Child Day Care Center, Verona, Virginia and Baltimore Regional Joint Board, Amalgamated Clothing and Textile Workers Union Health and Welfare Fund[1] *and* Dorothy B. Hancock and Amalgamated Clothing and Textile Workers Union, AFl-CIO-CLC, Local 1080A,[2] Party in Interest. Case 5-CA-11527

September 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On July 16, 1980, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, both Respondent and the General Counsel filed exceptions and supporting briefs.

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.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith and to adopt his recommended Order, as modified herein.

1. We agree with the Administrative Law Judge's finding that Respondent gave unlawful assistance to Local 1080A within the 10(b) period and with his reliance on *N.L.R.B.* v. *Erie Marine, Inc., Division of Litton Industries.*[3] The record shows that a union, first Local 423 and later Local 1080A, was established and existed not in response to the employees' wishes, but at the insistence of the Joint Board and as a result of the assistance of Respondent. Melvin Bourne, an administrator of the Fund with the responsibility of overseeing the operations of the Center, testified that at a staff meeting he personally told the employees that there would be a union at the Center and strongly urged them to join. Thus, it is clear that there was employer assistance in the original establishment and recognition of the Union. It is also clear that Respondent recognized and dealt with the Union on the Hancock grievance within the 10(b) period. Therefore, we agree with the Administrative Law Judge's conclusion that, since the Union continued to exist as assisted and to be recognized with its structure unchanged within the 6-month limitation period, there is no bar to the finding of a violation of Section 8(a)(2).[4]

2. We do not agree, however, that the union membership of Fund Administrator Bourne and Center Director Cook is evidence of unlawful assistance. The Board has never held that mere membership in a union by such officials shows unlawful interference with the affairs of the union. To do so would contravene Section 14(a) of the Act.[5] Since nothing more than membership by Bourne and Cook has been shown, a finding of unlawful interference in the Union's affairs cannot be sustained.[6]

3. Finally, we agree with the Administrative Law Judge's finding that Respondent has violated Section 8(a)(2) of the Act by recognizing Local 1080A because the Local has interests in conflict with representation of Respondent's employees. However, we base our conclusion solely on the dual role of Carmen Papale as one of the Fund's trustees and as the business agent who services Local 1080A.[7] We do not agree with the Administrative Law Judge's conclusion that an unlawful conflict of interest arises from the fact that the Joint Board, with which Local 1080A is affiliated, appoints half of the Fund's trustees or that the chairman of the Fund's board of trustees is the manager of the Joint Board. The Board has held that a union's participation in a trust fund does not preclude its representation of the Fund's employees where union officials do not represent a majority on the board of trustees and there is no other reason to suppose that the union is unable to approach negotiations with the single-minded purpose of protecting and advocating the interests of employees.[8] Thus, the cases cited by the Administra-

[1] Herein individually referred to as the Center and the Fund, respectively, and collectively referred to as Respondent.

[2] Herein referred to as Local 1080A or the Union. Local 1080A is affiliated with the Baltimore Regional Joint Board of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, which is herein referred to as the Joint Board.

The names of Respondent and the Party in Interest were amended at the hearing.

[3] 465 F.2d 104 (3d Cir. 1972), enfg. 192 NLRB 793 (1971).

[4] In view of our conclusion herein, we find it unnecessary to pass on whether the Administrative Law Judge, in finding the 8(a)(2) violation, properly relied on supervisory solicitation of new employees to join the Union.

[5] Sec. 14(a) provides:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

[6] See *Nassau and Suffolk Contractors' Association, Inc.*, 118 NLRB 174 (1957).

[7] *St. Louis Labor Health Institute, 230 NLRB 180 (1977); United Mine Workers of America Welfare and Retirement Fund*, 192 NLRB 1022 (1971).

The Hancock matter exemplifies the conflict of interest. Dorothy Hancock was laid off on June 8, 1979, as a result of a decision by the Fund's board of trustees to reduce operating costs. Although Papale was on the board of trustees of the Fund, he nevertheless handled Hancock's grievance concerning the layoff.

[8] Anchorage Community Hospital, Inc., 225 NLRB 575 (1976); *United Mine Workers, supra.*

tive Law Judge[9] are inapposite since therein the union representatives held a majority on the respondents' governing bodies.

ORDER

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 Administrative Law Judge, as modified below, and hereby orders that the Respondent, Child Day Care Center, Verona, Virginia and Baltimore Regional Joint Board, Amalgamated Clothing and Textile Workers Union Health and Welfare Fund, Baltimore, Maryland, its trustees, officers, agents, successors, and assigns shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Recognizing or bargaining with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 1080A, as the collective-bargaining representative of its employees unless and until that Union has been duly certified as such representative by the National Labor Relations Board."

