

**Atlas Electrical Service Co. and Local 199, Industrial Workers of Allied Trades, affiliated with The National Federation of Independent Unions and Local 3, International Brotherhood of Electrical Workers, AFL-CIO, Party to the Contract**

**Local 3, International Brotherhood of Electrical Workers, AFL-CIO and Local 199, Industrial Workers of Allied Trades, affiliated with the National Federation of Independent Unions and Atlas Electrical Service Co., Party to the Contract. Cases 29-CA-1200 and 29-CB-441**

June 19, 1969

### DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS  
FANNING AND JENKINS

On October 9, 1968 Trial Examiner Arthur M. Goldberg issued his Decision in the above-entitled proceeding, finding that Respondents had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in the attached Trial Examiner's Decision. Thereafter the General Counsel and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs. Respondents filed answering briefs.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>1</sup>

### 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 Order recommended by the Trial Examiner, and orders that the complaint herein be, and it hereby is, dismissed in its entirety.

<sup>1</sup>Chairman McCulloch in adopting the Trial Examiner's recommendation that the complaint be dismissed does not rely on that part of the Trial Examiner's Decision which rests on application of *U.S. Lingerie Corporation*, 170 NLRB No. 77, and *Spun-Jee Corporation*, 171 NLRB No. 64.

### TRIAL EXAMINER'S DECISION

ARTHUR M. GOLDBERG, Trial Examiner: Pursuant to an order of the Regional Director for Region 29, a hearing was held in Brooklyn, New York, on May 13 and 14, 1968, on the consolidated complaint issued on March 29, 1968, alleging that Atlas Electrical Service Co. (herein called Atlas or the Respondent Employer), violated Section 8(a)(1), (2), and (5) of the National Labor Relations Act, as amended (herein called the Act), and that Local 3, International Brotherhood of Electrical Workers, AFL-CIO (herein called Local 3 or the IBEW), violated Section 8(b)(1)(A) of the Act. Based upon the charge filed by Local 199, Industrial Workers of Allied Trades, affiliated with the National Federation of Independent Unions (herein called Local 199 or the Charging Party), on January 9, 1968, in Case 29-CA-1200, the complaint alleged that Atlas had entered into a collective-bargaining agreement with Local 3 notwithstanding the fact that Atlas was obligated to recognize and bargain with Local 199 and that thereafter Atlas refused to recognize and bargain with Local 199 or to honor the contract between Local 199 and the United Construction Contractors Association, Inc. (herein called the Association). Based upon the charge filed by Local 199 on January 9, 1968, in Case 29-CB-441, the complaint alleged that by its participation with Atlas in the foregoing acts Local 3 had restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act. The separate answers filed by Atlas and Local 3 denied all of the material allegations of the complaint.

All parties were represented at and participated in the hearing in Brooklyn, New York, and were afforded full opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. General Counsel argued orally at the close of the hearing. Briefs were filed by the General Counsel, Atlas, and Local 3.

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

#### FINDINGS OF FACT

##### I. COMMERCE

Atlas Electrical Service Co. has been since 1961 the sole proprietorship of Michael Kremer who maintains his principal place of business in New York City, New York. In 1967, Atlas' total volume of business was between \$160,000 and \$180,000, 80 percent of which, or over \$100,000, was derived from wiring automation machinery, printing plants, and the like. At the time of the events herein Atlas was working on a \$65,000 contract for Air France, an international common carrier by air, installing part of a communications system between Air France's New York and Paris offices. Although some of the materials and supplies used by Atlas undoubtedly originated outside the State of New York, the record contains no probative evidence regarding the value of such purchases by Atlas. Accordingly, I am unable to find that Atlas' operations standing alone are sufficient to meet the Board's standards for the assertion of its jurisdiction. However, at times material herein, Atlas was a member of the United Construction Contractors Association, Inc., an employer organization composed of about 75 contractors which bargains collectively with Local 199 and executes collective-bargaining agreements covering the wages,

hours, and other terms and conditions of employment of the employees of those members of the Association who thereafter execute an acceptance of such contract terms. In 1965 Atlas bound itself to the terms of such an Association-Local 199 contract and the status of the 1967 collective-bargaining agreement between the Association and Local 199 is the principal issue in the instant proceeding. "In these circumstances the relevant criteria in determining the Board's jurisdiction is the effect on commerce of the combined operations of all the Employers in the Association."<sup>1</sup>

