

**Jimmy L. Phillips, d/b/a J. L. Phillips Enterprises
and Laborers' International Union of North
America, AFL-CIO, Local 7. Case 3-CA-16923**

January 4, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On October 30, 1992, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed an exception to the decision.

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 exception and has decided to affirm the judge's rulings, findings,¹ 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, Jimmy L. Phillips, d/b/a J. L. Phillips Enterprises, Binghamton, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel excepted to the judge's finding in fn. 2 of his decision that the complaint failed to name Albert Mancini as one of the alleged discriminatees. We note that the General Counsel's amendment to the complaint and notice of hearing, dated August 5, 1992, added the name Albert Mancini to the list of alleged discriminatees contained in par. VII of the complaint. This inadvertent error does not affect the outcome of the case because the judge included Mancini in the remedy and recommended Order on the basis that his conduct was fully and fairly litigated.

Alfred M. Norek, Esq., for the General Counsel.
Jimmy L. Phillips, pro se, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on September 8, 1992, in Binghamton, New York. The complaint and notice of hearing, which issued on March 23, 1992,¹ was based on an unfair labor practice charge filed on March 2 by Laborers' International Union of North America, AFL-CIO, Local 7 (the Union). The complaint alleges that on about February 17, Jimmy L. Phillips, the proprietor, agent, and representative of J. L. Phillips Enterprises (Respondent), informed Bruce Knapp, Michael Zarelli, Leroy Brown, Jacob Fissel, Edward Hrehor, and Richard DeRose² that they were ineligible to be hired by

¹ Unless indicated otherwise, all dates referred to herein relate to the year 1992.

² The complaint fails to name Albert Mancini as one of the alleged discriminatees at par. VII. Because Mancini testified that he was one

Respondent because they were members of the Union, and thereafter, Respondent refused to hire these individuals, in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a sole proprietorship owned by Jimmy L. Phillips and doing business as J. L. Phillips Enterprises. Respondent's principal office is in Jacksonville, Arkansas, as well as various jobsites throughout the United States, including a baseball stadium that had been under construction in Binghamton, New York (the jobsite), where it was engaged in the installation of public seating for the stadium. During the 12-month period preceding March 23, Respondent purchased and received at its Arkansas facility goods valued in excess of \$50,000 directly from points outside the State of Arkansas, and during the same period it performed services valued in excess of \$50,000 in States other than the State of Arkansas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

General Counsel called as witnesses six of the seven alleged discriminatees who testified about the events of February 17, as well as Joseph McKay, the Union's business manager. Jimmy Phillips, the owner and proprietor of Respondent, testified on its behalf.

McKay testified that, as part of his job, he is generally familiar with construction projects in the Binghamton area, and he was aware of the construction of the jobsite, a multipurpose stadium (principally for baseball) in Binghamton. Work on the project began in about August 1991; the general contractor was Garbade Construction. In about January McKay visited the jobsite and saw that they were starting to do some of the preparation for the installation of the seats at the stadium. He asked an employee who was in charge of the seating, and was directed to Phillips, who was at the jobsite. McKay introduced himself and asked Phillips how he operated, and whether he normally hired union employees and Phillips said that he did. McKay asked him when he thought the seats might be in, and Phillips answered that he thought they would be installed about March 1. McKay asked what "his intentions were" as far as unloading and distributing the seats, and Phillips said that he would have to discuss that with the Garbade superintendent. McKay told Phillips that, historically, unloading and distribution were Laborers work. That was the extent of the conversation. It should be noted

of the union members present at the meeting with Phillips (as will be discussed more fully below) and as his participation was fully and fairly litigated, and as General Counsel's brief makes clear that Mancini is one of the alleged discriminatees, I find that his exclusion from the complaint was inadvertent, and he will be included as one of the alleged discriminatees.

that it is the Union's position that unloading the seats from the truck and distributing them to their eventual location was union work, while drilling the holes for the seats and their installation was carpenters' work. Phillips testified that the Laborers jurisdiction ends (and the Carpenters begins) after the seats are brought to their eventual location.

