

**Local No. 500, Laborers' International Union of North America, AFL-CIO (Peterson Construction Company) and Timothy A. Brown.** Case 8-CB-7116

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDAUGH

On September 2, 1992, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local No. 500, Laborers' International Union of North America, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Nancy Recko, Esq.*, for the General Counsel.  
*Joseph Allotta and John D. Franklin, Esqs. (Allotta & Farley)*, of Toledo, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter before the National Labor Relations Board (the Board) was tried before me in Toledo, Ohio, on June 11, 1992. The complaint against Local No. 500, Laborers' International Union of North America, AFL-CIO (Local 500 or the Respondent) was issued by General Counsel on November 27, 1991.<sup>1</sup> The complaint is based on charges filed by Timothy A. Brown, an individual, on October 15. The complaint alleges that, on September 27, Respondent attempted to cause, and did cause, Peterson Construction Company (Peterson or the Employer)

<sup>1</sup> All dates are in 1991 unless otherwise indicated.

to discharge Brown, an employee, for reasons other than a failure to tender the periodic dues and initiation fees uniformly required for membership in Respondent, a labor organization, within Section 2(5) of the Act, and that by such conduct Respondent violated Section 8(b)(1)(A) and (2) of the Act.

Respondent duly answered the complaint, admitting jurisdiction of this matter before the National Labor Relations Board (the Board), and the status of certain agents under Section 2(13) of the Act, but denying the commission of any unfair labor practices as defined by the Act.

On the testimony and exhibits entered at trial, and my observations of the demeanor of the witnesses, and on consideration of the briefs that have been filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

Peterson, a corporation with an office and place of business in Wapakoneta, Ohio, is a general contractor in the building and construction industry. Annually, in the course and conduct of that business, Peterson purchases and receives at its Wapakoneta facilities goods valued in excess of \$50,000 directly from suppliers located at points outside Ohio.

Therefore, Peterson is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent represents construction laborers in the Toledo area. Its chief officer is James D. Morris, business manager; reporting to Morris is William Thomas, business representative.

The Employer's vice president is Robert Schuerman; its masonry superintendent is Jack Michael McCullough. The Employer's Wapakoneta location is outside Respondent's geographical jurisdiction.

On September 11, Peterson began construction of a building at the University of Toledo. On September 23, Jack Michael McCullough, Peterson's masonry superintendent hired Charging Party Brown as a laborer. On September 27, Thomas came to the jobsite and asked McCullough how many laborers Peterson was then employing; McCullough replied that there were four; Thomas asked if he could speak with them, and McCullough said that he could.

Thomas testified that he then spoke to Brown in the presence of another laborer, Dawn Hile. According to Thomas, both Brown and Hile told him that they had been members of the Union, and they wanted to become such again; Thomas told both of them that they needed to talk to Morris to get reinstated. Brown did not dispute this testimony; Hile did not testify.

McCullough testified that at lunchtime he received a telephone call from Morris. According to McCullough:

[Morris] said, do you have laborers employed out there, and I said yes. And he asked who they was and I told him that. And he said that there was two members out there that did not belong to the Laborer's International Union. . . . And he said do you know if Peterson is signatory with the Laborer's International 500 and I said yes. He said, well if you don't—if you have people working on a job who are not members that they cannot work there. . . . I asked Mr. Morris what I should do. He said he cannot make that—cannot tell me what to do, but since these people were not union members that something would have to be done. And I said, do I lay them off or do I fire them. He said, something just has to be done since they are not members of the Local. . . . And I says, well, let me call my office.

Of the four laborers whom Peterson then employed, only Brown and Hile were not then members of Respondent's International Union.

