

**Sheet Metal Workers' International Association,  
Local Union 49, AFL-CIO (General Metal  
Products, Inc.) and Roger Jones. Case 28-CB-479**

August 19, 1969

**DECISION AND ORDER**

**BY CHAIRMAN McCULLOCH AND MEMBERS  
BROWN AND ZAGORIA**

On June 5, 1969, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

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 Trial Examiner Howard Myers 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 Respondent's exceptions, and the entire record in the case, and hereby adopts his findings, conclusions,<sup>1</sup> and recommendations.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Sheet Metal Workers' International Association, Local Union 49, AFL-CIO, Albuquerque, New Mexico, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:<sup>2</sup>

1. Modify paragraph 2(b) as follows:

“(b) Repay said Roger Jones any portion of said fines that he may have paid to Respondent with interest at 6 percent per annum.”

2. Add “with interest” at end of last indented paragraph of notice.

<sup>1</sup>See, in further support of the findings and conclusions of the Trial Examiner that Respondent violated Sec 8(b)(1)(B), our decision in *Toledo Locals Nos 15-P and 272 of the Lithographers and Photoengravers International Union, AFL-CIO (The Toledo Blade Company, Inc.)*, 175 NLRB No. 173.

<sup>2</sup>In accordance with our established policy, we shall order the Respondent to repay Roger Jones any portion of the fine levied against him that he may have paid to Respondent with interest at 6 percent per annum *Isis Plumbing & Heating Co.*, 138 NLRB 716

**TRIAL EXAMINER'S DECISION**

**Statement of the Case**

PAUL E. WEIL, Trial Examiner: Upon a charge filed October 25, 1968, by Roger Jones, an individual, herein sometimes called the Charging Party, against Sheet Metal Workers' International Association, Local Union 49, AFL-CIO, herein called the Respondent, alleging violations of Section 8(b)(1)(A) and (B) of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*) herein called the Act, the General Counsel, by the Regional Director for Region 28 (Albuquerque, New Mexico), issued a complaint on December 24, 1968, alleging a violation of Section 8(b)(1)(B) of the Act. By its duly filed answer Respondent admitted various facts alleged in the complaint but denied jurisdiction of the Board and denied the commission of any unfair labor practices.

Pursuant to notice a hearing was held at Albuquerque, New Mexico, on February 18, 1969, before Trial Examiner Howard Myers. All parties were represented at the hearing and had an opportunity to examine and cross-examine witnesses and present evidence in support of their contentions. At the close of the hearing the parties waived oral argument but requested time in which to file briefs with the Trial Examiner. Time was granted and briefs were duly received from the General Counsel and the Respondent.

Subsequent to the receipt of briefs by Trial Examiner Myers and before he issued his decision in the proceeding he retired. The Trial Examiner having thus become unavailable to the agency within the meaning of Section 54(d) of the Federal Administrative Procedure Act (5 U.S.C. Section 54(d)), Trial Examiner Paul E. Weil was assigned to consider the record and prepare a decision in accordance therewith.

Upon the entire record and in consideration of the briefs, I make the following:

**FINDINGS OF FACT**

**I. THE BUSINESS OF THE EMPLOYER**

General Metal Products, Inc., hereinafter called the Employer, a New Mexico corporation, is engaged in New Mexico in the business of contracting in the building and construction industry. During the 12 months preceding issuance of the complaint the Employer purchased sheet metal, heating, cooling, and ventilating equipment and other related products valued in excess of \$50,000 from other enterprises in New Mexico which had received such products directly from points outside the State of New Mexico. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

Respondent is and at all times relevant hereto has been a labor organization within the meaning of Section 2(5) of the Act

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**Factual Background**

The Employer installs heating, cooling, and ventilating equipment in new construction using employees who are

represented by the Respondent. The Employer is a member of the New Mexico Sheet Metal Contractors Association, Inc. (hereinafter called the Association), through which it has in the past had a contractual relationship with Respondent. The status of the contract current at the time of the hearing was not litigated. It appears however that there was some question between the parties as to the exact terms of the most recent agreement between the parties. Whatever the exact nature of the contract may have been it is undisputed that it covered not only the employees but the lower levels of supervision including working foremen and foremen.