Brown, a union member for 34 years, testified that he went to the jobsite on February 17 with Zarelli, Fissel, Hrehor, Knapp, DeRose, and Mancini; earlier that day they met with McKay, who told them that he thought that the seats might be ready for installation that day. Brown, who was the spokesman for the group, asked where he could find Phillips, and was directed to an area where he saw Phillips unloading a tractor-trailer with a forklift and two helpers. They approached Phillips and Brown asked him if he was going to be hiring laborers and Phillips said that he was. Brown handed him the list of the seven men who were there and Phillips looked at it, put the list in his pocket and asked if Brown belonged to the Union. Brown said that he did and Phillips said: "I can't hire you because of an agreement I have with Garbade Construction." That was the extent of the conversation and he and the other six individuals left the jobsite. He testified that Phillips never mentioned any wage rate, nor did Phillips say that he couldn't hire union men because he was only paying \$5 an hour. Phillips also never told them that he could hire them if they cleared it with the Union to work for less than the union rate.

Knapp, a union member for 25 years, testified that he went to the jobsite on February 17 with the other individuals. They saw Phillips on the forklift and Brown handed him a list containing their names and asked if he was hiring; he said that he was. Phillips then asked if they belonged to a union and Brown said that they were members of the Union. Phillips said: "Well, you'll have to go through Garbade." Phillips never said that he couldn't hire them because he was only paying \$5 an hour, nor did he mention any wage rate. Phillips also never said that he would hire them if they cleared it with the Union to receive a lower wage rate than provided by the Union.

Mancini, a union member for 30 years, testified that Brown asked Phillips if he was hiring laborers to unload the truck. Brown handed Phillips the list with the names and Phillips looked at the list and asked if they were members of the Union and they said that they were. Phillips said: "I can't hire you because I have a special contract with Garbade," although he did not explain further. Phillips did not mention a wage rate, say that he would hire them if they were willing to work for \$5 an hour or say that he would hire them if they cleared it with the Union.

Fissel, who has been a member of the Union for 19 years, testified that Brown asked Phillips if he needed any help and whether he was hiring laborers and he answered yes. Brown handed him the list and Phillips asked whether they were members of the Union and they said that they were. Phillips said: "Well, I can't hire you because I have a special arrangement with Garbade Construction." They all left. He also testified that Phillips never said that he couldn't hire union men because he was only paying \$5 an hour, he never mentioned any wage rate, and never said that he would hire them if they cleared it with the Union to work for lower than the union scale. Phillips also never told them to go directly to Garbade for work at the jobsite.

Hrehor, a union member for 32 years, testified that when they were at the jobsite that morning Brown asked Phillips if he was hiring laborers and Phillips said that he was. Brown then gave him the list of the out-of-work union members and Phillips said that he had a special agreement with Garbade, and that they would have to see Garbade about working at the jobsite. Phillips never mentioned a wage rate, nor did he say that he could not hire union men because he was only paying \$5 an hour. Additionally, Phillips never said that he would hire them if they would clear it with the Union to work for less than the union rate.

Zarelli, a union member for 23 years, testified that when they saw Phillips that morning Brown asked him if he was going to hire any laborers and Phillips answered yes. Phillips then asked if they were members of the Union and they answered yes. Phillips then said that due to a special agreement with Garbade, he couldn't hire them and they left. Phillips never said what wage rate he was paying, that he couldn't hire them because he was only paying a \$5 an hour rate, or that he would hire them if they would clear it with the Union to work for less than the Union's rate.

