

**District Council 9 and Local 18, International Brotherhood of Painters and Allied Trades (Creative Finishes Ltd.) and Bruce Reich.** Cases 2–CB–17886 and 2–CB–17887

October 1, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On May 11, 2001, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, District Council 9 and Local 18, International Brotherhood of Painters and

<sup>1</sup> The Respondents have 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 examined the record and find no basis for reversing the findings.

<sup>2</sup> In its exceptions, the Respondents rely on *Philadelphia Typographical Union 2 (Philadelphia Inquirer)*, 189 NLRB 829 (1971). We agree with the judge that the instant case is distinguishable. In *Philadelphia Inquirer*, the union removed a former treasurer from the seniority list and caused his layoff specifically because he had been indicted and convicted of embezzling union funds. The union did not act under color of a union-security clause. Here, the Respondents refused to accept Bruce Reich's dues payments until he made restitution and paid a union-imposed fine, and at the same time filed a grievance with the employer under the union-security clause for employment of a "nonunion man." Further, unlike *Philadelphia Inquirer*, there is no evidence in the record that Reich has been indicted or convicted of misappropriation of union funds.

Member Truesdale notes that he dissented in *San Francisco Elevator*, 248 NLRB 951 (1980), cited in the General Counsel's brief. In *San Francisco Elevator*, the Board found that the union violated Sec. 8(b)(1)(A) by maintaining an internal rule which required that members pay fines and assessments before dues are accepted. There he dissented from the majority's finding that the rule impliedly threatened the employees' employment because of its coordinated operation with a union-security clause. In contrast, the instant case involves the direct interference with an employee's employment because he failed to pay an internal union fine.

<sup>3</sup> We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

Allied Trades, their officers, agents, and representatives, shall take the action set forth in the Order as modified.

Insert the following paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

*Geoffrey E. Dunham, Esq.*, for the General Counsel.

*Howard Wien, Esq.*, for the Respondents.

*Edward T. Paulis, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City, New York, on February 6, 2001. On charges filed on April 12, 2000,<sup>1</sup> a consolidated complaint was issued on September 29, alleging that District Council 9 and Local 18, IBPAIT (Respondents or the Union), violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). Respondents filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on April 3, 2001.

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

FINDINGS OF FACT

I. JURISDICTION

Respondents have admitted, and I find, that the members of the Association of Master Painters and Decorators of New York, Inc. (the Association) are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that District Council 9 (the Council) and Local 18 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Local 18 and the Council

Local 18 is an affiliate of District Council 9. Sandy Vagelatos was the Council's secretary-treasurer/business manager. Norman Titus and Benjamin Rodriguez served as the Council's business representatives. Until November 21, 1998, Raul Rendon served as Local 18 president. He then became business representative for the Council. William O'Brien was business

<sup>1</sup> All dates refer to 2000 unless otherwise specified.

representative for the Council between 1995 and January 1, 2000, when he became Council president.

## 2. Bruce Reich

As of October 1997, Bruce Reich was financial secretary of Local 18 and business representative of the Council. He was also a past president of the Council. On October 7, 1997, Reich's wife told Titus that her husband had been mugged. On the same day Reich filed a police report alleging that \$600 in cash and Local Union dues checks in the amount of \$7400 were stolen.

On June 22, 1998, Reich resigned from his position as financial secretary of Local 18. Following Reich's resignation Frederick Moss, an accountant, conducted an audit of Local 18's financial records. A special meeting of Local 18 members was held on October 7, 1998, at which time Moss reported that there had been a shortage in the accounting for dues while Reich served as financial secretary. On October 13, 1998, Local 18's executive board issued disciplinary charges against Reich. Among the charges were that Reich failed to report missing funds and that he "failed to turn over all monies collected to the local union." On October 14, 1998, Reich resigned as business representative of the Council.

By letter dated November 11, 1998, Moss reported a total of \$26,974 as unaccounted dues payments. On December 15, 1998, a hearing committee of Local 18 found Reich guilty of the charges and determined that Reich should be expelled from the Local. The expulsion was revocable, however, if Reich made restitution of the \$26,974 and he paid a \$5000 fine. On March 22, 1999, a Local 18 membership meeting was held at which time Reich was given until March 31 to make restitution and he was informed that his failure to do so would result in the Local's refusal to accept Local union dues from him. Reich has not paid the \$26,974 and has not paid the \$5000 fine.

