

**Bay Cities Metal Trades Council and Southwest Marine, Inc.** Case 20-CB-8516

March 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On October 23, 1991, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel submitted 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, and conclusions<sup>1</sup> 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, Bay Cities Metal Trades Council, Oakland, California, its officers, agents, and representatives, shall take the action set forth in the Order.

<sup>1</sup> In adopting the judge's finding that the Respondent unlawfully threatened employees with the loss of health, welfare, and pension benefits if they resigned from union membership, we stress that the Respondent made these statements in the context of two other threats which we find, as did the judge, also violated Sec. 8(b)(1)(A) of the Act.

*Leticia Pena*, for the General Counsel.  
*David A. Rosenfeld (Van Bourg, Weinberg, Roger & Rosenfeld)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. On a charge filed on November 5, 1990, by Southwest Marine, Inc. (Employer), the General Counsel of the National Labor Relations Board (Board), by the Board's Regional Director for Region 20, issued a complaint and notice of hearing on December 19, 1990, against Bay Cities Metal Trades Council (Respondent), alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act (Act), by issuing letters dated October 26, 1990, to employees of the Employer which threatened the employees as follows: they would be fined and internal disciplinary action would be taken against them if they resigned their union membership and crossed Respondent's picket line to work for the Employer; they would be required to rejoin the Union and pay new initiation fees if they resigned their union membership; and, with the loss of benefits if they resigned their union

membership and crossed Respondent's picket line to work for the Employer. On January 2, 1991, Respondent filed an answer to the complaint denying the commission of the alleged unfair labor practices.

Subsequent to the issuance of the complaint and the Respondent's answer, all of the parties to this proceeding entered into a stipulation of facts. The parties agreed to submit this proceeding, without a hearing, directly to an administrative law judge for recommended findings of facts, conclusions of law, and order. The parties also agreed that the stipulation of facts together with the exhibits attached thereto, and the briefs of the parties, constitute the entire record in this case.

On July 22, 1991, Deputy Chief Administrative Law Judge Earledean V.S. Robbins issued an order assigning the matter to me for the issuance of a decision.

On the basis of the stipulation of facts and exhibits thereto, the briefs filed by the General Counsel and Respondent, and the entire record in this case, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a corporation in the ship repair business in San Francisco, California. During the 12-month period ending November 30, 1990, the Employer purchased and received at its place of business in San Francisco, California, products, goods, and materials valued in excess of \$50,000 directly from points outside California.

The Employer is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. RESPONDENT'S STATUS AS A LABOR ORGANIZATION

Respondent is an organization composed of various constituent members, which are labor organizations within the meaning of Section 2(5) of the Act, and Respondent exists for the purpose, inter alia, of representing such constituent labor organizations in dealing with employers concerning labor disputes and in bargaining collectively with employers regarding wages, rates of pay, hours of employment, and other terms and conditions of employment with its employees.

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

Respondent is the exclusive collective-bargaining representative of an appropriate unit of employees employed by the Employer at its San Francisco, California facility. The Employer and Respondent were signatories to a collective-bargaining agreement governing the terms and conditions of employment of those employees. The agreement was effective by its terms from July 27, 1987, to October 26, 1990.

Respondent and the Employer engaged in negotiations for an agreement to succeed the one scheduled to expire on October 26, 1990. The negotiations occurred between June 12 and October 26, 1990.

On or about October 24, 1990, the Employer was informed by Respondent that a strike was to be initiated after the collective-bargaining agreement between the parties expired on October 26, 1990.

On or about October 26, 1990, Respondent distributed a letter to certain of the employees employed by the Employer in the bargaining unit represented by the Respondent. This letter stated:

To: Our Good Members

From: Bay Cities Metal Trades Council  
Negotiating Committee

Subject: "Financial Core" participants

Recently Southwest Marine distributed a memorandum informing their employees about "financial core membership." This is a blatant attempt by the anti-union employer to divide its employees and weaken their unions. It should come as no surprise that this should happen since it comes from a company known for its anti-union bias and non-union yards in San Diego and San Pedro.

The law is not settled and clear about "financial core membership." We do not recognize "financial core membership." We do recognize that members can resign, but if they resign, they sever their relationship with the union. They are not members and lose the benefits of union membership. As a union member, you can have a voice and vote in the affairs of your union, including voting on contracts. As a non-member, you have no right to union rights and benefits.

Members who resign and quit their union are simply *scabs* and will be treated as such. *Scabs* may be fined if they cross the picket line, and we will take all internal disciplinary action which the law permits. *Scabs* who quit the union may be forced to rejoin and pay a new initiation fee. To the extent the law permits, we will require initiation fees of those who scab and quit the union.