Phillips was Respondent's sole witness. He testified as follows: Respondent installs stadium seating throughout the country, providing the labor and expertise, but not the seats themselves. His operation unloads the seats from the trucks, brings the seats to their eventual location, and bolts them in. Respondent performs both union and nonunion installations. He received a telephone call in January offering him the contract to install the seats at the jobsite, but that it "was a non-union installation. I was told that if I took the contract, that I possibly could have certain complications with the union, but that Garbade would stand behind us." He accepted the contract. His work was to begin on January 27, and on that date he arrived at the jobsite for the first time, at which time he met the "business agent," presumably McKay, behind home plate at the facility. All he could recollect of the conversation was that he told McKay that he could not hire union laborers or carpenters because he had a nonunion contract with Garbade; whereas union contracts allow for \$18 to \$25 an hour, nonunion contracts range from \$5 to \$7 an hour. He also told McKay that he has employed union laborers when he "carried a union contract." He told him that he would ask Garbade to "subsidize" the difference in the pay, or make some other arrangements with the factory or their contractor to cover the difference between union and non-union wages. When Phillips later asked this of Garbade, the request was refused.

It took Respondent about 3 weeks to complete its preliminary work of layout, drilling, and caulking anchors with the six employees who traveled with Phillips to the jobsite. At this stage, Respondent would normally leave for about 3 weeks, when the seats would ordinarily be scheduled to arrive. However, on this occasion, Phillips received a call that the general contractor wanted the job rushed, so if Respondent would remain at the jobsite, the factory would expedite the delivery of the seats. They agreed to do so, and Respondent remained. On about February 10, McKay returned to the jobsite (according to Phillips' testimony) and Phillips told him that Garbade had refused to make any adjustment in his contract, it was still a nonunion contract, which meant that he could not afford to pay union laborers. He said that he was caught in the middle, and there wasn't anything that he

could do. That was the last time he spoke to McKay, and his last involvement with the Union except for his meeting with the members, about a week later.

The first truck carrying the seats arrived at the jobsite on February 13 or 14; Phillips and his two employees unloaded it. The second truck arrived about 3 days later; it was while they were unloading this truck that he was approached by Brown and the others. Phillips testified:

When the gentlemen came up to me . . . I explained to them that I had an agreement with Garbade that—I had a non-union installation. In my contract I could not hire laborers. I told those gentlemen that if they wanted employment, if they would speak to Garbade, that I knew Garbade was hiring . . . that would be the only route I knew. They left without saying anything else.

Phillips was asked if he would have hired these individuals if he reached an agreement with them on a wage rate. He answered: “If the gentlemen could have worked for me for the wage, then I would not have had a problem hiring them.”

Phillips testified further that in about midday on February 17 he ordered temporary help from a local office of Olsten Temporary Help. The employees from Olsten numbered from 7 to 10 and began working on the morning of February 19. These employees worked with Respondent’s regular employees opening the boxes and distributing the seat components to where they would eventually be bolted. In addition, they put the seat components in place and loosely bolted the seats; Respondent’s regular employees tightened the connections and completed the work. The work was completed 6 to 7 weeks later.

McKay testified that Phillips never told him that he had a nonunion contract and that if he wanted to hire union laborers, he would have to ask Garbade to subsidize the difference, nor did he (McKay) ever say that he would talk to Garbade about the situation. McKay also testified that the January meeting at the jobsite was the only time that he spoke to Phillips and that there was no discussion of wage rates at this meeting. Fissel, Hrehor and Zarelli each testified that when they went to the jobsite on February 17 they were not aware that Respondent’s subcontract was nonunion; Brown, Knapp and Mancini were not questioned about this.

Phillips, of course, had an opportunity to cross-examine each of General Counsel’s witnesses. On those occasions, he asked Brown, Mancini, Fissel, and Zarelli whether, during their meeting on February 17, he told them to contact, or speak to, Garbade to obtain employment at the jobsite. Each answered that he did not say that to them.

