H. H. Robertson Company *and* Steve R. Martin *and* James H. Carson *and* Ross B. Martin

International Association of Bridge, Structural, and Ornamental Iron Workers, Local Union No. 413, AFL-CIO *and* James H. Carson *and* Ross B. Martin *and* Steve R. Martin. Cases 11-CA-8945, 11-CA-8981, 11-CA-9313, 11-CB-911, 11-CB-912, 11-CB-964, and 11-CB-916

September 21, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 21, 1981, Administrative Law Judge Howard I. Grossman issued the attached Decision in this proceeding. Thereafter, both Respondent Employer and Respondent Union filed exceptions and supporting briefs, and the Charging Party filed answering 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,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

The Administrative Law Judge concluded, and we agree, that Respondent Employer violated Section 8(a)(1) of the Act by discharging its general foreman, Ross B. Martin. This conclusion was based on the following findings, with which we also agree. Respondent Employer had hired Martin on the recommendation of Respondent Union's business agent, Robert Fowler. Beginning in early 1979, and continuing at all times material herein, Martin, a vice president of Respondent Union, was an outspoken advocate of changes in its internal administration. This advocacy earned Martin Fowler's enmity.

In the spring of 1979, Respondent Employer's area supervisor, Brack, told Martin that Fowler had been calling Respondent Employer's home office trying to discredit Martin and that Fowler "would like nothing better than for me to run you off." In a subsequent conversation, Brack informed Martin that he, Brack, had been receiving calls from his home office and from Fowler and that Brack would probably have to fire Martin if the problems between him and Fowler were not resolved. On a third occasion, Martin asked Fowler, in Brack's presence, why Fowler was trying to get Martin fired when he had recommended Martin for the job in the first place. Fowler replied, "I can change my mind." In the fall of 1979, Brack told Martin that Fowler was still calling the home office in an attempt to discredit Martin. He also said that the pressure was getting so bad that Brack would have to let Martin go for the good of the Company.

On February 19, 1980, Martin was supervising two gangs of ironworkers on a job. After an argument with Martin, the steward, Gray called a work stoppage for the following day. The next morning, only two ironworkers, Steve Martin, Ross Martin's son, and Carson, Steve Martin's friend, reported for work. Later in the morning, Martin and Fowler reached agreement to end the work stoppage, but Martin refused to take Gray back.

That same day, Brack and his superior, Dowd, had lunch with Fowler, during which they discussed the problems on Martin's jobsite. At or about 1 p.m., Brack telephoned Martin and told

[1] Respondent Employer and Respondent Union have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the third paragraph of sec. III,E, 3,(D),(2) of his Decision, the Administrative Law Judge stated that, "At lunch, Fowler asked [Ross] Martin, in the presence of his superior, Dowd, what Martin was going to do about the job." The record, however, reveals that Fowler asked this question of Respondent Employer's area supervisor, Brack, not Ross Martin. In sec. III,E,4,(c),(2) of his Decision the Administrative Law Judge stated that Brack's testimony "has realistic details and quotations which give in it the ring of truth" whereas it is clear from the context and the Administrative Law Judge's other findings that he was referring to Ross Martin's testimony. In the 14th and 15th pars. of sec. III,I, of his Decision, the Administrative Law Judge stated that employee Steve R. Martin was hired on February 17 and that employee Carson was hired on February 18. The Administrative Law Judge's earlier findings and the record show, however, that Martin and Carson were hired on October 17 and 18, 1979, respectively. Also, at fn. 19 of his Decision, the Administrative Law Judge gave an incorrect citation for *United Rubber, Cork, Linoleum and Plastic Workers of America, Local 878 (Goodyear Tire & Rubber Company)*. That decision is reported at 255 NLRB 251 (1981). These inadvertent errors do not affect our decision herein.

[2] In his Conclusion of Law 8, the Administrative Law Judge stated that Respondent Union violated Sec. 8(b)(1)(A) and (2) of the Act by refusing to refer supervisor-member Ross Martin to employment. We note that, at the time Respondent Union refused to refer Martin, he was no longer a supervisor. Accordingly, we hereby amend Conclusion of Law 8 by substituting the word "member" for the words "supervisor-member."

[3] Par. B,1,(c) of the Administrative Law Judge's recommended Order requires Respondent Employer to cease and desist from acceding to Respondent Union's pressure to discharge one of Respondent Employer's collective-bargaining representatives. However, the complaint did not allege and the Administrative Law Judge made no finding that Respondent Employer violated the Act by such conduct. Accordingly, we shall delete par. B,1,(C) from the recommended Order.

We find that it will effectuate the purposes of the Act to require Respondent Employer to expunge from its personnel records, or other files, of Ross B. Martin, Steve R. Martin, and James H. Carson, any references to their unlawful discharges and notify them in writing that this action has been taken and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

him, "I'm sitting here right now at lunch with Bobby Fowler and my boss, Chuck Dowd, and we've decided . . . you've got to lay off those two boys and put Link Gray back on the job."

Martin protested Brack's order but complied with it and laid off his son and Carson.[4] He wrote "union interference with right to work" as the reason for discharge on their termination slips. Shortly thereafter, he informed the Board's office of the circumstances surrounding the layoffs. A Board agent called Brack the next day to investigate.

On February 22, Brack constructively discharged Ross Martin by assigning him a position as a regular crewmember on a job located outside Respondent Union's jurisdiction. At the hearing, Brack admitted that his decision to change Martin's assignment was motivated by Martin's call to the Board office, Martin's writing "union interference" on Steve Martin's and Carson's termination slips, Brack's belief that Martin was involved in NLRB charges filed by Steve Martin and Carson, and because he was concerned that the dispute between Ross Martin and Fowler was affecting Respondent Employer's business.

Based on Brack's credited admissions, we find, in agreement with the Administrative Law Judge, that Respondent Employer discharged Ross Martin, in violation of Section 8(a)(1), for revealing unfair labor practices and providing related information to the Board and for assisting employees in utilizing the Board's processes.[5] We further find that to the extent that Brack was motivated to terminate Martin by Martin's and Fowler's internal union dispute, the enmity between Fowler and Martin was inextricably intertwined with Martin's call to the Board, thereby triggering Brack's final action. We further agree, therefore, with the Administrative Law Judge's conclusion that Respondent Union also is liable for Martin's discharge, under the particular facts of this case, since it created the entire situation which led to Martin's termination. Thus, we find that Respondent Union restrained and coerced Respondent Employer in the selection of its collective-bargaining representative, in violation of Section 8(b)(1)(B), by attempting to cause and causing Respondent Employer to terminate Ross Martin.

AMENDED REMEDY

In his recommended remedy, the Administrative Law Judge tolled Respondent Union's backpay liability for employees Steve R. Martin and James H. Carson and Supervisor Ross B. Martin as of the time it notifies these individuals and Respondent Employer that it has no objection to their employment or the selection of Martin as a collective-bargaining representative. However, we shall modify the remedy herein to provide that Respondent Union's backpay liability shall run until 5 days after such notification is made. See *Q.V.L. Construction, Inc.*, 260 NLRB 1096 (1982).

The Administrative Law Judge's recommended remedy also provides that Respondent Employer's backpay liability for employees Steve R. Martin and James H. Carson should be tolled as of the end of the Republic Foil job from which they were unlawfully discharged. We do not agree. Since the record indicates that Respondent Employer transferred employees from job to job, we cannot say with certainty that Martin and Carson would have been laid off upon the completion of the Republic Foil job. Therefore, we shall leave to the compliance stage of this proceeding the determination of when, if ever, Respondent Employer would have lawfully laid off employees Steve R. Martin and James H. Carson.

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:

A. Respondent International Association of Bridge, Structural, and Ornamental Iron workers, Local Union No. 413, AFL-CIO, Charlotte, North Carolina, its officers, agents, and representatives, shall:

1. Substitute the following for paragraph A, 1(f):

"(f) 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. Substitute the attached notice for that of the Administrative Law Judge.

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[4] The Administrative Law Judge found, and we agree, that Steve Martin and Carson were discharged in violation of Secs. 8(a)(3) and (1) and 8(b)(1)(A) and (2). Member Fanning does not rely on *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), but agrees that Respondent Union violated the Act by causing the discharge of Carson and Steve Martin for discriminatory reasons.

[5] An employer violates Sec. 8(a)(1) by discharging a supervisor for providing information to the Board regarding unfair labor practices because the provision of such information assists employees in obtaining vindication of their Sec. 7 rights through the Board's processes. As the Supreme Court stated in *Nash* v. *Florida Industrial Commission, et al.*, 389 U.S. 235, 238 (1967): "Congress has made it clear that it wishes *all persons* with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." (Emphasis supplied.) See *Professional Ambulance Service, Inc.*, 232 NLRB 1141, 1151 (1977) (supervisor gave affidavit to Board); *General Nutrition Center, Inc.*, 221 NLRB 850, 858 (1975) (supervisor provided information to the Board regarding a charge); and *Electro Motive Mfg. Co., Inc.*, 158 NLRB 534 (1966), enfd. 389 F.2d 61, 62 (4th Cir. 1968) (supervisor gave signed statement admitting commission of unfair labor practices).

In view of our finding herein, we find it unnecessary to reach the issue of whether Martin's discharge also violated Sec. 8(a)(4).

B. Respondent H. H. Roberston Company, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Delete paragraph 1(c) and reletter the subsequent paragraphs accordingly.

2. Substitute the following for paragraph B, 1(d):

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

3. Insert the following as paragraph B, 2(d) and reletter the subsequent paragraphs accordingly:

"(d) Expunge from its personnel records, or other files, of Ross B. Martin, Steve R. Martin, and James H. Carson any references to their unlawful discharges and notify them in writing that this action has been taken and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them."

4. Substitute the attached notices for those of the Administrative Law Judge.

APPENDIX A

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT restrain or coerce employees because they exercise the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL NOT cause or attempt to cause any employer to discharge or otherwise discriminate against employees in retaliation for exercising their Section 7 rights.

WE WILL NOT fail or refuse to refer employees for employment in retaliation for exercising their Section 7 rights.

WE WILL NOT restrain or coerce any employer in the selection or control of his representative for the purpose of collective bargaining or adjustment of grievances.

WE WILL NOT file disciplinary charges against or fine members because of their actions as representatives of their employer, or in defense of the Section 7 rights of employees.

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

WE WILL notify H. H. Robertson Company that we have no objection to its employment of Steve R. Martin, James H. Carson, or Ross B. Martin, and we will request that Company to reinstate Ross B. Martin to his former position as general foreman.

WE WILL notify Pittsburgh Bridge and Iron Company that we have no objection to its employment of Ross B. Martin, and request it to employ him.

WE WILL make Steve R. Martin, James H. Carson, and Ross B. Martin whole for any loss of earnings they may have suffered, with interest, because we caused their discharges, this obligation of ours being undertaken together with H. H. Robertson Company.

WE WILL make Ross B. Martin whole for any loss of earnings he may have suffered, with interest, because of our refusal to refer him for employment with Pittsburgh Bridge and Iron Company.

WE WILL rescind and expunge our $500 fine imposed upon Ross B. Martin, and repay him, with interest, any portion of such fine which he may have paid.

INTERNATIONAL ASSOCIATION OF BRIDGE STRUCTURAL, AND ORNAMENTAL IRON WORKERS, LOCAL UNION NO. 413, AFL-CIO

APPENDIX B

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 sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT condone or participate in the attempts of any labor organization to cause us to discharge, lay off, or otherwise discriminate against any of our employees because of their activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT accede to requests of any labor organization that we discharge, lay off, or otherwise discriminate against our employees because of their activities protected by Section 7.

WE WILL NOT discharge or lay off any supervisor because of his participation in the

filing of charges before the National Labor Relations Board, or his relaying information to the Board concerning employee complaints or charges.

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 offer Ross B. Martin reinstatement to his former position as general foreman, dismissing if necessary anyone now working in his former job.

WE WILL, together with Iron Workers Local 413, make whole Steve R. Martin, James H. Carson, and Ross B. Martin for any loss of earnings they may have suffered, with interest, because of our discharges of them.

WE WILL expunge from our personnel records, or other files, of Ross B. Martin, Steve R. Martin, and James H. Carson any reference to their unlawful discharges and notify them in writing that this action has been taken and that evidence of their unlawful discharges will not be used as a basis for further personnel actions against them.

H. H. ROBERTSON COMPANY

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge: This case was heard in Charlotte, North Carolina, on April 2 and 3, 1981. The charges in Cases 11-CA-8945, 11-CA-8981, and 11-CA-9313 were filed on February 26, March 10, and August 6, 1980, respectively, by Steve R. Martin, James H. Carson, and Ross B. Martin, respectively (herein the Charging Parties). The charges in Cases 11-CB-911, 11-CB-912, 11-CB-916, and 11-CB-964 were filed on March 10, 11, and 19, 1980, and November 28, 1980, respectively, by Charging Parties Carson, Ross B. Martin, and Steve R. Martin, respectively. Complaints or consolidated complaints issued on August 8 and September 19, 1980, and January 15, 1981. They allege that International Association of Bridge, Structural, and Ornamental Iron Workers, Local Union No. 413, AFL-CIO (herein Respondent Union), caused or attempted to cause H. H. Robertson Company (herein Respondent Employer, or the Company) to discharge James H. Carson and Steve R. Martin because said Charging Parties failed to adhere to an exclusive referral system in effect between Respondents, in violation of Section 8(b)(2) of the National Labor Relations Act, as amended (herein the Act): filed internal disciplinary charges against Charging Party Ross B. Martin and refused to refer him for employment because of an internal union dispute, in violation of Section 8(b)(1)(A); and caused or attempted to cause Respondent Employer to demote said Ross B. Martin, in violation of Section 8(b)(1)(B).