Southwest is trying to mislead you into thinking you will not lose health and welfare or pension if you scab. To the extent your pension or health and welfare is vested, you will not lose those benefits if you scab. But some of those who scab may lose some benefits depending on what action the company takes and the terms of the pension and/or health and welfare programs. Do not believe all that the company tells you. Only the health and welfare and pension offices have authority to speak with regard to benefits.

There are many benefits of remaining a union member. Those benefits include full participation in the union as well as many other benefits. We think all of you, with the exception of a few weak brothers and sisters, will ignore Southwest's threats and promises.

Do not give up your membership.

Do not *scab*.

From on or about October 29, 1990, to on or about December 14, 1990, certain of the Employer's employees em-

ployed in the bargaining unit represented by Respondent, ceased work concertedly and engaged in a strike.

#### B. Discussion and Conclusions

In judging whether Respondent's October 26 letter to the Employer's employees restrained or coerced them within the meaning of Section 8(b)(1)(A) of the Act, the test is whether the contents of the letter reasonably tended to coerce or intimidate the employees in the exercise of rights protected under the Act. *Longshoremens ILA Local 333 (ITO Corp.)*, 267 NLRB 1320, 1321 (1983), and cases cited therein. It is also settled that an employee's right to resign from the union is protected under the Act, as is the employee's right to then cross the union's picket line to work for an employer, without fear of being fined or disciplined by the union for engaging in this conduct. *NLRB v. Textile Workers*, 409 U.S. 213 (1972); *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); *Auto Workers Local 449 v. NLRB*, 865 F.2d 791 (6th Cir. 1989). This is true even for employees who change their membership status from full union membership to "financial core" status. *NLRB v. Hotel & Restaurant Employees Local 54*, 887 F.2d 28 (3d Cir. 1989). Also, because an employee has a statutory right to change his or her union membership from full membership to "financial core" membership, a union violates Section 8(b)(1)(A) by requiring that an employee pay a second initiation fee for engaging in this conduct. *NLRB v. Office Employees Local 2*, 902 F.2d 1164 (4th Cir. 1990).

#### IV.

I am of the opinion, for the reasons below, that when judged by the above-legal principles, there is merit to the allegations of the complaint charging Respondent with violating Section 8(b)(1)(A) of the Act by threatening employees-members of its constituent unions, that if they resigned their union membership and crossed Respondent's picket line to work for the Employer, they would be fined and that internal union disciplinary action would be taken against them, and that if they resigned their union membership they would be required to rejoin the Union and pay a new initiation fee.

On October 26, as described supra, Respondent distributed a letter to members of its constituent unions employed by the Employer.<sup>1</sup> Respondent distributed the letter in anticipation of its scheduled strike against the Employer and in response to the Employer's memorandum to the employees notifying them of their right under the Act to change their union membership from full union membership to "financial core" membership status.

Respondent's October 26 letter stated, among other things, Respondent did not recognize "financial core" membership status and further stated that although Respondent recognized

<sup>1</sup> Respondent contends there is no evidence that anyone who received the October 26 letter could have been affected by action taken by Respondent, because there is no evidence that anyone who received the letter "was subject to the [Respondent] as a member." This contention is without merit because the record reveals the letter was distributed by Respondent to the Employer's employees and it was addressed by Respondent to "Our Good Members." This evidence constitutes a prima facie showing that the letter was distributed to and received by employees of the Employer who were members of the Respondent's constituent unions.

union members had the right to resign, that “members who resigned and quit their union are simply *scabs* and will be treated as such.” The letter goes on to state Respondent intended to treat members who resigned, described by Respondent as “scabs,” in the following fashion:

*Scabs* may be fined if they cross the picket line, and we will take all internal disciplinary action which the law permits. *Scabs* who quit the union may be forced to rejoin and pay a new initiation fee. To the extent the law permits, we will require initiation fees of those who scab and quit the union.

I find that the language quoted immediately above was reasonably calculated to lead the members of the Respondent’s constituent unions employed by the Employer to believe Respondent might fine them and take internal union disciplinary action against them, if they resigned from the Union and crossed the Respondent’s picket line to work for the Employer. The language was also reasonably calculated to lead them to believe that if they changed their union membership from full membership to “financial core” membership status, Respondent might require them to rejoin and pay a second initiation fee.<sup>2</sup> Such threats tended to restrain or coerce the employees from exercising their right under Section 7 of the Act to resign their union membership and cross Respondent’s picket line to work for the Employer and to change their union membership status from full membership to “financial core” membership status. Accordingly, I conclude that by making the aforesaid threats Respondent violated Section 8(b)(1)(A) of the Act.