The record discloses that Jack Picoult, another member of the Association whose principal office and place of business is located in the State of New Jersey, is engaged in the business of general and electrical contracting and that during the 12 months preceding the instant hearing Jack Picoult performed electrical services on a Federal office building in New York City, New York, valued at \$200,000 and also performed work on a United States Post Office and courthouse in Newark, New Jersey, on a contract with a value of more than \$2,600,000. In connection with its work on the New York Federal office building Jack Picoult purchased materials from points in New Jersey and Kentucky. Alexander Picoult, president of the Association and partner in the Jack Picoult firm, testified without contradiction that members of the Association collectively purchased materials in interstate commerce valued in excess of \$50,000 and performed services outside of the State of New York in excess of \$50,000. The Board has previously asserted jurisdiction over the operations of Picoult alone<sup>2</sup> and has asserted jurisdiction on the basis of the Association's meeting the jurisdictional standards.<sup>3</sup>

I find that the Association is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that on the basis of Atlas' membership in the Association it would effectuate the policies of the Act for the Board to assert its jurisdiction in this proceeding over Atlas' operations.

## II. THE LABOR ORGANIZATIONS INVOLVED

Local 3, International Brotherhood of Electrical Workers, AFL-CIO, and Local 199, Industrial Workers of Allied Trades, affiliated with the National Federation of Independent Unions, are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background

Michael Kremer has been the sole proprietor of Atlas since 1961. All of Atlas' six employees were hired as unskilled helpers and trained by Kremer to perform the highly sophisticated electrical work involved in the installation of automation controls and printing presses which constitutes 80 percent of Atlas' operations.<sup>4</sup>

<sup>1</sup>Local 3, *International Brotherhood of Electrical Workers, AFL-CIO (Darby Electric Corporation)*, 153 NLRB 717, enf. 362 F.2d 232 (C.A. 2); *Belleville Employing Printers*, 122 NLRB 350, 352; *Westside Market Owners Association* 126 NLRB 167, 169-170; *Siemens Mailing Service*, 122 NLRB 81.

<sup>2</sup>Local 3, *IBEW, AFL-CIO (Jack Picoult and Al Picoult d/b/a Jack Picoult)*, 137 NLRB 1401.

<sup>3</sup>Local 3, *IBEW, AFL-CIO (Darby Electric Corporation)*, 153 NLRB 717, enf. 362 F.2d 232 (C.A. 2).

In 1963, to facilitate securing work, Kremer having determined that a union contract was necessary sought out Michael Gordon, president of Local 199, and arranged for Gordon to take Kremer's employees into Local 199 and for Atlas to sign a contract with that organization. Thereafter Kremer sent his employees to see Gordon. Although they were unaware of the prior arrangement which their employer had made with Local 199, the employees joined that organization and Kremer executed an individual collective-bargaining agreement with Local 199. On January 5, 1965, Atlas joined the Association and adopted the collective-bargaining agreement then in effect between the Association and Local 199.<sup>5</sup>

The Association, which deals with no union other than Local 199, has approximately 75 members. Under the terms of the constitution and bylaws of the Association "any person, firm or corporation, owning and operating an establishment engaged in construction, is eligible to become a member of this Association."<sup>6</sup> Under the procedures followed by the Association at the end of each contract term and following the negotiation of a new collective-bargaining agreement, each member of the Association is required to execute a new application for membership in the form signed by Kremer when he joined the Association in 1965. As explained by Alexander Picoult, president of the Association, in the event a current member of the Association fails to sign or delays in signing such a new application, "He is not a member of the Association at that point and until he signs the application, he is not considered a member." Picoult further testified that as to the new collective-bargaining agreement, until the member signs the new application for membership in the Association ". . . he has no relationship to the new contract. He does not bind himself to the new contract until he signs that application form."

### B. The Events of 1967

Under the terms of the collective-bargaining agreement entered into in 1964 between Local 199 and the Association the contract term ran until November 15, 1967, with a provision for automatic renewal from year to year unless either party served written notice of desire to terminate. In August 1967 Local 199 reopened the contract for renegotiation thereby setting in motion the termination date of November 15. Bargaining on the terms of the new contract took place from September until November 1967 and after the parties failed to resolve their differences by negotiation the impasse was submitted for decision to an arbitrator designated by the New York State Board of Mediation. The arbitrator issued his award setting the terms for the new contract about the end of

<sup>4</sup>As stated in General Counsel's brief, "Mr. Kremer spent a long time training his electrician employees to do their specialized work, and neither Local 199 nor Local 3 could supply him with experienced men in this specialty."