2. Substitute the attached notice for that of the Administrative Law Judge.

[9] *Medical Foundation of Bellaire*, 193 NLRB 62 (1971); *Centerville Clinics, Incorporated*, 181 NLRB 135 (1970).

APPENDIX

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

After a hearing at which all parties participated and were given the right to call, examine, and cross-examine the witnesses, it has been found by the National Labor Relations Board that we have committed certain unfair labor practices. We have been ordered to cease such activity, to post this notice, and to comply with its terms.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT recognize or bargain with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 1080A, as the exclusive representative of our employees unless and until that labor organization has been certified by the National Labor Relations Board.

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

WE WILL withdraw and withhold all recognition from Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 1080A, as the exclusive collective-bargaining representative of our employees unless and until that Union has been duly certified as such representative by the National Labor Relations Board.

Our employees are free to join Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 1080A, or to refrain from doing so.

CHILD DAY CARE CENTER, VERONA, VIRGINIA AND BALTIMORE REGIONAL JOINT BOARD, AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION HEALTH AND WELFARE FUND

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on April 17, 1980, at Staunton, Virginia, upon the General Counsel's complaint which alleged generally that the Respondent violated Section 8(a)(2) of the National Labor Relations Act, as amended, unlawfully assisting and dominating a labor organization.

Though admitting that it does recognize and bargain with the Party in Interest the Respondent contends that such is not unlawful.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Baltimore Regional Joint Board, Amalgamated Clothing and Textile Workers Union Health and Welfare Fund (herein the Fund), is a jointly administered trust fund organized pursuant to the provisions of Section 302(c)(5) of the Act which exists for the purpose of providing health care and related benefits to employees. The Fund is financed, in part, by contributions made by certain employers pursuant to provisions of various collective-bargaining agreements.

Among other things, the Fund operates five child day care centers in Pennsylvania, Maryland, and Virginia. The Verona, Virginia, facility (herein the Center, and jointly with the Fund, the Respondent) is the only one involved in this matter.

During the 12 months preceding the issuance of the complaint herein, the Fund received in excess of $50,000 for services furnished employers outside the State of Maryland. The Respondent admits, and I find, that at all times material herein, the Center and the Fund have been a single employer and/or joint employers, and at all times material have been an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Baltimore Regional Joint Board of the Amalgamated Clothing and Textile Workers Union, AFL-CIO (herein the Joint Board), is an affiliation of about 30 local unions in Virginia, Pennsylvania, and Maryland each of which has delegates to the Joint Board in accordance with its numerical membership. The Joint Board also has a board of directors which is composed of one delegate from each affiliated local union.

Pursuant to its bylaws, "The jurisdiction of the Joint Board shall. . . . All local unions chartered by the International unions within the jurisdiction of Joint Board shall affiliate with the Joint Board. . . ." The Joint Board is responsible for negotiating collective-bargaining agreements between the affiliated locals and various employers and administrating those agreements. Although not alleged in the complaint, it is clear that the Joint Board is a labor organization within the meaning of Section 2(5) of the Act.

One of the affiliated locals, Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 1080A (herein Local 1080A or the Union), is admitted to be, and I find that this is, a labor organization within the meaning of Section 2(5) of the Act. Local 1080A, as a Party in Interest, was represented in this proceeding.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

There is no factual controversy in this matter, the parties disagreeing only on the legal consequences of the agreed facts.

The Fund was established in 1963 for the purpose of providing health and eye examinations for members of the Joint Board's affiliated locals. In 1968, following a study by the Fund and, apparently, an amendment to Section 302(c) of the Act, the Fund began to operate child day care centers. The Verona facility was the first such center opened. Its function is to provide child day care services for employees of the local factory which has a collective-bargaining agreement with a local union affiliate of the Joint Board (respectively, Genesco and Local 423).

Pursuant to its trust agreement, the Fund is supervised by a board of trustees, five of whom are chosen by the Joint Board and five of whom are chosen by the participating employers. The five Joint Board trustees include Samuel Nocella, who at all times material has also been the manager of the Joint Board, and Carmen Papale, a business agent of the Joint Board. Since its inception, Nocella has also served as chairman of the Fund's board of trustees pursuant to election by a majority of the board members.

The Fund employs two administrators to supervise the day-to-day operations: Melvin Bourne is a professional manager who is principally in charge of operating the five day care centers, and Dr. Jose Martinez, who apparently is involved only with the health and eye examination functions of the Fund.

Bourne was hired just prior to the Verona facility opening. Reporting directly to Bourne are the directors of each of the centers. Bourne in turn reports to the board of trustees which meets quarterly; but, when there arises a matter of urgency, he may contact and get approval from Nocella for emergency action.