The complaints also allege that Respondent Employer discharged Charging Parties Carson and Steve R. Martin at the behest of Respondent Union, because they failed to adhere to the aforesaid exclusive referral system, in violation of Section 8(a)(3) and (1) of the Act, and discharged Charging Party Ross B. Martin, a supervisor, because he refused to commit unfair labor practices, in violation of Section 8(a)(1).

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of briefs filed by the General Counsel, the Charging Parties, and both Respondents, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer is a corporation engaged in the business of constructing metal roof and wall systems, with jobsites formerly located in the State of North Carolina, including a jobsite in Salisbury, North Carolina. During the 12-month period immediately preceding issuance of the last complaint described above, which period is representative of all times material herein, Respondent Employer purchased, and had delivered to its North Carolina jobsites goods and materials valued in excess of $50,000, from other North Carolina enterprises which in turn had received same from States other than the State of North Carolina. Respondent Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondents were parties to a collective-bargaining agreement providing that all employees required by the Company were to be furnished and referred to it by the Union, with certain exceptions relating to a few key supervisors, and a stated percentage of regular employees. Ross B. Martin, Respondent Employer's general foreman,[1] testified that his usual procedure was to call the hiring hall for men, and that the Union was able to supply all his requirements, with two exceptions. The agreement forbade any discrimination in the selection of applicants based on union membership.

Robert Fowler became business agent of Respondent Union in or about 1973,[2] and Ross B. Martin was elected vice president in July 1978. Martin had previously been recording secretary. A month later, in August, Fowler asked Martin whether he was interested in working for Respondent Employer in a supervisory position. Upon

[1] The parties stipulated and I find that Martin was a supervisor and an agent of Respondent Employer within the meaning of the Act.

[2] The pleadings as amended establish, and I find, that Fowler was an agent of Respondent Union within the meaning of the Act.

receiving Martin's expression of interest, Fowler arranged a meeting between Martin and John Brack, the Company's area district supervisor.

Thereafter, in August 1978, Respondent Employer appointed Martin general foreman within the Union's area five, comprising parts of North and South Carolina, and Tennessee. In such position, he participated in the adjustment of grievances. Martin's compensation was $1 over journeyman's scale, $10 daily per diem, a guaranteed 40-hour week, and a company vehicle and expenses for same. He testified credibly that he was praised by the Company for work that he did on various jobs.

B. *Dissension Within the Union*

In 1979, Martin took a position on various union problems which brought him into opposition with other union officers and with Fowler. Martin charged at a monthly meeting that the recording secretary was not performing his duties, and demanded that the office be declared vacant and a qualified person be appointed. In a meeting with Fowler in the latter's office, Martin also said that the Union's president was not qualified. Fowler told Martin to "shut his mouth and let them run the local the way they wanted to." Martin said that he had been a supporter of Fowler's, and did not wish to make him an enemy over the issue. "You don't want me for an enemy," Fowler answered.

At a later union meeting, the recording secretary asserted that he had a letter stating that the International had sustained him in the dispute. Martin then protested by letter to the International, and the latter sent an officer to investigate Martin's allegations. The International officer concluded that the local's officers were qualified for their positions.

C. *Evidence That the Union Attempted To Cause Ross B. Martin's Discharge*

Ross B. Martin testified that, in the spring of 1979, i.e., at or about the time of his disputes with Fowler, Respondent Company's area supervisor, John Brack,[3] instructed him to deliver some materials to one of the Company's warehouses. A union meeting had been scheduled, and union members Pete and Gus Karres accompanied Martin when he delivered the materials en route to the meeting. Brack was present when they arrived at the company warehouse, and a conversation took place.

Martin testified that, as he and the other two were about to leave, Brack said, "By the way, Bobby Fowler has been calling Pittsburgh again." (Respondent Employer's home office is located in Pittsburgh.) "The static's been coming back down to me," Brack continued, "trying to discredit you. Bobby Fowler would like nothing better than for me to run you off." Pete Karres testified that Brack said that the agent at 413 would not rest until he saw Martin off the job he was holding with the Company, because he, the agent, had talked to Brack's superiors about the matter. Gus Karres corroborated this testimony.[4]

Brack admitted that he knew there were internal conflicts within the Union, and that there were "problems" between Fowler and Martin. Both men discussed these "problems" with him. He admitted having a conversation with Martin and the Karres brothers in the spring of 1979. Although Brack denied telling them that Fowler was calling "Pittsburgh" and would like to run Martin off the job, or that "Pittsburgh" was complaining about Martin, he did testify that he told them that he had "feedback from Pittsburgh" questioning him about "something going on . . . between Mr. Fowler and Mr. Martin."

The substance of Brack's testimony is so close to that of the General Counsel's witnesses, and the latter being otherwise credible, I accept their version of the conversation.

Martin also testified that he had a second conversation on the same subject with Brack, in another company warehouse in at Morganton, South Carolina. After engaging in regular business, Brack drew Martin aside to a "deserted" area, and told him that the "home office" and Fowler had been calling him, and that he would probably have to fire Martin if the problems between Fowler and Martin were not reconciled. Brack denied telling Martin that Fowler was calling Pittsburgh again. However, he admitted having a conversation with Martin at Morganton. He also said that he had many conversations with Fowler about the referral system and "internal problems." In his pretrial affidavit he stated that Fowler and Martin talked to him about "potential union battles between the two." Since Brack admittedly told Martin in the prior conversation that he had "feedback from Pittsburgh" about what was "going on" between Fowler and Martin, company knowledge of the dispute at the home office level is established. Martin's testimony about the Morganton conversation is consistent with his corroborated version of the first conversation, and I credit it.

Martin testified without contradiction about a meeting with Brack and Fowler at the union hall, after Martin had discharged an employee and Fowler had accused Martin of firing a steward. When this matter had been resolved, Martin asked Fowler why he was trying to get the former discharged from the Company, since it was Fowler who had recommended Martin for the job. According to Martin, Fowler replied, "I can change my mind." Although Martin did not recall the exact date, it was between August 1978 and February 1980, and took place in Williamston, South Carolina, on a job for the Milliken Corporation. I credit this testimony.

[3] The complaints allege and the Company's answers deny that Brack was an agent of the Company and a supervisor within the meaning of Sec. 2(11) of the Act. Brack testified that he was the Company's area district supervisor during relevant times herein. The record has ample evidence that he possessed the indicia of supervisory status described in Sec. 2(11), and I find that he was in fact an agent and supervisor of Respondent Employer.

[4] Respondent Union moved to strike as hearsay the testimony of the two Karres witnesses insofar as they related what Brack, an agent of Respondent Employer, said that Fowler, an agent of Respondent Union, had said to "Pittsburgh." I granted said motions to the extent that said testimony pertained to Respondent Union. See fn. 21, *infra*.

D. *Continuing Union Dissension and Its Effect on Martin's Job*

The same pattern of events continued throughout 1979. In the fall, according to Martin, he discovered that the Union's president and Fowler were both drawing business agent's pay when Fowler was hospitalized and the Union's president was filling in for him. Martin protested this at a union meeting, calling it misappropriation of funds.

Brack continued his similar conversations with Martin. In the fall of 1979, or early 1980, in an automobile ride between Salisbury and Greensboro, Brack told Martin that Fowler was still calling Pittsburgh trying to discredit Martin, according to the latter. The pressure was getting so bad that Brack would have to let Martin go for the Company's good.

Brack testified that he did in fact have a conversation with Martin en route to Greensboro in late 1979 or early 1980. He again denied telling Martin that Fowler was calling Pittsburgh. The discussion on the way to Greensboro still concerned "internal problems between Mr. Fowler and Mr. Martin." However, Brack denied having any knowledge of what those problems were. He testified that Fowler had talked to him about Martin's failure to abide by the referral system, but said nothing about the nature of Martin's description of the "internal problems."

Brack's testimony about extended conversations with Fowler and Martin about their "problems," without knowing the nature of those problems, is incredible. I credit Martin's version of the conversation in the ride from Salisbury to Greensboro.

E. *The Republic Foil Job*

1. The hiring of Steve R. Martin and James H. Carson

Steve R. Martin, the son of Ross B. Martin, applied to the union hall in January 1979 for referral to an apprenticeship training program, and met Business Agent Fowler at that time. He was deemed ineligible for the program because of failure to meet educational requirements. Martin called Fowler for a job referral in May 1979, and the business agent offered him a job which Martin declined because of transportation problems. Fowler offered Martin another job later in the same month, which was also declined. Martin's name was not on the out-of-work list when Fowler offered him the job. The business agent testified that he made the offers because Martin had signed a referral application.

The Company was engaged in a project in Salisbury, North Carolina, called the "Republic Foil" job. Work began in September 1979, and the Union referred Ira and Preston Nicholson to this job, the latter as job steward. Later, in October, Brack arrived at the job, and said that he needed one of the men at another job. Ira Nicholson went with Brack, although Martin informed Brack that he could not run the Republic Foil job with one man, and that he thought the hiring hall was out of men.

Martin told Nicholson to call the hiring hall and get another man, but added that Martin could bring in his son if there was nobody at the hall. Nicholson testified that he could not reach either Fowler or the hall. Later that evening, he called Martin and told him to bring in another man. According to Martin, Nicholson said that a secretary at the hall reported that no one was available, and that Martin should bring in his son. Martin testified that he asked Nicholson for protection against Fowler's "running him off," and that Nicholson gave it to him. Nicholson testified that he had the authority as steward and Fowler's representative to give Martin permission to engage in direct hiring.

The next day, October 17, 1979, Martin hired his son, Steve R. Martin. Shortly, thereafter, the Company added another gang to the Republic Foil job.

On October 18, 1979, at the Charlotte Memorial Hospital jobsite, Pete Karres informed Martin that Fowler had requested Karres' presence at another job on behalf of the Union, according to Martin. Martin gave Karres permission to leave. He also told the hospital job foreman to call the hiring hall for a replacement, and instructed him to tell Fowler that Martin could hire a man off the street if the hall were still without men. Martin testified that the job foreman later reported to him that there were no men at the hall, and that Fowler had said that Martin could hire a man himself. Martin then hired James H. Carson, a friend of his son, and filled out tax and withholding forms for both young men.

Fowler asserted that he first heard of Steve Martin's and Carson's employment in December, when the Company submitted a report of dues received on checkoff, listing the two names. The Union had no authorization cards signed by the two men, and Fowler said that he called the Company to find out who they were and where they were working. Upon learning that the two were working on the Republic Foil job, Fowler called Martin and asked for the employees' social security numbers, and for checkoff authorizations. These requests were honored. Fowler said that, when the employer requests an employee, the Union has 48 hours in which to supply one.[5] Ross Martin testified that Fowler voiced no objections to him about the hiring of his son and Carson. Fowler testified that he had affirmed in a pretrial affidavit that he complained to Brack about the hirings, but stated that he meant that the two had not been referred from the hall.

Based on the foregoing evidence, I find that there were no job applicants at the hiring hall on October 17 or 18, and that the Union authorized the Company to hire directly without going through the referral system.[6]

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[5] Sec. 10 of the "Referral Clause" in the collective-bargaining agreement in effect between Respondents reads as follows:

> In the event that the referral facilities maintained by the Local Union are unable to fill the requisition of an Employer for employees within a forty-eight (48) hour period after such requisition is made by the Employer (Saturdays, Sundays and Holidays excepted), the Employer may employ applicants directly at the job site. In such events the Employer will notify the Local Union of the names and dates of such hiring [G.C. Exh. 2].

[6] The findings are based on Martin's testimony of what Karres, Nicholson, and the job foreman said to him. Although Business Agent Fowler testified that he protested *to Brack* about the failure to hire Steve Martin and James Carson by referral from the hall, he did not dispute Ross Mar-

Continued

2. The Company's problems with the Republic Foil job

Republic Foil objected to some of the materials used on the job, and rejected others. As a consequence, work was interrupted, and by February the money alloted by Respondent Company was "running tight" according to Brack. On February 14, 1980, he asked Martin what the latter thought of reducing the employee complement on the job from two "gangs" to one, i.e., from six to three employees. (A "gang" consisted of two men on a scaffold doing the work, and one man on the ground supplying them with materials.) Martin replied that all the men were gainfully occupied, and whether "it takes six men three days to do a job or three men six days, it comes out to the same in the end." Brack agreed, and Martin conceded that he would not replace any man who quit. He did tell Brack that the job had been underbid, and that there were "add-ons" which required additional time.

3. The events of February 19–20

a. *The shutdown of the Republic Foil job*

About a week later, on February 19, Martin arrived at the Republic Foil jobsite in the afternoon and saw one of the scaffolds coming down, with employees James Black and James Carson. Martin noticed that it was not quitting time, and asked them why they were coming down. They replied that they were getting materials. L. Y. "Link" Gray, then the Union's steward,[7] was standing there, and Martin asked him why he could not supply Carson and Black with materials. Gray replied, "I'm not going to supply two scaffolds any more. Call the hall and get another man."[8] (Martin testified without contradiction that Gray had previously told him that the latter would have no difficulty supplying two scaffolds.)