The Charging Party was a working foreman employed by the Employer. In this capacity during the summer and fall of 1968 he was in charge of a crew of some five sheet metal workers employed on a job at the Bernalillo County Mental Health and Retardation Center then under construction.

On July 12, 1968, Jones' crew was scheduled to commence work at 8 a.m. Prior to that hour he was informed by the general contractor on the job that a crane was immediately available for hoisting equipment to the floor of the building then under construction. Although Jones had seen one or more of his crew at the jobsite he decided to do the necessary work himself. He was assisted in this task by two other individuals, Darrell Hood, a superintendent of the Employer who was present on the jobsite that day, and Pablo Abeyta, the job superintendent for the general contractor. They continued until 8 o'clock, with Hood and Abeyta tying the equipment on the ground and Jones untying it at the top. At 8 o'clock Hood and Abeyta left and one of Jones' crew did the work of tying on equipment until the job was completed.

On August 10, 1968, Respondent advised Jones that its business manager, Rutherford, was preferring charges against him because on July 12 Jones "did perform work prior to the beginning of the regular work day, and used men of other crafts to assist him perform such work, which is within the jurisdictional claims of the sheet metal workers." In September the charges came on for hearing before a trial committee of Respondent. Jones admitted that on July 12, 1968, commencing at 7:45 a.m. he tied on sheet metal products and was assisted by Darrell Hood and Pablo Abeyta whom he identified. He was found guilty "as charged."

Respondent's membership voted to concur with the guilty verdict returned by the trial committee and Jones informed the Respondent that he would appeal. In his letter of October 10, 1968, objecting to the minutes of the trial Jones concluded by stating that he had been advised that the agreement between the Association and Respondent provided that the regular working hours were to be between 7 a.m. and 5 p.m. and therefore his action of commencing work prior to 8 a.m. on July 12 was not in violation of the contract. Because Respondent refused dues transmitted on October 21 because he had not paid the fine of \$500, Jones sent Respondent a personal check

for \$50 together with another check in payment of dues. The \$50 was the amount provided by the International Constitution under which Respondent operates as that portion of a fine which had to be paid prior to Respondent's acceptance of dues of a member and as a condition "of any proper appeal from the decision under which such fine was imposed." Respondent cashed both checks.

Instead of filing an appeal through the Union's procedures Jones filed his charge with the Board on October 25.

At some time prior to the filing of Jones' charge but after the incidents concerned therein a notice was addressed to all contractors signatory to the agreement with Respondent, stating in pertinent respect:

We we [sic] would direct your attention to certain Articles and Addendum in our Agreement some of which have been ignored in the past and which we expect compliance with in the future. Others on which we make our position clear to forestall future disagreements.

\* \* \* \* \*

#### ADDENDUM 2—SECTION 2(b):

The hours worked in any one day, regardless of the starting time, shall be 8 consecutive hours with 1/2 hour for lunch only.

When work is begun at 7:00 A.M.—for instance, the regular day is over at 3:30 P.M. and overtime will be paid for work performed thereafter. Also, the Local Union must be contacted in order to determine if working conditions on the respective job justify any hours other than 8:00 A.M. to 4:30 P.M.

This notice was received October 16 by the Employer herein. It was answered by a letter signed by Edward M. Miller, president of the Association, dated October 31, 1968, which says in pertinent part:

Pertaining to your reference regarding the starting time, lunch time, quitting time, etc. of the work day, here again, if we don't violate the Contract, we feel we are in the right and none present at our meeting could recall the Contract specifying a 1/2 hour lunch period. Perhaps you could enlighten us on this period.

#### Discussion

The General Counsel contends that Respondent, by its action in disciplining Jones, interfered with his exercise of his supervisory functions on behalf of management and specifically in his application of his own and presumably management's interpretation of the collective-bargaining agreement then in force between Respondent and the Employer. In so doing, according to the General Counsel, Respondent interfered with the Employer's choice of a collective-bargaining representative by disciplining Jones because Respondent disagreed with its interpretation of the agreement. The General Counsel relies chiefly on the Board's Decision in *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB No. 252.