<sup>5</sup>The application for membership in the Association which Kremer signed constituted as well an acceptance of the Association-Local 199 contract. That membership application reads as follows.

I (We) hereby apply for membership in the United Construction Contractors Association, Inc. I (We) understand that as a condition membership and continued membership, I (We) shall abide by the By-Laws of the Association. I (We) agree to be bound by, and to comply with the terms of any agreement now existing, or which may hereafter be entered into by the Association and the Industrial Workers of Allied Trades, Local 199, with the same force and effect as though I (We) had executed same as a party

<sup>6</sup>Art. III, sec. 1.

October 1967 and these terms were announced to the members of Local 199 at a meeting of that organization shortly after issuance of the award.

For some unspecified period of time the IBEW had been conducting a continuing campaign to organize Local 199 members into IBEW ranks. During September 1967 Atlas employees met with Victor Steinfeld, a member of Local 3 who served as a voluntary part-time organizer for IBEW. Following the meeting with Steinfeld, the Atlas employees during September and October spoke to Kremer on a number of occasions about switching from Local 199 to the IBEW. During these conversations Kremer told his employees that he could not afford to pay the benefits called for in the IBEW contract. On October 30, 1967, following announcement of the terms of the new Association-Local 199 contract, all of Atlas' employees signed authorization cards for Local 3, IBEW. The Atlas employees then notified Kremer that they had joined IBEW and asked him to sign a contract with that organization.

Approximately 2 weeks after his employees had advised him of their adherence to the IBEW, Kremer, on November 14, 1967, attended an Association membership meeting at which time he signed a new application for membership in the Association and accepted the terms of the new Association-Local 199 contract.<sup>7</sup> The collective-bargaining agreement between the Association and Local 199 provides in pertinent part at paragraph 3:

The Association agrees that each member of the Association, as a condition for membership (or continued membership) in the Association, shall execute a membership application which shall contain the following provision:

We agree to be bound by, and to comply with the terms of any agreement now existing or which may hereafter be entered into between the Association and Industrial Workers of Allied Trades, Local 199, with the same force and effect as though we had by these present executed the same as a party.

A duplicate original of the membership application shall be sent to the Union by the Association within five (5) days after its execution by a member.

On November 14, when he signed his new application for membership in the Association, Kremer was required to give notes to the Association covering his dues in that organization for the following 3 years and was told that if he failed to pay his dues in advance for that period he would not be permitted to retain his membership in the Association nor would he be covered by the new Association-Local 199 contract.

Four or five days after Kremer rejoined the Association, on November 18 or 19, the employees advised him that if Atlas did not sign a collective-bargaining agreement with the IBEW they would leave his employ and take jobs with IBEW contractors on referral from Local 3. At that time Atlas was engaged in two jobs with specified completion dates and Kremer testified without contradiction that failure to complete those jobs "would have ruined me." On or about November 26 or 27 Kremer asked Gordon, president of Local 199, for help. Gordon advised Kremer to let his men go and thereafter Local 199 referred one employee to Kremer who found the man sent by Gordon to be unqualified as an electrician and unable to perform Atlas' work.

Early in December 1967 Kremer turned to the Association for help. At that time Kremer spoke to the Association attorney, George Turchin, and asked what the Association could do for Atlas in face of the employees' ultimatum. Following this conversation Kremer was invited to a meeting of the Association's board of directors where, after Kremer explained the situation, he was advised to let the men go and not to worry. Some Association members suggested that they get together and finish Atlas' jobs. Kremer replied that this was not possible because his work depended on other people doing their jobs and further explained that the employees of the other Association members were not qualified to do the work involved on Atlas' jobs. Kremer told the Association board that for him to let his men go was the same thing as closing and going out of business.