Martin told Gray that he could not afford to get another man, and Gray replied that he was "agitated." Martin told the steward, "Link, you're going to have to stop this. Let's get this job done. Gray again asked Martin to call the hall for another man, and Martin responded: "Link, shut your mouth and listen to me for a minute. Let's get this job done and get out of this mud." The two scaffolds were separated by about 35 feet, and Nicholson stated that he told Martin that Gray had been doing a fine job under difficult circumstances. However, Brack testified that work in the mud was "not unusual."

Martin and Gray continued arguing. At the end of the shift, Gray told the men that Martin had told him to shut his mouth, that he had lost respect for Martin, and that he was shutting the job down. Martin told the employees that the shutdown was illegal, and that no one could do that except higher union authority. Gray, Nicholson, and Black said that there had better not be anybody on the job the next morning. Martin stated that he would be at the jobsite, and that any man desiring to work should be there.

b. *The work resumes*

Ross B. Martin, his son Steve, and Carson arrived at the jobsite the next morning, February 20. They found James Black sitting in his truck. Martin told Black that he was glad to see him, and asked him whether he was ready to go to work. Black did not do so, and left the jobsite. Gray did not show up at all, according to Martin.

Martin supplied his son and Carson with materials, and put them to work. He then had a telephone conversation with Fowler at or about 10 a.m., in which he told the business agent what had happened. Fowler agreed that the steward had no authority to shut down the job, and that it was illegal. He said that he would try to get the men back on the job. Martin said that he was allowing Nicholson to return as steward, but that he would continue the job with Steve, Martin, and Carson. There was a lengthy discussion between Fowler and Martin on this solution. Fowler finally said, "Go ahead and work."

Fowler reached Nicholson by phone, and the latter returned to the job at or about 10:30 a.m. Martin testified that he and Nicholson agreed that the latter would act as steward. Nicholson testified that there was no steward. I credit Martin. Black then returned, but Martin refused to take him back, his position being that Black had quit. The job continued with Steve Martin, Carson, and Nicholson as steward.

c. *Respondents have lunch together, February 20*

Charles E. Dowd, Respondent Employer's contract manager for the Eastern area and Brack's immediate su-

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tin's testimony that he voiced no objection to the latter. Given the already existing antagonism between Fowler and Martin, it is inconceivable that Fowler would not have protested the hirings to Martin if they had not in fact been authorized because of the absence of job applicants at the hiring hall.

This inference, added to the direct testimony of steward Nicholson, makes it indisputable that there were no applicants on October 17. It is not unlikely that the same condition continued the following day. This factor, plus the fact that Fowler did not protest to Martin about either hiring, and the Union's failure to contest the issue in this proceeding all support Ross Martin's testimony that there were no job applicants on either October 17 or 18. That testimony, although hearsay, was received without objection from either Respondent, and is "rationally probative in force and . . . corroborated by something more than the slightest amount of evidence." *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980).

It follows that the hall was unable to supply applicants for 48 hours after the Company's requisition on October 16 at the Republic Foil job. This provides additional justification for the hiring of Steve R. Martin, as it freed the Company from the requirements of the referral clause (see fn. 5, *supra*), thus supplementing the authority given it by steward Nicholson. The direct hiring on August 18 at the Memorial Hospital jobsite (Carson) was expressly authorized by Fowler.

[7] Preston Nicholson was the first steward on the job, but a second gang was added. The parties stipulated that Gray was, at certain times, an agent of the Union within the meaning of the Act. Although the stipulation does not specify the time, I find that Gray was an agent of Respondent Union within the meaning of Sec. 2(13) of the Act at all times when he was acting as the union steward on the Republic Foil job.

[8] There were five men on the job—Carson and Black on one scaffold, Preston Nicholson and Steve R. Martin on another, and L. Y. Gray on the ground supplying materials. According to Nicholson, Ross B. Martin also participated in the work, and the latter testified that he was working on the job on February 14. However, 5 days later, on February 19, he did not arrive until the afternoon, and Gray's testimony suggests that Martin had assigned him to supply both scaffolds, thus limiting the employee complement to five men. I conclude that Martin occasionally assisted on the Republic Foil job because of the Company's financial problems with it, but that his principal functions at all times were supervisory in nature.

perior, arrived in Charlotte the previous day, February 19. His stated purpose was to discuss subcontracting of work to nonunion contractors. According to Brack, he and Dowd visited the union hall on February 20, arriving there between 11 and 11:30 a.m., and entered an office where Fowler and L. Y. "Link" Gray were waiting for them. Fowler told Gray to tell Brack "what was going on."

Fowler and Dowd then left the office, according to Brack, and Gray related to Brack the events which had transpired at the Republic Foil job. Gray said that the men had been "pulled off the job and walked off." Brack testified that he inferred from this report that there was a problem between Gray and Martin, and that the two did not work well together. He conceded that there were no problems between Martin and his son, or with Carson. Brack placed a call to Martin at the jobsite, but, not able to reach him, Brack left word that he would call again at 1 p.m.

Dowd, Brack, Fowler, and another business agent then went to lunch, which lasted about 1-1/2 hours. Following an initial denial and after being confronted by the General Counsel with his pretrial affidavit, Brack admitted that Fowler asked him what he was "going to do about the job," which, in context, meant the Republic Foil job. Brack made a similar admission when being examined by union counsel. He testified that it was company policy to try to get along with a union when it had a contract. Fowler and Dowd denied that there was any mention of the Republic Foil job at lunch—the parties talked about subcontracting to nonunion contractors. Fowler denied ever mentioning the names of Steve Martin and Carson to the Company.

I conclude that the truth of the matter was memorialized in Brack's affidavit, and I credit his revised testimony on this factual issue.

d. *Brack's telephone conversation with Ross Martin during the lunch*

(1) Summary of the evidence

In response to a question whether Brack intended to get two gangs back to work at the time of his first attempt to reach Martin, at or about 11:30 a.m., in Fowler's office, Brack testified that it was his "intention to get everybody to work and get the job started."

Brack's intention had changed, however, by the time he actually reached Martin by phone at the jobsite, at or about 1 p.m. According to Martin, Brack asked him what was going on, and Martin replied that he had already talked to Fowler and that it was all straightened out. "No, Ross," Brack replied, according to Martin, "[Y]ou've done it all wrong. I'm sitting here right now at lunch with Bobby Fowler and my boss, Chuck Dowd, and we've decided you've got to do it this way. You've got to lay those two boys off and put Link Gray back on the job."

Martin protested that this would be a violation of the rights of Carson and Steve R. Martin, that he would not be a party to it, and that Link Gray would not work. "No, no, no," Brack replied, according to Martin, "this is the way it's got to be. You've got to lay those two boys off and put Gray back on." Martin said that Gray would have to work wherever he was assigned, and Brack replied that Martin could run the job as he wished.

Brack's original version of the conversation is entirely different. Although he was then at lunch with Dowd and Fowler, he denied saying that "we" had made the decision. Brack admitted telling Martin to lay off Steve R. Martin and James Carson, but avers that he and Ross Martin "decided" to do this. He contended that he also told the foreman to lay off James Black, but then admitted that Martin and Gray told him that Black had walked off the job. In effect, therefore, Black's layoff instruction was directed only toward Steve R. Martin and Carson. He told Martin that he would try to place "the two boys" in jobs outside the Union's jurisdiction.

Brack's principal reason for the action was that the work on the Republic Foil job was "85%" complete. He testified initially that he and Martin determined to reduce the employee complement to one crew, retaining Ross B. Martin as general foreman, Preston Nicholson as job foreman, and L. Y. Gray as "our Union steward." On cross-examination, however, Brack conceded that Martin argued with him about this matter, and said that it would not work. He also admitted stating in his pretrial affidavit that he cut back to one crew in order to "eliminate dissension."

In addition to the near completion of the job, according to Brack, his decision was based on the necessity of having a steward on the job, and neither Carson nor Steve R. Martin was eligible, apparently because they were not members of the Union.

Brack also contended that he was applying seniority principles, but his testimony is inconsistent on this subject. Thus, he stated that Steve Martin, Carson, and Black were the "youngest" on the Republic Foil job, but then admitted that Steve Martin had greater job seniority than Gray. Ross Martin, however, testified that James Black and L. Y. Gray had less job seniority than any of the other employees, testimony which is consistent with the other evidence. Martin also testified that the general practice was to make layoffs in accordance with job seniority.

Brack initially testified that it was not until his actual conversation with Martin that he made the decision to reduce the number of crews, in order "to cut back on all the dissension." However, he later admitted that his pretrial affidavit states that his decision was made between the time of his first attempt to reach Martin and the time of his actual conversation at 1 p.m.; i. e., during the time he was having lunch with Fowler and Dowd.

(2) Factual analysis

Brack's testimony is implausible for several reasons. If, as he testified, it was his intention at 11 a.m. to "get everybody" back to work, it is unlikely that he would have decided only an hour and a half later to reduce the employee complement down to one crew because of the alleged degree of completion of the job.

Further, Republic Foil had supplied "add-ons" to the job. Brack had discussed the subject of the number of

crews with Martin only a week before, on February 14, and had then agreed with the latter's reasoning that, "whether it takes six men three days to do a job or three men six days, it comes out to the same in the end." Brack had not changed his mind on this reasoning when he tried to reach Martin at 11:30 a.m., on February 20, and it is incredible that he would have done so during a luncheon of 1-1/2 hours during which, according to the testimony of Respondents' witnesses, the principal subject of conversation was subcontracting to nonunion contractors.

Brack's professed concern for the necessity of having a union steward on the job is not persuasive. Former Steward Gray had just described to Brack, in Fowler's office, Gray's version of the battle with Martin at the Republic Foil jobsite the previous 2 days. Then, at lunch, Business Agent Fowler had asked Martin, in the presence of his superior, Dowd, what Martin was going to do about the Republic Foil job. At the time that Brack ordered Martin to lay off his son and Carson, Nicholson was the job steward according to Martin, and the Union's interest was protected. In these circumstances, Brack's statement that the Company needed "our Union steward," L. Y. Gray, has an odd ring to it.

If Brack had really been concerned with the seniority and union stewardship principles which he professed, and had actually been motivated by a desire to save expenses and cut down to one crew, he could have allowed the job to remain with the crew selected by his general foreman—Steve Martin, Carson, and Nicholson, all three with the greatest job seniority, and with Nicholson as the union steward. The latter had been the first steward on the job. If Brack had really been concerned with avoiding further work stoppages, he would not have ordered Martin to take L. Y. Gray back on the job, since he already knew that it was antagonism between the two which had caused the shutdown.

Brack's denial that he told Martin that "we," i.e., Brack, Dowd, and Fowler, had decided to terminate Steve R. Martin and Carson is not believable. Why would Brack have told Martin that he would try to place "the boys" in jobs outside the Union's jurisdiction if the Union had not influenced him in the matter? Brack in fact was at lunch with Business Agent Fowler and his own supervisor, Dowd, and Fowler had asked him what he was going to do about the job. Composition of the Republic Foil crew had been the subject of a lengthy conversation that morning between Fowler and Martin, in which Fowler had reluctantly agreed to retention of Steve Martin and Carson. It, therefore, would have been natural for Martin to protest to Brack that he had already talked to Fowler, and that it was "all straightened out." It also would have been natural for Brack to respond that Martin did it "all wrong," and that "we" had decided otherwise.

The entire tenor of Brack's initial description of this telephone conversation, suggesting that Martin placidly agreed to the new arrangement, is incredible. Indeed, Brack finally conceded that Martin did not agree. I credit Martin's version of the conversation in all instances where it is inconsistent with Brack's.

I conclude that Brack changed his mind about returning everybody to work, and decided to reduce the employee complement to one crew, when he was having lunch with Fowler and Dowd. I further find that his real reason, as he candidly stated in his pretrial affidavit, was to eliminate dissension at the jobsite. His method for doing so is obvious from his order to Martin—get rid of "the two boys" (whose hiring had been one of the subjects of a charge already filed against Ross B. Martin by Fowler),[9] and take back "Link" Gray, Fowler's ally.

e. *The terminations of Steve R. Martin and James H. Carson*

After his 1 o'clock conversation with Brack, Martin ordered final pay for Steve R. Martin and Carson sent by telegraphic transfer. He also called a Regional Office of the Board, and informed a Board representative of what he was doing. Martin told the two employees that he was required to lay them off, and gave them their pay together with their termination notices. On these, Martin wrote as the reason for termination: "Union interference with right to work." He did this, according to his testimony, because Brack's statements on the telephone, at lunch with Fowler and Dowd, amounted to "coercion" by Fowler which caused Brack to order the layoffs of the two young men.

4. The termination of Ross B. Martin

a. *Second shutdown of the Republic Foil job*

On the following day, February 21, L. Y. Gray, Preston Nicholson, and Ross B. Martin arrived at the Republic Foil jobsite. Martin told Gray that he was back against Martin's wishes, but that as long as Gray performed his work and kept his mouth shut they could get the job done and "get out."

Martin told Nicholson and Gray to get on the scaffold. Gray refused. "I came up here as a ground man," he told Martin, "and I remain as a ground man. I will not work on a scaffold." Martin replied that he had been forced to fire two men off the scaffold in order to make room for Gray, and that the latter *would* work there. Gray responded, "Fire me!" According to Preston Nicholson, Gray repeated this two or three dozen times. Martin responded that this was what Fowler wanted him to do, and that he would be playing into Fowler's hands.