Respondent contends first, apparently, that Jones is not a supervisor; second, that if he is a supervisor the actions which brought about Respondent's disciplinary reactions were unconnected with his supervisory function, so that he was disciplined as a workman and union member rather than a foreman; third, that whether or not Jones is a supervisor the exigencies and circumstances peculiar to the

<sup>1</sup>The findings are memorialized in a minute of the hearing which states *inter alia*, "Jones said 'he used carpenters to help load and unload the elevator in exchange of his work'. Jones said 'he never did any of the carpenter work back'. Jones said 'he was guilty of going to work before 8 a.m. and using carpenters and labors [sic] to load our work'."

Although it does not appear relevant to this proceeding Jones filed objections to the minutes of the trial stating that he never said that he used carpenters or laborers to help him in his work because that was not true and restating the facts as set forth above.

building and construction trades necessitate that the Board as a matter of policy establish a different principle to regulate the relationship between unions and lower echelon supervision; and fourth, and finally, that Jones' discipline was an internal union matter protected by the Act. In this regard Respondent relies on *Allis-Chalmers Mfg. Co.*, 388 U.S. 175. It would appear that if any of the four contentions have merit Respondent must prevail.

1. I find Jones to be a supervisor. It is undisputed on the record that, except for visits to the jobsite about once a week by Darrell Hood, part owner and superintendent of the Employer, and visits by Paul Hood, president and part owner of the Employer, on two or three occasions during the period from March to October, Jones was the only management spokesman on the job. He had authority to hire and discharge, layoff and recall, and adjust grievances. He in fact laid off employees because they worked slower than he thought they should. He assigned all work in accordance with the needs of the job, scheduled working hours, granted time off for personal business to the employees under his supervision, kept time and attendance records, and was responsible for implementation of the Employer's agreements with Respondent. He determined the number of employees required to do the job. In short he had all of the functions and responsibilities spelled out in the definition in Section 2(11) of the Act.

2. The charges of which Jones was found guilty state as follows: "[the above-named] member, on July 12, 1968, did perform work prior to the beginning of the regular work day, and used men of other crafts to assist him perform such work, which is within the jurisdictional claims of the sheet metal workers." Respondent's contention is that Jones' performance of the work of tying on supplies and equipment for hoisting by the crane and untying the supplies and equipment when they had been hoisted to the first story of the building was journeymen's work which Jones as a journeyman and a "working" foreman performed for the Employer. The first part of the charge, that he performed work, is pointed to by Respondent as involving no supervisory function. However this is not the entire story. Unquestionably the assignment of a task is a supervisory function and the assignment of such task to be done at a time other than the normal working hours is even more so. The supervisory act is the decision whether and to whom such a task is to be assigned. It can hardly be said that Jones was not engaging in the supervisory act when his decision was to do the work himself without assigning it to an employee and to do it before the employees under his supervision commenced work. With regard to his alleged use of men of other crafts to assist him to perform such work, it appears that the only evidence before the trial board was that he was assisted by Darrell Hood, his own superintendent, who happened to be on the job and by Pablo Abeyta, the job superintendent for the general contractor. Obviously as a lower ranking supervisor Jones was not in a position to assign work to Hood or Abeyta.

Nevertheless he was found guilty by the trial board of using carpenters and laborers to load sheet metal employees' work. Clearly in the opinion of the Union which in Jones' absence approved and adopted the findings of the trial board based on the minute, he was found guilty of exercising a supervisory function, assigning work to carpenters and laborers that should have been assigned to sheet metal workers. It can hardly be said that any of the charges are clearly concerned with Jones' actions as a workman rather than his actions as a

supervisor. In any event I do not conceive that the functions of a working foreman are severable in this regard. Jones was inescapably a supervisory employee. He worked with the tools only by reason of his self-assignment to the work. The natural and perhaps inevitable result of the Union's action in fining him as they did in this case is not to interfere with his performance of rank-and-file work but rather with his activities as a supervisor and spokesman for the Employer. Accordingly, I find that the second defensive contention lacks merit.