Early in December Kremer called Local 3 and spoke to one Chaloupka, an IBEW official. Following that conversation Atlas' employees engaged in a half-day work stoppage. Kremer then spoke to employee Woods who suggested that they visit the IBEW office to discuss solution of Atlas' problem. The two men went to Local 3's office where Kremer was shown the IBEW authorization cards his employees had signed on October 30. A few days later Kremer signed a contract with the IBEW when in Kremer's words "The job stopped and I could not get any action, and at that time neither the Association or Gordon had done anything for me." On December 13, 1967, Kremer sent a letter of resignation to the Association and on January 3, 1968, advised Local 199 that his employees had been organized by Local 3 and that he had signed the contract with the IBEW. On March 21, 1968, his bank advised Kremer that a check for \$75 from the Association, the amount of annual dues in that organization, had been credited to his account. On various dates in April 1968 Local 199 received letters of resignation from Atlas' employees.<sup>8</sup>

### C. Findings and Conclusions

In the usual case of multiemployer bargaining there exists a consensual arrangement that the individual employer-members of the multiemployer unit will be bound without further action on their part to the terms of the new collective-bargaining agreement resulting from the negotiations between the multiemployer unit and the union involved. It is to preserve the integrity of such a consensual relationship and to maintain stability in bargaining relationships that the Board has enunciated and enforced its rules pertaining to withdrawal from multiemployer bargaining arrangements by either individual employers or the union.<sup>9</sup> However, based upon the facts of the instant case I do not find that there was a

<sup>7</sup>The foregoing recitation of the facts in this case is based upon a synthesis of the testimony of all witnesses, those of the Respondent and General Counsel, who were in substantial agreement on the material facts. A dispute arose on the issue of membership of the Atlas employees in Local 199. Gordon, president of Local 199, testified that the employees had paid their dues through December 31, 1967, and that this was the fact although the individual employee ledger cards maintained by Local 199 indicated they had paid only \$63, the equivalent of three quarters' dues at the rate of \$21 a quarter, in the year 1967. Two Atlas employees testified that during 1967 they had paid dues for only three quarters, through September 30, 1967, and had paid no dues to Local 199 following that date. Based upon their demeanor while testifying, as well as the inconsistency between Local 199's records and Gordon's testimony, I credit the employees' testimony that they had paid no dues to that organization after September 30, 1967.

<sup>9</sup>*Retail Associates, Inc.*, 120 NLRB 388; *Sheridan Creations, Inc.*, 148

<sup>8</sup>See fn. 5, *supra*.

consensual arrangement that the employer-members of the Association would be bound, by the terms of a new contract negotiated between the Association and Local 199, without any further action on the part of the individual employers. To the contrary, I find that at the conclusion of negotiations between the Association and Local 199 each employer-member was free to either reapply for membership in the Association and adhere to the terms of the newly negotiated contract or refrain from so applying to the Association and be free of the new contract provisions. Thus, Association President Picoult testified that until the individual employer signed a new application for membership in the Association ". . . he has no relationship to the new contract. He does not bind himself to the new contract until he signs that application form." That this was the policy followed is buttressed by Kremer's uncontradicted testimony that when he attended the Association meeting on November 14, 1967, with the purpose of signing a new application for membership in the Association and thus accepting the terms of the contract with Local 199, he was informed that unless he paid his dues for 3 years in advance he would not be permitted to retain his membership in the Association and would not be covered by the new Association-Local 199 contract. I further find that Local 199 acquiesced in this relationship of the individual employer-member of the Association to the obligations of the new collective-bargaining agreement. The contract, itself, expressly requires that each member of the Association reapply for membership and at the same time agree to be bound by and comply with its terms. Further, Local 199 as the Charging Party in these proceedings was represented by counsel who was present when Picoult testified that the individual employers were not parties to the agreement until execution of their new application form and acceptance of the contract terms. Yet, no testimony was offered to counter this denial of a prior acceptance by the individual employers of the outcome of the negotiations. It follows therefore that until each employer-member of the Association executes a new application for membership and an acceptance of the terms of the new contract he stands in the position of an individual employer dealing with the Union on an individual basis and the Board's rules pertaining to untimely withdrawal from the Association multiemployer unit do not apply.<sup>10</sup>

It is in this context of Atlas' obligations *vis-a-vis* the 1967 Association-Local 199 contract that the actions of Atlas' employees and Kremer's subsequent dealings with the Association, Local 199, and the IBEW, must be examined. When on October 30, 1967, Atlas' entire working force voluntarily signed authorization cards designating Local 3 to be their bargaining representative and shortly thereafter advised Kremer of their action, Atlas was not free to accept the terms of the Association-Local 199 contract. Under this state of facts Atlas was precluded from further bargaining with Local 199 until the question concerning representation raised by this rival claim on behalf of the IBEW had been resolved

by the orderly processes provided by the Act. *Shea Chemical Corporation*, 121 NLRB 1027, 1029. It follows that Atlas' acceptance on November 14 of the Association-Local 199 contract was in derogation of its obligations under *Shea Chemical*. The Board therefore should accord no weight to this contract entered into after all of Atlas' employees had advised Kremer of their defection to the IBEW.