## 3. Refusal to accept dues

Local 18 rejected Reich's tender of Local Union dues on May 15, June 29, and December 6, 1999, and April 24, 2000. Applying the IBPAT mandatory suspension rules, Local 18 suspended Reich's membership during September 1999 and dropped him from the membership roll in November 1999.

## 4. Creative Finishes

In April 2000, Vagelatos learned that Reich was employed by Creative Finishes (Creative), a member of the Association. Creative was a signatory to a Trade Agreement between the Council and the Association which contains a union-security clause. Also in April, Vagelatos learned that Creative was making, and that trust funds were accepting, fringe benefit fund contributions, including dues-checkoff, for Reich. Vagelatos informed Titus of this in the presence of O'Brien, Rendon, and Rodriguez.

On April 10, Rendon filed a grievance alleging that Creative violated the union-security clause by employing "one nonunion man." Charles Dudley, the job steward assigned to Creative, informed Rodriguez that he had seen Reich working for the Company. The Joint Trade Committee issued a notice of hearing on the grievance for April 12. One or two days prior to the date of the hearing, Hillary Klein, owner of Creative, arranged

for an adjournment of the hearing date. Klein then contacted the Association and spoke with Arnold Merrit, the Association's executive secretary. Klein asked Merrit if he had any information about the grievance. Merrit said he would investigate.

On April 12, at a Joint Trade Committee meeting, Merrit asked Titus, a Council business representative, for the identity of the nonunion employee referred to in the grievance. Titus told Merrit that the employee referred to was Reich. Merrit then called Klein and told her that he had spoken with Titus, that the employee was Reich and that Reich had not paid his dues. Following Klein's conversation with Merrit, on April 12 Reich's employment at Creative Finishes was terminated. By letter dated the same day from Creative Finishes Reich was informed that "the reason you were dismissed is that . . . Hillary Klein was informed by the union that you are no longer a union member in good standing and therefore we could not employ you anymore." The April 10 grievance against Creative was dismissed by the Joint Trade Committee in an Award of Arbitrators dated July 25.

## Discussion and Conclusions

In December 1998, Local 18 fined Reich \$5000 and required that he make restitution of \$26,974. Reich did not pay the fine, nor did he make restitution of the required amount. Reich tendered to the union dues on May 15, June 29, and December 6, 1999, and on April 24, 2000. At each time Local 18 rejected the tender of dues. During April 2000, Vagelatos learned that Reich was working for Creative. On April 10, Rendon filed a grievance alleging that Creative was violating the union-security clause by employing a "nonunion man," namely, Reich. On April 12, Creative terminated Reich's employment. In a letter from Creative to Reich the Company informed Reich that "Klein was informed by the union that you are no longer a union member in good standing and therefore we could not employ you anymore."

The complaint alleges that Respondents' filing of the grievance constituted a violation of Section 8(b)(2) of the Act. That section provides that it shall be an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee, in violation of Section 8(a)(3), "on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Thus, a union is not permitted to cause the termination of an employee because he has not paid a union fine. Respondents do not contest this. Respondents argue, however, that they were not the ones who caused Reich's discharge. They contend that it was Merrit, an Association employee, who had the conversation with Klein that led to Reich's discharge.

In *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499 (1993), the Board stated: "[D]irect evidence of an express demand by the Union is not necessary where the evidence supports a reasonable inference of a union request." In *San Jose Stereotypers Local 120*, 175 NLRB 1066 fn. 3 (1969), the Board held that a union will be found to have caused an employer to discriminate even in the absence of threats or coercion, if the union's request is acceded to. The Board stated, "[A] union's efficacious request that an employer discriminate against an employee is

unlawful.” See *Carpenters Local 1456 (Underpinning Constructors)*, 306 NLRB 492, 494 (1992).

Respondents filed a grievance that Creative was violating the union security clause by employing a nonunion man, namely, Reich. Rodriguez testified that members who are delinquent in their dues payments are expelled from the Union and can no longer work until they have satisfied their dues payments. Rendon similarly testified that a person cannot work as a painter “until he pays his dues.”

