

Titra Film Laboratories, Inc. and Clement Falzarano

FINDINGS OF FACT

Motion Picture Laboratory Technicians, Local 702 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO and Clement Falzarano. Cases 22-CA-4375 and 22-CB-1850

I. JURISDICTION

January 10, 1972

Titra, a New York corporation, has a plant at North Bergen, New Jersey, where it processes motion picture film. Titra annually sells and ships film valued in excess of \$50,000 directly from New Jersey to customers in other States. It is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Local 702 is a labor organization within the meaning of Section 2(5) of the Act.

DECISION AND ORDER

II. THE UNFAIR LABOR PRACTICES

BY MEMBERS FANNING, JENKINS, AND
KENNEDY

A. *Background*

On July 30, 1971, Trial Examiner Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Local 702 represents the employees of a number of companies engaged in the business of processing motion picture film in the New York metropolitan area. Among them is Titra. Titra was originally organized and brought under contract by Local 702 in 1952.

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

From 1949 to 1961 Local 702's contracts, including its contracts with Titra, contained an exclusive hiring provision known as the industry experience roster. The provision was dropped in the contract which was negotiated in 1960 and took effect in 1961. It does not appear in the current contract, which took effect on October 1, 1968, and runs until September 30, 1971. The current contract between Local 702 and the various film processing companies, Titra included, does contain a valid union-security clause (paragraph 1, Shop Agreement) which requires membership in Local 702 as a condition of employment after 30 days. Subparagraph (e) of paragraph 1 reads:

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

(e) In case of repeal or amendment of the Labor Management Relations Act of 1947 or in case of new legislation rendering permissible any union security to the Union greater than that specified in this paragraph of this Agreement, then and in such event such provisions shall automatically be deemed substituted in lieu hereof. In such event, and if permissible under law, the Union agrees to supply adequate, competent and qualified employees for the job requirements of the Employer in the classifications covered by this Agreement, and if the Union fails to do so within 48 hours the Employer may secure such employees from any source.

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 complaint herein be, and it hereby is, dismissed in its entirety.

The contract also contains a provision (paragraph 25, Union Requirements) which reads:

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

No employee shall be required to perform any act or work violative of the Constitution or By-Laws of this Union. The Union hereby represents that the provisions of this Agreement are not violative of said Constitution or By-Laws.

BENJAMIN K. BLACKBURN, Trial Examiner: The charges in these cases were filed on February 26 and served on March 1, 1971. The complaint was issued on April 16. The hearing was held on June 2 and 3 in Newark, New Jersey. The issue is whether Titra, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and Local 702, in violation of Section 8(b)(1)(A) and (2), have entered into and are giving effect to an exclusive hiring arrangement or practice in which length of membership in Local 702 is the controlling factor. For the reasons set forth below, I find that the General Counsel has failed to sustain his burden of proving that the Act has been or is being violated.

Paragraph 7 of the contract is entitled "Work Distribution and Layoffs." It provides for termination of employees with severance pay in situations where work becomes scarce. It also provides for employees in higher paid, more skilled job classifications to bump those in lower paid, less skilled classifications. Employees terminated pursuant to paragraph 7 have no recall rights.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of oral argument at the hearing, I make the following:

Local 702's bylaws provide, in article 27:

Union seniority, as distinguished from plant seniority-

ty, shall be fixed for each member as of the date of his initiation into membership in this Local. . . . When one or more unemployed members are equally available and competent to fill a job, preference shall be given in the order of the Union seniority of said respective unemployed members, but in the event that one or more of said available unemployed members were inducted on the same date, then and in that event, preference shall be given to such of said unemployed available members, who had been unemployed for the longest period of time.

Article 26 of Local 702's bylaws provides, in part, for a \$10 fine, suspension, and/or expulsion of a member found guilty after trial of "soliciting employment in laboratories under collective agreement with the Union, without the Union's consent."