Dorothy Hancock, the Charging Party herein, had been an employee of Genesco when the Verona center opened. She as well as other employees of the plant were given the opportunity to seek jobs at the Center and she in fact was hired. Though Hancock denied it, it appears that other plant employees also went to work for the Center when it opened. In any event, the Center opened with about 10 employees and a director. No union represented the employees at that time although Hancock, and presumably any others who had been employed at the plant, had been a member of Local 423.

Bourne testified that it was his understanding from the trustees that even though the Center was union sponsored the staff would not be union. It was his understanding that they would offer the employees the same benefits as set forth in the collective-bargaining agreement between Local 423 and Genesco, including wage increases and the like when called for by the contract. Indeed, Nocella testified the board of trustees decided to keep parity between the employees of the day care centers and the employees of the plants they were servicing.

However, according to Bourne, as time went on there began to develop some friction from the plant employees who noted that the day care center employees were not paying union dues but were receiving the same benefits as the members. "So the decision was made to let our people come into the Union, and certainly, erase a good part of what could be a continuing point of friction between the shop, who we were here to serve, and the people at the Center." Bourne further testified that since he had hired most of the Verona staff and had initially told them that they would not be union, he felt an obligation to advise them of the change. Thus, he went to Verona, held a staff meeting and told the employees that while he could not force them to join the Union, because Virginia is a "right to work state," he encouraged them to do so. Thus, the Verona staff became members of Local 423.

After a short time it was determined by the Joint Board that the interests of these employees was substantially different from the interests of the plant employees and that they should have a separate local union. Accordingly, a charter was issued on January 5, 1972, for Local 1080A, which thereby became an affiliate of the

Amalgamated Clothing and Textile Workers Union and the Joint Board. Since then, Local 1080A has functioned as an affiliate local of the Joint Board and has sent delegates to the Joint Board and the Joint Board's board of directors.

Although the Fund admits that it has recognized and bargained with Local 1080A, there has never been a collective-bargaining agreement between Local 1080A and the Fund. Employees of the Center still receive the benefits set forth in the collective-bargaining agreement between Local 423 and Genesco. Center employees do have their dues deducted pursuant to checkoff authorizations. The Fund deducts the dues and submits the money to the Joint Board which, pursuant to some formula, remits a portion to Local 1080A.

About 2-1/2 years ago (probably in or about September 1977) Nocella talked to Bourne about a potential problem that Bourne and the directors might have with regard to their insurance coverage inasmuch as they were not union members. For this reason, according to Bourne, they joined the Union. Bourne testified that he joined the International (probably the Joint Board) and the Verona director at the time, Gerald Cook, joined Local 1080A. Cook was a member of Local 1080A from September 1977 until he resigned his job in December 1978. The present director, David Alexander, was a member from July 8, 1979, until November 1979, at which time it was determined that Bourne and the directors would no longer have to be members. And when this determination was made the dues that they had paid were refunded to them.

Cook testified that as the director of the Verona center he was in overall charge of its operation, including the hiring and discharge of employees, their discipline, and the like. He further testified that employees would be solicited to join Local 1080A at the completion of their 6-month probationary period. He would tell employees that if they choose to join the Union they could do so and he would proffer a checkoff authorization. During the course of soliciting membership in the Union Cook would tell the employees that he would answer any questions about the Union.

Cook further testified that during his time as director, on various occasions, union meetings would be held on Center premises during regular business hours for which the employees were paid. The parties stipulated that such meetings occurred subsequent to Cook's resignation.

Dorothy Hancock was laid off on June 8, 1979, as a result of a determination by the board of trustees of the Fund to reduce operating costs. Hancock felt that she should not have been laid off and, accordingly, filed a grievance which was handled by the Joint Board business agent assigned to Local 1080A, Carmen Papale. There followed an arbitration of this matter although Hancock, on advice of her counsel, did not attend. Papale represented Local 1080A and Hancock while Bourne represented the Center/Fund. The matter was heard before a permanent arbitrator appointed, apparently, pursuant to the collective-bargaining agreement between Local 423 and Genesco.

B. *Analysis and Concluding Findings*

1. Unlawful assistance

As the Respondent correctly points out, simply allowing a union to hold meetings on company premises is not enough to demonstrate unlawful assistance. *Duquesne University of the Holy Ghost*, 198 NLRB 891 (1972). However, here there was substantially more. Specifically, supervisors of the highest level, the Fund administrator and the Center director, were members of the Union. Membership of such high-level supervisors shows unlawful interference with the affairs of the Union. *Schwenk Incorporated*, 229 NLRB 640 (1977). In addition to being members of the Union, the Center director solicited new employees to join the Union. Such clearly establishes unlawful interference in violation of Section 8(a)(2) of the Act. *St. Vincent's Hospital*, 244 NLRB 84 (1979).