Morris testified that when Thomas returned to Local 500's office that afternoon and reported what he had found, Morris had the office secretary check some records; the secretary confirmed that Brown and Hile were not paid-up members of Respondent, although they had once been. Further, according to Morris:

After I found out that information I called Mr. McCullough out at the University of Toledo at Peterson Construction Company and I explained to him that he had people out there that didn't belong to the union. . . . I talked to Mr. McCullough pertaining to the job as his having hired four people and not calling Local 500. I asked him had his office contacted him about the agreement we had with the Peterson Construction Company and the hiring procedures. And he told me no, that he had not talked to his office. . . . Well then I said I would call his office to make sure they contacted him to what was agreed to by vice president Schuerman and myself. He said, never mind, he would make the call.

Morris did not deny that he told McCullough that nonmembers could not work on the job and that "something just has to be done" about Brown and Hile; therefore, McCullough's testimony in this regard stands undenied.

At the time of the events in question, Peterson had no contractual agreement with Respondent, although Morris testified that, in mid-September, Peterson's vice president Schuerman agreed that Respondent would sign an agreement with Respondent. Schuerman did not testify. (Respondent and Peterson did sign an agreement, but not until late October.)

Morris further testified that he had two more telephone conversations with McCullough on September 27. The second conversation consisted only of a report by McCullough that he had not been able to reach Schuerman. On direct examination, Morris was asked, and he testified:

Q. Okay. Did you speak to Mr. McCullough a third time that day?

A. Yes. Later that afternoon, somewhere in the area around 4:00, 4:15, around 4:00, I'd say, I called—he had called to the office and I called him back and asked him what had happened. He stated to me that he had

talked to his official of the Peterson Construction Company and that they had told him what to do.

Q. And what did you say?

A. I asked him to—would he explain that to me, what did he mean that they had told him what to do. And he proceeded to explain that to me. He said that the two people would be gone at the end of the day. And I said to him, I said, Mr. McCullough, I want you to understand that is your decision and not my decision. He said that I understand. And then he proceeded to tell me that he would like to have two people Monday morning at 8:00 o'clock. And I said fine, thanks, I will try to get those people out there. And before I hung up I told Mr. McCullough, I said, I want to say it again to you that is your decision. I am not telling you to lay anybody off. He says I understand.

McCullough was not called in rebuttal to deny this latter exchange, and Morris' testimony in this regard stands undisputed.

McCullough testified that after his (one) telephone conversation with Morris on September 27, he conferred with Schuerman and they decided to terminate Brown and Hile, which McCullough did that afternoon. Before Morris' telephone calls of September 27, McCullough had not considered terminating either employee. When asked why he terminated Brown and Hile, McCullough testified, "Because they were not members of Local 500."

No charges on behalf of Hile appear to have been filed.

The termination notice that McCullough gave to Brown on September 27 recites:

Labor [sic] Local #500 said Tim does not belong to their [L]ocal and that he cannot work on this job site[.]

Brown was rehired by Peterson on October 10 and continued to work thereafter, without incident, until he quit several weeks later.

#### B. Analysis and Conclusions

Section 8(b)(2) provides that:

It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3).

Section 8(a)(3) prohibits employer discrimination against employees that would "encourage or discourage membership in any labor organization."

As succinctly stated in *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433 (1983):

The Board will presume that a union acts illegally any time it prevents an employee from being hired or causes an employee to be discharged because by such conduct a union demonstrates its power to affect the employee's livelihood in so dramatic a way as to encourage union membership among the employees. [Citations omitted.]

Where such presumption is not rebutted, it will be found that a union has violated Section 8(b)(2).

It is undisputed that on September 27 Morris called McCullough and told him that "if you have people working on a job who are not members that they cannot work there." It is further undisputed that Morris added that "something just has to be done."

Morris was not suggesting that "something just has to be done" by the union; his only reason for making the statement to the employer was to notify the employer that the employer "just has" to do "something." That "something" was, as Morris clearly stated to McCullough, that the nonmembers Brown and Hile "cannot work there."