Local 702's membership is the only pool of experienced film laboratory technicians in the New York area. Consequently, despite the fact that they have not been required by contract since 1961 to seek employees first through Local 702, film laboratories have continued to call Local 702 when they need experienced help to see if anyone is available. When Local 702 refers an applicant to a company, it fills out a three-part form. It keeps the pink copy for its own file. It gives the white and yellow copies to the applicant to take to the company. The white copy is for the company's records. The yellow copy goes to Local 702's steward at that laboratory. There was little or no unemployment in the film processing industry in the New York area until 2 or 3 years ago. Since then, there have been some experienced film technicians out of work.

Inexperienced persons breaking into the industry start as preparation men, the least difficult and lowest paying job classification in Local 702's contract. As they become experienced they advance through jobs of increasing skill and higher pay. Timers are the highest skilled and paid technicians in the industry. Any experienced film technician can do the work of a preparation man.

B. *The General Counsel's Case*

Neither Respondent presented any evidence at the hearing, electing, instead, to stand on the record made by the General Counsel. As a result, there is no dispute as to the facts set forth above or in this section. The General Counsel specifically disclaimed any contention that there is an industrywide practice that film laboratories in the New York area will hire through Local 702 exclusively. Indeed, the testimony of three officials of three other laboratories called by the General Counsel belies any such theory because it establishes affirmatively that firms other than Titra have no such arrangement with Local 702. The General Counsel called these witnesses, in part, in an effort to prove Local 702's desire to establish an exclusive hiring arrangement with Titra by showing that it has made such a demand on other employers in the industry. Their testimony established, at most, that Local 702 has forced other employers to rescind the hiring of new employees for higher paying jobs such as timer and promote from within. It has no probative value on the question whether Titra has an exclusive hiring arrangement or practice with Local 702, the basic allegation of the General Counsel's case.

Eight other witnesses called by the General Counsel gave testimony which did bear on this question. One was Richard Gramaglia, executive vice president of Local 702 from 1940 to 1958 and president from 1960 to 1966. Gramaglia testified that, as of the time he left office in 1966, there was an "agreement" between Local 702 and employers, Titra included, that "the employers, if they needed any employees, would ask Local 702 for reference of any people they had for jobs." Much of Gramaglia's time on the stand was spent in a dispute with the General Counsel as to whether Gramaglia had told the General Counsel, before the hearing, that employers were required to call Local 702 at the time he was president. Any value that his testimony might have had to establish that Titra had agreed to an exclusive hiring arrangement with Local 702 was destroyed when it became clear that he did not know the meaning of the word which counsel had been using to categorize Titra's commitment, if any, to Local 702, i.e., "obliged." On the basis of Gramaglia's testimony, I find that Titra did not, in the period following the abolition of its contractual obligation to use Local 702 exclusively as a source of new employees, make any explicit agreement with Local 702 to continue to do so although it did continue to ask Local 702 to refer experienced persons to it when it needed help.

The other seven witnesses called by the General Counsel all worked for Titra at one time or another. One was Corrado Nastasi, secretary-treasurer of Local 702. Nastasi worked for Titra from 1947 until 1958. He was the steward from 1952, when Titra was first organized, until he left. He testified flatly that in the period from 1952 to 1958 Titra hired persons who came to it from sources other than Local 702. In view of Titra's contractual obligation under the "industry experience roster" during this period, I find this testimony by Nastasi incredible. I have not, however, discredited Nastasi generally. His testimony is, for example, the basis for my findings above about Local 702's three-colored referral slip and how it is used.