Martin testified that Gray said that he was merely going to sit there and watch Martin. Nicholson averred that Martin asked Gray whether the latter was refusing to work, and that the latter denied it, saying that he would get the tools. And according to Nicholson, Gray did so. Martin, however, testified that it was Nicholson who obtained the tools. I credit Martin on these differing versions.[10]

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[9] See *infra*, sec. F.

[10] Nicholson had supported Gray's shutdown on the job on February 19, and, according to Fowler, later signed the business agent's charge against Martin. I consider him biased against Martin, and a less believable witness.

Martin again asked Gray whether he would get on the scaffold and go to work. Gray replied, "I wouldn't get on that scaffold to save your life." Martin then told Nicholson that Gray was refusing to work, and that the remaining two of them could not run the job alone. He said that he could not reach Brack, who was out of town, and that there was no use calling the union hall, because that was "where the problem's stemming from." Accordingly, Martin shut the job down.

Nicholson testified that, when Gray worked for Martin on another job at the Charlotte Memorial Hospital, Nicholson told Martin that Gray was "scared of the scaffolds" and would not work on them. However, Martin testified without contradiction that, when Gray originally asked him for work at the Republic Foil job, he told Gray that the latter would have to work on scaffolds, that Gray replied that he would, and that he actually did so on occasion. Brack stated that the job classification for the work involved was that of "sheeter," and that there was no distinction between sheeters who worked on scaffolds and those who remained on the ground.

I conclude that Gray refused to work, defied Martin's authority as general foreman to assign him to work on a scaffold, and taunted Martin by repeatedly challenging him to fire Gray.

b. *The effect on Martin's job*

Brack testified that, on the same day, February 21, he received a call from a Board agent stating that a charge had been filed against the Company. (The earliest charge herein, in Case 11-CA-8945, indicates that it was signed by Steve R. Martin on February 25, 1980, and received by the Board the following day. However, Martin testified that he called the Board on February 20.)

Brack called Ross B. Martin the evening of February 21. According to Martin, Brack said: "What's going on up there? Man, I'm getting calls from everywhere, NLRB, local union, personnel department of H. H. Robertson." Martin replied that he had previously told Brack that Gray would refuse to work. He also said that he and Nicholson could not run the job alone. Brack then told Martin to be in his office the next morning.

Brack acknowledged telling Martin that he had received calls from the Board and from the customer (Republic Foil), and that he ordered Martin into the office the next morning, but denied saying that he had received a call from the Company's personnel department. I credit Martin's testimony where it differs from Brack's.

c. *Martin's termination*

(1) Summary of the evidence

Martin and Brack met in the latter's office the next morning, February 22. According to Brack, he offered Martin an opportunity to return to the Republic Foil job as a regular gang member, with Nicholson as the foreman and Gray as the steward, or to work as a foreman in another location outside the jurisdiction of Respondent Union. Martin refused both offers. Although Brack professed uncertainty as to whether he really laid Martin off, he conceded that he did give him his final pay and made him the alternative offers.

At one point Brack said that he took action against Martin because the latter put the comments about "union interference" on the termination slips of Carson and Steve R. Martin, because he shut the job down, and because he was causing the customer problems. Also, Brack admitted that one of the reasons he terminated Martin was the fact that the latter called the Board, and because he believed that Martin was involved in the charges filed by his son and Carson. Brack admitted telling Martin that he was concerned about the problems between him and Fowler, and that this was affecting the Company's jobs.

Although Brack suggested that Martin might have retained his extra pay and use of the truck, he admitted that he said nothing to Martin about this.

Martin's version of the conversation is materially different. He first asked Brack's permission to record the conversation, and the latter refused. Brack asked whether Martin would accept a position in a gang, and Martin said that he would go back to his "same position." Brack said that this was impossible, and that Martin would have to work outside the jurisdiction of Respondent Union. (Martin agreed that he had previously worked as foreman outside the Union's jurisdiction.)

Martin asked Brack what *he* would do if Dowd did the same to Brack. "I'd take a walk," Brack answered. "Well, John," replied Martin, "I'm not going to take a walk. You're going to have to fire me." Brack then picked up the phone, called Pittsburgh, and ordered Martin's final pay wired down. He then took Martin over to the Western Union office, paid him off, and took back the company truck. According to Martin, Brack told him "irreconcilable differences" between Martin and Fowler had led to this action.

(2) Factual analysis

The credible evidence clearly establishes that the Company's primary concern was interruption of its jobs because of the intense hostility between Martin and Fowler. It is also clear from Brack's own testimony that it was company policy to "get along" with whatever union had a contract with the Company. As Brack himself conceded, he had determined that Martin and Gray did not work well together. Why then would he have offered to put Martin back into the Republic Foil job with Gray as steward? This would have led to additional disputes, and, possibly, more job shutdowns. Moreover, Martin would still have been working within the jurisdiction of Business Agent Fowler, his principal opponent within the Union. From Brack's point of view, the safest policy for the Company would have been to separate Brack and Fowler completely, and this could only have been done by putting Martin to work within another jurisdiction.

These considerations tend to support Martin's testimony that Brack told him that the only work available was outside the Union's jurisdiction. In addition, Brack's testimony has realistic details and quotations which give it the ring of truth. By contrast, Brack's testimony is con-

trived and artificial, except for admissions elicited on cross-examination. I credit Brack's admissions that he terminated Martin because of his call to the Board about the terminations of Carson and Steve R. Martin, because of his "Union interference" legend on their termination slips, and because of his belief that Martin was involved in the charges filed by his son and Martin. I note his admitted concern that the dispute between Martin and Fowler was affecting the Company's business.

d. *The job resumes again*

Preston Nicholson described resumption of the Republic Foil job on the following Monday, with L. Y. Gray, Nicholson, and an apprentice named Cribbs. Two weeks later, James Black replaced Cribbs, and the job was completed about 4 weeks after the terminations of Carson and the two Martins.

F. *Fowler Files Charges Against Martin*

The events at Republic Foil took place against a background of deepening conflict between Fowler and Martin within the Union. At a union meeting in mid-January 1980, Martin offered to shake hands with Fowler if the latter would just "back off" and let Martin represent the Company to the best of his ability. According to Pete Karres, Fowler rejected Martin's offer to shake hands. He replied that he would treat Martin as he would any other member. Before he could restrain himself, Martin testified, he called Fowler a "lying mother." The business agent leaned over the table, shook his finger at Martin, and said, "Watch it, brother, I'll bring charges against you." Replied Martin, "Bring your charges and be damned!"

On January 16, 1980, Fowler filed charges against Martin alleging violation of various articles of the Union's constitution. The charges include the following allegations:

> In October, 1979 Martin did not call Local 413 for men. Hired his son and friend off the street and transferred them from job to job and did not procure employment for members of this Local Union.
>
> At the regular meeting on January 12, 1980 called Business Agent "lying mother" in the meeting hall. Caused disturbance in meetings and dissension among members.
>
> Defrauding, slandering or otherwise wronging Business Agent in the regular meeting on January 12, 1980.
>
> Inciting or attempting to incite dissatisfaction or dissension among the members of Local 413.

As to the first charge, Fowler testified that Martin's conduct in hiring his son and Carson violated an oath which he took to secure employment for union members.[11] However, he conceded that nonunion applicants had an equal right to use the hiring hall. Martin's real offense was that he did not put his son's and Carson's names on the out-of-work list, according to the business agent. Asked what Martin had really done wrong, Fowler asserted that the foreman had failed to notify the hiring hall when he needed people at the Republic Foil job. He also complained about Martin's "disrupting" union meetings.

A "hearing" was held on March 8, 1980, at the union hall. Various union members were present. Martin testified that he did not receive the charges until 8 days before the hearing. Fowler said that he asked Martin who was responsible for putting the words "Union interference" on the termination slips of Martin's son and of Carson. Martin replied that this was his own action, and added that he thereafter called the Board's offices. Martin was asked whether he had threatened to destroy the Local (and Bobby Fowler) and denied it. Martin was found "guilty on all counts," according to his testimony, and was expelled from the office of vice president and fined $500. Martin has appealed this decision to the International Union.

G. *The Refusal To Refer Martin*

1. The PBI job

Martin continued to attend union meetings after his "hearing." He and Fowler agree that, in October 1980, Fowler asked Martin to sign the out-of-work list, and that the latter failed to respond. Fowler contended that the same thing had happened in May. An entry in the Union's out-of-work list for May 8 contains Martin's name followed by the legend: "Will contact us when ready to work. Refused to sign out of work list 5-8-80."

At a union meeting on November 8, 1980, Fowler announced that he had a job for six people in Augusta, Georgia, that was going to last 10 years. He again asked Martin to sign the out-of-work list—according to Martin, Fowler rose and "singled him out." Martin responded that he had a job interview the following Monday, and would let Fowler know whether he was available.

On November 18, 1980, Gus Karres was hired by the Pittsburgh Bridge and Iron Company (PBI) for work on a job in York, South Carolina. PBI had a contract with Respondent Union. Karres saw other individuals being hired on this job, and asked the union steward, Robert Craddy, whether PBI needed welders. Craddy replied affirmatively. Karres told Craddy that Ross Martin lived nearby, and said that he would call him. Karres did so, and informed Martin about the job. He also advised Martin that the job could not be filled out of the union hall.

Martin arrived at the job the next morning, November 19, and spoke with PBI Foreman Phillips. According to Martin, Phillips said that he needed him and asked whether he was ready to work. Robert Craddy, the union steward on the job, testified that PBI was hiring men through the Union.

Martin replied to Phillips that he had to be cleared by the union hall. Upon Phillips' instruction, Craddy then placed a call to Fowler. Craddy testified initially that

[11] Art. XXVI, sec. 18, of the Union's constitution in pertinent part requires members to swear: "I will at all times, by all honorable means within my power, procure employment for members of this Union" (G.C. Exh. 4).

Fowler said Martin had to come to Charlotte and sign the out-of-work list before working. Later, in response to a leading question from union counsel, Craddy testified that Fowler also said that Martin needed a referral slip. Martin testified that Craddy told him that he could go to work on the PBI job only if he personally went to the union hall in Charlotte and signed the out-of-work list. Martin denied that Craddy also said that he needed a referral slip. I credit Martin on what Craddy told him.

According to Martin, it was 80–90 miles round trip from the jobsite to the union hall. He did not do as Fowler required, and was not employed. Fowler contended at the hearing that Martin would have been referred if he had verbally requested that his name be put on the list. However, on December 8, Fowler wrote a letter to Martin informing him that he had not been referred to the PBI job because he had "refused to sign the Local's out-of-work list. Whenever you will sign the Local's out-of-work list, you will be referred to that job or any other job."

2. The Union's out-of-work list and referral slip practices

a. *Summary of the evidence*

Business Agent Fowler described the Union's out-of-work list as the only fair method of referring individuals for employment. Under this system, applicants for employment sign the out-of-work list and are referred to jobs by Fowler in the order in which their names appear on the list. If an applicant accepts referral, the employer's name and the date are noted on the list, and a line is drawn through the applicant's name. If the applicant rejects a job, the refusal is noted, and the applicant's name goes to the bottom of the list.

Fowler testified that it was not necessary for an applicant to sign the list personally—he could request Fowler or his secretary to do so. Nicholson testified that he followed this practice. However, Pete Karres testified that his name had appeared on the out-of-work list without his knowing how it got there. Fowler called him and offered him work on the PBI job without Karres' having signed the list. Gus Karres affirmed that he never signed the list—he simply went home after each job and waited for a call from the union hall for the next job. He surmised that the job steward informed Fowler when a job was finished, and that the business agent thus knew when Karres was out of work. Ross B. Martin testified that he had previously been referred to jobs without having signed the out-of-work list. Martin was not on the list when Fowler sought him out for the position of general foreman with Respondent Company. Fowler disputed portions of Martin's testimony. I credit the latter.

Fowler originally testified that Martin would not have been permitted to work at the PBI job even if he had requested that his name be placed on the out-of-work list, because there were others ahead of Martin on the list. However, the actual out-of-work list for this period is in evidence, and shows that other applicants who signed the list on November 17 were hired by PBI a few days later. One applicant who signed the list on November 20—the day after Martin's appearance at the jobsite—was hired the same day. Others who signed the list on November 24 were hired the next day. After his attention was directed to these facts, Fowler conceded that Martin probably would have been hired by PBI if he had asked Fowler on November 19 to put his name on the list.

Fowler also testified that a job applicant had to have a referral slip before working on a job. The "usual procedure," he said, was that the applicant appeared at the union hall to get his referral slip. However, the business agent added, sometimes the steward carries a referral slip with him when a job is starting. Nicholson stated that he had to go to the union hall for a referral slip before starting a job. However, he also testified that employees at the Republic Foil job could transfer over to the Charlotte Memorial Hospital job without referral slips. PBI job steward Craddy testified that, although some of the first PBI employees brought him their referral slips, he had picked up "a couple" himself, including Gus Karres', in order to get the job "in motion." The union hall was on the way from his residence to the jobsite. As Craddy put it, "In order to get the job going, we had to give or take one way or the other."

Gus Karres testified that, on occasion when he was at the union hall at the time of referral, he was handed a referral slip to take to the job. However, on the PBI job he was referred by a phone call from Fowler on November 18, and went directly to the job the next morning without obtaining a referral slip. Steward Craddy had his slip when he arrived. On Karres' prior job about a week before, he did not obtain a referral slip, and never saw one. Martin testified that when acting as steward he never took a referral slip from a job applicant and never supplied one for himself. He denied any conversation with Fowler about referral slips in connection with the hiring of his son or Carson.

