

**New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.) and Marvin Freese, Case 28-CB-486**

June 30, 1969

**DECISION AND ORDER**

BY CHAIRMAN McCULLOCH AND MEMBERS  
BROWN AND ZAGORIA

Upon a charge<sup>1</sup> duly filed by Marvin Freese (herein called Freese), an individual, against New Mexico District Council of Carpenters and Joiners of America (herein called Respondent), the General Counsel of the National Labor Relations Board, on February 25, 1969, issued and served upon the parties a complaint alleging violations of the National Labor Relations Act, as amended. In substance, the complaint alleges that the Respondent, by imposing a fine against Freese, a supervisor employed by A. S. Horner, Inc., has restrained and coerced and is restraining and coercing A. S. Horner, Inc., an employer, in the selection of its representatives for the purposes of collective bargaining and the adjudication of grievances in violation of Section 8(b)(1)(B) of the Act. The Respondent's answer denies the commission of unfair labor practices.

Thereafter, the parties entered into a stipulation with respect to the facts and, on April 22, 1969, filed a motion to transfer this proceeding to the Board. Thus, the parties expressly waived all intermediate proceedings before a Trial Examiner and oral argument before the Board, reserving only the right to file briefs. By Order dated April 28, 1969, the Board granted the parties' motion to transfer this proceeding to the Board and set a date for the filing of briefs. Thereafter, briefs were filed by the Respondent and the General Counsel.

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 considered the stipulated record, including the formal Board exhibits, the Statement of Facts with the exhibits attached thereto, and the aforementioned briefs of the Respondent and the General Counsel, and makes the following findings and conclusions:

**Facts**

**I. THE COMPANY'S BUSINESS**

A. S. Horner, Inc. (herein called the Company or Horner), A New Mexico corporation, at all material

<sup>1</sup>The original charge herein was filed on January 3, 1969, and was served upon the Respondent on about the same day.

times has maintained its principal office and place of business in Denver, Colorado, and has been engaged in the business of general contracting and highway construction in New Mexico. During the past 12 months the Company has derived revenue in excess of \$350,000, of which more than \$50,000 was derived from a contract with the State of New Mexico for the construction of a portion of Interstate Highway 40 which is a part of the National Interstate Highway program; revenue in excess of \$50,000 was derived from a contract with the Albuquerque, New Mexico Metropolitan Flood Control Authority, a subdivision of the state of New Mexico, which State annually purchases and receives goods and materials directly from outside the State of a value in excess of \$50,000. During the same period, the Company purchased, transferred, and had delivered to its operations in the State of New Mexico goods and materials valued in excess of \$50,000 which were transported and received from other enterprises located in the State of New Mexico, which other enterprises had received these goods and materials directly from sources outside the State of New Mexico. The parties stipulated, and we find, that at all times material the Company has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that the Company meets the Board's standards for assertion of jurisdiction over employers in the construction industry.

**II. THE LABOR ORGANIZATION**

It is conceded, and we find, that the Respondent is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

**III. THE UNFAIR LABOR PRACTICES**

**A. The Issue**

The broad question presented is: whether the Respondent violated Section 8(b)(1)(B) of the Act by fining Freese, a supervisor of the Company, for failing to obtain the required clearance and referral under the Respondent's constitution and bylaws, for working for an employer who does not contribute to the Respondent's health and welfare fund, and for failing to cease work when requested to do so by an authorized agent of the Respondent.

**B. The Facts**

At all times material herein, Freese occupied the position of superintendent for the Company at the latter's Albuquerque, New Mexico, Flood Control Authority job-project at Miles Road, S.E. (herein called the Miles Road job). In that capacity Freese was, and is, a supervisor within the meaning of Section 2(11) of the Act, having the authority, in the

interest of the Company, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, by the use of independent judgment. Specifically, he has at all relevant times been authorized in behalf of the Company to adjust employee grievances.

As of November 23, 1968,<sup>2</sup> and for approximately 12 years prior thereto, Freese was a member in good standing of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and for approximately 2 years prior to that date was a member in good standing of its affiliate, Local Union No. 1351, in Leadville, Colorado. Although Freese had not worked with his tools for about 5 to 6 years prior to the events herein, he continued to maintain his union membership as indicated above.

The Respondent is not the collective-bargaining representative of the Company's employees and no contractual relationships or obligations exist between the Company and the Respondent or any of its related local unions. In fact, a majority of the Company's employees voted against being represented by the Respondent in Board-conducted elections held on June 5, 1967, and July 26, 1968, the results of which were certified on June 13, 1967, and September 6, 1968, respectively.