Another ex-employee called by the General Counsel was Louis Chiocco. Chiocco worked for Titra from 1954 until 1957. He was a member of Local 702's executive board from 1965 until he resigned in November 1970. Chiocco testified that, while he was an officer of Local 702, he recommended that five or six persons be sent to jobs at Titra, all but one of whom were hired. Among the persons successfully recommended by Chiocco during this period were Clement Falzarano, who was hired by Titra in 1967 or 1968, Joseph D'Amico, who was hired in December 1967, George Chiocco, Louis' brother, who was hired in July 1968, and Emil Ognisanti, who was hired in 1966 or 1967. In each case, Louis Chiocco recommended to Local 702's president that the applicant be sent to fill an opening at Titra and the man was sent to Titra, usually with a referral slip. Louis Chiocco testified to no specific incident which occurred on or after September 1, 1970, the 10(b) date in these cases.

Two other witnesses, Joseph Conti and Chris Karinja, went to work for Titra in 1952 and have been there ever since. Conti was hired just at the time the plant was being organized. He testified that he checked with the plant manager every day for a period of several months. When

the manager finally said he had an opening and would hire Conti, he sent Conti to Local 702's office. When Conti returned with a referral slip, he was put to work. Karinja testified that he was called by an unnamed friend who knew he was out of work and told to go to Local 702. He did so and was sent to Titra with a referral slip.

The General Counsel's last three witnesses were all hired by Titra in the period when the contract between Titra and Local 702 contained no exclusive hiring agreement. Edward Lanzillo testified that he was hired in November 1967. His brother was working for Titra at the time. Lanzillo was working as a truckdriver and wanted a change. He asked his brother to help him get a job at Titra. His brother spoke to Local 702's steward. Lanzillo went to the plant, talked to both the steward and the plant manager, and was sent by the manager to Local 702 to get a referral slip. Lanzillo returned the next day with the slip and was put to work. Lanzillo was the only one of the three post-1961 hires called by the General Counsel to testify about the manner of their hiring who was interviewed by the plant manager before he went to work.

Joseph D'Amico was hired in December 1967. He was working as a longshoreman at the time, and work was getting scarce. He asked Louis Chiocco to help him get a job at Titra. When an opening developed, Chiocco asked D'Amico if he wanted it. D'Amico said he did. Chiocco brought a referral slip to his house. D'Amico went to the plant and was put to work by the steward. He did not see the plant manager until an hour or so later when the manager arrived. The manager merely had him fill out the papers, such as a W-4 form, usually required of new employees. D'Amico testified that 13 persons were hired by Titra after him. The only hirings which can be dated, from D'Amico's testimony, as coming after September 1, 1970, were those which took place in February 1971, about which more below.

Finally, George Chiocco confirmed his brother's testimony about how George was hired by Titra. In June 1968 George asked Louis to get him a job in the film industry because his job with a trucking firm was getting slow. Louis Chiocco told him to go to Titra around the first of July. He went, apparently without a referral slip. The plant was closed for vacation at the time. Consequently, George Chiocco spent his first 2 weeks in Titra's employ doing odd jobs. When the plant reopened, Local 702's steward put him

to work learning the duties of a preparation man. Like D'Amico, George Chiocco did not see Titra's plant manager until after the steward had put him on production work. The interview, as in D'Amico's case, concerned paperwork and not whether George Chiocco would or would not be hired. George Chiocco testified that six persons were hired after him. None can be dated from his testimony as coming after September 1, 1970.

The whole thrust of the General Counsel's case is that Titra has delegated the hiring function to Local 702. To this end he elicited testimony from all his witnesses except Gramaglia and Nastasi to the effect that everyone who comes to work at Titra gets hired through Local 702. Based on this testimony about what has happened in other cases as well as what has happened to the witnesses themselves, I find that Local 702's steward plays the key role in deciding who will be hired when a job opens up at Titra. The principal consideration, however, is not union membership but nepotism. Once again, with the exception of the events of February 1971 related in the next paragraph, all of the evidence about the hiring of specific individuals, as distinguished from Gramaglia's vague generalizations, relates to persons inexperienced in the film processing industry who were put to work initially as preparation men and advanced to more skilled jobs as they learned the business. Anyone who works in the plant or, apparently, anyone associated with Local 702 can recommend to the steward that a relative or a friend be given a job when one becomes available. The steward keeps a list and decides, according to his own discretion or according to the clout of the recommender, who shall be hired. The lucky applicant is sent to Titra with a Local 702 referral slip, reports to the steward, and is put to work by him. The result is that Titra's entire work force is made up of numerous groups of employees who share close family and social ties. Since there is no evidence that anyone has been hired by Titra in recent years in any other manner, I find that Titra has, in fact, delegated hiring to Local 702. Therefore, I find, Titra has continued to engage in the practice of using Local 702 as the exclusive source of employees even though its contractual obligation to do so ended in 1961.