The "Referral Clause" of the collective-bargaining agreement in effect between Respondents requires the Union to "register" all applicants for employment in four groups ("A" through "D") based on their employment history, and to "maintain each of the separate group lists set forth which shall list the applicants within each group in the order of the dates they registered as available for employment." When an employer requests employees, the Union is required first to "refer" applicants in group "A" in the order of their appearance on the list. There is no reference to a referral "slip" or other referral procedure (G.C. Exh. 2). The pages of Respondent Union's out-of-work list which are in evidence do not show classification of applicants into the four groups required by the collective-bargaining agreement (G.C. Exh. 9).

b. *Factual analysis*

I conclude that Respondent Union has no uniform referral slip practice. Although referrals are required by the collective-bargaining agreement, there is no mention of a "slip" in the contract. The Union undoubtedly does utilize referral slips, but the method of utilization varies from case to case, frequently depending on the urgency of the employer's need for men. In some instances the

applicant picks up the slip at the hall, in others the steward carries them out to the jobsite, and in others there is no slip whatever. Union control of the hiring is essentially maintained by telephone communication between the hiring hall and the job steward.

Nor is there any uniformity in the signature procedure on the out-of-work list. The contract does not require individual signatures—the Union is required to "register" applicants—and business Agent Fowler testified that a verbal request from the applicant is sufficient.

In some cases, registration is accomplished by personal signature, in others by a telephone call, and in still others by an inference made by the business agent that a man was out of work because a particular job had finished. The Union's out-of-work list does not list applicants within the four groups designated in the agreement, thus further suggesting the casual manner in which it is maintained.

3. Factual conclusions concerning Martin and the PBI job

Pittsburgh Bridge & Iron Company (PBI), an employer under contract with Respondent Union, was hiring men for a job in York, South Carolina, and Martin applied for a job on November 19, 1980. He did not have a referral slip and his name was not on the out-of-work list. He had previously failed on occasion to respond to Business Agent Fowler's request that he put his name on the list.

The PBI job steward called the union hall to obtain a referral for Martin, and was informed by Business Agent Fowler that Martin would have to go to the hall, a round trip distance of 80–90 miles, sign the out-of-work list, and/or obtain a referral slip. The job steward communicated this requirement to Martin, who failed to comply and was not referred for employment. Respondent Union later wrote a letter to Martin stating that he had not been referred to the job because he "refused to sign" the out-of-work list.

Respondent Union had no uniform referral slip or out-of-work list signature practices. Under these circumstances, Martin's appearance at the jobsite and request for work in the presence of the union steward, who himself called the hiring hall, were the equivalent of a call by Martin—one of the alternative practices accepted by the Union. Respondent Union in fact required that Martin make the 80–90 mile round trip to sign the out-of-work list and/or obtain a referral slip—a requirement which it did not uniformly impose on other applicants. There were no applicants ahead of Martin on the out-of-work list—others were being hired by PBI either immediately or a few days later.

H. *Further Dissension Within the Union*

A short time after Martin's application at the PBI job, he and Gus Karres attended a meeting at the union hall. A vice president of the International was present. After conclusion of business, Fowler said to Martin and Karres: "A member of the local informed me that you people have put the FBI on me and are investigating me. I'm tired of this sort of thing and I'm going to bring a civil suit against you in the amount of $250,000." "Bring a suit for $4 million," said the International vice president, "and have them working for you." The International officer then told Martin and Karres that the International would bring charges against them if the "harrassment" did not stop. Fowler did not disavow these statements.

I. *Factual Summary and Legal Analysis*

1. The terminations of Steve R. Martin and James H. Carson

The collective-bargaining agreement in effect between the Union and the Company contained an exclusive hiring hall provision. With a few exceptions pertaining to supervisors and a stated percentage of regular employees, all other employees required by the Company were to be furnished by the Union. There is no contention that the agreement was illegal on its face.

The exclusivity of the hiring agreement was observed in all instances except those involving the hirings of Steve R. Martin and Carson, who were not union members. These employees were hired by the Company because, in both cases, there were no applicants available at the hiring hall.

On October 16, 1979, the Company removed one of its employees from the Republic Foil job to another location, creating a need for another man. The Company's general foreman, Ross B. Martin, told Union Steward Preston Nicholson to call the hiring hall for another employee. The foreman added that he could get his own son if there were no applicants at the hall. The steward was unable to reach the business agent, and a secretary told him that there were no applicants at the hall. That evening he authorized Martin to hire another employee without going through the hiring hall; the foreman hired his son, Steve R. Martin, the next day, October 17.

There was another opening the next day, October 18, at the Charlotte Memorial Hospital jobsite, caused by Business Agent Fowler's request that one of the men assigned there go to another job on behalf of the Union. The hall had no other applicants, and Fowler said that the Company could hire a man off the street. Accordingly, General Foreman Martin hired James H. Carson, a friend of his son. The two hirings were authorized either by the Republic Foil job steward, the business agent, or were within the 48-hour exception to exclusivity in the collective-bargaining agreement.

There is record evidence of animus by the Union against the two hirings. In the first place, Steve Martin was the son of, and was hired by, Union Vice President Ross B. Martin, who was then locked in a bitter intraunion struggle with other union officers, principally Business Agent Fowler. Carson was the friend of young Martin, and was also hired by Ross B. Martin. It is not unlikely that the obvious animus of Fowler against Ross B. Martin was transferred, in part at least, to the latter's son and his friend.[12]

[12] Refusal to refer an individual for employment because of criticism of union administration, political opposition to a union official, or dissi-

Continued

This inference is buttressed by the inconsistent positions which Business Agent Fowler took toward the employment of the two young men. He did not protest to Ross Martin about the direct hirings—he could hardly do so, since the Union had authorized them. However, he did protest to Brack that the two were not hired through the referral system, and, apparently, failed to inform Brack that the hall had no one to refer at the time. Fowler ignored the fact that Steve Martin had made application for referral in May 1979, and that Fowler himself had offered Martin a job. Finally, and inconsistently, on January 16, 1980, Fowler charged Ross B. Martin with hiring "his son and friend off the street" and with other offenses, a charge on which Martin was ultimately found guilty by the Union, despite the fact that the Union itself had authorized the direct hirings.

The evidence also supports a conclusion that the Union attempted to cause and did cause the Company to terminate Steve R. Martin and James H. Carson on February 20, 1980, despite a disclaimer thereof by the Union and a defense from the Company that it was merely reducing the size of its employee complement at the Republic Foil job.

The pretextual nature of the Company's defense has already been set forth above—in summary, (1) Brack's acceptance on February 14 of Ross B. Martin's argument that the job costs would not be lowered by reducing the employee complement to one crew, because it would simply take longer to finish the job, including the "add-ons"; (2) Brack's continued agreement with this argument as late as about 11:30 a.m. on February 20 when he first tried to reach Martin; (3) the fact that Brack suddenly changed his mind by 1 p.m., after lunch with his own superior and with Business Agent Fowler, who asked Brack what he was going to do about the job; (4) Brack's statement to Martin that "we," i.e., Fowler, Dowd, and Brack, had decided that the Company had to lay off Steve Martin and Carson, and retain "Link" Gray; (5) the fact that the inclusion of Gray and Ross B. Martin into one crew, suggested by Brack, would have tended to cause the Company further trouble on the job; (6) the fact that the terminations of Steve Martin and Carson were contrary to customary job seniority principles; and (7) Brack's admission that his reason was a desire to eliminate "dissension" at the jobsite.

The same or similar evidence establishes overt action by the Union to cause the discharges. Although Fowler had agreed with Ross Martin in the morning of February 20 that steward Gray's shutdown of the job the prior day was illegal, Gray was right there in Fowler's office when Brack and Dowd arrived, and Fowler told Gray to tell his side of the story to Brack. This suggests that Fowler and Gray were working closely together, despite the admitted illegality of Gray's action at the jobsite the prior day, and that they were attempting to influence Brack on the composition of the Republic Foil crew. This inference is buttressed by Fowler's asking Brack what he was going to do about the job while they were at lunch, and by Brack's immediate order to Ross Martin to layoff his son and Carson and to retain Gray, as something that "we" had decided.

Based on this evidence, plus the pretextual nature of the reasons given by the Company, I find that the Union attempted to cause and did cause the Company to terminate Steve R. Martin and James H. Carson on February 20, 1980. There were two reasons, both unlawful—(1) the close association of Steve R. Martin and his friend Carson with Martin's father, a union dissident who had hired them, and (2) the fact that neither was hired through the referral system. This latter motive is established by Fowler's charge against Ross B. Martin on January 16.

Respondent Employer argues that the referral clause is valid on its face, and that the Union could have lawfully sought the termination of Martin and Carson, citing Board authority.[13] This argument is based on the well-established rule that nondiscriminatory hiring hall provisions are permissible and may be lawfully enforced by a union.

However, there is an exception when the referral clause is not applicable. Thus, in one case the exclusive hiring hall provision provided, as herein, that the union's failure to refer any worker within 48 hours of the employer's request would give the employer the right to hire whatever worker it chose. The union originally acquiesced in an individual's employment because it could not supply the employer with a worker, and then demanded the employee's discharge after his application for union membership was denied, despite its continuing failure to refer a worker. The Board held that the union had violated Section 8(b)(2) by insisting on the employee's discharge after it had failed to refer another worker within 48 hours. *International Union of Operating Engineers, Local No. 302, AFL-CIO (Associated Sand and Gravel, Inc.)*, 241 NLRB 737 (1979).

The same principle is applicable herein. It is clear that the hall had no applicants for 48 hours after General Foreman Ross B. Martin's request for another worker at the Republic Foil jobsite on February 16, and that the direct hiring of Steve R. Martin on February 17 was therefore permissible under the contract.[14]

Carson was hired on February 18, after Business Agent Fowler himself had caused a vacancy at the Charlotte Memorial Hospital jobsite, had admitted there were no applicants at the hall, and had given permission to the Employer to hire directly. Although the record is unclear as to whether the hall was without applicants for another 48 hours, I conclude that, under these circumstances, the Union was estopped to assert the inapplicability of the 48-hour rule, and that the Employer could reasonably rely on the authority to engage in direct hiring given to it by the Union's business agent. Accord-

dent activities in general has been held to violate the Act. *Frank Mascali Construction G.C.P. Co.; Frank Mascali Construction Co., Inc.*, 251 NLRB 219 (1980); *United Brotherhood of Carpenters and Joiners of America, Local No. 1914, AFL-CIO (W & H Conveyor Systems, Inc.)*, 250 NLRB 1426 (1980); *Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO (Hancock-Northwest, J.V.)*, 247 NLRB 1250 (1980).

[13] *Crouse Nuclear Energy Services, Inc.*, 240 NLRB 390 (1979); *General-Haskell-Amelco*, 225 NLRB 1358 (1976); *Construction and General Laborers' Local Union No. 596*, 216 NLRB 778 (1975).

[14] See fn. 5, *supra*.

ingly, the direct hiring of Carson was permissible within the terms of the contract. The collective-bargaining agreement is not specific on the subject of his transfer to the Republic Foil job.

It follows that the Union could not have lawfully demanded the discharge of either employee, despite the nondiscriminatory nature of the referral clause.

There is another reason for denying Respondent Union the protection of the contract. It is clear that, in causing the terminations of Steve R. Martin and Carson, the Union was failing to conform to its customary practice of job seniority, for the discriminatory reasons delineated above.

The collective-bargaining agreement herein makes no provision for procedure to be followed during terminations, although it does have a nondiscriminatory referral (hiring) clause. I conclude that the object of the latter would be defeated if the Union, while carefully adhering to the referral clause, were thereafter permitted to cause terminations for discriminatory reasons. Hiring and firing are integral parts of the same employment process, and a requirement of fairness in one can easily be defeated by discrimination in the other.

The fact that the guarantee of nondiscriminatory referral is found in the contract, while the guarantee of fairness in termination is based on customary practice, should make no difference. The Court of Appeals for the Ninth Circuit, commenting in a later case on a Board decision it had previously affirmed,[15] stated as follows:

> To be sure, the rules in this case have a contractual basis, while in Local 83 it appears that the rules merely represented established union practice . . . Even so, the principle is the same. When a union introduces an element of discretion into what is otherwise a nondiscretionary process, the union may be held accountable for discriminatory exercise of that discretion.[16]

Because the Union, for discriminatory reasons, introduced an element of discretion into an otherwise objective procedure of termination, by causing the Employer to terminate employees with more job seniority and to retain those with less tenure, it may be held accountable for its action.

The Supreme Court has stated: "It is now well established that, as the exclusive bargaining representative of the employees . . . the Union [has] a statutory duty fairly to represent all of those employees," and that this duty "includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct . . . A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca* v. *Sipes*, 386 U.S. 171, 177, 190 (1967).

I conclude that Respondent Union did not observe this mandate in causing the removal of the two alleged discriminatees contrary to customary seniority principles, for reasons which were arbitrary, capricious, and invidious, and that it thereby violated Section 8(b)(1)(A) and (2) of the Act.[17]

Respondent Employer argues that in order to establish that *it* violated the law by terminating Steve R. Martin and Carson, the General Counsel must establish that the Employer acted "in concert" with the Union "because they were not members of the Union," or that it "knew" that the Union gave preference to union members in layoff situations. This statement of the law is not entirely accurate. "Thus, the Board has consistently held that when an employer delegates hiring to a union by utilizing a union referral system to obtain its employees, it is responsible if the union operates the system in a discriminatory manner. This is so even if the employer has no actual knowledge of the union's discrimination." *Frank Mascali Construction G.C.P. Co., supra*, fn. 12.