On brief, Respondent does not mention Morris' statement to McCullough that "if you have people working on a job who are not members that they cannot work there." Respondent does contend that Morris, by his stating that "something just has to be done" about the nonmembers, was no more than a stating that the Employer had contractual obligations which would affect the hiring processes. However, even if Morris' predicate, that "they could not work there," could be ignored (which it cannot), Respondent's conduct would not be excused. On September 27, Respondent had no contract with the Employer. And even if Respondent had such a contract, and even if it did have a valid union-security agreement, and even if it could have been validly enforced in any respect, and even if the Union had sought only enforcement of the obligations to tender periodic dues (and not a raw assertion that "they cannot work there"), the employees had not been given notice of their financial obligations to the Union and afforded a proper chance to comply with those financial obligations.<sup>2</sup>

Nor is Respondent's conduct excused by Morris' telling McCullough, later in the afternoon of September 27, that it was "your decision" to discharge Brown and Hile. In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board held that, for a respondent to relieve itself of liability for unlawful conduct by effective repudiation: (1) its action must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct"; (2) there must be adequate publication of repudiation to the employees involved; (3) there must be no proscribed conduct *after the publication*; and (4) assurances must be given against future unlawful interference. The Board has held these standards, none of which have been met here, apply to cases of attempts to cause discrimination by labor organizations. *Auto Workers Local 376 (Emhart Industries)*, 278 NLRB 285 (1986). Any effective repudiation would, at minimum, include a notice to all members and employees, as will be required in this case, that Respondent has no objection to the employment of Brown by the Employer.

Accordingly, Respondent has failed to state any defense to the alleged violation of Section 8(b)(2).

I find and conclude that Morris' undisputed remark to McCullough, that nonmembers Brown and Hile "could not work there" and that "something just has to be done," clearly constituted a request that the Employer discharge Brown (and Hile), and that by those remarks of Morris, Respondent attempted to cause the discharges of Brown (and Hile) under Section 8(b)(2) of the Act. Moreover, the Employer did comply with the request, and therefore, the re-

quests did cause discrimination against Brown (and Hile) in violation of Section 8(b)(2).

Because the Union's request was (as was foreseeable) publicized to Brown in the termination notice of September 27, the Union's conduct further restrained employees in their Section 7 right not to become a member of a labor organization; therefore, Respondent's conduct further violated Section 8(b)(1)(A) of the Act, as I find and conclude.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Local No. 500, Laborers' International Union of North America, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Peterson Construction Company to discriminate against Timothy Brown, or any other employee, in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees of Peterson Construction Company in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment in accordance with Section 8(a)(3) of the Act.

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

(a) Notify Peterson Construction Company, in writing, that the Respondent Union has no objection to the employment of Brown, with all of his former rights and privileges, and furnish Brown with a copy of such notification.

(b) Make Brown whole,<sup>4</sup> with interest,<sup>5</sup> for all loss of pay that he may have suffered as a result of the discrimination against him.

(c) Post at its offices, meeting halls, and all other places where notices to members are customarily posted copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

<sup>3</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>4</sup>Backpay shall be computed on a quarterly basis, from date of discharge to date of Brown's resignation of his employment, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

<sup>5</sup>Interest shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>6</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>2</sup>*Hotel Employees Local 568 (Philadelphia Sheraton)*, 136 NLRB 888 (1962), enf.d. 320 F.2d 254 (3d Cir. 1963).

(d) Deliver to the Regional Director for Region 8 signed copies of the notices, in sufficient numbers to be posted by Peterson Construction Company, the Employer being willing.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

#### APPENDIX

NOTICE TO MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Peterson Construction Company to discriminate against Timothy Brown,

or any other employee, in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees of Peterson Construction Company in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment in accordance with Section 8(a)(3) of the Act.

WE WILL notify Peterson Construction Company, in writing, that we have no objection to the employment of Timothy Brown, with all of his former rights and privileges, and WE WILL furnish Brown with a copy of such notification.

WE WILL make Timothy Brown whole, with interest, for all loss of pay that he may have suffered as a result of the discrimination against him. (Brown has previously been reinstated by the Employer.)

LOCAL NO. 500, LABORERS' INTERNATIONAL  
UNION OF NORTH AMERICA, AFL-CIO