While there is no evidence that the Verona director solicited employees to join the Union within 6 months preceding the filing of the charge herein it is clear that Local 1080A in fact existed as assisted within the 10(b) period. Thus, within 6 months prior to the filing of the charge the Fund allowed the Union to use its premises to hold meetings during which employees were paid. Also during this period the Verona director as well as the Fund administrator continued to belong to Local 1080A and the Joint Board. Further, within the 10(b) period, the Fund did in fact recognize and deal with the Union specifically with relation to the Hancock grievance. Inasmuch as the Union continued to exist and be recognized with its structure and the company assistance substantially unchanged throughout the 6-month period prior to filing the charge, Section 10(b) is no bar to finding an unfair labor practice in this proceeding. *N.L.R.B.* v. *Erie Marine, Inc., Division of Litton Industries*, 465 F.2d 104 (3d Cir. 1972).

Although the complaint is couched in terms of domination as well as assistance, it is clear from the record that the Respondent did not create Local 1080A and does not really dominate it. The Respondent simply gives Local 1080A unlawful assistance. Local 1080A was created by and at the insistence of the Joint Board. While the Joint Board has substantial influence over the Fund, they are not identical. The Joint Board is not the employer. The employer is the Fund. On these facts I find there has been unlawful assistance but there has been no domination requiring an order that the employer disestablish the Union. Indeed, the employer in this case does not have the power to do so.

Accordingly, I conclude that by assisting Local 1080A, in the manner described, the Respondent has in fact unlawfully interfered with the administration of a labor organization in violation of Section 8(a)(2) of the Act.

2. Conflict of interest

The General Counsel also contends that the Fund violated Section 8(a)(2) of the Act by recognizing and bargaining with Local 1080A because the Union has interests in conflict with representing the Center's employees.

The facts here certainly support finding a conflict of interest—the Joint Board appoints half of the Fund's trustees and at the same time supervises the affairs of Local 1080A. Indeed, one of the Fund's trustees is the business agent who services Local 1080A. The chairman of the Fund's trustees is the manager of the Joint Board. Clearly on these facts the Union has interests *vis-a-vis* the Fund which might not be compatible with the interests of Local 1080A members.

Such a conflict may be grounds for denying the Union's petition for representation. *Welfare and Pension Funds*, 178 NLRB 14 (1969); or, be the basis for finding a violation of Section 8(b)(1)(A) of the Act, *St. Louis Labor Health Institute*, 230 NLRB 180 (1977); or be an appropriate defense to an employer's refusal to bargain with the Union. *Catalytic Industrial Maintenance Company*, 209 NLRB 641 (1974); *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954). Finally, to recognize or assist a union where such a conflict of interest exists has been held violative of Section 8(a)(2), *Centerville Clinics, Inc.*, 181 NLRB 135 (1970); *Medical Foundation of Bellaire*, 193 NLRB 62 (1971).

I therefore conclude that the potential conflict of interest which renders Local 1080A incompetent from representing the employees of the Verona center further establishes that the Respondent violated Section 8(a)(2) of the Act in continuing to recognize Local 1080A.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above, occurring in connection with the Respondent's operation of the child day care center in Verona, Virginia, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act

THE REMEDY

Having found that the Respondent has violated Section 8(a)(2) of the Act by assisting Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 1080A, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as an individual employee's membership in the Union was not predicated upon a union-security clause in an unlawful contract (there never having been a collective-bargaining agreement between the Respondent and the Union), and inasmuch as there is otherwise no evidence of coercion of any employee to join the Union within the 10(b) period, I will not recommend that the Respondent be ordered to reimburse its members for dues collected. As the Board said in *Unit Train Coal Sales, Inc.*, 234 NLRB 1265 (1978), ". . . Board and court precedent precludes as punitive the application of the reimbursement remedy where, as here, there is no evidence that the employees were coerced into signing authorization cards for the unlawfully assisted union. . . ."

Finally, union participation in a trust fund does not necessarily preclude its representing the fund's employees. *Anchorage Community Hosiptal, Inc.*, 225 NLRB 575 (1976). And since the facts may change, I deem it innappropriate to enter a broad injunction against the Fund or the Center ever recognizing Local 1080A or any other affiliate local of the Joint Board on grounds of an inherent conflict of interest.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[1]

The Respondent, Child Day Care Center, Verona, Virginia, and Baltimore Regional Joint Board, Amalgamated Clothing and Textile Workers Union Health and Welfare Fund, Verona, Virginia, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Recognizing or bargaining with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 1080A as the collective-bargaining representative of its employees.

(b) 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:

(a) Withdraw and withhold all recognition from Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Local 1080A, as the exclusive collective-bargaining representative of any of its employees unless and until that union has been duly certified as such representative by the National Labor Relations Board.

(b) Post at its premises in Verona, Virginia, copies of the attached notice marked, "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by its authorized representative shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[2] In the event that 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."