Assuming a requirement of company knowledge of the Union's discrimination in connection with the terminations, it is clear that Respondent Company had that knowledge. Thus, it knew of the hostility between Fowler and Ross B. Martin. The latter knew that Steve R. Martin was his son, and, since the foreman was a company agent and supervisor, this knowledge is attributed to Respondent Employer. The latter knew that Martin had hired his son and his son's friend.

Steward Gray informed Brack about the dispute between Gray and Martin at the Republic Foil jobsite. Brack knew his own decision, at or about 11 a.m. on February 20, to get everybody back to work, and the fact that he changed his own mind after talking to Fowler.

Respondent Employer knew its own termination procedure, and the fact that that procedure was not being followed. It knew that the two alleged discriminatees had job seniority over every one on the job except Nicholson, and that the latter had been the first steward on the job, and could fill that role again.

Finally, and unanswerably, Brack knew, as he admitted, that his real reason for removing the two alleged discriminatees and bringing back Gray was to eliminate "dissension" on the job. Clearly, Brack knew of the union animus against Steve Martin and James Carson. Why would he have told Ross Martin that he would try to find jobs for "the two boys" outside the Union's jurisdiction if he had not been aware of that animus?

I find that Respondent Employer had knowledge of, condoned, and participated in the Union's discrimination described above, resulting in the termination of Steve R. Martin and James H. Carson. Although the parties occa-

[15] *Construction, Building Materials & Miscellaneous Drivers, Local No. 83, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Various Employers within and outside of the Building and Construction Industry; Dooley's Building Materials Co. a/k/a Dooley's Block Company and V.O. Contracting Co.)*, 233 NLRB 509 (1977), enfd. 590 F.2d 316 (9th Cir. 1979).

[16] *N.L.R.B.* v. *Laborers' International Union of North America, Local 300, AFL-CIO [Alex Cameron]*, 613 F.2d 203 (9th Cir. 1980), enfg. 235 NLRB 334 (1978).

[17] *Construction, Building Materials & Miscellaneous Drivers, Local No. 83, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra*, fn. 15; *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), enforcement denied 326 F.2d 172 (2d Cir. 1963).

sionally described such action as "layoffs," the official written notice states that the employees were "terminated." I conclude that Respondent Employer in fact discharged them, and violated Section 8(a)(1) and (3) of the Act in doing so.

2. The discharge of Ross B. Martin

a. *The Union's attempts to cause Martin's removal*

The record shows a bitter and continuing political battle between Martin and Fowler lasting at least 2 years, and apparently continuing at the time of the hearing. It also shows, according to the credited testimony of Martin, that, on three separate occasions in 1979, Area Supervisor John Brack spoke to him about conversations which Business Agent Fowler had with "Pittsburgh" (i.e., the Company's headquarters) about Martin. Thus, Brack said that he was getting "static," that Fowler was trying to "discredit" Martin, and that he would like nothing better than to have the Company "run him off." On another occasion Brack told Martin that he would have to fire him if the problems between Martin and Fowler were not reconciled. Again, late in 1979, Brack told Martin that the pressure was getting so bad that Brack would have to let Martin go for the Company's good. Martin was contradicted on some details by Brack, and was corroborated on others.[18]

Martin also testified without contradiction or objection that, in the presence of Brack, he asked Fowler why the latter was trying to get Martin discharged, since it was the business agent who had originally recommended Martin for the job. Fowler replied, still in the presence of Brack, that he could "change his mind."

This testimony, by a witness at the hearing (Martin), was offered against a party (Respondent Union) as a statement made by the Union's agent (Fowler), was not hearsay under the Federal Rules of Evidence, and was admissible under applicable Board law.[19] It may appropriately be supplemented as against Respondent Union, by Martin's testimony as to what Brack said Fowler was telling Pittsburgh. This latter testimony, although hearsay as to the Union, is admissible to support other evidence.[20] Indeed, as the Board has recently stated:

> Courts have long recognized that hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence. . . . The Board jealously guards its discretion to rely on hearsay testimony in the proper circumstance.[21]

The totality of the evidence establishes that, beginning in 1979, Respondent Union made continuous attempts to cause Respondent Employer to remove Martin as general foreman, or to discharge him. That these were more than mere requests is shown by Brack's language—that he was getting "static," that Fowler wanted him to "run Martin off," and that the "pressure" was getting so bad that he would have to let Martin go. Finally, Fowler admitted in the presence of Company Representative Brack that he was trying to get Martin discharged.

It is clear, as Martin testified, that he was a representative of Respondent Employer for the adjustment of grievances. I find that, by the above-described acts and conduct, Respondent Union restrained or coerced an employer in the selection of its representative for the adjustment of grievances, in violation of Section 8(b)(1)(B) of the Act. *Miscellaneous Drivers and Helpers Local 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Bianco Manufacturing Co., a Division of Falcon Products, Inc.]* v. *N.L.R.B.*, 594 F.2d 1218 (8th Cir. 1979), enfg. 236 NLRB 1048 (1978).

b. *Martin's discharge*

On February 21, Martin's prediction, that the crew ordered by Brack for the Republic Foil job "would not work," was promptly fulfilled on the first day after Brack's order. L. Y. Gray refused to work, defied Martin's authority to assign work, and repeatedly challenged Martin to fire him. Since the job could not be worked with only two men, Martin shut it down. That night he received an anxious call from Brack saying that he was getting calls from everybody—the Union, the National Labor Relations Board, and the personnel department of Respondent Employer. Brack ordered Martin to report to him the following morning.

The next morning, February 22, Brack asked Martin whether he would accept a position in a gang, and Martin agreed to return to his former position. Brack said that this was impossible, and that Martin would have to work outside the Union's jurisdiction. (Martin had previously worked as a foreman outside the jurisdiction.) Brack told Martin that he would "take a walk" if Brack's superior made the same offer to him. "Well, John," Martin replied, "I'm not going to take a walk. You're going to have to fire me." Brack then had Martin paid off, and took back the company truck.

If Martin had accepted Brack's offer, it would have meant a forced demotion from general foreman to gang member outside the Union's jurisdiction, and loss of $1 hourly in Martin's rate of pay, $10 daily in per diem expenses, the guarantee of a 40-hour workweek, and use of the company vehicle. In addition, Martin would have in-

[18] As previously noted, fn. 4, *supra*, I granted Respondent Union's motion to strike the testimony of Pete and Gus Karres insofar as it related statements of Brack pertaining to Fowler, on the ground that it was hearsay as to Respondent Union. However, no such motion was made concerning the testimony of Martin.

[19] Rule 801(d)(2), Federal Rules of Evidence; *United Rubber, Cork, Linoleum and Plastic Workers of America, Local 878 (Goodyear Tire & Rubber Company)*, 255 NLRB 251 (1981); *United States Steel Corporation*, 250 NLRB 387, fn. 1 (1980); *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978).

[20] *N.L.R.B.* v. *Custom Chair Manufacturing Co.*, 422 F.2d 1300 (9th Cir. 1970), enfg. 170 NLRB 454 (1968).

[21] *RJR Communications, Inc.*, *supra*, fn. 6, 248 NLRB at 921. As now appears, my rulings on Respondent Union's motions to strike portions of the testimony of Pete and Gus Karres, *supra*, fn. 4, were erroneous. However, the record still contains sufficient evidence to support the findings made above.

curred the additional expenses of work at greater distances from home.

Brack admitted that some of his reasons for this action were Martin's call to the Board, his legend of "union interference" on the discharge slips of Steve R. Martin and James Carson, and his belief that Martin was involved in the filing of charges before the Board. The Board has affirmed the conclusion that an employer violates Section 8(a)(1) and (4) of the Act by discharging a supervisor for participating in the filing of a charge and in relaying information to the Board relevant to an employee complaint or charge. *General Nutrition Center, Inc.*, 221 NLRB 850, 858 (1975). This principle is applicable herein.

It is settled law that an employer, who, for an unlawful reason, transfers an employee to a different position involving reduced pay and benefits, and other more onerous conditions of employment such as increased expenses, has thereby constructively discharged the employee.[22] This is what Respondent Employer did to Martin, for the unlawful reason described above. Accordingly I find that, by such act, Respondent Employer constructively discharged Martin in violation of Section 8(a)(1) and (4) of the Act.

3. The Union's discipline of Martin

On January 16, 1980, about a month before his discharge by the Employer, Respondent Union filed charges against Martin alleging violation of the Union's constitution in that he engaged in various acts including hiring "his son and friend off the street . . . ." Thereafter, he was fined $500 and removed as vice president. The various complaints allege the disciplinary charges to be violative of Section 8(b)(1)(A) of the Act. The General Counsel repeats this allegation in his brief, without argument, and then argues that Section 8(b)(1)(B) was violated.

This latter contention is clearly correct. Before hiring his son and Carson, Ross B. Martin in each instance first requested an individual from the hiring hall, as required by the collective-bargaining agreement. It was only after he was told that there were no applicants available, and that he could hire directly, that he secured the employees which later became the subject of Fowler's charge. Martin, as a supervisor, was interpreting the Employer's rights under the contract, and was acting in the Employer's interest. The filing of charges by a union, against a supervisor for engaging in such activity, has been held by the Board to constitute an attempt by the union to impose its own interpretation of the contract upon the employer, in violation of Section 8(b)(1)(B). *Construction, Production, and Maintenance Laborers' Union, Local No. 383, AFL-CIO (Chanen Construction Company, Incorporated)*, 221 NLRB 1283 (1975). The same result has been reached where one of the union charges against the supervisor, as herein, was that he gave a job to a "nonreferred man." *International Union of Operating Engineers, Local Union No. 428, AFL-CIO (Mercury Constructors, Inc.)*, 216 NLRB 580 (1975). As the Board has stated:

> We have consistently applied these principles in finding union disciplinary actions against supervisors unlawful where they were rooted in disputes between employers and unions over the interpretation of their collective-bargaining agreement. Our concern in each of these cases rested upon the union's use of unlawful means to impose its interpretation directly or indirectly upon an employer's representative which, in turn, infringed upon the employer's right to unencumbered control of that representative. [*Teamsters Local No. 524, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Yakima County Beverage Company, Inc. and Chaney Beverage Company)*, 212 NLRB 908, 909-910 (1974)].[23]

This is not to say that Fowler's dispute with Martin over the latter's action in hiring his son and Carson was the *only* difference between them—the record demonstrates otherwise. However, the allegation of direct hiring was the first in the series of charges leveled at Martin by Fowler. The presence of Steve R. Martin and James Carson in the Republic Foil crew on February 20, and the Union's attempt to remove them, led directly to the conflict between Brack and Martin and to the latter's discharge—ultimately, over the Employer's interpretation of his contractual right to engage in direct hiring. I conclude that Respondent Union, by its filing of the charges against Ross B. Martin, thereby violated Section 8(b)(1)(B) of the Act.[24]

In reaching this conclusion, I have considered the fact that Martin occasionally did unit work on the Republic Foil job, because of the Employer's financial distress on that job. Nonetheless, Martin's principal functions were supervisory in nature, and his unit work at Republic Foil has not been raised as an issue by Respondent Union, either in its own charges against him, or in this proceeding. There was no strike, and Martin was not performing rank-and-file work behind a picket line. On the contrary, the Union's discipline of Martin was motivated principally by the fact that, as a representative of the Employer, he hired employees in a manner to which the Union objected. In the Supreme Court's language in *American Broadcasting Companies*, that discipline therefore "adversely affect[ed] the supervisor's performance of his collective bargaining or grievance-adjustment tasks and thereby coerce[d] or restrain[ed] the employer contrary to Section 8(b)(1)(B)."[25]

[22] See, e.g., *Coating Products, Inc.*, 251 NLRB 1271 (1980); *Sullivan Transfer Co.*, 247 NLRB 772 (1980); *Electric Machinery Company*, 243 NLRB 239 (1979).

[23] See also *Local Union No. 11 of the Wood, Wire, and Metal Lathers International Union, AFL-CIO (Wilton and Denton, Inc.)*, 202 NLRB 391 (1973).

[24] The fact that the complaint did not precisely allege Subsec. (B) of Sec. 8(b)(1) does not preclude a finding of a violation under that subsection. The General Counsel argued the matter in his brief, and the factual issues were fully litigated. *Cosmo Graphics, Inc.*, 217 NLRB 1061, fn.2 (1975).

[25] *American Broadcasting Companies, Inc.* v. *Writers Guild of America, Inc.*, 437 U.S. 411 (1978), reversing 547 F.2d 159 (2d Cir. 1976), denying enforcement 217 NLRB 957 (1975); see also *New York Typographical Union No. 6 (Typemen, Inc.)*, 229 NLRB 886, 991 (1977).