3. In support of its contention that the Board should establish a different rule of decision to regulate the relationship between unions and lower echelon supervision in the building and construction trade, Respondent in its brief lists various factors which it contends should be taken into consideration. They are: First, that in the trades historically only unit employees may perform unit work. Second, in order for "lower rung supervision" to be permitted to perform unit work when they are not supervising they are considered part of the unit at all times. Referral back to the job as a journeyman is not practical. Third, classification of working foremen may be awarded to a journeyman one day and removed the next and in practice they continually move up and down. This results in (one) working foreman referred from union halls after termination reregistering as a journeyman, (two) the classification may be changed from foreman to journeyman without reregistration, and (three) fringe benefits paid to journeymen are provided by contract for working foremen also under the trusts in which the Department of Labor has acquiesced. Fourth, working foremen are covered by the union-security provision of the contract under which they work and the Board "has never taken the position that as a consequence the Union is management dominated or assisted." Fifth, working foremen have not been considered ineligible to hold union office nor vote in union meetings.<sup>2</sup> Sixth, working foremen are considered as employees under the Act as far as the duty of fair representation is concerned.<sup>3</sup>

Based on these considerations Respondent concludes that "at the very least working foremen should be considered as employees rather than supervisors when they are not working in the capacity of a supervisor." With regard to the elements upon which Respondent relies I do not believe they support the distinction Respondent contends should be made. Aside from the fact that no evidence was adduced in the hearing that these elements are unique to the building and construction trades, it is quite clear that they are not. As a matter of fact in the case on which the General Counsel relies and which Respondent purports to distinguish each of these elements are presented as part of the factual picture on which the Board found a violation by a printing trades union, the International Typographical Union. It is no secret and there are many Board cases which illustrate that especially in large segments of the printing trades and entertainment industries only bargaining unit employees are allowed to perform unit work. But without discussing each of the alleged bases of distinction, I must consider the fact that the Board has never made such a distinction and the Act

<sup>2</sup>Respondent does not say considered by whom. There are, of course, cases in which the Board has found assistance to labor organizations in the building and construction field because the union offices were held by, and union decisions with regard to employer relationships were made by, employer supervisors.

<sup>3</sup>Respondent cites no authority to this proposition nor do I know of any

does not do so. When the Act speaks of supervisors and defines them it adds no exclusion of any particular type of supervisors or supervisors in any particular industry. Congress has had before it the peculiar problems of the building and construction industry on many occasions. Hearings have been conducted and considerations advanced to remove the trades from the Act in various respects but Congress has not seen fit to do so. I consider that I am bound by the explicit and express provisions of the Act in this regard. I believe that if a distinction is to be made it must be made in the text of the law rather than in the decisions based thereupon. Accordingly, I reject Respondent's third contention.

4. With regard to Respondent's position that Jones' discipline was an internal union matter again I find that the *San Francisco-Oakland Mailers'* case (*supra*) is dispositive. The acts with which the foremen in that case were charged by their union related to the overtime provisions of the contract and to the permitting of a nonmember of the respondent union therein to perform alleged unit work in violation of the contract. In the instant case the same type of action by Jones gave rise to the charges and it was clear that both allegations in the charges related to alleged breaches of the agreements between the parties rather than to union activities of Jones. While Respondent may have sought, by an internal union procedure, to enforce its viewpoint as to the meaning of the contract through discipline imposed upon the foremen this is not the sort of internal union proceeding that the Supreme Court spoke of in the *Allis-Chalmers* case. In addition, as the Board points out in the *Mailers'* case, the proviso relied on by the Supreme Court in *Allis-Chalmers* and by Respondent herein is limited to Section 8(b)(1)(A) of the Act and is not a part of Section 8(b)(1)(B), a violation of which in the instant case forms the basis of the charge. Of course, the discipline is an internal union matter, but the alleged violation by Jones was not. I shall therefore have to reject Respondent's fourth contention.

I find in agreement with the General Counsel that Respondent disciplined Jones because in its opinion he violated the established union collective-bargaining agreement<sup>4</sup> and hence article XVII, section 1(e) and article I, section 5(a) of the Respondent's International Constitution and Ritual. There is no contention that the agreement between the parties failed to provide a grievance procedure and the evidence preponderates to the contrary. Yet, Respondent did not see fit to use this procedure to explicate its difference of opinion with the Employer as to the meaning of its agreement. Whether the contract was in fact violated by Jones is not relevant in this proceeding,<sup>5</sup> nor is the question of whether in fact Jones was guilty as charged as he was found by the union trial board.<sup>6</sup> What is material is that Respondent attempted by its internal disciplinary procedure to circumvent the contractual procedures for settlement between the parties of a contractual grievance. The natural and probably inevitable consequence of Respondent's action must be to cause the foreman faced with such discipline to substitute the union's determination of the meaning of the agreement for the employer's. He therefore ceases to function as the employer's agent, and if the employer would be represented by a foreman who will act on its behalf, in accordance with the employer's viewpoint, it must appoint another. Inasmuch as the foremen are required to be union members, as Respondent states in its brief, subject to union discipline, it is improbable that an employer could find a representative