On October 2, 1968, Respondent's business representative, Edward L. Urioste, came to the Miles Road jobsite and asked Freese where he was from and where he maintained his union book. Freese replied that he was from Colorado and maintained his book at Leadville, Colorado, Local Union No. 1351. Urioste thereupon advised Freese to cease his employment with the Company and to report to the office of Local Union No. 1319, a constituent local of the Respondent, and to "sign up" on that local union's out-of-work list. Urioste also stated that he would be at the Local's office until 1 p.m. that day to accept Freese's registration on the out-of-work list. Freese told Urioste that he would not terminate his employment with the Company and that he did not intend to comply with the latter's request to leave the Miles road jobsite.<sup>3</sup>

Thereafter, on October 8, Urioste preferred charges against Freese alleging violations of Section 46, paragraphs A, B, and C of the Constitution and Laws<sup>4</sup> of the United Brotherhood of Carpenters and Joiners of America, the Respondent's parent organization, and Article I, paragraphs D and K of Respondent's Bylaws and Working Rules.<sup>5</sup> In sum, these violations consisted of working without a referral card for an employer not making payments

into the Respondent's health and welfare fund. By letter of October 29, the Respondent advised Freese of the foregoing charges against him and notified him that a hearing of Respondent's Trial Committee would be held on November 23. Freese attended the hearing at which he protested that he was in a supervisory position. Nevertheless, the Trial Committee unanimously found Freese guilty of the violations charged and assessed fines against him totalling \$350. By letter dated December 17, the Respondent informed Freese of the Trial Committee's action, and further advised that, on December 14, the Respondent's delegates voted to ratify the Trial Committee's action. Freese did not pay the fines and did not comply with the Union's provisions which he was found guilty of violating. As a result of the Respondent's action, Local Union 1351 in Leadville, Colorado, has refused to accept periodic dues tendered by Freese unless and until he pays the fines assessed against him by the Respondent.

### Discussion

Based on the facts stipulated by the parties and summarized above, we find, in agreement with contention of the General Counsel, that the Respondent restrained and coerced the Company in the selection and retention of its representative for the purposes of collective bargaining and the adjustment of grievances in violation of Section 8(b)(1)(B) of the Act.<sup>6</sup> The Respondent preferred charges, imposed fines, and attempted to collect such fines, against Freese because he refused, in his capacity as project superintendent, to obtain the required clearance card and work permit and because he refused to accede to Respondent's demands that he cease working for an employer not making contributions to Respondent's health and

<sup>1</sup>In pertinent part, these provisions require that a member who desires to transfer from the jurisdiction of his Local Union or District Council to work in another jurisdiction must obtain a "clearance card" from his Local Union which he must, in turn, present to the Local Union or District Council in whose jurisdiction he seeks to work. Before going to work in such other jurisdiction, a member must secure a working permit from the Local Union or District Council in the jurisdiction where work is secured.

<sup>2</sup>Article I of Respondent's Bylaws and Working Rules, in pertinent part, states:

D All members shall obtain a referral from the appropriate referral hall before going to work on any job. No workman may issue a referral to any Employer who is not paying the proper wage scale for the type of work he is doing. Neither shall he be issued a referral if it is an Employer who is not contributing to the Fringe Benefits negotiated by the District Council whenever possible to legally require the Employer to do so. Members violating this regulation shall be subject to charges and trial. This section may be waived for organizational purposes . . . .

K. Every member shall cease work when ordered to do so by an authorized official of the District Council or Local Union. Members violating this regulation are subject to charges and a trial.

<sup>3</sup>*San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB No. 252; *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; *New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 176 NLRB No. 105

<sup>4</sup>Unless otherwise indicated, all dates are in 1968.

<sup>5</sup>Similar demands to cease working for the Company were made by Urioste that day to carpenter foreman Paul Geer and two rank-and-file employees. These three complied with Urioste's demand and they have not yet returned to the Company's employ. No charges were filed, and the complaint does not allege unfair labor practices with respect to these three employees.

welfare fund. The Company, it is noted, was not obligated to secure personnel through the Respondent's hiring hall or to contribute to its health and welfare fund. Moreover, it is obvious from a reading of the Respondent's bylaws and working rules, *supra*, that Freese could not have obtained a clearance or working permit to work for the Company even if he had applied for one except under a waiver by the Respondent for organizational purposes, i.e., to assist the Respondent in organizing the Company's carpenter employees, in which event his loyalty would have been diverted from the Company to the Respondent. Thus, it appears that the Respondent was using its internal working rules to boycott an employer who did not have a contract with the Respondent by making it a violation, subject to fine, for its members to work for such an employer.<sup>7</sup> It is clear, therefore, that compliance by Freese with the Respondent's demands would have had the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances. As we stated in the *San Francisco-Oakland Mailers'* case, *supra*, "In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein — union interference with an employer's control over its own representatives."

The Respondent, relying on *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, contends that its conduct in disciplining Freese for violations of its internal union rules and regulations was within its legitimate internal interests as a labor organization, as permitted by the proviso to Section 8(b)(1)(A) of the Act. We find no merit in this contention. The Supreme Court's rationale in *Allis-Chalmers* does not permit a labor organization to interfere with an employer's right, under Section 8(b)(1)(B), to select its representatives for the purposes of collective bargaining or the adjustment of grievances. Thus, in *San Francisco-Oakland Mailers'*, we distinguished the *Allis-Chalmers* case and held that the proviso to Section 8(b)(1)(A) is limited to that section only and is not a part of Section 8(b)(1)(B).