Martin not only had charges filed against him—he was fined $500. The Board with judicial approval has concluded that, where a supervisor working behind a picket line performed no rank-and-file duties, a fine of $1,000 imposed upon him by the union violated Section 8(b)(1)(B). *Meat and Provision Drivers Union Local 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Quality Meat Packing Company)*, 224 NLRB 186 (1976), enfd. 580 F.2d 359 (9th Cir. 1978). Although the supervisor in the instant case, Martin, did minimal unit work, he did not do so behind a picket line, and, *a fortiori*, the fine restrained and coerced the Employer, under the rationales of *Local 626, id.*, and *American Broadcasting Companies, supra*. I am aware of the fact that Fowler filed other charges against Martin arguably pertaining only to internal union affairs, that Martin admitted one, and that he was found "guilty on all counts." Nonetheless, Fowler's testimony shows that he considered Martin's principal offense to be the fact that the supervisor hired his son and Carson "off the street," and failed to notify the hiring hall that he needed men—the latter allegation being false, according to the evidence in this proceeding. The fine was therefore principally grounded on the Union's objection to the manner in which Martin exercised his supervisory responsibilities, not on Fowler's disputes with Martin.

Under these circumstances, the Union may not be heard to argue that so much of the fine as pertained to internal union affairs constituted permissible union discipline. I conclude that where a labor organization (or an employer) commingles lawful and unlawful activity in such manner that it cannot be differentiated—as is the case with the homogeneous $500 fine—the entire conduct is unlawful.

The complaint does not specifically allege that Respondent Union imposed a fine on Martin. However, it does allege that the Union "filed internal disciplinary charges" against him. I conclude that the fine is "closely related" to this allegation, and therefore falls within "the general language of the complaint." *International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 (The Associated General Contractors of California, Inc.)*, 228 NLRB 1420 (1977), enfd. 600 F.2d 770 (9th Cir. 1979). Further, Respondent Union did not object to Martin's testimony about the fine, and he was available for cross-examination. Accordingly, the matter was fully litigated. *United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of Western Pennsylvania and Industrial Local No. 2605, AFL-CIO (DeRose Industries, Inc.)*, 256 NLRB 584 (1981).

I therefore find that Respondent Union, by its fine of $500 imposed upon Martin, violated Section 8(b)(1)(B) of the Act.

I turn now to the complaint allegation, not argued by the General Counsel, that the Union's disciplinary charges against Martin also violated Section 8(b)(1)(A). Various union members were present at the hearing on the charges, held at the union hall. Fowler asserted that Martin, in hiring his son and Carson, violated an oath to secure employment for union members. In effect, this amounted to a demand that a supervisor-member of the Union must prefer union job applicants over nonmembers or face union discipline, despite the nondiscriminatory provisions of the referral clause. In hiring his son and Carson, Martin was relying on his Employer's contractual right to hire directly when the Union could not supply applicants, and was protecting the right of individuals to be so employed even though they had not registered at the hiring hall.

The publication of these views in an open meeting, and the finding that Martin was "guilty as charged," could only have tended to interfere with the Section 7 rights of the individuals who observed the proceedings. They tended to make such individuals believe that it was wise to apply for employment through the Union's hiring hall, and still wiser to apply for union membership.

In one case decided by the Board, a collective-bargaining agreement gave preference in employment to individuals who had previously worked with employers having a contract with the union. The Board said that the union's actions implementing this preference "penalize employees for having exercised their statutory right to refrain from bargaining collectively through [the union] in the past, while rewarding those employees who have chosen to work in units represented by [the union]." Although the particular individuals who were wronged were found by the Board to be employees, the Board added that its conclusion would not have been different even if they had been supervisors. The Board stated:

> [T]he action taken against [the charging parties] was brought to the attention of union members who were admittedly employees and who were on the Union's executive board when the action was discussed. In addition, the charges in this case were read to members at regular meetings. It can reasonably be concluded that the discrimination thus directed by Respondent Union created an impact on other employees, the natural consequence of which was to restrain and coerce them with respect to their Section 7 rights, in violation of Section 8(b)(1)(A). [*International Photographers of the Motion Picture Industries, Local 659, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (MPO-TV of California, Inc., Y-A Productions, Inc.)*, 197 NLRB 1187, 1189, 1191 (1972), enfd. 477 F.2d 450 (D.C. Cir. 1973).]

This principle is applicable herein. The Union's discipline of Supervisor Martin, in retaliation for his action in protecting the Employer's contractual right to engage in direct hiring in certain circumstances, and the right of employees to be so employed, had "an impact on other employees, the natural consequence of which was to restrain and coerce them with respect to their Section 7 rights, in violation of Section 8(b)(1)(A)" (*Id*). I so find.

4. The Union's refusal to refer Martin

The Union's refusal to refer Martin to the PBI job took place against the background outlined above, which provides abundant evidence of union animus against him. The Union's referral practices did not conform to the requirements of the contract in that the out-of-work list

did not list applicants in the priority groups specified in the contract.[26] The contract required the Union to "register" and "refer" applicants, without specifying the exact method, and in practice the Union used various methods for both procedures, including instructions by telephone. A steward was required on each job, and the Union maintained effective control over the hiring process by communication with the steward.

Work was available at the PBI job on November 19, 1980, and Martin arrived and applied for work. The job steward called the hall at PBI's instruction and requested referral of Martin. The Union refused, unless Martin went to the hiring hall to sign the out-of-work list, a round trip of 80–90 miles. The Union had not made this a uniform requirement in the past.

I conclude that the Union's refusal to refer Martin to the PBI job was based on Fowler's animosity toward Martin, not on his failure to go to the hiring hall to sign the out-of-work list. This conclusion is mandated by several factors. The Board has relied on such intraunion political strife in finding that union denial of access to the hiring process was discriminatorily motivated. *Local 367, International Brotherhood of Electrical Workers (Penn-Del-Jersey Chapter of the NECA)*, 230 NLRB 86, 96 (1977). The fact that a union member filed an unfair labor practice charge against the union, as did Martin in this case, was relied on in a finding of discriminatory removal from a hiring list. *Construction, Building Materials & Miscellaneous Drivers, Local No. 83, etc., supra.* When an individual hired an attorney and sought to compel referral by legal means, the Board considered this evidence of unlawful motivation in the union's request to an employer that the latter fail to request such individual. *Painters Local Union No. 1555, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO (Alaska Constructors, Inc.)*, 241 NLRB 741, 743 (1979).

The inference of unlawful motivation warranted by these considerations is buttressed by the frailty of the Union's asserted reason for denying Martin referral to the PBI job. The evidence amply demonstrates that the Union had various methods of registering applicants on the out-of-work list, one of which was a request by telephone. Yet Fowler's letter to Martin, after the refusal to refer, states that Martin had to "sign" the list before he would be dispatched, thus denying him the right afforded other applicants to telephone their requests. On the other hand, the business agent inconsistently said that Martin never "requested" that his name be placed on the list. When Martin asked PBI for the job, and the steward called the hall with Martin standing next to him, Fowler relied on the reason that Martin had not "requested" that his name be put on the list—he had merely asked the Union for a referral. But the job steward was a union official, and Martin was impliedly asking that his name be put on the list by asking the steward for referral. Fowler's reasoning is pure sophistry.

Because of the positive evidence of animus, and because of the Union's shifting and inconsistent reasons for refusing to refer Martin, I conclude that its real reason was discriminatory in nature. *International Brotherhood of Electrical Workers, Local 401 (Stone and Webster Engineering Corporation)*, 251 NLRB 321 (1980). The hiring hall procedures were not uniformly applied to all applicants, a factor further indicating that the Union's stringent application of the out-of-work list rule in Martin's case was unlawfully motivated. *Construction, Building Materials & Miscellaneous Drivers, Local No. 83, etc., supra.* Accordingly, I find that the Union, by its refusal to refer Martin to the PBI job, thereby violated Section 8(b)(1)(A) and (2) of the Act.[27]

5. The Union's threat of a lawsuit

It would appear that, upon proper pleading, Fowler's threat to sue Ross B. Martin and Gus Karres was violative of Section 8(b)(1)(A). *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local Union No. 81 (Morrison Construction Company, Inc.)*, 237 NLRB 207, 210 (1978). It would also appear that Respondent Union should be held responsible for the threat of the International officer to file charges against the same two employees (*Sachs Electric Company*, 248 NLRB 669 (1980)), since the threat was made in Business Agent Fowler's presence and he failed to disavow it. However, the complaint does not allege these threats as violations of the Act, Respondent Union objected to the testimony of Martin and Karres on this subject, and the General Counsel appeared to treat the testimony as background evidence of animus, rather than as proof of an independent violation of the Act. Accordingly, I make no findings on these matters. In accordance with my findings above, I make the following:

Conclusions of Law

1. Respondent Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

2. Respondent Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By attempting to cause and by causing Respondent Employer to discharge employees Steve R. Martin and James H. Carson contrary to customary seniority practices, because of their close association with Martin's father, a union dissident, and in violation of their right to be employed by Respondent Employer pursuant to the terms of a collective-bargaining agreement in effect between Respondents—reasons which are arbitrary, capricious, and invidious—Respondent Union failed to abide by its statutory duty of fair representation, and restrained and coerced employees in violation of Section 8(b)(1)(A) and (2) of the Act.

4. By condoning and participating in Respondent Union's discrimination against Steve R. Martin and James H. Carson described above, and by discharging them at the request of the Union for said unlawful rea-

[26] The variation between the contract requirements and the Union's practice has not been alleged as a violation.

[27] See also *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 667, AFL-CIO (Union Boiler Company)*, 242 NLRB 1153, 1155 (1979), where the referral rules were described as "vague and indefinite and nowhere available."

sons, Respondent Employer thereby violated Section 8(a)(1) and (3) of the Act.

5. By attempting to cause and by causing Respondent Employer to discharge Supervisor Ross B. Martin, Respondent Union thereby restrained or coerced an employer in the selection of his representative for collective bargaining or the adjustment of grievances, in violation of Section 8(b)(1)(B) of the Act.

6. By discharging Supervisor Ross B. Martin because he participated in the filing of unfair labor practice charges before the Board, and relayed information to the Board concerning an employee's complaint or charge, Respondent Employer thereby violated Section 8(a)(1) and (4) of the Act.

7. By filing internal disciplinary charges against Supervisor-member Ross B. Martin, and by fining him $500, because he, on behalf of Respondent Employer, and in its interest, interpreted a collective-bargaining agreement in effect between Respondents so as to permit employment of Steve R. Martin and James H. Carson without referral from an exclusive hiring hall established by said agreement, Respondent Union restrained and coerced other employees with respect to their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act, and infringed upon Respondent Employer's unencumbered control of its representative, in violation of Section 8(b)(1)(B).

8. By refusal to refer Supervisor-member Ross B. Martin for employment in retaliation for his intraunion political opposition to a business agent, his hiring of employees without referral from Respondent Union's exclusive hiring hall, his participation in the filing of charges with the Board against Respondent Union by said employees, his own filing of such charges, and because of animosity against him by said business agent, Respondent Union thereby violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act.

9. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Union and Respondent Employer have both engaged in unfair labor practices, I shall recommend that each of them cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent Union be ordered to cease and desist from:

1. Restraining or coercing employees because they exercise their Section 7 rights.

2. Causing or attempting to cause Respondent Employer to discharge employees in retaliation for exercising their Section 7 rights, or causing the discharge of supervisors selected by the Employer as its representative for collective bargaining or the adjustment of grievances.

3. Failing and refusing to refer employees for employment in retaliation for exercising their Section 7 rights.

4. Filing disciplinary charges against or fining members because of their actions as representatives of their employer for collective bargaining or the adjustment of grievances.

5. In any other like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7, or employers in their selection of representatives for collective bargaining or the adjustment of grievances.

The affirmative action appropriately to be required of Respondent Union must be separated into action which remedies unlawful conduct for which it alone is responsible, and conduct for which it is jointly responsible together with Respondent Employer. In the former category is the Union's unlawful refusal to refer Ross B. Martin to the PBI job. The appropriate remedy is to require Respondent Union to notify Pittsburgh Bridge and Iron Company (PBI) and Martin that the Union has no objection to his employment with PBI or any other employer, and to make Martin whole for any loss of wages he may have suffered as a result of Respondent Union's discrimination against him, by payment to him a sum of money equal to that which he normally would have earned as wages from November 19, 1980, the date of Respondent Union's refusal to refer him to PBI job, to the date on which he receives written notification from Respondent Union that it will not discriminate against him, less his net earnings during said period, such sums and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[32] *United Brotherhood of Carpenters and Joiners of America, Local No. 1089, AFL-CIO (Emmett & F. Hargett d/b/a E. F. Hargett & Company)*, 233 NLRB 275 (1977).

It is also clear that Respondent Union must bear sole responsibility for the unlawful fine of $500 which it imposed on Martin. In *Meat and Provision Drivers Union Local 626, supra*, the union member had not paid the fine, but the Board nonetheless approved an order requiring the Union to rescind and expunge all records of the fine, and notify the union member (*id.*, 224 NLRB at 195). In the instant case, although Martin has appealed the fine to the International, the record is unclear as to whether he has paid any part of it. In the event that he has done so, a complete remedy would require the Union to repay Martin, with interest as described above, and to expunge the record thereof.