Joseph D'Amico and George Chiocco also testified about the events in February 1971 which apparently gave rise to these cases.¹ On January 8, 1971, Titra terminated the last 13 men it had hired, pursuant to paragraph 7 of its contract

reason of any activity in which you engaged protected by the Act, rather than as contended by the Employer because of your attendance record during your previous employment by Titra, which reveals that you were absent for approximately 64 days during calendar year 1970. It is further noted that although your charge alleges that other applicants for employment were not hired by Titra because of their intra-union political activity, the evidence fails to establish that either Titra or Local 702, through its exclusive hiring hall, denied employment to any other applicant because of his activities within the Union. Contrary to your contention that Titra assisted Local 702 by referring newly-hired employees to the Union's office where they were allegedly coerced into joining the Union prior to the expiration of the 30-day statutory grace period, the evidence adduced during the investigation revealed that the actual referral procedure was not an integral part of the hiring process and that such employees were not advised that they were required to join the Union before the expiration of the 30-day grace period as a condition of obtaining or maintaining their employment with Titra.

¹ The charges in these cases also allege that Local 702 and Titra required employees to join Local 702 sooner than 30 days after they were hired and that Titra discriminated against the Charging Party and others at the behest of Local 702. On April 13, 1971, in a letter to Clement Fazarano, the Regional Director dismissed all allegations of these cases other than the one litigated, i.e., that Titra and Local 702 are "parties to an exclusive hiring hall arrangement whereby job applicants [are] referred by the Union to employment on a preferential basis according to their respective length of union membership." That letter also said, in pertinent part:

The evidence adduced during the investigation is insufficient to establish that the above-named labor organization caused or attempted to cause Titra Film Laboratories to refuse to hire you because of your political activities within the Union or that such activities were the reason you were not hired by Titra. Rather Local 702 did refer you to Titra for employment and, contrary to your contention, the investigation revealed no evidence to support the conclusion that such referral was not made in good faith. Moreover, the evidence does not establish that the Employer failed to hire you by

with Local 702. The order of their plant seniority was the same as the order of their union seniority. George Chiocco, a finisher at the time, was seventh from the bottom of the list. Some, if not all, of the six below him were preparation men at the time they were terminated. D'Amico and Clement Falzarano were also among those terminated. As their hiring dates set forth above indicate, they were higher than Chiocco on the seniority list. In early February, Titra called Local 702 for preparation men (whether two or five is unclear in the record). Local 702 referred men to Titra who were among the six below George Chiocco on the seniority list and who were still preparation men at the time of their termination. D'Amico and Chiocco protested to Local 702 that they should have been given the jobs because of their greater seniority. They were told that the referrals had been made on the basis of job classification and not on the basis of seniority as, in fact, they had.

C. Analysis and Conclusions

I have found that Titra and Local 702 do, as contended by the General Counsel, have an exclusive hiring arrangement or practice² whereby Titra looks to Local 702's office for experienced employees and to Local 702's agent, the steward in its plant, for inexperienced help. That finding, however, meets only half the General Counsel's burden, for exclusive hiring halls are not, *per se*, illegal. *Hoisting and Portable Engineers, Local 302 (West Coast Steel Works)*, 144 NLRB 1449. To supply the second half—operation of the arrangement in a discriminatory manner—the General Counsel relies on an alleged presumption that Local 702 has given effect to article 27 of its bylaws in its dealings with Titra. No authority for the existence of such a presumption at law has been brought to my attention. However, assuming, for the sake of argument, that there is such a presumption, it is negated by the General Counsel's evidence of the manner in which Titra's and Local 702's exclusive hiring arrangement actually works.