for itself at the foreman level. This is precisely what the Board found to be a violation of Section 8(b)(1)(B) in the *Mailers'* case and I find, as in the *Mailers'* case, that by its actions Respondent restrained and coerced the Employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances in violation of Section 8(b)(1)(B) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Employer's operations 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.

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

#### CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Sections 2(5) and 8(b) of the Act.
2. The Employer is an employer within the meaning of Sections 2(2) and 8(b)(1)(B) of the Act.
3. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
4. By restraining and coercing the Employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has violated Section 8(b)(1)(B) of the Act I shall recommend that it cease and desist from restraining or coercing the Employer or any employer with whom it has a collective-bargaining agreement in the manner charged herein. Additionally, I find that the coercive effect herein can be removed only if Respondent is required to rescind the fine imposed against Jones and to repay to him that portion of the fine which he paid in order to remain in good standing with the Union and any further portions he may have paid in the interim.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, I recommend that the Respondent, its officers, agents, and

<sup>4</sup>Which was not so established that it was reduced to writing or offered in evidence.

<sup>5</sup>As the parties stipulated.

<sup>6</sup>Respondent in its brief appears to concede that the trial board's finding was incorrect with relation to the assignment of work to carpenters and laborers. Respondent's brief states "the fact that the superintendent for the general contractor and the part owner-superintendent of the Employer were loading the crane is immaterial for the purposes of the issue before us. Obviously Mr. Jones was not supervising either of these men, nor did he assign them to any task."

representatives, shall:

1. Cease and desist from:

(a) In any manner restraining or coercing General Metal Products, Inc., or any other member of the New Mexico Sheet Metal Contractors Association, Inc., in the selection of representatives chosen for the purposes of collective bargaining or the adjustment of grievances.

(b) Refraining or refusing to use the means provided by its collective-bargaining agreement for the adjustment of grievances and disputes thereunder and from substituting representatives of its own choosing for those provided for in the collective-bargaining agreement in order to restrain or coerce the Employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Rescind the fine levied against Roger Jones and excise all record thereof from its files.

(b) Repay said Roger Jones any portion of said fines that he may have paid to Respondent.

(c) Post at Respondent's offices and at the offices of all employers who are members of the New Mexico Sheet Metal Contractors Association, Inc., the Employer willing, as well as at Respondent's meeting place, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.<sup>8</sup>

<sup>7</sup>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."

<sup>8</sup>In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 28, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL MEMBERS OF SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 49, AFL-CIO (GENERAL METAL PRODUCTS, INC.)

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 members and all employees employed by General Metal Products, Inc., and New Mexico Sheet Metal Contractors Association, Inc., that:

WE WILL NOT in any manner restrain or coerce any of the aforesaid employers in the selection of representatives chosen for the purposes of collective bargaining and the adjustment of grievances or disputes under the contract.

WE WILL NOT refuse to follow the contract provisions provided in our collective-bargaining agreement with New Mexico Sheet Metal Contractors Association, Inc., for the means provided for the adjustment of grievances or disputes thereunder.

WE WILL NOT cite foremen or working foremen before our trial board nor require them to answer for decisions made by them as to the meaning or application of any collective-bargaining agreement to which we are a party where such an agreement contains provisions for the adjustment of grievances and disputes.

WE WILL rescind the fine assessed against Roger Jones and excise all record thereof from our files.

WE WILL repay Roger Jones any sums of money he paid on the fine assessed against him as a result of the trial held at our union hall on September 7, 1968.

SHEET METAL WORKERS'  
INTERNATIONAL  
ASSOCIATION,  
LOCAL UNION 49,  
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, 7011 Federal Building, 500 Gold Avenue, SW., Albuquerque, New Mexico 87101, Telephone 505-843-2508.