I now consider the discriminatory discharges of Steve R. Martin, James H. Carson, and Ross B. Martin. The Board with judicial approval has imposed joint and several liability upon union and employer where both contributed to the discrimination.[33] However, in some instances the Board has assessed the relative culpability of two wrongdoers, and has imposed primary responsibility upon one and secondary liability upon another. Thus, where the employer did not know of the Union's discrimination and could not have discovered it, the Board imposed only secondary liability on the employer. *Frank Mascali Construction G.C.P. Co., supra*, 251 NLRB 219. And, where the union was solely responsible for administration of an unlawfully administered insurance program,

[32] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[33] *Fruin-Colnon Corporation*, 227 NLRB 59 (1976), enfd. 571 F.2d 1017 (8th Cir. 1978); *Pacific Coast Utilities Services, Inc.*, 238 NLRB 599 (1978), enfd. 638 F.2d 73 (9th Cir. 1980).

the union was found primarily liable. *Exxon Company, U.S.A.*, 253 NLRB 213 (1980).

In one case the employer initially resisted the union's attempt to cause the discharges, and was held only secondarily liable. *Wismer and Becker, Contracting Engineers*, 228 NLRB 779 (1977). In another case the union was held primarily liable because it initially suggested the terminations, and later took credit for them. *Union Boiler Company*, 245 NLRB 719 (1979).

In applying these principles to the discharges of Carson and Steve R. Martin, on February 20, 1980, it must be noted that Ross B. Martin opposed the terminations during his morning conversation with Fowler that day. Martin was still the Employer's general foreman, and any action of his in attempting to block the discrimination is attributable to the Employer, in assessing degree of responsibility. On the other hand, and more compelling, there is the fact that Brack, Martin's supervisor, changed his own mind and succumbed to union pressure without any resistance whatever. In the last analysis, it was Brack's authority over Martin which forced the Employer's discrimination, and made a nullify of Martin's opposition to the unlawful conduct.

The case closest to these facts is *Union Boiler Company, id.*, where primary responsibility was attributed to the union because it initially suggested the terminations, and later took credit for them. In the instant case, however, Respondent Union did not take credit for the terminations; indeed, it denied any part in them. Further, the Employer's condonation of, and participation in, the Union's attempt herein to cause the terminations militates against a finding of lesser responsibility on its part. Accordingly, I shall recommend joint and several responsibility for these two terminations. The same result follows more easily in Ross B. Martin's case, since the record is devoid of any evidence that the Employer resisted the Union's attempts to cause his discharge.

A complete remedy requires the Union to notify the Employer and all three discriminatees that it has no objection to their employment by the Employer.[34] It is also clear that Respondent Employer must offer reinstatement to all three discriminatees, without prejudice to their seniority or other rights and privileges, and that both Respondents must jointly and severally make them whole for any loss of earnings they may have suffered because of the unlawful discrimination against them, with deductions of net earnings and addition of interest as described above.

In the case of Ross B. Martin, the backpay period begins on the date of his unlawful discharge, February 22, 1980, and ends on the date Respondent Employer offers him full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent one. Although Martin was a supervisor, a reinstatement and backpay order are required in his case, because to exclude him from same "would mislead the employees into imagining limitations on their own protection against such punishment." *General Nutrition Center, Inc., supra*, 221 NLRB at 860.

Martin was general foreman when he was discharged, a permanent position which did not depend on the continuance of any particular job in which the Company was engaged. Steve R. Martin and Carson, however, were hired only for a particular job[35] and their employment therefore did not have the same continuity as that of the general foreman. In a case involving only employers as respondents, with similarly temporary employment, the Board ordered backpay until the customary date of full reinstatement, but provided, as an alternative cutoff, the date that the employers ceased their operations. *Miami Springs Properties, Inc. and James H. Kinley and Associates, Joint Employers*, 245 NLRB 278, 280 (1979). In a similar case, the Board approved termination of backpay liability as of the date the Employer lost its contract to a competitor. *Am-Del-Co., Inc.*, 234 NLRB 1040, 1043 (1978).[36] Although not for precisely the same reason, the jobs of Steve R. Martin and James H. Carson were also temporary. Backpay liability should begin on the day of their unlawful discharges, February 20, 1980. Even if Respondent had not discharged them, however, their employment would have ended upon completion of the Republic Foil job, about 4 weeks later. Indeed, if Respondent had not reduced the employee complement down to one crew, Carson's and Martin's employment would probably have ended at an earlier date. The same equitable considerations that impelled the Board to provide the employers in *Miami Springs, supra*, with an alternative cutoff date for backpay liability at the time they ceased operations, require a similar provision for Respondent Employer herein at the time the Republic Foil job ended.

This means that backpay liability for the two Respondents might end at different dates—in the case of Respondent Union, when it supplies the required notices to the discriminatees and to the Employer, and, in the case of the latter, at the time of an offer of full reinstatement to the discriminatees, or the dates that the Republic Foil job closed. However, the same thing was done in *Fruin-Colnon, supra*, fn. 33, where the employer's backpay liability would have ended under applicable law at the time it made an offer of full reinstatement, but where the union's liability was specifically continued until the time that it sent the requisite notices that it no longer objected to employment of the discriminatees. (227 NLRB at 69, 70.)

A further consideration is the possibility that Ross B. Martin's entitlement to backpay from Respondent Union because of its refusal to refer him to the PBI job, and the joint responsibility of both Respondents to make him whole because of his discharge from Respondent Employer, might exist simultaneously. I conclude that in such circumstances he would not be entitled to duplicate backpay for the same time periods. He could not have

[34] *United Brotherhood of Carpenters and Joiners of America, Local No. 1089, supra*, 233 NLRB 275; *Fruin-Colnon Corporation, supra*, 227 NLRB at 69.

[35] Steve R. Martin was hired for the Republic Foil job. Carson was hired for the Charlotte Memorial Hospital job, and was later transferred to the Republic Foil job by Ross B. Martin. Transferring employees from one job to another, without going through the hiring hall, was a subject of dispute between Fowler and Martin.

[36] See also the court-drawn distinctions between "irregular" employment, *N.L.R.B.* v. *Blue Hills Cemetery, Inc.*, 567 F.2d 529 (1st Cir. 1977), enfg. 229 NLRB 258 (1977).

worked for PBI if he had still been the Employer's general foremen. Backpay computed at the foreman's rate, at Respondent Employer, would undoubtedly exceed the journeyman's rate at PBI. I therefore conclude that Martin will not be entitled to backpay because of the Union's failure to refer him to the PBI job at the same time that he is entitled to backpay based on the joint responsibility of both Respondents.

I shall also recommend that Respondent Employer be required to cease and desist from engaging in the following activities:

1. Condoning or participating in attempts by Respondent Union or any other labor organization to cause the discharge or layoff of, or other discrimination against, employees because of their activities protected by Section 7 of the Act.

2. Acceding to requests of Respondent Union or any other labor organization that it discharge, layoff, or otherwise discriminate against employees because of their activities protected by Section 7.

3. Acceding to requests of Respondent Union or any other labor organization that it discharge or layoff any of the Employer's representatives for the purpose of collective bargaining or grievance adjustment.

4. Discharging or laying off any supervisor because of his participation in the filing of unfair labor practice charges before the Board, or his relaying to the Board information concerning employee complaints or charges.

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

I shall also recommend that both Respondents be required to post appropriate notices. The appropriate location for posting by Respondent Employer is unclear. Ross B. Martin testified that John Brack had an office in Charlotte, North Carolina, but it is not certain whether there are employees to read the notice. Under these circumstances, I shall recommend posting by Respondent Employer at that address, at Respondent's permanent headquarters in Pittsburgh, Pennsylvania, and also at all jobsites in the Union's area 5 where the Employer has employees.

In accordance with these recommendations, I hereby deny the motions of both Respondents to dismiss portions of the complaint.

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

ORDER[37]

A. Respondent International Association of Bridge, Structural, and Ornamental Ironworkers, Local Union No. 413, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing employees because they exercise their Section 7 rights.

(b) Causing or attempting to cause Respondent Employer or any other employer to discharge or otherwise discriminate against employees in retaliation for exercising their Section 7 rights.

(c) Failing and refusing to refer employees for employment in retaliation for exercising their Section 7 rights.

(d) Restraining or coercing Respondent H. H. Robertson Company, or any other employer in the selection or control of its representatives for collective bargaining or the adjustment of grievances.

(e) Filing disciplinary charges against or fining members because of their actions as representatives of their employer for collective bargaining or the adjustment of grievances, or in defense of the Section 7 rights of employees.

(f) In any other like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act, or employers in their selection of representatives for collective bargaining or the adjustment of grievances.

2. Take the following action to remedy the unfair labor practices and to effectuate the policies of the Act:

(a) Notify Respondent H. H. Robertson Company, Steve R. Martin, and James H. Carson, in writing, that it has no objection to the employment of said individuals by Respondent Employer.

(b) Notify Respondent H. H. Robertson Company and Ross B. Martin, in writing, that it has no objection to the employment of said Martin by the Company, and simultaneously request Respondent H. H. Robertson Company reinstate said individual to his former position of employment as general foreman.

(c) Notify Pittsburgh Bridge and Iron Company and Ross B. Martin, in writing, that it has no objection to the employment of Martin by said company, and simultaneously request said company to employ said Martin in the position for which he applied on November 19, 1980.

(d) Jointly and severally with Respondent H. H. Robertson Company, make Steve R. Martin, James H. Carson, and Ross B. Martin, whole for any loss of earnings incurred by reason of having caused Respondent H. H. Robertson Company to discharge them in violation of the Act. The backpay is to be computed and bear interest as provided for in the section of this Decision entitled "The Remedy," and the liability of Respondent Union shall continue until it has complied with the requirements of paragraph 2(a) and (b) of this recommended Order.

(e) Make Ross B. Martin whole for any loss of earnings incurred by reason of its failure and refusal to refer Ross B. Martin for employment with Pittsburgh Bridge and Iron Company on or about November 19, 1980, except that such backpay shall not be paid in the event that said Martin is simultaneously entitled, for any period of time coextensive with the period contemplated by this subparagraph, to backpay under paragraph 2(d) of this recommended Order. The backpay is to be computed and bear interest as provided for in the section of this Decision entitled "The Remedy," and the liability of Respondent Union shall continue until it has complied with

[37] 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 by 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.

the requirements of paragraph 2(c) of this recommended Order.

(f) Rescind and expunge from its records a fine of $500 imposed upon Ross B. Martin, and make him whole for all or any part of such fine which he may have paid by repaying such sum to him with interest thereon calculated from the time of any such payment by Martin, in the manner set forth in the section of this Decision entitled "The Remedy" for calculation of interest due on backpay.

(g) Post at its offices and meeting hall frequented by its members copies of the attached notice marked "Appendix A."[38] Copies of said notice, to be provided by the Regional Director for Region 11, after being duly signed by Respondent Union's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent Union for 60 consecutive days thereafter, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that said notices are not altered, defaced, or covered by any other material.

(h) Mail to the Regional Director for Region 11, additional signed copies of the attached notice marked Appendix "A," for posting by Respondent H. H. Robertson Company.

(i) Notify the Regional Director for Region 11, in writing, within 20 days of the date of this Order, what steps it has taken to comply herewith.

B. Respondent H. H. Robertson Company, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Condoning or participating in attempts by Respondent Union or any other labor organization to cause the discharge, layoff, or other discrimination against employees because of their activities protected Section 7 of the Act.

(b) Acceding to requests of Respondent Union or any other labor organization that it discharge, layoff, or otherwise discriminate against employees because of their activities protected by Section 7.

(c) Acceding to requests of Respondent Union or any other labor organization that it discharge or layoff any of its representatives for the purpose of collective bargaining or adjustment of grievances.

(d) Discharging or laying off any supervisor because of his participation in the filing of unfair labor practice charges before the Board, or his relaying to the Board information concerning employee complaints or charges.

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

2. Take the following affirmative action to remedy the unfair labor practices and to effectuate the policies of the Act:

(a) Offer to Ross B. Martin immediate and full reinstatement to his former position as general foreman, dismissing, if necessary, any one who may have been hired or assigned to perform the work he had been performing in that capacity, or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Jointly and severally with Respondent Union, make Ross B. Martin whole for any loss of earnings incurred by reason of his discharge, from the date thereof to the date he is offered reinstatement. The backpay is to be computed and bear interest as provided for in the section of this Decision entitled "The Remedy."

(c) Jointly and severally with Respondent Union, make Steve R. Martin and James Carson whole for loss of earnings incurred by reason of its discharge of them, by payment of backpay with interest thereon computed in the manner described in the section of this Decision entitled "The Remedy," from the date of their discharges until such time as said employees are offered immediate, full, and unconditional reinstatement to, or employment in, their former or substantially equivalent positions, without prejudice to their seniority, or other rights and privileges enjoyed, or, alternatively, to the time that Respondent H. H. Robertson completed its work on the Republic Foil job.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, and all other records necessary to analyze and compute the amounts of backpay due under this recommended Order.

(e) Post at the office of its area supervisor, John Brack, One Woodlawn Green, Charlotte, North Carolina; at its permanent office in Pittsburgh, Pennsylvania; and at all jobsites where it has employees within Respondent Union's area 5, copies of the attached notice marked "Appendix B."[39] Copies of said notices, on forms provided by the Regional Director for Region 11, after having been signed by Respondent H. H. Robertson's representatives, shall be posted by it immediately upon receipt thereof, and shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted, except that posting at a jobsite shall not be required beyond the time of completion of the job there. Reasonable steps shall be taken by Respondent H. H. Robertson to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Mail to the Regional Director for Region 11 additional signed copies of the attached notice marked "Appendix B" for posting by Respondent Union.

(g) Notify the Regional Director for Region 11, in writing, within 20 days of the date of this Order, what steps have been taken to comply herewith.

[38] 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."

[39] See fn. 38.