In any event were I to find that the facts of the instant proceeding give rise to the usual obligations of the individual employer flowing from participation in Associationwide bargaining, I would further find that in the circumstances of this case unusual conditions existed permitting an untimely withdrawal by Atlas from the Associationwide bargaining. I am persuaded to this result by the following circumstances: Atlas' operations are totally different from those of the other members of the Association who are "engaged in construction."<sup>11</sup> The record supports the finding that the operations of Atlas, which consist primarily of supplying electrical services for the installation of automation controls and printing equipment, remove Atlas from the construction industry. *Carpet, Linoleum and Soft Tile Local No. 1247 (Indio Paint & Rug Center)*, 156 NLRB 951.<sup>12</sup> To perform the highly sophisticated electrical work of automation installation Kremer had himself trained his entire working force and replacements for these men were not obtainable in the labor market.

Thus, when the employees advised Kremer that they would leave his employ if he failed to sign a contract with the IBEW he was faced with the immediate prospect of being unable to complete his jobs in the process of being forced out of business. In the face of this threat Atlas unsuccessfully sought help from Local 199 and the Association in its efforts to remain in business. It was only after his appeals for help to Local 199 and the Association proved unsuccessful and after the employees had demonstrated their determination to be represented by Local 3 by participating in a work stoppage that Atlas signed a contract with the IBEW, resigned from the Association, and renounced the Local 199 contract.

All things considered, including the privilege that individual employer-members of the Association had concerning their acceptance or rejection of the results of Associationwide bargaining; the evident prospect that Atlas would be forced out of business if it continued to maintain Association membership and a bargaining relationship with Local 199; and, the failure of either the Association or Local 199 to assist Atlas to remain in business, by furnishing replacements for its disaffected employees I find that Atlas effectively withdrew from the Association and for the reasons stated above was not bound by the Association-Local 199 collective-bargaining agreement. *Spun-Joe Corp.*, 171 NLRB No. 64; *U.S. Lingerie Corporation* 170 NLRB No. 77. It follows therefore that Local 3 cannot be held to have violated the Act by its participation with Atlas in the execution of their collective-bargaining agreement. Accordingly, I shall recommend dismissal of the complaint in its entirety.

NLRB 1503, enfd. 357 F.2d 245 (C.A. 2).

<sup>10</sup>In these circumstances the test of union majority based on the multiemployer unit as a whole would not apply to those employers who had not rejoined the Association at the conclusion of Association-Local 199 bargaining. Cf. *Sheridan Creations, Inc.*, 148 NLRB 1503, enfd. 357 F.2d 245 (C.A. 2). Accordingly, prior to its reapplication for membership in the Association, Atlas' employees alone would constitute an appropriate unit for bargaining. Cf. *Mor Paskesz*, 171 NLRB No. 20.

<sup>11</sup>Association constitution and bylaws, art. III, sec. 1.

<sup>12</sup>The inclusion in the Association-Local 199 contract of a union-security clause requiring membership in Local 199 after 7 days of employment as authorized by Sec. 8(f) of the Act for contracts covering employees in the construction industry, would not of itself excuse Atlas' acts herein but would go only to the remedy had the facts herein led to a finding of the violation urged by General Counsel. *Tulsa Sheet Metal Works, Inc.*, 149 NLRB 1487, enfd. 367 F.2d 55 (C.A. 10).

**CONCLUSIONS OF LAW**

1. United Construction Contractors Association, Inc., is engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 3, International Brotherhood of Electrical Workers, AFL-CIO, and Local 199, Industrial Workers of Allied Trades, affiliated with the National Federation

of Independent Unions, are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents have not engaged in unfair labor practices as alleged in the complaint.

**RECOMMENDED ORDER**

It is recommended that the complaint herein be dismissed.