The only incident which clearly falls within the 10(b) period is also the only incident in the record in which experienced union members rather than inexperienced persons who had not yet joined Local 702 were referred to Titra by Local 702. In that instance, both Joseph D'Amico and George Chiocco, having been hired without experience and trained initially as preparation men, and having progressed to better paying jobs before they were terminated, were clearly, in the words of article 27 of Local 702's bylaws, "competent to fill" the jobs for which Titra sought men in February 1971. Both had greater union seniority than the men who were referred by Local 702. If Local 702 had given effect to article 27 at that time, D'Amico and Chiocco, or possibly even ex-Titra employees who were above them on the seniority list and yet were caught in the January 1971 termination, would have gotten the jobs. With respect to the other incidents in the record where inexperienced persons were referred to Titra by

Local 702, it is equally clear that article 27 was not invoked. None of those persons had any union seniority at the time he was referred. Presumably they all joined Local 702 somewhere along the way. But, as in the Regional Office's investigation of the charges, there is no evidence in this record that any person hired in this manner has ever been required to join Local 702 as a condition of getting a referral slip or sooner than the legal grace period allowed him under the union-security clause of the contract between Titra and Local 702. In fact, all of the evidence relating to these incidents demonstrates affirmatively that the union status of the applicant played no part in Local 702's decision to refer him.

If an inference is drawn that Titra, having called Local 702 for experienced help in February 1971, did so on other occasions when article 27 was given effect by Local 702, the General Counsel's case runs afoul of Section 10(b) of the Act. The only evidence from which a finding could be made that Titra hired anyone in the period after September 1, 1970, other than the incident already discussed, is Louis Chiocco's testimony that he recommended Local 702 send five or six persons to Titra while he was an officer and that his term ran until early November 1970. It is, I think, insufficient to support a finding that any of the persons recommended by Chiocco were, in fact, hired by Titra after September 1, 1970. Therefore, the only hiring which took place during the 10(b) period, insofar as the record is concerned, is the one in February 1971 in which Titra and Local 702 did not invoke article 27 and thus did no wrong. On this state of the record, Section 10(b) of the Act precludes a finding that the Act has been violated. *Cargo Handlers, Inc.*, 159 NLRB 321, 327 (fn. 12).

For the reasons stated, I find that the General Counsel has not sustained his burden of proving, by a preponderance of the evidence, that Local 702 has referred employees to Titra, pursuant to their exclusive hiring arrangement or practice, according to length of union membership, especially during the 10(b) period.

Upon the foregoing findings of fact, and on the entire record in these cases, I make the following:

CONCLUSIONS OF LAW

1. Titra Film Laboratories, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Motion Picture Laboratory Technicians, Local 702 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The allegations of the complaint that Titra has violated Section 8(a)(1) and (3) and that Local 702 has violated Section 8(b)(1)(A) and (2) of the Act have not been sustained.

Upon the foregoing findings of fact, conclusions of law,

merit It requires a strained reading of the language which states what is to happen in the event the law as it presently stands is changed. The parties could not have made clearer their intention, when they included paragraph 7(e) in their contract, of explicitly agreeing to an exclusive hiring hall only if the Act is amended.

² The General Counsel argues, in the alternative, that paragraph 7(e) of the contract presently in effect between Titra and Local 702 constitutes an agreement between them for an exclusive hiring hall. He reasons that exclusive hiring halls are not illegal *per se* under the Labor Management Relations Act of 1947, therefore, the language of paragraph 7(e) indicates the parties' present agreement. Such an argument is obviously without

and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

The consolidated complaint is dismissed in its entirety.