In so concluding I considered that Respondent did not inform the employee-members that they *would be* fined or disciplined or *would be* forced to rejoin the Union and pay a new initiation fee, as alleged in the complaint, but instead warned them that they *might be* fined and that Respondent would discipline them insofar as the law permitted, and that to the extent the law permitted Respondent would require that they pay a new initiation fee if they quit the Union.<sup>3</sup> However, even though Respondent’s message was worded in terms of action which the law permitted and/or action which Respondent *might* engage in, I am convinced that in the minds of the employee-recipients, the message could have only been ambiguous. And the risks of this ambiguity must

<sup>2</sup>I considered that the October 26 letter did not expressly say that “scabs” who quit the Union to become “financial core” members might be required to rejoin and pay a new initiation fee. However, the letter was captioned, “Subject: Financial Core participants,” and was distributed by Respondent in response to a memo from the Employer to the employees which explained the right of the employees to become “financial core” union members. In view of these circumstances, the message in the letter was reasonably calculated to lead the employee-recipients to believe that if they changed their union membership from full union membership to “financial core” membership, Respondent might require them to rejoin and pay a second initiation fee.

<sup>3</sup>I am of the view that the unfair labor practice findings are encompassed by the pleadings, despite the variance in the proof from the complaint’s unfair labor practice allegations. In any event, the variance is a minor one and the parties stipulated that, “to the extent that there are minor variations between the allegations in the Complaint and the facts set forth in this Stipulation, the Complaint is amended to conform to the Stipulation.”

be held against the Respondent, the publisher of the letter, rather than against the employees, who are not labor lawyers or union officials or otherwise knowledgeable about the intricacies of Sections 7 and 8(b)(1)(A) of the Act. *NLRB v. Miller*, 341 F.2d 870, 873–874 (2d Cir. 1965). Respondent’s reliance on *NLRB v. Iron Workers Local 433*, 850 F.2d 551, 555–558 (9th Cir. 1988), is misplaced. *Iron Workers Local 433* involved the issue of whether a statement made to a neutral employer by a union constituted an illegal threat within the meaning of Section 8(b)(4)(ii) (B) of the Act, whereas the issue here is whether a statement made to rank-and-file employees by a union is reasonably calculated to restrain or coerce the employees from exercising their Section 7 rights. Moreover, the recipients of the Union’s message in the instant case are employees, who are unsophisticated in the intricacies of Federal labor law, whereas, as the court noted in *Iron Workers Local 433*, the employer-recipient of the union’s message in that case was “sophisticated in labor matters.”

v.

The remaining unfair labor practice allegation alleges Respondent violated Section 8(b)(1)(A) of the Act by threatening employees, in its letter of October 26, with a loss of employment benefits if they resigned from the Union and crossed Respondent’s picket line to work for the Employer. In support of this allegation, the General Counsel relies on that part of the letter which states that “[m]embers who resign and quit their union are simply *scabs*,” and further states:

[The Employer] is trying to mislead you into thinking you will not lose health and welfare or pension if you scab. To the extent your pension or health and welfare is vested, you will not lose those benefits if you scab. But some of those who scab may lose some benefits depending on what action the company takes and the terms of the pension and/or health and welfare programs. Do not believe all that the company tells you. Only the health and welfare and pension offices have authority to speak with regard to benefits.

I am of the opinion that Respondent’s statement that some of the “scabs,” namely employees who resign from Respondent’s constituent unions, might lose some of their existing health, welfare, and pension employment benefits “depending on what action [the Employer] takes and the terms of the pension and/or health and welfare programs,” has the inevitable and foreseeable effect of inhibiting employees from exercising their statutory right to resign their union membership, inasmuch as the possibility of losing some of their health, welfare, and pension employment benefits because of their resignation is reasonably calculated to inhibit them from resigning. I therefore find that Respondent violated Section 8(b)(1)(A) of the Act by threatening the employees with the loss of existing health, welfare, and pension employment benefits if they exercised their statutory right to resign from Respondent’s constituent unions.

I have considered that the threatened loss of employment benefits involved conduct which Respondent attributed to a third party, the Employer. Nonetheless, I am persuaded the threat is “coercive” within the meaning of Section

8(b)(1)(A), inasmuch as it is a threat of the loss of existing employment benefits which was expressed to the employees by the labor organization which is the exclusive collective-bargaining agent of the employees to whom it was addressed. Under these circumstances, the threat was reasonably calculated to “coerce” the employees, within the meaning of Section 8(b)(1)(A), and would have this calculated effect without regard to whether the employees were told by employees that the Employer, rather than Respondent, might implement the threat.