We also find no merit in the Respondent's contention that, because here the individual was disciplined for his conduct as a union member and

not for his conduct while directly engaged in representing the Company's interests in resolving a particular dispute between the union and the employer, this case is distinguishable, on its facts, from the *San Francisco-Oakland Mailers'* case. This distinction, in our opinion, is without substance, since Freese possessed the actual authority to adjust grievances involving employees under his supervision. It is also clear, moreover, that the basic dispute underlying the disciplinary action against Freese was not entirely an intraunion matter but stemmed from the fact that the Company did not have a collective-bargaining agreement with the Respondent and was not making payments into the Respondent's health and welfare fund. Thus, as in *San Francisco-Oakland Mailers'* and in *The Toledo Blade Company* cases, *supra*, the underlying dispute was between the Respondent and the Company and not between the Respondent and one of its members.

Accordingly, we conclude that the Respondent's actions against Freese constituted unlawful restraint and coercion against the Company 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 operations of the Company described 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 of commerce.

#### V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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

#### CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material, a labor organization within the meaning of Section 2(5) and Section 8(b) of the Act.
2. The Company is an employer within the meaning of Sections 2(2) and 8(b)(1)(B) of the Act.
3. The Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
4. Marvin Freese, the Charging Party, is, and has been at all material times, a supervisor, within the meaning of Section 2(11) of the Act, of the Company, selected by the Company for the purposes, among others, of collective bargaining and

<sup>7</sup>That this was, in fact, the case appears from our decision in *A. S. Horner, Inc.*, 176 NLRB No 105. In addition, the transcript of Freese's hearing before the Respondent's Trial Committee, which was incorporated into the stipulation of facts as an exhibit, reports the following discussion:

Bro. Blacksher [member of the Committee]: Did you have a carpenter foreman

Bro. Freese: Yes.

Chairman: Union or non-union?

Freese: Union members on job were pulled off by Business Agent, Eddie Urioste.

Bro. Blacksher: Why were the men pulled off?

Eddie: They were working for a company that was not contributing to Health and Welfare. We had an election, and we had men working trying to organize. We lost the election, and it was my duty to pull those men off

the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

5. By preferring charges against Freese, citing him to trial, imposing fines against him, and attempting to collect such fines from him, the Respondent restrained and coerced the Company in the selection and retention of its representatives for the purposes of collective bargaining or the adjustment of grievances, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

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

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, New Mexico District Council of Carpenters and Joiners of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining and coercing the Company, or any other employer, in the selection and retention of its representatives for collective bargaining and adjustment of grievances.

(b) Preferring charges against, fining, or similarly disciplining Marvin Freese or any other supervisor of A.S. Horner, Inc., or any other employer, as a member of the Respondent, as to matters concerning their employment, while such member is the selected representative of A. S. Horner, Inc., or any other employer, for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action which we find will effectuate the policies of the Act:

(a) Rescind the fines imposed against Freese and expunge from its records all reference and other evidence in its files of the proceedings in which Freese was fined by the Respondent.

(b) Advise Freese in writing that it has taken the aforesaid action in compliance with paragraph 2(a), above, and that it will cease and desist from the action forbidden in paragraph 1 of this Order.

(c) Advise Local Union No. 1351, United Brotherhood of Carpenters and Joiners of America, Leadville, Colorado, wherein Freese maintains his membership, of the aforesaid action.

(d) Post at its business office, meeting hall, and all other places where notices to members are customarily posted, a copy of the attached notice marked "Appendix." Copies of said notice, to be provided by the Regional Director for Region 28, shall, after being duly signed by a representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it 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 the notices are not altered, defaced, or covered by any other material.

(e) Furnish the Regional Director for Region 28 signed copies of said notice for posting by A. S. Horner, Inc., if willing.

(f) Notify the Regional Director for Region 28, in writing, within 10 days from the date of the receipt of this Decision and Order, what steps have been taken to comply herewith.

"In the event that this 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."

## APPENDIX

### NOTICE TO ALL MEMBERS OF NEW MEXICO DISTRICT COUNCIL OF CARPENTERS AND JOINERS OF AMERICA

Pursuant to a Decision and Order of the 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 restrain and coerce A. S. Horner, Inc., or any other employer, in the selection and retention of its representatives, including Marvin Freese, for purposes of collective bargaining and adjustment of grievances.

WE WILL NOT prefer charges against, fine or similarly discipline Marvin Freese or any other supervisor of A. S. Horner, Inc., or any other employer, as a member of this labor organization, as to matters concerning their employment while such member is the selected representative of the Company, or any other employer, as its representative for the purposes of collective bargaining or the adjustment of grievances.

WE WILL rescind the fines imposed against Freese and expunge from our records all reference and other evidence in our files of the proceedings in which Freese was fined by us.

WE WILL advise Marvin Freese and Local Union 1351, United Brotherhood of Carpenters and Joiners of America, Leadville, Colorado, in writing, that we have taken the aforesaid action.

NEW MEXICO DISTRICT  
COUNCIL OF CARPENTERS  
AND JOINERS OF AMERICA  
(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 & U.S. Courthouse, 500 Gold Ave., SW, P.O. Box 2146, Albuquerque, New Mexico 87101, Telephone 505-843-2508.