I find that Respondents would not accept Reich’s tender of dues because he owed a fine and restitution. Respondents filing of a grievance, followed by Creative’s termination of Reich, constituted an “efficacious request” that Reich be terminated. The request for termination, in effect, was not a request for termination for failure to pay dues, but was a request for termination for failure to pay the fine and the amount required for restitution. This is unlawful within the meaning of Section 8(b)(2).

Respondents further argue that pursuant to *Philadelphia Typographical Union 2 (Philadelphia Inquirer)*, 189 NLRB 829 (1971), their action should not constitute a violation of Section 8(b)(2). In that case, Kelley, a former union treasurer, was expelled from the union because of “misappropriation of union funds.” In June 1967, Kelley was indicted for embezzlement and in November 1967 the union removed him from the seniority list. In February 1969, Kelley was convicted in Federal district court. The Board stated (at 831):

Respondent’s action against the embezzler related to legitimate considerations; namely the discouragement of criminal acts against the Union by its members. For these reasons, we find . . . that Respondent did not violate Section 8(b)(2) by eliminating Kelley’s priority and causing his layoff because he had embezzled a substantial amount of union funds.

I believe that *Philadelphia Inquirer* is distinguishable. That case did not involve a union-security clause. There was no contention that Kelley was removed from the seniority list for his failure to pay union dues. It was clear that at all times the union took the action that it did because of his embezzlement. In the instant case the Union filed its grievance because Creative was employing a “nonunion man.” In addition, there is nothing in the record to indicate that Reich was ever indicted, no less convicted. To the contrary, Reich’s position was that he had been mugged and that cash and union checks had been stolen. In *Philadelphia Inquirer*, on the other hand, Kelley had been indicted and convicted of the embezzlement of in excess of \$35,000.

Accordingly, I find that Respondents’ filing of the grievance caused Creative Finishes to terminate Reich, in violation of Section 8(b)(2) and (1)(A) of the Act.

#### CONCLUSIONS OF LAW

1. The members of the Association are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. By causing Creative Finishes, Ltd. to terminate the employment of Bruce Reich, Respondents have engaged in an unfair labor practice within the meaning of Section 8(b)(2) and (1)(A) of the Act.

4. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondents have engaged in an unfair labor practice, I find it necessary to order Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents have caused Creative Finishes, Ltd. to discharge Reich, I shall order that Respondents notify that company, in writing, that they have no objection to his being hired, without regard to his membership or his payment of a fine or restitution that he may owe to Respondents. I shall further order that Respondents make whole Reich for any loss of earnings and other benefits that he may have suffered by reason of the discharge. Backpay shall be from the date of the termination and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondents, District Council 9 and Local 18, International Brotherhood of Painters and Allied Trades, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Creative Finishes, Ltd., or any other employer, to discharge or otherwise discriminate against Bruce Reich because he is not a member of the Union, his membership having been terminated for some reason other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

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

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

(a) Notify Creative Finishes, Ltd., in writing, that the Union has no objection to the employment of Reich and furnish Reich with copies of such notification.

(b) Make whole Reich for any loss of earnings or benefits he may have suffered, with interest, in the manner set forth in the remedy section.

<sup>2</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.

(c) Within 14 days after service by the Region, post at their Union offices copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Creative Finishes, Ltd., if willing, at all places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

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

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<sup>3</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."

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 Creative Finishes, Ltd., or any other employer, to discharge or otherwise discriminate against Bruce Reich because he is not a member of our Union, his membership having been terminated for some reason other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or maintaining membership.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their Section 7 rights, except to the extent those rights may be affected by an agreement requiring membership in a labor organization as a condition of employment.

WE WILL notify Creative Finishes, Ltd. in writing that we have no objection to the employment of Bruce Reich and we will furnish him with copies of such notification.

WE WILL make Bruce Reich whole for any loss of earnings and benefits he may have suffered as a result of the discrimination against him, with interest.

DISTRICT COUNCIL 9 AND LOCAL 18,  
INTERNATIONAL BROTHERHOOD OF  
PAINTERS AND ALLIED TRADES