Alternatively, in finding the above-described violation of the Act, I considered it significant that Respondent did not present a single objective fact, either in its October 26 letter to the employee-members or during this unfair labor practice proceeding, to support its assertion that the employees were in danger of having the Employer reduce their existing health, welfare, and pension employment benefits if they resigned from Respondent’s constituent unions, nor did Respondent otherwise show it had some reasonable basis for telling the employees this. As the exclusive collective-bargaining agent of the Employer’s employees, whose terms and conditions of employment were governed by a collective-bargaining agreement between the Respondent and the Employer, Respondent would possess such facts, if they existed. In view of Respondent’s failure to reveal such facts, this is not a situation where a union, in seeking to dissuade employees from exercising a right protected by the Act, has truthfully predicted possible action by the employees’ employer or by some other third party, which would adversely effect their employment benefits, if they engaged in activity protected by the Act. Absent evidence that in threatening the employees in this case, that Respondent was merely expressing a truthful prediction or had some reasonable basis for the threat, it is my opinion Respondent’s threat was coercive within the meaning of Section 8(b)(1)(A), despite the fact Respondent attributed the threatened conduct to the Employer.

I am of the view that where, as here, the General Counsel has made a prima facie showing that Respondent’s message to the employees was reasonably calculated to coerce them from exercising right protected by the Act and Respondent apparently defends on the ground that its message truthfully predicted possible action by the Employer, without Respondent’s instigation or assistance, the Respondent must provide objective facts which show it was merely making a truthful prediction or had some reasonable basis for its expressed belief.<sup>4</sup> Respondent failed to do so. Cf. *NLRB v. Gissel Packing*

<sup>4</sup>The conclusion reached in this case is consistent with the principles set forth by the court in *NLRB v. Laborers Local 534*, 778 F.2d 284 (6th Cir. 1985). There, among other things, the court stated that, “[w]hen a Union has merely *objectively informed employees* of those consequences of the employees’ actions that are beyond the Union’s control, no Section 8(b)(1)(A) violation has occurred.” [Emphasis added.] Here, Respondent’s conclusionary statement that employees who resign their union membership “may lose some benefits depending on what action the company takes and the terms of the pension and/or health and welfare programs,” does not raise to the level of “objectively inform[ing] employees of those consequences of the employees’ actions that are beyond the Union’s control.” Respondent provided the employees with no objective facts which indicated that because of the terms of the governing pension and/or health and welfare programs, or for any other reasons, the Employer might reduce the employees’ existing health, welfare, or

*Co.*, 395 U.S. 575, 618 (1969), where, in considering whether an employer’s statement to employees constituted a threat proscribed by Section 8(a)(1) of the Act, or, as contended by the employer, a truthful prediction as to the probable consequences of unionization beyond the employer’s control, the Court held that for the employer’s defense to have merit, the claimed prediction “must be carefully phrased on the basis of objective fact.” It seems appropriate that a comparable standard be applied in the instant situation, since Respondent, which is the exclusive bargaining agent of the employees involved, is apparently claiming that its alleged illegal threat was a truthful prediction as to the probable consequences of the employees’ resignations beyond the Respondent’s control.

#### CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(b)(1)(A) of the Act by threatening to fine employees and to impose internal union disciplinary action on them, if they resigned from Respondent’s constituent unions and crossed the Respondent’s picket line to work for the Employer.
4. Respondent violated Section 8(b)(1)(A) of the Act by threatening employees with the loss of health, welfare, and pension employment benefits if they resigned from Respondent’s constituent unions.
5. Respondent violated Section 8(b)(1)(A) of the Act by threatening to require employees to rejoin Respondent’s constituent unions and pay a new initiation fee, if they changed their union membership from full union membership to “financial core” membership status.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(b)(1)(A) of the Act, I shall recommend an order requiring Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, Bay Cities Metal Trades Council, Oakland, California, its officers, shall

1. Cease and desist from

(a) Threatening to fine employees or to impose internal union disciplinary action against them, if they resign from Respondent’s constituent unions and cross Respondent’s picket line to work for the Employer.

pension benefits of employment if they resigned from Respondent’s constituent unions.

<sup>5</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.

(b) Threatening employees with the loss of employment benefits if they resign from Respondent’s constituent unions.

(c) Threatening to require employees to rejoin Respondent’s constituent unions and pay a new initiation fee, if they change their union membership from full union membership to “financial core” membership status.

(d) In any like or related manner 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) Post at its business office, hiring facility, and meeting places, copies of the attached notice marked “Appendix.”<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, 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.

(b) Additional copies of the attached notice marked “Appendix” shall be signed by an authorized representative of Respondent, and forthwith returned to the Regional Director for Region 20 for posting by the Employer, it being willing,

<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.”

at its San Francisco, California facility, where notices to its employees are customarily posted.

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

APPENDIX

NOTICE TO EMPLOYEES AND 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 threaten to fine you or to impose internal union disciplinary action against you, if you resign from our constituent unions and cross our picket line to work for Southwest Marine, Inc.

WE WILL NOT threaten you with the loss of employment benefits, if you resign from our constituent unions.

WE WILL NOT threaten to require you to rejoin our constituent unions and pay a new initiation fee, if you change your union membership from full union membership to “financial core” membership status.

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

BAY CITIES METAL TRADES COUNCIL