The credibility determination herein is not an easy one. Phillips was not an obviously incredible witness and his testimony is not so inconceivable as to be hastily discredited. In addition, I found somewhat surprising McKay’s testimony that he was unaware that Phillips’ contract was a low rate, nonunion contract. I would have thought that the head of the Union would have been aware of the terms of the contracts given out for such a high profile construction project in a city the size of Binghamton. Further, General Counsel’s witnesses were not in agreement on what Phillips said to them on February 17, although this is not unusual. In fact, it

would have been suspicious if each of the six witnesses testified in an identical manner. Overall, I found Brown, Mancini, Fissel, and Zarelli to be the most credible and believable of the witnesses, and their testimony matches fairly well: Phillips asked them if they belonged to the Union and, when they answered that they did, he said that he couldn’t hire them because of an “agreement” that he had with Garbade (Brown), he couldn’t hire them because of a “special contract” that he had with Garbade (Mancini), he couldn’t hire them because of a “special arrangement” he had with Garbade (Fissel), and he couldn’t hire them because of a “special agreement” that he had with Garbade (Zarelli). There is little significance to the differences in these versions of what Brown said, and I find that, after asking them if they belonged to the Union, Phillips told them that he couldn’t hire them because of a special arrangement that he had with Garbade.

This is not the usual fact pattern in an 8(a)(3) case. I credit Phillips’ uncontradicted testimony that sometimes he works with union employees and at other times he doesn’t. Although he refers to these situations as dependent upon his obtaining a union or nonunion subcontract, what he actually means is the determining factor is whether the subcontract he receives has a high enough dollar figure for him to afford to pay union wages. According to his testimony, the difference can range from \$5 to \$7 an hour for nonunion contracts to \$18 to \$25 for union contracts, and he has worked under both of these situations. Unfortunately (for Respondent), the subcontract at the jobsite was for the former low rate situation and Phillips, apparently, felt that union members would not accept \$5 to \$7 an hour to work for him at the jobsite. If he told them of these facts, and they refused to work at what they considered an hourly rate that was too low to be acceptable, there would obviously be no violation herein. However, that is not what occurred herein. After learning that they were union members, Phillips simply told them that he couldn’t hire them because of a special arrangement that he had with Garbade. Whether he said this because he assumed that they wouldn’t accept work at such a low hourly rate, or for another reason, the fact remains that he told them that he could not hire them because of their union membership and refused to hire them because of their union membership, which violates Section 8(a)(1) and (3) of the Act, and I so find.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by informing Jacob Fissel, Leroy Brown, Michael Zarelli, Edward Hrehor, Bruce Knapp, Richard DeRose, and Al Mancini that he could not hire them because they were members of the Union.
4. Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire Brown, Zarelli, Fissel, Hrehor, Knapp, DeRose, and Mancini because of their membership in the Union.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. While I would normally recommend that Respondent offer jobs to Fissel, Brown, Zarelli, Hrehor, Knapp, DeRose, and Mancini, because its subcontract at the jobsite is long over, and Respondent is out of the Binghamton area, there are obviously no jobs to offer. However, it is recommended that Respondent be ordered to make these individuals whole for any loss they suffered as a result of the discrimination against them. This will be determined at a subsequent supplemental hearing to determine what backpay, if any, they are owed. Backpay shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1172 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Jimmy L. Phillips d/b/a J. L. Phillips Enterprises, Binghamton, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing job applicants that they cannot be hired because they were members of the Union.

(b) Failing and refusing to hire job applicants because they were union members.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Make whole, with interest, Brown, Zarelli, Fissel, Hrehor, Knapp, DeRose, and Mancini in the manner set forth above in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

³If 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.

(c) Mail to each of the discriminatees and post at its principal office in Jacksonville, Arkansas, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, 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 employees 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.

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

⁴If 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."

APPENDIX

NOTICE TO EMPLOYEES
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 inform job applicants that they are not eligible for hire because they are members of Laborers' International Union of North America, AFL-CIO, Local 7 (the Union) or any other labor organization.

WE WILL NOT refuse to hire any job applicant because he is a member of the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, Leroy Brown, Albert Mancini, Jacob Fissel, Edward Hrehor, Bruce Knapp, Richard DeRose, and Michael Zarelli for any loss of earnings they suffered as a result of our discrimination against them.

JIMMY L. PHILLIPS, D/B/A J. L. PHILLIPS ENTERPRISES