members in matters of labor disputes, grievances and other phases of labor-management relations. In the operation of their businesses the employer members of BCA annually perform services outside the State of California valued in excess of $50,000. In the operation of their businesses, the employer members of AGC annually perform services outside California, valued in excess of $50,000 and annually purchase and receive goods directly from points outside California, valued in excess of $50,000.

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

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

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

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

1. Were Samuel J. Vance and Jon Watson self-employed persons within the meaning of the Act? This includes whether they were persons.

2. By threats, restraint, and coercion to Webb and Lipow, did Respondent violate Section 8(b)(4)(ii)(B) of the Act?

3. By threats, restraint, and coercion to Oltmans and Jackson, did Respondent violate Section 8(b)(4)(ii)(A) and (B) of the Act?

B. *The Facts with Respect to the Self-Employment Status of Vance.*

I find that at material times, Vance was a self-employed person.[3] He was in the business of excavating and grading, using a skip loader and dump truck in his operations. He owns the skip loader and tractor and when necessary, rents the dump truck by the hour. He pays his own costs, thus, he pays for needed insurance, fuel, repairs and services on his own equipment and pays for the rental of the dump truck and the fuel therefor, when he uses it. He either solicits work for himself or through the services of a company known as El Monte Equipment Co. He pays El Monte 10 percent of his earnings for El Monte's services in doing his bookkeeping, providing telephone service, advertising, and parking his equipment. Vance's customers are billed by El Monte and upon payment, El Monte deducts 10 percent for itself and remits the balance to Vance. During the last year, Vance worked for about 100 customers, including contractors and home owners. He charges and is paid by the hour. No deductions for social security or income tax are made from his compensation. During material times, Vance obtained an excavating and grading job with Webb and Lipow at the C.L. Peck Wilshire Plaza Construction Project. Webb and Lipow was performing the shoring operations on the Project pursuant to a contract with Peck. The shoring required the digging of holes by drills. Vance was retained to use his skip loader and take the dirt away from the holes and to spread it. The only directions he received were on his first day when he was told to keep ahead of the drills and spread the dirt.

C. *The Facts with Respect to the Self-Employment Status of Watson*

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

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

I find the facts establish Vance and Watson as independent contractors, or self employed persons. Respondent contends they are employees. The "right of control" test governs. It is recognized that no one factor is determinative of this issue. The persons for whom Vance and Watson performed work had the right of control only over the end to be achieved and not over the means to be used in reaching such end. Vance and Watson were independent contractors in law and as a matter of economic reality. They were persons and self employed

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

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

persons. They determined their own profits by what they paid for, or the rate at which they rented, their equipment; they set their own rates of pay; they determined what repairs and services they needed and arranged for the same to be done; they determined what insurance they needed and paid for the same. They were told what they should do but it was substantially left to them as to how they should achieve the ends. They assumed the risks of their businesses. They were to accomplish results or to use care and skill in accomplishing results. The control exercised by the contractors with respect to Vance and Watson was limited to the achievement of a desired result and did not include control of the means. They were self employed persons within the meaning of the Act. I consider it irrelevant that neither possessed a license as a contractor.

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

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

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

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

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

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of the Employers as set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found Respondent has violated Section 8(b)(4)(ii)(A) and (B) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.[9]

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

Conclusions of Law

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend Respondent, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Threatening, coercing, or restraining Webb and Lipow, or any other employer where an object thereof is to force or require said employers to cease doing business with Samuel J. Vance.

(b) Threatening, coercing, or restraining Oltmans or Jackson or any other employer where an object thereof is

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

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

[7] Shut down the job.

[8] The Glendale Fashion Center Construction Project

[9] I find insufficient probative evidence of a violation of Section 7 of the consolidated complaint.

to force or require said employers to cease doing business with Jon Watson.[10]

(c) Threatening, coercing, or restraining Oltmans or Jackson or any other employer where an object thereof is to force or require Jon Watson to join Respondent.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post, in conspicuous places, at its business offices and meeting halls, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[11] Copies of said notice to be furnished by the Regional Director for Region 31, shall, after being signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail copies of said notice to the Regional Director for posting by Webb and Lipow, Oltmans, and Jackson, they being willing, at all locations where notices to their employees are customarily posted.

(c) Notify the Regional Director, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.[12]

[10] I find no substantial evidence of a broad plan by Respondent to violate the Act.

[11] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[12] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

Pursuant to National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT threaten, coerce, or restrain Webb and Lipow or any other employer where an object thereof is to force or require said employers to cease doing business with Samuel Vance, a self-employed person.

WE WILL NOT threaten, coerce or restrain Oltmans Construction Company or Jackson Bros., or any other employer where an object thereof is to force or require said employers to cease doing business with Jon Watson, a self-employed person.

WE WILL NOT threaten, coerce or restrain Oltmans Construction Company or Jackson Bros., or any other employer where an object thereof is to force or require Jon Watson, a self-employed person, to join our Union.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California 90014 Telephone 688-5840.